WE "HAD A DREAM" IN *BROWN v. BOARD OF EDUCATION* . . .

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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[1]

Dr. Martin Luther King, Jr. articulated and brought to public consciousness his dream of a nation transformed "into a beautiful symphony of brotherhood"[2] based on racial equality[3] and social justice.[4] 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,[5] but also because of the initiative shown by the United States Supreme Court in *Brown v. Board of Education*.[6]

In *Brown*,[7] a unanimous Court struck down *de jure* racial segrega-

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1. William N. Meyrowitz, *His Dream* (Jan. 1996) (unpublished poem written by the author's eleven-year-old son, on file with author).

2. MARTIN LUTHER KING, JR., I Have a Dream Speech (Aug. 28, 1963), *in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 102, 105 (James M. Washington ed., 1992) [hereinafter I HAVE A DREAM].

3. *Id.* at 102-04. MARTIN LUTHER KING, JR., Speech on The Rising Tide of Racial Consciousness (Sept. 6, 1960) (abridged), *in* I HAVE A DREAM, *supra* note 2, at 64, 71; MARTIN LUTHER KING, JR., Speech Before the Youth March for Integrated Schools (Apr. 18, 1959), *in* I HAVE A DREAM, *supra* note 2, at 35, 35.

4. MARTIN LUTHER KING, JR., Letter From A Birmingham Jail (Apr. 16, 1963), *reprinted in* I HAVE A DREAM, *supra* note 2, at 84, 89-91; MARTIN LUTHER KING, JR., A Time to Break Silence Speech (Apr. 4, 1967), *in* I HAVE A DREAM, *supra* note 2, at 136, 149-50.

5. MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM *passim* (1958).

6. 347 U.S. 483 (1954).

7. This decision is commonly referred to as *Brown I* in contradistinction to a subsequent decision, Brown v. Board of Education, 349 U.S. 294 (1955) ("*Brown II*"), in which the Court undertook the task of fashioning a remedial response to the constitutional

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.[8] *Brown* made it untenable to argue that state authorization of racially "separate but equal"[9] schools is constitutionally justifiable.[10] 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."[11] 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.[12]

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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*.

8. *Brown*, 347 U.S. at 495. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

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.

10. *Brown*, 347 U.S. at 495.

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:
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> > "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[13] as well as a major step in the Court's social reform agenda.[14] Nevertheless, the expectations and aspirations naturally inspired by *Brown* have, after forty-two years, remained substantially unfulfilled.[15] Implementation of *Brown* has posed complex problems[16] and, no doubt, the shortfall may be attributed to many causes.[17] Ironically, one culprit has been the

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racial(ly) integrated school system."

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 rel.* 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).

14. MARTIN LUTHER KING, JR., Facing the Challenge of a New Age Speech (May 17, 1957), *reprinted in* I HAVE A DREAM, *supra* note 2, at 15, 18-19; ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST BROWN ERA 3-4 (1986); Louis H. Pollak, *The Limitless Horizons of* Brown v. Board of Education, 61 FORDHAM L. REV. 19, 19-22 (1992).

15. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 3-4 (1991); L. SCOTT MILLER, AN AMERICAN IMPERATIVE: ACCELERATING MINORITY EDUCATIONAL ADVANCEMENT 200 (1995); Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1001-03 (1994); Richarde W. Donelan et al., *The Promise of* Brown *and the Reality of Academic Grouping: The Tracks of my Tears*, 63 J. NEGRO EDUC. 376, 376-77 (1994); Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 643, 677-87 (1993); Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1285-86, 1289-91 (1992); Nathaniel R. Jones, Milliken v. Bradley: Brown's *Troubled Journey North*, 61 FORDHAM L. REV. 49, 49-55 (1992); Donald E. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 OHIO ST. L.J. 117, 117, 125, 136 (1987).

16. *See* Hayman & Levit, *supra* note 15, at 636-52; Jarvis, *supra* note 15, at 1285-87, 1303-04; Lively, *supra* note 15, *passim*; Robert A. Sedler, *The Profound Impact of* Milliken v. Bradley, 33 WAYNE L. REV. 1693, 1698-1702 (1987).

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.[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.'"[19]

While the *Brown* opinion is suffused with subtleties that have made its meaning a subject of much debate,[20] there can be no question that the decision invalidated state-imposed racial segregation of public

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amounts of "intergenerationally accumulated [familial] resources"); Rodney J. Blackman, *Returning to* Plessy, 75 MARQ. L. REV. 767, 776-77, 794 (1992) (suggesting that modern inequities in educating children stem from the fact that minority families are effectively trapped in economically depressed areas); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 608-13, 626 (1983) (assigning some responsibility for the failure to fulfill *Brown's* promise to the type of remedial decree issued in *Brown II*); Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863, 864-69 (1993) (blaming *Brown's* impotence on judicial frustration and impatience).

18. *See, e.g.*, Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 817-18 (1993); Hansen, *supra* note 17, at 867-69; Hayman & Levit, *supra* note 15, at 638-56; Jarvis, *supra* note 15, at 1285-86, 1289-91; Lively, *supra* note 15, at 125-27.

19. Robert A. Sedler, *Metropolitan Desegregation in the Wake of* Milliken - *On Losing Big Battles and Winning Small Wars: The View Largely From Within*, 1975 WASH. U. L.Q. 535, 543 (1975) (citations omitted). Professor Sedler writes: "The Supreme Court in *Brown* had proceeded upon the educational rationale that racial segregation was harmful to black children because it deprived them 'of some of the benefits they would receive in a racially integrated school system.'" *Id.* at 548 (quoting *Brown*, 347 U.S. at 494-95).

20. *Compare* Miriam P. Gladden, *The Constitutionality of African-American Male Schools and Programs*, 24 COLUM. HUM. RTS. L. REV. 239, 240-41 (1992-93) (arguing that *Brown* represents the formal abolition of apartheid in the United States and establishes the principle that African-Americans should not be disadvantaged in their education) *and* Hayman & Levit, *supra* note 15, at 636 (maintaining that *Brown* is a call to uproot racism and make the white majority less convinced of its own superiority) *and* Lively, *supra* note 15, at 118 (contending that a central point of *Brown* is to delegitimate racially identifiable schools because racial separation causes African-American children to feel inferior and thereby interferes with their educational opportunity) *with* Sedler, *supra* note 16, at 1693 (proposing that *Brown* invalidated all state-imposed racial segregation and the official structure of societal racism in the southern United States). Indeed, one commentator has observed with respect to *Brown*, that "[t]he lack of clarity as to which was the *ratio decidendi* . . . created the conditions in which later confusion would flourish." Brian K. Landsberg, *Equal Educational Opportunity: The Rehnquist Court Revisits* Green *and* Swann, 42 EMORY L.J. 821, 825 (1993). *See also* Mark Tushnet, *Public Law Litigation and the Ambiguities of* Brown, 61 FORDHAM L. REV. 23, 23, 28 (1992) (referring to the competing visions and consequent ambiguity inherent in *Brown*).

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.[21] 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.[22]

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*

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21. *See* Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1105-06 (1990); Gewirtz, *supra* note 17, at 588; Lively, *supra* note 15, at 117-19; Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1041, 1043 (1984); John M. Jackson, Comment, *Remedy for Inner City Segregation in the Public Schools: The Necessary Inclusion of Suburbia*, 55 OHIO ST. L.J. 415, 416 (1994).

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 Free Speech Clause 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

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23. *Brown*, 347 U.S. at 493 (emphasis added).

24. Commentators have not infrequently identified quality education as one of the rationales and aims of *Brown*. *E.g.*, David Chang, *The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process*, 63 B.U. L. REV. 1, 5, 8-9 (1983); Donelan, *supra* note 15, at 377; Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 774-75 (1986); Gladden, *supra* note 20, at 240; Jarvis, *supra* note 15, at 1287; James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 396 (1990); Lively, *supra* note 15, at 1287. *See* SALOMONE, *supra* note 14, at 201-02. *But see* Morgan, *supra* note 22, at 106-07 (asserting that the *Brown* Court did not refer to harm caused by inadequate education).

25. *Brown*, 347 U.S. at 493. *See* Beverley Anderson, *Permissive Social and Educational Inequality 40 Years After* Brown, 63 J. NEGRO EDUC. 443, 444 (1994).

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[27]--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.[28] The quality education provided "would equally enable"

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).

27. Prior to the U.S. Supreme Court's holding to the contrary in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), some state and lower federal courts construed *Brown* to signify that there is a fundamental positive right to education under the Federal Constitution. *E.g.*, Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 282-83, 285 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); Van Dusartz v. Hatfield, 334 F. Supp. 870, 874-75 (D. Minn. 1971); Robinson v. Cahill, 287 A.2d 187, 214 (N.J. Super. 1972). *See also* Chang, *supra* note 24, at 57-58 (stating that *Brown* treated education as a preferred constitutional value); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 117 & n.77 (1995) (observing that during the early 1970s, courts, in deciding educational financing cases, repeatedly relied upon *Brown* to find that education is a fundamental right triggering strict scrutiny under the Equal Protection Clause); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 238-39 (1991) (asserting that in writing the *Brown* opinion, Chief Justice Warren considered education to be a fundamental right under the U.S. Constitution).

28. *See* Chang, *supra* note 24, at 44-45; Liebman, *supra* note 24, at 377-78. *Cf.* SALOMONE, *supra* note 14, at 202-03 (contending that in order to operationalize the equality mandate of *Brown*, what is needed is understanding that "*equality for all* means *different or more is equal* for some"). In fact, the U.S. Supreme Court and lower federal courts have issued decrees in desegregation cases authorizing compensatory or remedial education programs as a remedy for *de jure* school segregation. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 279-88 (1977) ("*Milliken II*"); Oliver v. Kalamazoo Bd. of Educ., 640 F.2d 782, 787 (6th Cir. 1980); Morgan v. Kerrigan, 530 F.2d 401, 427-30 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Tasby v. Wright, 520 F. Supp. 683, 741-43 (N.D. Tex. 1981) *aff'd in part, rev'd in part*, 713 F.2d 90 (5th Cir. 1983); United States v. Board of Sch. Comm'rs, 506 F. Supp. 657, 671-72 (S.D. Ind. 1979), *aff'd in part, vacated in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); Liddell v. Board of Educ., 491 F. Supp. 351, 357 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981).

so as to furnish the condition precedent for each child, upon reaching maturity, to enjoy the nation's economic, political and intellectual vitality;[29] each child necessarily would be enabled only "within his or her innate potential" since no school can do more.[30] 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.[31] 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."[32]

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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.

32. *Brown*, 347 U.S. at 493.

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,[33] the breadth and depth of which have taken on disturbing proportions.[34] 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.[35] 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.[36] According to a 1993 study, twenty-five percent of high school seniors had a hard time deciphering their diplomas.[37] 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.[38] 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.[39] 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

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33. As to the existence of the crisis, see generally CHARLES J. SYKES, DUMBING DOWN OUR KIDS: WHY AMERICAN CHILDREN FEEL GOOD ABOUT THEMSELVES BUT CAN'T READ, WRITE, OR ADD *passim* (1995); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 551-52, 554-61 (1992); *but see* DAVID C. BERLINER & BRUCE J. BIDDLE, THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACK ON AMERICA'S PUBLIC SCHOOLS *passim* (1995) (claiming that, in large measure, the education crisis is a fiction manufactured for political purposes).

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."[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.[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."[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*.[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.[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.[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.[46] However, in order to successfully invoke strict scrutiny, plaintiffs were required by

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40. *Id.* at 16.

41. BERLINER & BIDDLE, *supra* note 33, at 218-19, 232, 260, 264-69; KOZOL, *supra* note 15, at 3, 23-39, 43-80, 83-115, 119-32, 137-74, 181-90, 198-205, 223-33. *See* Enrich, *supra* note 27, at 104, 124.

42. LANGSTON HUGHES, *Dream Boogie*, *in* SELECTED POEMS 221 (1987).

43. 411 U.S. 1 (1973) (5-4 decision).

44. *Rodriguez*, 411 U.S. at 4, 17-41, 47.

45. *Id.*

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.[47] 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.[48]

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.[49] The fact is that the Supreme Court has recognized an extensive array of implied rights over the years.[50] I have discussed elsewhere the *Rodriguez* Court's analytical approach in deciding whether to recognize a positive right to education under the Federal Constitution.[51] 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.[52] 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.[53]

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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.*

50. *See, e.g.*, NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982) (right of association); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (right to an open criminal trial); Jackson v. Virginia, 443 U.S. 307 (1979) (rights to a presumption of innocence and to demand proof beyond a reasonable doubt before being convicted of a crime); Zablocki v. Redhail, 434 U.S. 374 (1978) (the right to marry or not to marry); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (right to make one's own choice about having children); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (right to receive information); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel interstate); Afroyim v. Rusk, 387 U.S. 253 (1967) (right to retain American citizenship, in spite of commission of criminal activities, until expressly and voluntarily renouncing it); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); NAACP v. Button, 371 U.S. 415 (1963) (right to use the federal courts and to advise others to use them); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (right to hold one's own beliefs); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to rear children in accordance with parental values and beliefs).

51. Bitensky, *supra* note 33, at 564-67.

52. *Rodriguez*, 411 U.S. at 35.

53. John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 894 n.25 (1995). *See* Lively, *supra* note 15, at 128-29 & n.103. *Cf.* Sedler, *supra* note 19, at 561-62 (intimating that by giving preference to the interests of middle class suburban Caucasians in using their tax dollars for education of their own children, *Rodriguez* set the

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]

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stage for further desegregation decisions that would ultimately undercut the educational benefit protected by *Brown*). *But see* Chang, *supra* note 24, at 34 & n.112 (stating that a "performance - oriented interpretation" of *Brown* is "not inconsistent" with the *Rodriguez* Court's rejection of a positive constitutional right to education).

54. *See generally Rodriguez*, 411 U.S. at 35 (holding that there is no fundamental positive right to education under the U.S. Constitution).

55. Penelope A. Preovolos, Rodriguez *Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 75, 78-83 (1980).

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.

57. Papasan v. Allain, 478 U.S. 265, 285-86 (1986) (stating that the question of whether a fundamental constitutional right to education exists "has not yet [been] definitively settled"); Plyler v. Doe, 457 U.S. 202, 221 (1982) (taking the position that while "[p]ublic

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*")[58] 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.[59] 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.[60] 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."[61]

In *Milliken II*, the Supreme Court reviewed the decree resulting from the remand, which, in addition to ordering intradistrict student reassignments, included "educational sweeteners,"[62] *i.e.*, court-ordered educational compensatory or remedial programs.[63] Specifically, the Court approved of the trial court's "'remedial guidelines'"[64] 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.[65]

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education is not a 'right' granted to individuals by the Constitution. . . . neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"); *contra* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988) (noting that education has not yet been recognized as a fundamental constitutional right). For an analysis as to why the *Kadrmas* Court's pronouncement on the right to education is dictum, see Bitensky, *supra* note 33, at 570-73.

58. 418 U.S. 717 (1974) ("*Milliken I*"); *Milliken II*, 433 U.S. at 267.

59. *Milliken I*, 418 U.S. at 721, 732-36, 744-45, 752-53.

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.

63. *Milliken II*, 433 U.S. at 277, 279-88.

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 *Rodriguez*[67] 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

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the Detroit School Board. *Id.* at 278.

66. *Id.* at 280.

67. *Rodriguez*, 411 U.S. at 35. *See supra* notes 51-54 and accompanying text.

68. *Milliken II*, 433 U.S. at 275-77, 279-88; Preovolos, *supra* note 55, at 116.

69. *See* Paul R. Dimond, *The Anti-Caste Principle - Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, 47 n.176 (1983); Preovolos, *supra* note 55, at 116; Theodore M. Shaw, Missouri v. Jenkins: *Are We Really a Desegregated Society?*, 61 FORDHAM L. REV. 57, 60 (1992).

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 thoroughgoing 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;[73] racial bigotry has persisted in the education milieu and elsewhere;[74] controversial remedies for official school segregation, such as busing, have sometimes diverted attention from the task of improving educational quality.[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.[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

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to racial segregation. Consequently, these children may be relegated to racially separate and qualitatively unequal schools without the possibility of federal judicial intervention. KOZOL, *supra* note 15, at 201-02. *See* Sedler, *supra* note 19, at 561-62. If this analysis is sound, it should come as no surprise that *Milliken II*, as the second stage of the *Milliken* litigation, also has a regressive aspect.

73. ROBERT M. HARDAWAY, AMERICA GOES TO SCHOOL: LAW, REFORM, AND CRISIS IN PUBLIC EDUCATION 44-45 (1995); Liebman, *supra* note 24, at 358.

74. JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 23 (1984); KOZOL, *supra* note 15, *passim*; Derrick Bell, Brown *and the Interest-Convergence Dilemma, in* SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESEGREGATION *passim* (Derrick Bell ed., 1980); Gladden, *supra* note 20, at 243; Hayman & Levit, *supra* note 15, at 677-86.

75. Morgan, *supra* note 22, at 110-11. *See* Bell, *supra* note 74, at 100-01.

76. Bitensky, *supra* note 33, at 552-53, 632.

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 right[78] 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]

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77. *Id.* at 574-630.

78. *Id.* at 637-40.

79. *Id.* at 640-41.

80. *Id.* at 637-40.

81. The policy as well as legal bases for overturning *Rodriguez* are set forth in Bitensky, *supra* note 33 *passim*, and in Susan H. Bitensky, *Of Originalism, Reality, and a Constitutional Right to Education*, 86 NW. U. L. REV. 1056 *passim* (1992). *See also* Liebman, *supra* note 24, at 423 (noting that the Court might be persuaded to revise its *Rodriguez* ruling on education as a fundamental right). As it is, only a bare majority of the Justices supported the *Rodriguez* decision. *See Rodriguez*, 411 U.S. at 62-133 (Brennan, J., White, J., Douglas, J., and Marshall, J., dissenting).

82. *See supra* note 1 and accompanying text.