

The Tensions Between Integration and School Reform

by JOHN A. POWELL*

“Blacks have never been, and are not now, really considered to be citizens here.”¹

I. Introduction

All discussions of education are at essence discussions of citizenship. The Supreme Court has identified “the objectives of public education as the inculcation of fundamental values necessary for the maintenance of a democratic political system.”² More, these are discussions on the ability of members of all races to participate fully in democratic structures, and critiques of the formation and sustenance of racially just democratic structures. Molly Townes O’Brien has written that the efficacy of education could be measured by its capacity to “instill moral character, critical thinking ability, and cultural literacy,” but it is studied, instead, in terms of “standardized test scores, drop-out rates, or occupational attainment.”³ It is integration; in terms of not merely parity but in terms of the creation of a just space for the constitution of the self, education, and democracy; that must be the measure for the success of our schools. It may seem odd asserting that integration is the appropriate measure

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1. JAMES BALDWIN, *THE EVIDENCE OF THINGS NOT SEEN* 31 (1985).

2. Kevin Brown, *Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments*, 34 AKRON L. REV. 37, 59 (2000) (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 871-72, 876 (1982)).

3. Molly Townes O’Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 394-95 (1997) (citing JAMES S. COLEMAN & THOMAS HOFFER, *PUBLIC AND PRIVATE SCHOOLS* (1987); RAY MARSHALL & MARC TUCKER, *THINKING FOR A LIVING: EDUCATION AND THE WEALTH OF NATIONS* (1992); SOUTHERN EDUCATION FOUNDATION, *REDEEMING THE AMERICAN PROMISE: REPORT OF THE PANEL ON EDUCATIONAL OPPORTUNITY AND POST-SECONDARY DESEGREGATION* (1995)).

for educational success at a time when integration seems to be under attack and the major focus among educators seems to be educational reform. I believe this is a serious error whether one focuses on education or democracy.

In this article I will attempt to show why integration must continue to be a central focus for education and why the challenges to integration in general and the challenges waged by the reform movement in particular are misguided. I will examine and dissect the differing perspectives surrounding education discourse and the polarity that seems to be growing between the two major schools of thought surrounding the issues – those perspectives being the integrationist and reformist viewpoints.

In the second section I will attempt to contextualize school reform by first examining the importance of the symbiotic relationship that needs to exist between education and social justice. Next, I will discuss the history of education jurisprudence to demonstrate the ways in which citizenship and social justice for African Americans have been marginalized in respect to educational rights. And finally, I will look at how advocates have successfully been turning to state statutes and constitutions that guarantee an adequate education to students for relief. In the third section I will examine choice as an ideological concept and discuss how choice-based policies actually isolate low-income students of color⁴ from educational opportunity and undermine the goals of reformists and integrationists. In the last section entitled “integration” I will provide a definition for educational integration and clarify the terminology being used in discussion around this issue. I will elaborate on the need for even desegregation and equality in our schools, while suggesting that integration be a societal goal. In this section I will also review the implications for a radically integrated society of multiple school reform strategies. I will specifically look at separatist schools, accountability, standardized testing, tracking, neighborhood schools, educational choice programs, and charter schools. I will also touch on reform strategies that cooperate with desegregation.

In education discourse there is a growing polarity between those who might be called integrationists and those who might be called reformists.⁵ While the rhetorical tension between reformists and

4. Although this article focuses on African American students, the issues discussed here also affect other students of color, including Latino, Native American, and Asian American students.

5. The current trend is to move away from desegregation and view desegregation as

integrationists seems to be sharply drawn, largely by the reformists, the substantive divide is anything but clear. Although there is not one single position taken by integrationists or reformists, there are core tenets of each of these perspectives that will be helpful to explore in examining the tension between these respective educational camps.⁶

I see integrationists and reformists as divided into two camps. The first I will call the “modest integrationist.” This person takes a largely instrumental position, supporting racial integration primarily to produce a set of educational outcomes for the learner. This approach tends to be limited to education defined in a narrow sense such as the development of reading, math, and other educational skills. The goal of the modest integrationist is to achieve parity with non-minority students within these limited educational categories.

These outcome-oriented goals tend also to be bound up with input goals (i.e., insuring that minority students have the same resources or inputs that non-minority students have). The modest integrationist is focused on student outcomes, but at times the position requires a call for greater inputs for minority students in order to try to achieve the same set of outcomes had by non-minority students. The modest integrationist advocates for integration for largely instrumental reasons, believing that the political realities of our society are such that it is impossible to access and maintain resources for minority children short of integrated schooling. One

an oppositional measure to other school reforms. In 1999, school districts recently ending or phasing out their desegregation plans included: Buffalo, New York; Broward County, Florida; Mobile, Alabama; Minneapolis, Minnesota; Cleveland, Ohio; San Jose, California; Seattle, Washington; Wilmington, Delaware; and Charlotte, North Carolina. At the same time, school districts across the country are implementing school choice programs or reverting to neighborhood-based schools: Clark County, surrounding Las Vegas, Nevada; Nashville-Davidson County, Tennessee; Duval County, Florida. See William L. Taylor & Edwin Darden, *Guidance to School Boards on Race and Student Assignment*, INSIDE SCHOOL LAW, Vol. 1, Issue 1 (Winter 1999).†

6. It is clear that one could be both in favor of integration and reform, and some have called for both. Martha Minow has called for a building upon what she terms the last wave of equity reforms, including school desegregation, rather than a shift to reform qua reform. Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 259-260 (1999). But in the more polarized debate the claim for one is often framed in terms that are exclusive of the other. For example, Clint Bolick advocates parental choice over integration, arguing that with choice rather than race conscious policy, “we finally can deliver on the sacred promise of equal educational opportunities for all of America’s school children.” Clint Bolick, *Solving the Education Crisis through Parental Choice*, 11 STAN. L. & POL’Y REV. 245, 246 (2000) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) (stating that education “is a right which must be made available to all on equal terms”). It is this tension that I will focus on in this paper.

assumption made by modest integrationists is that those with resources, primarily whites, will not abandon a school in which a significant number of white students attend. This push for parity in outcomes also helps to drive the move toward greater reliance on standardized testing to measure the progress being made with respect to these outcomes.

The second group of integrationists is what I will call the “radical integrationists.” They support educational parity but believe that integration serves much broader educational values that transcend narrow skills such as reading and math. Radical integrationists believe that one of the principle goals of education is the creation of an effective citizenry and the opening of a space for a truly multi-racial, multi-ethnic society. This group believes that education has both an instrumental and a non-instrumental purpose. They believe that education, and particularly an integrated education, has intrinsic value and is constitutive of who we are, individually and socially. To this group, an effective segregated education is an oxymoronic concept.

Before moving on to a discussion of reformists, it is important to note that neither the modest nor the radical integrationist believes that integration is largely about assimilation.⁷ Assimilation, instead, is about the erasing of racial or ethnic difference, usually in favor of a dominant norm.⁸ Some have argued that both racial segregation and assimilation are predicated on the notion of white supremacy. Often the misplaced attack on integration is really an attack on assimilation; thus it is imperative to distinguish the two.

One goal of the many types of reformists is, like that of the modest integrationist, to achieve educational parity. They believe that this parity can be achieved by restructuring schools without addressing the racial or economic consequences of segregated schools. As a legal matter, reformists may accept the appropriateness of *Brown*,⁹ but as an educational policy matter may believe that, at

7. See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 636 (1992) (writing in a critique of the scholarship of Professor Wechsler on *Brown*, “to surmise that what blacks really sought in *Brown* was the right to associate with whites as opposed to the right not to be excluded from schools . . . exhibits a character of racial conceit that threatens to drown all substance”).

8. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1125 n.152 (1994) (stating that “the salient features of assimilation are that the members of ethnic groups . . . adopt the characteristics of the dominant culture and gain entry to its social institutions”).

9. See generally, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

best, *Brown* is irrelevant and, at worst, harmful. While not supportive of explicitly state-imposed segregation, reformists do not consider segregation, in and of itself, to be an obstacle to achieving educational goals. Rather, the emphasis is that efforts to integrate distract from the business of reform.

Reforms espoused by this group can take the form of vouchers, greater accountability through testing, charter schools, smaller class size, and/or changing the curriculum. Virtually all reforms reject the centrality of race and therefore racial integration in the schools. To reformists, at least rhetorically, race does not matter. Some who might be called modest reformists are willing to acknowledge that class might matter, or more specifically, that high poverty schools can create additional burdens for the learner. The more radical reformists reject this claim and insist that neither race nor poverty matter – only reform. In implementation, the reformists focus on the school. Occasionally the focus will extend to the family, but rarely, and not beyond the family to the structural forces that impact access to educational opportunity.

The reformists' position of the irrelevance of race resonates well with the current neo-conservative "colorblind" position. Drawing attention to race, except in a very narrow set of circumstances, is viewed as a distraction and even racist. Although not all reformists accept all aspects of the neo-conservative doctrine, like their conservative counterparts, they do reject the claim that a racially segregated school carries any significance.¹⁰ In fact, some would argue that it is racist to suggest that African American students need to have white students in the classroom in order to learn.¹¹ While this position has some appeal, at least rhetorically, it misses the underlying assumptions made by the radical and modest integrationists. Even the reformists who reject the claim that race still matters will often concede that economic segregation, or high poverty in schools, may not be a good idea. There are some reformists who argue that neither racial nor economic segregation carries significance if the school is willing to adopt the right reform strategies.

In this article I will assess the dominant ideologies and practices in education, and make both narrow practical claims as well as

10. For a discussion of the colorblind position see generally, Neil Gotunda, *A Critique of "Our Constitution in Color Blind,"* 44 STAN. L. REV. 1 (1991).

11. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (commenting that "[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior").

broader normative claims. I attempt to root my critique of education in legal history, data, and the exposure of privileging and subordinating structures.

Why not abandon this exercise and demand that the entire structure of education be toppled and constructed anew? After all, the evidence is in: the systems in place disadvantage low-income students of color, and open greater and greater opportunities to white students. What could possibly be preserved? It is important to recognize that advances toward educational parity have been made.

First, achievement gaps have narrowed considerably between African Americans and whites.¹² There is near equivalency between whites and students of color in high school graduation rates,¹³ and college attendance rates have risen dramatically for African American students.¹⁴

Second, sifting through history and contemporary reality could reveal to us structures that should survive. This is, in a manner, a toppling – but one that is deliberative of the path we have taken, what it has produced, and what we as a society should require of education.

A criticism I anticipate is that my call for a transformation of education into one that has radical integration as its goal and reform as its armature is idealistic and unrealizable. Even if this model of education is unobtainable, I would respond, if it functions as a regulative ideal and creates real improvements, it will have served the transformative mission.¹⁵ It may also provide a means of measuring our progress beyond the narrow goal of parity.

II. Contextualizing School Reform

A. The Purpose of Education

The goal of public education is not only to provide all children with a mastery of skills and knowledge, but to take them beyond that to full participation in society. Second, it must be acknowledged that

12. O'Brien, *supra* note 3, at 396 (reporting that the gap has narrowed in terms of reading, science, math, and SAT scores) (citing JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 36-38 (1994)).

13. STEPHAN & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* 190-91 (1997).

14. *Id.* at 192.

15. See generally RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983), for a discussion of how values, as regulative ideals that may not be achievable, can guide and be transformative.

public education is the primary mechanism for instilling our societal values. According to the Agency for Education in Democracy, schools are responsible for “[t]he enculturation of the young into the freedoms and responsibilities of a democratic society.”¹⁶ Schools must also provide a “deep and broad introduction into and preparation for participation in the human conversation.”¹⁷

Education is a forum in which justice, and not merely choice, is imperative. Neither equality in income, nor ability to pay for education translates into equality of educational access, attainment, or performance.¹⁸ Iris Young concurs, “Money continues to be a major discriminator. Middle- and upper-class children have better schools than poor or working-class children. Thus they are better prepared to compete for college admission. If by chance poor and working-class children qualify for college, they often cannot pay . . .”¹⁹

Edmund Gordon has written that an effective education and social justice, a too often disowned democratic ideal, are inextricably linked:

There may be some educational context/process relationships that are so symbiotic as to defy separation. It appears that education and social justice are so symbiotically related. In modern societies the achievement of universally effective education may not be possible in the absence of contexts in which social justice is valued and practiced. Similarly, the achievement of social justice may not be possible in the absence of achievement of universally effective education.²⁰

Since education is a highly important locus for personal development, and effective education cannot occur without social justice at the fore, we should ask what would result if justice were inserted into education. Can the ideas students have about race be changed if education is just? The answer is clear from research on school desegregation: students who are educated in an integrated environment are more likely to live in integrated environments as adults.²¹ This evidence shows that individual preferences are not pre-

16. John I. Goodlad, *Education and Democracy: Advancing the Agenda*, PHI DELTA KAPPAN (Sept. 2000), available at <http://www.pdkintl.org/kappan/kgoo0009.htm>.

17. *Id.*

18. See Emily Eakin, *The Intellectual Class Struggle*, N.Y. TIMES, Jan. 6, 2001, at A16-A18 (describing the academic work of Pierre Bourdieu).

19. IRIS YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 207 (1990).†

20. EDMUND W. GORDON, EDUCATION & JUSTICE: A VIEW FROM THE BACK OF THE BUS xii (1999).

21. Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational*

ordained; rather, that schools are a site of formation of the self and the choices made later on in life. That this is true of the self, the site of education, and perceptions on race has great significance for a new model of education and justice.

Even if one accepts the notion that choice does not function in the way that the rhetoric suggests, there may still be objection to having the state intervene in an area called private choice. Certainly under current Fourteenth Amendment jurisprudence, this would not necessarily support a cognizable equal protection claim. The arguments in favor of choice are not driven by Fourteenth Amendment jurisprudence, however. The proponents of choice are often making normative arguments related to issues of fairness and democracy, rather than legal arguments; but it is here that the claims are weakest.

As far as constitutional claims regarding private choice, there is a mistaken understanding of what is private. There is little consideration about how choices are formed and the interaction between government structures and private choice. This symbiotic relationship is probably nowhere stronger than in the creation of race and racialized choices.²² Even if choices were private, there is an argument that these choices reflect the badges and incidents of slavery and should be analyzed under the Thirteenth Amendment jurisprudence.

B. A History of Education Jurisprudence in the United States

To understand the ways in which the citizenship of African Americans has been limited, particularly in the context of educational rights, it is necessary to examine the history of the courts' engagement with the issues of access to educational institutions, broadly defined, and the negative impacts of the racially hierarchical nature of education on African Americans, particularly low-income African Americans.

This story is often told beginning with *Brown*, but it is more appropriate to begin the story with *Dred Scott*. This is because, although *Brown*²³ is often cited by the court for the overturning of

Interest? Evidence from Metropolitan Louisville, at <http://www.law.harvard.edu/groups/civilrights/publications/louisville.html> (citing A.S. Wells & R.L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, REVIEW OF EDUCATIONAL RESEARCH, 64 (4): 531-555 (1994)).

22. See Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717 (2000).

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

Plessy, this is too narrow a reading of *Brown*: it can also be read as the overturning of *Dred Scott*. The Court in *Dred Scott* was explicit that African Americans, slaves or otherwise, were not part of the American polity. In the land of the free, even free African Americans were unfree. There were no rights that whites were required to respect for African Americans. They were subordinated and subjugated. They were non-citizens. *Plessy* was a modification of this same logic. *Brown*, however, embodied a pledge on the part of the legal system to alter the systems that educate youth for citizenship – toward a racially just set of systems – indeed, a pledge to grant full citizenship to African Americans.

Though our schools today are the sites of greater equity than in the era preceding *Brown*, schools in this nation have never been truly integrated and are currently rapidly regressing to a state of racial and economic segregation. Equity is not justice. The segregation observed at present is a perpetuation of the denial of the right to the constitution of the self, education and, more largely, democracy, outside of a hierarchical and subordinating setting. When responding to racial segregation, the courts have largely condoned assimilation or striven for desegregation alone, rather than for a transformation of the system of education that radical integrationism calls for.

The Pre-Brown Era of Jurisprudence

In the early history of the United States, African Americans and other people of color were wholly denied citizenship. In *Dred Scott v. Sandford*, Chief Justice Taney stated:

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?²⁴

The Court held that black people were not citizens, and therefore had no rights under the Constitution, stating that a slave “could form no part of the design, no constituent ingredient or portion of a society based upon *common*, that is, upon *equal* interests and powers. He could not at the same time be the sovereign and the slave.”²⁵

Dred Scott was reconfigured in *Plessy*, but the position of the Court that African Americans should be subjugated to whites

24. *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1856).

25. *Id.* at 477.

strongly remained: a renewed statement about the very limited citizenship rights of people of color. *Plessy v. Ferguson* upheld the segregation of African Americans in “separate but equal” settings.²⁶

Writing for the majority, Justice Brown reasoned:

A statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.²⁷

To support this rationale, and to uphold segregation against challenges brought under the Thirteenth and Fourteenth Amendments, the Court relied in part on a Massachusetts Supreme Court decision upholding the segregation of public schools in Boston.²⁸ In that case, the court opined that the Fourteenth Amendment actually provided for separate but equal education systems, stating:

[W]hen this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.²⁹

This pronouncement of jurisprudential support for separate but equal educational systems in *Plessy* caused civil rights advocates to strategically alter their approach, by necessity of this legal framework to a focus on institutional parity rather than racial justice in education. From 1939 to 1954, civil rights activists focused their challenges on the allegedly equal status of legally segregated African American schools, calling for the enforcement of *Plessy*. One result of this tactic, and a demonstration of the willingness of whites to fund segregation, was that financing for African American schools in the South increased 800 percent.³⁰

26. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

27. *Id.* at 543.

28. *Id.* at 544 (citing *Roberts v. City of Boston*, 5 Cush. 198, 1849 WL 2756 (Mass.) (1849)).

29. *Id.*

30. MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA 1945-1990* 41 (1991).†

C. *Brown v. Board of Education* and the Early Movement toward Desegregation

The *Brown* cases, discussed in this section, exhibited a reversal in the approach of civil rights advocates, who targeted their efforts toward undermining the rationale behind keeping schools separate, having won for a time the battle over equality in funding

In the landmark 1954 decision of *Brown v. Board of Education*,³¹ the Supreme Court ruled that separate educational facilities did indeed provide unequal opportunities, finding against proponents of separate but equal schools. In overruling *Plessy*,³² the Court in *Brown* acknowledged that the psychological stigma of segregation deprived African American students of an equal education, stating that segregated schools are “inherently unequal.”³³ *Brown* can be seen as the first promise of full citizenship to African Americans. With a truly equal and integrated education, African American students would take a substantial step toward full and equal participation in American society. Moreover, students of all races, and our society itself, would benefit from a more fully realized democracy.

That this promise would not be kept, in any way truly transformative of education and other democratic structures, was apparent very early on. Education administrators, politicians, and the judiciary refused to accept the full meaning of the case and generally read *Brown* in its most narrow construction: as a command to make only slight reparations for the exclusion of African Americans from the very structure that would permit participation of African Americans in the shaping and construction of American society. In 1955, one year after their original decision in *Brown*, the Court in *Brown v. Board of Education (No. II)*, placed the implementation of the *Brown I* ruling in the hands of district courts, merely mandating that desegregation be done “with all deliberate speed.”³⁴ The Supreme Court subsequently refused to hear desegregation cases for eight years.³⁵

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

32. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

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

34. *Brown v. Bd. of Educ. (II)*, 349 U.S. 294, 301 (1955).

35. Positive federal legislation was enacted to contend with school segregation in 1964. Title VI of the Civil Rights Act authorized the federal Department of Justice and the Department of Health, Education, and Welfare to take action on school desegregation. The effect was observable with, between 1964 and 1966, the percentage of Southern black children attending desegregated schools rising by almost 10 percent, from 2.3 percent to 12 percent. See Civil Rights Act of 1964, §§ 601-606, as amended, 42

During the 1960s the Supreme Court critically examined undertakings toward fulfillment of the *Brown* promise of inclusive citizenship, giving particular scrutiny to the choice programs that had become pervasive in the post-*Brown* period: a presaging of the current tumult. In 1964, in *Griffin v. County School Board*, the Court determined that the deliberate speed mandate had proven ineffective.³⁶ In response to the protracted delays in Southern school desegregation, the Court stated that “[t]he time for mere deliberate speed has run out.”³⁷ Standing firmly behind the principle in *Griffin*,³⁸ the Court, in the 1968 case *Green v. County School Board of New Kent County*, disapproved what had become a favorite tool of desegregation avoidance in the South: “freedom-of-choice” programs.³⁹ These programs involved simply opening the doors of formerly segregated schools, though in reality not even the doors were opened, as discussed later in this article, because the actions of administrators, parents, and others at predominantly white schools prevented African American students from “choosing” the same schools that whites chose, thereby reifying the racially hierarchical state of public education.

The ostensible “open door” solution fails to meet nearly every criterion for a racially just educational system as espoused by the radical integrationist. Instead of creating a space in which students can self-constitute and give shape to education, the schools, by drawing African American students into a setting inscribed by white supremacy, would have created a program for assimilation. Additionally, this would have retained the white students in a supremacist structure. Were, instead, the schools and all families, in a participatory manner, to have examined the goals of education, the setting in which learning occurs, the tools of education, and the social and economic context of the students, and sought a transformation responsive to the need for racial justice, the radical integrationist would have found reason to support the effort.

Instead of permitting choice programs to foil efforts at

U.S.C.A. §§ 2000d to 2000d- 4a (providing that “no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance.”). See J. HARVIE WILKINSON, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 (1979).

36. *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964).

37. *Id.* at 234.

38. *Id.* at 218.

39. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968).

desegregating the schools, the Court in *Green* mandated that schools “convert to a unitary system in which racial discrimination would be eliminated root and branch.”⁴⁰

The 1970’s saw a conservative turn in the Supreme Court’s school segregation cases, simultaneous with the Nixon administration diminishing the strength of the federal government’s desegregation efforts.⁴¹ Exemplifying this turn was the 1973 case *Keyes v. School District Number 1*.⁴² There, the Court held that in school districts where no law mandated segregated schools, illegal *de jure*⁴³ discrimination could still be found if district policies and practices were intended to segregate the schools. By broadly interpreting “*de jure*” segregation to include intentionally segregative policies, rather than just explicitly segregationist laws, the Court in *Keyes* extended the duty to desegregate to many northern cities.⁴⁴ But in so doing, the Court forsook the opportunity to abolish altogether the distinction between *de jure* and *de facto*, or “in fact,” discrimination.⁴⁵ This more progressive move, advocated by only two justices filing separate opinions in *Keyes*, would have imposed on all segregated school districts the obligation to desegregate.⁴⁶

40. *Id.* at 438.

41. During the mid-1960s the Court had made desegregation a priority. By 1969, the new Nixon administration began to diminish the strength of desegregation efforts on the part of the federal government. In the summer of 1969, the Nixon administration announced that it would leave enforcement of desegregation orders to the courts, and would no longer avail itself of the power to enforce desegregation, by cutting off federal funding under the Civil Rights Act of 1964. This was a statement on the part of the administration that racially just participation in democratic structures would not be a priority, and this spurred major setbacks to the causes of both the modest and radical integrationists. Shifts in the judiciary began to spell disaster as well, due in large part to Nixon appointments to the Court. In his first term as President, Nixon had the opportunity to appoint four justices to the nine-member Supreme Court. Nixon’s first two appointees, Warren Burger in 1969 and Harry Blackmun in 1970, initially appeared willing to acquiesce in the Court’s pro-desegregation opinions. But the resignation in 1971 of Justices Black and Harlan, and their replacement with conservative Justices Powell and Rehnquist, marked a devastating turn in desegregation jurisprudence. See A. JAMES REICHLEY, *CONSERVATIVES IN AN AGE OF CHANGE: THE NIXON AND FORD ADMINISTRATIONS* (1981).

42. *Keyes v. Sch. Dist. (I)*, 413 U.S. 189 (1973).

43. *See id.* at 201.

44. *See id.* at 208.

45. *See id.*

46. It is significant that almost immediately after the *Keyes* decision, Colorado ended Denver’s liberal annexation powers. An amendment to the state constitution foreclosed any annexation after 1975 – just 2 years after *Keyes*. See Colo. Const. art. XIV § 3 (the “Poundstone Amendment”). This illustrates how closely tied housing segregation and the fragmentation of jurisdictions within a metropolitan region are to school segregation.

The failure of the *Keyes* Court to set the stage for confrontation of *de facto* segregation has profound relevance to the larger discussion of this article. This case disturbingly confirmed that whites were unwilling to accept and examine education as a forum for a racially just democracy, but were only willing to support reparations for explicit, clinically evidenced white supremacy, and only then in a narrowly distributive fashion. This was a lost opportunity for a declaration that systemic racism requires systemic and far-reaching transformation.

In *San Antonio School District v. Rodriguez*, also decided in 1973, the Court ruled that there is no federal constitutional right to an education and that the disparate distribution of school funding in Texas did not violate the Constitution.⁴⁷ This was another blow to efforts to advance racial and economic justice in education, and served as a tool for maintaining the isolation of racially and economically marginalized students.

The import of the *de jure/de facto* distinction set out in *Keyes* was demonstrated the following year when the Supreme Court, in a five-to-four decision in *Milliken v. Bradley*,⁴⁸ struck down the district court's order requiring interdistrict desegregation of Detroit and fifty-three surrounding suburbs. The Court ruled that cross-district desegregation measures could not be ordered unless it was shown that intentionally racially discriminatory acts of either the state or local officials were a substantial cause of the interdistrict segregation.⁴⁹ While this decision did not completely rule out metropolitan-area-wide desegregation efforts, it set a standard of proof that has since been met only twice, both times in metropolitan areas with only a few suburban school districts.⁵⁰

In 1991, in *Oklahoma City School Board v. Dowell*, the Court ruled that as soon as a school district achieves unitary status it may be released from its court-ordered desegregation measure, and there is no redress for any resultant *de facto* segregation.⁵¹ Here again the *de jure/de facto* distinction adopted in *Keyes* is important. Even though the end of busing after the *Dowell* decision led to a quick resegregation of elementary schools in Oklahoma City, there will be

47. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

48. *Milliken v. Bradley*, 418 U.S. 717 (1974).

49. *Id.* at 744-45.

50. *See Evans v. Buchanan*, 555 F.2d 373 (3d Cir. 1977); *Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976).

51. *Oklahoma Bd. of Educ. v. Dowell*, 498 U.S. 236 (1991).

no remedy for this segregation. Under *Keyes*, this resegregation, caused not by intentionally discriminatory policies but by a reversion to neighborhood schools, would likely be considered *de facto*, and therefore constitutionally acceptable.

Finally, in the 1992 case of *Freeman v. Pitts*, the Court no longer required a district to have all portions of its desegregation plan complete before releasing it from supervision.⁵²

D. Promising Jurisprudence

With the regressive shifts occurring in the federal jurisprudence, advocates have turned for relief to state statutes and constitutions that guarantee an adequate education to students. Adequacy suits not only reject the narrow federal jurisprudence but also breathe new life into Dewey's concept that education is about citizenship. In *Sheff v. O'Neill*⁵³ and a number of other cases, suburban whites have been members of the plaintiff class: if education is constitutive, then a segregated education not only marks minority urban students but white suburban students as well. As Toni Morrison has noted, we have acknowledged how our racist structures and histories have marked African Americans but little attention has been paid to how these phenomena have marked whites.⁵⁴ Adequacy suits provide a space for this.

Several cases outside of the adequacy sphere in the past few decades are remarkable in that the courts showed a cognizance of the link between racial isolation in education and patterns of residential segregation, or because the scope of the remedy ordered by the court demonstrated an understanding that only a metropolitan-wide desegregation scheme would effectively begin to address the problem. A resurgence in this type of judicial analysis and remedy-crafting is necessary to prevent further resegregation of the schools, and to open the door to more effective integration-oriented school reforms. That is, a satisfaction of the aspirations of reformists and integrationists.

Successful desegregation for decades was achieved in Charlotte, through the embrace of such broadly reaching remedies. In *Swann v. Charlotte-Mecklenburg*, after finding that segregated residential patterns in the city and county resulted from federal, state, and local government action, a unanimous Court authorized district courts to employ a variety of remedial tools as they oversaw the desegregation

52. *Freeman v. Pitts*, 112 S.Ct. 1430 (1992).

53. *Sheff v. O'Neill*, 678 A.2d 1267, 1271 n.3 (Conn. 1996).

54. See TONI MORRISON, *PLAYING IN THE DARK* (1992).†

process, including: the adoption of express racial goals for the student population in each desegregating school, as well as for faculty and staff racial ratios; the “pairing” of neighborhoods within a school district to meet desegregation goals; and busing.⁵⁵ This first busing program in the nation caused Charlotte to become one of the most thoroughly desegregated school systems.⁵⁶

In the companion case, *North Carolina State Board of Education v. Swann*, the Court unanimously struck down North Carolina’s anti-busing law, which had forbidden any assignment of school children by race.⁵⁷ Writing for the Court, Chief Justice Burger described race-conscious student assignments as an essential tool to fulfill “the promise of *Brown*” and rebuffed North Carolina’s contention that the federal Constitution required “colorblind” student assignments.⁵⁸

Another important case is *Liddell v. City of St. Louis*,⁵⁹ because the court considered the effect of patterns of residential segregation on school segregation, and recommended a remedy that addressed the relationship between the two. The court wrote that governmental actions had “intensified racial segregation”⁶⁰ and, accordingly: “It is critical that future actions in the housing area of all governmental bodies, federal, state and local, facilitate and not hamper school desegregation.”⁶¹

The vast majority of cases do not evince an understanding of the ways in which political fragmentation creates segregation and undermines democracy.⁶² *Sheff* again, is an exception. In *Sheff*, the Connecticut Supreme Court held that the state constitution guaranteed the right to a substantially equal educational opportunity

55. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

56. See Davison M. Douglas, *The Quest for Freedom in the Post-Brown South: Desegregation and White Self-Interest*, 70 CHI-KENT L. REV. 689, 694 (1994).

57. *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971).

58. *Id.* at 45. However, the desegregation mandate that resulted from *Swann* was largely undone by the court in the 1999 *Capachione* case. The court found that the school district had met the goals of the desegregation mandate and could be declared unitary. Neighborhood-based student assignment is planned for the 2001-2002 school year. The district court enjoined the Charlotte-Mecklenburg board from using racial criteria in making student assignments, even if the school board believes such a course is necessary and desirable to promote racially and ethnically heterogeneous public schools.

59. *Liddell v. Bd. of Educ.*, 491 F. Supp. 351 (E.D. Mo. 1980).

60. *Id.* at 358.

61. *Id.*

62. For a good discussion and empirical showing of the relationship between political fragmentation and school segregation, see DAVID RUSK, *CITIES WITHOUT SUBURBS* 35-38 (1993).

and that the de facto segregation in the public schools in Hartford deprived students of this opportunity.⁶³ Crucial to the judgment was the fact that municipal and school district lines were identical by statute. This districting statute was called the single greatest contributor to segregation in the opinion. At the time of the suit, the districting statute had left fourteen of Hartford's twenty-five elementary schools with a white enrollment of less than two percent. By considering the fragmented design of the metropolitan region, the court in *Sheff* was able to ascertain the engine behind the segregation and design the appropriate remedy.⁶⁴

These cases are exceptions to a generally very limiting jurisprudence.

III. Confronting Choice

In this section of the article, I examine choice as an ideological construct. As such a construct, in the current discourse on urban education and low-income students of color, I will assert, it is a vehicle for the isolation of low-income students of color, and undermines the goals of reformists and integrationists. It may be tempting to simply disarm choice. After all, choice is merely decision making.⁶⁵ Considered only as such, it could be the banner waved by conservatives or progressives. Who would object to a framework for participation in democratic structures? But it is not useful to simply dismiss or embrace choice. Instead, I will interrogate the way we use and think about choice in a given reality. The problem then that I am confronting is not choice in an abstract sense but the particular way that choice is used in a particular context. I will attempt to problematize and demystify choice not in a general sense but in the way it is used in our current discussion of integration and reform. Choice appropriately understood and contextualized has a certain but only limited value in our societal pursuit of a racially just and viable

63. *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

64. Note that the court directed the legislature to take appropriate actions to remedy this. The legislature responded with An Act Enhancing Educational Choices and Opportunities of 1997, establishing an array of interdistrict programs and voluntary student transfers in Hartford and its suburbs. The State Department of Education was charged with creating a five year plan to reduce fiscal disparities and racial isolation in the schools, and has implemented several components to date, the efficacy of programs which is hotly contested.

65. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 461 (1992) (finding that scholarship on public choice is "prone to focus on abstract features of political decisionmaking").

democracy.

Choice is presently constructed in this society as an unfettered good. As such, we implicitly assume that the more choice the better, and that a world with unlimited choice would be ideal. Choice is also seen as an individual act based largely on personal preference unmediated through social space and institutions. Therefore, autonomy is closely associated with choice. This view of choice would also make discussion of other values such as justice and equality unnecessary. That is, whatever is produced by choice is necessarily good. This view of choice is used in our society as a justification for continued racial subjugation and to obscure the way in which structure and systems reproduce racial inequality in our schools and larger society.⁶⁶ As long as the present arrangements are a production of these private choices, they are fair. But this notion of choice advances neither justice nor democracy in the larger context, nor parity in the more narrow context. At a more abstract level, a notion of choice that is not mediated through social practices and structures and that is unlimited is simply incoherent. Such a concept of choice is therefore not only not desirable, it is not possible.

Most reformists adopt this rhetoric of choice, which suffers from a number of flaws. One flaw operates at a conceptual abstract level. As asserted above, the choice advanced by many of its popular supporters simply does not and cannot exist. The second flaw follows the first. Because choice and the preferences it is related to are seen as natural, there is an inadequate examination as to how choice and related preferences come into being. Examination of this flaw has been developed by some of the critics of public choice theory but remains outside of the popular reformist discourse on choice. The failure to understand the relational nature of choice and how it is exercised in a social context is a flaw. This last error will be examined more closely below especially in the context of racial hierarchy and educational structures.

Choice is offered in our society as having both intrinsic and instrumental value. The assumption is that the more choice one has, the more free and good our society will become. This value is seen as attached to the individual and reflecting natural preference. But as we look at choice, it becomes clear that choice in a social environment such as education is often about a set of relationships and power that must be justified by other norms. The failure to

66. For a discussion of this matter, see Deval Patrick, *Forum: In Pursuit of a Dream Deferred: Linking Housing and Education*, 80 MINN. L. REV. 743 (1996).

contend with this will not only undermine many of our important democratic norms, but also will obscure the fact that unfettered choice will eventually turn and consume itself.

Choice has a particularly suspect history in the school context. Choice was used after *Brown* as many southern school systems tried to avoid the reaches of *Brown*, maintaining the subjugation of African Americans under various choice schemes.⁶⁷ Certain federal courts responded, demonstrating a clarity that is often lacking in today's discourse of choice, by not permitting choice to excuse continued racial subjugation. As federal district court Judge Wisdom wrote, "[e]ach of these laws, whether its objective was obvious or nonobvious, was designed to provide a state-supported sanctuary for white children in flight from desegregated public schools."⁶⁸

At that time, the Supreme Court similarly insisted on looking at both the impact on desegregation of the plans offered by the various school systems⁶⁹ and the relational nature of the choice to be exercised. The Court required an analysis of the relative choices available to African American and white children historically and contemporaneously.⁷⁰ The Court noted that while choice exists formally, it might nonetheless not exist in fact.⁷¹

'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end – the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action necessary to create a 'unitary, nonracial system.'⁷²

The racialization of choice caused the Court to reject choice plans adopted by southern school districts after *Brown*.⁷³ The choice

67. For a description of these maneuvers, see O'Brien, *supra* note 3, at 355-91.

68. O'Brien, *supra* note 3, at 386-87. (citing *Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833, 834 (E.D. La. 1967)).

69. See, e.g., *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968) (rejecting a "freedom of choice" plan where the effect was the perpetuation of racial segregation).

70. *Id.* at 432-33, 435 (analyzing the history and pervasiveness of segregation in the district as well as the impact of the choice plan on school demographics).

71. *Id.* at 434 n.2 (citing 45 C.F.R. § 181.54 (1967) that, according to Department of Health, Education, and Welfare regulations, "'freedom-of-choice' plans are among those considered acceptable [in the desegregation process] so long as in operation such a plan proves effective [in desegregating schools]") (Brennan, J.).

72. *Id.* at 440 (quoting the concurring opinion in *Bowman v. County Sch. Bd. of Charles City County*, 382 F.2d 326, 333 (4th Cir. 1967)).

73. See, e.g., *Monroe v. Bd. of Comm'rs of the City of Jackson*, 391 U.S. 450, 457

plans offered today suffer from similar limitations. Today, however, with few exceptions, there is scant meaningful examination of school choice in relationship to issues of racial justice.

Dorothy Roberts is one of the few scholars to challenge the rush to supplant justice with choice. She describes the hierarchical relationship between liberalism and justice as the "priority paradigm,"⁷⁴ asserting in particular that the hierarchy protects personal liberty at the expense of justice:

The priority paradigm . . . rests on the inherent assumption of liberal philosophy that privileging individual autonomy over social justice is essential to human freedom. The primacy of liberty, which shifts the burden of persuasion to those seeking to limit individual choice, does not allow for the possibility that other concerns might have equal constitutional or moral importance. Liberals require the state to remain neutral as to competing conceptions of value and human relationships so that each individual is free to choose her own moral understanding of justice. While government neutrality protects citizens against imposition of state orthodoxy, it also means the definition of liberty must set aside certain claims to substantive equality.⁷⁵

Roberts argues that the priority paradigm successfully cloaks the fact that individual preferences and decisions are not autonomous, but are made within and tied to power structures:

The priority paradigm rests on the belief that individuals' choices are purely personal, in the sense that they reflect only individual desires, fulfill the individual's unique meaning of self, and benefit the individual alone. This view, however, masks how whites' personal choices often are connected to oppressive social structures and constitute an exercise of power. Thus, liberalism's professed commitment to personal liberty turns out to safeguard massive institutional inequality.⁷⁶

(1968) (rejecting choice plan that failed to alter demographics in Tennessee school district); *Raney v. Bd. of Educ. of the Gould Sch. Dist.*, 391 U.S. 443, 446 (1968) (holding similarly in an Arkansas school district).

74. Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363, 366 (1996).

75. *Id.* at 370 (citing Dorothy E. Roberts, *Social Justice, Procreative Liberty, and the Limits of Liberal Theory: Robertson's Children of Choice*, 20 L. & SOC. INQUIRY 1005 (1995); John A. Robertson, *The Rightness of Rights Analysis: A Response to Dorothy Roberts*, 20 L. & SOC. INQUIRY 1022 (1995); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989)).

76. *Id.* at 374-75 (citing, for a critique of the liberal concept of the individual, MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988)).

Further, the preferences enabled by a choice framework are not those of a fixed, monolithic individual—this individual does not exist, nor do preferences truly exist outside of a social and political frame.⁷⁷ “The possibility that private preferences ought, at least in some circumstances, not to be regarded as autonomous thus has powerful implications”⁷⁸

This is also true to an extent for whites. That is, all of our choices, including those of whites, are necessarily constrained. This constraint is a function of our individuality and social being. Limited choices or constraints are a function of the nature of our physical and mental world. The nature of the world constrains and constitutes us. To be physical and mental beings in a real sense is difficult if not impossible to imagine without constraints. So the challenge to constraints or limited choice must be particular, of a particular nature, and not counter to constraints generally. In addition to this more global challenge, we are also limited in our choices because of our relationship to each other and because of scarcity.

If one person chooses something of a limited nature, then others’ choices are immediately constrained. Similarly, if one person chooses something of a relational nature, then others are constrained. Thus it is not that whites live in a world with unlimited choices while African Americans and other minorities live in a world without choice. Rather, the choices that each group makes are limited in a hierarchical and racialized way.

Whites use their power to prioritize their choices as white in a hierarchical relationship to people of color. Institutions and practices such as the drawing of jurisdictional boundaries are used to reflect this power. Part of the power of white preference is to cast this racialized arrangement as neutral and invisible. To challenge this practice would be to challenge the norm, or the status quo, and so preferences are unquestioned and privileged.⁷⁹ Institutions and

77. What implication does this further suggest in reference to the social and political frame of the United States when whites attain power by exercising their preferences, but people of color do not? I am not talking about individual whites but whites collectively. Whites are preserving their accumulated material status and political power by participating in these structures, while African Americans do not have access to the structures that have benefited and continue to privilege whites, such as wealth structures and the political process.

78. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1137-38 (1986).

79. Roberts, *supra* note 76, at 381 (citing Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992); Mari J. Matsuda, *Voices of America: Accent, Anti-Discrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J.

practices in society are designed to be responsive to white preference and to frustrate African American preference.⁸⁰ This invisibility allows preferences to persist and be fortified, not simply in their being exercised by whites, but also because it is difficult for those seeking justice to mount an attack against an invisible enemy.⁸¹ These arrangements are not simply the reflections of white power and choices but also produce white choices and power.

Even if the racialized nature of structures were made visible and individuals making choices were equipped today with equal material and political capital, the choices of African Americans would continue to be more constrained by whites' choices. This is because there is a "logic" to the institutions that serve whites and disserve African Americans and other minorities – a logic that extends beyond capital resources.⁸² This is the basis of a call for transformation of the institutions and structures rather than a demand for distributive or instrumental justice.

But what are white choices? Because choices are relational, white choices are as much about non-whites as about whites. When whites decide to leave a school system, they often attempt to make the choice not just about leaving a particular system, but distancing themselves from African Americans. To effectuate such a choice, black choice must be constrained in relationship to white choice.⁸³

Whites may refuse to attend formerly black schools because their community's history of school segregation has led them to expect that a "white" school is their proper place. Even though blacks retain the opportunity to attend a white school and

1329 (1991)).

80. Bell, *supra* note 7, at 898-99 (noting that institutions do not positively respond to black interest if it is in conflict with white interest) (referring to work by Professor Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-53 (1978)).

81. Sunstein, *supra* note 80, at 1166 (describing the complexities of choice when knowledge is absent).

82. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1850 (1994) (describing how the logic of geographic segregation will continue to harm blacks even if income parity with whites is achieved). On the logic of institutions, see generally, Lopez *supra*, note 23 at 1717. See generally, DALTON CONLEY, *BEING BLACK, LIVING IN THE RED* (1999) for a good discussion of how wealth rather than education or occupation reproduces racial inequality. It is important to note that because of the group nature of segregation, the disadvantage to blacks and the advantage to whites does not occur primarily at the individual level. For a discussion of the racialized state of high poverty schools, see Gary Orfield & John T. Yun, *Resegregation in American Schools, A Report of the Civil Rights Project*, (1999) available at <http://www.law.harvard.edu/civilrights/publications/resegregation99.html>.

83. RONALD DWORKIN, *LAW'S EMPIRE* (1988) (theorizing on choice and constraint).

receive a less segregated education, as long as whites refuse to attend previously black schools, the black schools will remain all black, and black children will be able to secure a less segregated education only by choosing to change schools and being unequally burdened⁸⁴

Nancy Denton has argued that self-segregation is not free choice, that it is more often a retreat from a society that demonstrates hostility to African Americans through discrimination.

'Voluntary' implies a free choice between at least two options, without compulsion or obligation; it connotes a positive choice. Thus, the issue is not whether some blacks prefer to live in all- or mainly-black neighborhoods . . . Rather, the issue is really whether such a 'choice' can be called voluntary if it results from a need to escape racism and racists.⁸⁵

I would question whether there is ever such a thing as free choice to be exercised by anyone. This phrase suggests a misunderstanding of the nature of choice or a different understanding of true choice. It may be that the problem with the choice made available to whites and African Americans in the housing context described by Professor Denton is that there is a relational nature to the choice given African Americans and whites, and the choices are hierarchically ordered.

What I have argued thus far is not an attack on choice. Rather, it is an attempt to release choice from an unworkable, idealistic liberalism. In order to make choice workable, we must have a better understanding of what choice means and how and why it necessarily constrains even as it grants one some degree of autonomy.⁸⁶ It is also necessary to contextualize choice: by placing the construct within an understanding of its past and persistent harms to people of color, particularly those economically as well as racially marginalized. "If . . . preferences of these various sorts were changed through a collective process of discovering and countering the distortions that underlie them, it would be proper to say that freedom was promoted rather than undermined as a result."⁸⁷

This contextualization should not be limited to education, but should envelop the full web of opportunity-granting and -denying

84. Paul Gewirtz, *Choice in the Transition: Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 745-46 (1986).

85. Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 808 (1996).

86. JUDITH BUTLER, BODIES THAT MATTER 223-30 (1993) (contending with choice, autonomy, constraints on choice, and structural dynamics).

87. Sunstein, *supra* note 77, at 1136 (citing, generally, RICHARD B. BRANDT, A THEORY OF THE GOOD AND THE RIGHT (1983)).

structures, such as residence. Nancy Denton exhorts this contextualization in a critique of the separatist position:

Comparing all-white to all-black neighborhoods to justify why segregation might be good thus ignores the social context in which segregated neighborhoods were created and persist. The comparison would only be valid in a society with equitable power distribution across the races and no racism – hardly a description of contemporary United States society. This is not to say that all-black neighborhoods are intrinsically bad, but rather to point out that all-black neighborhoods, because of the social context of the white power structure in which they are embedded, face a harder time in gaining equitable resource allocation than all-white ones. Those who assert that all-black neighborhoods are justifiable can make logical and even compelling points. However, the separatist position – like the argument that segregation is due to individual choice – ignores the practical and historical facts of racism, power, and economic domination.⁸⁸

If the public dialogue around choice were to shift toward such an exposure of privileging and subordinating structures, gains could likely be made. Amartya Sen has written, “particular importance has to be attached to the role of public discussion and interactions in the emergence of shared values and commitments.”⁸⁹ If public discussion is reformed, it follows that decisions made by individuals within a choice setting will be formed by that public discussion. It is conceivable, then, that the result would be more equitable decision making, even if, as Sen cautions, “we tend to react to one another’s views sometimes with a compromise or even a deal,” because “a workable solution can be based on the contingent acceptance of particular provisions, without demanding complete social unanimity.”⁹⁰

Salvaging choice requires going beyond a reparations or distributive approach and to the adoption of a model of choice that maximizes the ability of subordinated groups to fully participate in society in a constitutive and distributive manner.⁹¹ This would likely transform the institutions as well as the things to be chosen and those

88. Denton, *supra* note 87, at 810.

89. AMARTYA SEN, DEVELOPMENT AS FREEDOM 253 (1999).

90. *Id.*

91. john a. powell, *Worlds Apart: Reconciling Freedom of Speech and Equality, in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* 340-41 (Laura Lederer & Richard Delgado eds., 1995) (arguing that the most important right is that of participation); see also YOUNG, *supra* note 20 at 91-95 (discussing participatory and distributive reforms to democratic structures).

making the choice.

Roberts suggests that liberty should be preserved because it is an important principle in promoting racial equality. She calls for a reconstruction of the notions of liberty and equality: "A critical aspect of this vision is an understanding of liberty and equality that accounts for group oppression. Once we understand liberty as requiring the eradication of oppressive structures rather than opposing these changes, it makes no sense to prioritize liberty over equality."⁹²

What form could policies attendant to reconstructed notions of choice, preference, the non-autonomous individual, and power take in education? Systemic reform is needed in the place of individualized reform, and must safeguard against white supremacy rather than reflect it by forcing a choice of segregation or assimilation:

Because of the nature of the past discrimination, effective remedies for individuals cannot be furnished by purely individualistic solutions such as letting students choose their schools one-by-one; individualistic solutions misunderstand the remedial right. A black child's remedial right is not a right to attend the previously white school; it is a right to attend a desegregated school – an institution that is not racially identified, an institution whose attendance patterns do not reflect the regime of past de jure segregation, an institution that is not an element of a segregated system. That individual right simply cannot be fully achieved in isolation from what happens to other children: the effectuation of individual rights requires coordinated systemic action.⁹³

Even if racialized choice could be removed from this choice model, which is highly doubtful, there are still reasons to believe that such a model would not be consistent with fairness and democracy. The way that we discuss choice assumes educational resources are commodities.

As a commodity, education can be bought; this is manifested in the choice paradigm in which the highest bidder (i.e., the parent with the greatest resources to investigate and select a school for the student) gets the best school and others (i.e., the parent lacking the time, or other social capital, other resources, and education) are left with the "choice" of a struggling school.

92. Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363, 403-04 (1996).

93. Paul Gewirtz, *Choice in the Transition: Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 751 (1986).

The notion of education as a commodity is also reflected in distribution-based reforms. Because ascribing the character and mechanisms of a commodity to education ultimately fails low-income students in general, and low-income students of color in particular, while keeping white students in the machinery of supremacy, this framework is unsuitable and unjust. The choice model employed in today's discourse makes a mockery of equal opportunity and undermines the human capacity of millions of American children. It is imperative to replace this framework with one in which education is understood to be a social good rather than a private commodity, as well as a site of constitution of the self,⁹⁴ and a vehicle for racial and economic integration.

We must reject a model of choice advocated by many reformists that mischaracterizes choice as unfettered, that conceives of choice being exercised by the individual, and that envisions only distributive goals for participants. A new model of choice would view education as a public good. It would be constructed around choice as a matter not just in the abstract, but in reality and as relational. Specifically, a new model would conceive of choice in terms of ability to participate, not only in terms of social resources but also in terms of the constitution of our society and ourselves. If all families are provided a list of schools that they can send their children to, but only half of those families in fact have the capability of accessing those schools, the model is unjust. However, if the model contemplates capability to exercise choice, it will move us closer to a just result.⁹⁵ But even this approach still ignores the constitutive role of collective participation. If parents and students were allowed to meaningfully participate in the creation of school and educational goals and practices, they would have a different set of choices than the ones presently available to them. Since the capability to exercise choice is racialized, the model should deliberately and explicitly contend with race. This would be the first step on the path advocated by the group I have referred to here as radical integrationists.

94. See *supra* text accompanying section II. A., The Purpose of Education (describing education as an important locus of personal development, racial and cultural identity and attitudes, and internalization of societal values).

95. See generally, SEN, *supra* note 91.

IV. Integration

A. Integration and Even Desegregation

Before turning to the continuing need for educational integration and integration-cooperative reforms, it is important to clarify terminology. Segregation is racial, ethnic, and/or socioeconomic homogeneity of schools. Desegregation has come to mean numeric balance of racial and ethnic groups within a school – as it was originally intended, it was a broader term that encompassed elements of what I will now call integration. In the words of Martin Luther King, Jr.:

Although the terms desegregation and integration are often used interchangeably, there is a great deal of difference between the two. In the context of what our national community needs, desegregation alone is empty and shallow. We must always be aware of the fact that our ultimate goal is integration, and that desegregation is only a first step on the road to the good society⁹⁶

Educational integration is the systemic transformation of a school to create a diverse and inclusive environment within the school and the curricula, achieved through a variety of reforms. Importantly, integration is not simply a goal in terms of the schools in which students learn as a static site, but requires a transformation of the setting in which the identities of students are formed and form others. This is a deeper sense of integration. Edmund Gordon has written that we all operate on multiple cognitive levels, and require plurality in our thinking in order to reach full participation in society – this is the idea of integration of the mind:

[This] refers to the increasing demand that learners develop multiple competencies, some of which . . . apply generally while others will [apply in more] idiosyncratic settings. All of us find ourselves increasingly in situations where we must meet other than indigenous standards. Thus it is required that we become multilingual, multicultural, multiskilled, and capable of functioning in multiple environments and settings. So, while education is influenced by and must be responsive to the differences with which learners enter the educational system, the exit characteristics of its students must reflect the pluralistic demands of the society in which they live.⁹⁷

96. MARTIN LUTHER KING, JR., *THE ETHICAL DEMANDS FOR INTEGRATION* (1962).†

97. GORDON, *supra* note 21, at 49.

Integration is sometimes confused with assimilation, which forces a conformity to dominate white culture upon minority students. The integration that others in the radical integrationist camp and I are calling for requires a transformation of these privileging and subordinating structures and should not produce assimilation.

The Need for Even Desegregation Continues

A new model for justice and education requires a rejection of a distributive approach. But it is meaningful that we as a society have not even achieved distributional equality in the schools. That is, neither the calls made by the most modest integrationists nor reformists have been answered. Pertinent data on this failure are offered in this section. Students of color historically have suffered lower academic achievement and depressed life opportunities as compared to white students when they are educated in segregated environments. This conclusion was central to the *Brown* decision, and remains true today: children in racially isolated, high-poverty urban schools face myriad challenges that middle-class suburban children do not face, including substandard or deteriorating facilities, larger demands made on fewer resources which forces the cutting of so-called non-basic opportunities, racial isolation, concentration of poverty, and fewer familial resources.⁹⁸

A profound contributing factor to school segregation and racial and economic inequities generally is housing segregation, but we have not effectively addressed this connection as a society. Housing and school segregation are inextricably linked; the largest central city schools serve an increasingly non-white and poor population, reflecting the housing segregation in these cities. Cities like New York, Los Angeles, and Chicago have schools that have at least 85% students of color. Cities like Detroit and Washington, D.C. serve virtually no white students.⁹⁹

As a result of our failure to acknowledge the forces driving school segregation, and the implications for educational opportunity of school segregation, public schools are resegregating. Between 1980 and 1997, the number of African American students who attended majority white schools declined from 37.1 percent to 31.2 percent. In

98. Emeral A. Crosby, *Urban Schools: Forced to Fail*, PHI DELTA KAPPAN, (Dec. 1999), available at <http://www.pdkintl.org/kappan/kcro9912.htm>. See also Institute on Race and Poverty, *Student Voices Across the Spectrum: The Educational Integration Initiatives Project* (May 2000) (copy on file with the author).

99. Orfield & Yun, *supra* note 84.

the South, after showing improvement for over 20 years, the number of African American students attending majority white schools began declining rapidly from 43.5 percent to 36.6 percent between 1988 and 1994. The number of Latino students attending majority white school declined from 45.2 percent to 25.2 percent between 1968 and 1997.¹⁰⁰

Concentrated poverty that arises along with residential segregation brings with it additional impediments. Schools with high levels of low-income and minority students suffer more intensely the inadequacies many school reforms purport to address, such as parental involvement and poor student performance. And the schools are less equipped to respond to the needs of these students; these students are more likely to experience a fragmented curriculum, large classes, and low teacher expectations.¹⁰¹

The education of students in high poverty and racially isolated schools is hindered by the effect of poverty on their families' ability to provide an educationally supportive environment. There is agreement that in both schools and in the larger society education must be valued and encouraged for all children.¹⁰² Families, communities, and schools must provide learning environments that are supportive and inclusive. But this is nearly impossible to achieve when communities and schools are overwhelmed by poverty.

The Benefits of Desegregation Mandate the Embrace of a New Model

As mentioned earlier in this article, there is disbelief surrounding whether the efforts that have been made in this nation to democratize education through desegregation actually worked. This disbelief fuels the position of certain reformists who would abandon desegregation efforts wholesale in favor of colorblind reforms. Understanding that desegregation has produced both student outcome and societal benefits is imperative to the mission of both the modest and radical integrationists, and should serve to correct misapprehensions on the part of reformists. Data on these impacts are provided here.

The positive effects of desegregation in the schools start with the students but permeate far beyond the immediate environs of

100. *Id.*

101. Harvey Kantor & Barbara Brenzel, "Urban Education and the 'Truly Disadvantaged': The Historical Roots of the Contemporary Crisis, 1945-1990" in *The "Underclass" Debate* (1993).†

102. Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome?*, 43 DEPAUL L. REV. 1, 5 (1993) (citing JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL 31 (1978)).

students.¹⁰³ Students of color “who attend more integrated schools have increased academic achievement and higher test scores.”¹⁰⁴ These increases have been credited to, among other factors, better resource access and enhanced motivation or competition.¹⁰⁵ Attending a more desegregated school translates into heightened goals for future educational attainment and career, whereas being educated in a racially segregated environment is associated with lower educational attainment and career goals.¹⁰⁶

An important benefit of a long-term desegregated education¹⁰⁷ is that students tend more to live in integrated environments as adults.¹⁰⁸ Hence, diverse educational settings contribute to students’ ability to participate in a pluralistic society.¹⁰⁹ A fifteen-year longitudinal study comparing similar groups of minority students in Hartford, Connecticut who did or did not transfer to the suburbs under a voluntary desegregation program showed that those attending suburban schools were considerably more likely to live in integrated

103. See generally, Michal Kurlaender & John T. Yun, Is Diversity a Compelling Educational Interest? Evidence from Metropolitan Louisville (August 2000), available at <http://www.law.harvard.edu/groups/civilrights/publications/Louisville.html>.

104. *Id.* (citing R.L. Crain & R.E. Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis*, 88 AM. J. SOC., 839-854 (1983); R.L. Crain, *School Integration and the Academic Achievement of Negroes*, 44 SOC. EDUC. 1-26 (1971)).

105. *Id.* (citing A.S. Wells & R.L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531-555 (1994); G. ORFIELD, G. & S. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996)).

106. *Id.* (citing J. W. Schofield, *Review of Research on School Desegregation’s Impact on Elementary and Secondary School Students* in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION (J.A. Banks & C.A. McGee Banks eds., 1995); J. W. Schofield, *Maximizing the Benefits of a Diverse Student Body: Lessons from School Desegregation Research*, in DIVERSITY CHALLENGED (Gary Orfield ed., 2000); M.P. Dawkins, *Black Students’ Occupational Expectations: A National Study of the Impact of School Desegregation*, 18 URB. EDUC., 98-113 (1983); J.W. Hoelter, *Segregation and Rationality in Black Status Aspiration Status*, 55 SOC. EDUC. 31-39 (1982)).

107. *Id.* (citing J.H. Braddock, *The Perpetuation of Segregation Across Levels of Education: A Behavior Assessment of the Contact-Hypothesis*, 53 SOC. EDUC. 178-186 (1980); J.M. McPartland & J.H. Braddock, *Going to College and Getting a Good Job: The Impact of Desegregation*, in EFFECTIVE SCHOOL DESEGREGATION: EQUALITY, QUALITY, AND FEASIBILITY (W.D. Hawley ed., 1999)).

108. *Id.* (citing A. S. Wells & R.L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531-555 (1994)).

109. *Id.* (citing Patricia Gurin, *The Compelling Need for Diversity in Higher Education, Expert Report for University of Michigan pending lawsuit Gratz & Hamacher v. Bollinger* (1999)).

communities as adults.¹¹⁰

The Institute on Race and Poverty conducted a qualitative study that demonstrates many more benefits of an integrated environment than achievement, such as school enjoyment, increased understanding among students, improved student teacher relationships, greater interracial understanding, increased interracial interaction later in life, and better preparation for a diverse work world.¹¹¹

Other research has shown that the benefits of school desegregation extend into housing desegregation. A study of 960 school districts found that cities which implemented metropolitan-wide desegregation plans experienced substantially increased housing integration, an effect evident in districts of all sizes and in all regions of the country.¹¹² Districts that have experienced desegregation over the longest period of time have the lowest levels of housing segregation as well.¹¹³ School desegregation between 1968 and 1973 doubled the rate of housing integration in twenty-five central cities with an African American population of at least 100,000.¹¹⁴

With *Brown*, we as a society recognized the harm implicit in a system ordered on supremacy of some and subordination of others. Indeed, this harm is not limited to negative impacts on students' achievement, but reaches into and damages our democratic structure – reifying racial subordination in employment, health, wealth access, and political participation. Research has shown that the system can be altered for the good. Yet today still, we are in the position of having to ask: Have the negative effects of segregation and subordination ever been truly disestablished? Importantly, we have to consider the harms of segregation on both subordinated groups and whites, as Toni Morrison has suggested.¹¹⁵

110. ROBERT L. CRAIN, *THE LONG-TERM EFFECTS OF DESEGREGATION: RESULTS FROM A TRUE EXPERIMENT* (1986).†

111. *Institute on Race and Poverty, Education Integration Initiatives Project* (May 2000) (on file with the author).

112. Karl Taeuber, *Desegregation of Public School Districts: Persistence and Change*, PHI DELTA KAPPAN, September 1990, at 18-24.

113. Diana Pearce, *Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns*, Nat'l Inst. of Educ. (1980).†

114. Diana Pearce, Robert L. Crain, & R. Farley, *Lessons Not Lost: The Impact of School Desegregation on the Racial Ecology of Large American Central Cities*, (Apr. 1984) (paper presented at the American Educational Research Association Annual Meeting, New Orleans).

115. *See generally*, MORRISON, *supra* note 55.

Integration and Other School Reforms

Many education reformists have recently been pursuing reforms that function in two ways with integration efforts: (1) they actively disregard integration as a strong value in our schools; or (2) they foil integration efforts by focusing on the need for choice or quality. The implication is that integration no longer remains a primary or even secondary goal in education. In the next sections, I review the implications for the creation of a radically integrated society of multiple popular school reform strategies, including separatist schools, educational choice programs, standardized testing, vouchers and charter schools, curricular reform, and teacher training.

Reformists often go further than advocating their position and denigrate desegregation while pushing for choice and other reforms. The rhetoric is often fueled by charges that desegregation efforts had no positive effect on students of color, and even harmed them. In the words of Doris Wilkinson, “[p]ublic school integration and the associated demolition of the black school has had a devastating impact on African-American children – their self-esteem, motivation to succeed, conceptions of heroes or role models, respect for adults, and academic performance.”¹¹⁶

This approach fails to consider the social context and power structure of segregated education. Further, it blames desegregation without contemplating the potential for equity in education under a far-reaching, transformative model of integration. Martha Minow has written about this scapegoating of equality-oriented reforms by choice advocates, stating that “[r]acial desegregation, school finance litigation, special education, and bilingual education may be once proud names of prior school reforms, but now they often are blamed, directly or indirectly . . .” for the performance of schools.¹¹⁷

I question the logic of the assumption on the part of certain reformists that a segregated school is now acceptable. First, we know that without integration, the other values of education cannot be achieved for all students, especially those students who most need the additional support strong schools provide. Second, the assumption mistakenly accepts that a segregated education can be effective.

What is an effective segregated education? Research has shown that the characteristics of a segregated education include the concentration of poverty, a depression in resources and teacher

116. Doris Y. Wilkinson, *Integration Dilemmas in a Racist Culture*, 33 SOC'Y NO. 3, Mar. 1996, at 27-28.

117. Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 259 (1999).

training in the schools, higher teacher turnover rates, and the perpetuation of prejudicial attitudes on the part of students.¹¹⁸ These characteristics are not those of an effective educational environment.

B. The Antagonism of Certain Reforms to the Goals of Integration

Proponents of some education reforms disregard the impact reforms may have on integration efforts, in effect accepting segregation. But one thing should be clear: there should not be a choice between integration and education reform. Modest and radical integrationists do not want to disregard the benefits of certain reforms. Indeed, some reforms can support desegregation, and integration can help further certain reforms. We can have both educational reform and desegregation, but in order to accomplish this we must determine which reforms are antagonistic to desegregation and which are cooperative with desegregation and, more largely, integration. Though I approach this subject from the radical integrationist position, in considering whether reforms are poised to cooperate with the goals of integrationists, I consider whether the goals of even the modest integrationist may be satisfied.

Separatist Schools

One position gaining popularity and the backing of political will in many communities of color that pit school reform against the goals of integration is that deliberately racially homogeneous (i.e., racially separated) schools can serve students of color well. That is, that a good education can be had in a racially isolated environment, if

118. john a. powell, *Segregation and Inadequacy in the Twin Cities Public Schools*, 17 *HAMLIN J. PUB. L. & POL'Y* 255, 257 (1996) (describing concentrated poverty as an outcome of segregation in the schools); see also Jomills H. Braddock, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 *SOC. EDUC.* 178-86 (1980)†; Jomills H. Braddock, *Quality and Equality: Compatible or Incompatible Goals?*, 63 *PHI DELTA KAPPAN* 3, 166 (1981); Stephen J. Caldas & Carl Bankston III, *The Inequality of Separation: Racial Composition of Schools and Academic Achievement*, 34 *EDUC. ADMIN. Q.* 533, 534 (1998); John I. Goodlad & Jeannie Oakes, *We Must Offer Equal Access to Knowledge*, 18 *EDUC. RES.* 16-22 (1988); Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 *EDUC. RES.* 45-51, 62 (1989); Eric A. Hanushek, *A Jaundiced View of "Adequacy" in School Finance Reform*, 8 *EDUC. POL'Y*, 460-69 (1994); Eric A. Hanushek & Lori L. Taylor, *Alternative Assessments of the Performance of Schools: Measurement of State Variations in Achievement*, 25 *J. HUM.* 179-201 (1990); DOUGLAS MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); NICHOLAS J. MURGO & TAMMY K. WALSH, *PREDICTIONS: FROM PUBLIC SCHOOL TEACHER SALARIES TO STUDENT OUTCOMES* (1993); WILLIAM L. SHARP, *COLLECTIVE BARGAINING IN THE PUBLIC SCHOOLS* (1993)†.

funding is directed to the schools and reforms are implemented. John Sibley Butler talks about the potential of a recrudescence of the tradition in the African American South of “self-help,” by which he means the independent creation of African American schools and other community institutions.¹¹⁹ Self-help, Butler explains, is built on the principle that getting a quality education is more important than whether that education is desegregated or segregated.¹²⁰ Butler reports that students who attend all-black schools are more compelled to strive for achievement and less “concerned with the attitudes of whites.”¹²¹

But separating institutions only covers up the historical and present-day causes of racial disparities, and must as a strategy be rejected: “Self-renewal is critical to black progress. But so is a concerted, biracial attack on the social and economic causes of black disadvantages and alienation. The truth is that we cannot solve America’s racial problems separately, for at the root of those problems is separation itself.”¹²²

A useful point of comparison in the discussion of the viability of separatist education is separatist housing. There are racially homogeneous suburbs that, though middle class and bearing the semblance of an economic stability that bucks the notion that poverty travels with race, in fact stand on the brink of economic meltdown. Sheryll Cashin analyzed such a scenario in Prince George’s County, Maryland which is touted as a successful exercise in separatism – “the highest per-capita income, majority black jurisdiction in the United States.”¹²³ Cashin’s study of this county revealed that its proximity and open doors to neighborhoods populated by low-income African American families, its inability to attract new jobs, and its failure to capture other new economic growth will result in crisis.¹²⁴ In fact, this suburb is experiencing a decline in property values, an increase in child poverty, more numerous incidents of crime, lower standardized test results, and an increase in the population of low-income students because the suburb is unable to contend with the external forces, the

119. John Sibley Butler, *The Return of Open Debate*, 33 SOC’Y No. 3, Mar. 1996, at 11-18.

120. *Id.*

121. *Id.* at 18.

122. Vernon E. Jordan, *Black America: Looking Inward or Outward?* 33 SOC’Y No. 3, Mar. 1996, at 25.

123. Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 732 (2001).

124. *Id.*

dynamics beyond its borders, that create and continue to foster racialized economic inequality.¹²⁵

For the same reasons, separatist schools may initially prosper, but unless they are equipped with the tools to contend with outside forces, they will likely grow in their populations of high need students and ultimately face great crises. Moreover, separatist schools do not disturb the supremacist structures that limit attainment of democracy for people of color and whites.

Accountability

One reform that has increased in its popularity but does not pose benefits in terms of integration is accountability as presently conceived. Accountability measures include performance awards aimed to improve student performance by offering school or teacher incentives and board certification from the National Board for Professional Teaching Standards.¹²⁶ But measures such as performance awards do not provide help to urban schools that already struggle against fewer resources, greater challenges, and the resulting lower student achievement. As such, these types of reform do not align with the goal of integration, even that embraced by modest integrationists. Viewed from the radical integrationist position, current accountability measures are problematic in that they leave untouched subordinating structures, and measure the wrong outcomes. An appropriate accountability measure would have racial justice as its first and chief gauging factor, creating an umbrella for the consideration of the participatory nature of educational decision-making, the capacity of the school system to allow for self-constitution outside of a language and reality of subordination, and the potential of the structure to produce citizens aware and critical of privilege and racial hierarchy. Accountability measures as now conceived do not command their salvaging in the framing of a new model of education and justice.

Standardized Testing

High stakes standardized tests continue to be touted as reform

125. *Id.* at 37-38, 41-42, 47, 50-51, 58 (citing MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 19, 38, and generally (1999)).

126. See Adam Urbanski & Roger Erskine, *School Reform, TURN, and Teacher Compensation*, PHI DELTA KAPPAN, 367-70 (Jan. 2000), available at <http://www.pdkintl.org/kappan/kurb0001.htm>; see also Michael Fullan, *The Three Stories of Education Reform*, PHI DELTA KAPPAN, 581-84 (Apr. 2000), available at <http://www.pdkintl.org/kappan/kful0004.htm>.

mechanisms but have been shown to be more detrimental to low-income student of color outcomes than they are beneficial. Research has shown that students of color, those with disabilities, and low-income students tend to have lower passage rates on the standardized tests that determine grade advancement and graduation.¹²⁷ Beyond bias in the drafting, a well documented issue, and disparities in outcomes, concerns for students of color are that the institution of high stakes testing may lead students to drop out under self-imposed pressure and be encouraged to drop out by administrations eager to present a positive portrait of testing results.¹²⁸ And tests increase the retention rate (i.e., the rate at which students are held back) for students of color in major metropolitan school districts, which is the “single strongest predictor of whether students will drop out.”¹²⁹ A further concern for students of color attending schools in urban settings is that the pressures associated with poor outcomes may lead experienced teachers to leave these urban schools.¹³⁰

Tests have not even been shown to improve educational outcomes generally. The 1980s experienced a surge of standardized testing and assessment; the largest effort was the New Standards Project (NSP). It was found that these tests offer little to no reliability or generalizability, seldom take into account the variety of learning styles, and are often found to be racially and culturally biased.¹³¹ Despite such evidence, standardized testing as a means to improve educational “excellence” still maintains popular support. Proponents of high stakes testing point to several potential advantages for students of color in public schools: that testing increases teacher and student motivation, functions to eliminate tracking by standardizing expectations of students, and can provide the impetus to targeting for improvement low-performing schools that are attended predominantly by low-income students of color.¹³² Evidence to support these claims has not been put forth by

127. For a review of outcome disparities in different states, see Jay P. Heubert, *Graduation and Promotion Testing: Potential Benefits and Risks for Minority Students, English Language Learners and Students with Disabilities*, 9 POVERTY & RACE No. 5, Sept./Oct. 2000 at 1-2, 5.†

128. *Id.* at 5.

129. *Id.*

130. *Id.*

131. Elizabeth Spalding, *Performance Assessment and the New Standards Project: A Story of Serendipitous Success*, PHI DELTA KAPPAN, (June 2000), available at <http://www.pdkintl.org/kappan/kspa0006.htm>.

132. Heubert, *supra* note 129 at 5-6.

proponents, however.

For reasons similar to those given for a restructuring of accountability measures, above, testing must be transformed before it is retained.

Tracking

Tracking is another example of a seemingly performance-oriented school reform effort that we now know foiled desegregation efforts and caused great harm. Introduced in the 1920s, tracking was almost obsolete by the time of *Brown*. But immediately after *Brown*, schools used tracking to segregate students of color – creating segregated schools within schools:

The *Brown* decision is directly correlated with the re-introduction of tracking as a system of academic classification. Tracking was reintroduced into American school systems for two reasons. First, it was an effort by Southern states to dilute the effects of the *Brown* decision. Second, it was a response by Northern school systems to the influx of African-American students caused by the large-scale migration of African-American families from the South. Schools reacted to orders to desegregate by putting in place tracking systems as a means to place African-American and White students in different classrooms.¹³³

This reform effort was explicitly used to foil desegregation. Tracking operated to hold students of color back from their full potential, to keep them from becoming full citizens and informing citizenship, and also perpetuated whites' participation in a supremacist structure. Tracking, still pervasive in educational institutions, continues to produce short- and long-term educational outcome and attainment level disparities by race and class.

Neighborhood Schools

Neighborhood schools are another “innovation” and are antagonistic to the goal of racial and economic integration. Although they have the benefit of potentially allowing increased parental involvement, in communities and families where poverty is high, it is often impossible for parents to become involved at target levels. In addition to producing inconsistent results as regards parental involvement, neighborhood schools reinforce racial and economic

133. Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking has Resegregated America's Public Schools*, 29 COLUM. L.J. & SOC. PROBS. 469, 474-77 (1996).

isolation by leaving residential segregation untouched. Neighborhood schooling is a detrimental reform type, also, in that its implementation masks the fact that racial hierarchy has been inscribed into residential patterns – allowing, instead, families to believe that they have exercised a choice in housing and, therefore, a choice as to which schools their children will attend. This falsity attaches strongly to the reform of neighborhood schools.

From the perspective of the modest integrationist, neighborhood schools are troubling because they do not promote numerical desegregation nor equivalency in student outcomes. The radical integrationist problematizes this reform structure as well because the reversion to residence-determined attendance means a return to pre-*Brown* isolation of students of color from democracy-promoting structures.

It is questionable whether any of the above strategies can indeed improve the education of all students unless they are implemented within desegregated, or better still, integrated schools. Moreover, “[t]he new reforms expose children to new risks of inequality by leaving some students in dismal existing schools and making crucial to the selection of children’s schools the parents’ and guardians’ motivation and knowledge – qualities that are most certainly not equally distributed.”¹³⁴

Educational Choice Programs and Vouchers

Turning to the choice-based models, from the perspective of the modest integrationist, it is clear that any model of school choice reform that could be salvaged from the current set of reforms would have to counter the disparities in information, resources, and other elements of capacity to choose. At present, “[t]here is greater evidence that white students are better able to use choice to transfer from integrated urban schools to all-white suburban schools.”¹³⁵

The desire on the part of modest integrationists for improved student outcomes for all students is not met by the choice-based reform of vouchers. Vouchers are supported by those who point to studies that suggest improved achievement for African American students. In fact there is little empirical evidence of a positive impact

134. Martha Minow, *Reforming School Reform*, 68 *FORDHAM L. REV.* 257, 260-61 (1999).

135. Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome?* 43 *DEPAUL L. REV.* 1, 31-32 (1993) (citing James S. Liebman, *Voice, Not Choice*, 101 *YALE L. J.* 259, 259 (1991)).

on achievement.¹³⁶ Many researchers conclude that vouchers will compound the disparity between thriving and struggling districts.¹³⁷ One study found that “information levels regarding the voucher program were much higher among white parents with higher incomes, and the parents’ educational backgrounds proved to be an especially important factor.”¹³⁸

There are problems beyond the application stage. The extent to which transportation is provided under a school choice program can limit the choices of students of color and low-income students to attend the school of their choice. School districts may only provide transportation within their own district, or within a limited range.¹³⁹ For families without cars with which to drive students to schools out of bus reach, choice is constrained. And the families that tend far more to not own cars are low-income families of color.

To contextualize vouchers, and truly gauge whether this reform should be salvaged in the development of a new model, it is important to realize that they emerged at the time of gains in school desegregation, and served to provide white students a way out of desegregated schools. “After the unanimous decision in *Brown*, many southern states attempted to create state-supported voucher systems for white families who sent their children to segregated private schools.”¹⁴⁰ Because vouchers first emerged as a tool of racial subordination, and their value as regards integration seems limited even today, vouchers likely would not survive to take a place in a new model of racially just school reform, from either the position of the modest or radical integrationist.

Charter Schools

Like vouchers, charter schools were used to foil desegregation efforts. After *Brown*, southern states “created parental choice

136. ALEX MOLNAR, SCHOOL ‘CHOICE,’ WISCONSIN EDUCATION ASSOCIATION, EDUCATIONAL ISSUES SERIES, available at <http://www.weac.org/resource/nor96/vouchers.htm> (1996); see also Kim K. Metcalf & Polly A. Tait, *Free Market Policies and Public Education: What is the Cost of Choice?* PHI DELTA KAPPAN (September 1999), available at <http://www.pdkintl.org/kappan/kmet9909.htm>.

137. MOLNAR, *supra* note 138.

138. Daniel, *supra* note 137, at 33 (citing Amy Stuart Wells, *Choice in Education: Examining the Evidence of Equity*, 93 TEACHERS C. REC. 137, 147-50 (1991)).

139. *Id.* at 15 (citing MINN. STAT. § 120.062 subd. 9 (1993) (describing the limited transportation requirements of school districts under Minnesota school choice law)).

140. *Id.* at 4 (citing Henry M. Levin, *Market Approaches to Education: Vouchers and School Choice*, 11 ECON. EDUC. R. 279, 280 (1992)).

programs for public schools which technically permitted African-Americans and whites to transfer out of segregated school systems but which provided neither incentives for the legal apparatus to dismantle centuries of state-supported discrimination."¹⁴¹ Charter schools at this time did not in fact create choice for African American students. "Hostile white administrators, teachers, and students who sought to dissuade African-American enrollment at the all-white public schools confronted those who desired to transfer."¹⁴² Though the charter school movement now wears the semblance of race neutrality, "[p]arental choice in the 1950s and 1960s [] came to be linked to the perpetuation of segregation."¹⁴³

Even now charter schools are problematic because regulations as to admissions practices are not race conscious. This can lead to increased segregation at the school level, with parents of predominantly white students tending to have the resources to seek out and apply to charter schools, and parents of color confronting prohibitive application and admissions practices. "Rather than generating a desirable pluralism of methods and values, vouchers and charters could instead produce self-segregation that exacerbates intergroup misunderstandings along the familiar fault-lines of race, class, gender, religion, disability, and national origin."¹⁴⁴ A transformative approach to equity in education would require confronting and dismantling the subordinating mechanisms of charter schools: to reach the more instrumental goals of modest integrationists and go beyond, to an ignition of the transformation called for by radical integrationists.

C. Cooperation between Reform and Integration

Discussions regarding desegregation and integration often portray them in opposition to other types of school reform, when in fact true integration embraces many reform strategies. School reform efforts that cooperate with desegregation include reductions in class sizes and improvement of teacher quality. While many of the current school reform proposals have potential, none will make a broad impact on its own. Therefore, two critical items must be addressed:

141. *Id.* (citing Amy Stuart Wells, *Choice in Education: Examining the Evidence of Equity*, 93 TEACHERS C. REC. 137, 140 (1991)).

142. *Id.*

143. *Id.*

144. Minow, *supra* note 136, at 269 (citing KEVIN B. SMITH & KENNETH J. MEIER, *THE CASE AGAINST SCHOOL CHOICE: POLITICS, MARKETS, AND FOOLS* 76-77 (1995)).

(1) a well-planned, multi-pronged approach is the only way to impact the complex issues facing our education system today, and (2) ensure that such an approach occurs for all of our children.

True or radical integration is the vehicle to accomplish both of those tasks. True integration addresses the issues of achievement, opportunity, community, and relevancy at a systemic level. Through a transformative process, the school system becomes a place of learning and growth for students and teachers through innovative curriculum, technology, teaching practices, and administration, as well as a broad cultural understanding and application of that understanding. These instrumental advances then create a grounding for the more far-reaching goals of the radical integrationist, who seeks to build upon the transformation of the school setting to the recreation of a truly democratic society.

At the site of curricular reform, true integration requires a multicultural curriculum that is incorporated into daily work, and not merely added on or reserved for study during a special month, such as Black History Month. Another reform that cooperates well with integration, and enhances integration, is reduction in class size. Although disputed regarding its impact on achievement, class size has been shown to improve relationships and ameliorate student and teacher satisfaction. Third, success can be had through better teacher training and the development of a more racially and ethnically representative faculty.

IV. Conclusion

As we examine the history and current condition of education, and we reestablish what we want our system of public education to achieve for our citizens, we must ask some difficult questions. Is providing a quality education for all children rather than only a specific and ever decreasing segment of our society what we want? Are the crippling issues of racism and socioeconomic bias as they pertain to education worthy of addressing? Surely the answer to both questions must be yes. As Martha Minow exhorts:

Schools afford an arena for fighting about what kind of society we should be, how the old and new generations should relate, whether commerce should govern democracy or democracy shall govern commerce, and how individual freedoms should be rendered compatible with the common good. It is imperative that the new round of school fights center as much on the symbols of inclusion and equality as upon the rhetoric of individualism and quality. These values need one another so that the whole is at least as worthy as the sum of its parts, if not

perhaps more so.¹⁴⁵

Desegregation and integration are vital mechanisms to take positive action toward the difficult questions raised above. Certainly the deeper value of constituting ourselves into a true democracy and a society where racial justice is a reality is beyond the reach of these reforms and the instrumental claims of the modest integrationists. Some will argue that is utopic and we must pursue more modest goals. I have serious doubts that, given the relational nature of racial hierarchy, instrumental goals can be achieved without a broad attack on the very underpinnings of this structure: it is not enough to change black and brown test scores; as Dr King recognized, it is necessary to change the heart.¹⁴⁶

It may be as James Baldwin wrote, that as long as you think you are white, there is no hope for you.¹⁴⁷ Without integration no reform can work effectively because it will not be distributed to all students nor will it be done in an embracing and diverse environment. We must recognize that intent is not necessary to exact harm. By turning away from desegregation and integration efforts, we are exacting a tremendous harm not only on all of our children and our minority and impoverished children, especially, but also on our aspirations to become a real democracy. I have argued in this paper that we cannot move beyond what Professor Omi calls a racial dictatorship to a racial democracy by simply relying on a flawed notion of choice.

Educational reform in the U.S. has a tendency to move from one effort to another in a pendular fashion, while retaining little of the beneficial aspects of the prior effort, whether in curriculum (e.g., phonics and whole language) or systemic issues (e.g., desegregation and neighborhood schools).¹⁴⁸ In this pattern of subscribing to the reform in vogue, policy makers and others of influence seem to lose sight of the greater goal of education and what we need to provide for all of our students in order for them to become productive citizens, not just workers or consumers. We need an approach that does not just focus on the next new approach, or how to deal with the latest "crisis," – what is often a reactionary rather than a thoughtful response.¹⁴⁹ Often these strategies are only available to suburban,

145. *Id.* at 287-88.

146. MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 22 (1963).†

147. JAMES BALDWIN, *THE PRICE OF THE TICKET* 362 (1985).

148. *See generally*, Minow, *supra* note 136, at 257.

149. *See* Gregory J. Cizek, *Give Us This Day Our Daily Bread: Manufacturing Crises in Education*, PHI DELTA KAPPAN (June 1999), available at

wealthier, whiter schools and leave behind the already struggling urban schools. As a society, we need to reestablish our societal goals for education. Perhaps at its most basic, our goal for education is to prepare our children for a full life in our democracy. This can only be accomplished if we create a system that reflects these values, effectively and consistently delivering them.

In attempting to satisfy the goals of the modest integrationists (i.e., in seeking the equitable delivery of education) we must not as a society become satisfied. Rather, we must embrace integration not in a manner limited to what it can produce for learners, but for how it can escalate our society into a forum of truly pluralist engagement.

This article is not against reform or choice but asserts that education must be considered in terms of justice. And if we are focused on democracy and justice, the role of true integration will be expanded, not diminished. I believe when we give up on integration properly understood, it is only a short time before we have abandoned our commitment to a true democracy in our increasingly pluralistic society.

