All-Male Black Schools: Equal Protection, the New Separatism and *Brown v. Board of Education*

By RICHARD CUMMINGS*

Introduction

This article argues that although *Brown v. Board of Education*[1] is in some respects a spent force as a vehicle for achieving racial integration in the schools[2] and no longer reflects a consensus in the black community on the value of racial integration and the harm of separation, its conclusion that separate can never be equal remains valid for blacks as well as whites.[3] Further, it represents a yardstick by which America measures its progress towards a just society.

The all-male black schools (AMBSs) are based on two premises; that young black males need a special, exclusively black educational environment to survive, and that the curriculum of such an institution providing that educational environment should be Afrocentric. The proponents of the AMBS argue for its constitutionality on the grounds that the segregation involved is voluntary self-segregation and not a segregation required by law, and that because young black males have suffered inordinately in American society and require special treatment to remedy this plight, they can, as a class, be treated differently from whites, and females (both white and black).

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* Professor of Law, Pace University School of Law. Formerly of the Faculty of Law of The Haile Sellassie I University, Ethiopia and The University of the West Indies, Cave Hill, Barbados. The author wishes to thank Dr. Kenneth Clark and Mr. Michael Meyers, New York Civil Rights Coalition, and Mr. Walter W. Morrison, Director, Department of Research, NAACP, for their cooperation in the researching and writing of this article. He also wishes to thank his research assistant, Mr. Matthew Horn, for his extensive efforts in locating cases and materials essential for its completion.

1. 347 U.S. 483 (1954).

2. *See Freeman v. Pitts*, 112 S. Ct. 1430, 1453 (1992) (Scalia, J., concurring) (At some time, we must acknowledge that it has become absurd to assume without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time.").

3. *But see* Pamela J. Smith, Comment, *All Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2012-15 (1992).

The proponents of the AMBSs are referred to in this article as the "New Separatists," the post-modern anti-integrationists, who as the result of disillusionment with the promises of a truly interracial society, have sought to find solutions through the established constitutional order that legitimize separate educational institutions based on race and gender. They differ from the "Old Separatists" by their commitment to constitutional means to achieve the changes they consider essential for the survival of young black males. By working within the system, they affirm the American constitutional tradition while challenging the current application of its recognized doctrines. Yet while their commitment to the constitutional process and their sincerity are to be applauded, their conclusions must be eschewed.

Specifically, even if racial segregation of blacks is voluntary, as it is in AMBSs, it is still harmful. The "sanction of the law" standard of *Brown*[4] can be eliminated with its holding still intact. Further, gender based discrimination's "heightened scrutiny"[5] standard, beyond the simple "rational basis" test, is applicable to AMBSs because women are at least a semi-suspect class. Women in general, and black women in particular, resemble blacks as a class because of the history of discrimination against them. The "heightened scrutiny" standard for gender based discrimination, inspired in its development by *Brown*, now renders exclusion of women, both black and white, from the AMBS an unsustainable violation of equal protection.

The concept of AMBSs arose as a solution to the alienation of inner-city young black males. Some African-American educators are calling for the creation of all-male black schools (AMBSs) with all-black, all-male teachers[6]—an anathema to integrationist doctrine. Equal protection in post-liberal America defies easy analysis, as questions of identity and self-worth cloud any attempt to posit a simple solution to race relations in a society in constant flux.

This article considers the proposed plan in Detroit for AMBSs and the court decision in the Detroit case that entertained a challenge to them. There is an attempt in this decision to reconcile the laudable ob-

4. "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law." Brown v. Board of Education, 347 U.S. 483, 486 (1954) (quoting with approval a finding of the Kansas case.). *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J. dissenting).

5. *See* Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (adhering an intermediate level of scrutiny); Craig v. Boren, 429 U.S. 190 (1976); Fronterio v. Richardson, 411 U.S. 677 (1973).

6. *See* Patricia A. Jones, *Educating Black Males—Several Solutions*, 98 CRISIS, Oct. 1991, at 12; Smith, *supra* note 3, at 2005. Detroit, Chicago, San Diego, Baltimore, and the District of Columbia all have school boards that have proposed such schools. *Id.* at 2006.

jective of saving of young black males who are increasingly threatened by the violent world in which they are forced to live, with constitutional requirements and the demands of those within the black community who oppose the plan. Ultimately, the decision, while emphasizing established equal protection approaches, calls for compromise to effectuate a better public educational system for all.

It is not possible to understand the Detroit decision without an examination of equal protection doctrine, particularly as it applies to gender. In doing this, the article considers the important development of the "heightened scrutiny" standard in gender cases, relating this to the various plans for AMBSs around the country. The argument that black women are themselves a special class which gives rise to a new standard that constitutes a combination of both strict and heightened scrutiny is considered as a cogent argument against the AMBSs.

Further, this article considers *Brown's* progeny, showing the original decision's continued vitality, notwithstanding efforts to redefine its contours. In doing so, this article concludes that the decision in *Brown* has been elevated to an exalted place in American jurisprudence by virtue of both the compelling empirical evidence on which it rests and the clear and self-evident principles that led to the end of sanctioned educational segregation.

There is, in this approach, a dichotomy of race relations that is considered in the article, with the bi-polar realities being integration and separatism. The article considers competing social theories, including those dealing with the value of empirical data in the constitutional decision-making process and the role of natural law, as an inherent part of its analysis of constitutional doctrine. In coming down in favor of integration, this article points towards a reconciliation of opposites and the need for racial unity as the foundations for a democratic society.

This article was conceived just prior to the time of Justice Thurgood Marshall's death. That it should appear in a volume dedicated to his memory emphasizes the significance of the issues raised in it. To a great extent, the real issue is the legacy of the two Marshalls. Is the purpose of judicial review the enunciation of abstract principles unrelated to reality or is it the dynamic creation of a constitutional structure that works? John Marshall believed the latter, for as he said in *Gibbons v. Ogden*[7] in his legendary attack on Jefferson:

> [Powerful] and ingenious minds, taking as postulates, that the powers expressly granted to the government of the Union, are to be contracted, by construction, into the narrowest possible compass,

7. 9 Wheat. (22 U.S. 1) (1823).

> and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.[8]

Thurgood Marshall, who argued *Brown* on behalf of the NAACP Legal Defense Fund positioned himself in the tradition of John Marshall. He argued that if a nation could not exists, in the words of Lincoln, "half slave and half free," it could not, ultimately, exist first class and second class. The decision in *Brown*, this article suggests, affirmed that argument and rested primarily on the kind of structural pragmatism John Marshall called for in his philosophy of interpretation. One rejects this approach at one's peril,[9] for it leads to a fragmentation that undermines the nation's vitality, a fragmentation that one hoped had been left in the dust of the Civil War.

I. The Relevance of Social Science in *Brown*

The basic question the Court postulated in *Brown* was: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities?"[10] To this question, the Court responded tersely: "We believe that it does."[11]

Chief Justice Warren's use of the word "believe" lies at the heart of the difficulty with the decision. "Belief" connotes an act of faith, an affirmation of something that is not verifiable by empirical evidence, but which transcends the senses through an existential commitment. It is a distinctly non-legal, even an unlegal, term. That segregated schools are damaging to black children is either true or it is not, just as there was a virgin birth or there was not, just as Galileo was right that the earth revolved around the sun, or he was not, and the sun revolved around the earth. Although this is a matter of empirical substantiation, the Court attempted to escape the conundrum by arguing that "separate educational facilities are inherently unequal."[12] Something that is "inherently

8. *Id.* at 4.

9. *But see* Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, REPRESENTATIONS, Spr. 1990, at 1162-89 (Univ. of Cal. Press) (arguing that judicial review is an invention of the Federalists to protect private property).

10. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

11. *Id.*

12. *Id.* at 495.

unequal" is not so because of empirical data, but because of its very nature, known through pure reason.[13]

In wrestling with the "separate but equal" doctrine of *Plessy v. Ferguson*,[14] the Court relied heavily on *McLaurin v. Oklahoma State Regents for Higher Educ.*,[15] a case that involved the almost total isolation of a black graduate student while he pursued his studies in a separate facility. In segregated all-black schools, black students were not isolated, only separated from whites. Nevertheless, Chief Justice Warren's opinion, quoting from Chief Justice Vinson, emphasized the "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn the profession."[16] It continued:

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[17]

Arguing that segregation sanctioned by the law exerts a greater impact due to the sense of inferiority instilled in black children, Chief Justice Warren relied on the language of the Kansas case: "A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[18] Discarding the "separate but equal" standard of *Plessy*,[19] Chief Justice Warren concluded: "Whatever may have been the extent of psychological knowledge at the time of *Plessy*, this finding is amply supported by modern authority."[20] It is here that Chief Justice Warren turned finally in his famous footnote 11 to ostensibly empirical justification for his conclusions.[21]

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13. *See* THOMAS AQUINAS, SUMMA THEOLOGICA, Question 91, Third Article, passim. (Fathers of the English Dominican Province trans., Benziger Bros., Inc.)

14. 163 U.S. 537, 551-52 (1896).

15. 339 U.S. 637 (1950).

16. *Brown*, 347 U.S. at 493 (quoting *McLaurin*, 339 U.S. at 641).

17. *Id.* at 494.

18. *Id.* (quoting Brown v. Board of Educ., 98 F. Supp. 797, 799 (1951)).

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

20. *Id.* at 494-95.

21. *Id.* at 494 n.11. The footnote cited KENNETH B. CLARK, EFFECT OF PREJUDICE ON PERSONALITY DEVELOPMENT (1950) (Midcentury White House Conf. on Children and Youth); WITMER & KOTINSKY, PERSONALITY IN THE MAKING, ch. VI (1950); Deutscher & Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT. J. OPINION AND ATTITUDE RES. 229 (1949); Brameld, EDUCATIONAL COSTS, IN Discrimination and National Welfare 44-48 (MacIver, ed., 1949);

Brown was not the first case in which the Court relied on modern social science. The findings of Deutscher and Chein were cited in the Solicitor General and Assistant Attorney General's brief in *Henderson v. United States*,[22] a 1950 case involving the segregation of an African American on a railroad in interstate commerce. This study was also cited in the social science appendix submitted to the Supreme Court in the segregated schools cases,[23] and was, in turn, cited in Chief Justice Warren's footnote 11.[24]

Deutscher and Chein based their findings on data received from five hundred social scientists, including anthropologists, sociologists, and social psychologists, who had done research in the field of race relations.[25] According to Dr. Kenneth Clark, "[t]he investigators found that 90 percent of the social scientists who replied believed that segregation has bad psychological effects on members of the segregated group, even if equal facilities are provided."[26] The specific detrimental effects on members of the minority group were described as follows:

> 1. Segregation puts special burdens upon members of a minority group by the clear discrepancy between democratic ideals and the actual practice of enforced segregation.
> 2. Segregation is a special source of frustration for persons who are segregated.
> 3. Segregation leads to feelings of inferiority and of not being wanted.
> 4. Segregation leads to feelings of submissiveness, martyrdom, aggressiveness, withdrawal tendencies, and conflicts about the individual's worth.
> 5. Segregation leads to a distortion in the sense of what is real.[27]

As these traits are emphasized, a vicious cycle is created, some of the social scientists argued; the harmful personality patterns caused by segregation become reasons for legitimizing segregation.[28] African-American children react "to an awareness of their inferior racial status by escape and the conscious search for revenge."[29]

But blacks are not the only group harmed by segregation, the social

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Frazier, THE NEGRO IN THE UNITED STATES 674-81, (1949). *See generally* MYRDAL, AN AMERICAN DILEMMA (1944).

22. 339 U.S. 816 (1950).

23. KENNETH B. CLARK, PREJUDICE AND YOUR CHILD 41 (2nd ed. Beacon Press 1963) [hereinafter CLARK, PREJUDICE].

24. *See supra* note 21.

25. CLARK, PREJUDICE, *supra* note 23, at 39.

26. *Id.*

27. *Id.* at 39.

28. *Id.* at 40.

29. *Id.* at 42.

scientists concluded.[30] Whites suffer as well by virtue of their deprivation. Deutscher and Chein determined that eighty-three percent of the social scientists maintained that racial segregation "has detrimental psychological effects on members of the privileged group."[31] Dr. Clark summarized these findings with regard to whites:

> 1. Segregation is a symptom of some psychological maladjustment in those who demand segregation.
> 2. There are pervasive and elusive harmful effects of segregation on members of the majority group—increased hostility, deterioration of moral values, the hardening of social sensitivity, conflict between ideology and practices, the development of rationalizations and other techniques for protecting one's self.
> 3. Segregation results in inner conflicts and guilt feelings among members of the group enforcing segregation.
> 4. Segregation leads to disturbances in the individual's sense of reality and the relation of the individual to the world around him.[32]

Clark accepted moral judgments as an inherent part of social science research, urging as one of the major goals of the social sciences "a search for description and verification of moral laws."[33] As social psychologist Theodore Newcomb wrote:

> Medical research is not hampered by the assumptions that pain and disease are bad. Prejudice and discrimination are also bad. By directing our research to the practical end of eliminating them, I think we may find out not only that our research is better, but also that we have moved from illusion toward social reality.[34]

But have we? When terms such as "believe" or "moral judgments" are employed, we are in the realm of belief systems, not science. It could be argued that integrationist observers in the social sciences should not indulge their own preconceptions of what is right and wrong, even if those preconceptions may strike a majority as just. These preconceptions, it might be argued, lead to the avoidance of the question of whether there is anything of inherent worth in blackness outside of an integration context. Likewise, by implication, it dismisses an inquiry into the beneficial effects of African Americans identifying with African Americans without having to endure the pressures at an early age of conforming to a Caucasian-American dominant culture. This is not to conclude that the public financing of schools that provide this environment

30. *Id.* at 40.
31. *Id.*
32. *Id.*
33. *Id.* at 38.
34. Theodore M. Newcomb, *Autistic Hostility and Social Reality*, 1 HUM. REL. 69-86 (1949).

is constitutional; that remains to be evaluated. But while it is not the purpose of this article to rehash all the criticism of the social science evidence that followed *Brown*,[35] it is within its purview to suggest that the language of the social sciences used to overturn the "separate but equal" doctrine with regard to race must be considered a product of the liberal, integrationist structures that dominated the culture at the time of the decision, as well as the unconscious structures in the minds of the "Negro" Americans of that generation.[36]

II. The Pain of Prejudice

There is no more powerful exploration of those structures in American literature than Richard Wright's *Native Son*.[37] The image of Bigger Thomas, whether killing a giant rat in the housing project or raping Mary, the white woman whom he later killed, elicits outrage and fear. The terror evoked by Thomas as he waited on Death Row, explaining why he killed, along with the lynching in Lillian Smith's *Strange Fruit*,[38] had by the 1950s generated a latent sense of outrage among many whites about the condition of American blacks across the country, including among progressive white circles in the South.[39] As is so often the case in the American constitutional process, the moral law preceded the constitutional law, which is why the novels were written before the court decisions. Long before the findings of the social scientists, Richard Wright wrote in the voice of Bigger Thomas's defense attorney:

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35. *See generally* Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955); Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientists Role*, 5 VILL. L. REV. 224 (1959) [hereinafter Clark, *The Desegregation Cases*]; Kenneth B. Clark, *The Social Scientists, the Brown Decision and Contemporary Confusion, in* ARGUMENT (Friedman ed., 1969); *The Courts, Social Science, and School Desegregation*, 39 LAW & CONTEMP. PROBS. 1 (1975).

36. *See generally* CLAUDE LEVI-STRAUSS, ANTHROPOLOGIE STRUCTURALE (1955); *see also* KURZWELL, THE AGE OF STRUCTURALISM (1980) noting that:

> The basic premise of Levis-Strauss' approach is contrary to most American systems theories, which tend to deal with observable data and to ignore unconscious structures of mind. Second, the French use of the term 'scientific' is not linked to empirical proof in the same way as its American equivalent is. Third, French writers traditionally have brought personal experiences to their interpretation of history. Together, these intellectual habits have generated a highly allusive form of discourse which allows for many divergent interpretations of Levi-Strauss' original theories.

37. RICHARD WRIGHT, NATIVE SON (Harper Perennial 1992) (1944).

38. LILLIAN SMITH, STRANGE FRUIT (1948). The title, "Strange Fruit," was taken from the Billie Holiday song of the same name. BILLIE HOLIDAY, STRANGE FRUIT (Edward B. Marks Music Co. 1940) (written by Lewis Allan) "Southern trees bear a strange fruit, blood on the leaves and blood on the root. Black body swaying in the Southern breeze; strange fruit hanging from the poplar trees." *Id.*

39. *See* DAVID J. GARROW, BEARING THE CROSS—MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 12-125 (Vintage Books 1988); HOWELL RAINES, MY SOUL IS RESTED 32-77 (Penguin Books 1983) (1978).

> The hate and fear which we have inspired in him, woven by our civilization into the very structure of his consciousness, into his blood and bones, into the hourly functioning of his personality, have become the justification of his existence.
>
> Every time he comes in contact with us, he kills! It is a physiological and psychological reaction, embedded in his being. Every thought he thinks is potential murder. Excluded from, and unassimilated in our society, yet longing to gratify impulses akin to our own but denied the objects and channels evolved through long centuries for their socialized expression, every sunrise and sunset make him guilty of subversive actions. Every movement of his body is an unconscious protest. Every desire, every dream, no matter how intimate or personal, is a plot or a conspiracy. Every hope is a plan for insurrection. Every glance of the eye is a threat. *His very existence is a crime against the state.*[40]

If this society had not moved to rectify these outrages, surely the constitutional order itself would have been threatened. America's fabled "conspiratorial imagination"[41] could perceive the very revolutionary potential that Wright wanted it to see, a cancer eating away at the society, weakening it and rendering it vulnerable to unacceptable doctrines and personalities. But the legal strategies to integrate the southern schools failed to take into consideration the northern American cities with their urban decay, their vast dehumanized housing projects, and their devastated economies—the world of the Bigger Thomases. To some, there would inevitably have to be a choice between two prophets: Martin Luther King and Malcolm X.

III. The Reality of Segregation

The image of the Civil Rights Movement in *Brown* is integrationist, the "dream" of Dr. King[42] that blacks and whites would study and eventually live together in a common culture in which everyone was accepted as equal.[43] But the "integration" of this strategy was one of assimilation into the white world, presupposing that it was worth integrating into. In this pre-multicultural society, there was only one valid culture: the bland, homogenized, assimilationist culture in which humans were primarily consumers. Everyone was obliged to fit in or be discarded. The only black American to be offered a show of his own on television in the fifties was the legendary Nat "King" Cole, whose easy going, non-threat-

40. WRIGHT, *supra* note 37, at 366-67.

41. *See* Sanford Pinsker, *America's Conspiratorial Imagination*, 68 VA. Q. REV. (1992).

42. GARROW, *supra* note 39, at 283-84 (relating Dr. King's "I have a dream speech" during the Washington march in 1963).

43. *Id.*

ening manner could still not get him a sponsor.[44] Southern whites objected to the show and it was canceled. Segregationist whites' underlying fear of sexual contamination by blacks could not be overcome even by non-threatening entertainers such as Cole.[45] Segregation in the schools was simply an instrument of total separation with African Americans subjected to a situation of permanent inferiority, an inferiority that was regarded as "inherent" and not environmental.[46] The "invisibility" of African-Americans in the pre-*Brown* society was a universal condition that denied to them the "equal protection of the laws."[47]

IV. Types of Segregation

Pamela J. Smith, in her cogent comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*,[48] argued that *Brown* "did not attack mere separation of the races, but de jure segregation."[49] Education itself is not a constitutional right recog-

44. COLOR ADJUSTMENT (1991) (film by Marlon Riggs).

45. *See* WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE 76-77 (1968):

> For the black man, the white woman represents the *socially identified* female idea and thus an intensely exciting object of his sexual possession. She has been identified as precisely the individual to whom access is barred by every social institution. The forbiddeness and desirableness of the white woman make her a natural recipient of his projected oedipal fantasies. He sees himself as finally possessing the material object under circumstances which reproduce the dangerous defiant quality of oedipal interest as experienced by the child. He feels a sense of power at having acquired this highly valuable woman and a sense of power that she finds him desirable and indeed that she finds him *more* desirable than a white lover. But at the same time he perceives her as white and as a representative of all the white oppressors who have made his life so wretched. In a sense then, she becomes the target for a hatred which far transcends the encounter between this man and this woman.

This would appear to be an exaggeration, nevertheless, it is not an inaccurate description of a white racist's perception.

46. For a vivid description of a child growing up in a totally segregated America, see RICHARD WRIGHT, BLACK BOY (Harper and Row 1945). For the argument that racial differences in ability are biologically rooted, see NORMAN J. ITZKOFF, THE ROAD TO EQUALITY: EVOLUTION AND SOCIAL REALITY (1992). Itzkoff's solution is to encourage the highly intelligent to have more children and the less intelligent to have fewer. On the other side, arguing that environment is responsible for a person's ability, see JOHN R. WATSON, BEHAVIORISM (1925), the work that influenced B.F. Skinner and the Behaviorist school. The "nature" versus "nurture" argument has produced a synthesis in most social psychological analysis that both are of equal importance. *See* Stacey Schmeidel, *The Implications of Choosing Sides*, NEWSSMITH, Fall 1992, at 7.

47. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); *see generally* RALPH ELLISON, INVISIBLE MAN (Random House 1952).

48. Smith, *supra* note 3.

49. *Id.* at 2009; *See* Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954).

nized by the Supreme Court,[50] but once a state creates a system of education, it cannot avoid the consequences of violating constitutional standards deemed applicable by the Supreme Court.[51] Thus the Court in *Brown*, in analyzing the data before it, concluded that the forced segregation by law of African-American students violated the Equal Protection Clause of the Fourteenth Amendment, even if the schools provided facilities equal to those in every other way enjoyed by white students.[52] The "ultimate general principle"[53] of *Brown*, "that a State may not constitutionally *require* segregation of public facilities,"[54] does not by itself resolve the question of the validity of de facto segregation. This leads to Smith's basic premise that AMBSs are constitutional, and to the conclusion that *self-imposed* separation for black males is beneficial.[55] Both Smith's premise and conclusion must be scrutinized.

The crux of Smith's argument is that, notwithstanding the decision in *Brown*, because of white flight and segregated housing patterns—a pattern she describes as "resegregation"—the majority of African-American children attend public schools that are de facto segregated.[56] With no way to effectively provide most of these children with integrated education, these predominantly black school districts must address themselves to the realities facing the children they are responsible for educating. The constitutionality of resegregated school districts, when combined with the legitimization of local control, makes fundamental decisions about those schools, including decisions about curriculum, teachers, race, and sex of the students,[57] unreviewable.

Relying on extensive social psychological research that runs counter to the findings of Dr. Kenneth Clark, Smith concludes that only by allowing African-American boys to find their identities in all-male black schools can they, with the help of all-male black teachers as role models, free themselves from the destructive patterns in their relationships with their mothers and become self-sufficient and self-reliant men.[58] After examining the existing case law, she concludes that segregation by sex is also permissible as something beneficial to both male and female African

50. Plyler v. Doe, 457 U.S. 202, 221 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

51. *Plyler*, 457 U.S. at 221.

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

53. GERALD GUNTHER, CONSTITUTIONAL LAW 654 (12th ed. Foundation 1992).

54. Johnson v. Virginia, 373 U.S. 61, 62 (1963) (citing *Brown*, 347 U.S. at 495) (emphasis added).

55. Smith, *supra* note 3.

56. *Id.* at 2009.

57. *Id.*

58. Smith, *supra* note 3, at 2033.

Americans.[59] This last assertion will be examined first in order to isolate the race issue, to the extent to which that is possible.

V. Gender Segregation and the Equal Protection Clause

With regard to gender segregation, the "separate but equal" doctrine is alive and well, a phenomenon resulting from the consideration of gender classification under the "new equal protection" as semi-suspect, subject to a heightened, intermediate level of scrutiny.[60] The applicable test in an educational context is two-pronged. The classification is first scrutinized for purpose, which must be either compensatory or based on appropriate "roles and abilities of males and females."[61] The Court then scrutinizes the means to ensure that a "direct, substantial relationship" exists between the purpose of the classification and the means. The means must be based on "reasoned analysis" and not "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[62] "Separate but equal" education for boys and girls was upheld in *Vorcheimer v. School Dist.*,[63] and more recently, that standard was applied in *United States v. Virginia*,[64] establishing that the heightened scrutiny for gender classification is satisfied in education as long as the separate but equal criterion is satisfied as well.

Smith relied heavily on the lower court decision in *United States v. Virginia*[65] which, in applying heightened scrutiny, allowed the pure gender-discriminating all-male admissions policy of the state military institute to stand because "the exclusion of women was substantially related to the state's interest in providing that diverse education."[66] The court accepted the State's argument that allowing women to enroll would require substantial institutional changes and distract male students.[67] It relied on "an uncontested study regarding single-sex colleges,"[68] which concluded that "single-sex colleges provide better educational experiences than coeducational institutions."[69]

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59. *Id.* at 2047-48.
60. Craig v. Boren, 429 U.S. 190 (1976).
61. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).
62. *Id.* at 726.
63. 532 F.2d 880, 888 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977).
64. 976 F.2d 890 (4th Cir. 1992), *petition for cert. filed*, Jan. 19, 1993.
65. 766 F. Supp. 1407 (W.D. Va. 1991).
66. Smith, *supra* note 3, at 2047; *Virginia*, 766 F. Supp. at 1415.
67. *Id.* (citing *Virginia*, 766 F. Supp. at 1411-13).
68. *Id.*
69. *Id.* (quoting *Virginia*, 766 F. Supp. at 1412). The court went on to state that:

> Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with

Smith argued that "the traditional gender discrimination test, with all of its faults, is the appropriate level of scrutiny to be applied to the exclusion of African-American females from the AMBS."[70] Relying on *Mississippi University for Woman v. Hogan*,[71] Smith explained that a gender classification can pass constitutional muster if it is based on real differences, or is designed to compensate one gender for past discrimination.[72] She concluded that the alleged purpose behind AMBSs—putting an end to society's destruction of African-American males by providing quality education to African-American boys—should withstand intermediate scrutiny.[73]

At first blush, this analysis seems persuasive. As in *Brown*, there are ample empirical analyses and sociological studies to rely on.[74] And as in *Brown*, there is a sincere desire to eliminate a long standing injustice. But this is where the similarity ends. On the appeal in *United States v. Virginia*, the Fourth Circuit stopped short of ordering the Virginia Military Academy (VMI) to admit women and sent the case back to the district court for further proceedings.[75] The court suggested that Virginia "could satisfy the Constitution by establishing an all-female institution similar to VMI, by admitting women to VMI, or by withdrawing state support from VMI."[76] Lacking the benefit of the decision by the Fourth Circuit, Smith concluded that the district court decision was the only court that has "allowed pure gender discrimination in education."[77] Her analysis of the decision at that level was unfortunately incomplete. The Fourth Circuit noted that the issue was whether the unique benefit offered by VMI's type of education could be denied to women under the

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practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chance that those attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees.

Virginia, 766 F. Supp. at 1412.

70. Smith, *supra* note 3, at 2028.

71. 458 U.S. 718 (1982).

72. Smith, *supra* note 3, at 2028-29.

73. *Id.* at 2030. Smith noted that the *Hogan* court was able to rely on nationwide statistics in finding the university's purpose illegitimate because "geographic-specific statistics are not required in gender classification cases as they are in the racial classification context." *Id.* at 2029-30.

74. *See supra* notes 10-32 and accompanying text.

75. United States v. Virginia, 976 F.2d 890, 900 (4th Cir. 1992).

76. Virginia Falters in Latest Battle to Protect All-Male Military College, 61 U.S.L.W. 1049 (1992).

77. Smith, *supra* note 3, at 2029.

state's policy of diversity in education, which was advanced as the justification for maintaining the system as it is. VMI's institutional mission justified a single sex program, but the state did not reveal a policy that explained why it offered the unique benefit of VMI's type of education and training to men and not to women. The court concluded that:

> VMI has adequately defended a single-gender education and training program to produce "citizen soldiers," it has not adequately explained how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support VMI's admissions policy, a desire for educational diversity.[78]

In essence, what this means for AMBSs is that with regard to gender discrimination, such schools are possible only if equal facilities are also provided for black girls, white boys, and white girls so that everything is in perfect balance: all-male black schools, all-female black schools, all-male white schools, all-female white schools. This would require, in effect, four distinct school systems where there now is one, a back-breaking financial burden that, if put in place on a wide scale, would engender tax increases of monumental proportions. Cities already reeling from the increased costs of services and reduced tax bases would be strained beyond the breaking point to maintain a system that also required four different teaching staffs, one all-male black, another all-male white, one all-female black, another, all-female white. New school buildings would have to be constructed to accommodate the new four-way segregation. Who would pay?

Of course, the AMBSs are, in theory, to be located in those regions experiencing resegregation, so that there would be two of everything, not four. Yet two are still far more expensive than one.

Could separate still be equal as far as the African-American girls are concerned? The very reasoning of *Brown* would come into play, only this time from the point of view of black girls.

Smith rejected the theories of Professor Judy Scales-Trent, which would have justified a different level of scrutiny in cases of discrimination against African-American females and rendered the *Brown* approach applicable in the case of AMBSs with regard to African-American girls. Professor Scales-Trent, in her challenging article, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*,[79] argued that since a black woman in America is discriminated against because of her race and her gender, she is in both a suspect class by virtue of her race and a

78. United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992).

79. Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

quasi-suspect class because of her gender.[80] Her approach would require that African-American women be given "more than strict scrutiny" because they are members at once of a suspect and a quasi-suspect class.[81] Scales-Trent contended that this step is a logical extension of the Court's equal protection framework but conceded that "it seems unlikely that the Court will break ground for a group that it barely acknowledges as a separate class."[82]

Smith responded candidly:

> All of Professor Scales-Trent's theories are premised on general societal discrimination against African American women. They do not take into account intra-race gender discrimination. Between African American men and women, as separate groups, race is not a factor. The racial identification of both groups balances and minimizes any benefit the other would receive under a racial classification. What is left, then, is gender classification. Accordingly, the traditional gender discrimination test, with all of its faults, is the appropriate level of scrutiny to be applied to exclusion of African American females from the AMBS.[83]

Smith's acknowledgement that there is such a phenomenon as intra-race discrimination based on gender—a phenomenon that was poignantly verified in Justice Clarence Thomas's confirmation hearings during the testimony of Professor Anita Hill—raises the question of how to deal with potential feelings of inferiority among African-American women at being forcibly segregated by law from all-male all-black schools. While Professor Scales-Trent's analysis did not include intra-race gender discrimination, she cogently argued for a special recognition of the place of African-American women in the constitutional system. This argument paralleled that of Chief Justice Warren in *Brown* that the feeling of inferiority of "Negroes" is engendered by forced segregation by law, compounding the hardships already imposed on them by their place in society.[84] There can be no separation of black boys from black girls in public schools without resentment that once again the African-American

80. *Id.* at 34.

81. *Id.* at 34-35 (setting out her third theory). Her first two theories treated African-American women as follows: The first treated African-American women as a subset of the group labelled "women" or as a subset of the group labeled African-American. *Id.* at 24. The second classified African-American women as a "discrete group seeking protection under the Constitution." *Id.* While this second theory took into account "the historical degradation and prejudice that has been perpetuated against African American women because of their race and sex, as well as the historical and current political powerlessness of African American women," Smith denied that it would have any impact with regard to AMBSs because black males have suffered the same degradations. Smith, *supra* note 3, at 2023.

82. Scales-Trent, *supra* note 79, at 35.

83. Smith, *supra* note 3, at 2028.

84. Brown v. Board of Educ., 347 U.S. 483, 494 (1954). *See also id.* at 494 n.11.

female is getting the short end of the stick while the African-American male is being coddled and given special treatment, including a special Afrocentric curriculum.[85] This was implicit in Scales-Trent's exposition that equal protection requires yet another special class, that of black women. So while Smith and Scales-Trent each give us just one part of the picture, together they lead to the conclusion that AMBSs do harm black women and that unless there can be separate and equal facilities—a dubious possibility, given the shortage of funds and the inherent sense of inferiority that forced segregation engenders—the gender segregation of African Americans is not permissible under the Equal Protection Clause. As the National Organization of Women (NOW) Legal Defense and Education Fund has expressed it,

> [w]hat is of great concern to women's equity advocates is the implication that it is the presence of females, rather than poor economic and social conditions founded on RACE *and* sex discrimination, which has led to the present failure of schools to educate the majority of children in this nation's urban schools. None of the proposals for African-American male education have identified whether and how specific curricula would address the historical and present role and impact of African-American women. Nor have they addressed what actions would be taken to mitigate the kind of chauvinism which can emerge in any monocultural environment.[86]

Further, there is the reality of role identification that an Afrocentric curriculum would impose on both African-American boys and girls, if that curriculum is historically and empirically accurate. Professor Ali A. Mazrui,[87] a noted African scholar, has described the political subordination of women in Africa.[88] Such political subordination means that an

85. *See generally* ANGELA DAVIS, WOMEN, RACE & CLASS (1981); JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW. BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985); Linda Grant, *Black Females' "Place" in Desegregated Classrooms*, 57 SOC. EDUC. 98 (1984).

86. NOW Legal Defense and Education Fund, Public Education Programs for African American Males: A Women's Educational Equity Policy Perspective, Apr., 1991 (working draft) at 22. *See generally*, HULL, SCOTT, AND SMITH, ALL THE WOMEN ARE WHITE, ALL THE BLACK ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES (1982).

87. Research Professor at the University of Jos, Nigeria, and Professor of Political Science and Afro-American and African Studies at the University of Michigan.

88. ALI A. MAZRUI, THE AFRICANS: A TRIPLE HERITAGE 129, 133 (1986) ("African women have, on the whole, performed extremely poorly in sports compared with their male counterparts. The demilitarization of women is the biggest cause for the marginalization of women in sports and politics .... Class and gender have profoundly interacted in this particular division of labor."). *See also* Michael Meyers, *Black Racism at Taxpayer Expense*, WALL ST. J., July 30, 1991, at A16:

> Africanists, seeking to replace Eurocentrism with Afrocentrism, are substituting one distortion with another. They claim to want to give minority students a curriculum

"Afrocentric" curriculum, if it is accurate, will educate African-American boys to consider this subordination to be natural and to undervalue African-American girls as equals. This result presents a further reason for arguing that gender segregation among African Americans may be harmful in much the same way that Dr. Kenneth Clark found enforced segregation by race to be harmful to the self-esteem of African Americans.[89] The NOW Legal Defense and Education Fund has argued that since "schools as a microcosm of the larger society tend to manifest all forms of social inequality," all-male environments are likely to reproduce and reinforce negative ideas about women.[90]

VI. The Proposed Programs for AMBSs and the Emphasis on Race

The separation of African-American male students has been justified on several grounds, giving rise to a variety of approaches. The first "focus[es] attention on the special needs of the African-American male child" by separating male from female students.[91] This, in essence, is the approach adopted in both Milwaukee and Detroit. The Milwaukee task force on the status of African-American males recommended changing curriculum to include information on African-American culture along with other cultures, and "establishing what it terms 'Gender Socialization Courses' which would be required for all students, designed to help them establish gender in a 'safe' space."[92]

In San Diego, the school board has stressed "Improving the Achievement of African Male Students."[93] The board's goals include improving students' academic skills, increasing attendance rates, high school graduation rates and the number of students who meet college

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that more accurately reflects these students' needs and aspirations—Afrocentric or Africa-centered education. Africa, however, is not the source of all important ideas; nor is it a place of "natural" kinship or identification for most Americans, blacks included. We can and should include Africa in our global studies and in the review of history, but we needn't use our classrooms or textbooks to give Africa mythological properties, based on the alleged skin color of historical figures like Cleopatra and the kings and queens of ancient times. Besides, democracy, as much of the world is discovering, is so much more endearing and enduring an idea than are dynasties.

89. *See supra* notes 21-33; *see also* Sadker, Thomas, and Sadker, *Non-Sexist Teaching: Overcoming Sex Bias in Teacher-Student Interaction*, The Mid-Atlantic Center for Sex Equity, The American University, Washington, D.C., U.S. Department of Education.

90. NOW Legal Defense and Education Fund, *supra* note 86, at 27. *See generally* PUBLIC EDUCATION PROGRAMS FOR AFRICAN-AMERICAN MALES: LEGAL ISSUES RAISED BY PROPOSALS FOR SINGLE-SEX, SINGLE-RACE PUBLIC SCHOOLS (Apr. 1991) (working draft).

91. *Id.* at 12.

92. *Id.* at 13.

93. *Id.* at 14.

entrance requirements, and reducing suspensions.[94] The program is designed to raise the self-esteem of black male students through emphasis on African heritage. All schools are to assess the condition of their black male students. Four pilot schools have been assigned African-American male advocates. The project is to be funded through existing resources, redirecting current funds, new funds, and possibly some grant money. The proposal recommends allocating $250,000 from the general fund budget.[95]

In Prince George's County, Maryland, public schools are trying yet another approach that can best be described as excellence and equity rather than resegregation. Faced with the dramatic crisis of the African-American male in public education, along with its own constant problem in "implementing equity in employment and in curriculum, instruction, and the treatment of African-American male students,"[96] Prince George's County has used the information gathered by its task force as a

> mandate to intensify efforts to promote equity as a key element of restructuring schools for everyone. Its recommendations include increasing expenditures to match those of its magnet schools for gifted students, multicultural education, hiring more African American teachers, counselors and administrators with a focus on increasing the presence of black males in the classroom, and working with other agencies to implement a multi-service approach to schools serving disadvantaged communities.[97]

In Detroit, the Detroit Public Schools (DPS) have sought to establish a Male Academy in kindergarten through eighth grade.[98] The goal is "increasing the likelihood that urban males will grow up 'whole' and prepared to met the challenges of life and living."[99] Significant aspects of the Male Academy are an Afrocentric curriculum, a Rites of Passage Program, courses on spirituality, mentors, tutors, extended school activities, and a network of supports to encourage students to achieve and set goals.[100] The DPS Male Academy proposal is offered as "one of a number of alternative schools that have been . . . established to deal with the problems of educating urban youth."[101] According to the proposal, staff is to participate in "workshops, training classes and planning ses-

94. *Id.*

95. *Id.* at 14-15; Improving the Achievement of African American Males, San Diego City Schools, Office of the Deputy Superintendent, July, 1989 (on file with author).

96. NOW Legal Defense and Education Fund, *supra* note 86, at 15.

97. *Id.* at 15-16.

98. Male Academy Grades K-8, A Demonstration Program for At-Risk Males. Detroit Public Schools, Detroit, December 7, 1990 (Draft) [hereinafter Demonstration Program].

99. *Id.*

100. *Id.*

101. *Id.*

sions that focus on the developmental needs of male students."[102] The Detroit Public Schools plan to evaluate the Male Academy by documenting activities, attitudes, and perceptions of the staff. DPS will consider data on school achievement, including academic skills, attendance, and student conduct, in determining the advantages of a single-sex school. "In accordance with the District's policy on alternative schools of choice, if the school did not attain a satisfactory or excellent status and adequate building utilization within three years, it would lose its alternative School of Choice classification and be subject to District intervention."[103] The Detroit plan, which is couched in terms of gender and not overtly of race, is the only plan so far to be tested in the courts.

VII. The *Garrett* Decision[104]

This section considers the only litigation challenging the constitutionality of AMBSs to reach the courts, starting with the plan itself and the genesis of the challenge. It examines within the context of *Brown* the purported invitation by the schools to males of different races, and explores the ramifications of the exclusion of females against the backdrop of the Equal Protection Clause of the Fourteenth Amendment.

A. The Genesis of the Litigation

The Board of Education of the School District of the City of Detroit scheduled the opening of three Male Academies for August 26, 1991.[105] These schools were to serve exclusively approximately 250 boys in preschool through fifth grade.[106] Grades six through eight were to be phased in over the next few years, bringing the total to 600 boys eligible to receive excellent educational opportunities not available to girls.[107] The Academies were to offer special programs described above,[108] including "futuristic lessons in preparation for 21st century careers, an emphasis on male responsibility, mentors, Saturday classes, individualized counseling, extended classroom hours, and student uniforms."[109]

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102. *Id.*

103. Plaintiffs' Complaint, Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991).

104. Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991).

105. *Id.* at 1006.

106. *Id.*

107. NOW Legal Defense and Education Fund, *supra* note 86, at 14; Demonstration Program, *supra* note 98.

108. *See* Demonstration Program, *supra* note 98 and accompanying text.

109. Garrett v. Board of Educ., 775 F.Supp. 1004, 1006 (E.D. Mich 1991).

The legal challenge to the Detroit Male Academies was initiated by Shawn Garrett, a Detroit resident individually and as "next friend" to her four-year-old daughter, Crystal Garrett, enrolled in the Detroit public preschool, as well as by Nancy Doe, a Detroit resident individually, and as "next friend" to her daughters Jane, Judy, and Jessica Doe who were enrolled in the Detroit public schools.[110] With the Male Academies scheduled to open on September 3, 1991, the plaintiffs sought a temporary restraining order to prevent the taking of any steps to implement the Male Academies as well as a preliminary injunction enjoining the defendant from excluding girls from the Male Academies and "directing the defendant to modify those aspects of the Male Academies, such as the sex-specific name, that deter girls from applying to the schools, and requiring defendant to advertise, on the same basis as the initial promotion of the Male Academies, the availability of the Academies to girls."[111]

B. The Arguments

The motion for a temporary restraining order was denied on August 5, 1991.[112] Emotions began to run high in Detroit. Before oral argument could be heard on the preliminary injunction, the Garretts were subjected to threatening phone calls and intimidating comments from members of the community, the result of which was that Shawn Garrett both individually and as "next friend" to Crystal Garrett, voluntary dismissed her action.[113] The campaign of harassment reflected an unfortunate antidemocratic disposition, which contrasted with the traditional nonviolent ideology of the Civil Rights Movement.[114]

> The plaintiffs argued in their preliminary statement that the defendant's actions in establishing three Male Academies to provide excellent educational opportunities for 600 boys in the Detroit school system, while declining to permit girls to benefit from the enhanced learning opportunities available in the Male Academies [violated] the Equal Protection Clause of the Fourteenth Amendment, federal statutes forbidding gender discrimination in federally funded programs, the Constitution of the State of Michigan, and

110. *Garrett*, 775 F. Supp. at 1006.

111. Plaintiff's motion for Temporary Restraining Order and Preliminary Injunction. *Id.* Attorneys for the plaintiffs included the NOW Legal Defense and Education Fund, the ACLU Fund of Michigan, and the firm of Goodman, Eden, Millender & Bedrosian.

112. *Garrett*, 775 F. Supp. at 1005.

113. *Garrett*, 775 F. Supp. at 1005 n.1.

114. Any analysis of the legal issues surrounding All-Male Black Schools would be incomplete if these incidents that drove the Garretts from the litigation, leaving only anonymous plaintiffs, were not at least mentioned.

Michigan statutory law.[115]

In terms of federal causes of action, the complaint[116] alleged that by establishing the Male Academies, the Board of Education deprived plaintiffs of their equal protection rights under the Fourteenth Amendment and 42 U.S.C. § 1983, and has violated Title IX of the Education Amendment of 1972[117] and the Equal Educational Opportunities Act.[118]

C. Background to the Arguments

An effective analysis of these causes of action necessitates an examination of some further information. Efforts had been made, for example, to reduce the possibility of a constitutional challenge to the Academies. Much as the complaint is cleverly drafted to provide an independent and adequate state ground for a decision striking down the Male Academies, should there be an effective challenge on appeal to the federal grounds,[119]

115. Plaintiffs' Complaint, Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991). State grounds allege that the policies and practices of the Detroit Board of Education in developing, establishing, and promoting the Male Academies, and in denying plaintiffs access to and limiting their participation in such Academies because of their sex, violates the plaintiffs' rights under the Michigan State Elliot-Larsen Act, Mich. Comp. Laws §§ 37.102, 37.2302 (a) and 37.2402, for which a cause of action is afforded by Mich. Comp. Laws § 37.2801; that the Detroit Board of Education's establishment of three separate Male Academies that exclude girls on account of their sex and are open only to boys violates plaintiffs' rights under the Michigan State School Code of 1976, Mich. Comp. Laws § 380.1146; that the policies and practices of the Detroit Board of Education in establishing three Male Academies that exclude girls solely on the basis of their sex has denied plaintiffs their right to equal protection of the laws of Michigan, in violation of Article 1, § 2 of the Michigan State Constitution.

116. Plaintiffs' Complaint at 14-15, *Garrett*.

117. 10 U.S.C. § 1681. *See also* 34 C.F.R. § 106 *et. seq.* The Board is subject to Title IX and the regulations thereunder because it receives federal funds.

118. 20 U.S.C. § 1701, *et. seq.* A private cause of action is afforded under 20 U.S.C. § 1706.

119. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). *But see* Michigan v. Long, 463 U.S. 1032, 1037-44 (1983) (upholding federal jurisdiction in the absence of a plain statement that the decision below rested on adequate and independent grounds). The Court in *Long* established a new presumption of state dependence on federal law. The Court assumed that the state court relied on federal law when the state court decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion. . . ." *Id.* at 1040-41. When a state court's opinion or judgment incorporates a "plain statement . . . that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached" and that the state court decision rests on "bona fide separate, adequate and independent [state] grounds the [Supreme Court] . . . will not undertake to review the decision." *Id.*

Since the Detroit case was brought in federal district court, this reasoning is not directly applicable. Since the decision is based on both state statutory and state constitutional law, however, the case presents problems similar to Michigan v. Long, in that the Supreme Court might not consider the state grounds sufficient in themselves to support the decision and could conclude that the federal constitutional issues were paramount. Even if the Supreme Court

the Detroit "Male Academies" plan had been drawn up with a view towards potential legal challenges.

In October 1990, the Detroit Board of Education authorized the General Superintendent of the Detroit Public Schools to appoint a task force to review the possibility of creating a Male Academy for the Detroit Public Schools. The Male Academy Task Force, chaired by Dr. Arthur M. Carter, issued a draft proposal for a Male Academy, grades K-8, on December 7, 1990.[120] On February 26, 1991, the School Board passed a resolution approving the creation of a Male Academy to be opened in the 1991-92 school year and directed the Superintendent to take necessary steps to "encourage formation of such an academy."[121]

Pursuant to the School Board's resolution, the Superintendent prepared a flyer for distribution to boys eligible to apply for the Male Academy. The flyer indicated that the Male Academy was "created to build strong character and ensure academic excellence," and that "males from every nationality, race and/or religion will be welcomed."[122] In implementing the February 26 resolution, the Board elected to open three academies instead of one: the Cooper, Marxhausen, and Woodward Schools.[123]

The invitation to "males from every nationality, race and/or religion" to apply is clearly designed to avoid potential problems with *Brown*, lest an overtly all-black school be found to be a form of reverse segregation by race and hence a violation of the Equal Protection Clause of the Fourteenth Amendment.

The language of the flier by implication decries a school that would *not* welcome non-black students. But given the curriculum's emphasis on "Afrocentrism" as stated in the flier designed to solicit applications to the Academies,[124] it could be argued that this is a sign to potential applicants that the schools are meant to be all-black as well as all-male. For what else does "Afrocentrism" mean but the placing of things African at the center of the life of the school? And if that is the schools' objective, who else but blacks would be comfortable in such an environment?

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were to find that the United States Constitution and federal legislation does not prohibit the Male Academies, it could nevertheless sustain the lower court's finding that the Michigan constitution and statutes do prohibit them as a matter of adequate state grounds, unless it also found that the federal statutes preempted the field, making the Michigan law unconstitutional by virtue of the Enforcement Clause, injunction with the Equal Protection Clause of the Fourteenth Amendment and under the Supremacy Clause.

120. Plaintiffs' Complaint, Exhibit A, *Garrett*.

121. *See* Plaintiffs' Complaint, Exhibit B, *Garrett*.

122. *See* Plaintiffs' Complaint, Exhibit C, *Garrett*.

123. Plaintiffs' Complaint at 6, *Garrett*.

124. Plaintiffs' Complaint, Exhibit C, *Garrett*.

D. *Brown* in a New Dimension

If nothing else, *Brown* obliges one to ask whether that feeling of inferiority and the irreparable harm that forced segregation imposes on black school children vanishes when the segregation is created voluntarily as part of an ideology of separatism? *Brown* taught us, in essence, that blacks needed to be integrated into white schools and that the Constitution required it. The new separatism teaches that African-American boys need to be kept separate so that their identities and egos can escape the harm done to them when they are forced to attend integrated schools of both sexes. It teaches that as long as the all-male, all-black environment is voluntary, the element of shame is eliminated, moving the schools beyond the scope of the doctrine in *Brown* and beyond its concerns. The new dimension entered is presumably one of self-respect, so that the African-American male can function as a whole human being in a hostile world. If this is the subliminal message of the flier encouraging male applicants from "every nationality, race and/or religion," then the overt tactic being employed by the Detroit Board of Education was misleading. Who else would apply to the Male Academies (even with the terms "black" or "African-American" left out) unless there was some undisclosed plan to bus in white boys from Grosse Pointe? Arguably, by so advertising, the Detroit School Board evaded a claim that the academies violate the Equal Protection Clause of the Fourteenth Amendment due to racial discrimination. This apparently was the objective. Certainly, the addition of the word "Pluralistic"[125] in brackets next to "Afrocentric," does little to diminish the impact of "Afrocentric." These were meant to be all-black as well as all-male schools, with a token of respect thrown to *Brown*, as one might accord an infirm though once helpful relative.

E. The Admissions Policy

The plaintiffs emphasized that the Male Academy students were to be "selected based on an 'array of characteristics and attributes,' including achievement scores, citizenship grades, single-parent household, attendance, grade point average, retention in grade, teacher assessment, potential for success and letters of recommendation."[126] Moreover, each

125. Plaintiffs' Complaint at 9, *Garrett*. Other "special features" offered to boys attending the Male Academies are: Rites of Passage, futuristic lessons in preparation for 21st century careers, individualized counseling, extended day-extended hours, student uniforms, foreign language classes, and competitive sports.

126. Plaintiffs' Complaint at 12, *Garrett*; Demonstration Program, *supra* note 98, Exhibit A at 19-20.

applicant would be ranked based on these criteria and males from a "mix" of backgrounds would be selected for the Male Academies, "one-third from the highest ranking group, and one-third from each of the middle and lower ranking groups."[127]

The irony of this admissions policy is that it limits the enrollment of the "at-risk" African American males the academies were purportedly established to serve. The requirement that each boy's parent(s) must sign a "covenant of participation" with the school principal, agreeing to a certain amount of participation,[128] only serves to compound this irony. Since parental involvement and concern is a key indicator of school success, this requirement, the plaintiffs argued "will effectively 'select out' many of the students who, because parents are not involved in their education, are most at-risk."[129] In actuality, what the Detroit School Board had done was to create with taxpayer money exclusive, all-male, virtually all-black, prep schools serving the Detroit black middle class. The schools would give male children of the black middle class a leg up in college entrance competition and future career choices.[130]

The Detroit Proposal did not totally ignore the needs of female students. At-risk ghetto female students would get support through special schools of their own. According to the Proposal, however, "females . . . are not experiencing problems to the same severity and extent [as males]. When they do, pregnancy and parenting appear to be the primary cause."[131] But as the plaintiffs argued in their complaint, "[t]he statistics cited in the Proposal, however, suggest that the urban crisis is not limited by gender but, rather, affects all urban children. For example, in the 1989-90 school year, female students had a dropout rate of 45%—a high rate that is symptomatic of the same lack of opportunities and absence of self-esteem that face urban boys."[132] And the Proposal itself points out that fewer "than half of the females who drop out of school do so because of pregnancy."[133]

To meet the special educational needs of "at-risk" urban girls (pregnant and parenting teens), the Proposal called for the establishment of three special schools called "Continuing Education Centers" (CECs).

127. Plaintiffs' Complaint at 12, *Garrett*; Demonstration Program, *supra* note 98, Exhibit A at 21-22.

128. *See, e.g.*, Marxhausen Charter, Woodward Charter, Cooper Charter.

129. Plaintiffs' Complaint at 12, *Garrett*.

130. *But see* Meyers, *supra* note 88, at A16.

131. Demonstration Program, *supra* note 98, at 17.

132. Plaintiffs' Complaint at 13-14, *Garrett*; Demonstration Program, *supra* note 98, at 6 (Table I).

133. Demonstration Program, *supra* note 98, at 15-17; Plaintiffs' Complaint at 13, *Garrett*.

On its face, then, the Proposal attempted to address the "separate but equal" requirement of *Hogan*[134] with a three-for-three trade off; three special academies for boys, three for girls. But that is where the similarity ends.

The function of the CECs would be to serve pregnant girls in grades seven through twelve who have low academic achievement.

> Girls who are admitted to CECs transfer from their home school to continue their education for one or more semesters during pregnancy and after pregnancy, and transfer back to their home school upon readiness to return. The students' programs are supplemented by classes in parenting, child development and care as well as by nurses, counselors and homebound teachers . . . . [P]regnant girls who are not academically at risk are not eligible for CECs and may thus be denied the support services necessary to continue their education. Most significantly, girls who are not pregnant or parenting—who represent the majority of female dropouts—are not eligible for CECs.[135]

> Moreover, it is apparent that the CECs were not designed to offer an enriched educational environment to girls nor are the schools intended to prevent the underlying problems that urban girls face and which contribute to their high dropout rate, *i.e.* early pregnancy, few role models, and the absence of other opportunities. Instead, CECs represent an after-the-fact accommodation to the fact that pregnancy is a temporary disability that, as a practical matter, may require special treatment such as childcare, specialized medical attention and special support services.[136]

So, while the Proposal created a veneer of equality, in substance, girls in the Detroit Public School system were to be deprived of the specialized programs and opportunities that the Male Academies would offer to boys.[137] An astounding argument by the Board of Education further exposed its lack of candor in characterizing the CECs. The Board argued that the Male Academies "do not specifically prohibit attendance by females,"[138] and pointed to the fact that one female had been provisionally admitted, conditioned upon the resolution of litigation.[139] In granting the preliminary injunction, the court rejected this argument out of hand:

> Although the Board states the Male Academies are not intended or designed to be discriminatory single-sex programs in one breath, in

134. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).
135. Plaintiffs' Complaint at 13-14, *Garrett.*
136. Plaintiffs' Complaint at 14, *Garrett.*
137. *Id.*
138. Garrett v. Board of Educ., 775 F. Supp. 1004, 1012 (E.D. Mich. 1991).
139. *Id.* at n.13

> the next it asserts that the program is designed to gather data to determine what type of curriculum and teacher-training programs are necessary to alleviate the disparate impact of the current educational system on urban males. The Board cannot have it both ways.[140]

F. The Decision

Only that portion of the decision that deals with the Equal Protection Clause of the Fourteenth Amendment will be considered, as the purpose of this Article is to analyze the legitimacy of the "New Separatism" from the point of view of the Federal Constitution. In granting the preliminary injunction, the court relied on the two-pronged test of *Mississippi Univ. for Women v. Hogan*:[141] The exclusion of an individual from a publicly-funded school because of his or her sex violates the Equal Protection Clause of the Fourteenth Amendment, unless the defendant can show the sex-based "classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' "[142]

The district court in *Garrett* first dismissed the "separate but equal" method of satisfying the *Hogan* test because "Detroit offers no schools for girls even comparable to the Male Academies."[143] Justice O'Connor's analysis in *Hogan* is germane:

> Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is . . . legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.[144]

In affirming intermediate scrutiny for gender classification, Justice O'Connor acknowledged that, "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately bur-

140. *Id.* at 1012.

141. 458 U.S. 718 (1982).

142. *Id.* at 724 (citations omitted).

143. 775 F. Supp. 1004, 1006 n.4.

144. *Hogan*, 458 U.S. at 724-26 (citations omitted).

dened."[145] But such a "benign" justification requires "searching analysis."[146] A state can establish a "compensatory purpose [justification] . . . only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification."[147] This must be considered in light of *Craig v. Boren*,[148] in which the Court held that gender classification could not be used as a "proxy for other, more germane bases of classification."[149]

In the Detroit case, the court found that the Board could not meet the standard in *Hogan* and *Craig*. In a decision that is bound to fuel the fire in the debate over AMBSs, the court found that

> the Board cannot meet this standard because the Board's policy of excluding girls inappropriately relies on gender as a proxy for "at-risk" students. The Academies were developed in response to the crisis facing African-American males manifested by high homicide, unemployment, and drop-out rates. While these statistics underscore a compelling need, they fall short of demonstrating that excluding girls is substantially related to the achievement of the Board's objectives. The Board has proffered no evidence that the presence of girls in the classroom bears a substantial relationship to the difficulties facing urban males.[150]

This analysis necessarily leads to the court's conclusion that the Male Academies improperly used gender as a classification as a "proxy for other, more germane bases of classification."[151] The "at-risk" group was not only urban (euphemistic for black) males, but all children, including girls, in the Detroit public schools, a reality the court found amply supported by the data. If the object of the Male Academies was to rescue the "at risk" group, the Board should, the Court suggested, address itself to all the children in that group, including those male students who were most at-risk. The admissions policy specified a mix of students with a wide range of achievement levels, thus lessening the probability that those who were most at-risk would gain admission.[152] Since urban girls also "drop out of school, suffer loss of self-esteem and become involved in criminal activity," ignoring their plight "institutionalizes inequality and perpetuates the myth that females are doing well in the current system."[153]

145. *Id.* at 728.
146. *Id.*
147. *Id.*
148. 429 U.S. 190 (1976).
149. *Id.*, at 198.
150. Garrett v. Board of Educ., 775 F. Supp. 1004, 1007 (E.D. Mich 1991).
151. *Id.* (quoting Craig v. Boren, 429 U.S. 190, 198 (1976)).
152. *Id.* at 1008.
153. *Id.*

Moreover, the court agreed that the special curriculum for the Academies

> suggests a false dichotomy between the roles and responsibilities of boys and girls. For example, the Rites of Passage curriculum teaches that "men need a vision and a plan for living," "men master their emotions," and "men acquire skills and knowledge to overcome life's obstacles." These issues confront all adolescents and are not rites peculiarly male. Therefore, they are insufficient to justify gender-based classification.[154]

In *Hogan*, the attack on the gender-exclusive Mississippi University for Women's School of Nursing by a male seeking to pursue his studies as a nurse gave rise to the defense that it could be proved that the women-only policy compensated for historical discrimination against women, a defense that the Supreme Court ultimately rejected.[155] But in *Garrett*, the Detroit School Board argued, the situation was entirely different, with statistics showing that the present delivery of education had "resulted in substantially lower achievement levels for males than for females and that the Academies are the solution to this problem. The primary rationale for the Academies is simply that co-educational programs aimed at improving male performance have failed."[156]

The court replied that it was "wary" of accepting such a rationale:

> Although co-educational programs have failed, there is no showing that it is the co-educational factor that results in failure. Even more dangerous is the prospect that should the male academies proceed and succeed, success would be equated with the absence of girls rather than any of the educational factors that more probably caused the outcome.[157]

The Board attempted to rely on its creation of the single-sex CECs with their alternative programs which it said addressed the special problems of urban females, particularly pregnancy, and argued that because urban females experienced academic performance problems, this did not weaken the importance of their objective in opening Male Academies.[158]

But even if the objective of opening the Male Academies is important, the degree of its importance does not eradicate the burden of showing how the sexually discriminatory means are related to the achievement of that objective. And since there was no evidence that the presence of girls in any way causes the problems that urban black boys

154. *Id.* at 1007.
155. *Hogan*, 458 U.S. at 729-31.
156. *Garrett*, 775 F. Supp. at 1007.
157. *Id.*
158. *Id.*

experience in school, this second part of the *Hogan* test was not met.[159]

The Board then sought to establish that the second prong of the *Hogan* analysis—that the means must be substantially related to the objective—was satisfied for three reasons:

> First, the establishment of male academies is critical to expeditiously determine what curriculum and training programs will work to keep urban males out of the City's morgues and prisons. Second, the Board has already reviewed smaller scale experimental programs at two schools that specifically addressed the special needs of urban males and found them successful in improving the overall academic and behavioral aspects of the urban males' lifestyle. Third, the Board knows that current co-ed programs do not work. Consequently, the Board finds that research supports the establishment of an experimental school with a specialized curriculum to address the special needs of urban males.[160]

The Board noted that Ray Johnson, Assistant Principal at Cooper Elementary School, created a voluntary extra-curricular mentorship program, "Man-to-Man," that was three years old and afforded male students weekly interaction with professional male mentors across the city. "Johnson asserts that the program has been successful and has led to some improvement in the academic status of male participants. Woodward School enacted a similar program which also met with success."[161] Although these smaller-scale experimental programs accomplished the objective of improving the performance of urban males, the court emphasized that there was no showing as to why the exclusion of females was necessary to accomplish the goals of combating unemployment, dropout and homicide rates among urban males. The court commented that "[t]here is no evidence that the educational system is failing urban males because females attend school with males. In fact, the educational system is also failing females."[162]

A district court order granting a temporary restraining order and a preliminary injunction cannot be said to be a definitive statement on the nature of "heightened scrutiny" or "intermediate scrutiny," the middle scrutiny that is applicable under the Fourteenth Amendment to gender classification. Since *Hogan* was a 5-4 decision with a strong dissent by Justice Powell joined by now Chief Justice Rehnquist, there remains the possibility that the result in a case similar to *Garrett* could be different. Powell argued for a rational basis test in higher education cases with

159. *Id.* at 1008.

160. *Id.* (citation omitted).

161. *Id.* at 1008 n.6.

162. *Id.*

gender classifications,[163] a result that would be appealing to the New Separatists. *Hogan* is distinguishable on the grounds that it is a higher education case and hence deals with a level of separation of the sexes that is harder to justify than on the lower school level, as the decision in *United States v. Virginia*[164] makes clear. On the lower school level, there may be important objectives that can be reached only through separation of the sexes that were not thrashed out in *Garrett*. There might be evidence to support the hypothesis that a disciplined environment can more readily be sustained in single-sex elementary schools or high schools, or that racial integration can be achieved with greater ease in single-sex elementary or high schools. Since the intermediate standard of scrutiny is applicable, this would be easier to justify than a separation of school children based on race. Further, if the separation were based solely on sex and the schools for males and females could be said to be equal in the educational and extracurricular activities offered, there should be no reason to strike down such an arrangement on equal protection grounds.

The objections would ultimately have to be political, in the tradition of *McCulloch v. Maryland*.[165] But in the final analysis, this is not what the dispute is really about. It is not about gender; it is about race. For when the decision in *Garrett* addresses the crisis of the young urban male, we know it is not addressing itself to Oliver Barrett IV.[166] It is addressing itself to Bigger Thomas.[167] And it is no accident that there is no black female figure in American literature comparable to Bigger Thomas.

In the penultimate paragraph of the court's order, the court not only acknowledged who this case was about, but suggested that solutions might exist that are comprehensive and inclusive. "Indeed there has been a cry for help within this community," the court asserted.[168] "It is possible, the Court sees it as possible, that the exclusion of some can be rectified to the benefit of all, including the young, black male, who is indeed an endangered species."[169]

It is unfortunate that the perception of urban black males as being "at-risk" and an "endangered species" in comparison with urban black females was not explored more deeply in the arguments leading to the

163. *Hogan*, 458 U.S. at 742 (Powell, J., dissenting).
164. 766 F. Supp. 1407 (W.D. Va. 1991).
165. 17 U.S. (4 Wheat.) 316 (1819).
166. ERIC SEGAL, LOVE STORY (1971).
167. WRIGHT, *supra* note 37.
168. Temporary Restraining Order at 14, Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991).
169. *Id.*

order.[170] It is conceivable that the white perception of black women, even in the post-colonial condition, is that they are less threatening than black males. There may be structures in the post-slavery African-American mind that visualize black women as somehow self-sufficient and with more options for survival in a hostile culture that undervalues black masculinity except in the context of spectator sports.[171] It is this "undervaluing" that the court neglected, except in those sparse words towards the end of the order.

The Proposal failed because the court recognized young black urban females as an "at-risk" group. While the court's language is persuasive, the problem remains as to its characterization. The court's interpretation of the Constitution, and the Equal Protection Clause of the Fourteenth Amendment in particular, is steeped in a post-segregation ideology that was forged in the Civil Rights Movement. Implicit in its reasoning is the cultural identity of a modern, assimilated African American who perceives the ideology of the New Separatism as a threat, not only to the African-American community through a reintroduction of segregation, but to the identities of those very individuals who have begun to share power in a society that moves glacially but which is not so oblivious as to fail to create opportunities for change. With this in mind, the court sought to create a new safety valve on its own by diffusing the intensity of the New Separatism. By holding that the plaintiffs could succeed at trial in showing an equal protection violation based on gender, the court, in effect, ordered the admission of girls to the Male Academies on the threat that they would otherwise be declared unconstitutional.[172]

In granting the preliminary injunction, the court addressed itself to the opposing parties in the case: "The parties are ordered to get together and meet as a result of this Court's ruling today."[173] This action expressed the court's hope for a synthetic jurisprudence, a neo-Hegelian dialectic in which the thesis, racial integration, and its antithesis, separatism, meet and synthesize to produce a new model to rescue young black Americans who are sinking in the abysmal environment of Detroit and in all of urban America. Even as it rejected the Proposal of the Detroit Board of Education, it gave credence to the Board's efforts by accepting the validity of its objectives; the preservation of an "endangered species": the young urban black male. This is an image that must somehow be

170. For such a consideration, see generally, Smith, *supra* note 3.

171. *See generally* Sara Suleri, *Woman Skin Deep: Feminism and the Postcolonial Condition*, Critical Inquiry, "Identities," Vol 18, Summer 1992.

172. Order at 14, *Garrett*.

173. *Id.*

reconciled with the other image of the urban black male: the sociopathic criminal. Neither the court nor either of the parties dealt with the "important government objectives" related to crime and criminals, as opposed to victimization.

If it could be shown that young urban black males are far more likely to turn to serious crime, including crimes of violence, as the result of the pressures of society and the seemingly hopeless future they have, than young urban black females, who, while also victimized by the system, are more likely to get pregnant or become involved with victimless crimes such as prostitution, then it conceivably could have been argued that separating the boys from the girls, with the concomitant crime prevention programs implemented at the boys schools, might be substantially related to the anti-crime objective. This argument would be reinforced if the Male Academies were not selective, but were comprehensive with regard to the class of students most likely to become serious dangers, not only to themselves, but to society. It is not likely, however, that a proposal along these lines would ever be adopted. Its very hypothesis is based on a preconception about urban black male youth that would inevitably be challenged as bigoted and stereotypical, a sufficient reason under *Hogan* to be rejected.

The *Garrett* court appeared to be suggesting that it might accept special programs designed for young urban males within the context of a normal, co-educational, racially integrated school. But this, too, would inevitably run into trouble. If, for example, the extra-curricular "Man-to-Man" mentor system that was introduced with such success at the Cooper Elementary School and The Woodward School[174] were implemented on a regular basis in the Detroit school system, and no comparable program were introduced for girls, it would be difficult to sustain. The recognizable differences between men and women that should be able to support a variety of different programs fails the equal protection test of "heightened scrutiny," as Justice Powell lamented in his dissent in *Hogan*.[175] Nevertheless, the price to be paid for abandoning that test for one of mere rationality is far too high to be acceptable, even though the stricter test sometimes runs counter to the wishes of women to have all-women institutions funded by the state. Logically, based on the experience of women in the United States, there should be a two-tiered test for gender classification; a "rationality" test when the gender classification is for the benefit of women, and a "heightened scrutiny" test when the gender classification is used to exclude them. However, such a structure is

174. Garrett v. Board of Educ., 775 F. Supp. 1004, 1008 n.6.

175. 458 U.S. 718, 745 (1982) (Powell, J., dissenting).

difficult to imagine under current Supreme Court. Given the choice between "rationality" and "heightened scrutiny," it is better to keep the weapon that fights exclusion, the one that obliged the court in *Garrett* to rule against the Male Academies.

The *Garrett* court, then, while upholding the constitutional protection of women's rights under the Equal Protection Clause of the Fourteenth Amendment, left Bigger Thomas stranded, where he always has been, in the limbo of American constitutional interpretation. The Detroit Board of Education elected not to appeal or go to trial, withdrew the litigation, and avoided spending the estimated one million dollars it would have cost. The Board entered into an agreement with the plaintiffs setting aside certain seats so that girls could be admitted into the Detroit AMBSs, on the condition that the plaintiffs would not pursue the litigation.[176]

This ambiguous result leaves unanswered certain important questions with regard to the social science foundation of interpretations of the Equal Protection Clause of the Fourteenth Amendment. Were these question to be answered, they might shed light on the problem of AMBSs: To what extent does the social psychology of Dr. Kenneth Clark still legitimately direct our constitutional system on Bigger Thomas' behalf? To what extent does the contrary approach of the Afrocentricists and New Separatists find legitimacy in the Constitution as the result of a dynamic in our social order that has superseded *Brown*?

VIII. The Dichotomy of American Race Relations and Competing Social Theories

This section considers one critique of the conclusions drawn by the court in *Garrett*, and focuses on the relevance of empirical data in constitutional decisionmaking. What is at issue here is the holding by the *Garrett* court that African-American females are in as equally a poor a position as that of African-American males in American society; a conclusion that is the foundation for sustaining the Equal Protection challenge. This holding, however, contradicts Smith's critique, raising the question of it is possible to conclude that perception of the data can be correct while another is erroneous.

The opposing views of Edward Cahn and Kenneth Clark are also examined with regard to the relevance of the social science data in

176. Smith, *supra* note 3, at 2006 n.8; *See Garrett*, 775 F. Supp. at 1004; Stipulation and Agreement at 2, *Garrett*, 775 F. Supp. 1004; Statement of Deborah M. McGriff, General Superintendent, Detroit Public Schools (Nov. 6, 1991).

Brown. Cahn denies any relevance and argues that natural law was the true basis of the decision, whereas Clark insists the scientific data was highly relevant to the decision. This author sides with Clark, but reserves judgment as to whether the decision in *Brown* can be said to be a form of natural law.

A. Smith's Critique of *Garrett* as a Formulation of the Dichotomy

In criticizing *Garrett*, Smith argued:

> The district court also concluded that the Board would probably not be able to show that the exclusion of females was substantially related to the Board's purpose of assisting African-American males. It noted that the statistical evidence provided by the Board did not satisfy its burden of showing how the exclusion of females was "necessary to combat unemployment, dropout and homicide rates among urban males." The test is inappropriate to gender classification cases; the district court was applying some form of strict scrutiny. In gender discrimination cases, the Supreme Court has not required a governmental entity to show a probability of success. Instead, the Court has only required that an entity perform a reasoned analysis and not rely on stereotypical notions. The Detroit Board did not rely on stereotypes. It commissioned expert and parents, who studied the situation in Detroit and provided an extensive recommendation.[177]

But Smith misread *Garrett*. Indeed, the court *did* find that urban black male youths are an "endangered species."[178] What the court concluded was that there was virtually *no* evidence to support the contention that the elimination of females from the school environment would accomplish the desired objectives, such as the reduction of the unemployment and dropout rates, the reduction in drug addiction, and other plagues affecting the black urban male youth.[179] This was not a form of strict scrutiny, but merely an objective application of the two-pronged test of *Hogan*. The court defended the rights of females by asserting that they, too, had been victimized by the system and were entitled to the same special treatment.[180] There was no showing in the court's reasoning that it imposed some stricter standard than the one of intermediate scrutiny established by the Supreme Court for gender classification, a standard that was applied with considerable clarity in *United States v. Virginia*.[181] Further, Smith's argument that AMBSs in Detroit are ac-

177. Smith, *supra* note 3, at 2006 n.8 (citations omitted). *See also*, Demonstration Program, *supra* note 98.

178. *Garrett*, 775 F. Supp. at 1007.

179. *Id.* at 1007-08.

180. *Id.*

181. 776 F. Supp. 1407 (W.D. Va. 1991).

ceptable because they compensate for past discrimination against young black urban males does not accurately apply this exception carved out by Justice O'Connor in *Hogan*. In rejecting the University's argument in *Hogan*, she acknowledged that "[i]n limited circumstances, a gender-based classification favoring sex can be justified if it intentionally and directly assists members of the one sex that is disproportionately burdened."[182] But such a benign justification requires "searching analysis."[183] "[A] state can establish a compensatory purpose [justification] . . . only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification."[184]

The operative word here is "actually," for no matter how searching the analysis, if there is no showing that the members of the gender benefitted by the classification actually suffer a disadvantage related to the classification, the justification ceases to be benign. In *Hogan*, it could not be shown that women were disadvantaged in the nursing profession.

In *Garrett*, the court could not find that black males were worse off than black females in a society that inflicts irreparable harm on them both. Consequently, it concluded that the result should be the same as in *Hogan*. There simply was no basis for upholding a gender classification under the "heightened scrutiny" standard. But ultimately, such a finding depends profoundly on a vision of reality that is inevitably affected by the investigator's "apparatus of perception."[185] The difference in perception of the data by the *Garrett* court and Smith raises the larger question as to the role of social science data in general with respect to constitutional decisionmaking.

B. The Relevance of Social Science Data: The Competing Theories

What is in question is not legal precedent but the role of social science data in discrimination litigation. When does a hypothesis about a class of persons in a given institutional environment reach the level of certainty required to justify critical constitutional conclusions? And in such a situation, is it possible or even desirable that the viewpoint of the perceiver, the social scientist, be excluded from the data offered in support of the hypothesis? As Immanuel Kant observed, "things in themselves, which are the causes of our sensations are unknowable," and what we believe to be empirical knowledge is affected by our "apparatus of

182. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982).

183. *Id.*

184. *Id.* at 728; GUNTHER, *supra* note 53, at 673.

185. IMMANUEL KANT, THE CRITIQUE OF PURE REASON (2nd ed. 1787) (paraphrased by BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 707 (1945)).

perception," which includes the subjective elements of "space and time."[186]

Alexander Pekelis, in his argument for a "jurisprudence of welfare," observed almost half a century ago:

> We cannot turn back the clock. Social scientists [economists, sociologists and psychologists] are with us for good, and are going to remain in the very midst of government . . . . Judges may and should become acquainted with the various nonlegal disciplines . . . [i]n order to acquire the conviction that they can furnish no more certainty than Constitutions, statutes or precedents.[187]

This analysis should have dispelled the notion of certainty in what Michel Foucault described as the "human sciences."[188] At most, probability is all that they can offer. But in the context of judicial supremacy, this is problematic. As a famous passage from *Cooper v. Aaron*[189] declared:

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* . . . that "[I]t is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.[190]

If this is so, the lack of a definitive approach to reading that instrument is unsettling. Not only does the prospect of conflicting hermeneutics disrupt the notion of order and predictability, lending credibility to the notion that chaos inhabits the province of constitutional interpretation, but the arbitrary selection of empirical data and its analysis by scientists to either rationalize or determine a particular outcome with regard to such

186. *Id.* Kant referred to the unknown "things in themselves" as "noumena," arguing that "the concept of a noumenon is necessary to prevent sensible intuition from being extended to things in themselves, and thus to limit the objective validity of sensible knowledge. IMMANUEL KANT, CRITIQUE OF PURE REASON, (1781) (*quoted* in WALTER JONES, A HISTORY OF WESTERN PHILOSOPHY, 846 (1952)).

187. Alexander H. Pekelis, *The Case For a Jurisprudence of Welfare*, 2 SOCIAL RESEARCH, *in* LAW AND SOCIAL ACTION: SELECTED ESSAYS OF ALEXANDER H. PEKELIS 38 (Milton R. Konvitz, ed. 1970).

188. MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES 375 (1970).

189. 358 U.S. 1 (1958) (the Court's first decision on school desegregation to follow the remands in *Brown*).

190. *Id.* at 18.

interpretation further complicates any attempt to legitimize the ultimate decision-making process under the constitutional system.[191]

In rejecting the reliance on the findings of social scientists in the process of judicial review in *Brown v. Board of Education*,[192] Edmond Cahn argued that it was erroneous to maintain that the *Brown* decision was "caused by the testimony and opinions of the scientists." He asserted that the constitutional rights of Negroes—or any other Americans—should not rest on any such flimsy foundation as some of the scientific demonstrations in these records.[193] Apart from attacking social science evidence as unreliable, Cahn asserted that the cruelty inherent in racial segregation "is obvious and evident."[194] In so arguing, he juxtaposed two forms of reasoning: empirical, a posteriori inductive reasoning, and rational, a priori deductive reasoning.[195] To Cahn, racial segregation in the schools was unconstitutional. The injuries it imposed were clear and self-evident, so that the Court could take judicial notice of it without reference to any empirical data. What use the Court did make of the findings of the social scientists in the controversial footnote 11 was, he alleged, simply a magnanimous gesture in a decision that mentioned neither the testimony of the expert witnesses nor the statements submitted by the thirty-two social scientists.[196]

Cahn argued that "separate but equal" was a contradictory standard negated by pure reason. In so arguing, Cahn was advocating the application of a priori principles to constitutional adjudication. These are the principles that are separate and distinct from empirical perception, knowable to all through the exercise of their pure reason.[197] To Kant, time and space were basic a priori perceptions. To Thomas Aquinas, the

191. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959); JÜRGEN HABERMAS, LEGITIMATION CRISIS (1975).

192. 347 U.S. 483 (1954).

193. Cahn, *supra* note 35, at 157-58.

194. *Id.*

195. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON (N.K. Smith trans., Random House 1958) (1787): "But though all our knowledge begins with experience, it does not follow that it all arises out of experience. For it may well be that even our empirical knowledge is made up of what we receive through impressions and of what our own faculty of knowledge (sensible impressions serving merely as the occasion) supplies from itself. If our faculty of knowledge makes any such addition, it may be that we are not in a position to distinguish it from the raw material, until with long practice of attention we have become skilled in separating it. This, then, is a question which at least calls for closer examination, and does not allow of any off-hand answer: whether there is any knowledge that is thus independent . . . of the senses. Such knowledge is entitled *a priori*, and distinguished from the *empirical*, which has its sources *a posteriori*, that is, in experience."

196. Cahn, *supra* note 35, at 160-61.

197. Clark, *The Desegregation Cases*, *supra* note 35, at 227.

basic a priori principle was what he termed "natural law."[198] Since the basic precept of natural law is to "do good and avoid evil,"[199] the problem of American race relations must, perforce, be examined according to this dictate, or so Cahn tells us by implication. The adoption by the Constitution of natural law becomes, in this context, an a priori form of comprehension rather than an empirical one.

The decision in *Brown* contains scant references to legal or other authority. Along with the social science authority cited in footnote 11, there are some references to findings in other decisions, and an inconclusive, cursory history of the Fourteenth Amendment. The decision appears to rest on what the Court considers to be self-evident: that segregation is evil per se.[200] While this practice of a priori reasoning was once accepted during a period of history when the country's perception of good and evil was immature, it was no longer acceptable by 1954 in the United States.

But just as Cahn, who supported this interpretation of the Court's decision in *Brown*, argued that school segregation by race is, in essence, against natural law and hence against the Equal Protection Clause of the Fourteenth Amendment, the New Separatists argued the opposite contention, clouding any vision of what is inherently good or inherently evil. The passage of time, they explained, has shown that a decent education for young black urban males cannot be achieved through the vision of *Brown*, that the "modernist" liberal philosophy of integration has failed and that only a "post-modernist"[201] separatist philosophy can succeed by virtue of its own a priori premises, which can be perceived and appreciated only by those who are African-American.[202] What seems to be "self-evident" to the New Separatism is not that segregation is evil per se

198. Thomas Aquinas, Summa Theologica, First Part of the Second Part, Treatise on Law, Question 91: "[T]his participation of the eternal law in the rational creature is called the natural law.")

199. Thomas Aquinas, Summa Theologica, First Part of the Second Part, Treatise on Law, Second Article ("Hence this is the first precept of law, that good is to be done. All other precepts of the natural law are based on this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.").

200. Brown v. Board of Educ., 347 U.S. 483, 493-96 (1954). *But see* Clark, *The Desegregation cases*, *supra* note 35, at 227-28.

201. For an analysis of this elusive term, see Jean-Francois Lystard, *Answering the Question: What is Post-Modernism? in* POSTMODERNISM—A READER (Thomas Docherty ed., 1993).

202. *See, e.g.*, Smith, *supra* note 3; 1 JAWANZA KUNJUFU, COUNTERING THE CONSPIRACY TO DESTROY BLACK BOYS (1985); 2 JAWANZA KUNJUFU, COUNTERING THE CONSPIRACY TO DESTROY BLACK BOYS (1986).

(Dr. King),[203] but that self-reliance and separatism are both good and necessary (Malcolm X).[204] Neither of these propositions is subject to empirical verification; they lead to opposite conclusions with regard to social theory and race relations, and both affect one's vision of empirical reality.[205]

The phenomenon that has led to this dichotomy is resegregation. When *Brown* was decided in 1954, the majority of Americans lived in cities, with the rest of the country predominantly rural, even though the trend toward suburbanization was ineluctable.[206] "White flight," as it came to be known, restructured all of American society, creating environmental as well as social problems of enormous magnitude. Often the goals of blacks and environmentalists clashed, as open space that black groups wanted devoted to low income housing was preserved as parks, "forever wild," or as agricultural preserves. Criticizing the policies in Nassau County and Suffolk County on Long Island, which have devoted thousands of acres to parks, an NAACP official observed, "They build parks next to parks."[207] Blacks were, for the most part, either left behind in the inner cities, or clustered together in the new suburban ghettos. The old ghettos such as South Central Los Angeles became worse, ultimately providing living proof of Langston Hughes' prophesy:

> What happens to a dream deferred?
>
> Does it dry up
> Like a raisin in the sun?
> Or fester like a sore—
> And then run?
> Does it stink like rotten meat?
> Or crust and sugar over—
> Like syrupy sweet?

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203. *See* GARROW, *supra* note 39.

204. *See* ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X (1965).

205. *Compare* Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960) ("Segregation is historically and contemporaneously associated in a functioning complex with practices which are indisputably and grossly discriminatory.") *with* Malcolm X: "The only thing I want integrated is my coffee." MALCOLM X (Spike Lee Dir., 1992) (Based on THE AUTOBIOGRAPHY OF MALCOLM X (1965)).

206. *See* SAMUEL KAPLAN, THE DREAM DEFERRED; PEOPLE, POLITICS AND PLANNING IN SUBURBIA 1-18 (1976); THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH, A TASK FORCE REPORT BY THE ROCKEFELLER BROTHERS FUND, 84-86 (William K. Reilly, ed., Crowell, 1973).

207. THE USE OF LAND, *supra* note 206, at 54. *See also*, KAPLAN, supra note 206, at 72-86; MARK GOTTDIENER, PLANNED SPRAWL: PRIVATE AND PUBLIC INTERESTS IN SUBURBIA 50-53 (Sage, 1977). These authorities are in accord with the author's experience as Director of Natural Resources for the Town of East Hampton, New York from 1981 through 1983.

Maybe it just sags
Like a heavy load.
Or does it explode?[208]

It is from the living patterns of blacks and whites in America that the New Separatism gets its energy. If blacks will always live with blacks and among blacks, then what is the meaning of desegregation? How useful is strict scrutiny if it only scrutinizes de jure as opposed to de facto segregation? Ironically, it is from the jurisprudential right that the New Separatism gets its main allies. As Justice Scalia wrote in his dissent in *Ayers v. Fordice*,[209] "[t]here is nothing unconstitutional about a 'black' school in the sense, not of a school that blacks must attend and that whites cannot, but of a school that, as a consequence of *private choice* in *residence* or in school selection, contains, and has long contained, a large black majority."[210]

The challenge to constitutional interpretation almost forty years after *Brown* is whether or not there is a dynamic at work altering the Court's a priori perception of reality so as to give rise to yet another interpretation of the Equal Protection Clause of the Fourteenth Amendment with regard to both race and gender. The era of *Plessy*[211] came and went, jettisoned when the Warren Court insisted on an interpretation consonant with the times. The results were celebrated, but as the euphoria of the Civil Rights Movement, which had been torn apart by the struggle between separatists and integrationists, waned in the aftermath of the assassination of Dr. King,[212] the triumph of *Brown* seemed an increasingly empty one. With the failure of the "Black Power" movement, the concept of a race war became increasingly remote.[213] And as the concept of integration in the crime and drug-ridden inner cities became a chimera, there arose a movement that found itself curiously allied with the jurisprudential right that believed *Brown* to be a relic from the Warren days.[214]

Thus, Pamela Smith's argument that *Brown* should be limited to its most narrow holding, that it "did not attack mere separation of the races,

208. LANGSTON HUGHES, *Dream Deferred in* LANGSTON HUGHES THE PANTHER AND THE LASH: POEMS OF OUR TIMES (1951) (by permission of Alfred A. Knopf, Inc.).

209. 112 S. Ct. 2727 (1992).

210. *Id.* at 2743.

211. 163 U.S. 537 (1896)

212. *See* CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S 191-211 (1981).

213. *Id.* at 215-64. Carson saw the cycle of "Black Power" as moving from internal conflicts to white suppression.

214. *See* Smith, *supra* note 3, at 2010 n.31 (quoting Scalia's dissent in *Ayers v. Fordice* with approval).

but de jure segregation,"[215] and that the entire approach that the Court has fashioned with regard to women under the Equal Protection Clause is irrelevant to black women,[216] is part of a much larger shift in strategy. Far more Malcolm[217] or Ron Karenga than Martin, this approach accepts the separation of the races as an inevitability that should be looked on as an opportunity for growth and radical self-knowledge by African Americans. Even its rhetoric is similar to the radical separatists of the Sixties. As Julius Lester warned in 1967 (before his conversion to Orthodox Judaism): The government's determination that we are the ones to be eliminated by any means necessary, should never be underestimated."[218] Dr. Jawanza Kunjufu, "a consultant who has studied the plight of the African-American male in the inner-city school system"[219] in the 1980s and '90s, terms his three-volume opus *Countering the Conspiracy to Destroy Black Boys.*[220] Unlike the American blacks of the 1950s who sought the protection of the Warren Court in breaking down racial barriers to become part of the American mainstream, the New Separatists are looking to the Rehnquist Court, with Justices Thomas and Scalia, to uphold voluntary self-segregation by race and sex.

D. Against Originalism; Towards a Flexible Approach to the Fourteenth Amendment

The "New Separatists" find comfort in an originalist interpretation of the Fourteenth Amendment because under such an approach "voluntary" segregation could be sanctioned by it. However, the arguments of scholar Alexander Bickel undermine that position.

Alexander Bickel postulated that when the Fourteenth Amendment was adopted, the result in *Brown* was never contemplated, a point that is not so obscure, given the doctrine in *Plessy.*[221] He provided historical materials to support his contention that the Equal Protection Clause of the Fourteenth Amendment "was not expected in 1866 to apply to segregation."[222] Because of this, the Court could have felt itself trapped in a

215. Smith, *supra* note 3, at 2009.

216. *Id.* at 2016.

217. Specifically, Malcolm X's "pre-Mecca" consciousness. *See* HALEY, *supra* note 204.

218. JULIUS LESTER, REVOLUTIONARY NOTES 37 (1969). *See generally* JULIUS LESTER, LOOK OUT, WHITEY! BLACK POWER'S GON' GET YOUR MAMA! (1968).

219. Smith, *supra* note 3, at 2041, n.208.

220. 1 KUNJUFU, *supra* note 202, at 18-19; 2 KUNJUFU, *supra* note 202, at 1-9; 3 JAWANZA KUNJUFU, COUNTERING THE CONSPIRACY TO DESTROY BLACK BOYS 1-43 (1990).

221. Alexander M. Bickel, *The Original Understanding and the Segregation Decisions,* 69 HARV. L. REV. 1 (1955).

222. *Id.* at 64.

dilemma: either to follow the original intent and insist that it was powerless to overturn segregation in any form, or to go "counter to what it took to be the original understanding, and [to] formulat[e], as it has not often needed to do in the past, an explicit theory rationalizing such a course."[223] Bickel explained how the Court circumvented the trap: "The Court, of course, made neither choice. It was able to avoid the dilemma because the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866."[224]

Curiously, Bickel did not refer here to Chief John Marshall's theory of constitutional interpretation set forth with such majesty in *McCulloch v. Maryland*,[225] but that theory is implicit in Bickel's conclusion, with its rejection of the originalist doctrine. Bickel's hermeneutics, like Justice Marshall's, allows for a living and breathing Constitution that can adapt to changing circumstances so the Court can give a decision based on the moral and material state of the nation at the time of the case and not the time of the adoption of the Constitution or the amendments to it.[226] Given this rationale, presumably the "meaning" of the Equal Protection Clause of the Fourteenth Amendment could change again. But should it? If Bickel is right, any change would depend on changes in circumstances in the "moral and material state of the nation" in the future, and not as understood at the time of prior interpretations.

IX. New Life for *Brown* and New Hope for Integrated Schools and an Integrated Society

A. Recent School Desegregation Decisions

This section discusses the more recent progeny of *Brown* and demonstrates that these cases do not erode the continuing vitality of *Brown*, even though they call for a more realistic assessment of the efforts of the school systems to eradicate segregation. Integration has not been abandoned. Rather, it has been adapted to a new context in which allegations of bad faith by school boards must be supported by additional evidence evaluating current practices, as opposed to simply relying on findings from decades past. The original goals of integrated schools and an integrated society still have considerable support, as evidenced by new forms

223. *Id.* at 65.

224. *Id.*

225. 17 U.S. (4 Wheat) 316 (1819).

226. But see his later work, ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 11-42 (1970) (becoming increasingly suspicious of the idea of progress in constitutional interpretation).

of litigation in state courts. Pluralism also continues to be a dynamic force, with diversity in education made possible through various private options.

As the New Separatists press their arguments, the legacy of *Brown* continues to assert itself in some key Supreme Court decisions. In *Freeman v. Pitts*,[227] the Court affirmed that "[t]he school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation,"[228] and held additionally that a court may relinquish control over a former de jure school system in an incremental manner.[229] The principles set forth in the case are of profound significance for the desegregation process. As the *Freeman* Court stated, "once state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there arises a presumption . . . that any current racial imbalance is the product of that violation."[230]

In *Board of Education of Oklahoma City v. Dowell*,[231] the Court, in underscoring the equitable nature of the desegregation decree and in indicating that the term "unitary" has no magical import, required the district court to consider whether the school board "had complied in good faith with the desegregation decree since it was entered and whether vestiges of past discrimination had been eliminated to the extent practicable."[232] The establishment of the *good faith* compliance test in *Dowell* has had resounding significance for school boards, including the most recent decision in *Brown v. Board of Education of Topeka*,[233] the latest of the *Brown* progeny and heir to the legacy of Earl Warren and Kenneth Clark.

In this most recent *Brown* case, the district court concluded that the school system had achieved unitary status and was entitled to relief from judicial oversight in the remedial phase of school desegregation litigation.[234] The court therefore required the plaintiffs to make a new showing of discriminatory intent rather than requiring the school district to prove that any current racial imbalance was not causally connected to the prior de jure segregated school system.[235] Relying on *Dowell* and *Freeman* (and giving those decisions creative interpretations), the Court

227. 112 S. Ct. 1430 (1992).
228. *Id.* at 1447.
229. *Id.*
230. *Id.* at 1452 (Scalia, J., concurring).
231. 498 U.S. 237 (1991).
232. *Id.*; *See also* Brown v. Board of Educ., 978 F.2d 585 (10th Cir. 1992).
233. 978 F.2d 585 (10th Cir. 1992).
234. *See* Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*, the implementation decision).
235. *Brown*, 978 F.2d 585.

of Appeals reversed.[236]

The Tenth Circuit court did not consider itself imprisoned by rigid doctrines in combatting the evils of segregation. The court interpreted *Dowell* to mean that the simple creation of a "unitary" school system did not indicate that the problem was solved. The court refused to "treat unitariness as a rigid concept" and explained that "*Dowell* does not mark a retreat from the principle that '[t]he measure of any desegregation plan is its effectiveness.' "[237] In addressing itself to the abolition of de jure segregation as required by law, the court asserted:

> The Supreme Court's cases charge school boards that once operated school systems segregated by law with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated. Here, as we made clear in our initial opinion, the question is whether Topeka has successfully discharged the duty imposed by the Constitution to eliminate the vestiges of de jure segregation.
>
> Both *Dowell* and *Freeman* address the means by which a school system may be discharged from the active supervision of the courts. In *Dowell*, the court required the district court to consider whether the school board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable. *Freeman* expanded on this requirement by explicitly stating that a federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control, thereby allowing a school system to achieve compliance in one facet of its operations before it has fulfilled the whole of its affirmative duty. Neither *Dowell* nor *Freeman* suggests that the plaintiffs in the remedial phase of school desegregation litigation must make a new showing of discriminatory intent in order to obtain relief from a current condition of segregation.[238]

Remarkable organic (non-governmental)[239] anti-discriminatory developments contributed to alleviating some of the segregation in Topeka, where the school board did very little to desegregate its student assignment practices. Contrary to the general assumption about housing patterns in America, in Topeka, "increasing residential integration actually helped to decrease racial segregation in some of the city's neighborhood schools."[240] In such a situation, the existence of any trace of the old de jure segregation would be highly suspect, giving support to the conclu-

236. *Id.*

237. *Brown*, 978 F.2d at 588.

238. *Id.* at 589.

239. *See* CLINTON ROSSITER, CONSERVATISM IN AMERICA 29 (1956) ("The essence of conservatism is the feeling for the possibilities and limits of natural, organic change.").

240. *Brown*, 978 F.2d at 588-89.

sion in *Freeman* that if state-enforced school segregation is shown to have existed in 1954, a presumption arises that whatever current racial imbalance exists is the product of the original constitutional violation, a presumption that was not afforded to the plaintiffs by the district court. Moreover, at the time of the trial, the Topeka school system operated a number of "racially identifiable schools," imposing on it the "substantial burden of demonstrating the absence of a causal connection between any current condition of segregation and the prior de jure system."[241] Unless and until that burden is met, "the district court must retain some measure of supervision over the school system."[242]

The district court had disregarded Topeka's history of inaction, lending credibility to the argument of the New Separatists that *Brown* lacks authority as a force for social change. The district court had concluded that Topeka had achieved "unitary status," and based this conclusion on its belief that "the district's conduct over 30 years did not indicate a desire to perpetuate segregation."[243] But the Court of Appeals recognized that the path to hell can be paved with good intentions, or the absence of bad ones. The mere lack of identifiably discriminatory action or intent during that period of time was not enough by itself to "demonstrate the lack of a causal connection between the prior de jure system and the present system."[244]

This portion of the decision raises serious questions about the validity of AMBSs because of the ambiguous nature of de facto as opposed to de jure segregation. The court observed,

> The lesson of *Freeman* is that demographic changes may produce racially identifiable schools in a district that has fulfilled its affirmative duty. What matters is whether current racial identifiability is a vestige of a school system's de jure past, or only a product of demographic changes outside the school district's control. If the current condition is a vestige, then the school system has not fulfilled its affirmative duty.[245]

The irony is that the school district's repeated insistence that its various decisions were not motivated by "racial animus" was, in all probability, true. But as the court, which expressed its belief in the district's sincerity, concluded, "the innovative character of the school system by the time of trial suggests a genuine commitment to providing quality education to all its students. The district court thought such a

241. *Id.* at 590.
242. *Id.*
243. *Id.* at 590-91.
244. *Id.* at 591.
245. *Id.*

showing sufficient. As a matter of law, it was not."[246]

The Tenth Circuit court's commitment to results is compelling. Its insistence that on remand the district court evaluate the "good faith" of the school district was not empty. The decision required the district court to base its evaluation on "objective criteria." The court's concern was with the real possibility of resegregation after a declaration of unitariness, and it insisted that "[s]pecific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith."[247] The court summed up:

> the evaluation of the "good faith" prong of the *Dowell* test must include consideration of a school system's continued commitment to integration. A school system that views compliance with a school desegregation plan as a means by which to return to student assignment practices that produce numerous racially identifiable schools cannot be said to be acting in "good faith."
>
> The inquiry into Topeka's good faith, like the inquiry into whether further remedial efforts are necessary, must consider whether Topeka has taken affirmative steps in the direction of desegregation so as to establish a "consistent pattern of lawful conduct." A comprehensive plan, adopted and followed by the school board, aimed at eliminating the vestiges of segregation to the system would be evidence of good faith; so might a school board resolution declaring . . . [an] intention to comply with the Constitution in the future, but only if coupled with affirmative efforts across time. As we have observed above, inaction in the face of the affirmative duty to desegregate is not lawful conduct. A school system that does not take the required steps cannot be found in good faith and may not be discharged from continued supervision with respect to any facet of its operations.[248]

B. The Significance of the Most Recent *Brown* Decision

The ramifications of this latest *Brown* decision are considerable. Consider the pressures on a hypothetical school district by New Separatist blacks calling for establishment of an all-male black school with an Afrocentric curriculum and black male teachers. If in the past, school assignment was part of a system of segregation that was accomplished not by legislation but by conspiracy, and this legacy of de jure segregation continued until court supervision required that it be halted, cooperation with those calling for the AMBSs would constitute unlawful action. If the segregation is simply de facto, there is little pressure to rectify it.

246. *Id.*
247. *Id.* at 592.
248. *Id.*

In *Swann v. Mecklenburg Board of Education*,[249] the Supreme Court affirmed the lower court holding that there is no affirmative duty to cure racial imbalance in the situation of de facto segregation, stating "[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished."[250] But this statement is misleading; even if the "affirmative duty to desegregate" has been "accomplished," and there is no longer a dual system, there is still the requirement that affirmative steps be taken, in good faith, to eliminate all traces of it, as the Supreme Court in *Dowell* and *Freeman* explained, and as the court in the most recent *Brown* decision so artfully concluded.

The impression one gets from the arguments of the New Separatists is that they would sooner be done with the contest over de jure segregation, to relegate it to 1954, and move on. They would consider as de facto segregation everything following the formal steps to close down the dual system established by law (formally or informally). As long as there is a symbolic "unitary" system, the best thing that could happen is for the courts to leave it alone so they can have the opportunity to create their own brand of separation—AMBSs—under the auspices of black control. They would still have to demonstrate that they were in compliance with those doctrines dealing with gender, but leave race to the "natural" housing patterns, which have produced totally black school districts.

Apart from the reality that de jure segregation and de facto segregation are not always easily distinguished,[251] the introduction of such reforms as the "Afrocentric curriculum" and all-male black faculty is bound to be a factor in driving away whites, leading to the paradox that these measures could be seen as evidence of a failure to abolish all traces of the once de jure segregated system. The school district could find itself in the uncomfortable situation of being denounced by the New Separatists if they don't approve the AMBSs, and found in violation of a desegregation order by the court if they do. School segregation ostensibly resulting from a "voluntary" housing pattern may not be insulated from constitutional challenge.

The approach of the court in the recent *Brown* decision offered an interpretation of both *Freeman* and *Dowell* that made it premature to

249. 402 U.S. 1 (1971).

250. *Id.* at 31-32.

251. *See* Keyes v. School Dist., 413 U.S. 189, 215 (1973) (Douglas, J., concurring) (stating that there is "no difference between de facto and de jure segregation").

sound the death knell for integrated schools. It is an interpretation that rings true, making it harder for racial complacency to prevail. If there can be no constitutional challenge to segregated schools that are caused by supposedly "voluntary" housing patterns, then the spirit of *Brown* compels this society to ask how "voluntary" those patterns are. *Brown* is not mere legal precedent. It is a powerful symbol of what author Richard Klugar called "simple justice."[252]

C. The Cultural Legacy of *Brown*

The Warren Court undertook to remedy in *Brown* the bigotry of two centuries, to give not only to blacks but whites as well, a sense of justice and the conviction that the constitutional process and the institution of judicial review were somehow validated on a higher level than mere law. That the decision was 9 to 0 was not lost on the country. In its wake came the rush that is known as the Civil Rights Movement: the Montgomery bus boycott, the sit-ins, the Freedom Riders, the 1964 Civil Rights Act,[253] including public accommodations and Title VII outlawing discrimination in employment, and the 1965 Voting Rights Act.[254] The legislative flurry ended with the watered-down open housing legislation enacted in 1967.[255] The death toll was considerable, lest it ever be believed that this process was somehow pristine and responsive.[256] But as the movement for racial justice waned in America, the escalation of the war in Vietnam produced a backlash against the power of the federal government, as many of the same liberals who had argued for broad legislative and judicial power as mechanisms to achieve social justice now joined with others to attack what they saw as the encroachment of government on the lives of the people.[257] With the assassinations of Robert

252. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); *See* Nat Hentoff, *Simple Justice and How It Got Lost*, VILLAGE VOICE, Nov. 10, 1992, at 26-27.

253. Civil Rights Act of 1964, 42 U.S.C. § 1981 (1976).

254. Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1973 (1976).

255. For an analysis of the consequences of *Brown*, see Kenneth B. Clark, *Racial Justice in Education: Continuing Struggle in a New Era*, 23 HOW. L. J. 93, 95 (1980) [hereinafter Clark, *Racial Justice*].

256. For an account of the killings of civil rights workers James Chaney, Andrew Goodman, and Michael Schwerner, as well as the shooting of Viola Liuzzo, see CAGIN AND DRAY, WE ARE NOT AFRAID (1988). For an account of the murder of Medgar Evers as well as Dr. King, see GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, 269-70, 623-24 (1986).

257. *See, e.g.*, Massachusetts v. Laird, 400 U.S. 886 (1970) (challenging the legality of the Vietnam war. The author was a member of the team of Constitutional Lawyers' Committee on Undeclared Wars that submitted a lengthy amicus brief in this case). The Vietnam War actually split the liberals with Johnson, Humphrey, Robert Kennedy, Eugene McCarthy and

Kennedy and Martin Luther King, Jr., the energy of liberalism in America dissipated and disenchantment set in.

The constitutional process cannot be understood apart from these events because they led to the election by a narrow margin of Richard Nixon, whose first item on the agenda was reversing the direction of the Supreme Court. Although his first two nominees were rejected by the Senate and his third eventually became a moderate (Harrold Carswell and Clement Hainesworth were defeated; Harry Blackmun was confirmed), Nixon did succeed in elevating William Rehnquist to the Court. Had Justice Abe Fortas not been forced to resign and had Justice Arthur Goldberg refused Lyndon Johnson's appointment as Ambassador to the United Nations, the makeup of the Court would have been remarkably different. The Reagan-Bush era, really an extension of the Nixon-Ford era, with Carter squeezed in between as a reaction to Watergate, sealed the fate of the Court for years to come.[258]

D. Reacting to a Backward Looking Court

Constitutional scholarship has become medieval in its attempt to narrow and distinguish decisions by the Reagan-Bush Court that further erode the rights of individuals, to the point that one is reminded of Lincoln's attempt to narrow the impact of the *Dred Scott*[259] decision. He argued that it was a legal decision "in favor of Dred Scott's master and against Dred Scott and his family."[260] But unlike Douglas, "who would make it a rule of political action for the people and all the departments of governments," he, Lincoln, "would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs."[261]

Lincoln's posture here is like that of St. Thomas Aquinas, who wrote: "A tyrannical law, through not being accorded to reason, is not a law, absolutely speaking but rather a perversion of law . . . . The like are acts of violence rather than laws; because as Augustine says, *a law that is not just, seems to be no law at all.* Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or distur-

George McGovern on differing sides. This split destroyed the Great Society coalition, which never regained power. *See* RICHARD CUMMINGS, THE PIED PIPER PIPES; ALLARD K. LOWENSTEIN AND THE LIBERAL DREAM (1985).

258. With the retirement of Justice Byron White, President Clinton has the opportunity to alter this to some extent.

259. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

260. Abraham Lincoln, Speech in debate against Douglas, Springfield, July 17, 1858, *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 516 (R. Basler ed. 1953).

261. *Id.*

bance. . . ."[262] Lincoln, like the neo-Thomist Dr. King, saw certain Supreme Court decisions, those that were tyrannical or unjust, as non-binding in the broader sense. King was prepared to go to jail when he decided to break the law as a matter of conscience. Lincoln, it would appear, was prepared to take on the Court politically, to challenge the doctrine of judicial supremacy to a greater extent even than Roosevelt during the New Deal when he tried to pack the Court.

Brown enabled the country to avoid a political crisis of monumental proportions at a time when both the executive and legislative branches were paralyzed and held ransom to the forces of reaction. The principles the unanimous Warren Court enunciated with regard to racial segregation, in conjunction with the empirical evidence rose above the level of constitutional interpretation to that of true *natural law*, setting a standard for judicial integrity that had not been matched before, nor has it been since.[263] It is cruel irony that the New Separatists wish now to jettison *Brown* and leave it to the junkheap of history as some relic from the distant past.

X. Additional Perspectives on AMBSs in the Context of Kenneth Clark's Vision; The New Separatism versus the New Integration

That Kenneth Clark was able to contribute to the *Brown* court's enlightenment makes him worthy of further inquiry with regard to the question of all-male black schools. He has written:

> The decision in *Brown v. Board of Education*, like most of the great documents in man's continuous struggle for justice and humanity, was a simple, direct and eloquent statement of a moral truth. In spite of the attempts on the part of some legal purists and some neo-conservative intellectuals to disparage the significance of this decision, there are reasons to believe that future historians will rank *Brown* with such documents as the Magna Carta, the Declaration of Independence and the Emancipation Proclamation. These documents have in common the fact that they are indicative of the unique capacity of the human organism to formulate moral goals and to aspire to levels of social sensitivity and humanity. It is my personal belief that man's capacity for this moral quest differentiates him from animals and helps him to check those more primitive impulses and cruelties which threaten the survival of our

262. THOMAS AQUINAS, SUMMA THEOLOGICA, First Part of the Second Part, Treatise on Law, Question 92, Reply Obj. 4; Question 95, Fourth Article.

263. The Court's historical role in *Brown* will be fully documented in the forthcoming volume, MAX LERNER, GREAT JUDGES, GREAT CASES—DISPATCHES FROM THE CONSTITUTIONAL BATTLEFIELD (Richard Cummings ed., forthcoming 1993).

species.[264]

Notwithstanding the fact that Clark has perceived the decision in *Brown* to be fundamentally a moral one on the level of pure reason, he has also comprehended the reality of the decision's nature as an American legal phenomenon,[265] a duality to which Clark's critic, Edmond Cahn, did not address himself.[266] Because of this insight, Clark has also been able to see that the introduction of empirical sociological and psychological evidence is addressed to the mundane, legal aspect of the decision,[267] the roots of which go back to Brandeis, who first perceived the relevance of social science data to constitutional disputes.[268] In a reaction against the rigid case method of the American legal system (and American legal education), Justice Brandeis, "more of a legal and social activist, expressed the revolt in a characteristic type of decision (originally the 'Brandeis brief') which sought to keep the law abreast of social progress and found in history, economics and statistics the envelope of social reality within which the meaning of a case was contained."[269]

In this spirit, psychologist Dr. Kenneth Clark and his wife, Dr. Mamie Clark, did research on the effects of segregation on black school children as well as on white children,[270] research that had its impact on the Court in *Brown*.[271] The strategy worked in demolishing "the bland assertion in *Plessy* that enforced separation of the races in no way was intended to make blacks inferior."[272]

The Court's assertion, that the psychological evidence at the time of *Brown* (that segregation in schools *was* harmful to black children) supplanted whatever the extent of psychological knowledge was available about the effects of segregation at the time of *Plessy*, led the Court to

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264. Clark, *Racial Justice*, *supra* note 255, at 93.

265. *See id.*

266. *See* Cahn, *supra* note 35; *see* Kenneth Clark, *The Desegregation Cases*, *supra* note 35, at 227-35.

267. *See id.* at 228-30.

268. MAX LERNER, AMERICA AS A CIVILIZATION 428 (Henry Holt) (1957).

269. *Id.* at 429. Lerner also described the opposition of Justices Holmes, Pound, Cardozo, Frank, and Arnold to the rigidity of the case method that was introduced first at Harvard during the period of Professors Langdell and Ames.

270. *See* Hentoff, *supra* note 252 at 26-27.

271. *See* Brown v. Board of Educ., 347 U.S. 483, 495 n.11, citing Kenneth B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950). For other works by Kenneth B. Clark and Mamie P. Clark on the impact of segregation, see Kenneth B. Clark and Mamie P. Clark, *Racial Identification and Preference in Negro Children*, *in* READINGS IN SOCIAL PSYCHOLOGY (3rd ed. Holt 1947); Kenneth B. Clark, *Desegregation of the American Public Schools*, ANTI-DEFAMATION LEAGUE, CURRENT PROBLEMS AND ISSUES IN HUMAN RELATIONS EDUCATION (1955); KENNETH B. CLARK, PREJUDICE AND YOUR CHILD (2d ed. Beacon 1955).

272. Hentoff, *supra* note 252, at 26.

conclude, that "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected."[273] The Court's description of the effects of segregation was "amply supported by modern authority."[274] The question now is whether this authority is still "modern" or whether new evidence mandates a fresh examination of the situation of minorities in the American education system, forcing a change in the premise about race and education that had been accepted as immutable in 1954.

Dr. Clark argues that the methods and findings of his studies supporting the *Brown* decision remain valid.[275] Further, in anticipating the argument in *Freeman* that organically created neighborhood patterns that produce de facto segregated schools are not subject to law suits on the grounds that segregation is unconstitutional, Clark asserted:

> The method of litigation which seemed so effective in dealing with problems of racial inequity in the schools and other aspects of life in the southern states do not seem particularly effective in dealing with the more sophisticated *de facto* forms of school segregation in northern cities. It remains a fact that segregated schools in the North are as damaging to human beings as were the *de jure* segregated schools of the South. Children who are required to attend these racially segregated, inferior and stigmatized schools in northern cities are being subjected to forms of educational genocide which "may affect their hearts and minds in a way unlikely ever to be undone."[276]

Clark perceived the argument that distinguished between de facto and de jure segregation as essentially a "hoax" perpetrated by white northern racist education officials to justify urban segregation.[277] He did not anticipate it being used by African-American New Separatists on behalf of all-male black schools in a movement that has made its way into the educational and political mainstream.

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273. *See Brown*, 347 U.S. at 494-95.

274. *Id.*

275. *See* Clark, *The Desegregation Cases*, *supra* note 35. Clark refers specifically to "the use of the 'Dolls Test' (actual dolls, not pictures of dolls, were used in this research) on some of the plaintiffs," which was used "to determine whether the general findings from the larger number of Negro children who had been tested years before were true also for the children who were the actual plaintiffs in these cases. The decision to test some of these plaintiffs was a legal one made by the lawyers of the NAACP. It was their assumption as lawyers that general scientific findings would have more weight in a courtroom if it could be demonstrated that they also applied in the specific cases and for the particular plaintiffs before the court. When these plaintiff children were tested and interviewed by this writer, it was his judgment that some of these children showed evidence of the same type of personality damage related to racial prejudice, segregation, and discrimination which was found in the larger number of subjects who were studied in the original, published research. This opinion was presented to the courts in the form of sworn testimony." *Id.*

276. Clark, *Racial Justice*, *supra* note 255, at 100, (quoting *Brown*, 347 U.S. at 494).

277. *See id.* at 99-100.

Following the result in the *Garrett* decision, Michigan Rep. Hansen Clarke, (D-Detroit), introduced legislation to allow the establishment of single-sex alternative public schools in Michigan. His bills would remove legal obstacles cited in *Garrett* that halted operation of the alternative schools in Detroit.[278] His argument is essentially the one resorted to by all of the New Separatists: the inner-cities schools are de facto, not de jure segregated as the result of housing and community patterns and hence the rationale of *Brown* does not apply. The creation of AMBSs is permissible because inner-city African-American males are threatened with extinction and have a history of severe difficulties that African-American females do not have, giving rise to acceptable discrimination under the intermediate scrutiny standard of *Hogan*.[279]

Michael Meyers, executive director of the New York Civil Rights Coalition, opposed this reasoning through arguments similar to those of Kenneth Clark.[280] He reminded us that "[t]o aid the fight against racial separation in public facilities, the 1964 Civil Rights Act made it illegal for a public school or government-sponsored program to separate persons on the flimsy basis of skin color."[281] Here, the New Separatists rely on *Freeman* and the distinction between de facto and de jure segregation. Moreover, they counter with the point that the Male Academies in Detroit, for example, do not exclude anybody on the basis of race, religion, or nationality and that everyone is encouraged to apply, provided that person is male.[282] It could be argued with considerable justification that, notwithstanding such superficial compliance with the outlawing of de jure segregation by race, the clear communication that these schools are to have an "Afrocentric" curriculum and are to be staffed with all-male black teachers is a signal to non-blacks not to apply. A court in such an instance should pierce the "de facto" segregation veil to uncover a definite de jure policy of segregation by race, not only by sex, to which the standard of strict scrutiny should apply. In education cases, the applicable principle is the rule of *Brown* that "[s]eparate educational facilities are inherently unequal."[283]

278. *See* Representative Hanson Clarke, *Should states support single-sex, black schools? - Point; Counterpoint*, STATE GOVERNMENT NEWS, Jan. 1992, at 16. Compare the Minneapolis "academy" (co-educational) with the Seattle "academy" (all-male).

279. *Id.* at 16-17.

280. Michael Meyers, *Should states support single-sex black schools?-Counterpoint*, STATE GOVERNMENT NEWS, Jan. 1992 at 16-17.

281. *Id.*; Civil Rights Act of 1964, 42 U.S.C. § 1981 (1976).

282. *See supra* notes 98-103 and accompanying text.

283. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

Meyers, in his argument against the AMBSs, makes numerous salient points that underlie the legal problems:

> Such schools are not dedicated to free inquiry and critical thought, but to indoctrination and ideological programming. Often organized around the seven principles of Kwanza, these schools drill students to support such ideological concepts as "racial unity" and "faith in racial and political leaders." Schools, however, should stimulate critical thinking, not blind faith. Education should broaden students' horizons, not isolate them culturally.[284]

Referring to the supporters of these schools as "self-styled black nationalists," Meyers pointed to the "cultural balkanization" that separate schools for minorities will lead to:

> An officially balkanized public school system would not stop with separate schools for black boys but extend to black girls. Puerto Rican boys and girls, and so on. When will we realize that not all blacks are like or, for that matter, share the same culture? Similarly, Hispanics, Asians and whites also represent diverse cultures and experiences.[285]

Meyers accepted the sincerity of "minority advocates of segregation" "who really believe there is something different about black males." But he rejected their analysis that the special nature of black males in American society is the cause of "their high dropout rates, teen fatherhood, crime and imprisonment rates" finding it simplistic and "old-fashioned racism" based on a pejorative stereotype.[286] If he is right, and there is considerable reason to suspect that he is, then the argument in favor of all-male schools based on *Hogan* falls apart. Justice O'Connor made it clear that any discrimination based on gender is unacceptable. "Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions,"[287] she asserted for the Court. "Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[288] This would make it almost impossible for the proponents of the AMBSs to meet the burden of heightened scrutiny that gender discrimination mandates by providing a showing of an " 'exceedingly persuasive justification' for the classification."[289]

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284. Meyers, *supra* note 280, at 16-17.

285. *Id.* at 17.

286. Id.

287. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

288. *Id.*

289. *Id.* at 724 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

Meyers asserted, "[t]he all-male black school concept is paternalistic and sexist. It stigmatizes boys, ignores girls and brazenly disqualifies women as capable teachers of boys. In the minds of these mystics, only men can teach boys to become 'men.' "[290] He also warned: "Black parents who are concerned about their children's education and future should reject separatism. Moreover, unless our society is prepared to totally desegregate, we will continue to veer away from an integrated society and divide into racially separate and unequal parts."[291]

Even as the debate around the AMBS rages,[292] the theories of separation show signs of stimulating a new integrationist theory in which the separate components become the very instruments for the end to fragmentation. In this context, the long neglected state constitutions are being examined as possible vehicles for filling the gaps the Rehnquist Court has been creating, with its distinction between de jure and de facto segregation.[293]

A Connecticut suit attacking the racially isolated public schools of Hartford, *Sheff v. O'Neill*,[294] was originally filed in 1988 and has survived two state attempts to kill it on the grounds that there was no constitutional violation and that the social and economic conditions underlying segregation were beyond the scope of the court. The suit asks the Connecticut Superior Court to rule that segregated conditions, whatever their cause, "violate the Connecticut Constitution's guarantee of equal educational opportunity."[295]

The chances of success on the state level are enhanced in Connecticut because, unlike the Federal Constitution, under which there is no fundamental right to an education,[296] the state's constitution provides for free public education and guarantees equal opportunity regardless of

290. Meyers, *supra* note 280, at 17.

291. *Id.*

292. *See, e.g.*, Jones, *supra* note 6, at 12; Michael Meyers, *Separate is Not Equal*, WASH. POST, Sept. 23, 1992, at A19; Michael Meyers, *Black Racism at Taxpayer Expense*, WALL ST. J., July 30, 1991, at A16; Whitaker, *Do Black Males Need Special Schools?*, EBONY, 1991 at 17; Houpper, *Separatist But Equal?*, VILLAGE VOICE, May 19, 1992, at 27; Moody, *The New Segregation*, SEATTLE WEEKLY, Nov. 6, 1991, at 44. For a general discussion on disintegrating race relations in the United States, see TAYLOR, PAVED WITH GOOD INTENTIONS (1992).

293. *See* Freeman v. Pitts, 112 S. Ct. 1430 (1992). *See also* Bernard James and Julie M. Hoffman, Brown *in State Hands: State Policymaking and Educational Equity After* Freeman v. Pitts, 20 HASTINGS CONST. L.Q. (published in this issue , 1993)

294. 609 A.2d 1072. *See* George Judson, *Lawsuit Attacks the Segregation of Urban Schools From White Suburbs*, N.Y. TIMES, Nov. 29, 1992, at 48L.

295. *Id.*

296. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).

race.[297] The plaintiffs in the suit, the families of seventeen black, Hispanic, and white children from Hartford and West Hartford, argue that "victory could lead to a new era of school desegregation in northern states like Connecticut, where schools have become segregated not by law, but because minority groups are concentrated in a handful of cities."[298] If the suit is successful, it will have triumphed over the de jure-de facto dichotomy. Even when segregation is not intentional, it would be unconstitutional because it leads to unequal systems. As a pre-trial memorandum for the plaintiffs stated, "this court should not hold another generation hostage to the state's good intentions."[299]

How good these intentions are remains to be seen. Whatever the outcome of the trial, there will almost certainly be an appeal, with the state attempting to prevent the integration of the suburban schools. Such a response would give credence to Kenneth Clark's expressed fears about the white northern Board officials in New York who with "Orwellian logic, . . . stated that it was and remains its policy to encourage quality integrated education," while in the same pronouncement, "ordered the exclusion of minority group children from predominantly white schools, to better realize the original objective of quality integrated education."[300] It is not for nothing that Michael Meyers' language parallels that of Clark's in his criticism of the AMBS:

> It is now desirable rather than racist to segregate children on the basis of race. It is now realistic rather than sexist to match male teachers with male students. What utter nonsense and Orwellian doubletalk. But that is what some educators and community activists are urging us to accept. More stereotyping. More racism. More sexism. More distractions from the purposes and goals of American democratic education.[301]

Both Clark and Meyers have targeted the groups that could form a powerful coalition against the new integrationism; the white school officials in the North and the African-American New Separatists. The State

297. CONN. CONST. art. 1, § 20 (guaranteeing equal rights regardless of race) and art. 8 § 1 (guaranteeing public education).

298. Judson, *supra* note 294.

299. *Id.* The state, through its experts, is prepared to make the following arguments: "That desegregation has not significantly affected the achievement of black students[;] that most differences in school performance between Hartford and its suburbs are due to family background and economic status, not race[;] that most people in the Hartford area live where they do by choice, not because of discrimination[;] that minority groups in Connecticut cities do not believe integration is necessary for quality education[;] and that in any case, minority groups are moving to Hartford's suburbs at an increasing rate, achieving integration themselves." *Id.*

300. Clark, *Racial Justice*, *supra* note 255, at 99-100.

301. Meyers, *supra* note 280, at 17.

of Connecticut has shown as much by formulating "a much stricter defense against integration itself," including testimony from "minority groups in Connecticut cities" who "do not believe integration is necessary for quality education."[302] How far we have come from *Brown*.

What is needed to resolve these constitutional antinomes is a synthetic jurisprudence, in the Hegelian sense.[303] *Brown* is not a sterile and bland resolution of the segregation dilemma. There is nothing in the doctrine that separate can never be equal that negates the value of cultural integrity or that mandates ethnic assimilation. The same Constitution that protects educational opportunity protects multicultural diversity. Moreover, the existence of free choice provides ample opportunity to create the sort of private institutions that the New Separatists advocate. No one dictates to the Yeshivas[304] what their curriculum should be or that the teachers cannot all be male rabbis, or that the students should not be all male. But they do not do these things with the taxpayers' money.[305]

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302. *See* Judson, *supra* note 294.

303. According to Hegel:

> In the attempt which reason makes to comprehend the unconditional nature of the world, it falls into what are called Antinomes. In other words it maintains two opposite propositions about the source object, and in such a way that each of them has to be maintained with equal necessity . . . . [T]hey appear in *all* objects of every kind, in *all* conceptions, notions and ideas. For the property thus indicated is what we shall afterwards describe as the Dialectical influence in logic . . . . That true and positive meaning of the antinomes is this: that every actual thing involves a coexistence of opposed elements. Consequences to know, or, in equivalent to being conscious of it as a concrete unity of opposed determinations.

G.W.F. HEGEL, THE SCIENCE OF LOGIC, *reprinted in* THE ENCYCLOPEDIA OF THE PHILOSOPHICAL SCIENCES 97-100 (William Wallace trans., 2d ed. 1892). Thus, Hegelian logic involves the synthesis of these antinomes, or opposites. Universality is reached in the "line of activity" following "the three 'moments' of the notion which . . . is the specific or definite notion of understanding. The reception of the object into the forms of this notion is the *Synthetic Method*." *Id.* at 366. The popular conception of the Hegelian process is summarized in the phrase, "Thesis, Antithesis, Synthesis." For a critique and criticism of Hegelian logic, see KARL MARX AND FREDERICK ENGELS, THE GERMAN IDEOLOGY 105 (C.J. Arthur ed. 1970).

304. Yeshivas are Orthodox Jewish religious schools in which the curriculum is based on the Talmud, the Jewish religious code. Private, all-black Christian academies have been established with an Afrocentric curriculum packaged

> from one of the four publishers that produced the books for the white Southern Christian schools established to resist school integration in the early 1970's. . . . In interviews with more than a dozen administrators of black Christian schools, practically every educator acknowledged a white-orientated, if not racist slant in the traditional Christian school curriculum.

David J. Dent, *A Mixed Message in Black Schools*, N.Y. TIMES, Apr. 4, 1993, § 4A at 28.

305. But see Bob Jones Univ. v. United States, 461 U.S. 574 (1983), on the problems of tax exempt status for private schools with racially discriminatory admissions standards on the basis of religious doctrine under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C.

In the final analysis, there is in the critique of *Brown* a refinement of our comprehension of what it means to have a constitutional system in the ultimate sense. The poet Carl Sandburg once said that the Civil War was fought over a verb; the United States *are* or the United States *is*. When one looks at Lebanon, or Yugoslavia, or the former Soviet Union, one is in further awe of those who gave us our Constitution as the vehicle for creating a great nation. But perhaps it was the renowned African American folksinger and guitarist, Leadbelly, who said it best:

"We're in the same boat, brother,
We're in the same boat, brother.
And if you tip one end,
You're gonna rock the other.
We're in the same boat, brother."[306]

§ 501(c)(3) and the granting of charitable deductions for contributions to such schools under § 170 of the Internal Revenue Code, 26 U.S.C. § 170.

306. For essentially the same message in a more formal context, see Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) ("The destinies of the two races [are] indissolutely linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanctions of law.").