CHAPTER 5

THE LAW AND POLICY OF EARLY CHILDHOOD EDUCATION

Early childhood education is the new frontier of education law and policy. The evidence is unassailable that high-quality pre-kindergarten programs produce dramatic short-term and long-term educational, social, emotional, and economic benefits. *See* James J. Heckman, *Schools, Skills, and Synapses*, 46 Econ. Inquiry 289-324 (2008); James J. Heckman et al., *Analyzing Social Experiments as Implemented: A Reexamination of the Evidence from the HighScope Perry Pre-School Program*, 1 Quantitative Econ. 1 (2010), W. Steven Barnett, *Preschool Education as an Educational Reform: Issues of Effectiveness and Access,* National Research Council (2011), available at *http://nieer.org/publications/latest-research*; W. Steven Barnett, *Benefits and Costs of Quality Early Childhood Education*, 27 Child. Legal Rts. J. 7 (Spring 2007).

The evidence also demonstrates that there are tremendous racial and socioeconomic disparities in the level of high-quality pre-kindergarten programs available to the nation's three- and four-year-old children. White children and children living in favorable socioeconomic conditions participate in high-quality pre-K programs at a greater rate than children coming from poor socioeconomic conditions and minority groups. *See* American Psychological Association, Presidential Task Force on Educational Disparities, *Ethnic and Racial Disparities in Education: Psychology's Contributions to Understanding and Reducing Disparities, www.apa.org/ed/resources/racial-disparities.aspx*. This disparity results in a significant discrepancy in school readiness, and it also results in a virtually insurmountable "achievement" gap as early as kindergarten. *See, e.g.,* James J. Heckman, *The American Family in Black and White: A Post-Racial Strategy for Improving Skills to Promote Equality,* 140(2) Daedulus 70-89 (2011).

The evidence showing the inequality in access to indispensable pre-K education raises several familiar, but particularly acute, legal questions. First, if there is a federal or state constitutional right to at least a "minimally adequate education," does that right include a minimally adequate pre-kindergarten educational program? Second, if the state does provide pre-kindergarten programs to some of its children, must it also provide those programs to all

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its children on equitable terms? Third, would additional state involvement in pre-kindergarten educational programs represent an intrusion into the interest of parents to direct the upbringing of their young children? Finally, if expansion of access to high-quality preschool programs is desirable, should that expansion be the result of judicial remedies or legislation?

A. THE LEGAL LANDSCAPE OF EARLY CHILDHOOD EDUCATION

Each of the preceding questions is at play in the following two cases. In Abbott v. Burke (*Abbott V*), 153 N.J. 480 (N.J. 1998), the New Jersey Supreme Court ordered the state to remedy its unconstitutional failure to give every child a "thorough and efficient" education by providing a high-quality preschool program to all three- and four-year-olds in 30 high-poverty school districts. In Hoke County Board of Education v. State, 599 S.E.2d 365 (N.C. 2004), however, the North Carolina Supreme Court reversed the trial court's order requiring the state to provide preschool education to low-income students who were "at risk" of school failure. Although the *Hoke* court found that the state's failure to provide assistance to "at risk" children was unconstitutional, it concluded that the legislature, and not the courts, should initially attempt to design and implement a comprehensive preschool remedy.

RAYMOND ABBOTT V. BURKE (*ABBOTT V*)

153 N.J. 480 (N.J. 1998)

Our Constitution mandates that the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, §4, ¶1. This decision explains the remedial measures that must be implemented in order to ensure that public school children from the poorest urban communities receive the educational entitlements that the Constitution guarantees them.

The required remedial measures incorporate many of the recommendations made by Judge Michael Patrick King pursuant to the remand ordered by this Court in Abbott v. Burke, 149 N.J. 145 (1997) (*Abbott IV*). These measures are based on a solid evidentiary record that was fully informed by the views and recommendations of the Commissioner of the Department of Education, expert and knowledgeable witnesses offered by both parties, and the Special Master. Most important, the educational programs to be implemented through these remedial measures comport substantially with the statutory and regulatory policies that define the constitutional thorough and efficient education.

Disputes inevitably will occur and judicial intervention undoubtedly will be sought in the administration of the public education that will evolve under these remedial standards. Nevertheless, because of the Commissioner's strong proposals for educational reform and the Legislature's clear recognition of the need for comprehensive substantive educational programs and standards, we anticipate that these reforms will be undertaken and pursued vigorously and in good faith. Given those commitments, this decision should be the last major judicial involvement in the long and tortuous history of the State's extraordinary effort to bring a thorough and efficient education to the children in its poorest school districts. . . .

On January 22, 1998, Judge King issued his report and recommendation. After reviewing the different proposals put forth by the parties, he recommended that the following programs be implemented: whole-school reform, full-day kindergarten for five-year olds, full-day pre-kindergarten for four- and three-year olds, summer school, school-based health and social services, an accountability system, and added security. The Court now addresses those recommended reforms and other proposed remedial measures.

II

The Commissioner proposed that elementary schools in the Abbott districts undergo "whole-school reform," a comprehensive approach to education that fundamentally alters the way in which decisions about education are made. A school implements whole-school reform by integrating reform throughout the school as a total institution rather than by simply adding reforms piecemeal. If carried out successfully, whole-school reform affects the culture of the entire school, including instruction, curriculum, and assessment. The reform covers education from the earliest levels, including pre-school, and can be particularly effective in enabling the disadvantaged children in poor urban communities to reach higher educational standards. . . .

Because the evidence in support of the success of whole-school reform . . . is impressive, we adopt Judge King's recommendation "that the State require the Abbott districts to adopt some version of a proven, effective whole school design. . . . " We direct that implementation proceed according to the schedule proposed by the Commissioner and . . . contain the essential elements identified by the Commissioner. Finally, we direct the Commissioner to implement as soon as feasible a comprehensive formal evaluation program . . . to verify that [whole-school reform] is being implemented successfully and is resulting in the anticipated levels of improvement in the Abbott elementary schools.

B

This Court has consistently recognized and emphasized that early childhood education is essential for children in the [districts]. *See, e.g., Abbott IV, supra,* 149 N.J. at 183. Accordingly, both parties submitted major proposals in respect of early childhood education. The parties clearly recognized that early childhood programs are critically important and address the fact that, if at-risk children are to have any chance of achieving educational success, they must be education-ready. As recommended by the Commissioner and contemplated by the State's experts and the Special Master, early childhood education is consistent with whole-school reform's focus on early educational initiatives and grade-by-grade continuity and improvement. Early childhood education in the special needs districts is an integral component of whole-school reform.

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Both parties recommended full-day kindergarten for all Abbott five-year-olds. According to the Commissioner's report, "[s]tudies have shown that well-planned, developmentally appropriate full-day kindergarten programs for five-year-olds clearly provide one of the most cost-effective strategies for lowering the dropout rate and helping children at-risk become more effective learners in elementary school, particularly in first grade." The Commissioner's report also indicated that studies showed that students in full-day programs benefit more academically than students in half-day programs. Judge King "strongly endorse[d] the State's commitment to full-day kindergarten." We concur.

Full-day kindergarten comports with the requirements of [whole-school reform]. Dr. Slavin testified that schools implementing [whole-school reform] should increase their half-day kindergarten programs to full-day ones. Further, full-day kindergarten comports with statutory policy. . . .

Finally, research clearly supports the notion that full-day kindergarten is an essential part of a thorough and efficient education for the Abbott children. Not only will the children benefit in the long-run, as the empirical evidence demonstrates, but they will also be better prepared to enter first grade and take advantage of the opportunities presented by . . . whole-school reform.

Full-day kindergarten is not yet available in all Abbott districts. The demonstrated need for this program is acute. Because [whole-school reform] will be implemented in the Abbott schools without further delay, and because the Commissioner himself has indicated a willingness to ensure the availability of adequate temporary facilities, we affirm Judge King's recommendation that full-day kindergarten be "implemented *immediately*." In those schools unable promptly to locate or obtain adequate classroom space or instructional staff, full-day kindergarten shall be provided by the commencement of the September 1999 school year. The Commissioner's endorsement of full-day kindergarten signals and underscores the State's commitment to provide or secure the funds and resources essential for the effectuation of this early childhood initiative.

2

There is no fundamental disagreement over the importance of pre-school education. The Commissioner proposed half-day pre-school for four-year olds, and the plaintiffs and Dr. Odden recommended full-day pre-school for both three- and four-year olds. As the Commissioner's research itself demonstrates: "Well-planned, high quality half-day preschool programs . . . help close the gap between the home and school environments and the educational expectations that lead to academic success."

Empirical evidence strongly supports the essentiality of pre-school education for children in impoverished urban school districts. That evidence demonstrates that the earlier education begins, the greater the likelihood that students will develop language skills and the discipline necessary to succeed in school. A review of two major studies on pre-school cited by the parties, the HighScope Perry Preschool study and the Abecedarian study, also reveals that there is a strong correlation between the intensity and duration of pre-school and later educational progress and achievement. The Commissioner's expert on childhood education, Dr. Slavin, noted that "the programs that have shown the greatest success are ones that provide more intensive services" and "start with three-year-olds rather than four-year-olds." Common experience confirms this empirical evidence that pre-school attendance is linked to success in school.

A 1996 report by the Carnegie Task Force on Learning in the Primary Grades lends further support to that conclusion. Carnegie Corp. of New York, *Years of Promise: A Comprehensive Learning Strategy for America's Children* (1996). The Report recommends that high-quality learning opportunities for children ages three to five be made universally available:

> During the preschool years, children make the developmental leaps that form the basis of later achievement. To get all children ready for school and for an education that meets high standards of achievement, the task force recommends that the nation make a commitment to expanded high-quality public and private early care and education programs *for children ages three to five*, supported by national, state, and local mechanisms that are coordinated to assure adequate financing. [*Id.* at xi (emphasis added).]

Part of the basis of that recommendation is that one-third of children entering elementary school lack basic school-readiness skills. *Id.* at 17. One reason for this deficit is that poor areas suffer from a scarcity of quality, publicly-funded early care and early education for three- to five-year olds. *Id.* at 57.

The evidence also shows that one of the most important functions of early childhood education is language development. At the hearing, evidence was produced showing that children in low income families suffer greatly in language development. Key elements of language development begin when a child is three and four; therefore, opportunities for those children to learn are lost if early childhood education does not begin at those ages.

The Legislature itself has recognized the necessity of early childhood education for three- and four-year olds in the poorest school districts. N.J.S.A. 18A:7F-16 provides that for districts in which the concentration of low income pupils is greater than 20% but less than 40%, early childhood aid "shall be distributed" for "the purpose of providing full day kindergarten and pre-school classes and other early childhood programs and services." The statute does not specify whether the pre-school aid should be used for three-year olds or four-year olds or both. For districts in which the concentration of low income pupils is equal to or greater than 40%, the statute directs that additional funds be used "for the purpose of expanding instructional services previously specified [i.e., pre-school classes and other early childhood services] to 3 year olds." *Ibid.* For districts, then, with a 40% concentration of poor students, it is mandatory that . . . funds be expended for the pre-school education of three-year olds. The statute next provides that should extra funds remain, they may be used, "in addition to the instructional services previously specified" [i.e., the just mentioned pre-school for three-year olds and the aforementioned "early childhood programs"], for "the purpose of" providing "transition and social services to primary grade students." *Ibid.* The statute thus contemplates three tiers of funding: (1) undifferentiated funds to be expended on pre-school

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in Abbott districts with 20% poor; (2) additional monies that must be spent on pre-school education for three-year olds in districts with 40% poor; and (3) extra funds to be used for services for elementary school students in districts with funds remaining after the mandates of (1) and (2) have been met.

This construction of the statute is borne out by administrative regulation. *See* N.J.A.C. 6:19-3.2d (providing that beginning in the 2001-2002 school year, [funds] may be used only for "preschool, full-day kindergarten and other early childhood programs and services"). Finally, we note that GoodStarts, a full-day pre-school program for three- and four-year olds developed under the Kean administration under the name "Urban Early Childhood Initiative," evidences the early recognition of the value of such programs and is reflective of the same educational policy concerns underlying [New Jersey's Comprehensive Educational Improvement and Financing Act (CEIFA)].

In the vast majority of Abbott districts, more than 40% of the population is low income. For these Abbott districts, then, pre-school for three-year olds is legislatively mandated. As for the remaining handful of Abbott districts where between 20% and 39% of their respective citizens are poor, we note the following. The record is undisputed and, indeed, uncontrovertible that the conditions that work to deprive children of their constitutional entitlement to a thorough and efficient education are pervasive [in *all* the Abbott districts.] . . . Given the documented and undisputed similarity of conditions that deleteriously impact the ability of children throughout the Abbott districts to receive a sound education, it would be inconsistent with the legislative mandate underlying CEIFA for the Commissioner not to use his power under N.J.S.A. 18A:7F-6b to direct [all] Abbott districts to restructure their curricula in order to provide pre-school education for three-year olds and to reallocate and apply . . . funds to the cost of providing pre-school education for three-year olds. . . .

This Court is convinced that pre-school for three- and four-year olds will have a significant and substantial positive impact on academic achievement in both early and later school years. As the experts described, the long-term benefits amply justify this investment. Also, the evidence strongly supports the conclusion that, in the poor urban school districts, the earlier children start pre-school, the better prepared they are to face the challenges of kindergarten and first grade. It is this year-to-year improvement that is a critical condition for the attainment of a thorough and efficient education once a child enters regular public school.

Stated conversely, because the absence of such early educational intervention deleteriously undermines educational performance once the child enters public school, the provision of pre-school education also has strong constitutional underpinning. In light of our construction of N.J.S.A. 18A:7F-16, however, and the powers of the Commissioner delineated in N.J.S.A. 18A:7F-6b, we need not reach the constitutional issue. The provision in CEIFA for education of three-year olds is a clear indication that the Legislature understood and endorsed the strong empirical link between early education and later educational achievement.

We note that N.J.S.A. 18A:7F-16 does not unequivocally require districts receiving . . . funds to provide a full day of pre-school for either three- or

four-year olds. Because whole-school reform must be implemented gradually and pre-school education must itself be integrated as part of that comprehensive reform, we concur in the Commissioner's determination that, as an initial reform, a half-day of pre-school should enable Abbott children to be education-ready when they enter primary school and thus allow them to take advantage of the opportunity to receive the thorough and efficient education that whole-school reform will provide. The Court directs the Commissioner to exercise his power under N.J.S.A. 18A:7F-6b and -16 to require all Abbott districts to provide half-day pre-school for three- and four-year olds. The Court authorizes the Commissioner to require the Abbott schools to implement these programs as expeditiously as possible. In directing the implementation of pre-school programs in the Abbott schools, the Commissioner must ensure that such programs are adequately funded and assist the schools in meeting the need for transportation and other services, support, and resources related to such programs. The Commissioner may authorize cooperation with or the use of existing early childhood and day-care programs in the community. If any Abbott schools are able to obtain the space, supplies, teaching faculty, staff, and means of transportation that are necessary to implement these programs for the 1998-1999 school year, they should be supplied with the necessary funding to enable them to do so. The Commissioner shall ensure that all other Abbott schools shall have the resources and additional funds that are necessary to implement pre-school education by the commencement of the 1999-2000 school year. . . .

In summary, and consistent with this opinion, we determine and direct that the Commissioner implement whole-school reform; implement full-day kindergarten and a half-day pre-school program for three- and four-year olds as expeditiously as possible; implement the technology, alternative school, accountability, and school-to-work and college-transition programs; prescribe procedures and standards to enable individual schools to adopt additional or extended supplemental programs and to seek and obtain the funds necessary to implement those programs for which they have demonstrated a particularized need; implement the facilities plan and timetable he proposed; secure funds to cover the complete cost of remediating identified life-cycle and infrastructure deficiencies in Abbott school buildings as well as the cost of providing the space necessary to house Abbott students adequately; and promptly initiate effective managerial responsibility over school construction, including necessary funding measures and fiscal reforms, such as may be achieved through amendment of the Educational Facilities Act.

In directing remedial relief in the areas of whole school reform, supplemental programs, and facilities improvements, the Court remains cognizant of the interests of the parties, particularly those of plaintiffs who speak for and represent the at-risk children of the special needs districts. The lessons of the history of the struggle to bring these children a thorough and efficient education render it essential that their interests remain prominent, paramount, and fully protected.

Whether the measures for education reform that are to be implemented will result in a thorough and efficient education for the children in the Abbott districts depends, in the final analysis, on the extent to which there is a

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top-to-bottom commitment to ensuring that the reforms are conscientiously undertaken and vigorously carried forward. That commitment on the part of the Executive Branch has been demonstrated by the Commissioner's strong proposals and positive avowals to see these reforms through. The Legislature's commitment is evidenced by the sound and comprehensive public education that is contemplated by the statute within which these reforms will be effected. It is not enough, however, that the three branches of government, sometimes working together and sometimes at apparent odds, have each responded to the challenge to carry out the Constitution's command of a thorough and efficient education. We must reach the point where it is possible to say with confidence that the most disadvantaged school children in the State will not be left out or left behind in the fulfillment of that constitutional promise. Success for all will come only when the roots of the educational system—the local schools and districts, the teachers, the administrators, the parents, and the children themselves—embrace the educational opportunity encompassed by these reforms.

VIII

The Court directs that remedial relief consistent with this opinion be promptly undertaken.

NOTES AND QUESTIONS

1. The New Jersey Constitution guarantees a thorough and efficient education to children ages 5 to 18. What reasoning did the *Abbott* court use to extend the state's constitutional obligation to children of pre-kindergarten age?
2. Prior to the *Abbott V* decision, the New Jersey legislature had adopted curriculum standards for its public schools. In Abbott v. Burke, 149 N.J. 145 (N.J. 1997) (*Abbott IV*), the New Jersey Supreme Court declared that those curriculum standards establish the benchmark for determining whether students are receiving a constitutionally mandated "thorough and efficient" education. How are those curriculum standards also relevant to the state's constitutional obligation to provide high-quality preschool programs?
3. The New Jersey Supreme Court in *Abbott V* relied on empirical research regarding the benefits of high-quality pre-kindergarten education programs. According to the court, what is that evidence, and how does it inform the court's constitutional analysis? More generally, what is the relevance of such empirical research to the judicial interpretation of a constitutional provision?
4. The *Abbott V* preschool decision was the culmination of decades of litigation challenging the state's method of financing public education. In Robinson v. Cahill, 62 N.J. 473 (N.J. 1973), the New Jersey Supreme Court first addressed challenges by the state's low-income school districts to the state's use of property taxes to fund public education, which resulted in inadequate and inequitable resources in those districts. In 1990 the New Jersey Supreme Court in Abbott v. Burke, 119 N.J. 287 (N.J. 1990) (*Abbott II*), held unconstitutional the state's maintenance of inadequate educational

opportunities for children in those low-income districts. The court specifically found that "[m]any poor children start school with an approximately two-year disadvantage compared to many suburban youngsters." Abbott v. Burke, 149 N.J. at 179. The court further declared that "an intensive preschool and all day kindergarten enrichment program [would help] to reverse the educational disadvantage these children start out with." 119 N.J. at 373. In Burke v. Abbott, 136 N.J. 444 (N.J. 1994) (*Abbott III*), the New Jersey Supreme Court again declared the state's educational funding regime unconstitutional and indicated that the state should employ preschool as a supplemental program to remedy its constitutional violations. In response to that court decision, the New Jersey legislature then enacted the Comprehensive Education Improvement and Financing Act (CEIFA), N.J.S.A. §18A:7F-16. The CEIFA created a foundation level for funding a basic education and also provided additional funds for preschool and full-day kindergarten programs for low-income three- and four-year-olds. In *Abbott IV*, 149 N.J. 145 (N.J. 1997), however, the New Jersey Supreme Court found that the legislation had not allocated sufficient funds to meet the actual needs of low-income children. In the absence of sufficient legislative action, the Court remanded the remedial matter to a supreme court judge to hold an evidentiary hearing determining the funding and programmatic steps required to satisfy the educational needs of those children. At the hearing, Dr. W. Steven Barrett of the National Institute for Early Education Research (NIEER) offered comprehensive expert testimony regarding the benefits of high-quality preschool programs. Based on the evidence at the hearing, the supreme court judge recommended that the state provide funding for a full-day preschool program for all three- and four-year-olds in low-income districts. Finally, in *Abbott V*, the New Jersey Supreme Court ordered the state to provide "high quality" half-day pre-K programs for all those three- and four-year-olds.
5. By any measure, the court-mandated *Abbott* preschool programs have been a great success. By the 2009 school year, 43,775 three- and four-year-olds were enrolled in the program through public schools, private providers, and Head Start centers. In 2007 NIEER published the *Abbott Preschool Program Longitudinal Effects Study*. That initial study measured the effects of the learning gains attributable to the preschool programs for children as they enter kindergarten. According to the study, there is

> clear evidence of the following: (1) classroom quality in the Abbott Preschool Program continues, on the whole, to improve; (2) . . . children who attend the program, whether in public schools, private settings or Head Start, are improving in language, literacy, and math at least through the end of their kindergarten year; and (3) . . . children who attend preschool for two years at both age 3 and 4 significantly out-perform those who attend for only one year at 4 years of age or do not attend at all.

Study, at 3. NIEER then followed up its study by measuring the performance of these children through second grade. In *The Apples Blossom: Abbott Preschool Program Longitudinal Effects Study (APPLES) Preliminary Effects Through 2nd Grade*, NIEER finds that the significant pre-K gains in oral language,

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early literacy, mathematics, and grade retention either increased or persisted through second grade. The latest study concludes:

> These gains in learning and ability are large enough to be practically meaningful and are already beginning to result in savings for taxpayers who do not have to pay for extra years of schooling. The results of this study add to the considerable body of evidence indicating that quality preschool education can make a significant contribution to improve children's learning and development.... This study extends the evidence that such effects can be produced for today's children on a large scale by public programs administered through public schools by demonstrating persistent and not just initial effects on children's cognitive abilities.

The Apples Blossom, at 25.

Hoke County Board of Education v. State of North Carolina and the State Board of Education

599 S.E.2d 365 (N.C. 2004)

Orr, Justice.

The State of North Carolina and the State Board of Education ("the State"), as defendants, appeal from a trial court order concluding that the State had failed in its constitutional duty to provide certain students with the opportunity to attain a sound basic education, as defined by this Court's holding in Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997). We affirm the trial court on this part of the State's appeal with modifications....

[T]he State appeals those portions of the trial court's order that direct the State to remedy constitutional deficiencies relating to the public school education provided to students in Hoke County. In its memoranda of law, the trial court, in sum, ultimately ordered the State to: (1) assume the responsibility for, and correct, those educational methods and practices that contribute to the failure to provide students with a constitutionally-conforming education; and (2) expand pre-kindergarten educational programs so that they reach and serve all qualifying "at-risk" students. As for the trial court's first remedy, we affirm, with modifications. As for the trial court's second remedy, we reverse, concluding that the mandate requiring expanded pre-kindergarten programs amounts to a judicial interdiction that, under present circumstances, infringes on the constitutional duties and expectations of the legislative and executive branches of government....

I. Introduction

This case is a continuation of the landmark decision by this Court, unanimously interpreting the North Carolina Constitution to recognize that the legislative and executive branches have the duty to provide all the children of North Carolina the opportunity for a sound basic education. This litigation started primarily as a challenge to the educational funding mechanism imposed by the General Assembly that resulted in disparate funding outlays among low wealth counties and their more affluent counterparts. With the *Leandro* decision, however, the thrust of this litigation turned from a funding issue to one requiring the analysis of the qualitative educational services provided to the respective plaintiffs and plaintiff-intervenors....

The *Leandro* decision and the ensuing trial have resulted in the thrust of the instant case breaking down into the following contingencies: (1) Does the evidence show that the State has failed to provide Hoke County school children with the opportunity to receive a sound basic education, as defined in *Leandro;* (2) if so, has the State demonstrated that its failure to provide such an opportunity is necessary to promote a compelling government interest; and (3) if the State has failed to provide Hoke County school children with the opportunity for a sound basic education *and* failed to demonstrate that its public educational shortcomings are necessary to promote a compelling government interest, does the relief granted by the trial court correct the failure with minimal encroachment on the other branches of government?...

We begin our examination under the umbrella of the State's first argument—namely, whether there was a clear showing of evidence supporting the trial court's conclusion that "the constitutional mandate of *Leandro* has been violated [in the Hoke County School System] and action must be taken by both the LEA [Local Educational Area] and the State to remedy the violation." After a comprehensive examination of the record and arguments of the parties, this Court concludes that the trial court was correct as to this issue and thus we affirm, albeit with modifications....

In our view, the trial court conducted an appropriate and informative path of inquiry concerning the issue at hand. After determining that the evidence clearly showed that Hoke County students were failing, at an alarming rate, to obtain a sound basic education, the trial court in turn determined that the evidence presented also demonstrated that a combination of State action and inaction contributed significantly to the students' failings. Then, after concluding that the State's overall funding and resource provisions scheme was adequate on a statewide basis, the trial court determined that the evidence showed that the State's method of funding and providing for individual school districts such as Hoke County was such that it did not comply with *Leandro*'s mandate of ensuring that all children of the state be provided with the opportunity for a sound basic education. In particular, the trial court concluded the State's failing was essentially twofold in that the State: (1) failed to identify the inordinate number of "at-risk" students and provide a means for such students to avail themselves of the opportunity for a sound basic education; and (2) failed to oversee how educational funding and resources were being used and implemented in Hoke County schools.

At that point, the trial court also concluded that the State's failings, as demonstrated by the evidence, needed to be rectified....

V. Proper School Age/Pre-Kindergarten

The next two issues of the instant appeal by the State are outgrowths of one another. As a consequence, we address them in tandem. Initially, the State contends that the trial court erred when it ruled that the proper age for school children was a justiciable issue. In the State's view, the proper age at which children should be permitted to attend public school is a nonjusticiable political question reserved for the General Assembly. To the extent that

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the State argues that establishing the proper age parameters for starting and completing school—i.e., kindergarten, the entering class for public school students, shall be composed of five-year-olds—we agree. Article IX, Section 3 of the North Carolina Constitution provides that "[t]he General Assembly shall provide that every child of appropriate age . . . shall attend the public schools." Pursuant to such authority, the General Assembly has determined that five-year-olds *may* attend school and that seven-year-olds *must* attend school. N.C.G.S. §§115C-364, -378 (2003). Our reading of the constitutional and statutory provisions leads us to conclude that the determination of the proper age for school children has indeed been squarely placed in the hands of the General Assembly. In addition, the United States Supreme Court has defined issues as nonjusticiable when either of the following circumstances is evident: (1) when the Constitution commits an issue, as here, to one branch of government; *or* (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue. Baker v. Carr, 369 U.S. 186, 210, 7 L. Ed. 2d 663, 682 (1962). In our view, not only are the applicable statutory and constitutional provisions persuasive in and of themselves, but the evidence in this case demonstrates that the trial court was without satisfactory or manageable judicial criteria that could justify mandating changes with regard to the proper age for school children. Thus, with regard to the issue of whether the trial court erred by interfering with the province of the General Assembly—establishing the appropriate age for students entering the public school system—we conclude that the trial court did so err. First, our state's constitutional provisions and corresponding statutes serve to establish the issue as the exclusive province of the General Assembly and, second, there was no evidence at trial indicating the trial court had satisfactory or manageable criteria that would justify modifying legislative efforts. As a consequence, the Court holds that any trial court rulings that infringed on the legislative prerogative of establishing school-age eligibility were in error.

However, when considered in the context of the related issue of pre-kindergarten programs, the crux of this issue is less about whether school must be offered to four-year-olds than it is about whether the State must help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education. While the General Assembly may be empowered to establish the actual age for beginning school, the question of whether the General Assembly must address the particular needs of children prior to entering the school system is a distinct and separate inquiry. For example, the General Assembly, in its discretion, could establish that mandatory school attendance begins at four years of age, five years of age, or six years of age. However, the State's power to establish such an age does not answer the question of whether or not it must address the particular needs of those children who are, or are approaching, the established age for school admission. Thus, the issue before us is less about at-risk four-year-olds than it is about at-risk children approaching and/or attaining school-age eligibility as established by the General Assembly.

In our view, the evidence presented at trial clearly supported these findings and conclusions by the trial court: (1) A large number of Hoke County students had failed to obtain a sound basic education; (2) a large number

of Hoke County students were being denied their rightful opportunity to a sound basic education because the State had failed in its duty to provide the necessary means for such an opportunity; (3) there were an inordinate number of "at-risk" students attending Hoke County schools; (4) the special needs attendant to such "at-risk" students were not being met; and (5) it was ultimately the State's responsibility to meet the needs of "at-risk" students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education. In addition to ordering the State to reassess its resource allocations to Hoke County schools in an effort to improve them for students currently in attendance, the trial court heard evidence concerning the plight of those children who were about to enter the school system. Plaintiffs essentially argued that such evidence was relevant because it would show that the problem of "at-risk" students extended beyond those students already in school and would thereby support additional remedies that specifically targeted incoming students. Once the problems of "at-risk" students had been demonstrated at trial, it was not beyond the reach of the trial court to hear evidence concerning whether preemptive action on the part of the State might assist in resolving the problems of such "at-risk" students. Thus, we conclude that because the evidence presented showed that "at-risk" students in Hoke County were being denied their right to an opportunity to obtain a sound basic education, the trial court properly admitted additional evidence intended to show that preemptive action on the part of the State should target those children about to enroll, recognizing that preemptive action affecting such children prior to their entering the public schools might well be far more cost effective than waiting until they are actually in the educational system.

We now turn our attention to the trial court's findings and conclusions concerning "at-risk" children who are or were about to enter the Hoke County school system. In paragraph 74a of their complaint, plaintiffs alleged that "many ['at-risk'] children living in [Hoke County] begin public school kindergarten at a severe disadvantage. They do not have the basic skills and knowledge needed for kindergarten and as a foundation for the remainder of . . . school." Plaintiffs also alleged that "the lack of pre-kindergarten services and programs" offered in Hoke County deprived such students from receiving their opportunity for a sound basic education, and said that [Hoke County] schools "do not have sufficient resources to provide the pre-kindergarten and other programs and services needed for a sound basic education." As relief for the allegations raised in paragraph 74a, plaintiffs sought an order from the trial court that would, in essence, compel the State to provide remedial and preparatory pre-kindergarten services to "at-risk" four-year-olds in Hoke County.

In assessing the evidence presented at trial pertaining to the allegations of paragraph 74a, the trial court found: (1) that there was an inordinate number of "at-risk" children who were entering the Hoke County school district; (2) that such "at-risk" children were starting behind their non–"at-risk" counterparts; and (3) that such "at-risk" children were likely to stay behind, or fall further behind, their non–"at-risk" counterparts as they continued their education. In addition, the trial court found that the evidence showed that the State was providing inadequate resources for such "at-risk" prospective

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system that ensures all the state's children will be given their chance to get a proper—that is, a *Leandro*-conforming—education. As a consequence of such empowerment, those two branches have developed a shared history and expertise in the field that dwarfs that of this and any other Court. While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, we simultaneously recognize our limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain. Thus, we conclude that the trial court erred when it imposed at this juncture of the litigation and on this record the requirement that the State must provide pre-kindergarten classes for all "at-risk" prospective enrollees in Hoke County. In our view, based on the evidence presented at trial, such a remedy is premature, and its strict enforcement could undermine the State's ability to meet its educational obligations for "at-risk" prospective enrollees by alternative means. As a consequence, we reverse those portions of the trial court order that may be construed to the effect of requiring the State to provide pre-kindergarten services as the remedy for constitutional violations referenced in . . . this opinion. . . .

Finally, the Court notes that the original Constitution of our state, adopted on 18 December 1776, included the specific provision "[t]hat a school or schools shall be established by the legislature, for the convenient instruction of youth." N.C. Const. of 1776, para. 41. Some months before, William Hooper, one of North Carolina's delegates to the Continental Congress in Philadelphia, had solicited information from John Adams as to his thoughts on what should be included in a soon-to-be drafted constitution for North Carolina. Modern historians note that at the time, Adams was considered a "renowned authority on constitutionalism," John v. Orth, The North Carolina State Constitution: A Reference Guide 2 (1993), and that as he contemplated the future of the country, Adams became convinced that its success rested on education, *see* David McCullough, *John Adams,* 364 (Simon & Schuster 2001).

Adams, in subsequent correspondence, wrote: "[A] memorable change must be made in the system of education[,] and knowledge must become so general as to raise the lower ranks of society nearer to the higher. The education of a nation[,] instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many." *Id.*

This Court now remands to the lower court and ultimately into the hands of the legislative and executive branches, one more installment in the 200-plus year effort to provide an education to the children of North Carolina. Today's challenges are perhaps more difficult in many ways than when Adams articulated his vision for what was then a fledgling agrarian nation. The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro,* but fulfill the dreams and aspirations of the founders of our state and nation. Assuring that our children are afforded

the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined.

AFFIRMED IN PART AS MODIFIED, AND REVERSED IN PART.

NOTES AND QUESTIONS

1. In this opinion, the *Hoke* court found a judicially imposed remedy to be premature because the trial court lacked an evidentiary foundation for such a remedy, and the legislature had not had an initial opportunity to develop a preschool program. The North Carolina Supreme Court in *Hoke* left it to the executive and legislative branches to design services for at-risk pre-K children. In the wake of North Carolina's education finance litigation, the state legislature established a program called "More at Four" (MAF) to provide pre-K services to at-risk children. In 2011, however, the North Carolina legislature directed that the number of "at-risk" children served by the state's program could be no more than 20 percent of the total number of pre-K children served. The Hoke County Board of Education successfully sued to enjoin this artificial cap on the provision of pre-K services to at-risk children.
2. In Hoke County Bd. of Educ. v. State of North Carolina, No. COA 11-1545 (Aug. 21, 2012), the North Carolina Court of Appeals affirmed the trial court's decision to order the state to admit all "at-risk" four-year-olds throughout the state into its pre-K program:

> Now, it has been approximately eight years since the Supreme Court's ruling in *Leandro II*. During this time, the State has had ample opportunity to develop a program that would meet the needs of "at-risk" students approaching and/or attaining school-age eligibility. The only program, evidenced in the record, that was developed by the State since *Leandro II* to address the needs of those students was MAF, a pre-kindergarten program. Thus, unlike the Supreme Court in *Leandro II*, we are not faced with the decision of selecting for the State which method would best satisfy their duty to help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education. Rather, the State made that determination for itself when in 2001 it developed the pre-kindergarten program, MAF.
>
> Thus, we do not deem it inappropriate or premature at this time to uphold an order mandating the State to not deny any eligible "at-risk" four year old admission to the North Carolina Pre-Kindergarten Program. Under *Leandro II*, the State has a duty to prepare all "at-risk" students to avail themselves of an opportunity to obtain a sound basic education. Pre-kindergarten is the method in which the State has decided to effectuate its duty, and the State has not produced or developed any alternative plan or method. Accordingly, we affirm the trial court's order.
>
> . . . [I]n sharp contrast to the record that was before the Supreme Court in *Leandro II*, the record that was developed in the trial court and is now before this Court is replete with evidence, much of which was presented by the State, of the State's preferred—and, incidentally, only proposed—remedial aid to "at-risk" prospective enrollees, as reflected in the following unchallenged finding by the trial court:
>
> > The bottom line, seven years after *Leandro II*, is that the State, using the combination of Smart Start and the More at Four Pre-Kindergarten

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> Programs, have [*sic*] indeed selected pre-kindergarten combined with the early childhood benefits of Smart Start and its infrastructure with respect to pre-kindergarten programs, as the means to "achieve constitutional compliance" for at-risk prospective enrollees.

Moreover, the trial court found, and the State does not deny, that the State has touted the measurable statewide success and national recognition of its pre-kindergarten program, and has demonstrated the commitment of both the executive and legislative branches to increasing the availability of *Leandro*-compliant pre-kindergarten programs. For instance, the chairman of the State Board of Education and the state superintendent of the Department of Public Instruction submitted extensive action plans to the trial court chronicling the pre-kindergarten program's to-date and proposed future growth and expansion in order to fulfill the State's obligation to comply with the mandates first articulated in *Leandro I*. Additionally, the General Assembly enacted session laws that sought to standardize pre-kindergarten program requirements statewide and allocated State funds to facilitate the continued success of pre-kindergarten programs available to "at-risk" prospective enrollees across the State. In other words, based on the present record, it cannot be said that the trial court's order requiring the State to allow the unrestricted enrollment of "at-risk" prospective enrollees to pre-kindergarten programs "effectively undermine[d] the authority and autonomy of the government's other branches," . . . since both the executive and legislative branches have evidenced their selection and endorsement of this—and only this—remedy to address the State's constitutional failings identified in *Leandro II*. . . . Although the State opines that it chose to provide a broader remedy than that which was required to meet the needs of the parties at issue and urges this Court to limit the trial court's mandate to the "at-risk" prospective enrollees of Hoke County, we are not persuaded that the record necessitates such restraint of the trial court's order. Accordingly, based on the record before us, we hold that the trial court acted within its authority to mandate the unrestricted acceptance of all "at-risk" four year old prospective enrollees who seek to enroll in existing pre-kindergarten programs across the State. . . .

Simply put, it is the duty of the State of North Carolina to protect each and every one of these at-risk and defenseless children, and to provide them their lawful opportunity, through a quality pre-kindergarten program, to take advantage of their equal opportunity to obtain a sound basic education as guaranteed by the North Carolina constitution.

Additionally, we would like to emphasize that while MAF was the remedy chosen by the legislative and executive branches in 2001 to deal with the problems presented by "at risk" four year olds, it is not necessarily a permanent or everlasting solution to the problem. What is required of the State to provide as "a sound basic education" in the 21st century was not the same as it was in the 19th century, nor will it be the same as it will be in the 22nd century. It would be unwise for the courts to attempt to lock the legislative and executive branches into a solution to a problem that no longer works, or addresses a problem that no longer exists. Therefore, should the problem at hand cease to exist or should its solution be superseded by another approach, the State should be allowed to modify or eliminate MAF. This should be done by means of a motion filed with the trial court setting forth the basis for and manner of any proposed modification. . . .

3. The North Carolina courts in *Hoke* defined "at-risk" children as those who have "one or more of the following characteristics: (1) member of low-income family; (2) participate in free or reduced-cost lunch programs; (3) have parents with a low-level education; (4) show limited proficiency in English; (5) are a member of a racial or ethnic minority group; (6) live in a home headed by a single parent or guardian." In what ways do these characteristics make children "at risk"?
4. In *High Quality Pre-Kindergarten as the First Step in Educational Adequacy: Using the Courts to Expand Access to State Pre-K Programs,* 27 Child. Legal Rts. J. 24 (Spring 2007), Ellen Boylan demonstrates how education finance litigation can be used to expand access to state-funded, high-quality pre-K programs, particularly for disadvantaged students. *See also* James E. Ryan, *A Constitutional Right to Preschool?,* 94 Cal. L. Rev. 49 (2006). As the *Abbott* and *Hoke* litigations suggest, in light of the overwhelming benefits of preschool, a state's failure to provide minimally adequate preschool programs for students violates the constitutional mandate in many states. Litigants have attacked inequitable and inadequate preschool funding and access head-on, and they have sought remedies specifically tailored to early childhood education. Boylan documents state courts that have issued decisions regarding pre-K funding inadequacies and is tracking pending school finance cases that include claims for increased preschool funding. *See* Boylan, 27 Child. Legal Rts. J. at 26; *http://www.edlawcenter.org/assets/files/pdfs/publications/UsingCourtsToExpandAccessToPreK_2007.pdf.*

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B. THE POLITICAL LANDSCAPE OF EARLY CHILDHOOD EDUCATION

1. The Economic and Educational Benefits of High-Quality Early Childhood Education Programs

(a) The Importance of Early Learning Environments

Professor James J. Heckman from the University of Chicago Department of Economics, who won the Nobel Prize in Economics in 2000, has performed path-breaking research regarding the economic returns from investments in early childhood education programs. In his paper *Schools, Skills and Synapses,* 46 Econ. Inquiry 289 (2008), Professor Heckman documents the wealth of research demonstrating that early learning environments have a dramatic impact on adult success and well-being. In particular, Professor Heckman finds sound empirical research indicating the following:

1. Many major economic and social problems such as crime, teenage pregnancy, dropping out of high school, and adverse health conditions are linked to low levels of skill and ability in society.
2. In analyzing policies that foster skills and abilities, society should recognize the multiplicity of human abilities.

3. Currently, public policy in the United States focuses on promoting and measuring cognitive ability through IQ and achievement tests. The accountability standards in the No Child Left Behind Act concentrate attention on achievement test scores and do not evaluate important noncognitive factors that promote success in school and life.
4. Cognitive abilities are important determinants of socioeconomic success.
5. Socioemotional skills, physical and mental health, perseverance, attention, motivation, and self-confidence are also important determinants of socioeconomic success. They contribute to performance in society at large and even help determine scores on the very tests that are commonly used to measure cognitive achievement.
6. Ability gaps between the advantaged and disadvantaged open up early in the lives of children.
7. The family environments of young children are major predictors of cognitive and socioemotional abilities, as well as a variety of outcomes such as crime and health.
8. Family environments in the United States and many other countries around the world have deteriorated over the past 40 years.
9. Experimental evidence on the positive effects of early interventions on children in disadvantaged families is consistent with a large body of non-experimental evidence showing that the absence of supportive family environments harms child outcomes.
10. If society intervenes early enough, it can improve cognitive and socioemotional abilities and the health of disadvantaged children.
11. Early interventions promote schooling, reduce crime, foster workforce productivity, and reduce teenage pregnancy.
12. These interventions are estimated to have high benefit-cost ratios and rates of return.
13. As programs are currently configured, interventions early in the life cycle of disadvantaged children have much higher economic returns than later interventions such as reduced pupil/teacher ratios, public job training, convict rehabilitation programs, adult literacy programs, tuition subsidies, or expenditures on police.
14. Life cycle skill formation is dynamic in nature. Skill begets skill; motivation begets motivation. Motivation cross-fosters skill and skill cross-fosters motivation. If a child is not motivated to learn and engage early on in life, the more likely it is that when the child becomes an adult, he or she will fail in social and economic life. The longer society waits to intervene in the life cycle of a disadvantaged child, the more costly it is to remediate the disadvantage.
15. A major refocus of policy is required to capitalize on knowledge about the life cycle of skill and health formation and the importance of the early years in creating inequality in America and in producing skills for the workforce.

The evidence assembled by Professor Heckman about the importance of early learning environments undercuts the controversial research presented in *The Bell Curve,* written by Hernstein and Murray in 1994. That book suggested

that genetics locked into place differences in cognitive ability that could be measured by achievement test scores and that predetermined adult socioeconomic success. Heckman's work demonstrates that "personality factors are also powerfully predictive of socioeconomic success and are as powerful as cognitive abilities in producing many adult outcomes." *Id.* He concludes:

> Recent research . . . establishes the power of socioemotional abilities and an important role for environment and intervention in creating abilities. . . . [G]enetic expression is strongly influenced by environmental influences and . . . environmental effects on gene expression can be inherited. . . . [H]igh quality early childhood interventions foster abilities and . . . inequality can be attacked at its source. Early interventions also boost the productivity of the economy.

Id.

(b) The Proven Benefits of High-Quality Early Childhood Education Programs

In his essay *Promoting Social Mobility*, Boston Rev. (Sept./Oct. 2012), Professor Heckman describes the precise early childhood interventions that have been proven to produce substantial educational and economic benefits. He presents compelling evidence that early intervention in the form of high-quality preschool programs can have positive and lasting effects on the lives of children, particularly those from disadvantaged families. Such early interventions can improve cognitive and socioemotional skills. They also foster learning, reduce crime, promote workforce productivity, and reduce teenage pregnancy. Moreover, Professor Heckman calculates that investments in high-quality early childhood education programs pay a dramatic economic return of at least $10.00 for every dollar invested. *See also* Heckman, *Schools, Skills and Synapses*, at 309; James J. Heckman et al., *The Rate of Return to the HighScope Perry Preschool Program,* 94 J. Pub. Econ. 114 (2010); Frances A. Campbell et al., *Adult Outcomes as a Function of an Early Childhood Education Program: Abercedarian Project Follow Up*, Developmental Psychology online, dei: 10.1037/a0026644; James J. Heckman et al., *Understanding the Mechanisms Through Which an Influential Early Childhood Program Boosted Adult Outcomes*, 103 Am. Econ. Rev. 2052 (2013). The high returns on investments in early childhood programs include the significant reduction in health care costs, crime costs, special education costs, and other educational remediation costs. The rate of return also represents additional revenue generated from the income received by, and the taxes paid from, those who have had the advantages of a high-quality pre-K education.

Heckman relies on two longitudinal studies that he finds to be methodologically sound and statistically significant. The HighScope Perry Preschool Project in Ypsilanti, Michigan, followed 123 impoverished African-American children. Between 1962 and 1967, 50 of these three- and four-year-old children were blindly divided into a treatment group and a control group. The "treatment" group received a co-constructivist, play-based, child-centered, emergent curriculum that emphasized social and emotional development. The program included 2.5 hours of classroom education daily and 90-minute

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home visits weekly over a 30-week school year. The control group of children did not receive this program.

Researchers have followed the control group and the treatment group through age 40. The results are dramatic. The Perry treatment group performed significantly better on achievement tests, attained higher levels of education, required less special education, earned higher wages, were more likely to own a home, were less likely to require public assistance, were less likely to be arrested as juveniles or adults, and were less likely to be imprisoned. The incomes of the treatment group were also materially higher than those of the control group.

In their examination and reexamination of the data, which corrected for every conceivable methodological bias, Heckman, Moon, Pinto, Savelyev, and Yavitz concluded that the differences between the treatment and the control group were statistically significant and scientifically reliable. *Reanalysis of the Perry Preschool Program: Multiple-Hypothesis and Permutation Tests Applied to a Quasi-randomized Experiment*, 1 Qualitative Econ. 1 (2010); *The Rate of Return to the High Scope Perry Preschool Program*, 94 J. Pub. Econ. 114 (2010). In particular, those children who received the high-quality preschool program dramatically outperformed those who did not:

1. High school completion: Seventy-seven percent received a high school diploma or general education development (GED) diploma, compared to 60 percent.
2. Employment: Sixty-nine percent were employed at age 27, compared to 56 percent; 76 percent were employed at age 40, compared to 62 percent.
3. Income: Those treatment group students who were employed at age 27 had higher earnings (by $2,000 each) than those control group students who were employed; those treatment group students who were employed at age 40 had higher earnings (by $5,500 each) than those control group students who were employed.
4. Home ownership: Twenty-seven percent owned their homes at age 22, compared to 5 percent; 37 percent owned their homes at age 40, compared to 28 percent.
5. Arrest and prison record: Thirty-six percent were arrested five or more times, compared to 55 percent; 28 percent were imprisoned, compared to 52 percent.
6. School readiness: Sixty-seven percent were prepared for elementary school, compared to 28 percent.
7. Educational achievement: Forty-nine percent were achieving at grade level at age 14, compared to 15 percent.

See also Lifetime Effects: The HighScope Perry Preschool Study Through Age 40 (2005); Lawrence Schweinhart & David P. Weikart, *The HighScope Model of Education* in Jaipaul L. Roopnarine & James Johnson, *Approaches to Early Education* 226-228 (2012).

The net economic return from the program to taxpayers also has been remarkable. The program invested a total of $15,166 per student over the course of their entire preschool years. The economic return on that investment has

been $244,812 per student. *See Lifetime Effects*, at xvii, Fig. 10-2. That return is produced from significant reductions in crime costs and general and special education costs. In addition, the economic return includes the increased revenue generated from higher taxable income. Accordingly, each dollar invested yielded a return of $16.14. *See Lifetime Effects*, at xvii, Fig. 10-21.

The evidence adduced from the Perry School Project is consistent with the data collected from the Abecedarian Project. That North Carolina study involved children born between 1972 and 1977 into high-risk families. Children from four months to eight years old experienced an intensive full-day, year-round program of early childhood education. The treatment group also received home care and parental support. The researchers followed the children through age 30. As with the Perry School Project, the Abecedarian treatment group significantly outperformed their control group peers in academic achievement, social stability, and economic success. As Professor Heckman concludes, "[T]hese longitudinal studies demonstrate positive effects of early childhood environmental enrichment on a range of cognitive and non-cognitive skills, schooling achievement, job performance, and social behaviors." *Schools, Skills and Synapses*, at 308.

The results of the Perry and Abecedarian studies have been replicated in a much larger study of Texas's pre-K program. In *The Effects of Texas's Prekindergarten Program on Academic Performance* (2012), the Center for Analysis of Longitudinal Data in Educational Research analyzed evidence compiled from cohorts of over 680,000 racially and economically diverse students who were eligible to attend a Texas state-funded pre-K program. The results were significant:

> We find that having participated in Texas's targeted pre-K program is associated with increased scores on the math and reading sections of the Texas Assessment of Academic Skills (TAAS), and reductions in the probability of receiving special education services. We also find that participating [in] pre-K increases mathematics scores for students who take the Spanish version of the TAAS tests. Those results show that even modest pre-K program[s] implemented at scale can have important effects on students' educational achievements.

See Effects, at iii, 20; *see also* Sara Mead, *Texas Pre-K Programs Improve Kids' Elementary Achievement,* Educ. Wk. (Nov. 26, 2012) (finding the results for the large, diverse Texas programs to be consistent with other large-scale studies such as the Chicago Child Parent Center and Oklahoma's Universal Pre-K Program).

(c) The Particular Effectiveness of Early Childhood Programs That Develop "Nonacademic" Skills

Professor Heckman's research also shows that early childhood programs that are designed to develop so-called noncognitive skills are likely to achieve the greatest economic returns. *See* James Heckman & Yona Rubinstein, *The Importance of Noncognitive Skills: Lessons from the G.E.D. Testing Program*, 91 Am. Econ. Rev. 145 (2001) ("Much of the effectiveness of early childhood interventions comes in boosting noncognitive skills. . . .").

The Perry School and Abecedarian Projects demonstrate the critical significance of developing social and emotional skills. Although initial gains in

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CHAPTER 12

EQUAL EDUCATIONAL OPPORTUNITIES

The Equal Protection Clause in the United States Constitution and most state constitutions prohibit states and their public educational institutions from denying to students the "equal protection" of the laws. Nonetheless, as discussed in Chapter 4, the absence of a fundamental constitutional right to educational opportunities has permitted the states some degree of deference in their unequal allocation of educational resources to students. In this chapter, the issue of equal educational opportunity is reconsidered in the context of statutes and policies that classify students based upon constitutionally suspect categories such as race and gender.

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A. RACIAL SEGREGATION, DESEGREGATION, AND RESEGREGATION

1. Establishing the Constitutional Violation

BROWN V. BOARD OF EDUCATION OF TOPEKA

347 U.S. 483 (1954)

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a non-segregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the

Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. . . .

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . .

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

[4] . . . Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South [include] the rural character of the South and the different regional attitudes toward state assistance. . . . In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, *A History of Freedom of Teaching in American Schools* (1941), 112-132, 175-195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. . . .

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. . . .

In the instant cases, that question is directly presented. Here, . . . there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In McLaurin v. Oklahoma State Regents, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible

[6] The doctrine apparently originated in Roberts v. City of Boston, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. . . . But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

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considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[10]

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

NOTES AND QUESTIONS

1. In reaching its result in *Brown,* the Supreme Court could have articulated several different arguments for the unconstitutionality of racially segregated public schools, including (1) students who are members of a racial minority learn better when they are integrated in classrooms with children who are not members of a racial minority; (2) separate educational facilities assigned to minority children are, or inevitably become, tangibly worse than facilities assigned to majority children; (3) precluding members of a racial minority and members of a racial majority from congregating in the same educational environment denies to all students their First Amendment rights to freedom of association; and/or (4) the perpetuation of separate educational facilities, regardless of their relative quality, harms children who are members of a racial minority by stigmatizing them. *See, e.g.,* Laurence H. Tribe, *American Constitutional Law* §16-15, at 1476-1480 (2d ed. 1988); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 34 (1959); Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 Yale L.J. 470 (1976); Nathaniel R. Jones, *Correspondence,* 86 Yale L.J. 378-384 (1976). What are the relative strengths and weaknesses of each of these arguments? Which argument did the *Brown* Court ultimately accept?
2. The Court in *Brown* relies on both Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950). In *Sweatt,* the Supreme Court held that the Equal Protection Clause prohibits the state of Texas from denying to African-American students admission to the University of Texas Law School because of their race. The Court's reasoning was based in large part on the fact that the separate law schools that the state made available to African-American students lacked "substantial equality in the educational opportunities offered. . . . " 339 U.S. at 633-634. The Court found that the tangible facilities and intangible qualities of the state's African-American law schools were, in fact, unequal to those available at the University of Texas Law School. The Court also observed that because the African-American law schools excluded "most" of the state's lawyers, judges, and officials with whom future lawyers inevitably deal, those law schools were not "substantially equal" to law schools that include such a "substantial and significant segment of society." 339 U.S. at 634.

   In *McLaurin,* the Supreme Court concluded that the Equal Protection Clause also prevents states from treating students differently within the educational environment because of their race. In that case, McLaurin enrolled as a graduate student at the University of Oklahoma, pursuing a doctorate in education. The state forced him to sit in a seat in the classroom assigned to African-American students, to sit at a library table assigned to African-American students, and to eat at a "special" cafeteria table assigned to African-American students. 339 U.S. at 640. Although the Court assumed that these separations were "nominal" and resulted in no "disadvantage of location," it nonetheless declared: "[t]he result is that appellant is handicapped in his pursuit of an effective graduate instruction." 339 U.S. at 641. The state's practices violated the Equal Protection Clause because, in setting McLaurin "apart from the other students," the state had imposed "restrictions" that "impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *Id.* According to the Court, state-imposed restrictions "which prohibit the intellectual commingling of students" based on race produce "inequalities" that cannot be sustained. *Id.*

   Unlike the situation in *Sweatt,* the Supreme Court in *Brown* assumed that "the physical facilities and other 'tangible' factors" in the segregated African-American schools were "equal" to those of the all-white schools. What is the significance of that assumption in the *Brown* case? Does the *Brown* Court suggest what the result might have been if the facilities and other tangible factors were demonstratively unequal among the races? To what extent does the reasoning in *Brown* rely upon or depart from the reasoning in *Sweatt* and *McLaurin?*

[10] Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

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3. The petitioners in *Brown* made a strategic decision to attack the segregated aspects of public education rather than the tangible disparities in the quality of education between white and African-American students. Why do you think the petitioners chose that strategy? Consider the consequences of that strategy as you analyze the history of the remedial aspects of implementing the Court's desegregation rulings.
4. Two weeks before the Supreme Court issued its *Brown* decision, it decided Hernandez v. Texas, 347 U.S. 475 (1954). In that case, the Court held that the systematic exclusion of persons of Mexican descent from jury service constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. According to the Court, the "groups" requiring the "aid of the courts in securing equal treatment under the laws" include those who are "singled out" or subjugated by the attitudes of community members. Significantly, the Court recognized that the Equal Protection Clause does not prohibit just discriminatory laws; it also prohibits discriminatory community practices and attitudes that injure minority groups by segregating them and denying them access to important economic benefits. The Court understood the Equal Protection Clause to protect minority groups from subordination caused by social norms and constraints.

   The *Brown* court has been criticized because its language does not make clear that the Constitution precludes practices of racial oppression, subordination, and injury. *See, e.g.,* Derrick Bell, *Silent Covenants:* Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform (2004); Sheryll Cashin, *The Failures of Integration: How Race and Class Are Undermining the American Dream* (2004). Instead, *Brown*'s focus appears to be only (albeit importantly) on laws that formally separate the races. The critics of *Brown* often applaud the case as a monument to racial and educational equality, but lament the fact that its reasoning has allowed subsequent courts to frustrate the goal of genuine integration and educational equality. As you read the cases since *Brown,* consider whether these criticisms are fair.
5. What does "inherently unequal" mean? Are segregated schools unconstitutional because they are "inherently unequal," or because they in reality injure racial minorities by denying to them educational opportunities? According to the Court, what are the reasons that separate public educational facilities are not equal? The Court argues that even if tangible factors may be equal, segregation of children in public schools solely on the basis of race deprives the "children of the minority group of equal educational opportunities." List the ways in which it does so. The Court does not reach the issue of whether segregation adversely affects the children of the majority group. Do you believe that it does? Nor does the Court consider whether a diverse educational environment is valuable to all students. If the *Brown* decision is not rooted in the value of diversity, where does *that* value originate? What would diversity mean in this context? Could the benefits of a diverse student population for all students support a court order to achieve that diversity?
6. By focusing on the harm to African-American children caused by racial segregation, has the *Brown* Court and its progeny inadvertently divided the races on the *issue* of segregation itself? As the materials in Chapter 4 regarding the racial component to inequalities in educational funding demonstrate, the condition of racial segregation persists in the public schools throughout America. Does that condition allow white children and their parents to divorce themselves from the political and legal question of racial segregation? In other words, if racial segregation harms only African-American children, what incentive is there for white children to become invested in the problem? If, by contrast, the Supreme Court had recognized that the lack of diversity in schools harms *all* children, might that recognition have led to deeper political and legal opposition to segregation?
7. In Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*), the Supreme Court addressed the issue of remedy:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. . . .
>
> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases. . . . [T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.

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8. Can you detect even in this initial remedial language in *Brown II* the source of ongoing litigation about the scope of the remedy required by the Court's rulings? Interestingly, prior drafts of the opinion reveal that the Court originally wrote that desegregation must occur with "all appropriate speed," but the word "appropriate" was changed to "deliberate" in the final version of *Brown II*. *See http://www.abajournal.com/magazine/article/the_court_comes_together/*. Indeed, there was little speed and much resistance to the federal court orders implementing *Brown II*. In Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968), however, the Court rejected the school board's "freedom of choice" plan, which allowed students to choose their own public school. The board failed to show that its plan resulted in an effective transition to a unitary district, and therefore the board failed to demonstrate its compliance with its responsibility "to achieve a system of determining admission to the public schools on a nonracial basis. . . ." The Supreme Court concluded that school districts must eliminate racial discrimination in public education "root and branch." In Alexander v. Holmes County Bd. of Educ., 396 U.S. 1218 (1969), in the wake of concerted efforts by southern states to avoid integration, the Supreme Court denounced its "all deliberate speed" standard as a "soft euphemism for delay" that allowed too much deliberation and not enough speed. The Court ordered all southern school districts to become unitary on an immediate basis.

2. The Rise of Remedial Power

SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

402 U.S. 1 (1971)

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. Brown v. Board of Education (Brown I).

This case and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what Brown v. Board of Education was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. . . .

II

Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings. . . .

Over the 16 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not

discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.

By the time the Court considered Green v. County School Board., 391 U.S. 430, in 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws. In *Green*, the Court was confronted with a record of a freedom-of-choice program that the District Court had found to operate in fact to preserve a dual system more than a decade after *Brown II*. While acknowledging that a freedom-of-choice concept could be a valid remedial measure in some circumstances, its failure to be effective in *Green* required that:

> The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed. . . .

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III

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

. . . In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer

acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system. . . .

IV

We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the equal protection clause. Although the several related cases before us are primarily concerned with problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process.

In *Green,* we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary. Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment. In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs. Something more must be said, however, as to faculty assignment and new school construction.

In the companion case, the Mobile school board has argued that the Constitution requires that teachers be assigned on a "color blind" basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention. . . .

The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood

residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system. When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out. . . .

V

The central issue in this case is that of student assignment, and there are essentially four problem areas. . . .

(1) Racial Balances or Racial Quotas

The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. . . .

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools. . . .

We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green,* a school authority's

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remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

(2) One-Race Schools

The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move.

(3) Remedial Altering of Attendance Zones

The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank—and sometimes drastic—gerrymandering of school districts and attendance zones. An additional step was pairing, "clustering," or "grouping" of schools with attendance assignments made

deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools. More often than not, these zones are neither compact nor contiguous; indeed they may be on opposite ends of the city. As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals.

We hold that the pairing and grouping of noncontiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought. . . .

(4) Transportation of Students

The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country.

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case. . . . The

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District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority. . . .

VI

On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable. However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.

At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems would then be "unitary" in the sense required by our decisions. . . .

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

NOTES AND QUESTIONS

1. The Supreme Court in *Swann* finds the following four remedial devices to be within a district court's equitable power under the circumstances of this case: (1) racial quotas; (2) maintaining single-race schools; (3) altering attendance zones; and (4) cross-district transportation. Which of these devices is the most effective means of remedying racial segregation in the public schools? Which device is likely to result in the maintenance of integrated schools for the longest period of time?
2. Notice that in *Swann,* which was decided seven years before Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Supreme Court concludes that "affirmative action" is proper to achieve true nondiscrimination, particularly where the racial configuration of a district is a "loaded game board." How does the Court employ the concept of "affirmative action" in this context?
3. Apart from the court-ordered remedies approved by the Supreme Court in *Swann,* what other remedial measures could be implemented to achieve racial desegregation?

3. De Facto Segregation and Remedial Difficulties

KEYES V. SCHOOL DISTRICT NO. 1, DENVER, COLORADO

413 U.S. 189 (1973)

Mr. Justice BRENNAN delivered the opinion of the Court.

This school desegregation case concerns the Denver, Colorado, school system. That system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education. Rather, the gravamen of this action, brought in June 1969 in the District Court for the District of Colorado by parents of Denver schoolchildren, is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, school site selection, and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district. . . .

Before turning to the primary question we decide today, a word must be said about the District Court's method of defining a "segregated" school. Denver is a tri-ethnic, as distinguished from a bi-racial, community. The overall racial and ethnic composition of the Denver public schools is 66% Anglo, 14% Negro, and 20% Hispano. The District Court, in assessing the question of *de jure* segregation in the core city schools, preliminarily resolved that Negroes and Hispanos should not be placed in the same category to establish the segregated character of a school. . . .

We conclude, however, that the District Court erred in separating Negroes and Hispanos for purposes of defining a "segregated" school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment. . . . Indeed, the District Court recognized this in classifying predominantly Hispano schools as "segregated" schools in their own right. But there is also much evidence that in the Southwest Hispanos and Negroes have a great many things in common. The United States Commission on Civil Rights has recently published two Reports on Hispano education in the Southwest. Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians. In fact, the District Court itself recognized that "one of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination." This is agreement that, though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated" schools.

II

In our view, the only other question that requires our decision at this time is . . . whether the District Court and the Court of Appeals applied an incorrect legal standard in addressing petitioners' contention that respondent School

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Board engaged in an unconstitutional policy of deliberate segregation in the core city schools. Our conclusion is that those courts did not apply the correct standard in addressing that contention. . . .

This is not a case, however, where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. Several considerations support this conclusion. First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating "feeder" schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white. Similarly, the practice of building a school—such as the Barrett Elementary School in this case—to a certain size and in a certain location, "with conscious knowledge that it would be a segregated school," has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools. . . .

In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system." *Brown II.*

On remand, therefore, the District Court should decide in the first instance whether respondent School Board's deliberate racial segregation policy with respect to the Park Hill schools constitutes the entire Denver school system a dual school system. We observe that on the record now before us there is indication that Denver is not a school district which might be divided into separate, identifiable and unrelated units. This suggests that the official segregation in Park Hill affected the racial composition of schools throughout the district. . . .

On the question of segregative intent, petitioners presented evidence tending to show that the Board, through its actions over a period of years, intentionally created and maintained the segregated character of the core city schools. Respondents countered this evidence by arguing that the segregation in these schools is the result of a racially neutral "neighborhood school policy" and that the acts of which petitioners complain are explicable within the bounds of that policy. Accepting the School Board's explanation, the District Court and the Court of Appeals agreed that a finding of *de jure* segregation as to the core city schools was not permissible since petitioners had failed to prove "(1) a racially discriminatory purpose and (2) a causal relationship between the acts complained of and the racial imbalance admittedly existing in those schools." This assessment of petitioners' proof was clearly incorrect.

Although petitioners had already proved the existence of intentional school segregation in the Park Hill schools, this crucial finding was totally ignored when attention turned to the core city schools. Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system. On the contrary, where, as here, the case involves one school board, a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board's intent with respect to other segregated schools in the system. . . .

Applying these principles in the special context of school desegregation cases, we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system. We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate. Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events, thus leaving plaintiffs with the burden of proving otherwise. But at that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only "isolated and individual" unlawfully segregative actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent. . . .

In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding

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that segregative intent was not among the factors that motivated their actions. The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did. In *Swann,* we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention. . . . We made it clear, however, that a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.

The respondent School Board invoked at trial its "neighborhood school policy" as explaining racial and ethnic concentrations within the core city schools, arguing that since the core city area population had long been Negro and Hispano, the concentrations were necessarily the result of residential patterns and not of purposefully segregative policies. We have no occasion to consider in this case whether a "neighborhood school policy" of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting *de jure* segregation. It is enough that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation in a meaningful portion of the school system by techniques that indicate that the "neighborhood school" concept has not been maintained free of manipulation. . . .

Thus, respondent School Board having been found to have practiced deliberate racial segregation in schools attended by over one-third of the Negro school population, that crucial finding establishes a prima facie case of intentional segregation in the core city schools. In such case, respondent's neighborhood school policy is not to be determinative "simply because it appears to be neutral."

IV

In summary, the District Court on remand, *first,* will afford respondent School Board the opportunity to prove its contention that the Park Hill area is a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district. If respondent School Board fails to prove that contention, the District Court, *second,* will determine whether respondent School Board's conduct over almost a decade after 1960 in carrying out a policy of deliberate racial segregation in the Park Hill schools constitutes the entire school system a dual school system. If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system "root and branch." . . . If the District Court determines, however, that the Denver school system is not a dual school system by reason of the Board's actions in Park Hill, the court, *third,* will afford respondent School Board the opportunity to rebut petitioners' prima facie case of intentional segregation in the core city schools raised by the finding of intentional segregation in the Park Hill schools. There, the Board's burden is to show that its policies and practices with respect to school site location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., considered together and premised on the Board's so-called "neighborhood school" concept, either were not taken in effectuation of a policy to create or maintain segregation in the core city schools, or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools. Considerations of "fairness" and "policy" demand no less in light of the Board's intentionally segregative actions. If respondent Board fails to rebut petitioners' prima facie case, the District Court must, as in the case of Park Hill, decree all-out desegregation of the core city schools. . . .

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NOTES AND QUESTIONS

1. The *Keyes* decision represents the Supreme Court's first major ruling regarding the issue of racially segregated schools in a northern state without a history of legally mandated segregation. Accordingly, the *Keyes* case is often characterized as a northern *de facto* discrimination case, as opposed to a southern *de jure* discrimination case.
2. Because racial segregation was not required as a matter of Colorado law, the initial question in *Keyes* is whether the school district harbored the intent to effectuate a dual school system. The Court concludes that a school board's intent to create racially segregated schools is tantamount to state-mandated segregation. In other words, the intentional creation of *de facto* segregation is the same as *de jure* segregation from a constitutional perspective, except that any challenge to a *de facto* segregated system must begin with proof of intentional school district behavior. Do you agree that *de facto* segregation should be the legal equivalent of *de jure* discrimination? Should the remedies required to alleviate the two types of constitutional wrongs be identical?
3. Consider the Court's summary in Part IV of its opinion. That summary specifically identifies the order and burden of proof in a school desegregation case. Envision what the actual trial of the case might look like given the Court's parameters.

4. In *Keyes,* the Supreme Court treats the Hispanic students like the African-American students because the two groups have suffered similar "economic and cultural deprivation and discrimination." What other racial or ethnic groups would be included under that standard?
5. Is intent to *perpetuate* a dual system of segregation sufficient for a constitutional violation, or must there be an intent to *create* such a system? In Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979), the Supreme Court found *de jure* segregation in the Ohio districts based upon the fact that Ohio public officials had knowledge of the existence of segregated schools and failed to take affirmative steps to dismantle that dual system. The Court suggested that the failure to remedy an existing dual school system was itself a constitutional violation. What is the difference between a constitutional violation and a constitutional remedy? It is clear that "affirmative," race-conscious devices may, and indeed must, be employed to remedy a constitutional violation caused by the maintenance of a dual school system. Can the failure to take those affirmative steps itself be a violation of the Constitution? If so, then race-conscious decision making by public officials in their efforts to *avoid* maintaining an unconstitutional dual school system cannot be unconstitutional. When should a public body be permitted to take race into account in its decision making?
6. In Milliken v. Bradley, 418 U.S. 717 (1974), the Supreme Court made it clear that a federal court may *not*

> impose a multi-district, area wide remedy to a single-district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multi-district remedy or on the question of constitutional violations by those neighboring districts.

7. The *Milliken* Court's reasoning was based in large part on the principle of local control:

> [N]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. Thus, in San Antonio School District v. Rodriguez, 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence.

What is the meaning of local control here? Does the concept of local control really carry weight, or is it simply employed by the Court to justify its result?

8. The *Milliken* Court also addressed the issue of remedy:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

9. After *Milliken,* it became extremely difficult for urban school districts to achieve racial integration. There simply is not enough racial diversity *within* major American cities to accomplish racial integration through intradistrict school assignment plans alone. Without the participation of suburban districts, there are insufficient numbers of white students to achieve the integration of urban districts. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. Rev. 1597 (2003).

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4. Resegregation, Retrenchment, and Evolving Remedial Limits

Freeman v. Pitts

503 U.S. 467 (1992)

Justice Kennedy delivered the opinion of the Court.

DeKalb County, Georgia, is a major suburban area of Atlanta. This case involves a court-ordered desegregation decree for the DeKalb County School System (DCSS). DCSS now serves some 73,000 students in kindergarten through high school and is the 32d largest elementary and secondary school system in the Nation. . . .

II

Two principal questions are presented. The first is whether a district court may relinquish its supervision and control over those aspects of a school system in which there has been compliance with a desegregation decree if other aspects of the system remain in noncompliance. As we answer this question in the affirmative, the second question is whether the Court of Appeals erred in reversing the District Court's order providing for incremental withdrawal of supervision in all the circumstances of this case.

A

The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to ensure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present. This was the rationale and the objective of *Brown I* and *Brown II*. In *Brown I* we said: "To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." . . .

The objective of *Brown I* was made more specific by our holding in *Green* that the duty of a former *de jure* district is to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." We also identified various parts of the school system which, in addition to student attendance patterns, must be free from racial discrimination before the mandate of *Brown* is met: faculty, staff, transportation, extracurricular activities, and facilities. The *Green* factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown,* and we instructed the District Courts to fashion remedies that address all these components of elementary and secondary school systems.

The concept of unitariness has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn. But, as we explained last Term in Board of Ed. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 245-246 (1991), the term "unitary" is not a precise concept:

> It is a mistake to treat words such as "dual" and "unitary" as if they were actually found in the Constitution. . . . Courts have used the terms "dual" to denote a school system which has engaged in intentional segregation of students by race, and "unitary" to describe a school system which has been brought into compliance with the command of the Constitution. We are not sure how useful it is to define these terms more precisely, or to create subclasses within them.

It follows that we must be cautious not to attribute to the term a utility it does not have. The term "unitary" does not confine the discretion and authority of the District Court in a way that departs from traditional equitable principles.

That the term "unitary" does not have fixed meaning or content is not inconsistent with the principles that control the exercise of equitable power. The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision. In this respect, as we observed in *Swann,* "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann.* The requirement of a unitary school system must be implemented according to this prescription.

Our application of these guiding principles in Pasadena Bd. of Education v. Spangler, 427 U.S. 424 (1976), is instructive. There we held that a District Court exceeded its remedial authority in requiring annual readjustment of school attendance zones in the Pasadena school district when changes in the racial makeup of the schools were caused by demographic shifts "not attributed to any segregative acts on the part of the [school district]." In so holding we said:

> It may well be that petitioners have not yet totally achieved the unitary system contemplated by . . . *Swann.* . . . In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the [Pasadena Unified School District] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns. . . .

Today, we make explicit the rationale that was central in *Spangler.* A federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control. This discretion derives both from the constitutional authority which justified its intervention in the first instance and its ultimate objectives in formulating the decree. The authority of the court is invoked at the outset to remedy particular constitutional violations. In construing the remedial authority of the district courts, we have been guided by the principles that "judicial powers may be exercised only on the basis of a constitutional violation," and that "the nature of the violation determines the scope of the remedy." *Swann.* A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation.

We have said that the court's end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution. Milliken v. Bradley. . . . Partial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities. In *Dowell,* we emphasized that federal judicial supervision of local school systems was intended as a "temporary measure." 498 U.S. at 247. Although this temporary measure has lasted decades, the ultimate objective has not changed—to return school districts to the control of local authorities. Just as a court has the obligation at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of its decree, so too must a court provide an orderly

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means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance. A transition phase in which control is relinquished in a gradual way is an appropriate means to this end.

As we have long observed, "local autonomy of school districts is a vital national tradition." Dayton Bd. of Education v. Brinkman, 433 U.S. 406, 410 (1977) (*Dayton I*). Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course. As we discuss below, one of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution. Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility.

We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. While retaining jurisdiction over the case, the court may determine that it will not order further remedies in areas where the school district is in compliance with the decree. That is to say, upon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree. In particular, the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations.

A court's discretion to order the incremental withdrawal of its supervision in a school desegregation case must be exercised in a manner consistent with the purposes and objectives of its equitable power. Among the factors which must inform the sound discretion of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

In considering these factors, a court should give particular attention to the school system's record of compliance. A school system is better positioned to

demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations. And, with the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision. . . .

That there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. *Swann*, 402 U.S. at 31-32. If the unlawful *de jure* policy of a school system has been the cause of the racial imbalance in student attendance, that condition must be remedied. The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation. . . .

The effect of changing residential patterns on the racial composition of schools, though not always fortunate, is somewhat predictable. Studies show a high correlation between residential segregation and school segregation. Wilson & Taeuber, *Residential and School Segregation: Some Tests of Their Association*, in *Demography and Ethnic Groups* 57-58 (F. Bean & W. Frisbie eds. 1978). The District Court in this case heard evidence tending to show that racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80% white and 20% black, while blacks prefer a 50-50 mix.

Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.

In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that premise.

As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link

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between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith. In light of its finding that the demographic changes in DeKalb County are unrelated to the prior violation, the District Court was correct to entertain the suggestion that DCSS had no duty to achieve system wide racial balance in the student population. . . .

We next consider whether retention of judicial control over student attendance is necessary or practicable to achieve compliance in other facets of the school system. Racial balancing in elementary and secondary school student assignments may be a legitimate remedial device to correct other fundamental inequities that were themselves caused by the constitutional violation. . . .

There was no showing that racial balancing was an appropriate mechanism to cure other deficiencies in this case. It is true that the school district was not in compliance with respect to faculty assignments, but the record does not show that student reassignments would be a feasible or practicable way to remedy this defect. To the contrary, the District Court suggests that DCSS could solve the faculty assignment problem by reassigning a few teachers per school. The District Court, not having our analysis before it, did not have the opportunity to make specific findings and conclusions on this aspect of the case, however. Further proceedings are appropriate for this purpose.

The requirement that the school district show its good-faith commitment to the entirety of a desegregation plan so that parents, students, and the public have assurance against further injuries or stigma also should be a subject for more specific findings. We stated in *Dowell* that the good-faith compliance of the district with the court order over a reasonable period of time is a factor to be considered in deciding whether or not jurisdiction could be relinquished. . . . A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new *de jure* violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future. . . .

When a school district has not demonstrated good faith under a comprehensive plan to remedy ongoing violations, we have without hesitation approved comprehensive and continued district court supervision. . . .

[T]he District Court in this case stated that throughout the period of judicial supervision it has been impressed by the successes DCSS has achieved and its dedication to providing a quality education for all students, and that DCSS "has traveled the often long road to unitary status almost to its end." With respect to those areas where compliance had not been achieved, the District Court did not find that DCSS had acted in bad faith or engaged in further acts of discrimination since the desegregation plan went into effect. This, though, may not be the equivalent of a finding that the school district has an affirmative commitment to comply in good faith with the entirety of a desegregation plan, and further proceedings are appropriate for this purpose as well. . . .

NOTES AND QUESTIONS

1. In *Freeman,* the Court signals its relaxation regarding the urgency of court-mandated dismantling of all vestiges of a dual educational system. The Court relies on Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991), for its position that the creation of a racially "unitary" school district in all its dimensions is not a *constitutional* requirement. In *Dowell,* the Supreme Court concluded that a school desegregation remedy is a "temporary" measure that should be dissolved after "local authorities have operated in compliance with it for a reasonable period of time. . . . " 498 U.S. at 247-248. In *Freeman,* the Court returns to the principles of equitable remedies to ensure that a federal court's remedial plan is finely tailored to the actual constitutional violation. Where the constitutional violation has been redressed by a remedy, the district court may and should withdraw its jurisdiction over the monitoring and maintenance of that remedy. In other words, if resegregation has occurred by virtue of private choices, the court has no equitable power to devise additional remedies to redirect those private choices. Accordingly, a federal court's remedy for a constitutional violation can be entirely frustrated by "white flight." Moreover, because a state or school district apparently cannot take affirmative steps to desegregate its students *absent* a proven constitutional violation, a state or district may be unable to attempt to improve an obvious condition of *de facto* segregation.
2. Once again, the Court relies upon the principles of local school district control and autonomy to support its result. Are those principles persuasive in this context?
3. The *Freeman* Court indicates that a federal court's remedial power may weaken as the condition of resegregation becomes more and more removed in time from the original constitutional violation. Can you detect an evolving time limit on a federal court's exercise of remedial power in the Supreme Court's cases? Will the evolution of that concept lead the court to conclude that any race-conscious conduct by any governmental body (including the courts) must be temporary and must be specifically designed to remedy a constitutional violation?
4. What does the Court in *Freeman* mean when it declares that "[r]acial balance is not to be achieved for its own sake"? Is the Court rejecting "racial balance" as a legitimate educational goal, or merely suggesting that a federal court's remedial power cannot be exercised merely to achieve such a goal (no matter how desirable), unless that goal is required to remedy a proven constitutional violation?
5. There is significant evidence showing that the academic achievement levels of African-American students, as measured by standardized tests, increased dramatically as the result of their ability to learn in an integrated educational environment. *See* Gary Orfield & Chungmei Lee, Brown *at 50: King's Dream* or Plessy*'s Nightmare?,* Harv. C.R. Project, at 53 (Jan. 2004); Robert Crain & Rita Mahard, *Desegregation Plans That Raise Black Achievement: A Review of the Research* 35-45 (1982); William Taylor, Brown, *Equal Protection and the Isolation of the Poor,* 95 Yale L.J. 1700, 1710-1711 (1986). As this research suggests, "racial balance" improves the academic performance of African-American students. Can a school district take voluntary, affirmative steps to achieve "racial balance" for that "sake"?

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6. In the following *Jenkins* opinion, the Supreme Court traces ten years of litigation and court rulings in the case. How has the judicial approach to the issue of segregation changed over that time?

MISSOURI v. JENKINS

15 U.S. 70 (1995)

Chief Justice REHNQUIST delivered the opinion of the Court.

As this school desegregation litigation enters its 18th year, we are called upon again to review the decisions of the lower courts. In this case, the State of Missouri has challenged the District Court's order of salary increases for virtually all instructional and noninstructional staff within the Kansas City, Missouri, School District (KCMSD) and the District Court's order requiring the State to continue to fund remedial "quality education" programs because student achievement levels were still "at or below national norms at many grade levels."

A general overview of this litigation is necessary for proper resolution of the issues upon which we granted certiorari. This case has been before the same United States District Judge since 1977. Missouri v. Jenkins, 491 U.S. 274, 276 (1989) (*Jenkins I*). In that year, the KCMSD, the school board, and the children of two school board members brought suit against the State and other defendants. Plaintiffs alleged that the State, the surrounding suburban school districts (SSD's), and various federal agencies had caused and perpetuated a system of racial segregation in the schools of the Kansas City metropolitan area. . . .

After a trial that lasted 7½ months, the District Court dismissed the case against the federal defendants and the SSD's, but determined that the State and the KCMSD were liable for an intradistrict violation, i.e., they had operated a segregated school system within the KCMSD. The District Court determined that prior to 1954 "Missouri mandated segregated schools for black and white children." Furthermore, the KCMSD and the State had failed in their affirmative obligations to eliminate the vestiges of the State's dual school system within the KCMSD.

In June 1985, the District Court issued its first remedial order and established as its goal the "elimination of all vestiges of state imposed segregation." The District Court determined that "segregation had caused a system wide *reduction* in student achievement in the schools of the KCMSD." . . .

The District Court . . . ordered a wide range of quality education programs for all students attending the KCMSD. First, the District Court ordered that the KCMSD be restored to an AAA classification, the highest classification awarded by the State Board of Education. Second, it ordered that the number of students per class be reduced so that the student-to-teacher ratio was below the level required for AAA standing. . . .

The District Court also ordered programs to expand educational opportunities for all KCMSD students: full-day kindergarten; expanded summer school; before- and after-school tutoring; and an early childhood development program. Finally, the District Court implemented a state-funded "effective

schools" program that consisted of substantial yearly cash grants to each of the schools within the KCMSD. . . .

The KCMSD was awarded an AAA rating in the 1987-1988 school year, and there is no dispute that since that time it has "'maintained and greatly exceeded AAA requirements.'" The total cost for these quality education programs has exceeded $220 million.

The District Court also set out to desegregate the KCMSD but believed that "to accomplish desegregation within the boundary lines of a school district whose enrollment remains 68.3% black is a difficult task." Because it had found no interdistrict violation, the District Court could not order mandatory interdistrict redistribution of students between the KCMSD and the surrounding SSD's. The District Court refused to order additional mandatory student reassignments because they would "increase the instability of the KCMSD and reduce the potential for desegregation." Relying on favorable precedent from the Eighth Circuit, the District Court determined that "achievement of AAA status, improvement of the quality of education being offered at the KCMSD schools, magnet schools, as well as other components of this desegregation plan can serve to maintain and hopefully attract non-minority student enrollment."

In November 1986, the District Court approved a comprehensive magnet school and capital improvements plan and held the State and the KCMSD jointly and severally liable for its funding. Under the District Court's plan, every senior high school, every middle school, and one-half of the elementary schools were converted into magnet schools. The District Court adopted the magnet-school program to "provide a greater educational opportunity to *all* KCMSD students," and because it believed "that the proposed magnet plan [was] so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs." The District Court felt that "the long-term benefit of all KCMSD students of a greater educational opportunity in an integrated environment is worthy of such an investment." Since its inception, the magnet school program has operated at a cost, including magnet transportation, in excess of $448 million. . . .

In June 1985, the District Court ordered substantial capital improvements to combat the deterioration of the KCMSD's facilities. In formulating its capital-improvements plan, the District Court dismissed as "irrelevant" the "State's argument that the present condition of the facilities [was] not traceable to unlawful segregation." Instead, the District Court focused on its responsibility to "remedy the vestiges of segregation" and to "implement a desegregation plan which would maintain and attract non-minority enrollment."

As part of its desegregation plan, the District Court has ordered salary assistance to the KCMSD. In 1987, the District Court initially ordered salary assistance only for teachers within the KCMSD. Since that time, however, the District Court has ordered salary assistance to all but three of the approximately 5,000 KCMSD employees. The total cost of this component of the desegregation remedy since 1987 is over $200 million.

The District Court's desegregation plan has been described as the most ambitious and expensive remedial program in the history of school desegregation.

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The annual cost per pupil at the KCMSD far exceeds that of the neighboring SSD's or of any school district in Missouri. Nevertheless, the KCMSD, which has pursued a "friendly adversary" relationship with the plaintiffs, has continued to propose ever more expensive programs. As a result, the desegregation costs have escalated and now are approaching an annual cost of $200 million. These massive expenditures have financed "high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; green houses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities."

Not surprisingly, the cost of this remedial plan has "far exceeded KCMSD's budget, or for that matter, its authority to tax." The State, through the operation of joint-and-several liability, has borne the brunt of these costs. . . .

II

With this background, we turn to the present controversy. First, the State has challenged the District Court's requirement that it fund salary increases for KCMSD instructional and noninstructional staff. The State claimed that funding for salaries was beyond the scope of the District Court's remedial authority. Second, the State has challenged the District Court's order requiring it to continue to fund the remedial quality education programs for the 1992-1993 school year. The State contended that under Freeman v. Pitts, it had achieved partial unitary status with respect to the quality education programs already in place. As a result, the State argued that the District Court should have relieved it of responsibility for funding those programs. . . .

III

. . . Proper analysis of the District Court's orders challenged here . . . must rest upon their serving as proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct and their eventual restoration of "state and local authorities to the control of a school system that is operating in compliance with the Constitution." We turn to that analysis.

The State argues that the order approving salary increases is beyond the District Court's authority because it was crafted to serve an "interdistrict goal," in spite of the fact that the constitutional violation in this case is "intradistrict" in nature. "The nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." . . . The proper response to an intradistrict violation is an intradistrict remedy that serves to eliminate the racial identity of the schools within the affected school district by eliminating, as far as practicable, the vestiges of *de jure* segregation in all facets of their operations.

Here, the District Court has found, and the Court of Appeals has affirmed, that this case involved no interdistrict constitutional violation that would support interdistrict relief. . . . Thus, the proper response by the District Court should have been to eliminate to the extent practicable the vestiges of prior *de jure* segregation within the KCMSD: a system wide reduction in student achievement and the existence of 25 racially identifiable schools with a population of over 90% black students.

The District Court and Court of Appeals, however, have felt that because the KCMSD's enrollment remained 68.3% black, a purely intradistrict remedy would be insufficient. But, as noted in *Milliken I,* we have rejected the suggestion "that schools which have a majority of Negro students are not 'desegregated' whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered."

Instead of seeking to remove the racial identity of the various schools within the KCMSD, the District Court has set out on a program to create a school district that was equal to or superior to the surrounding SSD's. Its remedy has focused on "desegregative attractiveness," coupled with "suburban comparability." Examination of the District Court's reliance on "desegregative attractiveness" and "suburban comparability" is instructive for our ultimate resolution of the salary-order issue.

The purpose of desegregative attractiveness has been not only to remedy the system wide reduction in student achievement, but also to attract non-minority students not presently enrolled in the KCMSD. This remedy has included an elaborate program of capital improvements, course enrichment, and extracurricular enhancement not simply in the formerly identifiable black schools, but in schools throughout the district. The District Court's remedial orders have converted every senior high school, every middle school, and one-half of the elementary schools in the KCMSD into "magnet" schools. The District Court's remedial order has all but made the KCMSD itself into a magnet district.

We previously have approved of intradistrict desegregation remedies involving magnet schools. *See, e.g., Milliken I.* Magnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis, without requiring extensive busing and redrawing of district boundary lines. As a component in an intradistrict remedy, magnet schools also are attractive because they promote desegregation while limiting the withdrawal of white student enrollment that may result from mandatory student reassignment.

The District Court's remedial plan in this case, however, is not designed solely to redistribute the students within the KCMSD in order to eliminate racially identifiable schools within the KCMSD. Instead, its purpose is to attract non-minority students from outside the KCMSD schools. But this interdistrict goal is beyond the scope of the intradistrict violation identified by the District Court. In effect, the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students. . . .

In *Milliken I* we determined that a desegregation remedy that would require mandatory interdistrict reassignment of students throughout the Detroit metropolitan area was an impermissible interdistrict response to the intradistrict violation identified. . . .

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What we meant in *Milliken I* by an interdistrict violation was a violation that caused segregation between adjoining districts. Nothing in *Milliken I* suggests that the District Court in that case could have circumvented the limits on its remedial authority by requiring the State of Michigan, a constitutional violator, to implement a magnet program designed to achieve the same interdistrict transfer of students that we held was beyond its remedial authority. Here, the District Court has done just that: created a magnet district of the KCMSD in order to serve the interdistrict goal of attracting non-minority students from the surrounding SSD's and redistributing them within the KCMSD. The District Court's pursuit of "desegregative attractiveness" is beyond the scope of its broad remedial authority.

Respondents argue that the District Court's reliance upon desegregative attractiveness is justified in light of the District Court's statement that segregation has "led to white flight from the KCMSD to suburban districts." The lower courts' "findings" as to "white flight" are both inconsistent internally, and inconsistent with the typical supposition, bolstered here by the record evidence, that "white flight" may result from desegregation, not *de jure* segregation. . . .

In *Freeman,* we stated that "the vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied." The record here does not support the District Court's reliance on "white flight" as a justification for a permissible expansion of its intradistrict remedial authority through its pursuit of desegregative attractiveness. . . .

The District Court's pursuit of "desegregative attractiveness" cannot be reconciled with our cases placing limitations on a district court's remedial authority. It is certainly theoretically possible that the greater the expenditure per pupil within the KCMSD, the more likely it is that some unknowable number of non-minority students not presently attending schools in the KCMSD will choose to enroll in those schools. Under this reasoning, however, every increased expenditure, whether it be for teachers, noninstructional employees, books, or buildings, will make the KCMSD in some way more attractive, and thereby perhaps induce nonminority students to enroll in its schools. But this rationale is not susceptible to any objective limitation. . . .

Nor are there limits to the duration of the District Court's involvement. . . . Each additional program ordered by the District Court—and financed by the State—to increase the "desegregative attractiveness" of the school district makes the KCMSD more and more dependent on additional funding from the State; in turn, the greater the KCMSD's dependence on state funding, the greater its reliance on continued supervision by the District Court. But our cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution.

The District Court's pursuit of the goal of "desegregative attractiveness" results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that we believe it is beyond the admittedly broad discretion of the District Court. In this

posture, we conclude that the District Court's order of salary increases, which was "grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD," is simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation.

Similar considerations lead us to conclude that the District Court's order requiring the State to continue to fund the quality education programs because student achievement levels were still "at or below national norms at many grade levels" cannot be sustained. The State does not seek from this Court a declaration of partial unitary status with respect to the quality education programs. It challenges the requirement of indefinite funding of a quality education program until national norms are met, based upon the assumption that while a mandate for significant educational improvement, both in teaching and in facilities, may have been justified originally, its indefinite extension is not. . . .

In reconsidering this order, the District Court should apply our three-part test from Freeman v. Pitts. The District Court should consider that the State's role with respect to the quality education programs has been limited to the funding, not the implementation, of those programs. As all the parties agree that improved achievement on test scores is not necessarily required for the State to achieve partial unitary status as to the quality education programs, the District Court should sharply limit, if not dispense with, its reliance on this factor. Just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments, *Freeman,* so too will numerous external factors beyond the control of the KCMSD and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus. . . . Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the KCMSD will be able to operate on its own.

The District Court also should consider that many goals of its quality education plan already have been attained: the KCMSD now is equipped with "facilities and opportunities not available anywhere else in the country." . . . It may be that in education, just as it may be in economics, a "rising tide lifts all boats," but the remedial quality education program should be tailored to remedy the injuries suffered by the victims of prior *de jure* segregation. . . .

On remand, the District Court must bear in mind that its end purpose is not only "to remedy the violation" to the extent practicable, but also "to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution."

Justice GINSBURG, dissenting. . . .

The Court stresses that the present remedial programs have been in place for seven years. But compared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent.

In 1724, Louis XV of France issued the Code Noir, the first slave code for the Colony of Louisiana, an area that included Missouri. . . . When Missouri entered the Union in 1821, it entered as a slave State.

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Before the Civil War, Missouri law prohibited the creation or maintenance of schools for educating blacks: "No person shall keep or teach any school for the instruction of negroes or mulattoes, in reading or writing, in this State."

Beginning in 1865, Missouri passed a series of laws requiring separate public schools for blacks. The Missouri Constitution first permitted, then required, separate schools.

After this Court announced its decision in Brown v. Board of Education, Missouri's Attorney General declared these provisions mandating segregated schools unenforceable. The statutes were repealed in 1957 and the constitutional provision was rescinded in 1976. Nonetheless, 30 years after *Brown*, the District Court found that "the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." The District Court concluded that "the State . . . cannot defend its failure to affirmatively act to eliminate the structure and effects of its past dual system on the basis of restrictive state law." Just ten years ago, in June 1985, the District Court issued its first remedial order.

Today, the Court declares illegitimate the goal of attracting nonminority students to the Kansas City, Missouri, School District, and thus stops the District Court's efforts to integrate a school district that was, in the 1984/1985 school year, sorely in need and 68.3% black. Given the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon. . . .

NOTES AND QUESTIONS

1. In Missouri v. Jenkins, 495 U.S. 33 (1990) (*Jenkins II*), the Supreme Court rejected the district court's order requiring the Kansas City Metropolitan School District to increase its tax rate to raise the funds required to implement the court's ambitious plans. The Supreme Court, however, indicated that such a tax increase could be within the federal court's remedial power if "no permissible alternative would have accomplished the required task." Moreover, the Court made clear that a remedial order that does not impose its own tax increase but instead directs "a local government body to levy its own taxes is plainly a judicial act within the power of the federal court. . . ." What type of constitutional violation would justify such a remedy?
2. The district court creatively employed the concept of "magnet schools" to assist in its remedial plan. The Supreme Court defines a magnet school as "public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality." The Court declares that "[w]e have approved of intradistrict desegregation remedies involving magnet schools." Nonetheless, the Court rejects the district court's reliance on magnet schools here. Why?
3. After *Jenkins*, what is the law governing the responsibility of a state or school district to remedy a previous finding of intentional desegregation by achieving a condition of integration? What are the limits to a court's remedial power?

4. Reflect on the path of the Supreme Court's rulings since *Brown*. The Court's recent rejection of challenges to segregation and resegregation has had a significant impact on the racial composition of American schools. American "schools are becoming more segregated in all regions for both African American and Latino students." Orfield & Lee, Brown *at 50: King's Dream or* Plessy*'s Nightmare?,* Harv. C.R. Project, at 2 (Jan. 2004). In particular, the evidence shows that since the early 1990s, when the Supreme Court began to dilute court-ordered desegregation efforts, "there has been a major increase in segregation." *Id.* Throughout the nation, "Blacks and Latinos attend schools where two-thirds of the students are Black and Latino and most students are from their own group." *Id.* at 17. Since 1988, the percentage of African-American students attending a majority white school has declined from 43.5 percent to 30.2 percent. *Id.* at 21. *See also* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. Rev. 1597 (2003).
5. There is a stunning link between racial segregation and poverty. While only 15 percent of the intensely segregated white students attend schools with concentrated poverty, 88 percent of the intensely segregated minority students attend schools with concentrated poverty. *Id.* at 21. Furthermore, minority children in highly segregated minority schools with concentrated poverty "tend to be less healthy, to have weaker preschool experiences, to have only one parent, to move frequently and have unstable educational experiences, to attend classes taught by less experienced or unqualified teachers, to have friends and classmates with lower levels of achievement, to be in schools with fewer demanding precollegiate courses and more remedial courses, and to have higher teacher turnover. Many of these schools are also deteriorated and lack key resources." *Id.* at 21-22. *See also* Kevin Carey, *The Funding Gap: Low-Income and Minority Students Still Receive Fewer Dollars, in Many States,* Educ. Trust, at 6-9 (Fall 2003).
6. If *Brown* had challenged the inequality of tangible resources available to most minority students, would more progress have been made in the past 60 years? On the other hand, the evidence indicates that in an era when the Supreme Court took seriously *Brown*'s commitment to integration, significant progress was made in both the racial balance of schools and in the academic achievement of minority students. Among the recommendations made by Orfield and Lee is a call for presidential leadership on the issue of school desegregation, including the appointment of "judges and civil rights enforcement officials who understand that the Supreme Court was right in *Brown* and that the job is far from over." Harv. C.R. Project, at 40. Do you agree with that recommendation?
7. Finally, as you think about the link between poverty and segregation, reconsider the issues of inequitable and inadequate funding addressed in Chapter 4. To what extent would the recognition of a federal or state constitutional "right to education" create a climate of adequate and equitable funding that might help to bridge the racial divide?

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B. AFFIRMATIVE ACTION AND THE CONSTITUTIONALITY OF VOLUNTARY RACE-CONSCIOUS EDUCATIONAL POLICIES

In its desegregation cases from *Brown* to *Jenkins,* the Supreme Court has upheld the race-conscious decisions of public educational institutions where they are necessary to remedy a prior, proven act of racial segregation. In its affirmative action and student assignment cases, the court considers the constitutionality of voluntary race-conscious educational decisions. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Court first addressed the constitutionality of race-conscious university admissions programs. There a divided Court delivered a plurality opinion with no clear mandate. Twenty-five years later, the Supreme Court endorsed Justice Powell's opinion in *Bakke* that "student body diversity is a compelling state interest that can justify the use of race in university admissions." Grutter v. Bollinger, 539 U.S. 306 (2003). In Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007), and Fisher v. University of Texas, 570 U.S. ___ (2013), the Court reaffirmed that achieving the educational benefits of student body diversity can be a sufficiently compelling governmental interest to justify narrowly tailored, race-conscious student assignment and admission programs. While race-conscious admissions policies raise constitutional issues to be decided by the courts, they also have been the focus of political debate. When studying these cases, consider how the courts have handled both the legal and the political dimensions of these issues.

REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE

438 U.S. 265 (1978)

Mr. Justice POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., and the Equal Protection Clause of the Fourteenth Amendment.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers The Chief Justice, Mr. Justice Stewart, Mr. Justice Rehnquist and Mr. Justice Stevens concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun concur in this judgment.

I

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical School class. The special program consisted of a separate admissions system operating in coordination with the regular admissions process. . . .

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. On the 1973 application form, candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." . . . No formal definition of "disadvantaged" was ever produced, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation. Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. . . . While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16.

Although disadvantaged whites applied to the special program in large numbers, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups.

II

En route to this crucial battle over the scope of judicial review, the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.

This semantic distinction is beside the point: The special admissions program is undeniably a classification based upon race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

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The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co., supra,* 304 U.S., at 152-153 n.4, ... This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious.

B

It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." . . .

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. [T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

III

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." . . . The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession" . . . ; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

A

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown,* attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

C

Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that

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petitioner's special admissions program is either needed or geared to promote that goal. The court below addressed this failure of proof:

> Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.

D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. . . .

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967):

> Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." . . .

The president of Princeton University has described some of the benefits derived from a diverse student body:

> [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, "People do not learn very much when they are surrounded only by the likes of themselves."

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First

Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In Sweatt v. Painter, the Court made a similar point with specific reference to legal education:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges—and the courts below have held—that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.

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IV

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program.

In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. . . . And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases.

B

In summary, it is evident that the Davis special admissions program . . . tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including

their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

Opinion of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN, concurring in the judgment in part and dissenting in part.

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented—whether government may use race-conscious programs to redress the continuing effects of past discrimination and the mature consideration which each of our Brethren has brought to it—have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

The Chief Justice and our Brothers Stewart, Rehnquist, and Stevens, have concluded that Title VI of the Civil Rights Act of 1964 . . . prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Allan Bakke's rights have been violated and that he must, therefore, be admitted to the Medical School. Our Brother Powell, reaching the Constitution, concludes that, although race may be taken into account in university admissions, the particular special admissions program used by petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary to achieve petitioner's stated goals. Accordingly, these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke "is entitled to an order that he be admitted to the University."

We agree with Mr. Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself. We also agree that the effect of the California Supreme Court's affirmance of the judgment of the Superior Court of California would be to prohibit the University from establishing in the future affirmative-action programs that take race into account. Since we conclude that the affirmative admissions program at the Davis Medical

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School is constitutional, we would reverse the judgment below in all respects. Mr. Justice Powell agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.[1]

I

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the "last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927). Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" status before the law, a status always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred by our decision in Brown v. Board of Education, 347 U.S. 483 (*Brown I*), and its progeny, which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution.

Against this background, claims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds—let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

II

In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment.

First, no decision of this Court has ever adopted the proposition that the Constitution must be colorblind.

Second, even if it could be argued in 1964 that the Constitution might conceivably require color blindness, Congress surely would not have chosen to codify such a view unless the Constitution clearly required it.

[1] We also agree with Mr. Justice Powell that a plan like the "Harvard" plan . . . is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.

Third, the legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine.

A

The Court has also declined to adopt a "color-blind" interpretation of other statutes containing nondiscrimination provisions similar to that contained in Title VI. We have held under Title VII that where employment requirements have a disproportionate impact upon racial minorities they constitute a statutory violation, even in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job. More significantly, the Court has required that preferences be given by employers to members of racial minorities as a remedy for past violations of Title VII, even where there has been no finding that the employer has acted with a discriminatory intent. . . .

III

A

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," Edwards v. California, 314 U.S. 160, 185 (1941) (Jackson, J., concurring), summed up by the shorthand phrase "[o]ur Constitution is color-blind," Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions.

We conclude, therefore, that racial classifications are not per se invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

B

Respondent argues that racial classifications are always suspect and, consequently, that this Court should weigh the importance of the objectives served by Davis' special admissions program to see if they are compelling. In addition, he asserts that this Court must inquire whether, in its judgment, there are alternatives to racial classifications which would suit Davis' purposes. Petitioner, on the other hand, states that our proper role is simply to accept petitioner's determination that the racial classifications used by its program are reasonably related to what it tells us are its benign purposes. We reject petitioner's view, but, because our prior cases are in many respects inapposite to that before us now, we find it necessary to define with precision the meaning of that inexact term, "strict scrutiny."

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling

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