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Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation

Kevin Brown*

Introduction

In Brown v. Board of Education (Brown I)\(^1\) the Supreme Court concluded that state-imposed racial segregation of public schools\(^2\) deprives African-Americans of equal protection of the laws under the

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2. The scope of this Article is limited to the discussion of de jure segregation in public elementary and secondary schools; de jure segregation in higher education is beyond its purview. The term "public schools" as used in this Article, therefore, refers only to elementary and secondary schools and the term "public education" refers only to education in public elementary and secondary schools.

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With *Brown I* and its school desegregation progeny, the Supreme Court launched the nation on a course intended to desegregate its public schools. Over thirty-five years later, even though de jure segregation of public school students has been replaced by de facto segregation in many areas of the country, federal courts at both the district and the appellate levels are looking at school districts under court supervision with a new set of issues.

Lower federal courts frequently address the question of whether a school district in which de jure desegregation is found to exist satisfies its obligation under *Brown I* and its progeny; that is, has it

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4. The Supreme Court defined the constitutional violation of segregated public schools as "de jure" segregation. According to the Supreme Court, de jure segregation is "a current condition of segregation resulting from intentional state action directed specifically to the [segregated] schools." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205-06 (1973).

5. As one commentator noted, many cities, including northern cities such as "'Chicago, St. Louis, and Cleveland were almost as segregated as they would have been if a law mandated that all blacks live in exclusively black blocks and whites in exclusively whites ones.'" B. BLAUNER, BLACK LIVES, WHITE LIVES 165 (1989) (citation omitted). As a result, "in many cities 'black and white students go to separate schools, just as they did when 'separate but equal' was the guiding principle.'"

obtained "unitary status." A school system has achieved unitary

7. There is a considerable amount of confusion about the terminology in this area as well as the effect of a determination of unitary status on an outstanding desegregation decree. The Supreme Court has neither defined unitary status nor provided definitive guidance on the issue. See Keyes, 895 F.2d at 665; Dowell, 890 F.2d at 1491 n.15; Jacksonville Branch, NAACP v. Duval County School Bd., 883 F.2d 945, 950 (11th Cir. 1989); Keyes v. School Dist. No. 1, 609 F. Supp. 1491, 1516 (D. Colo. 1985); gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 Colum. L. Rev. 728, 792 (1986). The Court has, however, addressed the question of what constitutes a "unitary school system," as opposed to when a school system has obtained unitary status. A unitary school system is a school system that is not operating as a "dual school system." In contrast to unitary status, a unitary school system, though desegregated, may not yet have eliminated the vestiges of its prior discrimination. See Pate v. Dade County School Bd., 588 F.2d 501 (5th Cir.), cert. denied, 444 U.S. 835 (1979) (holding that a district court retains subject matter jurisdiction over a unitary school system to assure the maintenance of a unitary system); Youngblood v. Board of Pub. Instruction, 448 F.2d 770 (5th Cir. 1971) (ordering that when a school system is declared unitary the district court must retain jurisdiction over the case for at least three additional school years). See generally Chandler, The End of School Busing? School Desegregation and the Finding of Unitary Status, 40 Okla. L. Rev. 519, 538-41 (1987) (discussing the effects of a finding of unitary status on the court's role in eliminating other vestiges of past discrimination).

Once unitary status is achieved, lower federal courts have generally terminated active supervision of the school district, dissolved outstanding desegregation decrees, and returned plenary control over the school district and its educational policies to the responsible school officials. See, e.g., Jacksonville Branch, NAACP, 883 F.2d at 950; Quarles, 868 F.2d 750; Overton, 834 F.2d at 1175; Riddick, 784 F.2d at 543.

At least five circuits have held that federal jurisdiction over a school district terminates once the district obtains unitary status. Jacksonville Branch, NAACP, 883 F.2d at 950; Overton, 834 F.2d at 1174-1177; Morgan, 831 F.2d at 318; Riddick, 784 F.2d at 554-39; Vaughns v. Board of Educ., 758 F.2d 983, 988 (4th Cir. 1985); Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1241 (9th Cir. 1979). This leaves unitary school districts free to choose from the myriad of locally accepted methods for assigning students to various schools, including neighborhood school assignments, despite the fact that these methods invariably increase racial concentration in schools.

Professor Landsberg has argued that after a declaration of unitary status, a school district's adoption of a "retrogression plan" which is a student assignment plan that will increase the amount of segregation in the school district should be analyzed by a standard other than the traditional discriminatory intent standard adopted by the Supreme Court in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977) and Washington v. Davis, 426 U.S. 229, 240 (1976). Landsberg, The Desegregated School System and the Retrogression Plan, 48 La. L. Rev. 789, 816-34 (1988). Professor Landsberg avoids the fact that the adoption of student assignment policies differing from those embodied in the desegregation decree may substantially increase racial segregation of the students within the school district and at the same time not be classified as a new violation of the Equal Protection Clause.

In Dowell, however, the Tenth Circuit concluded that even though unitary status was obtained, the outstanding desegregation decree was not automatically dissolved. 890 F.2d at 1492. The Supreme Court recently granted certiorari in Dowell to address, among other issues, the impact of a determination of unitary status on an outstanding desegregation decree.

This Article does not attempt to enter the debate regarding the impact of a determination of unitary status on an outstanding desegregation decree; rather, it focuses on the harm caused by de jure segregation. For the purposes of the Article, then, a school district is considered to have obtained unitary status when federal court supervision ends and the outstanding desegregation decree is dissolved. At that point, full control over the school district is returned to the relevant educational authorities. Thus, the most recent opinion by the Tenth Circuit in Dowell does not amount to a finding of unitary status for the purposes of this Article.
status when a federal court determines that it is not only desegregated but also has eliminated the vestiges of its prior racial discrimination.\textsuperscript{8} Unitary status is not so much a moment in time as it is a general state of being.\textsuperscript{9} Unitary status is a conclusion based upon relevant considerations.

There is disagreement, however, as to what considerations are relevant. Many lower federal courts have concluded that the only relevant factors to consider in determining whether a school district has obtained unitary status are those that relate primarily to the amount of desegregation that has occurred within the school district.\textsuperscript{10} Arguments have been made in a number of cases, however, that the determination of unitary status should examine additional factors, such as objective educational achievement criteria\textsuperscript{11} and the good faith efforts of school officials.\textsuperscript{12}

To ascertain what factors a court should consider in determining whether unitary status exists, it is necessary to identify a theory explicating the harm resulting from de jure segregation that remedies are supposed to eliminate. To date, the Supreme Court has not defined the meaning of unitary status,\textsuperscript{13} the time and method of terminating an outstanding school desegregation decree,\textsuperscript{14} or the impact of unitary status on an existing desegregation decree.\textsuperscript{15} The Court, however, has granted certiorari in a Tenth Circuit case, Dowell v. Oklahoma Board of Education,\textsuperscript{16} in which it may have an opportunity to address issues related to unitary status, including what factors a court should consider when determining unitary status.\textsuperscript{17}

\textsuperscript{8} See Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985); Lee v. Macon County Bd. of Educ., 681 F. Supp. 730, 736-37 (N.D. Ala. 1988).

\textsuperscript{9} See, e.g., Dowell, 890 F.2d at 1491-92; Morgan, 831 F.2d at 320-21.

\textsuperscript{10} Quarkes, 868 F.2d 750; Overton, 834 F.2d 1175; Riddick, 784 F.2d 521; United States v. Board of Educ., 794 F.2d 1541 (11th Cir. 1986). To determine the amount of desegregation a school system has achieved many lower federal courts have applied the six factors set forth by the Supreme Court in Green v. County School Board, 391 U.S. 430 (1968). In Green the Court noted that "racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operation—faculty, staff, transportation, extracurricular activities and facilities." Id. at 435.

In addition to the Green factors, many lower federal courts consider whether school authorities have made "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971); see, e.g., Brown, 899 F.2d at 859; Dowell, 890 F.2d at 1499; Morgan, 831 F.2d at 319; Ross v. Houston Indep. School Dist., 699 F.2d 218, 227 (5th Cir. 1983).

\textsuperscript{11} See infra notes 209-11 and accompanying text.

\textsuperscript{12} See Jacksonville Branch, NAACP v. Duval County School Bd., 883 F.2d 945, 952 (11th Cir. 1989); Morgan, 831 F.2d at 319; Brown, 892 F.2d at 865; Dowell, 890 F.2d at 1499; Ross, 699 F.2d at 227.

\textsuperscript{13} See Keyes v. School Dist. No. 1, 895 F.2d 659, 665 (10th Cir. 1990).

\textsuperscript{14} See Gewirtz, supra note 7, at 792.

\textsuperscript{15} See Jacksonville Branch, NAACP, 883 F.2d at 950.

\textsuperscript{16} 890 F.2d 1493 (10th Cir. 1989), cert. granted, 110 S. Ct. 1521 (1990).

\textsuperscript{17} Given the current procedural context of Dowell, the Supreme Court is not being asked to determine the relevant factors that a lower court should consider when addressing the issue of unitary status. The Oklahoma City school desegregation case commenced with the filing of a complaint in 1961. In the ensuing years, the parties struggled through the difficult task of formulating a desegregation plan. After a plan
One of the intractable problems of the Supreme Court's jurisprudence in the area of de jure segregation has been its inability to articulate a coherent theory of the constitutional harm resulting from de jure segregation of public schools that justifies desegregation as the principal means to eliminate the harm. School desegregation has been the principal means employed to remedy the harm resulting from the constitutional violation of de jure segregation. Desegregation, however, is no doubt a remedy thought to address concerns other than merely the racial composition of public schools. With the Supreme Court agreeing to hear Dowell, it is

was implemented, the school board 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 this objective. Dowell v. School Bd., No. CIV-9452, slip op. (W.D. Okla. Jan. 18, 1977); see Dowell v. Board of Educ., 660 F. Supp. 1548, 1551 (W.D. Okla. 1985) (quoting the unpublished order in part). This order was not appealed.

In February 1985, the plaintiffs sought to reopen the case claiming that the school board abandoned the desegregation plan that had been approved by the district court in 1972. The district court concluded, and the Tenth Circuit upheld the decision, that as a matter of law, the principles of res judicata and collateral estoppel prohibited the plaintiffs from challenging the district court's findings that the school system was unitary. See Dowell, 795 F.2d at 1518.

Consequently, the issues in front of the Supreme Court center around the fact that the school system already has obtained unitary status. The questions posed to the Supreme Court are as follows:

(1) Should compulsory desegregation decree remain operative after formerly de jure school system achieves unitary status? (2) Does traditional standard for dissolution of injunctive decrees involving private parties, as enunciated in United States v. Swift & Co., 286 U.S. 106 (1932), govern dissolution of school desegregation decrees? (3) What affirmative desegregation obligations, if any, does formerly de jure school system have following its elimination of official discrimination and achievement of unitary status? (4) Subsequent to achievement of unitary status, is school board's action to adopt elementary neighborhood school plan that curtails compulsory busing scrutinized by board's lack of discriminatory intent, or by plan's racially disproportionate effect? (5) What are proper criteria for determining whether unitary status has been maintained? (6) Did court of appeals afford sufficient deference to factual findings of district court in compliance with Anderson v. Bessemer City, 470 U.S. 564 (1985)?

58 U.S.L.W. 3610 (1990). The Court must confront the impact of the determination of unitary status upon the outstanding school desegregation plan and decide with what standards a student assignment plan that deviates from the one outline in the court decree should be evaluated to determine its constitutionality. Id.

The Justice Department however has recently filed a motion with the Supreme Court requesting that the Court remand the case to the Tenth Circuit. The Justice Department wants the lower courts to conduct further proceedings on the question of whether or not the district is legally desegregated. See Volume IX, No. 39 EDUC. WEEK 1 (June 20, 1990). Such an inequity would focus specifically on the factors which a school system must consider in determining unitary status.

18. In Keyes v. School District 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." One could, however, take the position advanced by the Tenth Circuit in Dowell
imperative that the Court articulate a theory to explain the harm that results from de jure segregation. Such a theory would shed light on whether considerations other than those related only to desegregation should be taken into account by federal courts in determining whether unitary status has been obtained.

Part I of this Article proposes a new theory to evaluate the harm to which remedies for de jure segregation should be directed. Public schools are cultural institutions whose primary purpose is to instill values, including moral, political and social ideas, attitudes, opinions, and beliefs. The Supreme Court's jurisprudence with respect to education has long focused on this value inculcating function of education. This Article argues that in order to determine the harm produced by de jure segregation, it is necessary to view public schools from that perspective of their value inculcating function. From that perspective, the harm resulting from de jure segregation should be viewed as the inculcation of the invidious value, of a value that offends the Constitution. Public schools that engaged in de jure segregation were inculcating an invidious value belief in the inherent inferiority of African-Americans.

The segregation of students, teachers, staff, and administrators along racial lines was an administrative rule that was a primary component of an educational program designed to inculcate the invidious value. Remedies for de jure segregation, therefore, should be directed towards eliminating invidious value inculcation. Although desegregation has been the principal means employed to accomplish this goal, it should not be viewed as an end in itself. Eliminating invidious value inculcation is the remedy for the harm.

In the absence of an articulated theory by the Supreme Court explicating the purpose of remedies for de jure segregation, a number of theories have been developed to explain the harm produced by de jure segregation. Part II of this Article discusses some of these other theories offered to explicate the constitutional harm produced by de jure segregation of public schools. These theories fall into roughly three overlapping categories. The first category of theories

19. See infra notes 49-72 and accompanying text.
20. This theory loosely fits the Supreme Court's major school desegregation cases. See infra notes 110-202 and accompanying text. Unfortunately, the Supreme Court has adopted a narrow view of when public schools were inculcating the invidious value remedy, and the ability of the federal courts to remedy this constitutional violation. Extensive criticism of these limitations, as well as extensive exposition of the nature of invidious value inculcation in public schools, is beyond the scope of this Article.
views the harm resulting from de jure segregation in terms of identifiable harms to African-American school children. The second category of theories views the harm resulting from de jure segregation as the embodiment of a failure to the political process. The third category of theories views the harm resulting from de jure segregation as an interpretative harm resulting from the meaning attached to segregation by society.

Part III of this Article will contrast the invidious value inculcation theory discussed in Part I with other theories addressing the harm resulting from de jure segregation in public schools. Public education is the only government service organized primarily for the purpose of transmitting societal values to children. None of the other theories addresses the unique role of the value-inculcating function of public education when that function is contrasted with other services provided by the state. The failure to ground these theories in the value-inculcative aspect of public education is a significant shortcoming.

It is clear that factors related to desegregation, such as racial composition of the student body, faculty, and staff, transportation, extracurricular activities, and facilities, should be considered in determining whether or not a school system has achieved unitary status.\(^{21}\) What is not clear, however, is whether an examination of these factors alone should be used to determine the elimination of invidious value inculcation. Part IV of this Article proposes, tentatively, factors in addition to those related to desegregation which a court should consider in deliberating on the unitary status of a particular school district.

\(^{21}\) These are known as the Green factors after the Supreme Court’s opinion in Green v. County School Board, 391 U.S. 439 (1968), the most frequently cited Supreme Court opinion pertaining to the issue of unitary status. See supra note 10. In Green, the Supreme Court struck down a freedom-of-choice plan adopted by the New Kent County School Board on the ground that it failed to produce significant desegregation. In striking down the plan, the Court noted that Brown II, the implementation portion of Brown I, was

\[\begin{align*}
\text{a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School Boards such as the respondent... were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.}
\end{align*}\]

Green, 391 U.S. at 437-38 (emphasis added).

Although the Court did not specify what it meant by eliminating racial discrimination “root and branch,” at least one noted scholar has interpreted the reference to stand for elimination of all-white and all-black schools. See Days, School Desegregation Law in the 1980's: Why Isn’t Anybody Laughing? (Book Review) 95 Yale L.J. 1737, 1746 (1986).

The Court also observed that lower federal courts do not merely have the power, but rather the obligation, to render a decree that will eliminate the effects of past discrimination as well as bar like discrimination in the future. Green, 391 U.S. at 438 n.4 (citing Louisiana v. United States, 380 U.S. 145, 154 (1965)).
I. The Theory of Invidious Value Inculcation

Theories explaining the harm resulting from de jure segregation that remedies are meant to eliminate must accept a certain amount of generality. This Part first addresses why theories about remedies for de jure segregation will not yield particularized or determinative results in the context of a given school district. Next, this Part notes that public schools perform a number of important functions for American society, including inculcating dominant American cultural values and teaching dominant American heritage. This part discusses the reasons why the Supreme Court should view public schools in light of this value inculcating function. After discussing these reasons, this Part focuses on the nature of the harm caused by de jure segregation from the perspective of public schools as value inculcating institutions. Viewed in that fashion, the harm resulting from de jure segregation is invidious value inculcation the remedy for which is its elimination. As segregation was the principal means to inculcate the invidious value, desegregation is the principal means to eliminate invidious value inculcation. Finally, this Part shows how the theory of invidious value inculcation fits, albeit loosely, within the general framework of the Supreme Court’s de jure segregation jurisprudence.

A. Theories Explaining the Harm Resulting From De Jure Segregation in General

The Supreme Court has approved a number of different remedies for de jure segregation, including remedial reading,\textsuperscript{22} in-service teacher training, testing programs, and counseling and career guidance programs.\textsuperscript{23} School desegregation, however, has been the principal method used to eliminate the harm resulting from de jure segregation. A number of methods have been employed to accomplish desegregation, including the use of magnet schools, redrawing district boundaries, consolidations of school systems, and busing.\textsuperscript{24} No doubt school desegregation was thought to remedy harms other than those caused by the racial composition of public schools.\textsuperscript{25} The Court did not pursue desegregation for its own sake but because desegregation was a means directed at eliminating a harm, the most tangible manifestation of which was racially segregated schools. A coherent theory explaining the harm attributable to de jure segregation is necessary to illuminate the purpose behind the remedies for de jure segregation.

Theories explaining the harm resulting from de jure segregation that the remedies are meant to eliminate, however, must accept a certain amount of generality. Whatever the underlying theory, it

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\textsuperscript{22} Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1414 (11th Cir. 1985).
\textsuperscript{23} See Milliken II, 433 U.S. at 275-76.
\textsuperscript{24} Chayes, Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 47 (1982).
\textsuperscript{25} See supra note 18 and accompanying text.
will not yield particularized or determinative results.\textsuperscript{26} 

Traditional court-ordered remedies for many other constitutional violations are generally an outgrowth of the classic litigation model where judges are called upon to resolve private disputes between private individuals.\textsuperscript{27} In the classic litigation model, where the remedy is generally backward-looking,\textsuperscript{28} courts seek to compensate victims for the injuries they have suffered. The litigation model provides for determinative results because it is compensatory.\textsuperscript{29} In contrast to the classic litigation model, court ordered remedies for de jure segregation of public schools must assess the cumulative effects of discriminatory actions by school districts occurring over a considerable period of time.\textsuperscript{30} Lawsuits involving de jure segregation are perhaps the best examples of what Professor Chayes has named public law litigation.\textsuperscript{31} As Professor Chayes has demonstrated, the courts, when addressing public law litigation, are asked to address issues of public policy embedded in constitutional provisions.\textsuperscript{32} The remedy of school desegregation is being provided to African-American school children today for a constitutional violation that occurred in the past. As a result, the remedy for de jure segregation looks to the future rather than the past; it is corrective, not compensatory. The nature of the violation as well as the remedy for de jure segregation, therefore, makes the formulation of a theory that will yield particularized or determinative results difficult.

\section*{B. Reasons for Looking at Brown I and Its Progeny from the Perspective of the Value Inculcating Function of Public Schools}

Public schools perform three overlapping functions for American society. First, schools perform an academic function. Schools disseminate useful information, teach the basic academic and technical skills that are believed to be necessary for a child to become a self-sufficient and self-reliant adult, and assist in the cognitive development of children.\textsuperscript{33} Second, schools perform a sorting function.\textsuperscript{34} Schools act as classifiers of students based upon judgments about the student’s presumed academic abilities and potentials.\textsuperscript{35} Third,

\begin{thebibliography}{9999}
\bibitem{26} Chayes, \textit{supra} note 24, at 49.
\bibitem{27} \textit{Id.} at 4-5.
\bibitem{28} Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 \textit{Harv. L. Rev.} 1281, 1282 (1976).
\bibitem{29} Chayes, \textit{supra} note 24, at 5.
\bibitem{30} Gewirtz, \textit{supra} note 7, at 784.
\bibitem{31} \textit{Id.}
\bibitem{32} \textit{Id.} Chayes, \textit{supra} note 28, at 1284.
\bibitem{34} \textit{See infra} notes 250-55 and accompanying text.
\bibitem{35} The academic judgments made by public schools have immediate implications
\end{thebibliography}
schools perform a value-inculcating function. Public schools are social institutions that acculturate America’s youth. Schools inculcate dominant American cultural values and teach dominant American cultural heritage through the selection and exclusion of materials presented to students in the classroom. Values are also inculcated through a myriad of rules and regulations governing student and teacher conduct. For example, rules prohibiting fighting on school premises attempt to inculcate a belief that violence is not a proper 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; and rules requiring students to commence their academic day by reciting the pledge of allegiance to the flag attempt to produce patriotic beliefs. The segregation of public school students, teachers, and staff was the product of administrative school rules that also inculcated values, specifically, the inferiority of African-Americans.

Although American public schools perform three overlapping functions—academic, sorting, and value inculcation—the value inculcating function is most appropriate to judicial decisionmaking. Both the academic and sorting functions of public schools rely upon the expert judgment of those specifically trained to instruct for students in terms of rewards or punishments and in determining what kind of instruction the students will receive. See, e.g., J. Oakes, Keeping Track: How Schools Structure Inequality 75, 90, 189 (1985). These sorting judgments also have long-term implications for students. Academic judgments of public schools are a major determinant of the recipients of future positions of social advantage and, conversely, a major justification for confining adults to positions of social disadvantage. Sorting decisions made by public schools are therefore paramount in determining the future life chances of most students who receive public education. Id. at 149, 189.

Professor Tussman noted that the power of the state to make academic judgments in terms of the consequences of one’s life “make[s] pale indeed the transient chidings of the judicial power.” J. Tussman, Government and the Mind 59 (1977). According to Tussman:

[T]he consequences of the exercise of [the sorting function] are drastic . . . . Tracking and guiding into roles may have decisive and permanent effects. The certification of competence or fitness for higher educational opportunities is the modern substitute for the accident of birth as the determinant of the quality of life.

It is, I believe, no exaggeration to say that the consequences of the exercise of the [sorting function] outweigh the sanctions of the judicial power.

Id. at 165.

37. Mitchell, supra note 36, at 684.
39. In Keyes v. School District No. 1, 413 U.S. 189, 195-98 (1973), the Supreme Court noted that, in the Southwest, Hispanics and African-Americans have a great many things in common, including economic and cultural deprivation and discrimination. Due to the historic focus on African-Americans in public school desegregation, the discussions of invidious value inculcation and its implications contained herein are directed toward African-Americans. To the extent that Hispanics and other minorities have had similar experiences as African-Americans, however, the same explanation could apply to them as well.
America's youth.\textsuperscript{40} The Supreme Court has asserted its unwillingness to become the school board of the nation because it lacks the competence to function in that capacity.\textsuperscript{41} Although the Court may lack the competence to review public schools' academic and sorting functions, that does not mean that the Court lacks the competence to determine what values should be inculcated in public schools. There is a difference between specifying what values should be taught and determining what is the best method to teach those values. The latter requires expertise in educational methodology; the former does not.

There are also additional reasons why the Supreme Court should view de jure segregation from the perspective of the value inculcating function of public education. First, while the Supreme Court was familiar with the value inculcating function of public schools prior to \textit{Brown I}, its more recent cases involving public education have repeatedly recognized the importance of the value inculcating function of public education. Many of these recent cases have noted that the objective of public education is the inculcation of fundamental values. Second, public education involves the state's role in the maturation of children. Through education in public schools, the government participates in the formulation of consciousness of the next generation of adults. And finally, public schools are in many ways an indoctrinator's dream. They are designed to maximize the likelihood that students internalize the desired values. For these reasons, judicial scrutiny over the value inculcation process is imperative.

\textbf{1. Supreme Court Cases Recognizing the Value Inculcating Function of Public Schools}

At the time the Supreme Court decided \textit{Brown I}, it had not addressed issues in public schools frequently enough to have developed a consistent view of public education. Nevertheless, the Court was no stranger to the value inculcating function of education. In two of the Court's earliest opinions addressing education, \textit{Meyer v.}

\begin{itemize}
\item \textsuperscript{40} The Court noted in Board of Curators v. Horowitz, 435 U.S. 78, 89-90 (1978), that academic evaluations of students are by their nature subjective and require expert evaluation of cumulative information. This is a task not readily adaptable to judicial decisionmaking.
\item \textsuperscript{41} West Virginia v. Barnette, 319 U.S. 624, 637 (1943).
\end{itemize}
Nebraska and Pierce v. Society of Sisters, the Court recognized the value inculcating function of education. Although both Meyers and Pierce involved government regulation of private education, prior to the 1954 decision in Brown I, the Supreme Court had specifically examined value inculcation in the context of public education on two different occasions.

In Minersville School District v. Gobitis, the Supreme Court expressed little apprehension in asserting that public schools should engage in value inculcation, even if the values being inculcated were contrary to those of the students' parents. In Gobitis, the Court upheld a requirement that children of Jehovah's Witnesses participate in the flag salute, even if such a requirement violated their religious convictions. The Court, however, reversed the holding in Gobitis three years later in West Virginia State Board of Education v. Barnette. Notwithstanding the reversal of Gobitis, the Court in Barnette reaffirmed the importance of the value inculcating function of public schools by vigorously upholding the authority of public schools to foster national unity.

2. Brown I and Value Inculation

It is not surprising that Chief Justice Warren's opinion in Brown I also alluded to the value inculcating aspect of public education. In one of the most often quoted passages in Brown I, the Court stated that, "education is perhaps the most important function of state and

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42. 262 U.S. 390 (1923). In Meyer, the Court reversed the conviction of a school teacher for teaching the German language in violation of a 1919 Nebraska statute. The statute prohibited teaching any language other than English to students before they have completed the eighth grade. The Court noted that "the purpose of the legislation was to promote civil development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals." Id. at 401. It was believed that the training of young children in foreign languages would "inculcate in them the ideas and sentiments foreign to the best interests of the[e] country." Id. at 398. In holding the statute violative of the Fourteenth Amendment, Justice McReynolds indicated that although the statute's goals might be highly desirable, "a desirable end cannot be promoted by prohibited means." Id. at 401. In short, the means employed by the Nebraska statute impinged upon a protected liberty interest under the Fourteenth Amendment.

43. 268 U.S. 510 (1925). In Pierce, the Court invalidated an Oregon citizen's initiative that required "every parent, guardian or other person having control or charge or custody of a child between the ages of eight and sixteen years" to send the child to a public school. Id. at 530. The substantive effect of the initiative would have been to eliminate private schools. For an explanation of the historical events surrounding the initiative, see G. Tyack, S. James & F. Benavot, Law and the Shaping of Public Education, 1785-1954, at 177-92 (1987). Although upholding the right of private schools to operate, the Court noted that no question was being raised concerning the power of the state to reasonably regulate all schools, public and private, to provide that certain studies plainly essential to good citizenship be taught and that nothing be taught that is manifestly inimical to the public welfare. Pierce, 268 U.S. at 534.

44. 310 U.S. 586 (1940).
45. Id. at 599.
46. 319 U.S. 624, 642 (1943).
47. Id. at 640. The Court agreed that national unity was an end that officials may foster, but simply objected to compelling the fostering of national unity with the flag salute. Id.
local governments" and that "[i]t is a principal instrument in awak-
ening the child to cultural values." The Court in Brown I, there-
fore, also recognized the value inculcating function of public
schools.

3. Supreme Court Cases Recognizing the Value Inculcating Function of
Public Schools

Examining de jure segregation from the perspective of the value
inculcating function of public education seems to be particularly ap-
propriate in light of the recent Supreme Court cases addressing
First Amendment issues in public education. Although the
Supreme Court has always noted the importance of the value incul-
cating aspect of public education, its more recent First Amendment
cases have been extremely forthright about embracing this aspect as
the primary function of public education.

In Board of Education v. Pico, the Court addressed the removal of
controversial books from a public school library by school officials.
Justice Brennan, writing for a plurality of the Court, held that stu-
dents possess a right to receive information and that right is violated
whenever school officials remove books from school libraries in or-
der to deny students access to ideas with which the officials disa-
gree. In so holding, Justice Brennan stated that "[the Court has]
acknowledged that public schools are vitally important ... vehicles
for 'inculcating fundamental values necessary to the maintenance of
a democratic political system.' Likewise, Justice Blackmun, in his
concurring opinion, stated that "the Court has acknowledged the
importance of the public schools ... 'in the preservation of the val-
ues on which our society rests' ... Because of the essential social-
izing function of schools, local education officials ... 'awake[n] the

authority of public school officials to censor a student newspaper); Bethel School Dist. v.
Fraser, 478 U.S. 675 (1986) (upholding the authority of public school officials to disci-
pline 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 re-
move books from the school libraries); see also Ambach v. Norwick, 441 U.S. 68 (1979)
(upholding against an Equal Protection Clause challenge a New York statute forbidding
permanent certification as a public school teacher of any person who is not a United
States citizen).
50. See Kuhlmeier, 484 U.S. at 278; Fraser, 478 U.S. at 681; Pico, 457 U.S. at 864;
Ambach, 441 U.S. at 77-78.
52. Id. at 871. Justices Marshall and Stevens joined the opinion written by Justice
Brennan. Id. at 855. The Court remanded the case to the district court and instructed it
to determine the motive of the school officials in ordering the removal of the books. Id.
at 873-75.
53. Id. at 864 (quoting Ambach, 441 U.S. at 76-77).
child to cultural values.' Justice Rehnquist, in his dissenting opinion, also placed emphasis on the value inculcating function of public schools. Criticizing Justice Brennan's plurality opinion for its inconsistency, Justice Rehnquist stated that

the 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.

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.

In *Bethel School District v. Fraser*, the Court found itself addressing the situation of a student who had been disciplined for delivering a speech at a student assembly that made suggestive use of vulgar and offensive terms. Notwithstanding the change in circumstances from library book removal to student speech at a student assembly, the Court reaffirmed its belief in the value inculcating function of public schools. Citing its opinion in *Ambach v. Norwick*, the Court stated:

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare students 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 Ambach v. Norwick, we echoed the essence of this statement of the objectives of public education as the "inculcation of fundamental values necessary to the maintenance of a democratic political system."

In *Hazlewood School District v. Kuhlmeier* 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 value inculcation by public

56. 478 U.S. at 681 (emphasis added) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).
58. 484 U.S. at 262-64. Principal Reynolds of Hazelwood East High School objected to two student-written articles. One was an article describing three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school. Even though the pregnancy story used false names to keep the girls' identities a secret, Reynolds was concerned that the students could still be identified from the text. Reynolds also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. Reynolds' concern about the article on divorce related to the fact that one of the students identified by name made defamatory comments about her father. Reynolds felt that the student's parents should have been given an opportunity to respond to her remarks or to consent to publication. Id.
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schools. Further, in his dissent, Justice Brennan noted that public 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 students' social and moral development by transmitting to them an official dogma of 'community values.'"

Although Pico, Fraser, and Kuhlmeier all addressed First Amendment issues arising in the context of public schools, the Court has also paid particular attention to the value inculcating function of public schools in cases addressing issues involving the Equal Protection Clause in public schools. In fact, the Supreme Court's first articulation of the language regarding the role of education as inculcating fundamental values necessary for the maintenance of a democratic political system comes from an equal protection case, Ambach v. Norwich.

Ambach involved an equal protection challenge to a New York law that forbade certification of any person as a public school teacher who was not a citizen of the United States unless that person manifested an intention to apply for citizenship. The appellees were two foreign-born individuals who were otherwise qualified to teach in public schools. They challenged the law on the grounds that it violated the Equal Protection Clause by employing a classification based on alienage. In upholding the New York law, the Court stated that although classifications based on alienage are normally inherently suspect, there are exceptions. According to the Court "some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." Such functions, therefore, will not be reviewed under the rigorous constitutional test normally applied to suspect classifications. If the classification based on alienage relates to one of those government functions, then it is reviewed under the less stringent rational basis test.

61. Kuhlmeier, 484 U.S. at 271, 274, 278.
62. Id. at 278. (Brennan, J., dissenting) (citation omitted) (quoting Ambach v. Norwich, 441 U.S. 68, 77 (1979)).
64. Id. at 69-70.
65. Appellee Norwich was born in Scotland and was a citizen of Great Britain. She had been a resident of the United States since 1965 and was married to an American citizen. Appellee Dachinger was a Finnish citizen who came to the United States in 1966. She was also married to an American citizen. Neither of the Appellees wanted to give up their citizenship in their native countries. Id.
66. Id. at 71.
67. Id. at 74-75.
68. Id. at 73-74.
69. Id. at 74. The Court noted that the distinction between citizens and aliens is ordinarily irrelevant to private activity. However, the status of citizenship, whether by
In determining whether or not teaching in public schools constitutes a government function, the Court stated that "we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role." According to the Court, "[p]ublic education, 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." After finding the value inculcating function of public schools fundamental, the Court upheld the New York law under rational basis review.

4. Value Inculcation of Children Is Inevitable

Apart from Supreme Court case law recognizing the value inculcating function of public schools, there is another reason to examine de jure segregation from the value inculcating perspective: the cognitive development of children makes value inculcation inevitable. Although there are exceptions, children generally lack the experience, maturity, and judgment of adults, and, as a result, cannot critically evaluate what is being presented to them. Children must go through a maturation process during which they will have experiences and develop a perspective that will indelibly affect how they view themselves, others, their country, and the world. Thus, with respect to children, the question is not whether or not they will go through a maturation process in which they will obtain values, but birth or by naturalization, denotes an association with the polity. The lack of this association provides government entities with wider latitude in limiting participation of noncitizens. Id. at 75.

70. Id. at 76 (quoting Foley v. Connelie, 435 U.S. 291, 297 (1978)).
71. Id. at 80-81. The Court also noted the importance of the value inculcating function of public schools in another case addressing the application of the Equal Protection Clause in public schools, Plyler v. Doe, 457 U.S. 202, 221, reh'g denied, 458 U.S. 1131 (1982). Plyler, however, was not decided primarily with reference to the value inculcating function of public schools.
72. The Supreme Court has recognized "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." Bellotti v. Baird, 443 U.S. 622, 634 (1979).
73. Some commentators have challenged the notion that schools have an enduring effect on the attitudes, values, and even intellectual development. See R. Collins, The Credential Society 1-21 (2d ed. 1985); C. Jencks, Inequality: A Reassessment of the Effect of Family and Schooling in America, 135 (1972). Collins stresses that what is learned in school is rapidly forgotten and makes little contribution to the effectiveness of adult role job performance. The importance of schooling for Collins lies in the general acceptance of the principle that educational credentials are a fair and rational method of allocating occupational positions in American society. R. Collins, supra, at 20-21.
74. This line of research presents a particular challenge to the discourse regarding the inculcation of fundamental values. If the school's inculcation is ineffective, then arguably the exposure to ideas that a child or a parent finds abhorrent should not be objected to, because the effect on the child as an adult will be negligible. This conclusion, however, conflicts with the exercise of the state's police power, or parens patriae, to compel attendance at school which is obviously based on an assumption that the school experience does have an impact on how the child will view the world.
rather, who will be involved in that process and how will it be structured.\textsuperscript{75} No matter how misguided children are, in the near future they will become members of the adult community. Once they are adults they will be entitled to act on their own values, regardless of how they have come by them.

The influence of public education in the maturation process of America’s youth cannot be overstated. Public schools enroll approximately 90% of all eligible school-age children.\textsuperscript{76} As Professor Yudof remarked, in our society children are perceived in the Kantian sense “as both ends in themselves, evolving autonomous beings, and as instruments of larger societal purposes.”\textsuperscript{77} Through public education government participates directly in the formulation of the consciousness of the next generation of adult citizens.\textsuperscript{78} The establishment of public schools with concomitant compulsory attendance statutes\textsuperscript{79} reflects in part the exercise by the state of its police power to assure the public health, safety, welfare, and morality.\textsuperscript{80} Understanding the legitimacy of the establishment of public schools is the acknowledgment that, with respect to children, government power is not limited to physical coercion and persuasion. As opposed to the adult mind, the fertile mind of a child is a legitimate subject of public concern.\textsuperscript{81}

\textsuperscript{75} Ingber, Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools, 1987 U. ILL. L. REV. 15, 15-20.
\textsuperscript{76} In 1987 it was estimated that of all the students enrolled in elementary and secondary schools in 1985, 39.8 million of these students, or 89%, were enrolled in public schools. Department of Education Study, supra note 5, at 58.
\textsuperscript{77} Yudof, Library Book Selection and the Public Schools: The Quest for the Archimedean Point, 59 IND. L.J. 527 (1984).
\textsuperscript{78} M. Apple, Ideology and Curriculum 32-33 (1979).
\textsuperscript{79} Virtually every state plus the District of Columbia has adopted a compulsory school attendance statute. 2 W. Valente, Education Law: Public and Private 455-56 (1985).
\textsuperscript{80} The state police power has been ubiquitously recognized. E.g., State v. Hoyt, 146 A. 170 (N.H. 1929); State v. Bailey, 61 N.E. 750 (Ind. 1901); see also Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905).
\textsuperscript{81} For a discussion of the rationale of allowing the Government access to the mind, see J. Tussman, supra note 35, at 51-85. Professor Tussman asserts that the public interest in the condition of the mind is the most fundamental part of the public domain. Id. at 11.

Indeed, as long ago as 1933, Carter Woodson wrote:

When you control a man’s thinking you do not have to worry about his actions. You do not have to tell him not to stand here or go yonder. He will find his “proper place” and will stay in it. You do not need to send him to the back door. He will go without being told. In fact, if there is no back door, he will cut one for his special benefit. His education makes it necessary. C. Woodson, The Mis-Education of the Negro xiii (1933). This is not to say that the purpose of public schools is to produce automatons reacting obediently to the dictates of government authority, but rather to reveal the centrality of the involvement of the government in areas related to the formulation of the consciousness of children.
5. *Courts Must Be Solicitous of the Indoctrination of the Value Inculcating Function of Public Schools*

The final reason for looking at *Brown I* and its progeny from the value inculcating function of public schools is that instruction in public schools is designed to maximize the likelihood that students internalize desired messages. The use of exhortation, physical, and mental coercion, including physical punishment and a system of rewards and punishments that are common in public schools, is comparable to a system of indoctrination. As Professor Ingber has reminded us so cogently:

Public schools are, in many ways, an indoctrinator's dream. First, attendance is compulsory, and students lack the independent knowledge or psychological sophistication necessary to evaluate critically what their teachers tell them. Second, public schools can package their message as highly valued “education” rather than as less trustworthy propaganda. Third, the adult teacher’s authority and seemingly vast fund of knowledge will likely impress the children. Finally, teachers reward and punish students according to how well they learn the lesson of the day.

The cognitive condition of children and the structure of public education require courts to be particularly concerned about the value inculcating function of public schools. Public schools are responsible for teaching future generations of adult citizens and thereby are in the process of molding attitudes that will affect all Americans in the future. Analyzing *Brown I* and its school desegregation progeny from the perspective of the value inculcating function of public education thus may provide additional insight into the Supreme Court’s decisions in this area.

**C. The Harm Recognized in *Brown I* from the Perspective of the Value-Inculcating Function of Public Schools**

*Brown I* provides the only extended discussion by the Supreme Court of the harm resulting from de jure segregation of public

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82. In *Ingraham v. Wright*, 430 U.S. 651, 691-92 (1977), the Supreme Court held that use of corporal punishment as a means of maintaining discipline in public schools did not violate the Eighth Amendment nor was the failure to hold even an informal hearing prior to the paddling a violation of the students’ rights under the Due Process Clause of the Fourteenth Amendment. The Court recently refused to revisit the issue of corporal punishment in public schools by declining to hear *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir. 1988) (affirming the district court’s holding that plaintiffs who were paddled by their teachers failed to state a claim of deprivation of substantive due process or equal protection that would entitle them to relief under 42 U.S.C. § 1983), *cert. denied*, 109 S. Ct. 1343 (1989).


84. Professor Ingber succinctly described the dilemma of public education: The community demands an effective school program that promotes the “right” values . . . Yet children are highly vulnerable to “village tyrants” who might pervert the educational process. On one hand, society expects schools to instill values and thoughts while transmitting knowledge. On the other, it fears the power of public education to . . . thwart constitutional mandates.

*Id.* at 19.
schools. Although the Court noted that segregation may produce an educational harm, the Court focused on the psychological harm caused by segregation. As the Court stated, "[t]o separate [African-American children] 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." Feelings of inferiority obviously are the result of a value—the belief in such inferiority. From the perspective of the value inculcating function of public schools, the central inquiry is thus whether public schools are engaged in actions that could inculcate such a value. It is not a question of whether or not schools are successful at generating feelings of inferiority. Rather, the focus is on whether schools are inculcating the invidious value.

Segregation in public schools was a system founded upon the classification and separation of students based on race. Yet, there is nothing inherently wrong with classification and separation of school children. Schools routinely classify and separate students as a matter of pedagogy. Fourth grade pupils, for example, are separated from sixth grade pupils. Students are also classified and separated on the basis of perceived academic ability. In order to determine whether or not public schools are engaged in invidious

85. Brown I, 347 U.S. at 494. Chief Justice Warren quoted a portion of the oral record of a Kansas court that noted that inferiority affects the motivation of a child to learn. Id. at 493. According to Warren, therefore, the educational harm was derivative from true psychological harm. This point also was made by the group of social scientists working in the area of American race relations. The report was attached as an appendix to the appellant's briefs filed in Brown I. See The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement, 37 MINN. L. REV. 427, 430 (1953) [hereinafter Social Science Statement]. The Court also noted that it is doubtful that any child may reasonably be expected to succeed in life if denied the opportunity of an education. Brown I, 347 U.S. at 493.


87. The practice of achievement or ability grouping is not per se unconstitutional. Under certain circumstances courts have approved this practice. See, e.g., Montgomery v. Starkville Mun. Separate School Dist., 854 F.2d 127, 129 (5th Cir. 1988) (stating that achievement grouping in English and math was permissible even though it resulted in segregated classrooms); Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986) (holding that school district's bilingual program did not discriminate against Mexican-Americans in its ability groups practice); Castaneda v. Pickard, 648 F.2d 989, 996 (5th Cir. Unit A 1981) (noting that ability grouping is not per se unconstitutional but is subject to closer judicial scrutiny when occurring in a school district with a past history of unlawful discrimination); Morales v. Shannon, 516 F.2d 411, 414-15 (5th Cir.) (finding that grouping according to academic performance that resulted in Mexican-American students being grouped together was not unlawful), cert. denied, 423 U.S. 1034 (1975). But see Larry F. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (permanently enjoining the use of IQ tests which were resulting in the overrepresentation of black students in special classes), aff'd, 793 F.2d 969 (9th Cir. 1984); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1979) (order granting preliminary injunction to restrain school district from administering IQ tests that were resulting in the placement of children in racially unbalanced classes), aff'd, 502 F.2d 963 (9th Cir. 1974); Hobson v. Hansen, 269 F. Supp. 401, 1990]
value inculcation, it is necessary to determine why the separation of black and white school children occurred; that is, the meaning attached to the separation.

The only way to determine the meaning attached to the segregation of black and white school children is to examine the contemporary and historical context that produced racial separation in public schools. The historical context of segregation in the South was formulated and perpetuated over the course of the 300 years of interaction between the blacks and whites. As Professor Black noted some thirty years ago:

Segregation in the South comes down in apostolic succession from slavery and the *Dred Scott* case. The South fought to keep slavery, and lost. Then it tried the Black Codes, and lost. Then it looked around for something else and found segregation. The movement for segregation was an integral part of the movement to maintain and further “white supremacy” . . . .

As an organized system, the connotation attached to segregation was unmistakably clear: African-Americans were inferior to whites. 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.”

Segregation was the product of the prevailing and historical belief in the invidious value. Segregation in public schools was merely a part of a deeply rooted cultural system based on and designed to


Tracking, a system which groups secondary school students for instruction by achievement and ability has also been criticized from an educational and methodological standpoint. *See, e.g.*, J. Oakes, *supra* note 59 (concluding that tracking reflects and perpetuates racial inequalities in society, leading to unequal educational experiences of minority and poor children).


89. *Black, 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 the system of slavery. The mere policing of the slaves and the exaction of involuntary labor required more or less constant scrutiny. C. Woodward, *The Strange Career of Jim Crow 12* (3d ed. 1974).

90. K. *Karst, Belonging to America 17* (1989).

91. According to the authors of the *Social Science Statement*, “historically segregation patterns in the United States were developed on the assumption of the inferiority of the segregated.” *Social Science Statement, supra* note 86, at 432-33. As Justice Harlan stated in his dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 557, 560 (1896), segregation “proceeded 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.”

92. In *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 relationships.'” R. *Kluger, Simple Justice 726* (1976).
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perpetuate the invidious value. Although the belief in the invidious value generated the practice of segregation, segregation also reinforced the invidious value. A cycle was initiated in which segregation was based on the invidious value and the practice of segregation perpetuated this value. Racial segregation in public schools was not, therefore, the transgressor; the transgressor was invidious value inculcation. Mandatory racial segregation in public schools was simply the principal means by which to inculcate the invidious value.

D. Phrasing the Remedy for De Jure Segregation

Initially, the Supreme Court did not mandate racial mixing in order to eliminate the harm resulting from de jure segregation. After Green, however, it was clear that the Court required racial mixing in order to prevent public schools from inculcating the invidious value any longer. Mandatory racial mixing in public schools represented a significant departure from the Court’s remedies for segregation of public parks, beaches, golf courses, transportation, transportation,

93. One cannot think about segregation without being reminded of Charles Black’s immortal 1960 article. Black wrote:

Then does segregation offend against equality? Equality, like all general concepts, has marginal areas where philosophic difficulties are encountered. But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description.

Here I must confess to a tendency to start laughing all over again.

Black, supra note 89, at 424.


95. The Supreme Court’s opinion in Brown I could be read as merely prohibiting segregation and not requiring racial mixing. Additional support for this proposition can be found in Section 401(b) of the 1964 Civil Rights Act, which specifically states: “De-segregation means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but ‘desegregation’ shall not mean the assignment of students to public schools in order to overcome racial imbalance.” 42 U.S.C. § 2000c(b) (1988) (emphasis added). In Green, however, the Supreme Court officially declared that segregated public schools have an affirmative duty to integrate their student bodies. Green v. County School Bd., 391 U.S. 430, 441-42 (1968).

96. New Orleans City Park Improvement Ass’n v. Detiege, 358 U.S. 54 (1958) (per curiam).


and other public facilities. In those cases, the Court simply concluded that mandatory racial separation was unconstitutional. Nor could this departure be attributed solely to a distinction between adults and children. In *Bazemore v. Friday* the Court also rejected the notion that mandatory racial mixing of children was necessary to eliminate the harm resulting from segregated 4-H and Homemaker's clubs sponsored by the state.

The remedy for segregation of public education differs from the remedy for segregation of other public facilities or services because the primary purpose of public education is to inculcate values in children. The rights involved in public schools, therefore, are those of children in a value inculcating institution. At the time the Supreme Court expressed its frustration with the lethargic pace of the desegregation process in *Green*, desegregation appeared to be the best means by which public schools could eliminate invidious value inculcation. In order to eliminate the harm resulting from de jure segregation in public schools, racial mixing seemed to be required. Although desegregation was the principal means by which to effectuate the remedy, it was not the remedy itself. The remedy was for the public schools to cease the inculcation of the invidious value.

E. The Value Inculcation Theory Within the Framework of the Major School Desegregation Cases

The Supreme Court did not explicitly endorse invidious value inculcation as the harm produced by de jure segregation. This Part examines the major Supreme Court cases of *Green v. County School Board*, *Keyes v. School District No. 1*, *Milliken v. Bradley (Milliken I)*, *Pasadena City Board of Education v. Spangler*, and *Milliken v. Bradley (Milliken II)*, as they would be seen if the Court viewed the constitutional harm derived from de jure segregation as invidious

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102. See supra notes 42-72 and accompanying text.
103. The Court first expressed dissatisfaction with the implementation decision of *Brown II* in *Cooper v. Aaron*, 358 U.S. 1 (1958). There, the Court spoke out against the open and violent resistance that *Brown I* was encountering in the South: "The Constitutional rights of [the] respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature." *Id.* at 16.
104. In *Goss v. Board of Education*, 373 U.S. 683 (1963), the Court invalidated a desegregation plan that allowed students initially assigned on the basis of school zone boundaries to transfer from a school where their race was in the minority to a school where their race was in the majority. In voiding the plan, the Court characterized it as working only toward the "perpetuation of segregation." *Id.* at 686.
105. See infra notes 113-18 and accompanying text.
106. See supra notes 42-72 and accompanying text.
value inculcation. This examination will show that viewing the harm resulting from de jure segregation as invidious value inculcation fits, albeit loosely, within the general framework of these cases.

1. Green v. County School Board—Why It Was Necessary to Eliminate the Racial Characteristic of the Public Schools

In Green, the Supreme Court struck down a freedom-of-choice plan adopted by the New Kent County School Board on the ground that it failed to produce significant desegregation. The cause of the initial separation of black and white school children in New Kent County was based upon the invidious value. The attendance patterns of schools in New Kent County, therefore, reflected the invidious value, which was being inculcated in the public schools. In order to terminate invidious value inculcation, the dual school system had to be dismantled. Desegregation would eliminate the existence of the all-white and all-African-American schools and thereby eliminate the principal characteristic being used to inculcate the invidious value. Until the racial identifiability of the schools was eliminated and there were “just schools,” the principal means by which to inculcate the invidious value still existed.

The freedom-of-choice plan adopted by the school authorities was not a remedy for the past violations, but rather it was a continuation of the prior practice of invidious value inculcation. The fact

111. 391 U.S. 430 (1968).
112. Id. at 441. There were only two schools in the entire school district: New Kent School was on the east side of the county and the George W. Watkins School was on the west side of the county. Id. at 432. Watkins was considered the school for blacks and New Kent the school for whites. Id. The desegregation plan implemented by the school board allowed a pupil to choose his or her own public school. Students who did not choose were reassigned to the school they previously attended. Students seeking enrollment for the first time were assigned at the discretion of the school board. Id. During the three years the desegregation plan was in effect, no white student had enrolled in the Watkins school and only 15% of the black students attended New Kent School. Id. at 441.

According to the Supreme Court, this plan was not a sufficient step to effectuate a transition to a unitary system because it “operated simply to burden children and their parents with a responsibility which (Brown II) placed squarely on the School Board.” Id. at 441-42.

114. Green, 391 U.S. at 442.
115. The need to eliminate the racial characteristics of the school in order to eliminate the invidious value inculcation would also explain the Supreme Court’s holding in United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972). In Scotland Neck, the Court noted that public school officials could not justify continued racial imbalance in public schools because of the fear of “white flight.” Id. at 491. Even though a desegregation plan might include the seeds of resegregation, the racial character of the schools had to be disestablished in order to eliminate the inculcation of the invidious value.
that African-American and white parents may have had some choice in the schools that their children attended did not eliminate invidious value inculcation. Their choices had been conditioned by established patterns of behavior and beliefs that were rooted in the invidious value. To simply conclude that freedom-of-choice plans eliminated invidious value inculcation overnight would require the Court to ignore the social context of the parents' choices. It would not be possible to explain the continued existence of the segregated school attendance pattern as a product of autonomous choices that were independent of the invidious value. Although the Constitution generally does not recognize the concept of tainted choice, the nature of public education as a value inculcating institution for children requires special consideration of the possibility of tainted choices when determining how to remedy a constitutional violation affecting public schools.

2. Keyes v. School District No. 1—Intentional Segregation as the Constitutional Violation and the Keyes “Presumption”

The Supreme Court's opinion in Keyes is noteworthy for two reasons. First, the Court introduced the de jure/de facto segregation distinction. Second, the Court adopted a procedural rule that a finding of intentional school segregation in a meaningful part of a school district created a strong presumption that segregated schooling throughout the district was similarly motivated.

Keyes was the first Supreme Court opinion addressing de jure segregation in a state (Colorado) where, in 1954, the public schools were not segregated pursuant to state statutory authority. At the time of the Supreme Court's decision in Brown I, segregation of public schools was mandatory in seventeen states pursuant to state

116. For an excellent discussion of the concept of tainted choices, see Gewirtz, supra note 7, at 741-49.
117. Id. at 749.
118. This explanation of the need to eliminate racial identifiability would also explain the Supreme Court's treatment of the companion case to Green, Monroe v. Board of Commissioners, 391 U.S. 450 (1968). In Monroe, the defendant, in order to comply with Brown II, instituted a geographically based attendance zone student-assignment policy, but as part of the plan it allowed any student to transfer from his zoned school to a school of choice. Id. at 453-54. All white students and most black students exercised their right to transfer to the previously racially identified schools. Id. at 457. That plan, like the one in Green, thus failed to produce a significant amount of desegregation. Id. at 458.
120. The Court in Keyes also addressed for the first time the issue of how to treat Hispanics for purposes of de jure segregation of public schools. As discussed above, because most of the Supreme Court's school desegregation jurisprudence was developed within the context of race relations between blacks and whites, this article focuses on de jure segregation of public schools within the context of that relationship. See supra note 62.
121. Keyes, 413 U.S. at 205-06.
122. Id. at 208.
statute and permissible by statute in four other states.123 Approximately 40% of the nation's school children were enrolled in segregated schools in those states.124 Before Keyes, school districts segregated pursuant to state statute were automatically charged with an affirmative duty to effectuate a transfer to a racially nondiscriminatory school system.125 Racial segregation of public school children in those states was clearly directed towards invidious value inculcation.126

The racial segregation in public schools challenged in Keyes did not arise in an area of the country that shared the South's history of racism. The history of race relations outside of the "Old Confederacy" and border states was both qualitatively and quantitatively different than that of the South and border states.127 To begin with, slavery was primarily confined to the South and border states. At the time of the Civil War, approximately 92% of all blacks lived in the states that comprised the Old Confederacy and the border states.128 For most northern and western states, therefore, there was very little history of slavery. Even as late as 1940, fourteen years before Brown I, over three-quarters of African-Americans still resided in the South and the border states.129 For some states, especially Western states, there was no history of a large population of African-Americans.

In Keyes, the Court faced the issue of how to determine the constitutional violations in areas of the country where school segregation did not arise pursuant to state statute. In the South and border states, school segregation pursuant to state statutory authority made the school systems that engaged in invidious value inculcation easy to identify. It was not necessary to make the arduous distinction between school systems that violated the constitution and school systems that did not. As a result, the ad hoc decisions that federal
courts made were confined to the remedial stage. By contrast, in *Keyes*, the Court was required to formulate a method for lower federal courts to use in order to identify school systems that violated the Constitution from those that did not. Individual determinations of which school systems were engaged in invidious value inculcation were therefore inevitable. What was in doubt was the formulation of the method by which to make those determinations.

The Supreme Court in *Keyes* posited intentional segregation as the standard. The Court emphasized that there was a difference between de jure and de facto segregation. De jure segregation is a "current condition of segregation resulting from intentional state action directed specifically to the [segregated schools]." If the plaintiffs could not establish that the segregation was intentional, then there was no constitutional violation.

From *Keyes* it is obvious that invidious value inculcation depends upon the local meaning attached to segregation in public schools. It is an effects-oriented examination because from the perspective of the value inculcating function of public schools, the primary effect of public education is the inculcation of values. The Court in *Keyes* directed federal courts to look primarily at the intent of the local school officials to determine the existence of de jure segregation. School board decisions, including those related to student, teacher, administrative, and staff school assignments, embody local consensus values. Public schools have historically been inculcators of local community values.

The focus on the intent of school officials as the way to assess the local meaning attached to segregation seems appropriate. By ascertaining the intent of school officials, the local community values that were being inculcated in the public schools were elucidated. The requirement that plaintiffs prove intent to segregate the students was tantamount to the plaintiffs proving that the meaning of segregation in the public schools in a given school system operated to inculcate the invidious value. If the plaintiffs could not establish that segregation was the result of intent, then schools were not inculcating the invidious value.

The adoption of an intent standard to determine whether or not a constitutional violation has occurred, however, suffers from a few drawbacks.

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130. *Keyes*, 413 U.S. at 208.  
131. *Id.* at 205-06.  
132. *See supra* notes 42-72.  
133. The Court in *Keyes* also noted that to determine whether a school was segregated required more than a focus limited to the racial composition of faculty and staff, but also required that community and administrative attitudes towards the schools be taken into account. *Keyes*, 413 U.S. at 196. The primary focus of determining whether or not de jure segregation existed, however, was on the intent of school officials.  
135. At least one commentator has taken issue with the conclusion that racial prejudice was a factor in the Denver School Board's policy decisions. Yudof, *Nondiscrimination and Beyond in School Desegregation*, in *SCHOOL DESSEGREGATION: PAST, PRESENT AND FUTURE* 97, 110 (1980).
number of defects. First, the standard makes the effort of establishing a constitutional violation tedious, expensive, and protracted. "Six weeks of trial [producing] more than four thousand pages of testimony and nearly two thousand exhibits' [is] not uncommon in the search for constitutional violations." Even though courts almost always find de jure segregation whenever litigation is "seriously pursued," the added cost of obtaining and introducing such evidence is no doubt enough to discourage many potential plaintiffs from going to court at all.

Second, as recently pointed out by Professor Strauss, the intent standard as applied generally in antidiscrimination cases is incoherent and indeterminate. Its operation in the area of school segregation is no different. Recognizing as much, Justice Powell, in his separate opinion in Keyes, urged a more uniform approach and predicted that the results of litigation under the new standard would be "fortuitous, unpredictable, and even capricious" as courts endeavored "to ascertain the subjective intent of school authorities with respect to action taken or not taken over many years."

True to Justice Powell's prediction, the adoption of an intent standard has led to inconsistent results. For example, at the same time a federal judge in Grand Rapids, Michigan ruled that optional attendance zones, construction of schools in segregated neighborhoods, and assignments of black teachers to black schools all had permissible explanations. A different federal judge in nearby Kalamazoo, Michigan held similar practices to be unconstitutional. On appeal, the Sixth Circuit affirmed both of the lower court decisions.

Rather than adopting an intent standard, the Court could have focused on the existence of de facto segregation as the means for determining whether invidious value inculcation had occurred. A de facto segregation standard would not have eliminated the need for federal courts to make ad hoc determinations based on whether or not a particular school system was segregated. Such a standard, however, would reduce the cost of the determination of whether

139. Keyes, 413 U.S. at 233 (Powell, J., concurring in part and dissenting in part).
142. Higgins, 508 F.2d 779 (Grand Rapids); Oliver, 508 F.2d 178, (Kalamazoo).
there has been a constitutional violation and would provide an opportunity for much more uniform results. Moreover, by selecting de facto segregation as the standard rather than intentional segregation, the Court could have increased the number of school systems that would be seen as engaging in invidious value inculcation.

The adoption of a standard that focused on the intent of the school officials, however, adds credence to the notion that the underlying harm which remedies for de jure segregation are to alleviate is with the educational process in public schools. If the locus of the harm was African-American school children, then a focus on de facto segregation made more sense than a focus on the intent of school officials. African-American school children would suffer just as much in de facto segregated schools as they would in de jure segregated schools. Invidious value inculcation theory sees the locus of the underlying harm with respect to de jure segregation with the value inculcating process. A focus on the intent of school officials provides a better guide to elucidating the local meaning attached to segregation which is essential in determining the existence of invidious value inculcation.

In addition to establishing the de jure/de facto distinction, the Keyes Court also adopted an evidentiary presumption. The "Keyes presumption" states that a finding of de jure segregation in a meaningful portion of a school district creates a prima facie case that de jure segregation exists throughout the district. Once the plaintiff establishes de jure segregation in a meaningful portion of the district, the burden of proving otherwise shifts to the school district. The Keyes presumption is not triggered until after the plaintiffs prove that the school district engaged in de jure segregation in a meaningful part of the school district. The entire district is under the control of the same school authorities and is part of the same community. The entire district, therefore, is inculcating the community's local values. If a significant portion of that school district is shown to be engaged in invidious value inculcation, there is reason to presume that such a situation exists in the entire school

144. Id.
145. Keyes, 413 U.S. at 201-03.
146. The Court appeared to retreat from the Keyes presumption in Dayton Board of Education v. Brinkman (Dayton I), 433 U.S. 406 (1977). The Court decided 8-0 (with Justice Marshall not participating) to vacate a school desegregation decree and remand for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976). The Court instructed the district court on remand to "determine how much incremental segregative effect [the school board's isolated] violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference." Dayton I, 433 U.S. at 420. When the Dayton case reached the Supreme Court for the second time, the Court noted that the barrier to the system-wide relief posed by Dayton I was overcome by resort to the Keyes presumption. Dayton Bd. of Educ. v. Brinkman (Dayton II), 445 U.S. 526, 540-42 (1979). Thus, although the Court appeared to initially reject the Keyes presumption in Dayton I, it appeared to restate the vitality of that presumption in Dayton II.
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district. In addition, if the entire school district was not seen as tainted by invidious value inculcation, then it would have been much more difficult to remedy the portion of the school district that was inculcating the invidious value.

3. Milliken v. Bradley (Milliken I)—Limitation on State Action

The Supreme Court in Milliken I addressed de jure segregation of the Detroit Public School System. The plaintiffs in Milliken I proved that the Detroit school district had engaged in de jure segregation within its boundaries. Therefore, the Detroit public schools were engaged in invidious value inculcation. What was at stake in Milliken I was the limitation to be placed on the ability to remedy invidious value inculcation found in a given school district.

The boundaries of the Detroit Public School System were established over a century before the litigation began in Milliken I. The district court concluded that there were too few white students to effectively desegregate public schools if the remedy was limited to Detroit only. The Supreme Court had to decide whether or not to view the suburban school districts as separate and distinct entities from the Detroit School District for purposes of remedying the constitutional violation that had occurred in Detroit public schools.

The Court concluded that to justify an interdistrict school desegregation decree, the plaintiffs must show that a violation occurring within one school district produced a significant segregative effect in another. In other words, the intentionally segregative acts must

147. But see Fiss, School Desegregation: The Uncertain Path of the Law, 4 PHIL. & PUB. AFF. 3, 26. Professor Fiss argues that the Keyes presumption is based on a view that any errors in determining the scope of the remedy for de jure segregation should be made in the direction of findings that would support a broader integration remedy because integration is considered to be a preferable condition to separation, without regard to whether it fits as a remedy for the defendant's violation. My argument can be contrasted with Professor Fiss's. I argue that the Keyes presumption is based upon the view that invidious value inculcation either exists or does not exist with an entire school system. To conclude that only a portion of a school system engaged in invidious value inculcation ignores the fact that the entire system is in the same community and controlled by the same individuals who are responsible for the value inculcation of the entire school district.

149. Id. at 724-31.
150. Id. at 748.
151. Id. at 735.
152. Id. at 743-45. In 1950 the city of Detroit had a population of approximately 1,900,000, which constituted 61% of the population in the metropolitan area. By 1970, the population within the city had declined to approximately 1,500,000, which constituted only 36% of the population of the metropolitan area. There were 838,877 whites and 660,428 blacks. The population of Detroit's suburbs more than doubled in that twenty-year period. Most of the increased school population in the suburban school districts was, therefore, of recent origin. Sedler, The Profound Impact of Milliken v. Bradley, 33 WAYNE L. REV. 1693, 1705 (1987).
be a substantial cause of interdistrict segregation. If the school districts acted independently, however, the fact that intentional segregation existed in one school system was simply not relevant to the educational process in another school system.

The values being inculcated in Detroit's public schools were presumed not to have tainted the value inculcating process of the other school systems. A Detroit-only remedy was sufficient to eliminate invidious value inculcation from the Detroit public schools, thus limiting the remedy for invidious value inculcation to the boundaries of the school system that was found to be inculcating the invidious value. The Court took this position in spite of the fact that such a remedy prevented meaningful racial mixing of students.

The limitation placed on the remedy for invidious value inculcation in Milliken I was by no means required. The Court could have rejected the school boundaries limitation by focusing on any of three considerations noted by Justice Marshall in his dissenting opinion. First, evidence at trial showed that the state of Michigan itself had taken actions contributing to the segregation in the schools of Detroit. Second, the Detroit Board of Education was an agency of the state of Michigan. As such, its acts of racial discrimination could be considered those of the state of Michigan for purposes of the Fourteenth Amendment. Finally, according to Justice Marshall, "the District Court found that under Michigan law and practice, the system of education was in fact a state school system, characterized by relatively little local control and a large degree of centralized state regulation with respect to both educational policy and the structure and operation of school districts." By viewing the violation of de jure segregation as that of the state's educational program as opposed to that of each separate school district, the Court could have treated the entire state's educational system as one for purposes of remedying invidious value inculcation within Detroit public schools. Cross-district busing would simply have been viewed as an administrative inconvenience. Thus, the Supreme Court could have expanded the remedy for invidious value inculcation to encompass cross-district busing if necessary in order to provide meaningful desegregation.

4. Pasadena City Board of Education v. Spangler—The Impact of Subsequent Resegregation of Students

In Spangler, the Supreme Court reviewed a district court order

154. Id. at 745.
155. Id.
156. As pointed out by Professor Lawrence, "[b]y holding that the Detroit district court’s choice of an inter-district remedy was in error, and that only an intra-district remedy was warranted by the facts, the Supreme Court necessarily found that there was no ‘constitutional violation’ existing outside of the boundaries of the Detroit school system.” Lawrence, supra note 127, at 20.
158. Id.
159. Id.
requiring periodic adjustments of student assignments in order to maintain the approximate amount of desegregation among students as originally achieved.\textsuperscript{161} The Court held that once a school district has implemented a racially-neutral attendance pattern for students, a district court cannot require continued adjustments in order to maintain a certain amount of desegregation.\textsuperscript{162} The subsequent resegregation of students is not part of the original constitutional violation that the district court had the authority to remedy.\textsuperscript{163} Accordingly, the Court concluded that the subsequent resegregation in \textit{Spangler} was attributable primarily to choices of individuals to relocate—not the school's efforts to further invidious value inculcation.\textsuperscript{164} Because resegregation was not caused by public school officials, the schools were not inculcating the invidious value.

The Court’s conclusion that the subsequent resegregation was not a part of the original constitutional violation was not inevitable. The Court could have used an analysis similar to that employed in \textit{Green}\textsuperscript{165} and concluded that the subsequent resegregation indicated that the racially-neutral attendance pattern had never been originally established. The subsequent resegregation of students could have been deemed a result of choices that had been conditioned by the invidious value, thus allowing the invidious value inculcation to continue.

5. \textbf{Milliken v. Bradley (Milliken II)—Does Invidious Value Inculcation Extend Beyond the Racial Composition of Public Schools?}

Even if, as argued above, the harm produced by de jure segregation is invidious value inculcation, a nagging question persists. If de jure segregation inculcated the invidious value, it stands to reason that other elements of public school educational programs, including teaching strategies, teacher, staff, and administrator attitudes, and testing procedures,\textsuperscript{166} were also used to inculcate the invidious

\textsuperscript{161} \textit{Id.} at 434-36. When the court addressed the issue of periodic adjustments of student school assignments, the unified Pasadena school district was not unitary with respect to other aspects of its school system, such as hiring and promotion of teachers and administrators. \textit{Id.} at 436.

\textsuperscript{162} \textit{Id.} at 434-35.

\textsuperscript{163} \textit{Id.} at 435-37.

\textsuperscript{164} \textit{Id.} at 435-36.

\textsuperscript{165} \textit{See supra} notes 116-18 and accompanying text.

\textsuperscript{166} Lower federal courts have addressed various issues relating to teaching strategies and testing procedures, see, e.g., Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (striking down ability grouping instituted by school officials), \textit{aff'd sub nom.} Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc), and school testing procedures, see, e.g., Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (holding that the use of IQ tests to place children in special classes for the educable mentally retarded inculcated the invidious value), \textit{aff'd}, 793 F.2d 269 (9th Cir. 1984); \textit{see also supra} note 87.
value. Further, schools teach values not only by using administrative rules and regulations governing student and teacher conduct but also through the selection and exclusion of certain curricular information.\textsuperscript{167} One could suspect that the traditional educational program undervalues the contributions of African-Americans and their ancestors.\textsuperscript{168} Should these elements be central in formulating remedies for de jure segregation? After all, the nature and scope of a segregation remedy must directly address and relate to the constitutional violation.\textsuperscript{169}

\textit{Milliken II}\textsuperscript{170} may provide insight into the limitation on the Court's ability to eliminate invidious value inculcation in the entire educational program of public schools. In \textit{Milliken II}, the Supreme Court once again focused on the Detroit Public School System\textsuperscript{171} and affirmed a district court order approving remedial educational components proposed by the Detroit School Board as part of the remedy for de jure segregation.\textsuperscript{172} In formulating its order, the district court determined that the state of Michigan was as responsible for segregation of Detroit's public schools as the school system itself. Thus, 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.\textsuperscript{173} The state of Michigan objected to being made partially responsible for funding this remedy.\textsuperscript{174}

The educational programs proposed by the Detroit School Board,

\begin{itemize}
  \item \textsuperscript{167} See supra notes 37-38 and accompanying text.
  \item \textsuperscript{168} Some lower federal courts have included a requirement in their desegregation decrees that schools eliminate racial bias in the curriculum. \textit{E.g.}, Berry v. School Dist., 515 F. Supp. 344 (W.D. Mich. 1981); United States v. Board of School Comm'rs, 506 F. Supp. 657 (S.D. Ind. 1979); Evans v. Buchanan, 447 F. Supp. 982 (D. Del. 1978), aff'd, 582 F.2d 750 (3d Cir. 1978). The potential for bias in the traditional education program has not gone unnoticed by educational experts. \textit{See} W. Sedlecek & G. Brooks, Jr., \textit{Racism in American Education} 48-49 (1976). Attempts to address racial bias in the traditional educational program during the 1960s and 1970s led to increased discussion and implementation of multiethnic and multicultural educational components. Banks, \textit{Race, Ethnicity and Schooling in the United States: Past, Present and Future}, in \textit{Multicultural Education in Western Societies} 43 (1986). As a result, many textbooks were revised in the 1970s to include more information about the experiences and cultures of diverse ethnic groups. \textit{Id. at 47}. A neo-conservative movement, however, developed in education in the 1980s. This movement was characterized by a strong push for assimilation, national pride, and patriotism. As a result of the influence of this movement, many recent textbooks include less information about ethnic groups than their early-1970s counterparts. Further, many school districts have abandoned their multicultural education programs, placing ethnic issues on a low priority. \textit{Id. at 47}.
  \item As Professor Banks has noted, the teaching strategies, culture, norms, and other aspects of public schools indicate that many of the nation's educators have been influenced little, if at all, by the myriad developments and publications in multiethnic education. \textit{J. Banks, Multiethnic Education: Theory and Practice} 12 (1981). As a result, even though the student population in the United States is increasingly multiethnic, the curriculum in many schools remains Anglocentric.
  \item \textsuperscript{169} \textit{Milliken II}, 433 U.S. at 280.
  \item \textsuperscript{170} 433 U.S. 267 (1977).
  \item \textsuperscript{171} For a discussion of \textit{Milliken I}, see supra notes 148-59 and accompanying text.
  \item \textsuperscript{172} 433 U.S. at 279.
  \item \textsuperscript{173} \textit{Id. at 277}.
  \item \textsuperscript{174} \textit{Id. at 279}.
\end{itemize}
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and approved by the district court, fell into four categories: reading, in-service training for teachers and administrators, revised testing procedures, and counseling and career guidance. 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." A testing program was adopted because the district court found that black children were "especially affected by biased testing procedures." Counselors were included in the plan to address the psychological pressures that undergoing desegregation would place on Detroit's students.

In upholding the district court's order, the Supreme Court noted that the educational components of the desegregation plan were intended to remedy the effect of de jure segregation on the Detroit Public School System. Given the purpose of the in-service training, testing, and counseling and career guidance components, those components were responsive to eliminating invidious value inculcation from the educational program of Detroit's public schools beyond merely matters of racial composition. Even though the district court concluded that the reading component was intended to eradicate the effects of past discrimination, that component was not directly responsive to eliminating invidious value inculcation. Teaching reading is more a part of the academic function of public schools than the value inculcating function. The Court's approval of the reading component, therefore, cannot be justified by looking at public schools from the perspective of their value inculcating function, but instead justification of the approval requires public schools to be viewed with the perspective of their academic or sorting functions.

175. The district court concluded that there was "no educational component more directly associated with the process of desegregation than reading." Id. at 275. The General Superintendent of Detroit's schools was "to institute a remedial reading and communications skills program [t]o eradicate the effects of past discrimination." Id. This program was to be formulated and implemented by the superintendent and a committee of his selection. Id.
176. Id. at 274-76.
177. Id. at 275-76.
178. Id. at 276. The district court directed the Detroit School Board and the Michigan Department of Education "to institute a testing program along the lines proposed by the local school board in its original desegregation plan." Id.
179. Id.
180. Id. at 287-88.
181. Id. at 275.
182. See supra notes 33-34 and accompanying text. Although a portion of the holding of Milliken II represents a deviation from the view that the harm resulting from de jure segregation as invidious value inculcation, the deviation is not as great as it first appears. The Detroit School Board implemented all of the educational components of the desegregation plan. Of the four educational components, only the reading component was
In *Milliken II*, the Court advised federal courts to “take into account the interests of state and local authorities in managing their own affairs” when devising a remedy for de jure segregation.\(^{183}\) The Court noted that the district court did not substitute its judgment for that of the elected local school officials as to what educational components were beneficial to the school community.\(^{184}\) This is consistent with the Supreme Court’s previous pronouncements that the education of the nation’s youth is not the responsibility of federal courts, but rather, the responsibility rests primarily with parents, teachers, and state and local officials.\(^{185}\) Federal courts lack both the expertise of educators and the accountability of local and state educational officials.\(^{186}\) Federal courts, therefore, cannot precisely ascertain the consequences of their intervention into the educational programs of public schools.\(^{187}\)

It is true that federal courts have invaded the province of public school officials in a number of other cases. The Supreme Court has authorized federal courts to resolve disputes impacting upon the educational programs of public schools when basic constitutional values are “directly and sharply implicate[d].”\(^{188}\) For example, the Supreme Court decreed that school officials must provide students with informal hearings prior to temporary suspensions from public schools.\(^{189}\) Given the frequency of student suspensions, the requirement of informal hearings is a sizeable intrusion into what had previously been the exclusive province of educators.\(^{190}\)

not specifically directed toward the elimination of invidious value inculcation. Absent the liability of a state defendant that would share the cost of the remedy, there was no reason for local school authorities to argue for remedial programs sought by the Detroit School Board in this case. It is within the authority of local school authorities to initiate these programs on their own and to pay for them out of their own resources. As such, *Milliken II* is only applicable in school desegregation cases in which local school officials are in favor of adopting remedial programs and the state looms as a potential deep pocket from which to obtain additional funding for the programs. For examples of such cases, see, e.g., *School Bd. v. Ballies*, 829 F.2d 1308, 1310 (4th Cir. 1987); *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404, 436 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986); *Liddell v. Missouri*, 731 F.2d 1294, 1298-99 (8th Cir. 1981) (en banc), *cert. denied*, 469 U.S. 816 (1984).

184. Id. at 275.
190. The United States Department of Education reported that for the 1983-1984 school year there were 10 suspensions in junior and senior high school for every 100 students. *Department of Education Study*, supra note 5, at 99. Given that over 18,000,000 students were enrolled in Grades 7-12 in the Fall of 1983, id. at 37, there
book removal decisions also are reviewable by federal courts to determine whether or not the removal decisions are precipitated by improper motives of school officials. Further, the Supreme Court in *Tinker v. Des Moines Independent Community School District* proclaims that students have the right to freedom of speech within public schools, as long as that speech is not "materially and substantially" disruptive to the educational process and does not interfere with the rights of others. The Court has even invalidated state statutes prohibiting the teaching of evolution and requiring the teaching of creation theory when the theory of evolution is also taught. School desegregation litigation, like constitutional litigation in other areas of public education, is a substantial invasion into the autonomy of public school officials. Indeed, federal court supervision of public schools pursuant to desegregation orders could be characterized as placing a school district into legal receivership.

In sum, the above decisions, and others, have eroded the once absolute power of school officials and the state over the educational process. Despite the many intrusions by the Supreme Court into the educational programs of public schools, the Court has stopped far short of anything as pervasive as what would be required to eliminate invidious value inculcation from the traditional public school educational program. For example, in order to address invidious value inculcation in the curriculum, a court would have to approve, or at least review, the offering and termination of courses and the selection of textbooks and other instructional materials. To date, the Supreme Court's intrusions into the educational programs of public schools have been limited primarily to procedural rights were at least 1,800,000 suspensions potentially affected by the Court's decision in *Goss* in the 1983-1984 school year alone.

191. *Pico*, 457 U.S. 853 (1982). In *Pico*, the plurality of the Court held that whenever the decisive factor behind the decision to remove a book from a school library is the intention to deny students access to ideas that school officials disagree with, the removal decision violates the student's right to receive information. *Id.* at 870-72.


193. *Id.* at 513.


198. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (holding a state statute permitting...
and prohibitions against certain activities. Even when the Court's decisions have impacted directly on curricular material, the Court has not specified curricular material that public schools should teach. Rather, the court has only prohibited actions that were motivated by a desire to advance the interest of certain religious groups.

The reason for restricting the remedy for invidious value inculcation primarily to school desegregation may be a recognition of the limits of federal courts in addressing education issues. Courts should certainly encourage public school officials to initiate programs to revise their traditional curriculum, but mandating such programs is another issue entirely. Although this argument is powerful, it reflects what Professor Minnow would call a "form of judicial passivity" in the face of complexity. By showing deference, courts are asserting that they have no power or responsibility to act.

II. Other Theories on the Harm Resulting from De Jure Segregation of Public Schools

In the absence of an articulated theory by the Supreme Court explicating the constitutional harm produced by de jure segregation, a number of theories have been developed to explain the purpose of remedies for de jure segregation. These theories fall into roughly three overlapping categories. The first category of theories views the harm resulting from de jure segregation in terms of identifiable harms to African-American students. The specific harms that these "remedial" theories focus on include lower educational achievement, feelings of inferiority, societal discrimination suffered by African-Americans, and distorted attendance patterns that resulted from the existence of de jure segregation. A second category of theories views the harm resulting from de jure segregation as the

199. See, e.g., Aguillard, 482 U.S. 578 (holding invalid under the Establishment Clause a state statute forbidding the teaching of evolution in public schools unless the theory of "creation science" was also taught); Stone, 449 U.S. 39 (striking down a Kentucky statute requiring the posting of a copy of the Ten Commandments purchased with private funds on the wall of each public classroom); Schempp, 374 U.S. 203 (invalidating school prayer statute); Barnette, 319 U.S. 624 (invalidating compulsory flag salute).

200. See, e.g., Aguillard, 482 U.S. 578 (striking down a statute requiring that when the theory of evolution is presented, the theory of creationism must also be presented).


203. Id.

204. See infra notes 208-68 and accompanying text.
embodiment of a failure of the political process that bases government decisions on invidious motives. A third category of theories views the harm resulting from de jure segregation as an interpretative harm resulting from the meaning attached to segregation by society. Theories in this category view government actions segregating public schools as stigmatizing African-Americans. This stigmatic harm is distinct from any observable harm.

Although these theories suggest a number of different harms that result from de jure segregation, none of them are based on the value inculcating function of public schools. As a result, they generally do not explain why racial mixing is necessary for purposes of remedying de jure segregation in public schools but not other government services provided by states. The failure to ground these theories in the value inculcating function of public schools is a serious shortcoming.

A. Remedial Theories

Remedial theories look backward and attempt to ascertain the effect of de jure segregation on its victims. Once the harm is determined, the purpose of remedy, according to the remedial theories, is to restore victims to the position that they would have occupied absent the constitutional violation. Remedial theories generally assume that the impact of the harm resulting from de jure segregation is not on the value inculcating process of public schools, but rather its effects on African-American school children. In ascertaining the harm caused by de jure segregation, remedial theories focus on four overlapping effects attributed to de jure segregation on African-American school children: (1) educational harms; (2) psychological harms; (3) general societal discrimination; and (4) distorted school attendance patterns.

It is important to note a problem with most of the remedial theories. The remedies for de jure segregation are being provided to African-American school children today. Yet many of the victims of de jure segregation graduated or left public schools before the implementation of any remedy. The desegregation of today's public school children cannot possibly restore those victims to the position they would have occupied absent the constitutional violation. As a result, many victims of de jure segregation are not provided with a remedy at all. As a result, remedial theories generally can not accomplish the goals they are devised to achieve.

205. See infra notes 269-84 and accompanying text.
206. See infra notes 285-92 and accompanying text.
207. See supra notes 96-102 and accompanying text.
208. See, e.g., Milliken II, 433 U.S. at 282; Milliken I, 418 U.S. at 738.
1. Educational Achievement

If the harm resulting from de jure segregation of public schools is viewed as lower educational achievement by African-American school children than by their white counterparts, then in order to determine unitary status, courts should examine objective educational achievement criteria.\(^{209}\) This theory requires the Court to view public schools primarily from the perspective of their academic function.\(^{210}\) As discussed below, viewing public schools from the academic function, as opposed to the value inculcating function, will force courts to make decisions requiring technical expertise in educational methodology.\(^{211}\)

Viewing the harm resulting from de jure segregation as lower educational achievement suggests that public school districts have not obtained unitary status until the performance of African-American students, as determined by objective educational achievement criteria, is essentially equal to that of their white counterparts.\(^{212}\) In determining unitary status, courts should therefore look first to the Green factors discussed above.\(^{213}\) In addition to applying the Green factors, courts should also consider issues related to the educational achievement of African-American students, such as scores on standardized tests, drop out rates, graduation rates, and the percentage of students attending post-secondary education institutions and undertaking full-time employment. The Richmond, Virginia School Board advanced such an argument in the context of a school desegregation termination case, School Board v. Baliles.\(^{214}\)

With the exception of the reading component in Milliken II,\(^{215}\) the Supreme Court has never explicitly endorsed remedies for de jure segregation based on their impact on the educational achievement of African-American school children.\(^{216}\) It was not until Green that the Court made it clear that racial balancing must occur in order to

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\(^{209}\) One could argue that for school districts where desegregation of the student body is obtainable, the determination of unitary status should be based on the Green factors. See supra note 10. But where desegregation is not viable, determination of unitary status should be based on academic components. See School Bd. v. Baliles, 829 F.2d 1308, 1312 (4th Cir. 1987).

\(^{210}\) See supra note 33 and accompanying text.

\(^{211}\) See infra notes 224-36 and accompanying text.


\(^{213}\) See supra note 10.

\(^{214}\) Baliles, 829 F.2d 1308. Although the School Board in Baliles argued that using educational achievement factors to determine unitary status was appropriate for a school district that could not desegregate its students, id. at 1312, these factors could also be applied in determining whether school districts in which desegregation is obtainable have achieved unitary status.

\(^{215}\) See supra notes 181-82 and accompanying text.

\(^{216}\) In Milliken II, the Court approved a district court opinion when the school board argued that remedial education courses should be included in the remedy for Detroit's de jure segregation. Milliken II, 433 U.S. 267 (1977). In Milliken II, however, it was the school board that argued for the remedial programs—not the district court. Questions concerning the ability of a court to make decisions requiring educational expertise were therefore not presented. See supra text accompanying notes 170-87.
remedy the harm resulting from de jure segregation.\textsuperscript{217} Although the Court may have hoped for significant improvement in the academic achievement of African-American school children from the implementation of school desegregation decrees, studies existing at the time of \textit{Green} shed doubt on the ability of racial desegregation, as opposed to economic class desegregation, to have a significant impact on academic achievement by African-Americans.\textsuperscript{218}

As part of the Civil Rights Act of 1964,\textsuperscript{219} 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.\textsuperscript{220} In the fall of 1965, a research team led by James Coleman of Johns Hopkins University and Ernest Campbell of Vanderbilt University surveyed some 4,000 public schools.\textsuperscript{221} The research team not only scrutinized educational facilities, materials, curricula, and laboratories, but also analyzed educational achievement as determined by standardized tests.\textsuperscript{222} Although the primary purpose of the study was to measure how school resources affected pupil achievement, the Coleman Report also assessed the effect of desegregation on academic performance.\textsuperscript{223}

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-

\textsuperscript{217} See \textit{supra} notes 111-18 and accompanying text.

\textsuperscript{218} J. Coleman, \textit{Equality of Educational Opportunity} 331 (1966) [hereinafter Coleman Report].


\textsuperscript{220} Coleman Report, \textit{supra} note 218, at iii.

\textsuperscript{221} D. Ravitch, \textit{supra} note 123, at 168.

\textsuperscript{222} Coleman Report, \textit{supra} note 218, at iii.

\textsuperscript{223} Id. The findings from the Coleman Report sent conflicting signals regarding the efficacy of school desegregation in improving the achievement level of African-American students. According to Ravitch, among the major findings of the survey were:

\begin{enumerate}
  \item Most American children attended schools where almost all of their fellow pupils were of the same race.
  \item Schools attended by white students had some advantages in physical resources over those attended by blacks, but the differences were far less than anticipated, or, as one analyst pointed out, "American schools were virtually separate but equal" at the time of the survey.
  \item [Academic] achievement seemed to be related to the student's family background rather than to the quality of the school.
  \item Next to the student's own family background, the other factors related to achievement were social composition of the school and the student's sense of control of the environment.
\end{enumerate}

D. Ravitch, \textit{supra} note 123, at 168-69, see Coleman Report, \textit{supra} note 218, at 4-23.

The study also found "that variations in the facilities and curriculums [sic] of the school account for relatively little variation in pupil achievement insofar as this is measured by standard tests." Coleman Report, \textit{supra} note 218, at 21. The study did, however, note that variations in facilities appeared to have a greater impact on the educational achievement of African-American students than upon white students. Id. at 22.
white classes; (2) those in classes that were half black and half white; (3) those in majority-black classes; and (4) those in classes with no whites.\(^2\)\(^2\)\(^2\) African-American students in the first group generally received the highest scores on the standardized tests, although the differences from group to group were small.\(^2\)\(^2\)\(^5\) African-American student achievement, however, did not rise in proportion to the presence of white classmates.\(^2\)\(^2\)\(^6\) 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.\(^2\)\(^2\)\(^7\) Moreover, in the Midwest, some African-American students in all-black classes outperformed even those African-Americans in majority-white classes.\(^2\)\(^2\)\(^8\) Against the background of the most comprehensive study of academic achievement in public schools to date, it was unlikely that the Green Court would have viewed the constitutional harm attributable to de jure segregation as reduced academic achievement by African-American school children.

Notwithstanding the findings contained in the Coleman Report, other problems exist in viewing the remedies for de jure segregation as directed towards remedying inadequate academic achievement. First, as an empirical matter, no consensus exists as to the correlation, if any, between desegregated schooling and student achievement.\(^2\)\(^2\)\(^9\) If indeed school desegregation does not significantly improve the academic performance of African-American children, then desegregation decrees, despite their significant costs and disruption to the educational process have only a marginal impact on remedying the effects of de jure segregation. In addition, most of the research on the effects of school desegregation on African-American students is by necessity measured by standardized

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\(^{224}\) Coleman Report, supra note 218, at 31-32.

\(^{225}\) Id. at 29. Because there was no court-ordered busing in 1965 when the Coleman Report was conducted, 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, that the socioeconomic status of the student was a strong determinant in academic achievement. See supra note 223.

\(^{226}\) Coleman Report, supra note 218, at 1-2.

\(^{227}\) Id. at 31.

\(^{228}\) Id. at 32.

achievement test. Yet evaluating academic achievement in terms of performance on basic skills tests is a narrow way of thinking about a child's education. Second, concentrating on educational achievement criteria would require a shift in the focus of court supervision of segregated public school districts. Courts would have to design remedies directed toward improving educational achievement of African-American children and not emphasizing desegregation. Even if courts were willing to shift their focus from desegregation to educational programs, there is considerable disagreement over what academic programs lead to enhanced educational performance by African-Americans. A court would be treading on uncertain ground if it

230. Hilliard, Reintegration for Education: Black Community Involvement with Black Students in Schools, in BLACK EDUCATION: A QUEST FOR EQUITY AND EXCELLENCE 209 (1989). The child's education encompasses much more than the ability to choose the correct response on a standardized multiple choice examination. These standardized exams measure only a few narrow facets of the child's academic and intellectual development. The rigid format of these exams does not allow for measurement or acknowledgement of the acquisition of many important aspects of intellectual development (e.g. creativity, divergent thought, the ability to synthesize information, social skills, etc.). In addition, standardized tests are alleged to exhibit cultural bias, as well as a questionable correlation between the skills these exams test and the skills the child needs for future success.

231. The primary spokesperson among those that have argued that remedies for de jure segregation of public schools should focus on educational achievement of African-American school children rather than school desegregation has been Professor Derrick Bell. See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976); Bell, A Model Alternative Desegregation Plan, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 124 (D. Bell ed. 1980); Bell, Civil Rights Commitment and the Challenge of Changing Conditions in Urban School Cases, in RACE AND SCHOOLING IN THE CITY 194, 201 (1981); see also Chang, supra note 212.

Likewise, Professor Shane argues that for school systems in which it is not possible to obtain integration, court decrees should be directed toward improving the educational effectiveness of the schools that minority children attend. Shane, School Desegregation Remedies and the Fair Governance of Schools, 132 U. PA. L. REV. 1041, 1117-26 (1984). According to Shane, in cases where a court regards integration as impossible or impracticable, his fair governance principal will lead to a remedial mix perhaps identical to Professor Bell's. Shane distinguishes his theory from Bell's on the ground that Bell believes that educational programs should take priority over integrative efforts, whereas for him integration is the most important measure to pursue. Id. at 1126-27.

232. The late Senior Assistant to the Chancellor for Instruction, New York City Public Schools, Ronald Edmonds, did pioneering work, in what he termed "effective schools" for minority children. He identified five characteristics that effective schools for minority children have in common: (1) strong administrative leadership; (2) a climate of expectation "in which no children are permitted to fall below minimum but efficacious levels of achievement"; (3) an orderly but not unduly rigid atmosphere; (4) an emphasis on pupil acquisition of basic school skills; and (5) frequent monitoring of pupil progress. Edmonds, Effective Education for Minority Pupils: Brown Confounded or Confirmed, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 121 (D. Bell ed. 1980); see also Bossert, Dwyer, Rowan & Lee, The Instructional Management Role of the Principal, 3 EDUC. ADMIN. Q. 34-64 (1982). The "effective schools" literature has been criticized on the following grounds: (1) the research relied upon by the studies utilized small and narrow samples that severely limited their generalizability; (2) only one study was longitudinal—that is, studying the changes in the subjects over an extended period of time—thus preventing conclusions being drawn concerning the staying
ordered educational programs designed to improve the academic achievement of African-American students. This uncertainty could make it difficult for courts to formulate and supervise an effective remedy.\textsuperscript{233} Finally, the educational programs that would arguably have the most significant impact on educational achievement of African-American school children would probably be the most difficult for courts to implement and supervise.\textsuperscript{234} For example, the late Senior Assistant to the Chancellor for the Instruction of New York City Public Schools, Ronald Edmonds, has noted that among the characteristics of effective schools for minority school children are strong administrative leadership, a school climate where it is expected that all children can and will learn, and an educational atmosphere that is orderly.\textsuperscript{235} Yale's Professor James Comer, although agreeing with most of the characteristics articulated by Edmonds, has also emphasized the need for parental involvement in the education of minority children.\textsuperscript{236} Any court would have a very difficult time formulating, implementing, and supervising measures that would produce these characteristics in public schools, assuming it is possible to achieve such results through court-ordered remedies at all.

2. Feelings of Inferiority

In \textit{Brown I} Chief Justice Warren specifically noted that segregation of African-American children from other children 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 that is unlikely to be undone.\textsuperscript{237} Chief Justice Warren buttressed his conclusion in \textit{Brown I} that segregation in public schools inflicted psychological harm on African-Americans with evidence from seven social science sources.\textsuperscript{238} Racial segregation tends to create feelings of inferiority and personal humiliation power of effective schools over time; (3) the studies were mostly correlational, thus begging the question on cause and effect; (4) the definition of effective schools masks the fact that most of the inner-city schools identified as effective still have lower mean scores than do more affluent schools within the same district; and (5) there is a tendency for studies in effective schools to compare exceptionally bad schools with exceptionally good schools. See Comer, Haynes & Hamilton-Lee, \textit{School Power: A Model for Improving Black Student Achievement}, in \textit{Black Education: A Quest for Equity and Excellence} 191 (1989). In addition, Ron Edmonds's effective education theory has been specifically criticized on the grounds that neither parental involvement nor community involvement was considered an important variable in effective education for minority students. See Comer, Haynes & Hamilton-Lee, \textit{supra}, at 192; Hilliard, \textit{supra} note 230, at 201.

\textsuperscript{233} See supra note 187.
\textsuperscript{235} Edmonds, \textit{supra} note 232, at 121; see \textit{supra} note 220.
\textsuperscript{236} Comer, Haynes & Hamilton-Lee, \textit{supra} note 232, at 190; see also J. Comer, \textit{School Power} 125-45 (1980).
\textsuperscript{237} 347 U.S. at 494.
\textsuperscript{238} K.B. Clark, \textit{Effect of Prejudice and Discrimination on Personality Development} (\textit{Mid century White House Conference on Children and Youth}, 1950); E. Frazier, \textit{The Negro in the United States} 674-81 (1949); G. Mrydal, An American
in African-American youths, whose self-esteem is soon replaced with self-hatred, rejection of their racial group, and frustration.239

The argument characterizing the harm resulting from de jure segregation in public schools as feelings of inferiority isolates segregation in public schools as the cause of feelings of inferiority in African-American school children. The social science evidence cited by the Court in Brown I,240 however, never isolated segregation in public schools as the cause of the feelings of inferiority of African-American school children. For instance, the “doll study” by Kenneth and Mamie Clark suggested that black children considered themselves to be less worthy than white children but did not identify school segregation as the independent cause of the psychological harm.241 Further, the study edited by Witmer and Kotinsky analyzed the effect of various environmental factors, including school segregation, that mold the development of the human personality.242 The study pointed out that children who are not treated with respect subconsciously learn that they are not worthy of respect and that others like them are not worthy of respect either.243 Finally, the survey of social scientists conducted by Deutscher and Chein to determine whether prevailing social science opinion supported the belief that enforced racial segregation had detrimental effects, asked whether segregation had a harmful psychological effect on the segregated group—not whether segregation in public schools had a


Doubt has always been expressed in a number of diverse corners as to whether the social science evidence cited in Brown I actually influenced the justices. See Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157-58 & n.16 (1955); Van Den Haag, Prejudice About Prejudice, in The Fabric of Society (1957). Regardless, the social science evidence was useful in establishing the general meaning attached to segregation.

239. R. Kluger, supra note 92, at 556.
240. See supra note 238.
241. See I. Newby, Challenge to the Court 32 (1969); P. Rosen, The Supreme Court and Social Science 183 (1972). The study was conducted with 253 African-American children, between the ages of three and seven, many of whom were too young to attend public school. The children were given identical white and brown dolls. The study results demonstrated that African-American children infrequently preferred the white doll over the brown doll, associating the white doll with “good” qualities, and the brown doll with “bad” qualities. Among the three year olds, 75% were aware of the racial difference of the doll. Since many of the children were too young to have attended public school, the public school system could not have been directly responsible for promoting the negative racial self-images in these children. I. Newby, supra, at 21-32.
242. Witmer & Kotinsky, supra note 238, at 237.
243. Id.
harmful psychological effect.\textsuperscript{244} It is true that some of the social science studies cited by the Supreme Court in \textit{Brown I} noted the strategic role that segregation in public schools played in contributing to the harmful psychological effect of segregation.\textsuperscript{245} The social science evidence, in general, however, did not indicate that the psychological harm suffered by African-American school children was attributable solely to school segregation as opposed to other environmental factors, such as non-school segregation.\textsuperscript{246}

Indeed, some commentators have argued, based on studies cited by the Supreme Court in \textit{Brown I}, that school segregation was not the principal cause of the feelings of inferiority of African-American children on the ground that the children already had such feelings before they entered public school.\textsuperscript{247} Phrasing the harm resulting from de jure segregation of public schools as feelings of inferiority, therefore, may not be justified by the social science evidence cited by the Court in \textit{Brown I}.

In addition to the conclusions that can be drawn from the social science data relied upon by the Court in \textit{Brown I}, there are additional reasons to reject the notion that the harm resulting from de jure segregation is feelings of inferiority. First, there is no consensus that African-American children that attend desegregated schools possess a higher self-esteem than those who do not.\textsuperscript{248} The remedy of school desegregation, therefore, may not be effective at alleviating any feelings of inferiority which may exist. Second, feelings of inferiority may have disparate causes, such as socioeconomic status, that cannot be adequately addressed by public school authorities. It may prove difficult to separate out feelings of inferiority related to race from such feelings related to other causes. Even if social scientists feel confident in claiming the ability to make such a separation, it is doubtful that courts will be confident enough to base a decision to terminate a desegregation order on this kind of social science data.\textsuperscript{249}

\textsuperscript{244} About 90\% of the respondents agreed that segregation does have a harmful psychological affect on the segregated group, with only 2\% disagreeing. Deucher & Chein, supra note 238, at 259, 265.

\textsuperscript{245} See Witmer & Kotinsky, supra note 238, at 257; Chein, supra note 238, at 234.


\textsuperscript{249} Also, the allocation of the burden of proof might become dispositive as to whether or not unitary status has been obtained. The Supreme Court in \textit{Green} placed
3. Providing Equal Educational Opportunity

Americans believe that positions of social advantage should be awarded on the basis of individual merit, not ascribed on the basis of ancestral heritage.250 An integral part of the American system of meritocracy is the public school system.251 Decisions of public schools are important factors in determining future occupational opportunities.252 The sorting function performed by public schools is an application of the liberal educational policy that dominates public schools, which focuses on individual achievement based on merit.253

All school children should have the opportunity to compete to the best of their ability in this meritocracy. In order to make public schools consistent with the American meritocratic tradition,254 therefore, it is necessary to desegregate public schools. Allowing African-American school children to attend schools with white school children enables African-Americans to compete fairly for positions of social advantage.255

If the goal of school desegregation is to eliminate societal discrimination by providing equal educational opportunity, then desegregation plans should remain in effect until this lofty goal has been obtained. There is no consensus, however, that a correlation exists between desegregated schooling and adult “life chances.”256 In addition, school desegregation cannot make up for racial discrimination in housing or employment. Further, desegregation of public schools

the burden on the school district to eliminate racial discrimination. Green, 391 U.S. at 437-39. School districts, therefore, appear to bear the burden of demonstrating unitary status. See Tasby v. Wright, 713 F.2d 90, 96 (5th Cir. 1983).

250. Many former Presidents and Vice-Presidents have manifested their belief in equality of opportunity. See Freeman, Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay, 23 HARV. C.R.-C.L. L. REV. 295, 362-63 (1988) (quoting: Ronald Reagan, “equal opportunity at the starting line of life, but no compulsory tie for everyone at the finish”; Richard Nixon, “a day when every child in this land has . . . an equal chance to go just as high as his talents will take him”; Hubert Humphrey, “I’ll take my stand, as I always have, on equal opportunity. . .”).

251. The public school system has been described as a democratic school system, because public schools are free and open to all minors regardless of race, creed, color, national origin, socioeconomic class, and demonstrated or presumed academic abilities. D. RAVITCH, supra note 123.

252. See supra note 35.

253. M. APPLE, supra note 78, at 18.

254. See CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES (1947).


256. “Life chances” is defined by Professor Levin as “a child’s future ability as an adult to participate fully in the social, economic, and political life of society. More narrowly, ‘life chances’ may be considered in terms of such outcomes as ultimate earnings, occupational status, and political efficacy.” Levin, Education, Life Chances, and the Courts: The Role of Social Science Evidence, 39 LAW & CONTEMP. PROBS. 217 (1975). There is a complex multitude of psychological, social, genetic, political, economic, and educational
schools cannot account for other forms of discrimination that have negatively impacted the African-American community.

If the justification for school desegregation is the eradication of societal discrimination, then desegregation is simply an inadequate remedy to accomplish such a sublime goal. "One vehicle can carry only a limited amount of baggage." Remedies for de jure segregation alone cannot provide the equal opportunity that is part of the American meritocratic notion. The Supreme Court recognized as much in Swann v. Charlotte-Mecklenburg Board of Education:

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities.

4. Distorted School Attendance Patterns

Desegregation can be seen as rectifying distorted school attendance patterns caused by de jure segregation. This theory was explicitly proposed by the Supreme Court in its unanimous opinion in

influences that can determine an individual's occupational attainments and earnings. The actual effect of elementary and secondary education and of a particular educational environment is particularly difficult to trace because the outcomes that must be reviewed are far removed in both time and context from the education process. Id. at 218.

Despite the difficulty of measuring the precise effect that desegregation will have on life chances, it is possible to formulate a hypotheses that can be empirically tested. Much of the literature on schooling and adult incomes assumes that education produces verbal and mathematical skills as well as other knowledge that translate into higher productivity in the marketplace and therefore higher earnings. See generally supra note 234. Accordingly, the effect of schooling on income is determined by the effect that schooling has on skills and knowledge. Still, as noted earlier, there is no consensus on the impact of desegregation on academic achievement. See supra notes 216-18 and accompanying text.

258. Id.
259. Id.
260. A variant of the replicating-attendance-pattern theory can be found in Brown I where the Court was concerned with vindicating the associational rights of African-American school children. Brown I, 347 U.S. at 494 (discussing the psychological effects of segregation). This concern is also implicit in Brown II where the Court indicated the necessity of guaranteeing the "admission [of African-American] children to public schools as soon as practicable on a non-discriminatory basis." Brown II, 349 U.S. at 300.

Professor Wechsler rejected the notion that Brown I can be justified with reference to the associational harm suffered by African-American school children in segregated schools. Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 34 (1959). Wechsler doubts that Brown I rested solely upon the determination that segregation caused injury to black children because he believes that the evidence of the harm caused by de jure segregation was both inadequate and conflicting. Id. at 32-33. The portion of Wechsler's article asserting that segregation did not harm African-Americans has been persuasively refuted. See Black, supra note 89, at 421; Heyman, The Chief Justice, Racial Segregation, and the Friendly Critics, 49 CALIF. L. REV. 104 (1961); Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. PA. L. REV. 1 (1959).

Wechsler, however, also argues that Brown I did not rest upon the notion that segregation interfered with the right of African-Americans to associate with whites. According to Wechsler, if one concludes that segregation is a denial of the freedom of association,
In Dayton I, the Court remanded a desegregation plan to determine, among other issues, how much of an incremental segregative effect was produced by the constitutional violations of Dayton school officials on the racial distribution of Dayton's school population. According to the Court, the remedy designed by the district court should only redress the additional segregative effect attributable to the constitutional violation by the Dayton Public School System.

Because remedies for de jure segregation of public schools address the cumulative effects of discriminatory actions that occur over a considerable period of time, however, it is virtually impossible to ascertain what amount of desegregation would have existed absent the discriminatory conduct of school officials. Any desegregation remedy ordered by a federal court to correct distorted school attendance patterns caused by de jure segregation would be based on arbitrary considerations and, at the very best, would be speculative. Because of the arbitrary nature of such a remedy, a theory resting remedies for de jure segregation upon a notion of correcting distorted school attendance patterns would be difficult to defend.

Even if rectifying distorted school patterns is a viable theory to explain remedies for de jure segregation, it suffers from another defect. Such a remedy does not place all victims of discrimination in the position that they would have occupied absent the constitutional violation. Absent the discriminatory conduct by school officials, school children who are not transported to achieve racial balancing remedies will most likely be given an integrated education at their neighborhood school. Students who are transported to correct distorted school patterns will be adversely impacted by the negative consequences of being transported beyond their neighborhood schools. At a minimum, such children will incur additional travel time to and from school. Their education may also suffer because

then its remedy—integration—forces an association upon those for whom it is unpleasant or repugnant and, as such, would be a denial of their associational rights. Wechsler, supra, at 34. One must ask, therefore, whether "[g]iven a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?" Id. at 34.

262. Id. at 420.
263. Id.
264. Justice Rehnquist recognized as much in Dayton I by noting the difficulty of the task of determining the incremental segregative effect. Dayton I, 433 U.S. at 420.
265. See Dworkin, supra note 143, at 27.
the children and their parents may be unable to participate as effectively in extracurricular school programs. The negative consequences of providing such children with a desegregated education may therefore actually outweigh the benefit they would receive from a desegregated education. In such circumstances, the children not only are not placed in the position that they would have occupied absent the constitutional violation but may be made worse off by the remedy than before.\textsuperscript{266}

5. Summary

None of the remedial theories appears to provide an adequate explanation for the Supreme Court's school desegregation jurisprudence.\textsuperscript{267} All of the remedial theories, except for the theory related to correcting distorted school patterns, rely in part on an assumption that desegregation will produce certain measurable positive results. Social science evidence, however, does not necessarily support the conclusion that school desegregation will increase educational achievement of minority students, eliminate feelings of inferiority of minority students, or provide minority students with enhanced occupational chances as adults.\textsuperscript{268} The theory asserting that remedies for de jure segregation are justified because they replicate attendance patterns makes school desegregation remedies arbitrary. It is simply impossible to ascertain what the school attendance patterns would have been absent the constitutional violation by school officials. It would appear, therefore, that if there is an underlying theory explicating the harm resulting from de jure segregation, it does not lie with the remedial theories articulated above.

B. Theories Regarding the Failure of the Political Process

Professor Dworkin has argued that school desegregation can be explained with reference to how prejudice corrupts the political process.\textsuperscript{269} According to Professor Dworkin, constitutional rights to a racially balanced school are given because there is a high antecedent probability that political judgments regarding school assignments

\textsuperscript{266} Id.
\textsuperscript{267} See also id. (rejecting the theory that integration is a right).
\textsuperscript{268} A number of social scientists have conducted studies on the impact of school desegregation. These studies have generally attempted to measure the impact of school desegregation on the following: (1) the educational attainment of minority students; (2) the self-esteem of blacks; (3) the prejudice of whites towards blacks; and (4) the prejudice of blacks towards whites. Conclusions about these matters have been tentative. See, Cook, Social Science and School Desegregation: Did We Mislead the Supreme Court? 5 PERSONALITY & SOC. PSYCHOLOGY BULL. 420 (1979); Stephen, School Desegregation: An Evaluation of Predictions Made in Brown v. Board of Education, 85 PSYCHOLOGICAL BULL. 217 (1978).

\textsuperscript{269} Dworkin, supra note 143, at 28-30; see also Simon, Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination, 15 SAN DIEGO L. REV. 1041, 1049 (1978) (noting that racial prejudice prevents the normal functioning of democratic processes and that those processes cannot adequately protect groups against which prejudice is directed).
will be influenced by preferences based on racial prejudice. It is the antecedent probability that school assignment decisions will be based on prejudice against African-Americans that justifies judicial intervention. In order to eliminate this corrupting influence in the political process, Professor Dworkin argues, it is necessary for courts to order racial balancing remedies.

Pursuant to this theory, it appears that unitary status must await one of two conditions. Either the background of individual prejudices against which political decisions are made must change or members of the disadvantaged minority must assume political power over school assignment decisions to such a degree that those decisions are no longer corrupted by the prejudice against them. Courts addressing unitary status should, therefore, assess community attitudes regarding prejudice towards African-Americans. If the relevant federal court is certain that prejudice against African-Americans has abated in the community where the schools exist, then the school system has achieved unitary status. Alternatively, if African-Americans make up a significant portion of those in positions to make student school assignments, then the court should conclude that unitary status has been obtained.

Professor Dworkin's argument cannot explain why courts should have ordered desegregation as a remedy for de jure segregation. The harm that Professor Dworkin sees as derived from de jure segregation is basing government decisions on racial prejudices. As pointed out by Professor Yudof, if the government action would have been taken absent the consideration of racial prejudices, then the harm noted by Dworkin would apparently not exist. Use of race-neutral means to make school assignments, such as neighborhood attendance policies, should eliminate the harm Dworkin has identified. Assuming that segregation was the result of a corrupting influence in the political process, this influence could, therefore, be eliminated by corrective measures far short of mandatory racial mixing.

Another argument based on the corrupting influence of the political process has been articulated by Professor Shane. According to Professor Shane, the harm resulting from de jure segregation is the vulnerability of African-American school children in segregated
schools. Professor Shane asserts that racial segregation renders minority students "systematically vulnerable to hostile or insensitive treatment." In specific, according to Professor Shane, segregated schools "effectively subjugate minority students in the competition for educational resources and deprive[] them of any basis for reasonable confidence in the evenhanded administration of their schools."

Professor Shane notes that African-Americans suffer from segregation, not because African-American children would be better off going to school with whites, but because they are largely "powerless to partake of an educational program that is not hostile" to them. Desegregation is thus the appropriate remedy for de jure segregation because it disperses African-American school children among white students and thereby increases the difficulty of subjugating the educational interests of African-American school children. Judicial intervention is necessary to implement fully the remedial measures that Professor Shane's "fair governance" requires, including integration of students.

There are several problems with Professor Shane's theory. First, as he acknowledges, his theory cannot be squared with the Supreme Court's acceptance of a de facto/de jure distinction. If the constitutional violation was rendering African-American school children vulnerable to hostile or insensitive treatment, this violation would occur irrespective of the character of the segregation.

Second Professor Shane's argument assumes that African-Americans are only vulnerable as a segregated group in segregated schools. To the contrary, as noted by Professor Bell, the "desire of the white majority to give priority to the interests and needs of whites over those of Blacks—is as viable and pernicious a force for harming the hearts and minds of Black children in a racially-balanced school as it ever was under the pre-Brown 'separate

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276. Id. at 1043.
277. Id.
278. Id.
279. Id. at 1084.
280. Professor Shane actually argues that "integration," as opposed to "racial balancing," should be the preferred method to remedy the harm related to de jure segregation. Racial balancing, the Supreme Court's "preferred remedial strategy," is "the reassignment of students throughout a public school district to prevent . . . the concentration of minority students residing within the district in racially identifiable schools." Id. at 1092. Moreover, according to Professor Shane, "racial balancing need not imply significant interracial education unless the racial composition within the district would permit it." Id. at 1093. Integration on the other hand, refers to "the assignment of majority and minority pupils in such a way as to assure substantial interracial contact in each school." Id. As a result, cross-district remedies would be more readily available under Professor Shane's model than envisioned by the Supreme Court's decision in Milliken II.

281. Id. According to Professor Shane, by creating a minority presence in each school, integration restructures a school system so as to also help assure that African-Americans "have some decisionmaking influence throughout the formerly segregated school district and generates increased confidence that official decisions will take minority interests into account." Id. at 1094.
282. Id. at 1104-27.
283. Id. at 1087-92.
but equal’ system.”

Although African-American children and white children may not be separated spatially in desegregated schools, African-American children still can be subjected to discriminatory treatment individually or as subgroups within the desegregated school system.

Discriminatory treatment in desegregated schools takes many forms—some subtle and some not so subtle. For example, the public school system traditionally divides students in “academic tracking” groups. According to Jeannie Oakes, “it is clear that in our multiracial schools minority students were found in disproportionately small percentages in high-track classes and in disproportionately large percentages in low-track classes.”

The assignment of students to lower groups is likely “to lower the expectations for his or her learning” and “may result in a self-fulfilling prophecy, with students achieving only what is expected of them.” Research also indicates that African-American children in desegregated suburban schools are placed in learning disability groupings and classes for the educably mentally retarded at a significantly higher rate than in city schools. African-American children may also be subjected to more personal and individual discrimination in the desegregated school setting. “Many black children continue to experience isolation, insensitivity, and outright rejection in public schools that may be perfectly balanced by race but remain dominated by whites.”

African-American parents have reported serious racial discrimination against their children by white teachers. As a result, “blacks in desegregated schools may have more anxiety with regard to achievement because of negative comparisons of themselves with white students.” Also, an “extensive review of the literature” has revealed that “desegregated schools disproportionately discipline black children.”

This allegation seems to be supported by federal litigation challenging discriminatory discipline practice against African-American children.

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286. Id. at 170; see also Chunn, Sorting Black Students for Success and Failure: The Inequity of Ability Grouping and Tracking, in BLACK EDUCATION: A QUEST FOR EQUITY AND EXCELLENCE 93 (1989).
289. Rosenbaum, Kulieke & Rubinowitz, supra note 287, at 40.
292. See Coleman v. Franklin Parish School Bd., 702 F.2d 74, 77 (5th Cir. 1983)
Finally, and more importantly, if the harm that remedy for de jure segregation is supposed to cure is the systematic vulnerability of African-Americans in the competition for educational resources, the harm seems to suggest a remedy different from that proposed by Professor Shane. In order to assure that African-American children are not systematically vulnerable to hostile or insensitive treatment, the most responsive remedy seems to be sanctioning separate but equal educational districts. In those districts where minority students attend schools, the district should be fully controlled by minority members, with mandatory access to the same educational resources as the majority students. This Plessy-styled separate-but-equal remedy, however, was implicitly rejected by the Supreme Court in Brown I.

C. Theories Regarding Stigmatic Harms

The stigmatic harm theory\(^2\) views the harm resulting from de jure segregation as an interpretative harm—as opposed to a causal harm—that results from the meaning attached to segregation by society.\(^3\) De jure segregation is a public symbol of the inferiority of African-Americans.\(^4\) As such a symbol, racial segregation in public schools violates the constitution because such segregation is an invidious labeling device.\(^5\) In other words, through school segregation, the government insults or offends the dignity of the minority against whom the prejudice is directed.\(^6\) There is no need for evidence to support the proposition that segregation is an insult to African-Americans—"we know it."\(^7\) The inference drawn from segregation is unmistakably clear. School desegregation eliminates the dignitary harm to African-American school children caused by government action representing stigmatic labelling because it erases the label that accompanies segregation.\(^8\)

(holding that the a plaintiff stated valid cause of action when school authorities intentionally and purposely discriminated against a black child on the basis of race, by striking the child on the head and creating a serious wound requiring stitches); Sherpell v. Humnoke School Dist. No. 5, 619 F. Supp. 670 (E.D. Ark. 1985) (striking down an "assertive discipline" program that might have been used as "a protective cover for unconstitutional conduct" by teachers and administrators who possess the disposition to "shield any racial bias in imposing a discipline against a black child, when in fact there may by insufficient reasons, or no reason at all to discipline the child").

293. 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, 105; Cahn, supra note 237, at 150.

294. Dworkin, supra note 143, at 21. Stigmatic harm is an abstract harm distinct from any observable harm. The stigmatic harm arguments, therefore, do not rest on assertions that there is a causal connection between de jure segregation and some observable harm suffered by African-American school children, such as lowered educational achievement, feelings of inferiority, or distorted school attendance patterns. Thus these arguments avoid the difficulty associated with the remedial theories that may need to draw on social science evidence to justify school desegregation as a remedy.


296. Id. at 24.

297. See Simon, supra note 269, at 1047.

298. Cahn, supra note 238, at 158.

299. See Simon, supra note 269, at 1054.

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The stigmatic harm theory provides an explanation of why separate educational facilities are inherently unequal. As with the political process explanations, however, it is unclear why racially neutral remedies alone do not eliminate the stigmatic harm. If the harm is caused by government action taken with the intent to stigmatize, such a harm should be eradicated by ensuring that the government decision is made on a racially neutral basis. If government decisions are made on a racially neutral basis, that would seem to eliminate invidious labeling because the decisions are no longer based upon a stigmatizing motive. The stigmatic harm theory, therefore, does not explain why the Court compelled racial balancing as part of the means to remedy the harm of de jure segregation.

III. Invidious Value Inculcation Compared to the Other Theories on the Harm Resulting from De jure Segregation of Public Schools

This Part contrasts the theory viewing the harm of de jure segregation as invidious value inculcation with other theories regarding the harm resulting from de jure segregation. First, invidious value inculcation theory is contrasted with traditional remedial theories. The primary difference between invidious value inculcation theory and remedial theories is disparity in where the theories place the locus of the harm resulting from de jure segregation. Invidious value inculcation views the locus of the harm as the value inculcating process of public schools. Remedial theories generally view the locus of the harm with African-American school children. Second, this Part contrasts invidious value inculcation theory with theories that view the harm of de jure segregation as the embodiment of a failure in the political process. Political process theories see the locus of the harm as a distortion of the political process as opposed to the value inculcating process of public schools. Finally, this Part discusses the distinction between invidious value inculcation and theories regarding stigmatic harms. Invidious value inculcation theory is similar to stigmatic harms theories, except that it views the harm of de jure segregation of public schools as a sui generis application of antidiscrimination law.


301. Invidious value inculcation theory has some parallel with the notion of limits on government speech articulated by Professor Yudof. Yudof notes that governments communicate through a multitude of acts disseminating information as well as by withholding information. These acts or omissions have an important impact by influencing the attitudes and opinions of the populace. Yudof asserts that certain government communications should be considered ultra vires in the sense that there are certain messages that government should not disseminate. M. YUDOF, supra note 36, at 296-306.
A. The Remedial Theories

Viewing the harm produced by de jure segregation as invidious value inculcation is distinguishable from the traditional notions of remedial theories. Traditional remedial theories are directed at putting the victims of discriminatory conduct into the position that they would have occupied absent the constitutional violation. The invidious value inculcating theory asserts that the remedy for de jure segregation is forward-looking, not backward-looking. It is therefore corrective, as opposed to compensatory. In addition, invidious value inculcation theory focuses on the distortion caused by de jure segregation of the value inculcating process of public schools. Unlike remedial theories, which focus on the victims of discriminatory conduct, this theory does not assume that de jure segregation produced some kind of observable harm in African-American school children. Rather, it views the locus of the harm of de jure segregation as the value inculcating process of public schools.

The social science evidence relied on by most of the remedial theories regarding the impact of school desegregation on the educational achievement,\textsuperscript{302} self-esteem,\textsuperscript{303} or adult life chances\textsuperscript{304} of African-Americans is inconclusive. These studies have failed to prove consistently that desegregating schools produces positive educational or psychological benefits for African-Americans. Viewing the harm produced by de jure segregation as invidious value inculcation, however, does not require social science data supporting the effectiveness of school desegregation as a remedy for alleviating a condition endemic to African-American school children. Because the focus of invidious value inculcation theory is its effect on the value inculcating process, these social science studies are misdirected.

The remedial theory most analogous to invidious value inculcation theory views the harm resulting from de jure segregation as producing feelings of inferiority in African-American school children. The principal distinction between the two theories is one of focus. As indicated above, invidious value inculcation views the locus of the harm as the value inculcating process of public schools. Feelings of inferiority theory views the locus of the harm as within African-American school children.

The Supreme Court's decision in \textit{Bazemore v. Friday}\textsuperscript{305} further illustrates this distinction. In \textit{Bazemore}, the Court ruled that mandatory racial mixing of children in 4-H and homemaker clubs was not necessary to eliminate the harm produced by de jure segregation of those clubs.\textsuperscript{306} The state of North Carolina administered

\textsuperscript{302} See supra notes 229-30 and accompanying text.

\textsuperscript{303} See supra note 248.

\textsuperscript{304} See supra note 268.

\textsuperscript{305} Bazemore, 478 U.S. 385 (1986) (per curiam).

\textsuperscript{306} Id. at 386.
agricultural extension programs through the North Carolina Agricultural Extension Service.\textsuperscript{307} In his concurrence, Justice Brennan noted that the purpose of these programs was "to aid in the dissemination of useful and practical information on subjects relating to agriculture and home economics." \textsuperscript{308} The Extension Service was a division of the School of Agriculture and Life Sciences at North Carolina State University. Part of the activities sponsored by the Extension Service included the operation of 4-H and homemaker clubs for children to learn home economics and other practical skills.\textsuperscript{309}

Prior to 1965, the Extension Service maintained segregated 4-H and homemaker clubs. In response to the adoption of the Civil Rights Act of 1964, the Extension Service discontinued its mandatory segregated club policy. The Extension Service subsequently adopted a number of policies related to the clubs, including the following: (1) all voluntary clubs must be organized without regard to race; (2) each club must certify that its membership is open to all persons regardless of race; (3) the Extension Service must instruct its agents to encourage the formation of new clubs without regard to race; (4) the Extension Service must publish its policies in the media; and (5) the Extension Service 4-H camps must be fully integrated.\textsuperscript{310}

The Supreme Court in Bazemore rejected the need for mandatory racial mixing of the clubs on the ground that there was no current violation of the Fourteenth Amendment,\textsuperscript{311} even though 98.8% of all homemaker clubs were either all white or all black and in racially mixed communities 880 single-race 4-H clubs still existed in 1980 compared to 892 single-race clubs in 1972.\textsuperscript{312} The Court distinguished Bazemore from Green\textsuperscript{313} on the ground that racial mixing was not necessary in Bazemore because, as opposed to the choice of whether to attend public school, the choice of whether to join a 4-H or homemaker club is entirely voluntary.\textsuperscript{314} Not only can individuals choose which club to join, but they can also choose not to join any club at all.

This reasoning, however, is unpersuasive. As with Green, in

\begin{itemize}
  \item \textsuperscript{307} Id. at 388 (Brennan, J., joined by all other Members of the Court, concurring in part).
  \item \textsuperscript{308} Id. at 388-89.
  \item \textsuperscript{309} Id. at 389.
  \item \textsuperscript{310} Id. at 407 (White, J., concurring).
  \item \textsuperscript{311} Id. at 387-88, 408.
  \item \textsuperscript{312} Id. at 410-11 (Brennan, J., dissenting in part).
  \item \textsuperscript{313} See discussion of Green, supra notes 111-18 and accompanying text.
  \item \textsuperscript{314} Bazemore, 478 U.S. at 408 (White, J., concurring).
\end{itemize}
Bazemore there was 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 a choice between attending public schools or private schools. In Green, students (or their parents) were also 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 sixteen, and in some states, only to age fourteen. 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.

If the Court viewed the constitutional harm produced by de jure segregation in public schools as the generation of feelings of inferiority in African-American children, then the same concern that led to mandatory desegregation in public schools should be present when children join segregated 4-H and homemaker clubs. In order to remedy this harm, the Court should have ordered mandatory racial mixing of children in 4-H and homemaker clubs as it did in public schools.

The Court's distinction between 4-H and homemaker clubs in Bazemore and public schools in Green is better explained by the distinction between the primary purposes of each institution, not by reference to compulsory school attendance statutes. Whereas the purpose of the 4-H and homemaker clubs is the dissemination of useful information, the primary purpose of public schools is the inculcation of values. Racial mixing, while not relevant to disseminating useful information, is extremely relevant to inculcating values.

B. Theories Regarding the Failure of the Political Process

Political process theories view the harm of de jure segregation as the embodiment of a failure in the political process. The theory of

315. See supra text accompanying note 255.
317. Green, 391 U.S. at 433-34.
318. W. Valente, supra note 79 at 466.
319. Id.
320. Bazemore, 478 U.S. at 988-89 (Brennan, J., joined by all other Members of the Court, concurring in part).
321. See supra notes 42-72 and accompanying text.
322. Because the purpose of 4-H and homemaker clubs was to disseminate useful and practical information, these clubs performed a function similar to the academic function of public schools. If the Court believed that the academic function of public schools required desegregation, then it should have mandated desegregation for 4-H and homemaker clubs.
invidious value inculcation focuses upon the value inculcating process to determine if a violation has occurred. Like the political process theories, however, focus on the school officials' actions is relevant in assessing whether or not a constitutional violation has occurred. The intentions and actions of school officials are relevant because they are the ones charged with the responsibility of formulating and implementing the value inculcating process of public schools.323

As discussed earlier, theories that view the harm of de jure segregation as deriving from a corruption of the political process cannot explain why remedies for the violation include mandatory desegregation of public schools.324 Viewing the harm resulting from de jure segregation as invidious value inculcation, however, focuses remedies for the harm upon deficiencies in the value inculcating process as opposed to corruption in the political process. Use of race-neutral methods, such as making student school assignments on the basis of neighborhood school attendance policies, would eliminate the corrupting influence on the political process. Simply eliminating the corrupting influences of the political process may not, however, cure the distortion of the value inculcating process. More than simply racially neutral methods may be required.

C. Theories Regarding Stigmatic Harms

According to the invidious value inculcation theory, the harm to be eliminated from public schools is also an interpretative harm. Invidious value inculcation, therefore, overlaps with theories that view de jure segregation as producing stigmatic harm. The difference between these two explanations of the harm resulting from de jure segregation is that invidious value inculcation is grounded in the value inculcating function of public education325 and the stigmatic harm theory is not. Invidious value inculcation views the harm resulting from de jure segregation as sui generis in antidiscrimination law because it involves the distortion of the value inculcating process of public schools.

The state's stigmatic designation operates differently within the context of public schools than elsewhere in American society. The designation of inferiority is presented to children in public schools which by their very nature are value inculcating institutions.326 The state is not merely labeling a group as inferior and simply allowing individuals to accept or reject the label as accurate. Instead, the

323. See supra note 130-35 and accompanying text.
324. See supra note 273-74 and accompanying text.
325. See supra notes 82-94 and accompanying text.
326. See supra notes 293-300 and accompanying text.
state is affirmatively attempting to foster a belief in the accuracy of the label.

As pointed out earlier, other theories resting on notions of stigmatic harms do not adequately explain why mandatory desegregation was necessary to remedy the harm.\textsuperscript{327} The remedy being provided for de jure segregation of public schools is for violations that take place within the context of a social institution the primary purpose of which is to inculcate values. Use of race-neutral means to make school assignments does not eliminate the inculcation of the value if racial mixing does not occur. The race-neutral assignments that perpetuated racial segregation simply reflected the established patterns of behavior, psychology, and belief that were rooted in the invidious value. The continued racial segregation, therefore, still operated to inculcate the invidious value. These racially segregated patterns have to be disestablished before schools eliminate invidious value inculcation. Therefore, racial mixing is required as part of the remedy.\textsuperscript{328}

\textbf{IV. Issues to Consider in Determining Unitary Status if the Harm Resulting from De Jure Segregation is Viewed as Invidious Value Inculcation}

If the harm resulting from de jure segregation is viewed as invidious value inculcation, then determining unitary status requires a multifaceted examination. This Part proposes, tentatively, a number of factors in addition to the \textit{Green} factors which should be considered by courts in determining whether unitary status has been achieved.

First, courts should examine the current situation with policymaking school officials, including school board members, superintendents, and other important officials of the school district. The commitment of these individuals to the elimination of invidious value inculcation is an important prerequisite to a determination of unitary status. Courts faced with determining unitary status should also consider the extent to which these individuals have institutionalized programs that will insure that public schools will not return to their old ways.

Second, the courts should examine the extent to which minorities are represented on school boards or in other prominent school administrative offices, and the likelihood that such representation will continue. Significant representation of minorities in decisionmaking capacities is evidence that the school system has a commitment to prevent the reinstitution of invidious value inculcation.

Third, courts should consider the good faith of school boards and other school officials in implementing desegregation decrees.\textsuperscript{329}

\begin{itemize}
  \item \textsuperscript{327} \textit{See supra} note 301 and accompanying text.
  \item \textsuperscript{328} \textit{See supra} notes 283-92 and accompanying text.
  \item \textsuperscript{329} In Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987), \textit{vacated sub nom.}, Freeman v. Pitts, 110 S. Ct. 532 (1989), the First Circuit analyzed three factors to determine
\end{itemize}
The cooperation of school officials in eliminating the vestiges of past discriminatory conduct suggests that the school system has vigorously pursued the elimination of invidious value inculcation.

Finally, courts should consider the efforts of school districts to address racial bias in their traditional educational program. If schools have engaged in invidious value inculcation, it stands to reason that the other elements of the educational program, especially the curriculum, also will reflect the invidious value.\footnote{330} Although a few federal courts have included a requirement in their desegregation decrees mandating the elimination of racial bias in the curriculum,\footnote{331} most courts have not. As noted above,\footnote{332} the complexity of this issue will require careful consideration by courts.

Courts, however, should react favorably to any systematic effort by a school district to address racial bias in its traditional educational program. Although courts should be hesitant about wading into the traditional educational program in an effort to eliminate invidious value inculcation, it is unlikely that a school system will have eliminated invidious value inculcation if it has not attempted to address racial bias in its traditional educational program. Systematic efforts by school districts to reduce bias in their (1) teaching strategies; (2) curriculum, textbooks, and other instructional materials; (3) teacher, staff, and administrator attitudes; and (4) testing procedures should therefore be given significant consideration by federal courts in determining whether unitary status has been achieved. Some school districts have recently supplemented their traditional educational programs with programs that focus specifically on the cultural heritage of African-Americans from an Afrocentric perspective.\footnote{333} Under the direction of Dr. Asa Hillard and others, these school districts have developed supplemental instructional materials to be used in a number of courses, including math, science, language arts, social studies, music, and art, to emphasize the academic and creative contributions of Africans and African-Americans.\footnote{334}

\footnote{330} See supra notes 260-292 and accompanying text.
\footnote{332} See discussion of Milliken II, supra notes 166-203 and accompanying text.
\footnote{333} See Education Week 8 (October 18, 1989). These school districts include: Atlanta, Georgia; Chicago, Illinois; Detroit, Michigan; New Orleans, Louisiana; Portland, Oregon; Indianapolis, Indiana, and the District of Columbia.
\footnote{334} Id.
should be evident that the schools that have supplemented their educational program have taken significant steps toward eliminating the vestiges of invidious value inculcation that extend beyond the racial composition of the schools.

**Conclusion**

With the Supreme Court having granted certiorari in *Dowell*, its first school desegregation termination case, it is imperative that the Court have a theory elucidating the constitutional harm resulting from de jure segregation. Without such a theory it is impossible to determine when a school system has eliminated the vestiges of de jure segregation and thus obtained unitary status. School desegregation has been the principal means used to remedy the harm caused by de jure segregation. Racial balancing in public schools, however, is no more the goal to be attained by remedying de jure segregation than racial imbalance was the evil to be remedied. Desegregation was surely intended to address other concerns.

Public schools are cultural institutions whose primary purpose is to inculcate values. The Supreme Court's jurisprudence with respect to education was long focused on this value inculcating function of education. The harm resulting from de jure segregation should also be viewed from the perspective of the value inculcating function of public education. From this perspective, the constitutional harm resulting from de jure segregation is invidious value inculcation. Segregation of students, teachers, staff, and administrators along racial lines was an administrative rule that was the primary component of an educational program designed to inculcate a belief in the inferiority of African-Americans.

Notwithstanding the invidious value inculcation attributable to de jure segregation, many courts that have addressed the issue of unitary status have confined their review to issues related solely to desegregation. Although federal courts should review the status of desegregation in the school districts, other factors are also relevant in the determination of whether a school system has obtained unitary status. Remedies for de jure segregation should be viewed as directed towards the elimination of invidious value inculcation. Desegregation was the principle means chosen to accomplish this goal. It should not, however, be viewed as the remedy for the harm. The remedy for the harm is the elimination of invidious value inculcation.

As a result, in determining whether unitary status has been obtained, a court should focus on the existence of the invidious value in the school system. The court should also examine the attitudes of school officials regarding the school system, and any systematic changes to the educational program that were adopted by the school district to eliminate racial bias in the educational program.

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