

Brown Blues: Rethinking the Integrative Ideal

More than forty years have passed since the Supreme Court's *Brown v. Board of Education* decision, declaring unconstitutional state-imposed segregation of public schools. One would have thought that by now American society would have arrived at a consensus with respect to the substance and scope of *Brown*. The truth is otherwise. Even in the education sector of our national life that *Brown* specifically addressed, deep differences remain over what changes that decision was designed to effect.

Of course, opposition to *Brown* by whites committed to the maintenance of racial segregation in public education has been a daily reality from the moment the decision was announced. Over the years, that opposition has taken a variety of forms both simpleminded

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and sophisticated. However, it was generally thought that one group, African Americans, was uniformly supportive of *Brown* and committed to its full implementation in education. After all, *Brown* was the culmination of a long campaign by the National Association for the Advancement of Colored People (NAACP) to overturn the "separate but equal" doctrine. It also ushered in, without doubt, more than a generation of court decisions and legislation that eradicated all vestiges of formal segregation in America.

Several developments in recent years suggest, however, that growing numbers of blacks may be turning away from the integrative ideal. Three examples of this shift are worth noting: first, black parents now express support for school board efforts to end desegregation plans that involve busing, favoring instead a return to neighborhood schools, even though this would result in increases in the number of virtually all-black schools in the inner city; second, at the urging of black parents, school boards in a number of major cities have attempted to create all-black male academies; third, black administrators, faculty, students, and alumni of historically black colleges in the South have joined

state officials in opposition to court-ordered higher-education desegregation plans. Some critics have dismissed these developments as perverse efforts to return to a "separate but equal" regime. In fact, these developments raise serious and complex questions about the future of race relations in America that deserve careful analysis, not simplistic characterization. This essay is an attempt to contribute constructively to that process.

Blacks and Neighborhood Schools

The school desegregation process has not been unproblematic, to say the least. More than forty years after *Brown*, there is still active litigation alleging constitutional violations. There is no gainsaying, however, that as a result of *Brown* and its progeny, thousands of black, white, and Hispanic children have been able to receive integrated educations and develop both educational and social skills that will stand them in good stead in later life. At the very least, the mandatory presence of white children has saved some black and other minority children from the physically inferior facilities—and inferior resources—to which they had been assigned under segregation.

Acknowledging the important gains of desegregation, however, should not blind us to the continuing legacy of segregation within desegregated systems. In many schools, racially segregated classes make it unlikely that children of different races will have meaningful interaction during the school day. Moreover, the black community has paid, in some instances, a high price for desegregation. For example, schools that served not only as educational institutions but also as community centers in predominantly black neighborhoods have been closed; black teachers and administrators have been dismissed and demoted disproportionately; and black students have encountered increased disciplinary action in recently desegregated schools. This record establishes, contrary to common assumptions, that desegregation has not been an unmitigated benefit to previously segregated black students and educators.

Meanwhile, demographic changes in the United States since 1954 have produced a pattern of residential segregation. This makes further progress in school

desegregation in certain areas difficult to envision. Urban centers across the nation are predominantly black and Hispanic; the suburbs and rural areas are predominantly white. Even in those cities where the white population exceeds the minority, the public school populations are predominantly black and Hispanic. This latter phenomenon can be explained by the presence of childless white couples, older white couples, and white families with children enrolled in private and parochial, rather than public, schools.

Although some litigation efforts to achieve metropolitan-wide desegregation have been successful, the Supreme Court's 1974 decision in a Detroit school desegregation case effectively limited the availability of that remedy in most urban areas. A few large cities have adopted voluntary desegregation plans involving urban and suburban communities, but their

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impact on inner-city segregation has been modest, largely because those participating in such programs have been disproportionately black. The result has been, therefore, a one-way rather than a two-way process, with urban blacks heading out to suburban schools but relatively few suburban whites coming into the city.

Some members of the black community have begun to question whether the result achieved is worth the time and expense that desegregation entails. There is also a sense among some blacks that in areas where desegregation plans no longer produce meaningful numbers of whites and blacks studying together, the plans are maintained because of the mistaken belief that blacks cannot learn unless whites are sitting next to them in class. The blacks who challenge the continuation of such plans argue that a return to neighborhood school assignment makes more sense because parental and community involvement in the schools would be more likely to increase. Moreover, governmental resources expended on busing could be redirected to improving the quality of materials and instruction available at those schools.

Blacks and whites who oppose efforts to roll back desegregation plans do so for a variety of reasons. First, they fear that such proposals are yet another attempt by school boards guilty of past intentional segregation to escape any further role in avoiding resegregation. Second, they suspect blacks who support such rollbacks of acting more in their own political and economic interests than in the interests of black children.

What rollback proponents seek, they say, are more and better jobs for black administrators and teachers in exchange for reduced pressure to increase or maintain desegregation levels. Third, rollback opponents fear that a return to all-black schools will result in "benign neglect" of those schools in terms of resources allocated for facilities, material, and personnel.

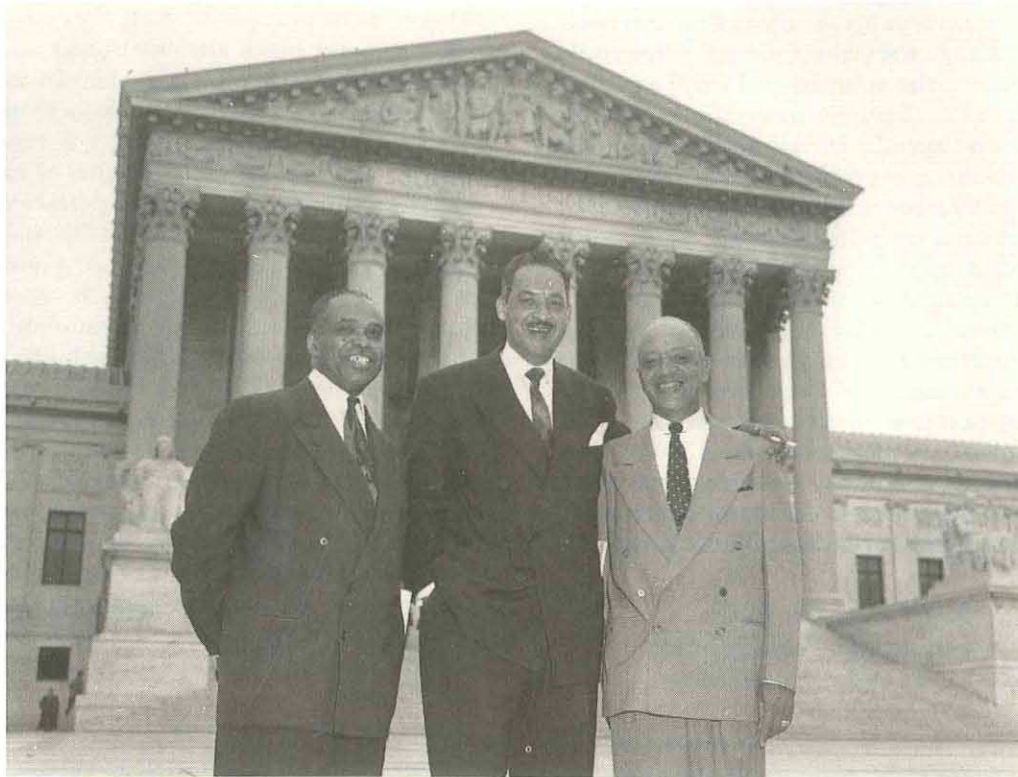
This debate, although perhaps the subject of greater media focus in recent years, is not a new one. Blacks, having seen the bad, along with the good, of desegregation, have for some time questioned whether the process should be extended to the limits that Supreme Court precedents allow. This attitude has been particularly prevalent with respect to desegregation plans that require extensive busing. These voices of restraint often had no effective forum, however. White school boards that expressed such views were correctly regarded as untrustworthy spokespersons on this issue. The major civil-rights organizations representing the plaintiffs in desegregation cases, on the other hand, strongly rejected—and continue to reject—any thought of stopping short of what the Constitution would permit.

The debate has taken on a new dimension, however, because black mayors, city council members, and school superintendents have begun to express concerns about the wisdom of what they see as "desegregation at any cost." Courts are justifiably perplexed

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over how to evaluate the views of this group because their authority, as elected and appointed blacks, to speak for the black community certainly is equal to, if not greater than, that of plaintiffs and their lawyers in school desegregation cases. Although some might dismiss their views as perversely malevolent toward black students, the positions of black elected and appointed officials deserve to be seen as expressions of concern about the most effective approach to educating black children under daunting circumstances.

For these and other reasons, blacks increasingly support efforts by school districts under court desegregation orders to return to neighborhood school arrangements, even though such modifications inevitably will return certain facilities in the black community to largely one-race status. Of course, we must not lose sight of the fact that constitutional rights are individual. Whether a school district has satisfied its responsibility under *Brown* and its progeny to dismantle a dual system is not subject to resolution by referendum. The



The three lawyers who prevailed in Brown celebrating before the U.S. Supreme Court Building on May 17, 1954. Left to right are: Washington lawyer George E. C. Hayes; Thurgood Marshall, special counsel for the NAACP; and James Nabrit, Jr., professor and attorney at law at Howard University. UPI/Corbis-Bettmann. Reprinted with permission.

difficult legal question is how we determine whether the dual system is still in place.

Many school boards insist that by removing the vestiges of their own segregative practices, they have satisfied constitutional requirements. Continued segregation, they argue, is not their fault but rather the consequence of residential segregation caused by private choice and market forces. Critics reply that schools have a duty to go on making adjustments until patterns of segregation have been eradicated. They take the position that the demographics cited to explain continued segregation are not adventitious but rather the result of mutually reinforcing segregative policies of school boards and other governmental agencies such as public housing authorities.

Under current Supreme Court doctrines, those who wish to modify desegregation plans are likely to prevail, because the Court consistently has refused to consider the extent to which segregative actions by governmental agencies other than school boards might justify maintenance of desegregation plans when modification would result in resegregation. Consequently, school desegregation plaintiffs are left with a wrong in search of a remedy. As they witness schools that were all black before desegregation return to that status once

the board's modifications go into effect, it must seem to them that years of effort have been in vain.

Schools for Black Males

Media attention and public debate over the past few years have also focused on proposals to establish public schools or programs exclusively for black male students. In Milwaukee, for example, the school board planned to designate two schools as all-black or virtually all-black facilities in which special attention would be given to the educational and developmental needs of black males. These "immersion schools" would offer features unavailable in other Milwaukee facilities: school days one hour longer and less rigidly structured than normal, a multicultural curriculum, and mandatory Saturday classes held in cooperation with the local branch of the Urban League. Weekend sessions would focus on nonacademic subjects, such as "what it means to be a responsible male," "how to save and invest money," and "the practicalities of cooking and cleaning." The students would also be required to wear uniforms.

As a result of actual or threatened litigation, Milwaukee's proposal and similar ones in other urban

school districts were modified to include female and white students who wished to participate. The legal and political debate continues, however. At the core of the controversy is the question of whether a school that admits only blacks is any more constitutional than the ones that *Brown* outlawed because they admitted only whites.

At one level, they clearly are not comparable. The system of state-imposed racial segregation in public education that *Brown* declared unconstitutional was designed to ensure that blacks remained a second-class, subjugated race in American society. Schools established for black males, in contrast, are not

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designed to subjugate whites or deny them first-class citizenship. Rather, they address what most people would acknowledge is the critical plight of young black males in urban America.

At another level, however, our history counsels us to be wary of *any* racial classifications. For that reason, the Supreme Court has mandated that any use of racial criteria by government must be for the purpose of achieving a compelling interest and must be necessary to achieve that purpose. Dual school systems under segregation failed that test because maintaining segregation of the races did not constitute a compelling governmental interest. All-black academies, in contrast, concededly are designed to meet a compelling interest—saving black males from educational and social disaster. However, the case has not been made persuasively that this is an interest that *necessarily* requires the exclusion of whites.

The fact that a school district might be able to achieve its goals more efficiently employing a racially exclusive approach is no justification for such a system. Expedience cannot legitimize racial segregation. Even taking the proponents of all-black academies at their word, there is little evidence to support the view that mentoring, counseling, extended school days, small classes, and a curriculum that gives proper recognition to the contributions of blacks to American society will improve black male educational and social functioning *only* in a racially segregated setting. Such an enriched educational environment is likely to produce positive results *irrespective* of the racial setting.

Proponents may contend that only experimentation will determine the effectiveness of such programs. Racial classifications, however, are not proper subjects for experimentation. Of course, in many urban

settings, the likelihood that whites will be enrolled in inner-city schools and thereby be displaced to accommodate the all-black academies is slim. Similarly, whites likely will not apply to attend such schools. Under these circumstances, as a practical matter, school districts can set up programs for all-black student bodies without imposing any bar to whites.

Proposals to create all-black academies have attracted adherents largely in inner-city districts (like those in Milwaukee) whose schools cannot feasibly be desegregated. Black parents and sympathetic school officials in these communities have joined forces to develop a structure that they hope will save black males. Such approaches clearly reflect disenchantment with the *Brown* integrative ideal and may be educationally misguided. However, to the extent that whites and females may participate, the programs would not appear to violate constitutional limits.

Historically Black Colleges and Universities

Lawyers for the NAACP prepared for their ultimate assault on the "separate but equal" doctrine in *Brown* by challenging successfully the exclusion of blacks from all-white graduate and professional schools. Indeed, it was in one of those earlier cases that the Supreme Court acknowledged the "intangible" inequality caused by segregation that would figure so prominently in its 1954 decision. The Court made clear shortly after *Brown II*, the desegregation implementation decision in 1955, that

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southern higher-education officials could not delay opening their institutions by invoking the "all deliberate speed" doctrine. Consequently, efforts by blacks to enroll in previously all-white colleges and universities during the late 1950s and early 1960s found support in the courts, as well as in the executive branch. In a few instances, the government even called out troops to ensure the admission of blacks.

Meanwhile, almost no attention was being given to the fact that southern and border states were continuing to operate dual systems of higher education. This arrangement was dictated, in large part, by the federal government's promotion in 1862, under the First Morrill Act, of state land-grant colleges for whites and then in 1890, under the Second Morrill Act, parallel institutions for blacks. Thereafter states systematically discriminated against black institutions in the

allocation of funds for a period that extended well beyond 1954.

The historically black institutions, as a group, nevertheless achieved remarkable success educating students from segregated and inferior secondary schools. They developed programs that provided their students with instruction and nurturing sufficient to prepare them to function effectively in society after graduation. In many cases, their graduates have pursued graduate and professional training at prestigious universities in the North and West.

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Early attempts to challenge dual systems of higher education produced court orders that seemed to embrace a "freedom of choice" approach. State officials successfully argued that college students were not assigned to institutions but rather were free to select a college or university based on considerations of curriculum, location, cost, and admissions requirements. Consequently, as long as states did not preclude students from attending an institution because of their race, the courts determined that dual systems did not offend the Constitution.

In the early 1970s, however, black plaintiffs initiated litigation in *Adams v. Richardson*, charging federal officials with illegally providing funds to states that maintained dual systems of higher education. As a result of this suit, the court ordered the Department of Health, Education and Welfare (HEW)—and later the Department of Education—to launch an enforcement campaign to dismantle those systems. Central to that campaign was the premise that the states in question had a constitutional duty to remedy the conditions that created and perpetuated separate black and white institutions at the postsecondary level.

Black higher-education groups were at odds with federal agencies and the NAACP Legal Defense and Educational Fund, which brought the *Adams* suit, regarding the wisdom of pressing desegregation of public colleges and universities. Black college presidents, faculty, and alumni were undoubtedly mindful of the burdens the black community had been forced to bear during desegregation of public primary and secondary systems. They feared that desegregation of higher education would result, at best, in whites displacing black teachers and administrators, as well as black students. At worst, given the relative inferiority of their institutions, desegregation might result in the

closing of schools or the absorption of traditionally black institutions into historically white schools. In either event, institutions important to the black community would lose their identity, and opportunities in higher education for black administrators, faculty, and students would be significantly diminished.

Despite similar concerns, however, proponents of desegregation in higher education believed that both litigation and administrative enforcement could increase resources available to historically black institutions. Reducing program duplication and forcing states to locate especially attractive academic programs at traditionally black schools would also enhance the schools' long-term viability.

It is fair to say that this desegregation effort has not been very successful. Significant segregation between historically black and white institutions is still apparent. Since 1973, state officials have effectively utilized the administrative process to delay meaningful change. Ultimately, the Court of Appeals for the District of Columbia Circuit dismissed the *Adams* litigation on technical grounds, thus allowing the federal government to decide on the nature, scope, and timing of enforcement largely free of court oversight.

In 1992, however, a case involving the Justice Department and the state of Mississippi presented the Supreme Court with an opportunity to define a state's constitutional duty to dismantle formerly dual systems of higher education. Some lower federal courts had taken the position that higher-education authorities had an affirmative responsibility, similar to that imposed on school boards in the case of primary and secondary school desegregation, to eradicate the vestiges of their dual systems. These courts believed that this responsibility must be discharged by addressing a variety of practices that affect students' decisions about which institutions they attend, such as admissions standards, program duplication, institutional resources, and governance. Other courts, as we have seen, rejected the notion that primary and secondary school desegregation doctrines had any applicability to higher education, principally because college and university attendance is not mandated by the state but depends on individual student choice. Consequently, these courts—including the trial court that heard the Mississippi case and the Fifth Circuit Court of Appeals—concluded that a state's constitutional responsibility ends once the state has removed all racial bars to students' attending the college or university of their choice.

In *United States v. Fordice*, the Supreme Court essentially embraced the former "affirmative duty" doctrine and reversed the lower courts' determination that Mississippi had met its constitutional responsibility. The Court found that in at least four areas—admissions standards, program duplication, institutional

mission assignments, and continued operation of all eight public universities—the state had failed to show that the “policies and practices traceable to its prior system that continue to have segregative effects” had “sound educational justification” and could not “be practicably eliminated.” The case was then returned to the lower courts for evaluation of the Mississippi system against the Court’s newly articulated standard.

The Court’s decision left in limbo, however, the future of Mississippi’s three historically black institutions. Although the Court acknowledged that “closure of one or more institutions would decrease the discriminatory effects of the present system,” it declined to find such action constitutionally required. However, it flatly rejected the notion that Mississippi had a constitutional duty to upgrade the historically black institutions, as such. Rather, it left to the lower courts the question of whether “an increase in funding is necessary to achieve a full dismantlement.” Given this ambiguity, the possibility exists that Mississippi will be able to achieve a unitary higher-education system by closing those institutions.

Disproportionate Burdens

It is this fear that black institutions will be the inevitable casualties of higher-education desegregation that has complicated the dismantling of dual systems. Take, for example, the ostensibly odd alignment of parties in a case from Louisiana. After concluding that Louisiana’s desegregation plans were inadequate, the federal court commissioned its own strategy. That plan envisioned, among other things, merging the traditionally black Southern University Law Center into the law school of Louisiana State University (LSU), the state’s traditionally white flagship institution. The two law schools are located in Baton Rouge, only a few miles apart.

That the state opposed the merger plan was not surprising. However, it was joined by the Southern University Board of Supervisors, which viewed the court’s order as a step backward, rather than forward, for black education in Louisiana. The board claimed that blacks, the victims of the state’s history of segregation and discrimination in higher education, were being required to bear a disproportionate burden in rectifying that situation. Specifically, the board contended that the merger of Southern University’s law school with LSU’s would undoubtedly displace black faculty and staff and curtail opportunities for blacks seeking legal education. The court’s plan did not envision LSU’s absorbing Southern University’s faculty and staff, nor did it require LSU to expand to insure against a net loss of law school seats for black students after the merger.

In defense of its plan, the court took the position that the merger was required by the Constitution and

Redefining Equality

Neal Devins and Davison M. Douglas,
editors

The idea of equality is central to American civic life and one of the foundations of our national identity, yet there is little consensus on the meaning of the term. Charges of unequal treatment continue to be voiced nationwide, in both public discourse and in the courts, and competing views of equality have erupted into a cultural conflict that looms large in contemporary American politics.

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was in the long-term interests of the citizens of Louisiana, black and white. But for the state's creation and maintenance of segregated higher education, the court pointed out, there would not still be two public law schools in the same city, one white and the other black. The court concluded that desegregation could occur only if one of the institutions closed. Moreover, the court observed that in a fiscally strapped state, maintaining two law schools in Baton Rouge made no economic sense.

Southern University's law school had been denied adequate state support because of its status as a black institution. The condition of its physical plant and the

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quality of its educational program were, as a result, inferior to those of LSU. Consequently, the court concluded that Southern University's law school should be the one to close. In response to the Southern University Board of Supervisors' concerns about the desegregation process, the court suggested that the board was interested in protecting the jobs of Southern University faculty and administrators rather than in improving educational opportunities for blacks.

This controversy delineates starkly the dilemma confronting proponents of higher-education desegregation. The court clearly was correct that the maintenance of dual, segregated law schools in one city makes no legal or fiscal sense and that merging the institutions would require blacks and whites to study law together rather than apart. But the black opponents of the merger also have compelling arguments. Absent the state's history of discriminatory treatment of Southern University Law Center, the school's facilities and program probably would not be so inferior to those of LSU. Had there been "tangible" equality over the years between the two institutions, white students might have opted to attend Southern University rather than LSU based on "intangible" considerations, such as the presence of particular faculty members or curricular emphases. Moreover, there is no reason why Southern University's board should apologize for seeking to protect the jobs of faculty and administrators. They, too, are victims of the state's segregative practices.

Finally, Southern University Law Center and LSU Law School have different admissions criteria. As a consequence, Southern University has been able to admit some black students who, based on objective indicators such as grade-point average and Law

School Admission Test scores, would not be competitive candidates at LSU. Southern University, nevertheless, has been able to train and graduate generations of black lawyers who provide competent legal services to poor and minority communities in the state. Unless LSU ensured that black students whom Southern University would have admitted would find seats at LSU, the merger would represent a net loss of educational opportunities for black students in Louisiana.

The Louisiana case eventually was dismissed in light of the Fifth Circuit's ruling in the Mississippi case. Solving the dilemma in Louisiana and in other states where higher-education desegregation is under way will not be easy now that the Supreme Court has vacated that decision. Any solution must operate within the twin constraints of constitutional requirements and economic reality. At the same time, it must address responsibly the displacement effects of the desegregation process and the ironic price that the black community must pay for desegregation.

Conclusion

The *Brown* decision and the integrative ideal that it embraced have opened opportunities for black advancement that were previously unthinkable. *Brown* also transformed our entire society in other ways too numerous to mention. As the developments discussed above suggest, however, the increasing racial polarization and residential segregation in America have put the integrative ideal to the test. Concerns about the burdens blacks have had to carry in the desegregation process, and the seemingly intractable problems presented for largely black school systems in educational *extremis*, are causing growing numbers of blacks to rethink *Brown's* integrative ideal. These are admittedly difficult questions. Nevertheless, they deserve to be asked—indeed, they cannot be avoided. They must also be answered, although the answers may be uncomfortable and disappointing, at least in the short run, for those of us who hoped that we would see a different America forty years after *Brown*.

—Drew S. Days, III

Drew S. Days, III, is Alfred M. Rankin Professor at Yale Law School. This essay has been adapted from his chapter in *Redefining Equality*, edited by Neal Devins and Davison M. Douglas, copyright 1998 by Oxford University Press. Published by arrangement with Oxford University Press, New York.