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Brown v. Board of Education is one of the most cited and studied cases in United States history. While a substantial majority considers it to be one of the most important cases in this country, there are others who demur. But even the detractors are forced to acknowledge Brown, if only for the purpose of dismissing it. Like many historic events of this magnitude, the meaning and significance of the case is not easy to settle. This is because the meaning is constantly being redefined, reinterpreted, and contested. There are few icons in our nation’s history as significant as Brown. It should not surprise us, then, that 2004 was a year in which there were literally hundreds of events to celebrate or, for those who might take a more modest view of the accomplishments under Brown, to commentate, or even to mourn Brown. My purpose in this chapter is not to revisit the importance of Brown or to try to resolve what the Court “should have said.” The doctrinal debate over Brown is well-rehearsed and need only delay me briefly before I examine some other, less well-considered aspects of the case.

Brown v. Board of Education (No. II)²

(Brown II) turned fifty on May 17, 2005, a year after Brown I reached the same age.³ But unlike Brown, there were few who took note of the anniversary of Brown II. Without editorials, books, or reenactments, Brown II’s birthday quietly came and went. In this chapter, then, I will break this “covenant of silence” and discuss its importance. I believe that Brown II is important in its own right as the remedy stage of Brown. I also believe that one cannot adequately understand Brown without Brown II. When read together, along with their history, the challenge that the Court believed it was confronting in this nation becomes clearer. This understanding is relevant for us today as we continue to live with the reality of segregation.

I will make three claims in this chapter. First that Brown cannot be understood without considering its relation to the remedial decision known as Brown II. Many commentators think of Brown II as a bad afterthought to Brown where the Court limited or backed away from its more expansive language of Brown. I argue in this chapter that Brown II, in spirit if not in content, was decided either before or contemporaneously with Brown—certainly not afterward. My second claim is that the Court anticipated but underestimated the degree of change that would be necessary to desegregate our schools and society at large. In the process, I will also examine how the conflation of the terms segregation and integration has made an already difficult process even more so. Finally, I will argue that the realization of a more profound vision of Brown requires a radical shift in the meaning of “whiteness” and an understanding of how whites are injured by segregation and “white space.”⁴

This chapter will not be a dense examination of legal doctrine based on either Brown or Brown II. I am more interested in suggesting how we might move beyond the current “failures of integration” discussion. I salute the work of those who have already weighed in on Brown, with a special acknowledgment to those who challenge the false nostalgia of

³. Hereafter, I will refer to Brown I as simply Brown, as is customary.
⁴. In a number of respects, I join the Honorable Judge Robert Carter in the claim that segregation is not the illness but a symptom. Michigan Law Review 86 (May 1988): 1083, 1095, but I differ from Judge Carter in that I feel that while segregation may indeed be the symptom and not the disease, like a number of symptoms, it can kill us in its own right.

segregation such as Sheryl Cashin, not only for her treatment of our failures related to integration but for her willingness to introduce the concept of integration back into the segregation discussion. Recognition must also go to Gary Orfield, Jonathan Kozol, Douglas Massey, Nancy Denton, Richard Ford, and others.

**Reading Brown and Brown II Together**

We are in a strange place as a country. Seldom does a week go by that we do not lament the failure of our “urban” education system. It is not surprising that most of the failing school systems are both majority low-income and majority minority. So, even while we celebrate *Brown* and the apparent success of ending racial discrimination and segregation, we continue to live a somewhat disturbed and muted existence with this persistent racial, and now economic, segregation. This might make sense if we were no longer concerned with education in our society, but nothing could be further from the truth. Given our fears and anxieties about globalization and the blossoming of the information age, we insist, loudly and incessantly, that education is more important now than it has ever been to secure us against what appears to be a frightening and uncertain future.

There is a good deal of disagreement today about the importance of *Brown* and what it meant or means. There are those who still think that *Brown* is wrong because integration, or at least the premise associated with *Brown*, is both wrong and racist. This position has been associated with Justice Clarence Thomas and other soft black nationalists. The premise of this position is that a black child does not need to sit next to a white child in order to learn, and to think otherwise is a form of racism toward the black child. Of course, this is a misstatement of what is at issue and is particularly disturbing coming from the sole black member of the current Supreme Court. He and other like-minded Justices, energized by Republicans from Reagan on, have been bent on reversing civil rights that are inconsistent with middle-class white prerogative.

Jack M. Balkin and Brace A. Ackerman, in their interesting volume on *Brown*, rehearse several of the multiple positions on *Brown*. These argu-

5. I think that the term minority is very problematic. It is not a value-free concept nor is it necessarily very accurate. See Michel Laguerre’s *Minoritized Space: An Inquiry into the Spatial Order of Things*. However, I will use it in this chapter for lack of a well-accepted alternative.

6. Jack M. Balkin and Brace A. Ackerman, eds., *What Brown v. Board of Education Should*
ments run the gamut. Some assert that *Brown* hurt the goal of ending segregation by galvanizing whites against integration and that without it we may have achieved greater integration than we have today. Others argue that *Brown* has been a great achievement despite the disappointment in the educational context. And, of course, there are those who argue that the current state of schools provides no meaningful comment on *Brown* because the sole purpose of *Brown* was to eliminate state-sponsored segregation, not segregation itself. To that end, *Brown* has been a success.

Compared to its better known cousin, not much has been written on *Brown II*. Much of what has been written treats *Brown II* as a bad afterthought, a problem or a mistake in relationship to its more honorable cousin. The dominant story is that the Court, for whatever reason, blinked after *Brown*. The position of Loren Miller, a lawyer and historian, is not uncommon: “The harsh truth is that the first *Brown* decision was a great decision; the second *Brown* decision was a great mistake.” But the truth is not that simple.

Consider the history of *Brown* as reported by Richard Kluger in *Simple Justice*. The Justices understood the importance of *Brown*, and the Court was badly divided over whether to reverse *Plessy v. Ferguson*, uphold it, or find for the plaintiff on some narrow ground that avoided the issue of segregation. The Court was also concerned that a divided opinion in such an important case would fail to settle the issue and could hurt the Court’s credibility. Justice Felix Frankfurter had a stroke of genius—delay. The Court could avoid deciding the case and send it back down for rehearing. However, the rehearing had to be done in a way that did not have the appearance of delaying. So, the Court developed a set of questions that were to be answered by the lower court hearing. During this delay, Chief Justice Vinson, who was reluctant to overturn *Plessy*, died.

Earl Warren was appointed as Chief Justice of the Supreme Court to replace Vinson. He had never served as a judge but had been the governor and attorney general of California. The new Chief Justice was against segregation and made that clear after *Brown* was reargued in 1953. But he also felt strongly that a divided court could render a decision ineffective

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and hurt the status of the Court. He believed that it was important that any decision be unanimous. Justice Douglas believed that the principle in the case was straightforward—racial segregation was wrong. He would have left the details to be worked out by the lower courts. He believed that in order to get close to a majority in *Brown*, there would have to be a *Brown II*. Additionally, according to Kluger, *Brown* would have to be crafted to give society “a good deal of latitude and enough time to respond in as painless a fashion as possible.” The case would have to be carefully crafted to temper and not inflame or blame segregationists, especially in the South, while proclaiming that the time for segregation was over.

Those who know of *Brown II* are most likely to know it for the now famous and disturbing phrase “all deliberate speed.” This statement could suggest both that there was a time during which segregation was appropriate and that there is a need to go slowly in reversing this arrangement. Indeed, in the memos back and forth between the Justices, both of these positions were made explicit. There would be an end to segregation in schools, but it was to happen over an extended period of time. This would not be the first time that the country would insist on the gradual implementation of a remedy for injustice, even while recognizing the injury visited on black people. For example, as many states began to reject slavery, a number of them adopted its gradual ending, which would leave slaves in servitude for at least another generation. These situations reflect concern about the institutional complexity of simply doing the right thing. In the case of slavery, there was the concern about the loss of property for the slaveholder and the apparent need to garner white acceptance and support. Similarly, in *Brown II*, the Court was concerned about the innocent segregationist and the embedded nature of segregation—institutionally and culturally—as well as a concern for avoiding a violent rejection of desegregation by whites. In both situations, there was much less concern expressed about the needs and interests of blacks than those of whites. Too often, the cost associated with racial justice is shifted to blacks. Even though black subjugation may be viewed as wrong in the imagined future, there is often only a weak recognition

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10. See supra note 9, p. 682.
11. See supra note 6, pp. 50–52.
13. Lani Guinier makes the observation that the cost of desegregation, when it finally occurred, was on the back of poor whites. More affluent whites were spared the cost and inconvenience. This arrangement would ultimately undermine the goal of stable integration. See Lani Guinier, “From Racial Liberalism to Racial Literacy: *Brown v. Board of Education* and the Interest-Divergence Dilemma,” *The Journal of American History* 91, no. 1 (June 2004): 92–110.
that there was wrongdoing in the real present and past. One reason for the country’s continued failure to address racial injustice is the inability to recognize the relationship between racial subornation and whiteness. The goal then becomes the impossible task of achieving racial justice without substantially disturbing whiteness.14

The need for gradual desegregation was voiced by a number of the Justices prior to their willingness to sign on to Brown. Justice Frankfurter, who was both one of the intellectual giants on the bench and one of the Justices most concerned about overturning Plessy, had been strongly courted by Warren for his intellectual as well as general support. As Frankfurter warmed to the idea of overturning Plessy, he wrote a memo setting out some of the necessary elements of an opinion overturning that decision. Specifically, he wrote about the limitations of the Court to remedy past wrongs. “When the wrong is a deeply rooted state policy the court does its duty if it decrees measures that reverse the direction of the unconstitutional policy so as to uproot it ‘with all deliberate speed.’”15 Justice Frankfurter was not writing abstractly. He was telling the Court not to expect too much too quickly. Indeed, he and others were to make it clear that one of the preconditions for getting a unanimous decision on Brown was that the remedy would have to be pursued “with all deliberate speed.”

Alexander Bickel, who clerked for Justice Frankfurter and remained close to him, stated that, “There is little doubt in my mind that at whatever conference the decision was taken in 1954, Justices Frankfurter, Black and Jackson left the room with a mutual understanding of the general form the eventual decree (Brown II) of the court would take—that it would provide for a gradual enforcement and not forthwith as was the usual practice.”16 Justice Reed, a Southerner, was the last holdout to the unanimous opinion. While Frankfurter was more likely to write a separate opinion if he did not get what he wanted in the majority opinion, Reed was set to write a dissent up until the last minute. Chief Justice Warren approached him and asked him to think about what was good for the country. According to his law clerk at the time, Reed put aside his basic beliefs. The only condition he extracted from the Chief Justice was a pledge that segregation would be dismantled gradually.

15. See supra note 9, p. 686.
16. Ibid., p. 695.
When one looks at the discussion of Brown and Brown II, they are often treated as two separate opinions. However, history requires that they be read as an interactive whole. If that is done, it makes little sense to think of Brown II as a great mistake in relation to Brown. Instead, Brown II can be seen as a precondition of Brown. Chief Justice Warren had a number of challenges before him. The obvious one was to get a unanimous opinion from the Justices who disagreed. But the disagreements were not for the same reason. Some, including Justice Reed, thought segregation and Plessy were right. Others, such as Justice Frankfurter, thought segregation was wrong but were not sure of the constitutional bases for challenging it. And almost all of the Justices were concerned with the response of the entrenched South and the harm that the Court might suffer if its order was effectively rejected by whites. This last issue was by far the most significant, and the Court simply would not have found that segregation was unconstitutional without having first addressed it.

If the Court were to find segregation unconstitutional, a number of preconditions would be required. One was not to blame the South for segregation. It might be wrong in the future but it was not wrong in the past. There is circularity in the Court’s reasoning. The very fact that segregation was extensive and institutionally embedded was a powerful indication that it is not wrong. This is the very logic the earlier Court used to constitutionalize segregation in Plessy. This logic also put anti-segregationists and anti-racists in the position of sounding incoherent in talking about past wrongs: If there were past wrongs, it is not because of past wrongdoers (with a few notable exceptions), and certainly not the average white person. Another precondition was to avoid immediate enforcement of the significant changes that an end to segregation would require. The Court went to great lengths to mollify the South. One of the reasons for having a separate hearing on the remedy was to give the South some time to get used to the idea. The language was specifically chosen to be noninflammatory. And there would need to be ample time to enforce the remedy. Those Justices who were most sure that segregation was wrong were also most sure that the Court could do little to enforce a remedy and, therefore, called on the Court to do virtually nothing to enforce it. They also wanted the Court to treat the case as an individual harm that would have to be enforced individually against one school district at a time. Some of the Justices who were less sure about the rightness of the decision believed there must be some enforcement, but only gradual. Brown II adopted parts from the various camps. The
remedy would be individually enforced, but it would be enforced with all deliberative speed. Of course, an individualistic response was inconsistent with the concern that segregation was deeply embedded in our institutions and culture.\footnote{17}{See supra note 9. Also see Kluger, Simple Justice.}

The Court also framed the remedy in the negative. There was no promise of integration but only a promise that the state would not sponsor segregation. There was no one on the Court pushing for a more expansive structural remedy with immediate impact. In all fairness, even this reading may not be as narrow as it seems today. Much of the South was organized under state-sponsored segregation, so even ending just this was no small matter.\footnote{18}{Kimberle W. Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law,” Harvard Law Review 101 (May 1988): 1331, 1359–60.} But the Court did recognize the embedded nature of segregation and would later more explicitly recognize its institutional relationship and arrangement. But, more often than not, this would be used as an excuse to relieve the Court of any duty. The large contours of remedy were worked out before \textit{Brown} was ever announced. It is difficult, then, to be critical of \textit{Brown II} without implicating \textit{Brown}. They cannot be so easily separated.

\textbf{Underestimating the Degree to Which Change Is Necessary}

The condition of blacks in urban schools is both separate and unequal. Justice Thomas and others who romantically embrace the efficacy of racial segregation have not mounted even a modest challenge to these realities. Professor Derrick Bell, a prominent black law professor, makes a similar argument against \textit{Brown} and integration, although based on a more complicated set of reasons. He argues that the way integration has occurred has not served poor blacks and that the effort to integrate was bound to fail because it conflicts with white interests. He argues that there was a short period of time when, because of international conditions and the interests of the elite, whites supported \textit{Brown} and the ideal of integration. Bell does acknowledge that low-income black children attending more integrated schools do better than nonintegrated blacks based on a number of indicators. What Bell really seems to be saying is that the push for integration has not produced integration and what has been produced is largely harmful to poor blacks. He also argues that the integration that would benefit poor blacks would more likely occur
if the schools were first equalized. Without this, we have a system that continues to hurt low-income blacks.¹⁹

Like Bell, Professor Lani Guinier also believes that the way we implemented desegregation was problematic. But she draws very different inferences. While Bell would have avoided efforts to integrate schools, Guinier would have focused on integrating black children into high-performing, low-poverty schools. Not only would this have resulted in the best educational outcomes, but it would have also restructured white working-class interests so that there would not be the kind of polarization between low-income blacks and working-class whites that took place.²⁰

There are a number of problems with the way we think about Brown. Many of these positions require that Brown necessarily stand for one thing. While some arguments may be more defensible than others, it is an error to assume that there is a single connotation for what Brown meant or should mean. The question is a combination of hermeneutic, normative, and political issues. While it is important to think about what the Court thought it was doing and the context of its actions, this should be the beginning of the inquiry, not the end. I have already suggested in other writings that while the prominent issue before the Court appeared to be embodied in Plessy, the actual issue was represented more directly in Dred Scott. The issue in Scott was whether blacks could be full members of the political community. In Scott, the Court made it clear that the answer was no. Plessy can be thought of as an extension of Scott despite the fact that it was decided after the Civil War. It is clear that the Civil War Amendments were designed in part to overturn Scott. But the Court demurred, asserting in the Slaughter-House Cases²¹ that implementing the Civil War Amendments, and particularly the Fourteenth Amendment Privilege and Immunities clause, would require a radical restructuring of our national and state institutions and social structures to robustly redefine participation and include the freed slave in the community of all citizens.

The very institutions that the Court did not want to disturb were the institutions that came into being under the heavy influence of a slave


²¹. 83 U.S. 36 (1873).
society where white supremacy and exclusion remained unquestioned. It is interesting to note that Brown faced much of the same problem. While the Slaughter-House Cases argued that the Fourteenth Amendment could not have intended such a radical institutional shift, the Court in Brown recognized that the Fourteenth Amendment might indeed mandate such an institutional shift, but they were not confident that the Court could effectively order such a shift. One reading of Brown II is that because segregation, and by extension white supremacy, was so culturally and institutionally embedded, it could not be fundamentally addressed by the Court or anyone else. The exclusion of blacks and other nonwhites, not just from schools but from every aspect of society where citizenship and benefit were to be conferred, could only be modestly disturbed and even then only with the permission of the offending “innocent” whites. To do otherwise would require a substantial set of institutional rearrangements that seemed to be beyond the competence and practical authority of the Court. The question before the Court in Brown was not simply whether Plessy or segregation was wrong under the Constitution, but how deeply embedded segregation was in our institutions and national identity, especially in the South. To deal with this substantial challenge, the Court had to narrow the question and the scope of the answer.

The Court’s treatment of institutional arrangements and structures has been, at best, confusing and inconsistent. On the one hand, the Court’s behind-the-scene musings during Brown make it clear that it was aware that successful implementation of the decision would require significant institutional and cultural shifts. At times, it treated these arrangements as opaque and mysterious. At other times, it treated these arrangements as natural and transparent. Both approaches support a false position that the Court cannot or should not significantly disturb the status quo. Consider the Supreme Court’s opinion in Milliken. In that case, the Court


treated municipal and school board boundaries in the Detroit areas as natural, sacred, and beyond the power of the Court. Yet the issue of local control and local boundaries had been raised many times before. Indeed in *Brown*, the issue was raised by the government, and the Court easily brushed aside the concern of localism in favor of the plaintiffs’ rights and the need to end segregation.\(^{26}\) At the appellate level in *Milliken*, the court had ordered a remedy that included the suburbs, noting that to do otherwise would create the conditions for overturning *Brown*.\(^{27}\) It noted that local control was not a sufficient concern to stand in the way of a constitutional mandate to desegregate. The Supreme Court did not show the same concern when establishing the foundation for *Brown*; instead, in *Brown II* it all but constitutionalized localism, lessening the concern for desegregation and civil rights.

While asserting that local control was natural, the Court asserted that the cause of housing segregation was opaque. When looking at the patterns of housing segregation that were central in supporting segregation between the city of Detroit and the suburbs, the Court noted that it did not know, and perhaps would never know, why housing was segregated in Detroit. This is an amazing story that the Court and the nation would return to many times despite overwhelming evidence that the cause of housing segregation is not only knowable, but is largely traceable to government action and inaction and even substantial public expenditures.\(^{28}\)

What the Court and the nation have done is to allow institutional arrangements and racial meaning to obstruct the deeper potential of *Brown* to reach institutional structures. But it is worse than this. The Court has actively participated in supporting the structures that are used to frustrate *Brown*’s ability to challenge the underlying meaning of *Scott* and *Plessy*.

One of the debated meanings of *Brown* is the promise of integration and its ability to alter institutional arrangements. I will not restate the debate here, but will simply point to a prior issue that must be addressed before joining the integration discussion. What do we mean or should we mean by integration; what is the relationship between segregation, desegregation, assimilation and integration? It is surprising how little attention has been paid to these questions, even as policy makers and Justices stake

\(^{26}\) Supra note 9, p. 675.


out positions on what is appropriate. Under close examination, these seemingly simple questions turn out to be quite complex. I believe that before we can make the kind of change that a multiracial democracy calls for, we must first engage these questions. Let’s take a brief look at some of these concepts and their relationship to each other.

Segregation means the separation of people or groups, in our context, by race and by class. Racial segregation is the issue that Brown was designed to address. Today we are often more sensitive to the class segregation inherent in racial segregation. Some scholars assert that it is really class or “economic segregation” that creates disadvantages for black people. In some respects, there is merit in this claim. For example, putting all low-income students in the same school—when all of a poor student’s classrooms are also poor—creates a substantial educational burden for the students. The effect of this economic segregation is different, however, than the family condition of a given student. In fact, a number of studies have asserted that a student from a middle-class background attending a high-poverty school will, on average, do worse academically than a low-income student attending a middle-class school. A story in the New York Times focuses on a school district in Wake County in North Carolina that limited the poverty level of each school to no more than 40 percent of students on free and reduced lunch. The impact on the test results of low-income students of color was very significant.

It is interesting that there has been much less challenge to the assertion that economic segregation creates a pedagogically difficult learning environment for students than the assertion that racial segregation produces a similar negative environment for the disfavored group. There are a number of observations that are worth pointing out in this context. The first is that in talking about segregation there is often a false sense of symmetry. This false symmetry is more likely to come up in the racial than the class context. So there will be some who suggest that there is symmetry between whites who are segregated from blacks and blacks who are segregated from whites. Under this rubric, the most racially isolated group is middle-class suburban whites.

A Wisconsin study noted that if an area was 90 percent black, it would be considered segregated, but if it were 9 percent white it would

not be. Does this suggest that whites are segregated and therefore suffering all the attendant harm associated with segregation? The obvious answer is no. The reason the question might even seem reasonable is because of our failure to seriously examine the nature of segregation. The Kerner Commission Report noted that the segregation of blacks was imposed for the benefit of whites. Marilyn Frye has noted similarly that prisons keep some people in and some people out. Yet even the most extreme formalist would not confuse the lack of symmetry in this example.

Segregation, then, should not be thought of just as the separation of people in some neutral formal sense. It has a value and meaning that goes beyond just the separation. It is more useful to think of segregation as relating to the distribution of opportunity both in a relative and a more objective sense. The purpose of segregation is to separate a group not just from another group but from relative opportunity itself. The failure to see this is to repeat the failure and false promise of Plessy. Because there is a differential in benefit, segregation can only be achieved by the exercising of power by one group over another. I am not suggesting that whites are not injured by segregation—they are. There was a claim in some Brown cases that whites were injured by segregation. Despite this, we have failed to seriously consider how whites are indeed injured by segregation even when they have more than nonwhites. But this issue was not acknowledged at the Supreme Court level. While there is certainly a need for this examination, it should not be conflated with the injury that blacks and other people of color suffer from segregation.

31. A 2003 study by Quinn and Pawasarat critiques the use of the dissimilarity index as being racially-biased and based on a white majority view of segregation. The authors contend that the dissimilarity index considers any majority African American neighborhood as segregated, but finds most majority white neighborhoods to be integrated, due to the methodological constraints of the index. As stated by Quinn and Pawasarat, “The index, is based on a one-way concept of desegregation where blacks are expected to move into white areas, but whites are not expected to move into majority black areas.” See Quinn and Pawasarat, “Racial Integration in Urban America: A Block Level Analysis of African American and White Housing Patterns.” Employment and Training Institute, School of Continuing Education. University of Wisconsin-Milwaukee, January 2003. (page 1). Available on-line at: http://www.uwm.edu/Dept/ETI/integration/integration.pdf.


33. John a. powell, “Opportunity-Based Housing,” *Journal of Affordable Housing and Community Development Law* 12, no. 2 (Winter 2003): 188. For a discussion on the relational harm between groups where all may be above some objective standard of deprivation, see Amartya Sen, *Development As Freedom* (New York: Knopf, 1999). See also John a. powell, “The Legitimate Needs of Members in a Democratic State,” *Santa Clara Law Review* 44, no. 4: 969, where I argue what is needed are the goods and status to effectively participate in a democratic society.
One of the ways that we have tried to reconcile our ideological commitment to equal opportunity and colorblindness with persistent segregation and resegregation is to claim that segregation today is not imposed, that it is a function of choice. The choice argument, or justification, tries to maintain that separation between the races, and by extension classes, is either natural or self-selected by the disfavored group. Although there are increasing numbers of African Americans and Latinos who have begun to express the possible benefit of choosing segregation over integration, this should not distract us from understanding the function of segregation as it is imposed by the dominant group. There can be a number of benefits that come from a group being allowed to form both a group consciousness and a strategy to challenge the dominant group. But this is still a defensive action in response to a strategy by the dominant group to subordinate the less-favored group. Even some of the apparent supporters of segregation acknowledge that if segregation stops being a benefit to the dominant group, the dominant group is much less likely to support it. Segregation must be understood in terms of domination, power, and the uneven distribution of burdens or benefits to a group.34

Earlier, I touched on the difference between racial and economic segregation in the educational context and our different responses to the two forms of segregation. It may not surprise the knowledgeable reader to find that there is a high correlation between racial and economic segregation. Much of the literature on concentrated poverty shows that low-income black children are significantly more likely to live in a low-income, high-poverty neighborhood and go to a racially isolated high-poverty school. There is little claim that the parents of these children have a choice of whether to send their children to such schools nor does research dispute that the children going to such schools, even middle-class children, face added challenges. In this context, there is a consensus that this situation is externally imposed with a heavy cost on nonwhites. But this de

34. There is no instance of black flight because a few whites move into a neighborhood or school. Consistent research shows a strong willingness for African Americans to live in integrated neighborhoods, with most preferring neighborhoods that are racially mixed. See Maria Krysan and Reynolds Farley, “The Residential Preferences of Blacks: Do They Explain Persistent Segregation?” Social Forces 80, no. 3 (2002): 937–80. In addition, research suggests that African Americans prioritize neighborhood opportunities and school quality more than racial preferences when selecting neighborhoods. In surveys conducted in the Washington D.C. region, nearly 60 percent of African Americans identified school quality as important in neighborhood selection, while only 3 percent felt neighborhood racial composition was important. See Greg Squires, Samantha Friedman and Catherine Saidat, “Housing Segregation in the United States: Does Race Matter?” Lincoln Institute of Land Policy Conference Paper (2001).
facto segregation is often seen as de jure desegregation, with little effort expended to even recognize, let alone remedy, this condition.

De jure desegregation, at least under federal law, has come to mean that segregation is not deliberately imposed by the state, or more accurately, that plaintiffs cannot prove it under increasingly greater burdens required by the courts. It is not clear that either Brown or Brown II requires this understanding. Indeed, it was not until the Warren Court had been replaced by a much more reactionary Court that this understanding would emerge. Some state courts have rejected this assumption, ruling instead that de facto segregation as well as de jure segregation violates the law.35 The harms and disabilities associated with segregation are present regardless of whether it is explicitly state imposed or not. While there may be some disagreement over whether the harms are the same, virtually no research suggests that there is not significant harm regardless of how the segregation came to be. When advocates fight for school desegregation, it is doubtful they intend to fight de facto but not de jure segregation. Adding to this confusion, some use the term desegregation as a synonym for integration.

When advocates fight for school integration, they are challenging segregation without the legal distinction between de facto and de jure segregation.

But what is meant by integration? How is it different from desegregation? The Rev. Dr. Martin Luther King Jr. delineates between the terms this way:

The word segregation, represents a system that is prohibitive, it denies the Negro equal access to schools, parks, restaurants, libraries and the like. Desegregation is eliminative and negative, for it simply removes these legal and social prohibitions. Integration is creative, and is therefore more profound and far-reaching than desegregation. Integration is genuine intergroup, interpersonal doing. Desegregation then, rightly, is only a short-range goal. Integration is the ultimate goal of our national community. Thus, as America pursues the important task of respecting the “letter of the law,” i.e., compliance with desegregation decisions, she must be equally concerned with the “spirit of the law,” i.e., commitment to the democratic dream of integration.36

Much of our conversation about integration is not helpful. As I have suggested, we sometimes use integration to mean no more than desegregation. At other times it is used to mean that students of color are attending the same schools as white students, but not that they are in the same classrooms or getting the same level of instruction. Many “integrated” schools have nonwhite students tracked in remedial classes in the basement, while the AP and college preparatory classes are virtually all-white and located on the upper floors. Some of the attacks on integration are based on this kind of reality. A more subtle, but still problematic form of “integration” occurs when nonwhite students are placed in the presence of white students, but the curriculum and class environment are still oriented toward the white students. There is an assumption that the nonwhite student must assimilate into the white structure and curriculum as an invited guest. This arrangement, which harms both white and nonwhite students, is not true integration and is not good education.

There are other problematic ways of thinking about integration such as putting poor black and Latino students in a school and calling it integrated. Another problematic example is putting poor black and poor white students together. While this might achieve a degree of racial integration, the class segregation can still limit the life chances of the students.

You will recall that Justice Thomas asserted that segregation is not the problem and that the insistence on having a black child sit next to a white child is racist. Maybe, maybe not. The obvious question not asked by Thomas is why whites, with the support of the state and the courts even after Brown, continued to resist sitting next to, or for that matter, living next to blacks. Is that racist? Would Thomas also assert that the call for economic desegregation or integration is classist? Justice Thomas’s assertion only makes sense in the abstract. In the real world, black students attending segregated schools are not just separated from white students, they are also separated from most middle-class students, qualified teachers, AP classes, and other factors associated with an adequate education. Segregation aids in reproducing the ideology of racial inferiority for blacks and an ideology of racial superiority for whites. But segregation is more than an ideology. It has cultural meaning and it has consequences for the sorting of material benefits.

What desegregation has come to mean, at least in law, is that there is no affirmative state or government sponsored segregation that can be proven. So desegregation can be consistent with de facto segregation. In Brown, the Court is fairly clear that even where segregation is not state
imposed, there is an injury. But today the Court either rejects that there is injury or maintains that there is no federal constitutional violation if the segregation is de facto. What the Court is asserting is that as long as there is no intentional state requirement, there is no segregation in law. And indeed, some members of the Court today have asserted that the promise of Brown is “desegregation,” not integration.

So, what do we mean by integration? Some have used integration interchangeably with assimilation. I have asserted that in the U.S. both segregation and assimilation can only be understood in the context of white supremacy. Even what is called self-segregation by black Americans can only be understood in this context. But in what way are assimilation and segregation (de jure or de facto) predicated on white supremacy? Let’s consider segregation first. It is predicated on both the “purity theory” and the debasement of blacks. The assumption is that there is something wrong with the “racial other” and, therefore, he must be physically separated from whites. There is a fear that blacks will contaminate both the blood and culture of white society if they are allowed to mix. This message is found in many of the early discourses on race, even by some that supported the end of slavery. Thomas Jefferson was of the opinion that if slavery ended, blacks would have to be sent back to Africa. Benjamin Franklin was concerned about not polluting this white nation. Abraham Lincoln thought it was ridiculous to talk about the mixing of the races.

In many respects, the segregation imposed and tolerated by the Court in Plessy was already very much a part of the national consciousness and certainly expressed in Scott. Plessy, and a number of other cases heard after the Civil War and even today, ignored the fact that the Civil War and the Civil War Amendments were designed to give birth to a new nation.

Segregation is not just an expression of white supremacy; it is also one of the mechanisms for its creation and reproduction. The harms of segregation are bound up with both material consequences and with

38. I assume that the Court might very well know there is an injury. What they are more likely saying is that they are willing to protect whites and whiteness from having to be polluted by nonwhites. If this seems too strong, consider how careful a more liberal Court was in taking care of the perception and interest of white segregationists and how little concern and attention is paid generations of inner-city children who almost everyone acknowledges are being mis-educated.
the message that segregation conveys. Judge Robert Carter has said that he was mistaken when he asserted that segregation was the major problem; instead, he indicates that segregation is simply a symptom of white supremacy.\(^41\) This is only partially right. Segregation is both a symptom and a cause. We increasingly accept the notion, if only partially, that race is socially constructed, but how is it constructed? Martha Mahoney notes that after the end of Jim Crow, segregation provided not only a way to distribute material benefits to whites but also a means of constructing white identity. Segregation, then, functions both in the construction of racial identity and in the racialized distribution of material and cultural benefits.

Before leaving this discussion, two caveats are important to note. The first is that there is no single practice or structure that supports racism and white supremacy. As important as segregation is for our current arrangement of white supremacy, there is not an entailment between the two. Nor is racism only an internal or external process.\(^42\) For racism to be sustained there must be both material condition and social meaning to support this arrangement. But the end of Jim Crow should teach us that as the world changes, practices and structures can change and adapt to new conditions giving us new expressions of racism. Each change in a racist condition and justification is likely to produce a different iteration of racism and racist expression.

Like segregation, assimilation is also an expression of white supremacy. The segregationist asserts that there is something wrong with the racial other; he must be either contained or regulated when in “white space.” The assimilationist asserts that there is something wrong with the racial other but, instead of just being contained, the racial other must be fixed to become more like the dominant race. Think of the “melting pot” as it applied to eastern and southern Europeans; the burden was on them to become like “normal” Americans. When measured against this white American norm, these immigrants came up short and defective. There was no similar scrutiny of “Americans.”\(^43\) This may be considered a softer

\(^{42}\) See supra note 43, pp. 175–80.
\(^{43}\) The argument for assimilation and its supremacy implication are made clear in such work as Samuel Huntington’s Who Are We?: The Challenges to America’s National Identity (New York: Simon & Schuster, 2004). In the book Huntington asserts that we are not an immigrant country but a settler country, the difference being that in a settler country the norms, values and rules are set by the original founders. All others must assimilate to these norms or be excluded.
form of white supremacy. The harder segregationist believes that there is something wrong with the racial minority, while the assimilationist says the same thing but does not believe it to be immutable. But to both, the racial other is inherently defective.

When we look at the efforts and meanings associated with integrating schools, they are likely to be associated with either desegregation, which still allows for de facto segregation, or assimilation, where nonwhite children are invited into “white space” as guests and are expected to behave and assimilate. Many of the attacks on integration by detractors like Bell and Justice Thomas are really an attack in large part on the notion that the racial other must be fixed in accordance with a predetermined set of white norms. If there is a need to be fixed, it must extend to the white population as well as the racial other. In many respects, most critics of integration fail to distinguish integration from assimilation, or to develop a true sense of integration. But rejecting assimilation does not entail embracing segregation, either self-imposed or imposed by others. What then would true integration look like? I will provisionally offer the following definition. Integration in the school context requires that students meet in the learning environment as equals and in a process that supports mutual interaction and reciprocity as equals. The environment must both support and respect the learners. Recognizing that much of the learning process occurs between the students themselves and not just between student and teacher, the environment must encourage, facilitate, and reward meaningful interaction among all students. The environment must reflect the needs of the students as both individuals—whole complex beings—and members of multiple groups, all this while being sensitive to the cognitive, emotional, spiritual, individual, and social needs of the learners. Learners should be brought together in an environment where there is the appropriate “critical mass” of different groups, when possible, for optimum learning to take place. The structure, curriculum, and the norms of the classroom and the building must be consistent with this mission. Integration must be affirmatively valued and pursued. Isolation of students by race, class, or other categories that would undermine the learning of true integration or that would support the learning of inferiority or superiority must be avoided. I also suggest that our understanding of integration and the conditions necessary to actively support integration will continue to evolve. Integration, like democracy, must be seen as a process. We may not get to our goal, but its pursuit should shape our practices.

44. See supra note 5.
Shifting the Meaning of Whiteness

It is not simply that race is socially constructed; in our society it is constructed to support the notion of inferiority and superiority. As suggested above, there is more than one reading of Brown. One is the very limited reading that Brown was not meant to desegregate schools and certainly not designed to integrate schools. It was meant only to be symbolic, and it has done that. Bell and others make this assertion. A second reading is that the Court blinked; that after deciding Brown, the Court got cold feet and took back much of the spirit of Brown in Brown II. The third reading is that the Court was contemplating something much more profound but did not have an adequate understanding of how to achieve it. It mistakenly thought that time, and little else, would help them bring about a real transformation. They were wrong, but well-intentioned. I assert that the third reading is the best.

The first meaning of Brown is reflected in Justice Douglas’s position. But it was not accepted by Chief Justice Warren or the Court. The second position need not delay us long. This position views Brown II as an afterthought. It was not. Knowing that a radical restructuring was needed to implement Brown, the Court had the broad contours of Brown II worked out before deciding Brown. This reading is also supported by later actions of the Warren Court when it finally rejected the “deliberate” part of Brown II and went on to assert a sweeping, but still inadequate, vision of what must be done.

Brown and Brown II can more aptly be seen as a profound vision of integration and a multiracial and multiethnic democracy. It is the vision of a society without a superior class. This reading is a rejection not just of Plessy but also of Scott. It is the call for the nation to break from its racist past and embrace a transformative vision. But this break requires both a restructuring of our institutions and a rethinking of our national meaning. What the Court was concerned about in Brown was how to get there, understanding that there would be resistance to the profound social change required. On this, the Court was right. What the Court failed to do was to explicitly talk about and openly explore these profound changes. Some members of the Court thought the resistance would be too strong. It is interesting to note that the members of the Court who

45. In A New Birth of Freedom, the late law professor Charles Black argues that the goal of the Civil War Amendments were to usher in a new set of institutional arrangements, and the failure to do this continues to undermine our efforts for a racial democracy. Charles Black, A New Birth of Freedom: Human Rights, Named and Unnamed (New Haven: Yale University Press, 1999).
were most clear that segregation was wrong were also most skeptical about the possibility of real change.\(^{46}\) Some members who were less sure about ending segregation and worried about the Court’s legitimacy in overturning \textit{Plessy}, nonetheless believed that it was imperative for the Court to say something about the process for implementing desegregation. They took the position that the South would need to be treated fragilely and given sufficient time to get used to the idea.\(^{47}\) This was the view that prevailed in \textit{Brown II} and, by extension, in \textit{Brown}.

Where the Court failed was in correctly identifying, or even seriously investigating, what was necessary for this radical transition to work. This was not to be the first time that, as a nation, we have made this mistake. After the Civil War, the North failed to put into place what was necessary to truly end white supremacy and domination in the South and, by extension, in the entire country. The failure was not just in how the country dealt with recalcitrant whites but also the failure to seriously address the needs of black people, to secure their place as full citizens and repudiate \textit{Scott}. In both \textit{Brown} and \textit{Brown II} and Civil War reconstruction, there was an assumption that time, with little else, would do the work. At some point, the country and the Court would reinterpret the goals of \textit{Brown} and the Civil War to be consistent with white dominance based on a different set of institutional arrangements and cultural meanings.

If we are to take seriously the more profound reading of \textit{Brown} and \textit{Brown II} as well as the Civil War Amendments, we must be more explicit about the vision and the process necessary to achieve it. I have already suggested that I think this vision is quite radical, and yet it is deeply connected to our early dream of an American nation as reflected in the Declaration of Independence.\(^{48}\) That vision is for an inclusive democracy without racial hierarchy, dominance, or subordination. The Court, in its behind-the-scenes musings, recognized that the realization of this vision would require a new set of institutional arrangements and indeed a new kind of black American.\(^{49}\) What the Court failed to seriously consider is the new kind of whiteness that would be necessary to support this vision. To require blacks to change and prove themselves worthy without recognizing what is required of whites is both wrong and backward. This position reflects the assimilation model in which blacks are seen as damaged and in need of repair before they are allowed into white schools, white

\(^{46}\) See supra note 9, pp. 680–85.

\(^{47}\) Ibid.

\(^{48}\) See supra note 50.

\(^{49}\) See supra note 9, pp. 700–5.
neighborhoods, and white society as equals. While this language might seem odd when explicitly stated today, it was espoused by a number of blacks and whites—Booker T. Washington, for example. Of course, it was a less offensive position than the segregationists’ view that blacks and whites could never live as equals.

These underlying currents are still very much with us today in less explicit language. While I am not opposed to looking at how a radical vision of inclusion and democracy calls for a change in black America, the heart of the problem must be located in white America. A group of people forced to live in slave conditions are likely to adopt behaviors and norms that would not be appropriate if they were full members of a free society. Similarly, people forced to live in “ghettos” and conditions of concentrated poverty will likely adopt behaviors and norms inconsistent with living as full members of society. The Kerner Commission recognized this reality almost forty years ago. But in a slave society and a society based on white hierarchy that turns its back on democratic ideals, the problem is with the slavemaster and those who support slavery—not with the slave. The conditions of slavery and segregation are not endogenous, and that is one of many serious errors in understanding racial hierarchy today. If there is a culture of poverty in the poor black community, and there might well be, it is largely created and maintained by those outside of that community for their own benefit. What the Court and others have recognized is that racial justice, and in this case integration, will not likely happen if there is strong resistance from large numbers of whites. One of the ideas that at least some members of the Court relied on was that improving conditions for blacks over time would reduce white opposition. Bell, while being at best ambivalent to the possibility of racial justice and equality, does suggest that if the condition of blacks were to improve, there would likely be less resistance to equality and integration.50 This may be correct for some whites, but there are reasons to believe that it may be difficult to reach the critical mass necessary to make the radical break I have been discussing. Indeed, one has to wonder why, despite some substantial gains in the size of the black middle class and improvement in racial attitudes, so many of the old norms of Southern racism seem to resonate with so many Americans. Some have suggested that the road to building a majority party is a thinly veiled form of Southern racism.

A number of authors have argued that when racial justice issues run up against white prerogative, racial justice loses. This is Bell’s “interest

50. See supra note 8.
convergence theory,” or Lipsitz’s “possessive investment in whiteness,”
or Ryan’s “middle-class prerogative” in school desegregation. A pessimis-
tic interpretation of this phenomenon is that we will never achieve racial
justice, and some of the authors take this position. What I am suggesting
is that Brown and Brown II anticipated a similar problem but arguably
took a more optimistic view. The authors of these cases believed that
whites could change.

It is to this view that I now wish to turn. But first, let me state it
more forcefully. There are two parts to this proposition. The first is that
in order to achieve racial justice in our society, mere must be a different
kind of whiteness. The second is that this new white space must be per-
ceived as a benefit to people who are currently in the old white space. It is
important to note that I am not talking just about people who are pheno-
typically white. There are a number of reasons for this. Who is classified
as a legitimate member of this white space has changed before and will
continue to change. As I have suggested above, the goal of assimilation
is to expand in some fashion who is legitimately in this space. I asserted
above that the assimilation goal is racist because it defines those outside
of this space as deficient. They only become sufficient by becoming like
whites and only then may they be welcomed in.

Definitionally, those who are not permitted in white space are
those labeled as “black.” Again, I am not speaking of how people look.
Whiteness was defined early on as nonblack.51 While the definition has
changed and will continue to change, there is little to suggest that the
nonblack meaning of white space will change. Indeed, there are some
suggestions that it will harden.52 When individual blacks are invited to
this white space only to recoil, it is this contradiction that they are often
reacting to. When James Baldwin respectfully declined an invitation as
a wonderful literary black, he stated that the “price of the ticket” was
too high.53 Leave your “blackness” at the door, if you can. This demand
had been made and accepted by a number of Europeans in the history
of ethnically nonwhites becoming white. Of course, if all blacks or even
large numbers are invited in, and there is not a “new black,” white space
might cease to operate. But this offer has never been extended. I am
also asserting that the goal should not be to get into this space, but to
dismantle it.

51. See supra note 43, pp. 65–70.
52. George Yancey, Who Is White?: Latinos, Asians, and the New Black/Non-black Divide
(Boulder, CO: Lynne Rienner, 2003), 149–55.
Martin’s Press, 1985).
But there is also a problem from the position of those who are dependent upon white space for identity and power—specifically whites. The foundation and the function of this space is exclusion and domination, but because whiteness is relational, it is understandable that after the Civil War whites were anxious and confused about who they were. And in this context, the relationship is one of domination, exclusion, and fear. So assimilation is a problem not just for those who would come in but also for those who are already in this white space. Justice Thomas’s skepticism about the need to enter this white space to be successful is understandable. The solution, however, is not to stay outside the space or to leave the space undisturbed. The goal of racial justice is not just to free nonwhites but to free whites from this white space.

What I am suggesting is that there is something problematic for those who inhabit this white space as well as a problem with the space itself. To understand this, we must first look carefully at this space. The space of whiteness, of course, has changed and will continue to change. It is a contested space. But a number of its underlying principles change only in degree. It is a negative space, that is, it is defined in part by who and what is kept out. So it is a space of exclusion and domination. This is because those excluded are already present. The exterior and the interior are radically interdependent and unequal. This sets up a dual relationship that undermines the principles of democracy. Justice Harlan suggested as much when he talked about the Constitution not recognizing dominate or subordinate classes. Creating such a distinction makes a mockery of the democratic norm. Harlan, however, did not go far enough. Even while he was unwilling to accept the constitutional acknowledgment of a racial caste system, he thought such a system was natural and inevitable in the social sphere. He was wrong on both counts. He also failed to recognize the role of law and other public institutions in creating this apparently natural space.

Whites who occupy this space feel both a sense of power over and a sense of danger from the other. There is the constant threat of pollution and annihilation of the other. This fear must be policed, yet the other is needed. But the other is not just in the physical space; the other is also in the psychic space. The space is maintained not just by denying the other

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“out there,” but, more problematically, by denying the other in the self. The psychological, material, and spiritual damage to those in this state of fear has not been adequately explored. After the Civil War, there was an opportunity to embrace true democracy and a more whole self. But this also required a new kind of whiteness. The failure to produce this radically new white space and white identity under the post-Civil War conditions left many whites adrift, confused, and angry. This anger was used after Reconstruction to develop another space maintained through fear and violence. This white space is a space of spiritual death. We are now in danger of losing the opportunity presented by the civil rights movement as we continue to live under the shadow of Scott. To capture this opportunity, we must deepen our understanding of social justice and fundamentally restructure our institutional and cultural arrangements to support a space without masters or servants. This is the unfulfilled promise of our democracy.

It might be too much to expect that the Court would take all this on. This white space emerged over several decades and is supported by many of our institutions and our national ethos. But there is another part of our history and a dream that we must redeem. We must first have our own truth and reconciliation, not just for blacks but for whites. What the Court might have done was to have an experiment that explored the damage to whites caused by segregation and a false sense of superiority. What the court might have done was to push for a better definition of the need for creating a holistic citizenry in our growing democracy. Too often there has been the assumption that nonwhites are defective, and the goal is to move them to the unstated, and sometimes even stated, norms of whiteness. That is why the Civil Rights Act of 1866 could talk about blacks getting the same rights and benefits as whites. We still talk in such terms when we assume that the goal is equality, meaning nonwhites are equal to whites without a more careful examination as to what this means. We must remember that the Civil War Amendments promised the end of slavery and the right of full citizenship before it spoke of equality. It is not that equality is not important—it is. But what must we be equal to?

Whites are not likely to give up white space or participate in its destruction unless they see both how they are harmed by it and that there is a better alternative. It is not simply a question as to whether we can move forward in opposition to white prerogative but whether we can

gain support for the development of a new kind of white prerogative, a new kind of white being that is not in opposition to the other. There are also signs that the ability to pay the racial bribe for whites to continue to defend white space may be coming undone.57 There are many shortcomings to Brown and Brown II. There are also a number of radical readings of these cases. They are both available to us. But I suggest that if we fail to enliven the more radical view of Brown and call for a different radical vision of whiteness and eradicate the harms experienced under the present structures, it is more our failure than theirs.

In looking at the injuries that this system inflicts, we must not fall into a false sense of symmetry and assume that the injury to those outside and inside is the same.58 Nonetheless, we have still not had the analogy of the doll experiment for whites. Maybe there is none. But we must seriously explore the question, what has this white space done to those inside the space—as well as those outside of it?

While an exclusive conception of white space has kept nonwhites out, it has also trapped whites within. By defining themselves as what they are not, whites have prevented themselves from creating a more positive image for themselves. Ultimately, this definition by exclusion, in a world that is increasingly finding value in the multicultural expression of many groups, must leave those trapped within white space feeling increasingly insecure and defensive about their own identity. Future research might focus on any connections between a lack of white identity and the erosion of community supports within suburban America and its effects on predominantly white social problems, such as teenage suicide.

Segregation harms whites and nonwhites, but in very different ways. If whites can begin to see that segregation and its underlying mindsets is more harmful to them than any perceived benefits it provides to them, then true integration may finally become possible. Once whites are able to create a self-identity that is not based on exclusion, then white space as we know it will cease to exist and different races will be able to interact on an equal level. Then, and only then, will segregation have come to an end in America.

57. Andrew Barlow, Between Fear and Hope: Globalization and Race in the United States (Lanham, MD: Rowman & Littlefield, 2003). Barlow argues that globalization threatens many of the benefits associated with whiteness and thereby may offer a ray of hope. See also Alberto Alesina and Edward L. Glaesar, Fighting Poverty in the United States and Europe (New York: Oxford University Press, 2004). Here the authors compare the development of social citizenship in the United States and Europe and find that race has retarded development in the U.S.

58. See supra note 3.