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WE “HAD A DREAM” IN BROWN v. BOARD OF EDUCATION . . .

Susan H. Bitensky

Doctor, Doctor, you had a dream;  
In what eyes do you think  
Your dream was fulfilled?  
Doctor, Doctor, with your skin dark,  
With your eyes full of determination,  
Was your dream achieved?  
Doctor Martin Luther King, Jr.:  
Dreams can come true.

- William N. Meyrowitz

Dr. Martin Luther King, Jr. articulated and brought to public consciousness his dream of a nation transformed “into a beautiful symphony of brotherhood” based on racial equality and social justice. In the 1950s and 1960s, it seemed that Dr. King’s dream was on its way to realization, not only because of significant strides achieved by the civil rights movement, but also because of the initiative shown by the United States Supreme Court in Brown v. Board of Education.

In Brown, a unanimous Court struck down de jure racial segrega-
tion in the public elementary and secondary schools as inherently violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Brown made it untenable to argue that state authorization of racially "separate but equal" schools is constitutionally justifiable. In other words, under Brown, official racial segregation is a per se constitutional violation even if a defendant were to introduce evidence showing that the schools serving Caucasian children and the schools serving African-American children are provided with equal "buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." The linchpin for this holding is the Court's factual finding that separation of children into public elementary and secondary schools according to racial identity is interpreted by the African-American students as denoting their inferiority; this sense of inferiority, in turn, undermines motivation to learn.

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violations announced in Brown. Brown II, 349 U.S. at 294. Unless otherwise indicated, the first Brown v. Board of Education decision will hereinafter be referred to as Brown.


9. The notion that facilities could be separate for the races and, at the same time, equal was first embraced by the U.S. Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896). In Plessy, the Court upheld under the Equal Protection Clause of the Fourteenth Amendment Louisiana's racial segregation of railroad passengers. Plessy, 163 U.S. at 548-49, 552.


11. Id. at 492. Indeed, during the course of the Brown litigation, the courts below had concluded that the segregated schools in issue were "equalized, or are being equalized" with respect to tangible resources. Id. at 492 & n.9. (Brown was a consolidated opinion deciding cases litigated in the states of Kansas, South Carolina, Virginia, and Delaware. Id. at 486 & n.1).

12. Id. at 494. The Court took judicial notice of this fact, stating:
To separate [children in public elementary and secondary schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a
Brown is a landmark case in the truest sense: the decision was a drastic departure from precedent\textsuperscript{13} as well as a major step in the Court’s social reform agenda.\textsuperscript{14} Nevertheless, the expectations and aspirations naturally inspired by Brown have, after forty-two years, remained substantially unfulfilled.\textsuperscript{15} Implementation of Brown has posed complex problems\textsuperscript{16} and, no doubt, the shortfall may be attributed to many causes.\textsuperscript{17} Ironically, one culprit has been the racial(ly) integrated school system.”

\textit{Id.}

13. Brown represented a breakthrough insofar as it repudiated the doctrine that governmentally sanctioned “separate but equal” facilities for African-Americans pass muster under the Equal Protection Clause. Laurence H. Tribe, American Constitutional Law § 16-15, at 1475-76 (2d ed. 1988); Paul R. Dimond, Panel I: Brown and the Transformation of the Constitution: Concluding Remarks, 61 Fordham L. Rev. 29, 29-30 (1992). However, before Brown, the Court had struck down several state statutes that segregated the races in the educational context; these decisions were based on evidence that institutions serving African-Americans did not provide equivalent benefits or that such institutions did not exist rather than on the theory that “separate but equal” schools is a contradiction in terms. See, e.g., Sweatt v. Painter, 339 U.S. 629 (1950) (invalidating state prohibition of African-American enrollment in a state law school where an alternative state law school for African-Americans was of inferior quality); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (holding that a state law school may not deny admission to an applicant solely because of race); Missouri ex rei. Gaines v. Canada, 305 U.S. 337 (1938) (requiring that state-provided legal education must be made available to African-Americans as well as Caucasians).


17. See, e.g., Miller, supra note 15, at 119-20 (attributing continued gaps in academic performance between children of different races to, among other things, differing
Court itself. Its post-*Brown* school desegregation cases have, in the long run, limited the possibilities for mandating desegregation and of thereby providing equal educational opportunities through the mixing of the races.\(^\text{18}\) However, it is the purpose of this article to show that the disappointing denouement also derives, in significant measure, from the Court’s betrayal of *Brown*’s other promise—its "‘educational rationale.’"\(^\text{19}\)

While the *Brown* opinion is suffused with subtleties that have made its meaning a subject of much debate,\(^\text{20}\) there can be no question that the decision invalidated state-imposed racial segregation of public...
elementary and secondary schools. Given this holding, it would defy common sense to suggest that the Brown Court was not after racial desegregation of the schools for desegregation's sake. If this were the sum total of Brown's meaning, that contribution alone to equal protection jurisprudence and race relations would be of monumental proportions.

But the Court was also after more than desegregation for desegregation's sake. The Brown decision was contextual and that context was a concern for the standard of education in the public schools. Desegregation that would result in racially mixed schoolhouses offering substandard education would be an incomplete, if not perverse, realization of Brown's import. Indeed, the Brown opinion elucidates that the type of education with which the Justices were most concerned,

is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good


22. Generally speaking, Brown furthered the perception that race does not make people unequal. Hayman & Levit, supra note 15, at 635-36; Jarvis, supra note 15, at 1288; Sedler, supra note 16, at 1693. See Salomone, supra note 14, at 200. Cf. Denise C. Morgan, What Is Left to Argue in Desegregation Law? The Right to Minimally Adequate Education, 8 Harv. Blackletter J. 99, 107 (1991) (noting that it was not until Brown that African-Americans realized that racial segregation was but a by-product of a "more pernicious disease - white supremacy"). In this sense, Brown has had a pedagogic effect even apart from the remedial decrees of Brown II. Susan H. Bitensky, A Contemporary Proposal for Reconciling the First Amendment with Curricular Values Inculcation in the Public Schools, 70 Notre Dame L. Rev. 769, 803-04 (1995); Bruce C. Hafen, Schools as Intellectual and Moral Associations, 1993 B.Y.U. L. Rev. 605, 609-10. See Stephen Arons & Charles Lawrence III, The Manipulation of Consciousness: A First Amendment Critique of Schooling, 15 Harv. C.R.-C.L. L. Rev. 309, 323, 349 (1980); but see Kevin Brown, Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?, 78 Cornell L. Rev. 1, 56-60 (1992) (contending that the values lesson of Brown may have been adverse to the interests of African-American children since the decision assumes that only minority children need to or will profit from integrated schooling). Insofar as Brown and subsequent school desegregation cases have resulted in increased racial integration, there is evidence that the experience for all children of interacting with other races has improved interracial relationships. See Hayman & Levit, supra note 15, at 717, 724-25; James S. Liebman, Desegregating Politics: "All-Out" Desegregation Explained, 90 Colum. L. Rev. 1463, 1570-71, 1643-44 (1990); contra Shane, supra note 21, at 1058-59.
citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. 23

The Brown Court was not concerned that segregation deprives African-American children of substandard learning, but rather, that such a policy deprives them of quality learning. 24 Brown's "educational rationale" is that de jure segregated public schools cheat these children of educational content that would prepare them for responsible political participation, initiate them into the ranks of the culturally literate, and give them the basis for later professional training. 25 As such, Brown promises educational quality, linking it with the potential for adult success; it is the caliber of the adults into which children will mature, even more than children's mental well-being during childhood, which drives the decision. 26 Thus, Brown's agenda

26. I do not mean to suggest that the Court was insensitive to children in deciding Brown. Clearly, that was not the case, for the Justices wrote with evident compassion that segregated public schooling "generates [in African-American children] 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." Brown, 347 U.S. at 494. The inference is that the Justices were in some degree moved by the potential for damage to children's hearts and minds during childhood as well as to damage that was "unlikely ever to be undone" in adulthood. However, the Court's full discourse on the value of education makes it plain that it is education as a key to adult fulfillment that is at the heart of Brown. Id. at 493; Chang, supra note 24, at 33-34; Marvin P. Dawkins & Jomills H. Braddock II, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 J. Negro Educ. 394, 394, 403 (1994); Shane, supra note 21, at 1050, 1053. See Anderson, supra note 25, at 445, 448; Donelan, supra note 15, at 377; Gladden, supra note 20, at 239-40. Cf. Jarvis, supra note 15, at 1288 (stating that Brown has had the effect of helping African-Americans to "claim their right to national citizenship"). But see Brown, supra note
includes elevating quality public education to a constitutional interest under the Equal Protection Clause—particularly that quality which is the means of empowering future generations of adults.

The legal standard which, it would seem, should follow from this premise is that meaningful equal protection must involve the public schools in providing children with that proportion of quality education as would equally enable each child, within his or her innate potential, to partake of professional training and of the nation's cultural and political life upon reaching adulthood. This, in addition and as a complement to desegregation, is the other central tenet of Brown reduced to its formulaic logic. Providing each student with such a "proportion of quality education" would allow those African-American children whose education is in greatest need of enhancements to receive them, regardless of the equivalency of inputs into different schools.

22. at 56-57, 76-80 (arguing that Brown may have actually impeded African-American empowerment because the Court focused on the idea that segregation retards the intellectual development only of minority children).


so as to furnish the condition precedent for each child, upon reaching maturity, to enjoy the nation's economic, political and intellectual vitality; each child necessarily would be enabled only "within his or her innate potential" since no school can do more. Finally, although the holding of Brown is a commitment to minorities, all "children" should be encompassed by the standard, as a matter of policy and logic, on the assumption that a Court desirous of improving the educational level for African-American children would not be desirous of diminishing or freezing educational quality below that level for other children. That is undoubtedly why Chief Justice Warren's Brown opinion includes forceful dicta on the importance of education with reference to children in general, stating that "it is doubtful that any child may reasonably be expected to succeed without education, and that where the state provides education it "is a right which must be made available to all on equal terms.”

29. Brown, 347 U.S. at 493. See also supra note 26 and accompanying text. Cf. Chang, supra note 24, at 31 (asserting that Brown's "definition of equal educational opportunity envisions a school system that will enable minority students to learn as effectively as do whites") (emphasis added).

30. It is probably stating the obvious to point out that with respect to educating elementary and secondary school children, "[e]quality of results is limited by . . . differences in individual potential." SALOMONE, supra note 14, at 202.

31. Charles B. Vergon, Epilogue: Brown at the Threshold of the 21st Century: Enduring or Withering Legacy?, 63 J. NEGRO EDUC. 482, 485 (1994). See also Maria L. Marcus, Learning Together: Justice Marshall's Desegregation Opinions, 61 FORDHAM L. REV. 69, 88 (1992) (remarking that Justice Marshall favored school integration "because it confers positive benefits on all children"). In light of the language of the Brown opinion, it would be illogical, to say nothing of politically disastrous, to argue that the constitutional education interest protected by the decision can only benefit African-Americans or other minority groups. One commentator, noting that by the year 2000 the majority of children in some states will be Hispanic, has suggested that an "anti-caste" principle informs Brown such that "the legal basis for the claim of discrimination must be broad enough to include all racial, ethnic, and gender groups." Paul R. Dimond, Panel II: Civil Rights and Education After Brown: Concluding Remarks, 61 FORDHAM L. REV. 63, 65, 66 (1992). Another commentator has criticized Brown's apparent focus on the benefits of desegregation for African-American children rather than all children because Brown, so understood, perpetuates the prejudicial notion that African-Americans are inferior. Brown, supra note 22, at 67-69. He states, "If African-Americans were as good as Caucasians, then both blacks and whites should be beneficiaries of remedies for de jure segregation." Id. at 68. Although Professor Brown's analysis is astute in uncovering a hidden and repugnant assumption undergirding Brown, it is arguable that his analysis overlooks a counterweight in the form of the education interest which Brown protects on behalf of all children. See supra notes 23-28 and accompanying text.

Lamentably, Brown's promise of proportionate equality of quality education along these lines has not been kept, either for the African-Americans to whom the promise was specifically made or for others who have implicitly stood to benefit from its full implementation. It is unlikely that the Justices who decided Brown had in mind a school experience that, taken in the aggregate, could legitimately be characterized as a national education crisis. However, a brief sampling of even a few recent statistics suffices to convey the existence of such a crisis, the breadth and depth of which have taken on disturbing proportions. For example, as of 1994, half of the college graduates in this country could not read a bus schedule; only forty-two percent of them could summarize a newspaper article or accurately compare two editorials. Consider that the readers used in the sixth, seventh, and eighth grades during 1993 are simpler and less demanding than school readers used before World War II, while the readers used in the fourth and fifth grades during 1993 are less difficult than comic books. According to a 1993 study, twenty-five percent of high school seniors had a hard time deciphering their diplomas. A 1992 survey found that high school seniors could correctly answer elementary questions in the field of economics only thirty-five percent of the time. It should thus come as no surprise that SAT verbal scores dropped fifty-four points and math scores dropped twenty-three points during the period from 1962 to 1994. When the performance of American students is compared to that of children in other countries, the picture becomes even more dismal. "By virtually every measure of achievement, American students lag far behind their counterparts in both Asia and Europe, especially in math and science. Moreover, the evidence suggests that

34. Bitensky, supra note 33, at 551-52.
35. SYKES, supra note 33, at 100-01.
36. Id. at 129.
37. Id. at 21.
38. Id. at 22.
39. Id.
they are falling farther and farther behind.\textsuperscript{40} Adding insult to the historical injury of racial segregation, the crisis is most glaringly manifested in underfinanced school districts of which many are urban centers with high concentrations of impoverished minority children.\textsuperscript{41}

This ongoing deterioration necessarily raises the question as to why Brown's promise of proportionate equality of quality education has not eradicated or mitigated the situation. Surely if that promise had been fulfilled, especially in conjunction with fulfillment of Brown's commitment to desegregation, the statistics would be very different. If the promise were kept, not only would high school graduates be able to read their diplomas, they might well be able to use their degrees to pursue professional careers and participate in the nation's political and cultural affairs--regardless of race or socioeconomic status. The dream we had in Brown v. Board of Education has, at best, become "a dream deferred."\textsuperscript{42}

The explanation for the decision's impotence as an agent of educational quality may be found, at least in part, in the U.S. Supreme Court's retreat from Brown's education guarantee in San Antonio Independent School District v. Rodriguez.\textsuperscript{43} Rodriguez was a class action brought on behalf of Mexican-American schoolchildren who challenged that component of Texas' system of financing public education based on local property taxes.\textsuperscript{44} The gravamen of the complaint was that Texas had violated the Fourteenth Amendment's Equal Protection Clause insofar as this aspect of the financing scheme caused school districts with low property tax bases to receive less funds than districts with higher property tax bases.\textsuperscript{45}

Plaintiffs-appellees urged the Supreme Court to review the challenged legislation under the strict scrutiny standard, the most stringent measure of a statute's constitutionality, and therefore, the most favorable standard of review available to them.\textsuperscript{46} However, in order to successfully invoke strict scrutiny, plaintiffs were required by

\textsuperscript{40} Id. at 16.
\textsuperscript{42} LANGSTON HUGHES, Dream Boogie, in SELECTED POEMS 221 (1987).
\textsuperscript{43} 411 U.S. 1 (1973) (5-4 decision).
\textsuperscript{44} Rodriguez, 411 U.S. at 4, 17-41, 47.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 17, 28-29. Under the strict scrutiny standard of review, the Texas statutes would be upheld only if the state could show that the statutes furthered some compelling state interest. Id. at 16-17.
the Court to meet one of two criteria: either the challenged law must infringe upon a fundamental right under the Constitution, or the law must adversely affect a suspect class. In considering the first criterion, the Court confronted head-on the question of whether a positive right to education exists under the U.S. Constitution.

As it happens, the U.S. Constitution is silent on the issue of education. The Rodriguez Justices acknowledged, however, that such silence is not by itself dispositive. The fact is that the Supreme Court has recognized an extensive array of implied rights over the years. I have discussed elsewhere the Rodriguez Court’s analytical approach in deciding whether to recognize a positive right to education under the Federal Constitution. For purposes of this article, it suffices to point out that the Rodriguez majority ruled that a positive fundamental right to education is not among the panoply of rights afforded implicit protection under the Constitution. This was the sleight of hand that broke Brown’s promise of quality education; Rodriguez simply withdrew the promise without even mentioning that Brown had been in any way affected.

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47. Id. at 17.
48. Id. at 29.
49. Id. at 33-34. The Court stated that the test for discerning a fundamental constitutional right is that the right must be either “explicitly or implicitly guaranteed by the Constitution.” (emphasis added) Id.
52. Rodriguez, 411 U.S. at 35.
Nevertheless, the consequence is that Brown has been sundered from its education context and substantially eviscerated. Brown, read in light of Rodriguez, presumably now stands for the proposition that the Equal Protection Clause would be satisfied if the public schools were to provide an equality of low quality education or even an equality of de minimis education as long as the "education" occurred in schoolhouses free of state sanctioned racial segregation.54

Interestingly, the signs are that the Rodriguez Court was not altogether at ease with what it had done in relation to the right to education. The Justices declined to leave the matter in terms of unequivocal repudiation. In dicta that one commentator has dubbed the "unheld holding" of Rodriguez,55 the Court indicated that, in an appropriate case, it might find that there is a right to "some identifiable quantum of education" sufficient to provide children with the "basic minimal skills" necessary for the enjoyment of the rights of speech and full participation in the political process.56 This was no slip of the pen. In two subsequent cases addressing the issue of whether the education right exists, the Court effectively reiterated the "unheld holding" even as it continued to disavow the right.57

54. See generally Rodriguez, 411 U.S. at 35 (holding that there is no fundamental positive right to education under the U.S. Constitution).
56. Rodriguez, 411 U.S. at 36-37. The Court stated:
Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [to free speech or to vote], we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where-as is true in the present case-no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process. Id.
Perhaps prompted by this continuing sense of unease, the Court also subsequently developed a stratagem that allows for periodically softening Rodriguez's blow to Brown whenever softening might seem in order. That stratagem is well exemplified by the relief ultimately ordered in the *Milliken v. Bradley* ("Milliken I") desegregation litigation. In *Milliken I*, decided one year after Rodriguez, the Supreme Court rejected a metropolitan-wide multi-district remedy for *de jure* racial segregation within the single-district Detroit public school system. The Court so held because there was no showing that the state or any of the predominantly white suburban school districts had caused interdistrict segregation or a segregative effect in Detroit. The case was accordingly remanded for reformulation of a plan for intradistrict relief "directed to eliminating the segregation found to exist in Detroit city schools." 

In *Milliken II*, the Supreme Court reviewed the decree resulting from the remand, which, in addition to ordering intradistrict student reassignments, included "educational sweeteners," i.e., court-ordered educational compensatory or remedial programs. Specifically, the Court approved of the trial court's "remedial guidelines" for the Detroit Board of Education that would assure implementation of an educational plan with four components: a remedial reading and communications skills program, a comprehensive in-service teacher training program, a testing program devoid of racial, ethnic or cultural biases, and a counseling program to advise students concerning new vocational and technical school programs.

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60. Id. at 744-45.
61. Id. at 753.
62. *Gewirtz*, supra note 17, at 653-55. Professor Gewirtz uses the term "educational sweeteners" to denote judicial incentives to whites to stay in more racially mixed schools. I use his term more broadly to also denote educational enhancement remedies that are valuable in themselves and as incentives for African-American acceptance of remedial plans inadequately geared toward integration.
64. Id. at 275 (citations omitted).
65. Id. at 275-77. This four part remedial educational plan had been generated by
The Court described the purpose of the plan as restoring children victimized by racial segregation to the position they would have occupied in the absence of such discrimination.66

In effect, Milliken II substitutes for the education right repudiated by Rodriguez67 judicial discretion to order improvements in the quality of education in discrete desegregation cases.68 Comparison of the two cases makes a compelling argument for this linkage.69 On the one hand, Rodriguez denies to all children the power to demand, as a matter of federal constitutional right, that the public schools provide quality education.70 On the other hand, Milliken II gives back to the children victimized by de jure public school segregation, and only to those children, the hope that an individual judge in an individual school desegregation case may see fit to decree under the Equal Protection Clause a remedial or compensatory remedy that improves the quality of education in the offending school district.71 Whether by design or happenstance, therefore, the Milliken II Court mitigated the harshness of Rodriguez, but with an essentially conservative strategy for dealing with the crisis in educational quality and race discrimination in the nation’s public schools.72 Indeed, the Milliken II option may be viewed as a

66. Id. at 280.
67. Rodriguez, 411 U.S. at 35. See supra notes 51-54 and accompanying text.
70. Rodriguez, 411 U.S. at 35.
71. Milliken II, 433 U.S. at 275-77, 279-88. Cf. Gewirtz, supra note 17, at 656 (suggesting that courts might refrain from ordering Milliken II relief if they deem it too expensive for defendants).
72. Many commentators characterize the Supreme Court’s agenda in rejecting a multi-district desegregation decree in Milliken I as one of retrenchment from Brown. E.g., Hansen, supra note 17, at 870-71; Hayman & Levit, supra note 15, at 643; Jarvis, supra note 15, at 1290; Jones, supra note 15, at 50; Jackson, supra note 21, at 417. When Milliken I is considered in conjunction with Rodriguez, some have even seen in the combination a return to Plessy days. The reason for this dire assessment is that while Milliken I may generally preclude minority plaintiffs from obtaining an interdistrict desegregation remedy, Rodriguez also effectively precludes them from challenging inequities among school districts with respect to the financing of education. The result is that African-American children living in those poorer school districts segregated along interdistrict lines are unable to make viable Equal Protection Clause claims on the basis of either of the two theories logically available - - unequal treatment in relation to school district financing or unequal treatment in relation
political convenience that can be used to forestall the more thorough-going and controversial reform implicit in Brown's education promise. Milliken II, in realpolitik terms, gives the judiciary authority to inject educational enhancements into the brew when the combined effects of educational deficiencies and school segregation are too severe and threaten to make public anger boil over (or before the boiling point is reached, in cases where the judge has sufficient foresight or is sympathetically inclined toward plaintiffs' claims of educational deprivation due to racial discrimination). The point is that Milliken II lends itself to being used as a sort of societal safety valve in the discretion of the courts in order to give back, in bits and pieces and here and there, some of what Rodriguez stole from Brown's promise of a better education.

It would be preposterous to contend that the vitiation of Brown and the concomitant deterioration of public schooling is wholly attributable to Rodriguez. Societal forces have been operating since Brown that are indifferent or hostile to public schools;\textsuperscript{73} racial bigotry has persisted in the education milieu and elsewhere;\textsuperscript{74} controversial remedies for official school segregation, such as busing, have sometimes diverted attention from the task of improving educational quality.\textsuperscript{75} Even with the best of intentions, state and local governments have often been too financially strapped to undertake a substantial overhaul of educational standards.\textsuperscript{76} Clearly, it is a composite of factors than have turned Brown's promise more into words of aspiration than commitment. But Rodriguez, without fanfare and under cover of Milliken II's softening influence, has figured into the process in no minor way.

The Brown Court and the civil rights movement had a dream. At this juncture, the prognosis for its meaningful realization on a national
scale does not seem to be cause for optimism. Although reform on multiple fronts will be essential to the full effectuation of *Brown*, the Supreme Court could, in the next suitable case, make a critical contribution to that end by taking advantage of the “unheld holding” in *Rodriguez*, i.e., by overturning *Rodriguez* and its progeny and recognizing an implied positive right to education in the U.S. Constitution. As I have explored in detail elsewhere, there is no dearth of theoretical bases for judicial recognition of the right,77 and there are no insurmountable obstacles either to delineating the quality of education guaranteed by the right78 or to its enforcement.79

I have also proposed in other writings a formula for the quality of education that the right would obligate government to provide.80 No doubt, a workable and effective paradigm for the content of the right—the precise level of educational quality mandated—will require the study and input of many wise heads. However, this much should be borne in mind in the process: the right will be self-defeating if all that it guarantees is a low or mediocre quality of education. Only a right that aims high will comport with and further the promise of *Brown*. In overturning *Rodriguez*,81 the Court would help to save *Brown* and would fulfill the young poet’s assurance to Dr. Martin Luther King, Jr. that these “[d]reams can come true.”82

77. Id. at 574-630.
78. Id. at 637-40.
79. Id. at 640-41.
80. Id. at 637-40.
82. See *supra* note 1 and accompanying text.