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THE INTERGRATION MYTH: AMERICA'S FAILURE TO PRODUCE EQUAL EDUCATIONAL OUTCOMES

By Samuel E. Brown*

The progeny of the landmark case *Brown v. Board of Education*¹ have impacted high schools today in several important ways. Currently, a high school education does little to significantly improve students' chances for higher income and employment stability. Preparing students for college is primarily a responsibility that falls on the shoulders of high school educators. A college degree is becoming the standard threshold for identifying someone as "educated," and therefore able to take advantage of expanding opportunities for upward mobility. Creating a society that facilitates that preparation is the responsibility of that society's government and citizens. When society fails to fulfill that responsibility, especially in the case of minority citizens, it is often difficult for those citizens to find redress through legislative representatives and bodies. Therefore, the judicial system can lend itself as the most effective governmental branch through which minorities can find redress for their legitimate grievances.

In the past, equal protection was understood to mean equality not only in natural, political and civil rights, but also in social rights. However, after decades of failures caused by the abandonment of our social rights to the hands of private citizens, it is time Americans sought to activate equal protection to compel our government to secure these rights for all citizens. In this way, a vital and fundamental right, such as the right to equal access, opportunities, and outcomes in education, will become a day-to-day reality that will replace the shallow, unsubstantiated façade of equality that exists today.

This article examines how and why America has yet to fulfill the dream of *Brown*. First, I examine the integration, or lack thereof, of America's public schools and scrutinize the effectiveness of past efforts to desegregate public schools after the *Brown* decision. Second, I illustrate the effects of court cases, school tracking, and re-segregation of public schools by using African-American high school students in Washington, D.C. ("D.C.") as a specific case study. Finally, I discuss whether equal protection should merely facilitate equal opportunity in education, or if it should go further in securing equality in educational outcomes as well.

BEYOND BROWN: ALL DELIBERATE SPEED

In deciding *Brown*, the Supreme Court refused to look back 58 years to the decision in *Plessy v. Ferguson*.² Instead, *Brown* considered the full development of public education and "its present place in American life throughout the nation."³ Similarly, it is not sufficient to compare the current state of education for African-American students to what it was in 1955. Our analysis today should look to the relationships between education and segregation, the development of segregation in America, and "its present place in American life."⁴

In *Brown*, Chief Justice Warren recognized that segregation with the sanction of law detrimentally deprived African-American students of some of the benefits they would receive in an integrated setting.⁵ Following *Brown*, a U.S. Supreme Court order in *Brown II* mandated that schools desegregate with "all deliberate speed."⁶ At present, the *Brown* ruling has failed to secure the right to attend integrated schools for African-American students for longer than a cursory twenty to thirty year period. This suggests that curing de jure or ostensibly state-sanctioned segregation does not make desegregation a reality. Thus, perhaps one of the shortcomings of the U.S. Supreme Court order was the lack of foresight to ensure that once desegregated, American schools would remain so.

Additionally, after *Brown*, Americans became steeped in the belief that once public schools became racially integrated, disparities in education might begin to disappear. Fifty years later, high schools in urban areas are as segregated as ever and the educational disparities persist. Phenomena such as "White flight" and the creation of small, one high school districts have resulted in the same pre-1955 segregation of students. Notably, in the middle of the twentieth century, the courts were the most effective places for African Americans to find redress for their educational grievances. However, because the courts were once effective does not necessarily mean they are the best tool to cure social and civil justice for African Americans today. Yet still, it is crucial that the judicial system, with its history of curing social and civil injustices in upholding the Constitution, continues to serve as a foundation for securing equal protection.

While African Americans have made great strides in "catching up" to White Americans, they still remain over-represented in prisons,⁷ under-represented in the workforce,⁸ and under-represented in higher education. In 1955, African Americans faced blatant state-sanctioned discrimination in education. In 2005, African Americans face an entirely new monster: a subtle manifestation of discriminatory ideals cloaked under a veil of seemingly equal access. Some would argue the latter poses an even greater challenge to African Americans' efforts to obtain meaningful, substantial educational opportunities than the former discrimination of 50 years earlier. At best, "all deliberate speed" was an ambiguous phrase that has not brought African Americans beyond the evils revealed by *Brown*, namely the equalization of educational opportunities for children of all races.

BIRDS OF A FEATHER: DE JURE AND DE FACTO DISCRIMINATION

The *Brown* ruling was in line with the original purpose of the Fourteenth Amendment. At its inception, the Fourteenth Amendment recognized that whether discrimination was state-

sanctioned or the result of private actions and choices, the results on its victims were the same. The Fourteenth Amendment sought to alleviate oppression and segregation not only from government, but from all sources both public and private, an ideal which the U.S. Supreme Court recognized in the Slaughter-House Cases.⁹ However, *Brown* has largely failed because it does not address private as well as public-sanctioned discrimination, or in other words, the difference between de jure and de facto discrimination. This is compounded by the U.S. Supreme Court's failure to find that the Constitution requires schools to remedy de facto segregation. Even the lower courts have split on whether the failure to remedy de facto segregation in schools constitutes a constitutional violation.

For example, in *Spencer v. Kugler*,¹⁰ the U.S. Supreme Court upheld a District Court ruling against African-American parents and students who were seeking a more racially-balanced school system. The District Court adopted the longstanding notion that schools should only be required to continue desegregation efforts where de jure discrimination had been proven. Justice Douglas' dissent recognized that the current situation of school segregation is not accidental or purely de facto. He further asserted that the distinction between de facto and de jure segregation "is not as clear-cut as it appears."¹¹ Four years later, in *Washington v. Davis*,¹² the U.S. Supreme Court held that a law is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. The fact that there are both predominantly African-American and predominantly White-American schools in a community does not itself indicate a constitutional violation.

This line of thinking continued into the 1980s, as shown in *Crawford v. Board of Education*.¹³ After a California state court ordered busing of students to remedy segregation in Los Angeles, California voters adopted a state constitutional amendment that limited any State court-ordered busing for desegregation purposes that went above and beyond what the federal Constitution required. The U.S. Supreme Court held that the amendment did not employ a racial classification, had no discriminatory purpose, and the Fourteenth Amendment did not preclude a state from amending prior measures that went beyond the requirements of the Fourteenth Amendment. In his dissent, Justice Marshall recognized the fundamental fact that a state constitutional amendment should not override federal constitutional guarantees; if it did, it would effectively deprive California's minority children of their federal right to equal protection.¹⁴

Unfortunately, the pattern of re-segregation that began in

the early 1980s continued throughout the 1990s. In *Board of Education v. Dowell*,¹⁵ the U.S. Supreme Court authorized a return to segregated neighborhood schools. In 1972, the District Court entered a desegregation decree against the school district, finding that it had not eliminated de jure segregation. By 1977, the school district had achieved "unitary" status, meaning it had desegregated its schools but had not necessarily satisfied the 1972 decree. Eight years later in 1985, the school district adopted a "student reassignment plan" ("SRP"), whereby previously desegregated schools would return their student bodies to primarily one-race status. The U.S. Supreme Court held that desegregation decrees were not intended to operate in perpetuity. The U.S. Supreme Court also proposed a test: in determining when to dissolve such a decree, courts should consider whether the school district has met the terms of the decree in good faith and whether the vestiges of past discrimination had

been eradicated to the greatest extent possible. Apparently, the majority felt 13 years of desegregation was sufficient to eliminate the vestiges of centuries of segregated education.

In *Dowell*, Justice Marshall dissented again, this time joined by Justices Blackmun and Stevens. Marshall pointed out that the SRP superimposed attendance zones over some residentially segregated areas, resulting in a racial imbalance in over half of the district's schools where student bodies were either more than 90% African-American, or 90% non-African-American. Marshall rejected the majority's suggestion that the Court's decision would differ if residential segregation resulted from private

decision-making. Marshall believed that the District Court's conclusion that the school district's racial identity was due to personal preference did not sufficiently hold state and local officials or the school board accountable. He asserted that the decision failed to address the unique role the school board plays in creating "all-Negro" schools. Marshall also stated that the existence of personal preferences does not mean a school district is no longer accountable for helping to create such preferences or absolves the district from its obligation to desegregate schools as much as possible. In his mind, the mandate from *Brown* imposed an affirmative duty on school districts to eliminate any conditions that furthered ideas of racial inferiority underlying state-sponsored segregation.

Despite these stinging dissents, Justices Douglas and Marshall never quite convinced the U.S. Supreme Court of the illogical distinction between de jure and de facto segregation when it came to the pragmatic application of the Fourteenth Amendment to educational segregation jurisprudence. Still, their words ring true today. Regardless of the source of segregation, the evils that the *Brown* decision sought to obviate are re-

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curing in force in today's major metropolitan areas, often with the same effect on African-American school children - a sense of inferiority, unequal educational opportunities and facilities, and a serious dearth of racially diversified populations.

RE-SEGREGATION ON A NATIONAL LEVEL

A 2001 Harvard University Report entitled "*Brown* at 50: King's Dream or *Plessy*'s Nightmare?" ("Harvard study") examined the decade of re-segregation that followed the 1991 Dowell decision.¹⁶ Some of its major findings include:

- A major increase in segregation in many districts where court-ordered desegregation ended in the past decade. The courts assumed that the forces that produced segregation and inequality had been cured. However, this [Harvard] report shows they have not.
- Rural and small town districts are, on average, the nation's most integrated; large cities and suburbs of large metropolitan areas are the epicenter of segregation.
- American public schools are now only 60% White American and nearly one-fourth of U.S. students are in states with a majority of non-White-American students. However, except in the South and Southwest, most White-American students have little contact with non-White-American students.

The Harvard study confirms that approximately 20 years of integration means absolutely nothing if schools are permitted to re-segregate in ways that result in unequal educational opportunities. However, some interesting arguments exist to counter the theory that this trend of resegregation is necessarily bad. Anthony Bradley of the Acton Institute highlights some of these arguments in his article countering the Harvard study.¹⁷ First, Bradley asserts that no ethnic minorities today are denied admission to schools in their districts on the basis of race because *Brown* successfully prohibits districts from using race to prevent children from attending schools in their own district. In his view, the Harvard study incorrectly thinks it is wrong for schools to reflect racial composition of their respective communities. Second, Bradley wonders why community schools have to be integrated at all, criticizing the Harvard study's lack of support for the conclusion that exposure to interracial settings has positive implications for minority academic achievement and White American socialization. Third, he believes that minority teachers, administrators, and parents should be insulted at the notion that increasing their children's exposure to White-American children and teachers will increase their academic performance. Bradley also identifies what he believes is the true evil in the equation - discrimination. He claims if minority parents want their kids to be in better schools, they have two options: as taxpayers, they can pick up and move to a good school district, or they can demand excellence in their own community's schools. Bradley goes on to label the Harvard study as "overly simplistic and reductionistic" because Americans are no longer simply divided by race. He believes instead that the racial phenomenon of segregated residential areas is more closely tied to class and

other related factors such as income level.

I challenge Bradley's contentions on several points. First, the goal of the *Brown* decision and subsequent desegregation order was to eliminate the vestiges of racial discrimination. School districts have reshaped their boundaries to reflect segregated residential patterns with the Supreme Court's blessing. This is merely an indirect way of achieving what *Brown* sought to prevent districts from doing directly: segregating students on the basis of race. Second, it is well-known that corporate America and most of our institutions of higher education have found time and again that diversity serves a valuable purpose for both White American socialization and minority integration into the upper echelons of academia and business. If it works for these institutions and the adults they employ, then how and why is it somehow undesirable for our children? Third, Bradley thinks that the true evil in this equation is not segregation but discrimination. He believes that African-American parents, over-represented in the lower-classes (especially in the metropolitan areas where segregation is most profound), should simply pack up and move to a better school district. Yet, I wonder how many working single mothers, living paycheck-to-paycheck in the inner city, Bradley actually knows, or if he realizes the tremendous difficulty in finding extra time, money, or energy to move?

Furthermore, the reason the courts have been the last resort for achieving educational justice is precisely because African-American political power has proven ineffective to create change. Claiming that Americans are no longer divided by race but by class blatantly ignores the very real links between race and class. African Americans find themselves on unemployment and in the military at a rate proportionately double that of their population. Does this mean African Americans volunteer for military duty out of some overwhelming sense of civic duty, or is there just a serious lack of other viable opportunities for upward mobility? Can we explain away the fact that half of America's prison population is African American as a function of economics? Bradley, and all of us, should keep in mind:¹⁸

- As of 1997, the net worth of White-American families was eight times that of African Americans and 12 times that of Hispanics. The median financial wealth of African Americans (net worth less home equity) is \$200 while that of Hispanics is zero.¹⁹
- African-American applicants were granted less than 1% of total home mortgages approved between 1930 and 1960.²⁰ Only in 1999 did home ownership among African Americans recover ground lost since 1983.
- In 1865, African Americans owned one half of 1% of the nation's net worth. In 1990, their net worth totaled 1%.²¹
- On average, African-American students scored 144 points less on the Scholastic Aptitude Test (SAT) than White-American students where the parents of both races earn over \$70,000.²²

Regardless, racism, discrimination, or segregation are still a very real and tangible phenomenon that adversely affects the

ways in which Americans interact in all of our major institutions - most importantly - in education.

RE-SEGREGATION CASE STUDY: WASHINGTON, D.C.

Although America is gradually becoming integrated in some areas, major metropolitan areas and schools still experience high levels of racial segregation. D.C. is no exception. African Americans make up approximately 60% of D.C.'s total population, non-Hispanic White-Americans constitute 25%, and Hispanics are approximately 8%.²³ Surprisingly, a recent study by the University of Wisconsin-Milwaukee ranks D.C. twenty-third in African-American White-American residential integration for the nation's 50 largest cities.²⁴ However, this residential integration does not lead to the kind of educational integration the *Brown* court anticipated in its desegregation order. Nearly half of all public high schools in D.C. are at least 95% African-American.²⁵ D.C. public schools have a total African-American population of 84.4%.²⁶ Certainly, the frequency of White-American students attending private schools in D.C. might account for some of this disparity. Still, it seems odd that only two schools in D.C. have a White-American student population over 20%, one only has 12%, another two combine for 5%, and the rest have 1% or less. So why are the schools not integrated here as in other places? Often, the execution of integration policies involves transporting African-American students to predominantly White-American schools, not the other way around. This, in and of itself, is an entirely new form of discrimination.

However, it is important to keep in mind that D.C. is a special case, since the ruling in *Bolling v. Sharpe*²⁷ found D.C. school segregation violated Fifth Amendment due process rather than equal protection. Still, the fundamental goal of racially integrated schools is the same: to provide equality in educational access to foster equality in educational outcomes. One D.C. Circuit Court case, *Hobson v. Hansen*,²⁸ is in line with this sentiment, but demonstrates a very different conclusion from the nationwide equal protection cases alluded to earlier.

Hobson concerns the system of tracking that was introduced into the D.C. public school system ("DCPS") in the 1960s to address the academic gaps between African-American and White-American students who were by then attending more integrated schools.²⁹ Under the tracking system, African-American and poor children were disproportionately assigned to the lower educational tracks.³⁰ In 1967, a school segregation suit was brought against the Superintendent of DCPS, the D.C. Board of Education, and others, charging that the DCPS system violated Fifth Amendment due process for not fully complying with the principles announced in *Bolling*. The D.C. Circuit Court found that the tracking system denied African-American schoolchildren equal educational opportunities when compared to those

provided to the more affluent White-American school children. The court ordered the abolition of the tracking system and barred any future tracking system that failed to bring the majority of D.C. children into the mainstream of public education.

Judge Skelly Wright's opinion set out several reasons for the decision. First, Judge Wright noted that the law is especially concerned for minority groups because the judicial branch is often the only hope for redressing grievances. Wright recognized that American society is based on White-American and middle-class values that, intentionally or not, create barriers apparent in most aptitude tests for lower-class and African-American children. Second, Wright alluded to the fact that the vestiges of three hundred years of slavery and discrimination remain intact as psychological senses of inferiority, worthlessness, fear and despair tend to transmit from one generation to the next through a child's parents. While some would argue that this is a debilitating and almost racist attitude toward the state of

African-American children, it is in fact a very realistic and pragmatic view of the effects of the vestiges of American racism. I believe that this sort of view, at the very least, brings to light certain issues that most people would rather sweep under the rug and pretend do not exist. Furthermore, Wright poignantly notes that "when the school is all

[African American] or predominantly so, this simply reinforces the impressions implanted in the child's mind by his parents, for the school experience is then but a perpetuation of the segregation he has come to expect in life generally."³¹ The goal, therefore, should not simply be to achieve numerically balanced racial ratios, but should go further to eliminate the vestiges of centuries of educational discrimination in the true spirit of *Brown* and its progeny.

CONCLUSION: EQUAL EDUCATION DOES NOT MEAN EQUAL OUTCOMES

The *Brown* Court voiced its doubt that any child could be reasonably expected to succeed without having the opportunity of education. It further reasoned that this opportunity is a right that must be made available to all on equal terms.³² Could the U.S. Supreme Court have meant that equal opportunity did not encompass the fundamental concept that, beyond simply giving the appearance of fairness, equal opportunity should in some way affect and create real fairness in reality? If so, that would seem to conflict with what the U.S. Supreme Court said nearly twenty years after *Brown* in *San Antonio Independent School District v. Rodriguez*³³ when it announced that education was not a fundamental, constitutionally-protected right.

Given the U.S. Supreme Court's apparent split on the subject, the apprehension created by the idea to use the judicial branch to ensure equal opportunity and equal outcomes seems appropriate. This is solidified by the mere fact that reliance on the judicial system as a means of repairing the disparity in out-

In 1865, African Americans owned half of 1% of the nation's net worth. In 1990, their net worth totaled 1%.

comes also seems misplaced. Furthermore, there is a valid argument that judicial victories in achieving equal opportunity have been a false source of hope, leaving African Americans complacent in the vital struggle for equal outcomes. However, we must remember that as a consequence of our majority governance system, the executive and legislative branches often do not operate in the best interests of minority groups.

While I personally do not purport to have the solution, it is my hope that we will continually discuss and analyze these issues. That discussion should stem from the idea that equal protection without equal outcomes is adverse to the very purpose of providing equal protection. Furthermore, equal protection should signify not only literal protection under the law, but equality of outcomes under state schemes that discriminate by subverting existing laws. In the future, it is American schools that must strive for equal outcomes if we hope to fulfill the dream of *Brown*: equal educational opportunities facilitated by integrated schools, which will lead to a truly integrated society where the equality of educational outcomes is a reality.

Admittedly, there is some truth to the argument that the focus on segregation, as opposed to discrimination, is the one of

the greatest tricks ever played on America's struggle for racial harmony. The widespread acceptance of the idea that eliminating segregation will somehow cure our racial problems is detrimental to our society as a whole. Although it is true that integration is an important step to creating exposure and facilitating racial interaction, the effects of racist discrimination will not cease to exist based solely on taking this step. Instead, Americans must take the next step and challenge the core discrimination that leads to disparate educational outcomes. If education is the key to upward mobility in America, then the disparities in equal educational outcomes in the African-American community, particularly for high school students, may be the snare that entraps a significant portion of its members into a perpetual cycle of indifference, apathy, and poverty. Not only do these disparities eventually lead to disparate representation in higher education, they also lead to disparities in the job market, home ownership, and a host of other indicators which, if nonexistent, may inevitably eradicate discriminatory beliefs. As Americans begin to see actual equality in their colleges and jobs, the vestiges of discrimination will truly fall away and *Brown's* goal will be achieved.

ENDNOTES

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¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (hereinafter "Brown").

² 163 U.S. 537, 552 (1896).

³ *Brown*, 347 U.S. at 492-3.

⁴ *Id.*

⁵ *Id.* at 494 (quoting *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)).

⁶ 349 U.S. 294, 301 (1955) (hereinafter "Brown II").

⁷ See Press Release, U.S. Dep't of Justice Bureau of Justice Statistics, Nation's Prison and Jail Population Grew 2.6 Percent During 12 Months That Ended June 30, 2005, available at <http://www.ojp.usdoj.gov/bjs/pub/press/pjim05pr.htm> (last visited July 8, 2006).

⁸ See U.S. Dep't of Labor Bureau of Labor Statistics, Employment Situation Summary May 2006, available at <http://www.bls.gov/news.release/empsit.nr0.htm> (last visited July 8, 2006).

⁹ 83 U.S. 36, 71 (1872).

¹⁰ 404 U.S. 1027 (1972).

¹¹ *Id.* at 1030 (Douglas, J., dissenting) (quoting Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 91st Cong., 2d Sess., 352-4 (1970)).

¹² 426 U.S. 229, 241 (1976).

¹³ 458 U.S. 527 (1982).

¹⁴ *Id.* at 551 (Marshall, J., dissenting).

¹⁵ 498 U.S. 237 (1991).

¹⁶ Gary Orfield and Chungmei Lee, The Civil Rights Project Harvard University, *Brown at 50: King's Dream or Plessy's Nightmare?* available at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf> (January 2004) (last visited July 8, 2006).

¹⁷ Anthony B. Bradley, Acton Commentary, *Counter Argument to Harvard Study; Harvard's Civil Rights Project Misses the Mark*, available at <http://www.acton.org/ppolicy/comment/article.php?id=101> (last visited July 8, 2006).

¹⁸ Edward N. Wolff, *Recent Trends in Wealth Ownership*, available at <http://www.sharedcapitalism.org/scfacts.html> (last visited July 8, 2006) (hereinafter "Recent Trends").

¹⁹ *Id.* (quoting Edward N. Wolff, *A Scholar Who Concentrates ... on Concentrations of Wealth*, TOO MUCH, Winter 1999), at 41 n.6.

²⁰ *Recent Trends*, supra note 18 (quoting Results of 1991 Federal Reserve Board study analyzing 1990 Home Mortgage Disclosure Act data) (emphasis added).

²¹ *Recent Trends*, supra note 18 (quoting DALTON CONLEY, BEING BLACK, LIVING IN THE RED (1999)).

²² *Id.*

²³ Wikipedia, available at http://en.wikipedia.org/wiki/Washington,_D.C.#Demographics (last visited July 8, 2006).

²⁴ Lois Quinn and John Pawasarat, *Racial Integration in Urban America: A Block Level Analysis of African-American and White Housing Patterns*, rev. Jan. 2003, available at <http://www.uwm.edu/Dept/ETI/integration/integration.pdf> (last visited July 8, 2006).

²⁵ GreatSchools.net, available at http://www.greatschools.net/cgi-bin/cs_where/DC (enter "4850 Connecticut Ave. NW, Washington, DC 20008" in the Street, City and Zip Code fields, and select "20" in the mileage drop-down field and "High" in the "I'm interested in ___ schools" drop-down field; then follow "Ethnicity" tab) (last visited July 8, 2006).

²⁶ District of Columbia Public Schools: Just the Facts, available at <http://www.k12.dc.us/dcps/offices/facts1.html#2> (last visited July 8, 2006).

²⁷ 347 U.S. 497, 498-99 (1954).

²⁸ 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

²⁹ See KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA 249 (2005).

³⁰ See *id.* at 250.

³¹ See *id.* at 250-1 (quoting *Hobson*, 269 F. Supp. at 482).

³² *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

³³ 411 U.S. 1 (1973).