

Brown v. Board of Education and the Interest-Convergence Dilemma

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Source: *Harvard Law Review*, Vol. 93, No. 3 (Jan., 1980), pp. 518-533

Published by: The Harvard Law Review Association

Stable URL: <https://www.jstor.org/stable/1340546>

Accessed: 14-02-2019 02:00 UTC

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## COMMENT

### BROWN v. BOARD OF EDUCATION AND THE INTEREST-CONVERGENCE DILEMMA

Derrick A. Bell, Jr.\*

*After Brown v. Board of Education was decided, Professor Herbert Wechsler questioned whether the Supreme Court's decision could be justified on the basis of "neutral" principles. To him Brown arbitrarily traded the rights of whites not to associate with blacks in favor of the rights of blacks to associate with whites. In this Comment, Prof. Derrick Bell suggests that no conflict of interest actually existed; for a brief period, the interests of the races converged to make the Brown decision inevitable. More recent Supreme Court decisions, however, suggest to Professor Bell a growing divergence of interests that makes integration less feasible. He suggests the interest of blacks in quality education might now be better served by concentration on improving the quality of existing schools, whether desegregated or all-black.*

IN 1954, the Supreme Court handed down the landmark decision *Brown v. Board of Education*,<sup>1</sup> in which the Court ordered the end of state-mandated racial segregation of public schools. Now, more than twenty-five years after that dramatic decision, it is clear that *Brown* will not be forgotten. It has triggered a revolution in civil rights law and in the political leverage available to blacks in and out of court. As Judge Robert L. Carter put it, *Brown* transformed blacks from beggars pleading for decent treatment to citizens demanding equal treatment under the law as their constitutionally recognized right.<sup>2</sup>

Yet today, most black children attend public schools that are both racially isolated and inferior.<sup>3</sup> Demographic patterns, white flight, and the inability of the courts to effect the necessary degree of social reform render further progress in implementing *Brown* almost impossible. The late Professor Alex-

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\* Professor of Law, Harvard University. This Comment is a later version of a paper presented at a Harvard Law School symposium held in October 1978, to commemorate the 25th anniversary of *Brown v. Board of Educ.*, 347 U.S. 483 (1954). I wish to thank Professors Owen Fiss, Karl Klare, Charles Lawrence, and David Shapiro for their advice and encouragement on this piece.

<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> Carter, *The Warren Court and Desegregation*, in RACE, RACISM AND AMERICAN LAW 456-61 (D. Bell ed. 1973).

<sup>3</sup> See Bell, Book Review, 92 HARV. L. REV. 1826, 1826 n.6 (1979). See also C. JENCKS, INEQUALITY 27-28 (1972).

ander Bickel warned that *Brown* would not be overturned but, for a whole array of reasons, "may be headed for — dread word — irrelevance."<sup>4</sup> Bickel's prediction is premature in law where the *Brown* decision remains viable, but it may be an accurate assessment of its current practical value to millions of black children who have not experienced the decision's promise of equal educational opportunity.

Shortly after *Brown*, Professor Herbert Wechsler rendered a sharp and nagging criticism of the decision.<sup>5</sup> Though he welcomed its result, he criticized its lack of a principled basis. Professor Wechsler's views have since been persuasively refuted,<sup>6</sup> yet within them lie ideas which may help to explain the disappointment of *Brown* and what can be done to renew its promise.

In this Comment, I plan to take a new look at Wechsler within the context of the subsequent desegregation campaign. By doing so, I hope to offer an explanation of why school desegregation has in large part failed and what can be done to bring about change.

### I. PROFESSOR WECHSLER'S SEARCH FOR NEUTRAL PRINCIPLES IN *BROWN*

The year was 1959, five years after the Supreme Court's decision in *Brown*. If there was anything the hard-pressed partisans of the case did not need, it was more criticism of a decision ignored by the President, condemned by much of Congress, and resisted wherever it was sought to be enforced.<sup>7</sup> Certainly, civil rights adherents did not welcome adding to the growing list of critics the name of Professor Herbert Wechsler, an outstanding lawyer, a frequent advocate for civil rights causes, and a scholar of prestige and influence.<sup>8</sup> Nevertheless,

<sup>4</sup> A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 151 (1970).

<sup>5</sup> Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The lecture was later published in a collection of selected essays. H. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 3 (1961).

<sup>6</sup> See, e.g., Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); 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).

<sup>7</sup> The legal campaign that culminated in the *Brown* decision is discussed in great depth in R. KLUGER, *SIMPLE JUSTICE* (1976). The subsequent 15 years is reviewed in S. WASBY, A. D'AMATO & R. METRAILER, *DESEGREGATION FROM BROWN TO ALEXANDER* (1977).

<sup>8</sup> Professor Wechsler is the Harlan Fiske Stone Professor of Constitutional Law Emeritus at the Columbia University Law School. His work is reviewed in 78 COLUM. L. REV. 969 (1978) (issue dedicated in Professor Wechsler's honor upon his retirement).

Professor Wechsler chose that time and an invitation to deliver Harvard Law School's Oliver Wendell Holmes Lecture as the occasion to raise new questions about the legal appropriateness and principled shortcomings of *Brown* and several other major civil rights decisions.<sup>9</sup>

Here was an attack that could not be dismissed as after-the-fact faultfinding by a conservative academician using his intellect to further a preference for keeping blacks in their "separate-but-equal" place. Professor Wechsler began by saying that he had welcomed the result in *Brown*; he noted that he had joined with the NAACP's Charles Houston in litigating civil rights cases in the Supreme Court.<sup>10</sup> He added that he was not offended because the Court failed to uphold earlier decisions approving segregated schools. Nor was he persuaded by the argument that the issue should have been left to Congress because the Court's judgment might not be honored.<sup>11</sup>

Wechsler did not align himself with the "realists," who "perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place,"<sup>12</sup> nor with the "formalists," who "frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support."<sup>13</sup> Wechsler instead saw the need for criteria of decision that could be framed and tested as an exercise of reason and not merely adopted as an act of willfulness or will. He believed, in short, that courts could engage in a "principled appraisal" of legislative actions that exceeded a fixed "historical meaning" of constitutional provisions without, as Judge Learned Hand feared, becoming "a third legislative chamber."<sup>14</sup> Courts, Wechsler argued, "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."<sup>15</sup> Applying these standards, which included constitutional and statutory interpretation, the subtle guidance provided by history, and appropriate but not slavish fidelity to precedent, Wechsler found difficulty with Supreme Court decisions where principled reasoning was in his view either deficient or, in some instances,

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<sup>9</sup> See Wechsler, *supra* note 5, at 31-35.

<sup>10</sup> Wechsler recalled that Houston, who was black, "did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess." *Id.* at 34.

<sup>11</sup> *Id.* at 31-32.

<sup>12</sup> *Id.* at 11.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 16.

<sup>15</sup> *Id.* at 15.

nonexistent.<sup>16</sup> He included the *Brown* opinion in the latter category.

Wechsler reviewed and rejected the possibility that *Brown* was based on a declaration that the fourteenth amendment barred all racial lines in legislation.<sup>17</sup> He also doubted that the opinion relied upon a factual determination that segregation caused injury to black children, since evidence as to such harm was both inadequate and conflicting.<sup>18</sup> Rather, Wechsler concluded, the Court in *Brown* must have rested its holding on the view that "racial segregation is, *in principle*, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved."<sup>19</sup> Yet, Wechsler found this argument untenable as well, because, among other difficulties, it seemed to require an inquiry into the motives of the legislature, a practice generally foreclosed to the courts.<sup>20</sup>

After dismissing these arguments, Wechsler then asserted that the legal issue in state-imposed segregation cases was not one of discrimination at all, but rather of associational rights: "the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved."<sup>21</sup> Wechsler reasoned that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."<sup>22</sup> And concluding with a question that has challenged legal scholars, Wechsler asked:

Given 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?<sup>23</sup>

In suggesting that there was a basis in neutral principles for holding that the Constitution supports a claim by blacks for an associational right, Professor Wechsler confessed that he had not yet written an opinion supporting such a holding. "To write it is for me the challenge of the school-segregation cases."<sup>24</sup>

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<sup>16</sup> *Id.* at 19.

<sup>17</sup> *Id.* at 32.

<sup>18</sup> *Id.* at 32-33.

<sup>19</sup> *Id.* at 33 (emphasis added).

<sup>20</sup> *Id.* at 33-34.

<sup>21</sup> *Id.* at 34.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## II. THE SEARCH FOR A NEUTRAL PRINCIPLE: RACIAL EQUALITY AND INTEREST CONVERGENCE

Scholars who accepted Professor Wechsler's challenge had little difficulty finding a neutral principle on which the *Brown* decision could be based. Indeed, from the hindsight of a quarter century of the greatest racial consciousness-raising the country has ever known, much of Professor Wechsler's concern seems hard to imagine. To doubt that racial segregation is harmful to blacks, and to suggest that what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then. Professor Charles Black, therefore, correctly viewed racial equality as the neutral principle which underlay the *Brown* opinion.<sup>25</sup> In Black's view, Wechsler's question "is awkwardly simple,"<sup>26</sup> and he states his response in the form of a syllogism. Black's major premise is that "the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states."<sup>27</sup> His minor premise is that "segregation is a massive intentional disadvantaging of the Negro race, as such, by state law."<sup>28</sup> The conclusion, then, is that the equal protection clause clearly bars racial segregation because segregation harms blacks and benefits whites in ways too numerous and obvious to require citation.<sup>29</sup>

Logically, the argument is persuasive, and Black has no trouble urging that "[w]hen the directive of equality cannot be followed without displeasing the white[s], then something that can be called a 'freedom' of the white[s] must be impaired."<sup>30</sup> It is precisely here, though, that many whites part company with Professor Black. Whites may agree in the abstract that blacks are citizens and are entitled to constitutional protection against racial discrimination, but few are willing to recognize that racial segregation is much more than a series of quaint customs that can be remedied effectively without altering the status of whites. The extent of this unwillingness is illustrated by the controversy over affirmative action programs, particularly those where identifiable whites must step aside for blacks they deem less qualified or less deserving. Whites simply cannot envision the personal responsibility and the potential sacrifice inherent in Professor Black's conclusion that true equality

<sup>25</sup> See Black, *supra* note 6, at 428-29.

<sup>26</sup> *Id.* at 421.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 425-26.

<sup>30</sup> *Id.* at 429.

for blacks will require the surrender of racism-granted privileges for whites.

This sober assessment of reality raises concern about the ultimate import of Black's theory. On a normative level, as a description of how the world *ought* to be, the notion of racial equality appears to be the proper basis on which *Brown* rests, and Wechsler's framing of the problem in terms of associational rights thus seems misplaced. Yet, on a positivistic level — how the world *is* — it is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites. Hence, Wechsler's search for a guiding principle in the context of associational rights retains merit in the positivistic sphere, because it suggests a deeper truth about the subordination of law to interest-group politics with a racial configuration.

Although no such subordination is apparent in *Brown*, it is possible to discern in more recent school decisions the outline of a principle, applied without direct acknowledgment, that could serve as the positivistic expression of the neutral statement of general applicability sought by Professor Wechsler. Its elements rely as much on political history as legal precedent and emphasize the world as it is rather than how we might want it to be. Translated from judicial activity in racial cases both before and after *Brown*, this principle of "interest convergence" provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

It follows that the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice — or its appearance — may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.

In assessing how this principle can accommodate both the *Brown* decision and the subsequent development of school desegregation law, it is necessary to remember that the issue

of school segregation and the harm it inflicted on black children did not first come to the Court's attention in the *Brown* litigation: blacks had been attacking the validity of these policies for 100 years.<sup>31</sup> Yet, prior to *Brown*, black claims that segregated public schools were inferior had been met by orders requiring merely that facilities be made equal.<sup>32</sup> What accounted, then, for the sudden shift in 1954 away from the separate but equal doctrine and towards a commitment to desegregation?

I contend that the decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation. First, the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. At least this argument was advanced by lawyers for both the NAACP and the federal government.<sup>33</sup> And the point was not lost on the news media. *Time* magazine, for example, predicted that the international impact of *Brown* would be scarcely less important than its effect on the education of black children: "In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that 'all men are created equal.'" <sup>34</sup>

Second, *Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. Returning black veterans faced not only continuing discrimination, but also violent attacks in the South which rivalled those that took place at the conclusion of World War I.<sup>35</sup> Their disillusionment and anger were poignantly expressed by the black actor, Paul Robeson, who in 1949 declared: "It is unthinkable . . . that American Negroes would

<sup>31</sup> See, e.g., *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850).

<sup>32</sup> The cases are collected in Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 482, 483 n.27; Leflar & Davis, *Segregation in the Public Schools — 1953*, 67 HARV. L. REV. 377, 430-35 (1954).

<sup>33</sup> See Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 12 (1976).

<sup>34</sup> *Id.* at 12 n.31.

<sup>35</sup> C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 114 (3d rev. ed. 1974); J. FRANKLIN, *FROM SLAVERY TO FREEDOM* 478-86 (3d ed. 1967).



go to war on behalf of those who have oppressed us for generations . . . against a country [the Soviet Union] which in one generation has raised our people to the full human dignity of mankind."<sup>36</sup> It is not impossible to imagine that fear of the spread of such sentiment influenced subsequent racial decisions made by the courts.

Finally, there were whites who realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation.<sup>37</sup> Thus, segregation was viewed as a barrier to further industrialization in the South.

These points may seem insufficient proof of self-interest leverage to produce a decision as important as *Brown*. They are cited, however, to help assess and not to diminish the Supreme Court's most important statement on the principle of racial equality. Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.<sup>38</sup>

Thus, for those whites who sought an end to desegregation on moral grounds or for the pragmatic reasons outlined above, *Brown* appeared to be a welcome break with the past. When segregation was finally condemned by the Supreme Court, however, the outcry was nevertheless great, especially among poorer whites who feared loss of control over their public schools and other facilities. Their fear of loss was intensified by the sense that they had been betrayed. They relied, as had generations before them, on the expectation that white elites would maintain lower class whites in a societal status superior

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<sup>36</sup> D. BUTLER, PAUL ROBESON 137 (1976) (unwritten speech before the Partisans of Peace, World Peace Congress in Paris).

<sup>37</sup> Professor Robert Higgs argued that the "region's economic development increasingly undermined the foundations of its traditional racial relations." Higgs, *Race and Economy in the South, 1890-1950*, in *THE AGE OF SEGREGATION* 89-90 (R. Haws ed. 1978). Sociologists Frances Piven and Richard Cloward have also drawn a connection between this economic growth and the support for the civil rights movement in the 1940's and 1950's, when various white elites in business, philanthropy, and government began to speak out against racial discrimination. F. PIVEN & R. CLOWARD, *REGULATING THE POOR* 229-30 (1971). See also F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 189-94 (1977).

<sup>38</sup> President Lincoln, for example, acknowledged the moral evil in slavery. In his famous letter to publisher Horace Greeley, however, he promised to free all, some, or none of the slaves, depending on which policy would most help save the Union. *SPEECHES AND LETTERS OF ABRAHAM LINCOLN*, 1832-65, at 194-95 (M. Roe ed. 1907).

to that designated for blacks.<sup>39</sup> In fact, there is evidence that segregated schools and facilities were initially established by legislatures at the insistence of the white working class.<sup>40</sup> Today, little has changed. Many poorer whites oppose social reform as "welfare programs for blacks" although, ironically, they have employment, education, and social service needs that differ from those of poor blacks by a margin that, without a racial scorecard, is difficult to measure.<sup>41</sup>

Unfortunately, poorer whites are now not alone in their opposition to school desegregation and to other attempts to improve the societal status of blacks: recent decisions, most notably by the Supreme Court, indicate that the convergence of black and white interests that led to *Brown* in 1954 and influenced the character of its enforcement has begun to fade. In *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>42</sup> Chief Justice Burger spoke of the "reconciliation of competing values" in desegregation cases.<sup>43</sup> If there was any doubt that "competing values" referred to the conflicting interests of blacks seeking desegregation and whites who prefer to retain existing school policies, then the uncertainty was dispelled by *Milliken v. Bradley*,<sup>44</sup> and by *Dayton Board of Education v. Brinkman (Dayton I)*.<sup>45</sup> In both cases, the Court elevated the concept of "local autonomy" to a "vital national tradition":<sup>46</sup> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."<sup>47</sup> Local con-

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<sup>39</sup> See F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 187 (1977). See generally Bell, *supra* note 33.

<sup>40</sup> See C. VANN WOODWARD, *supra* note 35, at 6.

<sup>41</sup> Robert Heilbruner suggests that this country's failure to address social issues including poverty, public health, housing, and prison reform as effectively as many European countries is due to the tendency of whites to view reform efforts as "programs to 'subsidize' Negroes. . . . In such cases the fear and resentment of the Negro takes precedence over the social problem itself. The result, unfortunately, is that the entire society suffers from the results of a failure to correct social evils whose ill effects refuse to obey the rules of segregation." Heilbruner, *The Roots of Social Neglect in the United States*, in *IS LAW DEAD?* 288, 296 (E. Rostow ed. 1971).

<sup>42</sup> 402 U.S. 1 (1971).

<sup>43</sup> *Id.* at 31.

<sup>44</sup> 418 U.S. 717 (1974) (limits power of federal courts to treat a primarily black urban school district and largely white suburban districts as a single unit in mandating desegregation).

<sup>45</sup> 433 U.S. 406 (1977) (desegregation orders affecting pupil assignments should seek only the racial mix that would have existed absent the constitutional violation).

<sup>46</sup> *Id.* at 410; 418 U.S. at 741-42.

<sup>47</sup> 418 U.S. at 741.

trol, however, may result in the maintenance of a status quo that will preserve superior educational opportunities and facilities for whites at the expense of blacks. As one commentator has suggested, "It is implausible to assume that school boards guilty of substantial violations in the past will take the interests of black school children to heart."<sup>48</sup>

As a result of its change in attitudes, the Court has increasingly erected barriers to achieving the forms of racial balance relief it earlier had approved.<sup>49</sup> Plaintiffs must now prove that the complained-of segregation was the result of discriminatory actions intentionally and invidiously conducted or authorized by school officials.<sup>50</sup> It is not enough that segregation was the "natural and foreseeable" consequence of their policies.<sup>51</sup> And even when this difficult standard of proof is met, courts must carefully limit the relief granted to the harm actually proved.<sup>52</sup> Judicial second thoughts about racial balance plans with broad-range busing components, the very plans which civil rights lawyers have come to rely on, is clearly evident in these new proof standards.

There is, however, continuing if unpredictable concern in the Supreme Court about school boards whose policies reveal long-term adherence to overt racial discrimination. In many cases, trial courts exposed to exhaustive testimony regarding the failure of school officials to either desegregate or provide substantial equality of schooling for minority children, become convinced that school boards are violating *Brown*. Thus far, unstable Supreme Court majorities have upheld broad desegregation plans ordered by these judges,<sup>53</sup> but the reservations expressed by concurring Justices<sup>54</sup> and the vigor of those Justices who dissent<sup>55</sup> caution against optimism in this still controversial area of civil rights law.<sup>56</sup>

<sup>48</sup> *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 130 (1979).

<sup>49</sup> See generally Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILOSOPHY & PUB. AFF. 3 (1974); Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 NW. U.L. REV. 382 (1977).

<sup>50</sup> *Dayton Bd. of Educ. v. Brinkman* (Dayton I), 433 U.S. 406 (1977).

<sup>51</sup> *Columbus Bd. of Educ. v. Penick*, 99 S. Ct. 2941, 2950 (1979).

<sup>52</sup> *Austin Independent School Dist. v. United States*, 429 U.S. 990, 991 (1976) (Powell, J., concurring).

<sup>53</sup> *Dayton Bd. of Educ. v. Brinkman* (Dayton II), 99 S. Ct. 2971 (1979); *Columbus Bd. of Educ. v. Penick*, 99 S. Ct. 2941 (1979).

<sup>54</sup> See *Columbus Bd. of Educ. v. Penick*, 99 S. Ct. 2941, 2952 (1979) (Burger, C.J., concurring); *id.* at 2983 (Stewart, J., concurring).

<sup>55</sup> See *id.* at 2952 (Rehnquist, J., dissenting); *id.* at 2988 (Powell, J., dissenting). See also *Dayton Bd. of Educ. v. Brinkman* (Dayton II), 99 S. Ct. 2971, 2983 (1979) (Stewart, J., dissenting).

<sup>56</sup> The Court faces another difficult challenge in the 1979 Term when it reviews whether the racial balance plan in Dallas, Texas, goes far enough in eliminating one

At the very least, these decisions reflect a substantial and growing divergence in the interests of whites and blacks. The result could prove to be the realization of Professor Wechsler's legitimate fear that, if there is not a change of course, the purported entitlement of whites not to associate with blacks in public schools may yet eclipse the hope and the promise of *Brown*.

### III. INTEREST-CONVERGENCE REMEDIES UNDER BROWN

Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized. Whites in policymaking positions, including those who sit on federal courts, can take no comfort in the conditions of dozens of inner-city school systems where the great majority of nonwhite children attend classes as segregated and ineffective as those so roundly condemned by Chief Justice Warren in the *Brown* opinion. Nor do poorer whites gain from their opposition to the improvement of educational opportunities for blacks: as noted earlier, the needs of the two groups differ little.<sup>57</sup> Hence, over time, all will reap the benefits from a concerted effort towards achieving racial equality.

The question still remains as to the surest way to reach the goal of educational effectiveness for both blacks and whites. I believe that the most widely used programs mandated by the courts — "antidefiance, racial balance" plans — may in some cases be inferior to plans focusing on "educational components," including the creation and development of "model" all-black schools. A short history of the use of the antidefiance strategy would be helpful at this point.

By the end of the 1950's, it was apparent that compliance with the *Brown* mandate to desegregate the public schools would not come easily or soon. In the seventeen border states and the District of Columbia, fewer than 200 thousand blacks were actually attending classes with white children.<sup>58</sup> The states in the deep South had not begun even token desegregation,<sup>59</sup> and it would take Supreme Court action to reverse

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race schools in a large district that is now 65% black and Hispanic. *Tasby v. Estes*, 572 F.2d 1010 (5th Cir. 1978), *cert. granted sub nom. Estes v. Metropolitan Branches of Dallas NAACP*, 440 U.S. 906 (1979).

<sup>57</sup> See p. 526 *supra*.

<sup>58</sup> P. BERGMAN, *THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA* 561 (1969).

<sup>59</sup> *Id.* at 561-62.

the years-long effort of the Prince Edward County School Board in Virginia to abolish rather than desegregate its public schools.<sup>60</sup> Supreme Court orders<sup>61</sup> and presidential action had already been required to enable a handful of black students to attend Central High School in Little Rock, Arkansas.<sup>62</sup> Opposition to *Brown* was clearly increasing. Its supporters were clearly on the defensive, as was the Supreme Court itself.

For blacks, the goal in school desegregation suits remained the effective use of the *Brown* mandate to eliminate state-sanctioned segregation. These efforts received unexpected help from the excesses of the massive resistance movement that led courts to justify relief under *Brown* as a reaffirmance of the supremacy of the judiciary on issues of constitutional interpretation. *Brown*, in the view of many, might not have been a wise or proper decision, but violent and prolonged opposition to its implementation posed an even greater danger to the federal system.

The Supreme Court quickly recognized this additional basis on which to ground school desegregation orders. "As this case reaches us," the Court began its dramatic opinion in *Cooper v. Aaron*,<sup>63</sup> "it raises questions of the highest importance to the maintenance of our federal system of government."<sup>64</sup> Reaching back to *Marbury v. Madison*,<sup>65</sup> the Court reaffirmed Chief Justice Marshall's statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>66</sup> There were few opponents to this stand, and Professor Wechsler was emphatically not one of them. His criticism of *Brown* concluded with a denial that he intended to offer "comfort to anyone who claims legitimacy in defiance of the courts."<sup>67</sup> Those who accept the benefits of our constitutional system, Wechsler felt, cannot deny its allegiance when a special burden is imposed. Defiance of court orders, he asserted, constituted the "ultimate negation of all neutral principles."<sup>68</sup>

For some time, then, the danger to federalism posed by the secessionist-oriented resistance of Southern state and local of-

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<sup>60</sup> Griffin v. County School Bd., 377 U.S. 218 (1964).

<sup>61</sup> Cooper v. Aaron, 358 U.S. 1 (1958).

<sup>62</sup> P. BERGMAN, *supra* note 58, at 555-56, 561-62.

<sup>63</sup> 358 U.S. 1 (1958).

<sup>64</sup> *Id.* at 4.

<sup>65</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>66</sup> 358 U.S. at 18.

<sup>67</sup> Wechsler, *supra* note 5, at 35.

<sup>68</sup> *Id.*

ficials provided courts with an independent basis for supporting school desegregation efforts.<sup>69</sup> In the lower federal courts, the perceived threat to judicial status was often quite personal. Surely, I was not the only civil rights attorney who received a favorable decision in a school desegregation case less by legal precedent than because a federal judge, initially hostile to those precedents, my clients and their lawyer, became incensed with school board litigation tactics that exhibited as little respect for the court as they did for the constitutional rights of black children.

There was a problem with school desegregation decisions framed in this antidefiance form that was less discernible then than now. While a prerequisite to the provision of equal educational opportunity, condemnation of school board evasion was far from synonymous with that long-promised goal. Certainly, it was cause for celebration when the Court recognized that some pupil assignment schemes,<sup>70</sup> "freedom-of-choice" plans,<sup>71</sup> and similar "desegregation plans," were in fact designed to retain constitutionally condemned dual school systems. And, when the Court, in obvious frustration with the slow pace of school desegregation, announced in 1968 what Justice Powell later termed "the *Green/Swann* doctrine of 'affirmative duty,'" <sup>72</sup> which placed on school boards the duty to disestablish their dual school systems, the decisions were welcomed as substantial victories by civil rights lawyers. Yet, the remedies set forth in the major school cases following *Brown* — balancing the student and teacher populations by race in each school, eliminating one-race schools, redrawing school attendance lines, and transporting students to achieve racial balance<sup>73</sup> — have not in themselves guaranteed black children

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<sup>69</sup> See, e.g., *Goss v. Board of Educ.*, 373 U.S. 683 (1963) (struck down "minority to majority" transfer plans enabling resegregation of schools); *Bush v. New Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La.), *aff'd*, 365 U.S. 569 (1961) (invalidation of state "interposition acts"); *Poindexter v. Louisiana Financial Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 215 (1968) ("tuition grants" for children attending private segregated schools voided).

<sup>70</sup> These plans, requiring black children to run a gauntlet of administrative proceedings to obtain assignment to a white school, were at first judicially approved. See *Covington v. Edwards*, 264 F.2d 780 (4th Cir.), *cert. denied*, 361 U.S. 840 (1959); *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala.), *aff'd*, 358 U.S. 101 (1958).

<sup>71</sup> *Green v. County School Bd.*, 391 U.S. 430 (1968) (practice of "free choice" — enabling each student to choose whether to attend a black or white school — struck down).

<sup>72</sup> *Keyes v. School Dist. No. 1*, 413 U.S. 189, 224 (1973) (Powell, J., concurring in part and dissenting in part).

<sup>73</sup> See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).

better schooling than they received in the pre-*Brown* era. Such racial balance measures have often altered the racial appearance of dual school systems without eliminating racial discrimination. Plans relying on racial balance to foreclose evasion have not eliminated the need for further orders protecting black children against discriminatory policies, including re-segregation within desegregated schools,<sup>74</sup> the loss of black faculty and administrators,<sup>75</sup> suspensions and expulsions at much higher rates than white students,<sup>76</sup> and varying forms of racial harassment ranging from exclusion from extracurricular activities<sup>77</sup> to physical violence.<sup>78</sup> Antidefiance remedies, then, while effective in forcing alterations in school system structure, often encourage and seldom shield black children from discriminatory retaliation.

The educational benefits that have resulted from the mandatory assignment of black and white children to the same schools are also debatable.<sup>79</sup> If benefits did exist, they have begun to dissipate as whites flee in alarming numbers from school districts ordered to implement mandatory reassignment plans.<sup>80</sup> In response, civil rights lawyers sought to include entire metropolitan areas within mandatory reassignment plans in order to encompass mainly white suburban school districts

<sup>74</sup> See, e.g., *Jackson v. Marvell School Dist. No. 22*, 425 F.2d 211 (8th Cir. 1970). There were also efforts to segregate students within desegregated schools by the use of standardized tests and achievement scores. See *Singleton v. Jackson Mun. Separate School Dist.*, 419 F.2d 1211 (5th Cir.), *rev'd per curiam*, 396 U.S. 290 (1970); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

<sup>75</sup> See, e.g., *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189 (4th Cir. 1966). For a discussion of the wholesale dismissal and demotion of black teachers in the wake of school desegregation orders, see materials compiled in 2 N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, *ENERSON, HABER, AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 679-80 (4th ed. 1979).

<sup>76</sup> *Hawkins v. Coleman*, 376 F. Supp. 1330 (N.D. Tex. 1974); *Dunn v. Tyler Independent School Dist.*, 327 F. Supp. 528 (E.D. Tex. 1971), *aff'd in part and rev'd in part*, 460 F.2d 137 (5th Cir. 1972).

<sup>77</sup> *Floyd v. Trice*, 490 F.2d 1154 (8th Cir. 1974); *Augustus v. School Bd.*, 361 F. Supp. 383 (N.D. Fla. 1973), *modified*, 507 F.2d 152 (5th Cir. 1975).

<sup>78</sup> For a recent example, see the account of racial violence resulting from desegregation in Boston in Husoch, *Boston: The Problem That Won't Go Away*, N.Y. Times, Nov. 25, 1979, § 6 (Magazine), at 32.

<sup>79</sup> See N. ST. JOHN, *SCHOOL DESEGREGATION* 16-41 (1975).

<sup>80</sup> See D. Armor, *White Flight, Demographic Transition, and the Future of School Desegregation* (1978) (Rand Paper Series, The Rand Corp.); J. Coleman, S. Kelly & J. Moore, *Trends in School Segregation, 1968-73* (1975) (Urban Institute Paper). But see Pettigrew & Green, *School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis*, 46 HARV. EDUC. REV. 1 (1976); Rossell, *School Desegregation and White Flight*, 90 POL. SCI. Q. 675 (1975); R. Farley, *School Integration and White Flight* (1975) (Population Studies Center, U. Mich.).

where so many white parents sought sanctuary for their children.<sup>81</sup>

Thus, the antidefiance strategy was brought full circle from a mechanism for preventing evasion by school officials of *Brown's* antisegregation mandate to one aimed at creating a discrimination-free environment. This approach to the implementation of *Brown*, however, has become increasingly ineffective; indeed, it has in some cases been educationally destructive. A preferable method is to focus on obtaining real educational effectiveness which may entail the improvement of presently desegregated schools as well as the creation or preservation of model black schools.

Civil rights lawyers do not oppose such relief, but they clearly consider it secondary to the racial balance remedies authorized in the *Swann*<sup>82</sup> and *Keyes*<sup>83</sup> cases. Those who espouse alternative remedies are deemed to act out of suspect motives. *Brown* is the law, and racial balance plans are the only means of complying with the decision. The position reflects courage, but it ignores the frequent and often complete failure of programs which concentrate solely on achieving a racial balance.

Desegregation remedies that do not integrate may seem a step backward toward the *Plessy* "separate but equal" era. Some black educators, however, see major educational benefits in schools where black children, parents, and teachers can utilize the real cultural strengths of the black community to overcome the many barriers to educational achievement.<sup>84</sup> As Professor Laurence Tribe argued, "[J]udicial rejection of the 'separate but equal' talisman seems to have been accompanied by a potentially troublesome lack of sympathy for racial separateness as a possible expression of group solidarity."<sup>85</sup>

This is not to suggest that educationally oriented remedies can be developed and adopted without resistance. Policies necessary to obtain effective schools threaten the self-interest of teacher unions and others with vested interests in the status quo. But successful magnet schools may provide a lesson that

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<sup>81</sup> See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974). In Los Angeles, where the court ordered reassignment of 65,000 students in grades four through eight, 30-50% of the 22,000 white students scheduled for mandatory busing boycotted the public schools or enrolled elsewhere. U.S. COMM'N ON CIVIL RIGHTS, *DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT* 51 (1979).

<sup>82</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>83</sup> *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

<sup>84</sup> S. LIGHTFOOT, *WORLDS APART* 172 (1978). For a discussion of the Lightfoot theory, see Bell, *supra* note 3, at 1838.

<sup>85</sup> L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-15, at 1022 (1978) (footnote omitted).



effective schools for blacks must be a primary goal rather than a secondary result of integration. Many white parents recognize a value in integrated schooling for their children but they quite properly view integration as merely one component of an effective education. To the extent that civil rights advocates also accept this reasonable sense of priority, some greater racial interest conformity should be possible.

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Is this what the *Brown* opinion meant by "equal educational opportunity"? Chief Justice Warren said the Court could not "turn the clock back to 1868 when the [fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."<sup>86</sup> The change in racial circumstances since 1954 rivals or surpasses all that occurred during the period that preceded it. If the decision that was at least a catalyst for that change is to remain viable, those who rely on it must exhibit the dynamic awareness of all the legal and political considerations that influenced those who wrote it.

Professor Wechsler warned us early on that there was more to *Brown* than met the eye. At one point, he observed that the opinion is "often read with less fidelity by those who praise it than by those by whom it is condemned."<sup>87</sup> Most of us ignored that observation openly and quietly raised a question about the sincerity of the observer. Criticism, as we in the movement for minority rights have every reason to learn, is a synonym for neither cowardice nor capitulation. It may instead bring awareness, always the first step toward overcoming still another barrier in the struggle for racial equality.

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<sup>86</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954).

<sup>87</sup> Wechsler, *supra* note 5, at 32.