Brigham Young University Education and Law Journal

Volume 2005 | Number 1 Article 6

Spring 3-1-2005

Brown v. Board of Education and the No Child Left Behind Act: Competing Ideologies

Dana J. Nichols

BROWN V. BOARD OF EDUCATION AND THE NO CHILD LEFT BEHIND ACT: COMPETING IDEOLOGIES

The sum of all known reverence I add up in you whoever you are,
The President is there in the White House for you, it is not you who are here for him,
The Secretaries act in their bureaus for you, not you here for them,
The Congress convenes every Twelfth month for you,
Law, courts, the forming of State, the charters of cities, the going and coming of commerce and mails, are all for you.[1]

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.[2]

The president and I believe education is a civil right—there should be equal access for all, not just the privileged few.[3]

I. INTRODUCTION

The *Brown v. Board of Education*[4] decision and the No Child Left Behind Act[5] share a common goal: to provide every child with a quality education.[6] A quick glance at the rhetoric of both *Brown* and NCLB suggests they are philosophical siblings. Upon closer examination, however, it is apparent that two distinctly different ideologies motivated the *Brown* decision and NCLB. For *Brown* a separate education could

1. Walt Whitman, *A Song for Occupations*, in *Leaves of Grass* 172 (Prometheus Books 1995) (originally published 1892).

2. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) [hereinafter *Brown I*].

3. Rod Paige, *Where's the Choice*, Wall St. J. A14 (July 29, 2003).

4. *Brown I*, 347 U.S. 483.

5. *No Child Left Behind Act of 2001*, 20 U.S.C.S. § 6301 et seq. (LEXIS 2004) [hereinafter NCLB].

6. *See Brown I*, 347 U.S. at 493; *No Child Left Behind Act of 2001*, 20 U.S.C.S. § 6301 et seq.

never be equal, and affirmative racial integration was necessary to provide every child with a quality education. Conversely, under NCLB the ideologies of high-stakes accountability and a market-driven approach ensure that a separate education can be equal, and that every child will have a quality education.

Although NCLB and the *Brown* decision both have common aims, such as seeking to enforce federal guidelines while stressing local control and sovereignty,[7] they also have key differences. One major difference between NCLB and *Brown* is the use of modern pedagogical techniques. NCLB emphasizes the use of modern techniques,[8] whereas, *Brown* had little to say about pedagogy other than referring to the racial environment.[9]

Despite the criticism of both approaches included in this paper, I impute nothing other than pure motives to proponents of *Brown's* desegregation regime and to proponents of NCLB's education reform. There is room in both camps for those who sincerely wish for greater opportunities for all children; they are, however, different camps. The key difference between the two camps reflects the unique genesis of each approach. *Brown* was born of the Civil Rights Movement[10] and formed in reaction to rampant state-sponsored racism. NCLB emerged from a decades-long conservative movement seeking to reform education using market and business models.[11] Both movements seek a better, or at least fairer, public education system; yet they differ in how to achieve this goal.

The ideological distinctions outlined in this paper have a long history of interaction. The tension between the varied approaches is apparent from the steady decline of *Brown's* influence on the desegregation of American schools. While the influence of *Brown* wanes, high-stakes accountability and choice programs, such as NCLB are gaining momentum. This is no coincidence. In part, this divergence of remedies in education reform results from a conflict of ideological emphasis. Specifically, each camp has offered competing solutions for minority

7. *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955) [hereinafter Brown II] ("School authorities have the primary responsibility for elucidating, assessing, and solving [the] problems [caused by segregation in schools]; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."); 20 U.S.C.S. § 6575 ("Nothing in [NCLB] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction.").

8. 20 U.S.C.S. § 6651(e)(5)(B)(i).

9. *See generally Brown I*, 347 U.S. 483.

10. *Brown I*, 347 U.S. at 490.

11. *See infra*, Part III.

underachievement in public schools.

Professor Boger of North Carolina described the collision of disintegrating desegregation efforts and rising "high-stakes accountability"[12] as part of a "perfect storm"[13] of education woes.[14] Boger concluded, "the convergence of racial segregation and high-stakes accountability testing all but dooms racially segregated, economically isolated public school[s] and their students to failure on state accountability tests, entrenching broad patterns of grade retention, student demoralization and dropout, and teacher flight."[15]

What happened to the hope of racial desegregation? Why are Boger and other supporters of the *Brown* desegregation regime[16] so worried about the effects of "high stakes accountability" measures like NCLB? This paper will address these questions by reviewing the history, ideology, criticisms, and dismantling of *Brown* and the brief history of NCLB. Additionally, this paper will compare the respective philosophies of *Brown* and NCLB, and examine the ideological tension between the two solutions. By examining the two philosophies in this manner, the scholar, educator, and citizen can better understand the distinctions that shape the debate of education reform, and formulate their own positions on the critical issues addressed by the *Brown* decision and NCLB.

II. REVIEW OF BROWN V. BOARD OF EDUCATION

> To separate [children] 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.... We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate

---

12. John Charles Boger, *Symposium, Education's "Perfect Storm"? Racial Segregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. Rev. 1375, 1425-26 (2003). The "high stakes accountability" movement that Boger refers to includes "setting high educational goals for every student and school; . . . providing carefully designed curricula moving students directly toward those goals; . . . regularly measuring student progress through uniform, statewide tests; . . . providing incentives—both rewards and punishments—to motivate all those in the system; and . . . freeing local authorities—teachers, principals, and school boards—from most state regulation." *Id.* at 1426. Nearly all of these measures and ideas are included in NCLB.

13. Sebastian Junger, *The Perfect Storm: A True Story of Men Against the Sea* (W.W. Norton & Co. 1997) (the boat and crew were tragically lost when the ship steered into the confluence of three severe weather systems).

14. Boger, *supra* n. 12, at 1378. Boger compares the deterioration of segregation efforts and the rise of high-stakes accountability with the last voyage of the Andrea Gail, as detailed in the book "*The Perfect Storm.*"

15. Boger, *supra* n. 12, at 1450.

16. *Id; see generally* Kevin B. Smith & Kenneth J. Meier, *The Case Against School Choice* (M.E. Sharpe 1995).

> educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are... deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[17]

A. Brief History of Brown

1. Separate but Equal

Brown specifically overturned the ill legacy of the *Plessy v. Ferguson*[18] decision. The infamous *Plessy* decision gave birth to the U.S. Supreme Court's "separate but equal" doctrine,[19] despite acknowledging that the "object of the [14th] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law."[20] The Court found no reason to suppose that equal protection of the races implied social integration of the races.[21] *Plessy* was the gateway to a line of cases that stressed the government's role in preserving the separate, but equal, station of blacks in American society.[22] Nearly every state supreme court whole-heartedly endorsed the social division of blacks and whites[23]

---

17. *Brown I*, 347 U.S. at 494, 495.

18. 163 U.S. 537 (1896).

19. *Id.* at 543 ("A statute which implies merely a legal distinction between the white and colored races... has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.").

20. *Id.* at 544 (U.S. Const., amend. XIV, § 1 states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

21. *Plessy*, 163 U.S. at 544.

22. *See e.g. People ex rel. Cisco v. Sch. Bd. of Borough of Queens*, 56 N.E. 81, 82 (N.Y. 1900) (stating that "[t]he most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated, not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument"); *but see Cartwright v. Bd. of Educ. of City of Coffeyville*, 84 P. 382, 383 (Kan. 1906) (explaining that "[t]he board of education has no power to exclude colored children from schools established for white children, for the reason, solely, that they are colored, in the absence of a statute conferring such power.").

23. The Court distinguished social accommodations from civil and political rights. Even under the *Plessy* jurisprudence, a state could not deprive a black citizen of civil rights. *Strauder v. W. Va.*, 100 U.S. 303, 308 (1879) (The 14th Amendment guaranteed the black population "the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.").

through the "separate but equal" doctrine.[24]

This judicial precedent continued thirty-one years after *Plessy*,[25] when the Supreme Court in *Gong Lum v. Rice*[26] applied the "separate but equal" doctrine to the education of U.S. citizens of Chinese ancestry.[27] The question before the Court was "whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black."[28] The Court dismissively declared that it was a settled issue,[29] explaining that this "question . . . has been many times decided to be within the constitutional power of the state Legislature to settle, without intervention of the federal courts under the federal Constitution."[30] The Court reasoned that a state could discriminately educate individuals based on race because nearly every state Supreme Court and legislature allowed such discrimination.[31]

Thus, *Plessy's* promise of equal, though separate, accommodations proved empty. The infamous Jim Crow laws,[32] condoned by the Court's

---

24. *See e.g. Dameron v. Bayless*, 126 P. 273, 274 (Ariz. 1912); *Wysinger v. Crookshank*, 23 P. 54, 56 (Cal. 1890); *Reynolds v. Bd. of Educ. of City of Topeka*, 72 P. 274, 277-78 (Kan. 1903); *Roberts v. City of Boston*, 59 Mass. 198, 206 (Mass. 1849); *Lehew v. Brummell*, 15 S.W. 765, 766 (Mo. 1891); *People ex rel. King v. Gallagher*, 93 N.Y. 438, 456 (N.Y. 1883); *McMillan v. Sch. Comm.*, 12 S.E. 330, 331 (N.C. 1890); *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 210 (Ohio 1871).

25. *Plessy*, 163 U.S. at 537.

26. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

27. *Id.* at 85–86.

28. *Id.* at 85.

29. *Id.* at 85–86.

30. *Id.* at 87; *Cisco*, 56 N.E. at 82 (agreeing that "[i]f the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained"); *Ward v. Flood*, 48 Cal. 36, 52 (Cal. 1874) (claiming that "[t]here is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.").

31. *Gong Lum*, 275 U.S. at 85–86 (quoting *Plessy*, 163 U.S. at 545).

32. As one commentator observed,

> Jim Crow, a caricature of a black created by a white minstrel in 1828 to entertain white crowds, had by late in the century come to symbolize a systematic political, legal, and social repression of African-Americans. Blacks were subjected to judicially and politically sanctioned segregation, discrimination, and violence in a system Glenda Elizabeth Gilmore, a professor of history at Yale University, has called one of 'white supremacy, a system that was established both through legislation and the courts, and through custom. It could mean anything from being unable to vote, to being segregated, to being lynched. It was part and parcel of a system of white supremacy. Sort of like we use the apartheid as a codeword to describe a certain kind of white supremacy.

Charles J. Ogletree, Jr., All Deliberate Speed: Reflections On The First Half Century Of *Brown v.*

reluctance to enforce equality, systematically degraded and deprived blacks of their civil and social rights.[33] In particular, the Court seemed wary of federal interference with the traditional state concern of education. In order to remedy inferior education of black children, "a Court decision would have had to eliminate discretion [of local administrators] or closely supervise its exercise," and "[t]he political branches of the national government would have been disinclined to enforce such a decision."[34] Even Justice Harlan, the lone dissenter in *Plessy*, stated his concern that "any interference on the part of federal authority in the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."[35]

2. *Civil Rights Movement*

With the growth of the Civil Rights movement in the first half of the twentieth century, the notion that separated races could be equal was challenged in an ultimately effective way. Beginning around 1930, the National Association for the Advancement of Colored People (NAACP) relied on the "separate but equal" doctrine to force states to provide better educational opportunities for black students.[36] During and following World War II, the ranks of the NAACP swelled with returning black veterans eager to assert the freedoms for which they fought.[37] The NAACP's strategy was to force the states either to maintain equal educational facilities if they remained separate, or to allow blacks to enter white schools. This approach proved especially useful for the promotion of blacks into white law schools.[38]

Board of Education 98 (2004) (quoting National Public Radio (NPR), "Remembering Jim Crow: A Documentary by American RadioWorks" (radio broadcast, Oct. 2001) (available at http://www.americanradioworks.org/features/remembering/ transcript.html)).

33. Michael J. Klarman, *From Jim Crow To Civil Rights: The Supreme Court and the Struggle for Racial Equality* 57 (2004).

34. *Id.*

35. *Cumming v. Board of Ed. of Richmond County*, 175 U.S. 528, 545 (1899) ("We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states.").

36. J. Clay Smith, Jr., *Supreme Justice: Speeches and Writings of Thurgood Marshall* 46 (U. of Pa. 2003).

37. Justin Ewers, *Making History*, U.S. News and World Rpt. 76, 77 (Mar. 22-29, 2004) ("Membership in the National Association for the Advancement of Colored People swelled from 50,000 in 1940 to 450,000 in 1946.").

38. *Id.* at 77 (Graduate programs were "relatively easy target[s]" for 'separate but equal' desegregation because "apart from Howard University in Washington, D.C. and a medical school in Nashville, the South didn't offer black students any education at all."); *see also Sweatt v. Painter*, 339 U.S. 629, 635 (1950); *Sipuel v. Bd. of Regents of U. of Okla.*, 332 U.S. 631, 632–33 (1948); *Mo. ex rel.*

Beginning in the 1950s, Thurgood Marshall, the lead attorney for the NAACP, and other civil rights leaders felt an increasing "determination to eliminate all racial distinctions in America."[39] Marshall "knew that de jure and de facto segregation, which isolated the races in public schools and elsewhere, was a dangerous public policy."[40] Marshall also warned, "a segregated society would forever be unable to live up to its fundamental principles."[41]

By 1950, the time seemed right for a change in the Supreme Court. In *McLaurin v. Oklahoma State Regents for Higher Education*,[42] the Court stated that because society was growing "increasingly complex," the nation increasingly needed leaders unhampered by separate and unequal training.[43] In *McLaurin*, a black student was admitted to an Oklahoma university to pursue a graduate degree in education. However, pursuant to state law, the school imposed restrictions on the black student's association with white students. The Court concluded this separation resulted in the black student being impermissibly "handicapped in his pursuit of effective graduate instruction."[44] The Court boldly moved in the direction of desegregation under the 14th Amendment Equal Protection Clause when it stated that the black student, "having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races."[45]

After the Court's decision in *McLaurin*, the Court seemed ready for a monumental decision. A combination of unlikely events set the stage for

---

Gaines v. Canada, 305 U.S. 337, 349–50 (1938) (stating that "[t]he white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege . . ."; *Pearson v. Murray*, 182 A. 590, 593 (Md. 1936) (stating that "[s]eparation of the races must nevertheless furnish equal treatment. The constitutional requirement cannot be dispensed with in order to maintain a school or schools for whites exclusively. That requirement comes first.").

39. Smith, *supra* n. 36, at xiv.

40. *Id.*

41. *Id.*; *see also* Smith, *supra* n. 36, at xiv (stating that "[w]hile this stance was not Marshall's alone, it confirmed the beliefs of descendants of slaves and of liberals that they should continue to rely on the Declaration of Independence, Emancipation Proclamation, and the Reconstruction Amendments to transform America into a nation that embodied the creed it was preaching around the world to lead communist and emerging nations to democratic values."). Other civil rights leaders had also stressed this point, including Dr. Martin Luther King, Jr. *See generally* Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Martin Luther King, Jr.*, 103 Harv. L. R. 985, 1035–36 (1990).

42. *McLaurin v. Okla. St. Regents for Higher Ed.*, 339 U.S. 637 (1950).

43. *Id.* at 640–42.

44. *Id.* at 641 ("Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.").

45. *Id.* at 642.

change. First, Thurgood Marshall brought a segregation case to the Court involving schoolchildren. Meanwhile, Justice Frankfurter used backroom politicking in an attempt to stall any desegregation decision before an election year.[46] Then Chief Justice Vinson, an opponent of desegregation, died unexpectedly,[47] and Chief Justice Earl Warren, an opponent of the "separate but equal doctrine," was appointed to the Court.[48]

3. Brown *and* Brown II

The *Brown* case presented the straightforward question of whether segregation of schoolchildren based on race was consistent with the 14th Amendment's guarantee of equal protection.[49] All of the children-plaintiffs in the *Brown* class action suit sought to attend white schools in their neighborhoods, where each had earlier been denied attendance on racial grounds.[50] The Court addressed this issue by unanimously overturning *Plessy* and rejecting the "separate but equal" doctrine by succinctly declaring, "[s]eparate educational facilities are inherently unequal."[51] The monumental decision invalidated all state imposed segregation of public schools as violative of the 14th Amendment's Equal Protection Clause.

Brown v. Board of Education of Topeka[52] *(Brown II)*, decided just a year later, addressed the issue of remedies to the desegregation problem, because the states were dilatory or defiant in following the *Brown* decision.[53] Owing to the complex and varied nature of segregation in the states, the Court placed the "primary responsibility" for remedying segregation's ills on the local school authorities.[54] The Court empowered

---

46. NPR, *The Supreme Court and* 'Brown v. Board of Ed.' *The Deliberations behind the Landmark 1954 Ruling*, http://www.npr.org/templates/story/story.php ?storyId=1537409 (accessed Jan. 24, 2004). In 1952, Thurgood Marshall represented the clients who brought the case that would be known as *Brown*. Justice Frankfurter, noting a sharp split on the Court against desegregation and the potentially explosive effect of a segregation decision in an election year, persuaded the Court to stall any decision. *Id.*

47. *Id.* ("In September 1953, with the court seemingly split and oral arguments a month away, Chief Justice Fred Vinson died in his sleep."). Justice Frankfurter quipped to one of his clerks that the death of Chief Justice Vinson in the middle of the *Brown* controversy was his first sure sign of God's existence. Chief Justice Vinson opposed desegregation and was not as skilled as his successor at creating consensus among the justices. *Id.*

48. *Id.* Chief Justice Warren skillfully persuaded the dissenting justices to side with the desegregation movement. *Id.*

49. *Brown I*, 347 U.S. at 493.

50. *Id.* at 487.

51. *Id.* at 495.

52. *Brown II*, 349 U.S. 294 (1955).

53. *Id.* at 298.

54. *Id.* at 299.

the local federal district courts to keep a close eye on the schools' progress, and to make "such orders and decrees consistent with" the desegregation order.[55] The Court also commanded that desegregation among the states proceed "with all deliberate speed."[56]

B. *The Judicial Rise and Fall of* Brown

Today, the desegregation regime created by the *Brown* decision is currently a work in regress. Gary Orfield, director of the Harvard Project on School Desegregation, argues that the modern Supreme Court has "dismantle[d] . . . desegregation" in its attempts to interpret *Brown* and its progeny.[57] In part, this dismantling is due to strong conservative resistance to *Brown* and its federal mandates.[58]

1. *Judicial Support for* Brown

Nine years after *Brown II*, the Court declared that "the time for mere 'deliberate speed' has run out."[59] In *Green v. County School Board*,[60] the Court struck down "freedom of choice"[61] plans that placed the burden of integration on black students.[62] The Court chastised the Virginia school district for its "deliberate perpetuation of [an] unconstitutional dual system" and declared "[s]uch delays are no longer tolerable."[63] Fifteen years after the original *Brown* decision, the Court displayed its impatience with the states' slow desegregation efforts and replaced the decree, "all deliberate speed," with "at once."[64]

Emboldened by the Civil Rights Act of 1964[65] and the changing political tide, the Court in the 1960s and 1970s raised the pressure on local districts to desegregate their schools. In *Swann v. Charlotte-*

---

55. *Id.* at 301.

56. *Id.*

57. Gary Orfield & Susan E. Easton, *Dismantling Desegregation: The Quiet Reversal of* Brown v. Board of Education 1 (New Press 1996).

58. *Id.* Orfield and Easton describe the concerted efforts by the Nixon, Reagan, and Bush administrations to weaken *Brown's* impact on local schools through judicial appointments. *Id.* at 339.

59. *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 234 (1964).

60. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968).

61. In *Green*, a "freedom of choice" plan allowed pupils to choose to attend one of the two schools in the district. *Id.* at 434. One school was all-white and one school was all-black. *Id.* at 431. If a student did not choose, he or she was automatically reassigned to the school previously attended. *Id.* at 434.

62. *Id.* at 438.

63. *Id.* The Court did not completely rule out the role of personal choice plans, it simply held that "a plan utilizing 'freedom of choice' is not an end in itself." *Id.* at 439–40.

64. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20, 29 (1969).

65. *Civil Rights Act of 1964*, Pub.L. No. 88-352, 78 Stat. 241 (1964).

Mecklenberg Board of Education,[66] the Court forcefully declared that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."[67] The Court identified segregation as "the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution."[68] The Court reiterated that local school districts had an "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."[69]

The *Swann* Court approved bussing schoolchildren between neighborhoods to eliminate racial segregation in metropolitan areas.[70] The Court reasoned, "[t]he 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."[71] The Court noted that a school district's use of race in determining which schools students should attend was normally impermissible.[72] However, the Court held that because school authorities often "present[ed] a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments."[73]

2. *Judicial Dismantling of* Brown

In 1973, the Court began to change course from its decision in *Brown*. Starting in *Keyes v. School District No. 1*,[74] the Court sought to distinguish de jure from de facto segregation.[75] The Court held that the purpose of *Swann* was to remedy the wrongs of past segregation and to punish those school districts with a history of purposeful or intentional segregation.[76] Gary Orfield asserts that this reversal in emphasis was due to conservative pressure on the Court.[77] The rolling back of desegregation efforts marks the rise of the same ideological base that

66. 402 U.S. 1, 15 (1971).

67. *Id.*

68. *Id.*

69. *Id.* (quoting *Green*, 391 U.S. at 437-38).

70. *Swann*, 402 U.S. at 28.

71. *Id.* at 26.

72. *Id.* at 28.

73. *Id.*

74. 413 U.S. 189 (1973).

75. *Id.* at 208.

76. *Id.* at 208-09.

77. Orfield & Easton, *supra* n. 57, at 339 ("The judicial and political pressure for resegregation arose from decades of major changes growing out of five presidential election victories by a virtually all-white party opposed to civil rights.").

would lead the effort to reform education using the market-based techniques later codified in NCLB.

The repudiation of bussing broke the back of judicially mandated desegregation. In *Milliken v. Bradley*,[78] the Court removed the option of bussing children from wealthier white suburbs into downtown Detroit.[79] The Court held that federal affirmative integration could only be applied to schools that had shown clear de jure discrimination in the past.[80] Thus, the Court began applying *Brown's* remedial desegregation doctrine only as a punishment towards school districts with a history of explicit discrimination.[81]

The effect of this new approach was that federal courts were no longer allowed to inquire into the underlying de facto racism that supported the alignment of school districts in many northern cities. The Court worried that suburban districts, which had "not [been] shown to have committed any constitutional violation," would be adversely affected by desegregation.[82] The practical result is that, even today, many school districts in the North are far more segregated than school districts in the South.[83]

In the second *Milliken v. Bradley*[84] case, the Supreme Court further stymied desegregation efforts by the district court and admonished federal courts to narrow the effects of federal desegregation mandates.[85] The issue in *Milliken II* was whether and to what degree federal district courts were permitted to fashion remedial relief for students deprived of equal education in the past.[86] The Supreme Court held that courts have authority to remedy past discrimination, but that such relief must be limited "to the constitutional violation" and violator.[87]

---

78. 418 U.S. 717, 744–45 (1974) [hereinafter *Milliken I*].

79. *Id.* at 745.

80. *Id.* ("[A]n interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation.").

81. *Id.*

82. *Id.*

83. John R. Logan & Deirdre Oakley, *The Continuing Legacy of the* Brown *Decision: Court Action and School Segregation, 1960-2000* Table 2, http://mumford.albany.edu/schoolsegregation/reports/brown01.htm (accessed Mar. 29, 2004).

84. 433 U.S. 267 (1977) [hereinafter *Milliken II*]

85. *Id.* at 280–82; *see also U.S. v. Lopez*, 514 U.S. 549, 564 (1995) (Education is an area "where States historically have been sovereign.").

86. *Milliken II*, 433 U.S. at 279.

87. *Id.* at 279. ("Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation. But where, as here, a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'" (citations omitted)).

Milliken II set up a three-part framework "to guide district courts in the exercise of their remedial authority" under the Equal Protection clause and *Brown*.[88] First, the Court stated that, "like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation."[89] Second, the Court directed that the "decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[90] Finally, the Court guided the federal courts in devising a remedy to "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[91] Thus, the focus changed from eliminating segregation "root and branch"[92] to merely punishing districts with a history of de jure discrimination and returning local control as soon as possible.

The federal circuit courts followed the Supreme Court's shifting attitude. For example, in 1986, the Fourth Circuit allowed a school district to return to local control once "all vestiges of de jure segregation" had been eradicated.[93] In such "unitary" systems, "the school boards and not the federal courts will run the schools, absent a showing of an intent to discriminate."[94]

In 1991, the Supreme Court noted that federal desegregation orders "are not intended to operate in perpetuity."[95] The Court stressed, "[l]ocal control over the education of children allows citizens to participate in decision-making, and allows innovation so that school programs can fit local needs."[96] The Court held that a school district that "substantially complies" with a desegregation order is freed from the oversight of the federal judiciary.[97] For example, the Court freed the school districts in Oklahoma City from judicial oversight after only thirteen years of

88. *Id.* at 280.

89. *Id.*; *see also Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) ("The remedy must be related to the condition alleged to offend the Constitution."); *Swann*, 402 U.S. at 16 ("[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation.").

90. *Milliken II*, 433 U.S. at 280 (emphasis added).

91. *Id.* at 281.

92. *Swann*, 402 U.S. at 15.

93. *Riddick v. Sch. Bd. of City of Norfolk*, 784 F.2d 521, 543 (1986).

94. *Id.*

95. *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991).

96. *Id.* at 248.

97. *Id.* at 250 ("A school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like, but it of course remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment.").

"effective" federal desegregation.[98]

In 1992, the Court in *Freeman v. Pitts*[99] held that a district's partial compliance with a desegregation order could release it from federal oversight.[100] The Court set out three factors to determine whether a school district had sufficiently desegregated:

> [(1)] Whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; [(2)] whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and [(3)] 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 courts' decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.[101]

In 1995, the Court finished shifting its focus away from the *Brown* line of cases requiring racial integration to a new precedent of rapid restoration of local control in school districts.[102] The Court in *Missouri v. Jenkins* stressed that only de jure, not de facto, segregation was to be combated by the federal judiciary.[103] The Court found it dispositive that the *Jenkins* case "involved no interdistrict constitutional violation that would support interdistrict relief."[104] That is, there was a history of *intra*district segregation, but no history of *inter*district de jure segregation.[105] Thus, an interdistrict solution was inappropriate.[106]

In effect, following *Jenkins*, federal courts were no longer permitted to enforce de facto desegregation in schools effectively.[107] Nevertheless, many schools districts still operate under desegregation plans.[108]

---

98. *Id.* at 251 (Marshall, J., dissenting).

99. 503 U.S. 467 (1992).

100. *Id.* at 490.

101. *Id.* at 491.

102. *Jenkins*, 515 U.S. at 102 (quoting *Freeman v. Pitts*, 503 U.S. 467, 489 (1992)).

103. 515 U.S. 70.

104. *Id.* at 90.

105. *Id.* at 92 ("The District Court's remedial plan in this case, however, is not designed solely to redistribute the students within the [school district] in order to eliminate racially identifiable schools within the [school district]. Instead, its purpose is to attract nonminority students from outside the [district] schools. But this *inter*district goal is beyond the scope of the *intra*district violation identified by the District Court." (emphasis added)).

106. *Id.*

107. *See e.g. Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (per curiam), *cert. dismissed*, 529 U.S. 1050 (2000) (prohibiting race-conscious desegregation plans); *Eisenberg v. Montgomery County Sch. Bd.*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000) (prohibiting race-conscious desegregation plans).

108. Logan & Oakley, *supra* n. 83, at Table 1 (Between 1955 and 1994, 1087 schools districts, 782 in the South and 304 in other areas of the country, were placed under federally imposed

However, those plans are increasingly ineffective, due to changing demographics, "white flight" out of inner-city school districts,[109] and the Court's abandonment of the doctrine that supported the plans.[110] While the segregation of schools decreased throughout the seventies and eighties, school segregation resurfaced in the 1990s.[111] Segregation today is still very rampant in the U.S. For example, "Seventy percent of black students attend schools in which racial minorities are a majority, and fully a third are in schools 90 to 100 percent minority."[112] On the fiftieth anniversary of the *Brown* decision, some have commented on the irony that segregation has made a comeback in public schools.[113]

The decline of *Brown's* influence is accompanied by the resurrection of pre-desegregation rhetoric. Gary Orfield compares the reasoning of *Milliken* and *Jenkins* to the rationale of *Plessy*.[114] In particular, he notes that both *Plessy* and *Jenkins* employed federalist concerns to allow states to perpetuate separate educational facilities.[115] Orfield also shows that arguments against the basic premise of *Brown,* that separate could not be equal, has resurfaced in recent decades.[116]

---

desegregation plans.).

109. *See infra* n. 141 and accompanying text.

110. Orfield & Easton, *supra* n. 57, at 21. ("Today, a great many school districts remain under desegregation orders and have not filed motions to dissolve their plans." Some districts "have plans that are increasingly ineffective because of the tremendous growth of white suburbs and the expansion of city ghettos without any adjustment of attendance areas set upon in the old court order.").

111. Logan & Oakley, *supra* n. 83, at 5. ("Nationally there has been a slight upward drift in school segregation, as experienced by the average black student. This was expected as a result of Supreme Court and other decisions in the 1990's that facilitated the dismissal of desegregation orders. But if dismissal of segregation orders is the source of this upward tilt, the table shows that this phenomenon applies primarily outside the South. On average segregation did not rise in Southern districts that had implemented a desegregation plan.").

112. Adam Cohen, *The Supreme Struggle,* N.Y. Times 4A (Jan. 18, 2004).

113. *Id.* (Cohen notes that the "fierce resistance that school desegregation has met in the political realm, and more recently in the courts, has many civil rights advocates and scholars lamenting what one legal academic calls Brown's 'hollow hope.'" Cohen also quotes Orfield, "If you really believe in Brown, you can't celebrate it right now.").

114. Orfield & Easton, *supra* n. 57, at 33.

115. *Id.* at 34; *see also* Richard Thompson Ford, *Brown's Ghost,* 117 Harv. L. Rev. 1305, 1306 (2004) (showing that Stanford's Professor Ford argues that courts are partially responsible for the resegregation of schools, stating that "[l]egal rules, as much as private preferences, make segregation possible—indeed, almost inevitable . . . [and] [s]egregation is not simply the reflection of private preferences; it is also the product of law.").

116. Orfield & Easton, supra n. 57, at 37 (pointing out that conservative leaders like President Reagan's Assistant Attorney General for Civil Rights William Bradford Reynolds and Justice Clarence Thomas defended segregation as a benefit).

C. *The Ideals of Brown*

1. *Separate Cannot be Equal*

"[S]eparate educational facilities are inherently unequal."[117] The court reasoned that separating black children based on their race "generates a feeling of inferiority as to their status in the community."[118] This feeling of inferiority "affects the motivation of a child to learn."[119] Thus, a black child, shunned because of her race, is deprived of the right to an education equal to that of a white child.

Whether the *Brown* Court intended one or two grounds for its decision is unclear. Arguably, there are two rationales for the *Brown* decision: (i) "separate educational facilities are inherently unequal," and/or (ii) feelings of inferiority caused by state-enforced segregation violate the Equal Protection Clause.[120] Kathleen Sullivan described the justifications as either "prohibit[ing] all advertence to race even in the nominally symmetrical structures of official racial segregation," or "prohibit[ing] the imposition of racial hierarchy or caste."[121] Depending on which rationale one accepts for the *Brown* decision has a significant impact on one's acceptance of the distinction between de facto and de jure segregation.

If an individual accepts the first rationale that racially segregated educational facilities can never satisfy the Constitutional requirement of equal protection, then de facto segregation is equally as odious as de jure segregation. Conversely, if an individual accepts the second rationale that state-enforced segregation may cause psychologically damaging feelings of inferiority, then other forms of segregation may not be necessarily injurious. This is particularly true if the segregation *naturally* occurs absent state action. That is, if black children can be equally well educated in a de facto black school, then no state action is required to remedy the segregation. If there is natural segregation then the judiciary need only step in when there is state-sponsored segregation causing feelings of inferiority.

Justice Clarence Thomas is among individuals who adopt the second rationale that state-enforced psychological inferiority is the controlling principle that *Brown* intended to eliminate.[122] When Justice Thomas

117. *Brown I*, 347 U.S. at 495.

118. *Id.* at 494.

119. *Id.*

120. Kathleen Sullivan & Gerald Gunther, *Constitutional Law* 644 (Found. Press 2001).

121. *Id.*

122. *Jenkins*, 515 U.S. at 121–22 (1995) (Thomas, J., concurring).

criticizes the assumption that blacks need whites to learn he undermines *Brown's* legacy of racial integration.[123] Justice Thomas remarked in his *Jenkins* concurrence, "given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."[124]

Conversely, some contemporary commentators and researchers stress the absolute negative effects of segregation, whether de facto or de jure.[125] These commentators cite social science research underscoring the lack of equal access to quality education given to blacks and other minorities in all-minority schools.[126] For these scholars, the obvious cause of this inequality of opportunity is racially segregated schools.[127] Most scholars concede that the persistent achievement gap between racial groups may be an effect of complex factors other than segregation. These factors include economic disparities and cultural and familial values that certainly have some effect on the persistent test score gaps between white and minority schoolchildren.[128] Nevertheless, many supporters of *Brown* and its progeny are adamant that segregation of schoolchildren, whether de facto or de jure, necessarily disadvantages minority schoolchildren.[129]

---

123. *Id.*

124. *Id.* ("Indeed, it may very well be that what has been true for historically black colleges is true for black middle and high schools. Despite their origins in the shameful history of state-enforced segregation, these institutions can be both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of learning for their children. Because of their distinctive histories and traditions, black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." (citations and quotations omitted)).

125. *See e.g.* Judith Blau, *Race in the Schools: Perpetuating White Dominance?* 203 (Lynne Reiner 2003); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 Am. U. L. Rev. 1461 (2003).

126. *See supra* n. 105.

127. Roslyn Arlin Mickelson, *Achieving Equality of Educational Opportunity in the Wake of Retreat from Race Sensitive Remedies: Lessons from North Carolina*, 52 Am. U. L. Rev. 1477, 1485 (2003).

128. *See* Meredith Phillips, Jeanne Brooks-Gunn, Greg J. Duncan, Pamela Klebanov & Jonathan Crane, *Family Background, Parenting Practices, and the Black-White Test Score Gap*, in *The Black-White Test Score Gap* 103 (Brookings Instn. Press 1998).

129. *See e.g. Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 482 (1979) (Powell, J., dissenting) ("[D]e facto segregation has existed on a large scale in many of these cities, and often it is indistinguishable in effect from the type of de jure segregation outlawed by *Brown*"); Kevin Brown, *50 Years of Brown v. Board of Education: Essay: The Road Not Taken In Brown: Recognizing The Dual Harm Of Segregation*, 90 Va. L. Rev. 1579, 1590 (October 2004); Jeffrey J. Wallace, *"John Bingham And The Meaning Of The Fourteenth Amendment": Ideology vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 Akron L. Rev. 693, 710 (2003) ("The expansive interpretation of equal opportunity... interprets the objective of antidiscrimination law as the eradication of the substantive conditions of black subordination, and it attempts to enlist the

The proposition that segregation disadvantages minority schoolchildren, which *Brown* is founded upon, needs little empirical support to thrive. While evidence may be marshaled for or against competing ideologies, some basic assumptions are unassailable. For advocates of *Brown*, the proposition that separate education can never be equal is nearly a matter of faith. Similarly, many modern conservatives (not known for their overwhelming support of desegregation under *Brown*)[130] accept as a matter of principle that properly managed market forces, rather than state-imposed integration, will improve the overall quality of education for all, regardless of any separation.[131]

2. *Racial Integration: A Positive Right of Minority Children*

The Court's decisions in the late 1960's advanced racial integration as a positive right for individuals to demand equality, rather than allowing only a negative right to be free from inequality.[132] The *Brown* court sought to equalize educational opportunities of white and black schoolchildren. One way to achieve this in a caste society was to join the fate of the privileged children with those of the underprivileged children. In such a scheme, parents would not be able to withhold benefits from certain children based on race or socioeconomic class.

Initially, the *Brown* desegregation plan began as a choice-centered doctrine. The element of choice allowed black children the option of attending previously all-white schools.[133] In response, Southern school districts created "freedom of choice" plans in order to facially comply with desegregation orders.[134] Unfortunately, these "nominal desegregation plans" were used by the districts to "forestall any

---

institutional power of the courts to further the national goal of eradicating the effects of racial oppression."); Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence Of Denial And Evasion*, 40 Am. U.L. Rev. 1307, 1330 (Summer 1991) ("Differentiation between de jure and de facto segregation, however, is largely illusory.).

130. Orfield & Easton, *supra* n. 57, at 16. (Orfield notes that former Presidents Reagan and George H.W. Bush, leaders of the modern conservative movement, did not support the desegregation movement during their respective administrations.).

131. Boger, *supra* n. 12, at 1425–26; *see also* Paul T. Hill, *The Supply Side of School Choice*, in *School Choice and Social Controversy* 140, 142 (Brookings Instn. Press 1999) (explaining the focus by conservatives on the difference between de jure and de facto segregation. The modern political right overwhelmingly criticizes de jure segregation. However, because de facto segregation is a product of "market" forces, conservatives see a market-based approach as a legitimate solution).

132. A positive right is often referred to as an "entitlement." That is, an individual's positive right entitles her to government action beneficial to her interests. Negative rights, on the other hand, are more akin to our traditional notion of a "freedom." That is, an individual's negative rights protect him from government interference by prohibiting governmental action in a particular sphere.

133. Amy Stuart Wells, *Time to Choose: America at the Crossroads of School Choice Policy* 62 (Hill and Wang 1993).

134. *Green*, 391 U.S. at 438; Wells, *supra* n. 133, at 62.

meaningful school desegregation efforts."[135] The Court later abandoned "choice" as an effective remedy for segregation.[136]

"*Brown* rested on the principle that intentional public action to support segregation was a violation of the U.S. Constitution."[137] This assertion was quite controversial because the Supreme Court reversed fifty years of judicial endorsement of social discrimination based on race. The principle that the government may not actively discriminate based on race in certain situations had a long-standing precedent.[138] Arguably, *Brown* merely extended this principle to public education. Yet the *Brown* decision extended beyond a mere prohibition of discrimination. Faced with continued deep-seated and state-sponsored racism, the Court fought back with remedies that focused on the student composition in the districts, rather than the "purpose and good faith of desegregation efforts."[139] Thus, the Court rejected "choice" plans and required affirmative racial integration when it endorsed the bussing of students.[140]

In the wake of *Brown* and required affirmative racial integration, a negative public reaction ensued. Whites began to pull their children from public schools in inner cities and other predominantly minority areas.[141] This type of withdrawal has been termed "white flight," and in part, was directly inspired by the *Brown* decision and the public animosity towards integration.[142] During this same time, white-dominated state legislatures withdrew support for public schools. For example, in *Griffin v. County School Board*,[143] the Court had to reprimand the Virginia school system

---

135. Wells, *supra* n. 133, at 63.

136. *Green*, 391 U.S. at 440. ("[T]he general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation." The Court suggested that other remedies, including zoning, may be more effective at combating segregation in schools.).

137. Orfield & Easton, *supra* n. 57, at 2.

138. *See e.g. Cooper v. Aaron*, 358 U.S. 1, 16 (1958); *Buchanan v. Warley*, 245 U.S. 60, 81 (1917) (stating that "[i]t is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution").

139. Sullivan & Gunther, *supra* n. 120, at 734.

140. *Swann*, 402 U.S. at 29 (Court-mandated gerrymandering of school districts was permissible in order to remedy past segregation); Sullivan & Gunther, *supra* n. 120, at 734. ("Thus, the freedom of choice issue in the context of formerly de jure segregated schools sharply presented the question of whether the 14th Amendment merely required desegregation (the elimination of formal racial barriers) or compelled integration (the creation of racially mixed schools)... The Court's answer was clear: its emphasis shifted from purification of the decisional process to achievement of a certain result, albeit on the theory that achieving results was the only acceptable evidence that the process had been purified.").

141. Jay Tolso, *Chain Reaction*, U.S. News & World Rpt. 84 (Mar. 22-29, 2004).

142. *Id.*

143. *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218

for closing down public schools and giving white children vouchers for private schools in order to avoid desegregation orders.[144] Another example of whites reacting to the forced integration in the decades after *Brown* was the State of Mississippi's refusal to offer public kindergarten for its youngsters,[145] at least in part, to avoid mixing young black children with young white children.[146]

In fact, not all federal courts agreed with the Supreme Court's decree that segregation must end by affirmative state-enforced racial integration. Resistance from the judiciary began early and strong. In 1958, the Fifth Circuit declared, "the Fourteenth Amendment does not speak in positive terms to command integration, but negatively, to prohibit governmentally enforced segregation."[147] Even today, Justice Thomas relies on this reasoning to oppose such an affirmative integration of schools.[148] In *Jenkins*, he argued that "[t]he point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color."[149] He sarcastically quipped that "if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks."[150]

However, the language and immediate history of *Brown* empowered federal courts to ensure that school districts properly mixed their populations to avoid continued segregation of black children. Court-ordered desegregation reached its zenith with the bussing of children between neighborhoods and districts in the early 1970s.[151] It was not until the rise of the modern conservative Court that *Brown* was interpreted as only requiring school districts to eliminate any de jure

144. *Id.* at 234.

145. NPR, *William Winter and the Education of Mississippi: Former Governor Reflects on Efforts to Modernize Schools*, http://www.npr.org/features/feature .php?wfId=1718439 (accessed Mar. 1, 2004). While white parents could send their children to private kindergartens, black children were typically excluded from private schooling.

146. *Id.* ("In 1980, when William Winter became governor of Mississippi, there was no state funded kindergarten. School attendance was not compulsory. Mississippi ranked last in the nation among most educational indicators. And in the more than 25 years that had passed since the 1954 Brown vs. Board of Education decision, the state had not been able to come to terms with school desegregation. In 1982, Gov. Winter succeeded, against all odds, in passing the most sweeping education reform the state had ever seen, which among other things established kindergarten for all Mississippians.").

147. *Holland v. Bd. of Pub. Instr.*, 258 F.2d 730, 732 (5th Cir. 1958).

148. *Jenkins*, 515 U.S. at 122 (Thomas, J., concurring).

149. *Id.*

150. *Id.*

151. *Swann*, 402 U.S. at 28.

segregation plans.[152]

III. THE NO CHILD LEFT BEHIND ACT

A. *Explanation of the Act*

"*No Child Left Behind* is designed to change the culture of America's schools by closing the achievement gap, offering more flexibility, giving parents more options, and teaching students based on what works."[153]

The No Child Left Behind Act, passed on January 8, 2002, is based on four fundamental principles: high-stakes accountability, parental choice, local control, and dissemination of modern pedagogical methods.[154] As one commentator remarked, "it is hard to disagree with the goals of NCLB: closing the achievement gap between high- and low-achieving students, including... members of 'at-risk' groups."[155] Indeed, the overall goals of NCLB and *Brown* appear identical, or at least congruent: to provide an equally good education to all students, regardless of race.[156] However, the ideological emphasis of NCLB's method differs from *Brown's* legacy. In particular, NCLB's emphasis on high-stakes accountability and choice plans differs from the ideological underpinnings of *Brown*.[157]

---

152. Orfield & Easton, *supra* n. 57, at 19 (noting the Supreme Court's "philosophical shift" away from *Brown*).

153. U.S. Dept. of Educ., *Stronger Accountability: Accountability*, http://www.ed.gov/nclb/accountability/index.html (accessed Mar. 1, 2004).

154. *Id.*

155. Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New Idea, Getting Behind No Child Left Behind and Getting Outside of it All*, 15 Hastings Women's L. J. 1, 27 (2004).

156. *No Child Left Behind Act of 2001*, 20 U.S.C.S. § 6301 et seq. ("An act to close the achievement gap with accountability, flexibility and choice, so that no child is left behind.").

157. NCLB's other two principles, modern pedagogy and local control, will not be explored in this paper. *Brown I* simply did not address pedagogy. *Brown I*, 347 U.S. 483. While *Brown II* stated that local authorities had primarily responsibility for improving their schools, the reality was much different. *Brown II*, 349 U.S. at 299. Under *Brown's* authority, federal courts become involved in the day-to-day operation of local schools. In *Milliken I*, the district court ordered judicially created school programs, including a state-funded 'effective schools' program. 418 U.S. at 732. The Court overturned the district court's intrusive remedies and announced the priority of returning schools to local control. *Id.* at 744. Gary Orfield compared this call for local sovereignty to that used in the *Plessy* era to segregate schools in the first place. Orfield & Easton, *supra* n. 57, at 33. NCLB has sparked a similar controversy as a federal program that purports to preserve local control. Recently, the Utah legislature protested against the perceived encroachment of the Act by threatening to opt Utah out of portions of NCLB. Ronnie Lynn, *'No Child' Law Closer to Federal Funds Only*, Salt Lake Trib. A10 (Feb. 26, 2004). Virginia's House of Delegates has also considered a similar move. Andrew Block, *Debating School Standards Reveals Double Standards*, Richmond Times-Dispatch A15 (Apr. 3, 2004). Both states are concerned with the amount of control that the federal government would have over traditional locally controlled public school districts.

Indeed, these principles of high-stakes accountability and choice plans of NCLB have been at the center of the modern conservative movement's education reform plans.[158] In the early 1980s, when *Brown's* influence declined, conservatives began in earnest to reform education using market-based models borrowed from the business community.[159] Presidents Reagan, George H.W. Bush, and George W. Bush have all endorsed school voucher and other market-based reforms.[160] NCLB is the latest federal presentation of modern conservatives' vision of education reform.[161]

B. The Principles of NCLB

1. High-stakes Accountability: Separate Can Be Equal

Under the act's accountability provisions, states must describe how they will close the achievement gap and make sure all students, including those who are disadvantaged, achieve academic proficiency. They must produce annual state and school district report cards that inform parents and communities about state and school progress. Schools that do not make progress must provide supplemental services, such as free tutoring or after-school assistance; take corrective actions; and, if still not making adequate yearly progress after five years, make dramatic changes to the way the school is run.[162]

High-stakes accountability is a foundational principle of NCLB.[163] "[A]ccountability systems borrow many of their essential features from the world of business management."[164] With NCLB, "the federal government threw its full weight behind closing the racial learning gap."[165] The Act places its great hope for improving impoverished schools by increasing the accountability of teachers, schools, and districts

158. Rosenbaum, n. 155, at 26.

159. *Id.* ("NCLB is a product of the standards-based reform movement and has a lot of currency among policy-makers and politicians otherwise opposed to the federal government's meddling in education and other matters of local control.").

160. Michael J. Dailey, *Blaine's Bigotry: Preventing School Vouchers In Oklahoma . . . Temporarily*, 39 Tulsa Law Review 207, 212 (2003); *see also* Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, in *School Choice and Social Controversy* 36 (Brookings Instn. Press 1999).

161. A brief of history of these two principles is presented *infra* Parts IV.B.1 and IV.B.2.

162. U.S. Dept. of Educ., *supra* n. 153.

163. U.S. Dept. of Educ., *Overview: Introduction: No Child Left Behind, Introduction*, hppt://www.ed.gov/nclb/overview/intro.index.html (accessed Sept. 24, 2004).

164. Boger, *supra* n. 12, at 1380.

165. Edward Blum, *Two Hundred Ninety-Four Months and Counting?*, 8 Tex. Rev. L. & Pol. 213, 226 (2003).

in which minority students live.[166] The Act uses a "carrot and stick" approach to improving test scores of disadvantaged students. The carrot aspect of NCLB includes Title I federal funding for public schools. The stick aspect of NCLB is quite oppressive. If local schools fail to measure up to NCLB's demanding requirements, "a series of increasingly onerous sanctions will kick in, with the final result being a total restructuring of under-performing schools: staff replacements, reconstitution as a charter school, [and] state or private management takeovers."[167]

Noticeably absent is any mention of racial integration among and between school districts. This absence is not accidental. The operative focus of NCLB's accountability measures is making sure that every student has an opportunity to "bloom where planted." The conservative movement since *Brown* has been openly antagonistic to affirmative state-sponsored racial integration.[168] NCLB reflects this lack of faith in racial integration.

High-stakes accountability is not necessarily antagonistic to *Brown's* desegregation regime, though many conservative defenders of high-stakes accountability oppose affirmative integration.[169] High-stakes accountability is the conservative movement's answer to the same problem addressed in *Brown*: the under-education and underachievement of minority students.[170] NCLB's solution avoids affirmative action or state-enforced racial integration. Conservative beliefs regarding desegregation stress the need to prevent the government from creating de jure segregation, but not to enforce racial integration.[171] When the government starts to create affirmative action programs of

---

166. U.S. Dept. of Educ., *Stronger Accountability: Questions and Answers on No Child Left Behind, Accountability,* http://www.ed.gov/nclb/accountability/schools/ accountability.html (accessed April 14, 2004).

167. Blum, *supra* n. 165, at 226.

168. Gary Orfield & Carole Ashkinaze, *The Closing Door: Conservative Policy and Black Opportunity* 205 (U. of Chi. 1991) ("The federal and state policy changes successfully implemented by conservatives entailed a total redefinition of the problem of racial inequality . . . [T]he perception of the late 1960s that America faced a fundamental racial crisis was replaced by the belief that everything reasonable had been done and that, in fact, policies had often gone so far as to be unfair to whites. Conservatives argued that the policies were even hurting the intended beneficiaries and that minorities would be better off if welfare programs and policies such as affirmative action and school desegregation were abandoned").

169. *Id.*

170. Unlike NCLB, *Brown* did not explicitly address educational deficiencies. *Brown I*, 347 U.S. at 494; *Compare to No Child Left Behind Act of 2001*, 20 U.S.C.S. § 6365. The evil that *Brown* addressed was the under-education of black children. *Brown I*, 347 U.S. at 494. The Court linked the feeling of inferiority inspired by state-sponsored racism to a lack of student motivation. *Id.* In turn, this motivation made it difficult for minority children to achieve at the same level as their white counterparts. *Id.*

171. Sullivan & Gunther, *supra* n. 120, at 733–35.

enforced racial segregation, conservative resistance heats up.[172]

2. The Role of Choice: Using Market Approaches to Reform Education

"Parents of students in Title I schools identified for school improvement, corrective action, or restructuring will have the option to transfer to another public school in the district not in school improvement."[173]

The drafters of NCLB envisioned harnessing the engine of competition to improve schools.[174] NCLB creates markets within school districts to foster competition for students among the schools.[175] These markets require the development of education-savvy consumers. Boger describes the hopeful advent of "the educationally oriented parents and children (call them 'educational connoisseurs')" who take advantage of choice in education.[176] According to Boger, these educational connoisseurs "will demand and receive higher quality educational services than consumers with less exacting educational tastes."[177]

Choice in education is as old as market theory itself. Adam Smith advocated that children be allowed to choose their own teachers.[178] Thomas Paine suggested an early form of vouchers for low-income families to help them choose the school attended by their children.[179] Within the last century, Milton Friedman proposed absolute school choice, removing the government from education altogether.[180] More recently, former Presidents Ronald Reagan and George H.W. Bush both proposed school voucher programs.[181] NCLB is the latest attempt to give

---

172. Orfield & Easton, *supra* n. 57, at 16.

173. U.S. Dept. of Educ., *Overview: Introduction: Executive Summary of No Child Left Behind*, http://www.ed.gov/nclb/overview/intro/execsumm.html (accessed April 14, 2004).

174. U.S. Dept. of Educ., *Stronger Accountability: No Child Left Behind: President Bush's Education Reform Plan, Promoting Parental Options and Innovative Programs*, http://www.ed.gov/nclb/overview/intro/presidentplan/page_pg9.html (accessed Apr. 14, 2004) ("Systems are often resistant to change—no matter how good the intentions of those who lead them. Competition can be the stimulus a bureaucracy needs in order to change. For that reason, the [a]dministration seeks to increase parental options and influence. Parents, armed with data, are the best forces of accountability in education. And parents, armed with options and choice, can assure that their children get the best, most effective education possible.").

175. *No Child Left Behind Act of 2001*, 20 U.S.C.S. §§ 7172–7173.

176. Boger, *supra* n. 12, at 1443. (quoting James S. Liebman, *Voice, Not Choice*, 101 Yale L.J. 259, 261 (1991)).

177. *Id.*

178. Dailey, *supra* n. 160, at 211.

179. *Id.*

180. *Id.*; Milton Friedman, *The Role of Government in Education, in Economics and the Public Interest* 123 – 25 (Robert A. Solo ed., Greenwood Press 1982).

181. Dailey, *supra* n. 160, at 212.

children and parents choice in education.[182] NCLB endorses market approaches because of the success the market has had in improving the quality of many other aspects of modern life. Proponents of school vouchers hope that voucher systems "would create a competitive environment which would ultimately result in better education for both the private and public school student."[183]

Modern conservatives contest the notion that modern vestiges of racial isolation are entirely due to state action, or that they are amenable to state remedies. To modern conservatives, a private marketplace remedy is appropriate to fix the problems created by personal, not public, choice.[184] Justice Thomas stressed that "[t]he continuing 'racial isolation' of schools after de jure segregation has ended may well reflect voluntary housing choices or other private decisions."[185] According to Justice Thomas, and indeed the modern conservative movement generally, endorsement of individual economic autonomy or any overt governmental attempt to alter segregation caused by "private choices" would violate basic conservative notions of liberty and would be counterproductive.[186]

Predictably, there is some tension between the supporters of NCLB, who advocate charter schools and a market approach, and the teachers' unions. While the National Education Association (NEA) "supports public charter schools that have the same standards of accountability and access as other public schools," the NEA insists, "[p]ublicly funded schools must be accountable to the general public — as well as parents — for budgets, health and safety standards, academic standards and access for students."[187] Further, the NEA asserts, "holding charter schools

---

182. *Brown* and its progeny also sought to give black children the right to choose which school they would attend. Wells, *supra* n. 133, at 62. However, the Court conclusively stated that school choice was not useful for many segregated districts. *Green*, 391 U.S. at 440.

183. Jo Ann Bodemer, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the* Lemon *Test*, 70 St. John's L. Rev. 273, 287-88 (1996); Dailey, *supra* n. 160, at 213.

184. On the other hand, those who support desegregation readily admit the role of private choice in the segregation of schools. Ford, *supra* n. 115, at 1306. ("Many private individuals, families, and institutions of civil society desired, and still segregation; deprived of direct state support, they found other means for perpetuating it." However, Ford argues the courts have failed in their duty to counter such de facto segregation: "Many legal scholars, myself among them, have blamed the inadequate response of the federal courts for allowing and indeed facilitating white flight." Ford further argues that the courts' failure to address segregation, in whatever form, have implicitly legitimized private segregation.).

185. *Jenkins*, 515 U.S. at 116 (Thomas, J., concurring) ("That certain schools are overwhelmingly black in a district that is now more than two-thirds black is hardly a sure sign of intentional state action.").

186. *Id.*

187. Natl. Educ. Assn., *Charter Schools*, http://www.nea.org/charter/index.html (accessed Mar. 9, 2004).

accountable to parents and taxpayers is proving to be troublesome."[188] In short, the NEA distrusts the introduction of market forces into the traditionally public service of education.

Some commentators argue that the NEA's conflicts with market approaches are better explained as the result of the NEA's interest in maintaining job security and the status quo for its teachers and constituents.[189] In particular, market-based merit pay and fluid rules about hiring and firing clash with the Union's traditional approach to education.[190]

This resistance to capitalist approaches in education has stirred up antipathy between the teachers' unions and the Bush administration. Recently, U.S. Secretary of Education Rod Paige caused a controversy when he compared the NEA, to a "terrorist organization" because of the organization's opposition to NCLB.[191] Enraged, the NEA called for Mr. Paige's dismissal.[192] The episode demonstrates the significant tension between the teachers' unions, which tend to support socially-conscious public policy, and the Bush administration's capitalistic approach to education reform.[193]

Those who advocate market approaches to education reform regard desegregation and affirmative action as distractions from the real problems facing today's education system.[194] Affirmative action[195] is, in some respects, antithetical to a free-market approach because it compels, rather than harnesses, individual choice. Consequently, some have argued that "[r]ace-based affirmative action sweeps under the rug the need for the kinds of real educational reform" that market based solutions can provide.[196] "The longer affirmative action remains in place,

---

188. *Id.*

189. Blum, *supra* n. 165, at 225–26 ("The state of minority education in this country will not change until the forces of competition take effect in every inner-city school district.").

190. *Id.* at 225–26.

191. Robert Pear, *Education Chief Calls Union 'Terrorist,' Then Recants*, N.Y. Times, A20 (Feb. 24, 2004) (Comment made during a private meeting with Governors at the White House on February 23, 2004).

192. Sam Dillon & Diana Jean Schemo, *Union Urges Bush to Replace Education Chief Over Remark*, N.Y. Times, A15 (Feb. 25, 2004).

193. Blum, *supra* n. 165, at 227 (discussing the Thernstroms, authors on the effects of racial segregation and desegregation, rejection of affirmative action as distracting to the real problems facing education).

194. *See id.*

195. Affirmative action, the use of racial considerations by the government to promote the advancement of members of disadvantaged minority groups, is intimately related to the desegregation effort started by *Brown*. In both cases, race-sensitive solutions are used by the state to remedy traditional patterns of discrimination and inequality existent in the "market."

196. *Id.*

the more the likelihood of reform diminishes; the longer major educational reform is delayed, the wider the gap will probably grow."[197]

One of the key benefits of market approaches, from the perspective of NCLB supporters, is the power of incentives. Conservatives criticize affirmative action programs for their lack of incentives. "After all," Blum notes, "why should a black high school student bust a gut studying three extra hours every night to get an A in a difficult course, when he knows a C+ will get him the same offer from a competitive college?"[198] Of course, this argument is weaker given the current law regarding affirmative action in colleges as outlined in recent Supreme Court cases.[199] Given the subjective and uncertain nature of acceptable college admission practices,[200] a black high school student has a great incentive to maintain good grades.

Nevertheless, a focus on incentives can be problematic. While Americans enjoy a considerable amount of competition and rugged individualism in society, they also strive for an egalitarian notion of "equal opportunity." In other words, Americans believe everyone should get an opportunity to lead a successful life. Education, as the *Brown* court pointed out, is essential to maintaining an even playing field.[201]

One can easily see how some competition and incentive structures are useful in education. But what happens when it is carried too far? In the business world, Americans allow Darwinist influences to weed out failing enterprises. The labor and real capital of the failed businesses are then recycled by the market into new businesses. What is the result of a failing (by analogy, insolvent) school?

The "failing" label is essential to the market approaches of NCLB.[202] Once a school "fails," it triggers the parents' option to take their children out of the school.[203] In a recent discussion, Scott Cameron[204] pointed out

---

197. *Id.*

198. *Id.* at 228.

199. *Gratz v. Bollinger*, 539 U.S. 244, 270–71, 275 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 336–37, 343 (2003) (The Supreme Court struck down point-based or quota systems for affirmative action, while affirming a subjective approach.).

200. *See supra* n. 221 and accompanying text.

201. *Brown I*, 347 U.S. at 493.

202. U.S. Dept. of Educ., *Stronger Accountability: Choice and Supplemental Educational Services Frequently Asked Questions*, http://www.ed.gov/parents/schools/ choice/choice.html#1 (accessed Apr. 14, 2004) ("Children are eligible for school choice when the Title I school they attend has not made adequate yearly progress in improving student achievement—as defined by the state—for two consecutive years or longer and is therefore identified as needing improvement, corrective action or restructuring. Any child attending such a school must be offered the option of transferring to a public school in the district—including a public charter school—not identified for school improvement, unless such an option is prohibited by state law.")

203. *Id.*

that labeling an entire school as failing is counterproductive to the process of improving it. According to Dean Cameron, one of the key components of educational quality is a student's perception of herself, her teachers, and her school. Indeed, arguably, the *Brown* court arguably rested its "separate is inherently unequal" doctrine on the damaging sense of inferiority that segregation instilled in black children.[205] So, once a school has been labeled failing, the children of that school belong to a failure. Leaving the school may not be a real option for many of the children, so they are stuck in an inferior school. Further, such labeling depresses the job quality of teachers and administrators at those schools. In the end, primary and secondary education may make poor markets.

Furthermore, NCLB seems to limit the effectiveness of any potential "school markets" by eliminating the choice doctrine using high-stakes accountability. Although choice is a critical ideological component of NCLB; it does not allow interdistrict competition. Thus, if an entire school district is failing, the "failing" label is given to all schools in the district regardless of individual school performance. Hence, a student stuck in a poor school district has no real market choice. In addition, a school district is not motivated, under NCLB, by interdistrict competition; only individual schools participate in the intradistrict market.

IV. COMPARING *BROWN* AND NCLB

First, it must be emphasized that the philosophies behind *Brown* and NCLB are not necessarily antagonistic. Rather, some of the key differences come down to ideological emphases or priorities. For instance, NCLB does not require segregation of minority children, nor does it emphasize the need to desegregate America's schools. Instead, NCLB is premised upon the hope that increased accountability of teachers in underperforming schools can close the achievement gap without the necessity of mixing the racial makeup of children's classrooms.

A. Separate Is Not Equal vs. Separate Can be Equal

In 1964, sociologist James S. Coleman was commissioned to prepare a report on the achievement gap between blacks and whites. [206] He

204. Scott Cameron is Associate Dean at J. Reuben Clark Law School at Brigham Young University.

205. *Brown I*, 347 U.S. at 493.

206. Blau, *supra* n. 125, at 28.

concluded that the "racial variation in educational achievement was due not to differences in school practices, but rather to inadequate parenting."[207] Coleman summarized the report's findings:

> The sources of inequality of educational opportunity appear to lie first in the home itself and the cultural influences immediately surrounding the home; then they lie in the schools' ineffectiveness to free achievement from the impact of the home.[208]

Around the time of Coleman's report, Daniel Patrick Moynihan, then Assistant Secretary of Labor, agreed with Coleman's conclusions.[209] Moynihan blamed the deterioration of the black family as the root of black education woes.[210] Subsequent research showed that Coleman's and Moynihan's methodologies were flawed and left out key variables including economic shifts and unequal resources.[211]

However, Moynihan and Coleman's arguments gained credence among conservatives reacting to the Civil Rights movement.[212] Some commentators observed, "Assumptions that the remaining problems [of the minority community] stemmed from deficient minority aspirations, culture, and family structure dominated the federal executive branch in the 1980s."[213] It seemed easier to blame lack of black achievement on seemingly "intangible" factors. These intangible factors included aggregated individual choices within the minority community that placed their children at a disadvantage in mainstream America. Seen this way, racial integration of schools would have little effect on the achievement of minority students bound by their "cultural" choices.

NCLB certainly does not embrace an integration or assimilation approach to racial disparity.[214] Rather, the Act stresses the need for each

---

207. *Id.*

208. James S. Coleman, *Equal Schools or Equal Students?*, 4 The Pub. Interest 73–74 (1966).

209. *The Case for National Action: The Negro Family*, Policy Statement, 1965, 787–326, U.S. Govt. Printing Off., (U.S. Dept. of Lab. 1965).

210. *Id.*; Blau, *supra* n. 125, at 29.

211. *Id.*; (Blau points out that, among other problems, Moynihan's sweeping generalization about the black family were unfounded, given his research results. Instead, lack of education and occupational opportunity appeared to be stronger indicators of disparity between the black and white populations.); *see* William Julius Wilson, *The Declining Significance of Race*, (2nd ed., U. of Chi. Press 1980) (Wilson detailed the effect that shifting economic conditions had on the impoverishment of black families in the Northeast. In particular, the movement of economic activity away from the Rustbelt of the Northeast deprived many transplanted blacks of manufacturing jobs.).

212. Orfield & Ashkinaze, *supra* n. 168, at 206.

213. *Id.* (These assumptions gave "great prominence to such neoconservative researchers as Thomas Sowell, Charles Murray, and Glenn Loury.").

214. *See* 20 U.S.C.S. § 6301 (statement of purpose of NCLB). The Act's remedies for the achievement gap and failing schools focus exclusively on improving the quality of the school rather than moving a student out of a failing school district.

child to bloom where planted. High-stakes accountability seeks to improve the quality of education wherever or whoever a student is, and not remove that student to another environment as the first alternative. Of course, if high-stakes accountability fails to improve the school environment, a student may have the choice to move to another school within the same district.[215]

Conversely, the early proponents of *Brown* and desegregation sought to reconfigure an educational institution that only favored the advancement of white children. The most direct way for Thurgood Marshall and desegregating courts to achieve this end was to affirmatively mix the racial composition of public schools. Anything short of combined resources for all the races, dominant or oppressed, cheated black children of equal educational opportunity.

B. Affirmative Integration vs. Market-driven Choice

One of the primary differences between *Brown* and NCLB is the difference in perceptions of the purpose of public education and the proper role of government. While *Brown* emphasized that education prepares children to become citizens in an egalitarian democracy, NCLB treats education as a commodity. Supporters of desegregation often insist that primary and secondary education should not be subject to the merciless forces of modern capitalism. Instead, they would tend to argue that public education is a public good that should be provided without regard to market forces. On the other hand, NCLB, as a product of the neoconservative movement, is premised on the idea that education is a service that can benefit from competition. The modern conservative movement that supports NCLB embraces the libertarian values of economic autonomy and rejects any perceived oppressive influence of government on markets. Public education, they would argue, is a stagnant institution that would benefit from robust competition.

Indeed, such competition may be inevitable. In this regard, white flight can be seen as the market at play. Wealthy parents who cannot stomach the idea of their children attending a failing school simply vote with their feet or pocketbooks. These families either move to all-white neighborhoods or place their children in private schools to avoid integration. Of course, white flight is not inspired solely by racism. The reality is that all-minority schools in poor urban areas tend to be much

215. U.S. Department of Education, *Ten Facts Every Parent Should Know About the No Child Left Behind Act*, http://www.ed.gov/nclb/choice/help/tenfacts/index.html (accessed November 17, 2004) ("No Child Left Behind may let you transfer your child to a better public school if the state says the school your child attends needs to improve.").

poorer in quality than predominantly white schools in suburban areas. Most parents would think twice before voluntarily sending their child to struggling schools (often populated by minority students). Thus, due to "market forces," the cycle of privilege and opportunity continues along lines of race. NCLB and *Brown* offer different solutions to breaking the cycle.

Different reactions to white flight from supporters of *Brown* and NCLB are telling. Advocates of desegregation view white flight as an evil that must be remedied, by bussing if necessary. Advocates of choice and the market would likely regard white flight as an inevitable consequence of market forces. NCLB, at least in theory, seeks to widen the choices available to all education consumers.[216] The drafters of the Act would tend to argue that they are simply extending to disadvantaged families the choice that is available to more economically-privileged families.

V. CONCLUSION

Brown and NCLB may share an objective, but their goals differ. *Brown* and its progeny sought to use race-sensitive solutions to increase the quality of education for black children. NCLB, on the other hand, depends on market-based approaches to increase minority achievement in public education. The different approaches of providing every child with a quality education stem from at least two differences in ideology. For *Brown* a separate education could never be equal, and affirmative racial integration was necessary to provide every child with a quality education. Conversely, under NCLB high-stakes accountability and a market-driven approach ensure that a separate education can be equal, and every child will have a quality education.

It would be jejune to assume that these ideologies have not clashed before. Similar lines in the sand defined the *Plessy* debate at the end of the 19th century. The *Brown* decision and the policy of affirmative action stands or falls depending on where the Court, the President, Congress, and the American people come down on these issues. *Brown* was dismantled because the ground shifted and the conservative approach gained momentum. NCLB developed out of that same conservative movement.

Disagreement on these points is over a century old and is unlikely to

216. However, this fiction of choice does not survive scrutiny. First, NCLB only allows a transfer within the same district. If the entire district is failing, the children remain trapped. Second, "choice" is not a magic power, endowing its possessor with the miraculous ability to ignore the social, economic, and logistical realities of life. The parents and children do not always have the luxury of being "education connoisseurs."

disappear any time soon. While this author does not claim that either position is superior to the other, it is instructive to understand how they differ. Knowing the distinctions between *Brown* and NCLB allows each of us to shape the debate in a meaningful way and find common ground where parties agree. Thus, understanding the differences between the two competing ideologies and their solutions for providing a quality education for every child, aid the scholar, educator, and citizen alike in coming to his or her own position on these critical issues.

Dan J. Nichols