The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process

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THE BUS STOPS HERE: DEFINING THE CONSTITUTIONAL RIGHT OF EQUAL EDUCATIONAL OPPORTUNITY AND AN APPROPRIATE REMEDIAL PROCESS†

DAVID CHANG*

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**I. INTRODUCTION: RIGHTS AND REMEDIES**

Everyone knows why courts order busing. Segregated schools saddle blacks with an inferior education. Blacks are disadvantaged enough in American society. If segregated schools reinforce a correspondence between race and class, so that race becomes caste, then society should eliminate them. Integrate. Bus.

Such remedial goals are laudable; one might even say that they are morally implicit in a system that embraces ideals of individual "merit." Busing,

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Commentators also have acknowledged the significance of the caste-like nature of race in America. *See, e.g.*, B. Bittker, *The Case for Black Reparations* 17 (1973) ("[A]s slavery receded into the background, it was succeeded by a caste system embodying white supremacy."); Yudof, *Nondiscrimination and Beyond: The Search for Principle in Supreme Court Decisions*, in *SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE* 108 (W. Stephan & J. Feagin eds. 1980) ("Integration is part and parcel of the undoing of a caste system that consistently, over long periods of time, has disadvantaged Black Americans.").

2. A "meritocratic system" rewards individuals according to the value of their contributions to society. Such a system can encompass either a market mechanism of distribution or control by a welfare state. The justice of such a system can be
nevertheless, is a controversial issue in American political discourse. Social scientists question its effectiveness. Supreme Court Justices question its wisdom. Significant sectors of the public oppose it—even purported beneficiaries—and Congress has considered restricting the jurisdiction of

understood in at least two ways. The first focuses on maximizing social wealth—individuals who contribute most to the social “good” should be most rewarded. This notion of justice cannot accommodate a remedial ideal that seeks to compensate for social disadvantages suffered by individuals unless the short-term costs in efficiency are outweighed by long-term gains in productivity. The second view of a meritocracy places as its cornerstone the just treatment of the individual. Skills are still rewarded to the extent society values them; there is no socialistic distribution of wealth according to need. But this view contains the fundamental notion that all individuals have the right to realize their innate skills, so that each person has an equal chance to compete in the meritocratic system of distribution. True “merit” can be rewarded only when the process gives an equally fair chance to each person.

For a discussion of the concept of merit and racial justice, see Fallon, To Each According To His Ability, From None According To His Race: The Concept Of Merit In The Law Of Antidiscrimination, 60 B.U.L. Rev. 815 (1980) (The concept of “merit” must be considered in the context of fundamental social goals and values.).

See, e.g., Court Ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 150 (1981) (statement of Herbert J. Walberg, Professor of Education, University of Illinois, Chicago) [hereinafter cited as Senate Hearings] (“[B]using for purposes of school desegregation has not proven significantly helpful on average to the learning of either majority group or minority students.”).

See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 469 (1979) (Burger, J., concurring) (“It is becoming increasingly doubtful that massive public transportation really accomplishes the desirable objectives sought.”); id. at 483-89 (Powell, J., dissenting) (“Experience... has cast serious doubt upon the efficacy of far-reaching judicial remedies directed not against specific constitutional violations, but rather imposed on an entire school system on the fictional assumption that the existence of identifiable black or white schools is caused entirely by intentional segregative conduct, and is evidence of systemwide discrimination.”); Keyes v. School Dist. No. 1, 413 U.S. 189, 247-48 (1973) (Powell, J., concurring and dissenting) (“Any child, white or black, who is compelled to leave his neighborhood and spend significant time every day being transported to a distant school suffers an impairment of his liberty and his privacy.”).

Black residents of Boston, for example, have expressed discontent with the court ordered assignment of students in Boston’s desegregation case. See Boston Globe, March 12, 1982, at 1, col. 1 (poll showing that 79% of black parents in Boston favored a plan allowing them to choose the schools their children will attend). One faction of plaintiffs has advocated that the district court abandon student assignment formulae in favor of a “freedom of choice” assignment plan coupled with court-mandated improvements in educational quality. These plaintiffs, however, neither identified the constitutional source nor justified the scope of their proposed alternative remedy. See generally Boston Globe, Nov. 19, 1982, at 15, col. 1 (discussing district court’s rejection of plaintiffs’ motion for proposed “freedom of choice”
the federal courts to order busing as a remedy for proven constitutional violations.\(^6\)

However scrutinized in political debate, busing as a legal remedy has not been adequately analyzed.\(^7\) The critical relationship between right and remedy has not been demonstrated because the underlying constitutional right has never been precisely defined. From the earliest pronouncements, the right to be free from racial discrimination in public education was not supported by clear normative precepts. “Separate but equal” was deemed constitutionally permissible; the doctrine embraced some notion of equality, but equality in what sense and toward what end was never quite clear.\(^8\)

\(^6\) In the fall of 1981, for example, the Senate and House of Representatives considered a series of bills that would have curtailed the power of federal courts to order busing as a remedy. *Senate Hearings*, supra note 3, at 150, *passim*. Senate bill S. 528, *The Neighborhood School Act of 1981*, was designed to “establish reasonable limits on the power of courts of the United States in the imposition of injunctive relief in suits to protect the constitutional rights of individuals in public education . . . .” *Id.* at 671. The bill would have severely restricted federal judicial power to “order or issue any writ ordering directly or indirectly any student to be assigned or to be transported to a public school other than that which is nearest to the student’s residence . . . .” *Id.* at 673.

These hearings also provide some insight into the domination of political considerations in the congressional debate. In his opening remarks, Senate Subcommittee Chairman John P. East solemnly noted that busing “is a matter of vital public importance. It is a major political issue. It has tremendous importance and ramifications in American politics . . . . So it is in that spirit that I, as chairman of this subcommittee, approach the matter.” *Id.* at 2. Significantly, Senator East did not mention the constitutional rights of black students anywhere in his opening remarks. *See id.* at 1-2.

\(^7\) Even those Supreme Court Justices who question the wisdom of busing have not focused on the proper relationship between right, harm, and remedy. Rather, they have based their evaluations on extraneous considerations such as local autonomy. *See, e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 483 (1979) (Powell, J., dissenting) (noting that the district court order improperly dismantles neighborhood schools “in the face of compelling economic and educational reasons for preserving them”); *id.* at 489 (Rehnquist, J., dissenting) (emphasizing “complete . . . displacement of local authority”).

\(^8\) The phrase “‘separate but equal’ does not define clear constitutional principles. What does it mean for the state to provide equal educational facilities to separate racial groups? Must there be an equal expenditure per student? Must each racial population as a whole receive equal funds, so that the population with fewer constituents would receive more funds per student? For a murky treatment of the “equality” requirement under the regime of “‘separate but equal,” see *Cumming v.*
Today, after nearly a century of development, the right remains fuzzy and obscure, encompassing competing doctrinal and normative strands.

Contemporary problems of normative and doctrinal ambiguity began in 1954 with two landmark Supreme Court decisions. In *Brown v. Board of Education,* the Court declared racial segregation in public education unconstitutional under the fourteenth amendment; in *Bolling v. Sharpe,* the Court invalidated purposeful segregation under the fifth amendment. But there was a more significant distinction in the rationales underlying these two decisions, a dichotomy that plagues the evolution of constitutional doctrine even today. Although *Bolling* employed what has now become standard equal protection analysis relating legislative means to legislative ends, *Brown* focused on the quality of education provided to minorities, holding that purposeful segregation is unconstitutional because it affords minority students unequal educational opportunity. *Brown* did not discard the "separate but equal" doctrine, but reinterpreted its applicability in the realm of public education.

As a consequence of this doctrinal dichotomy, case law since 1954 purporting to frame the right against racial discrimination in education has developed in the context of competing normative precepts. The different constitutional values of *Brown* and *Bolling* both justified the proscription of affirmatively imposed segregation. Subsequent cases, however, have proscribed other forms of segregation, only tenuously related to intentional state policy. For these other forms of segregation, the distinction between the constitutional values pursued by *Brown* and *Bolling* is critical.

*Richmond Bd. of Educ.,* 175 U.S. 528 (1899) (rejecting challenge to locality’s failure to provide high school facilities for blacks by suggesting that relevant question was not whether county should close white high school or open black high school, but whether it should close black elementary schools and open black high school).


*11* *Bolling* provided the Court’s first explicit pronouncement that the principles of equal protection apply to the federal government through the due process clause of the fifth amendment. *But c.f.* *Korematsu v. United States,* 323 U.S. 214, 216 (1944) (The Court, without specifying the textual origin of its constitutional analysis, and in the context of a suit against the United States, declared that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”).

*12* For an early analysis of these equal protection principles, see Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

*13* *Brown,* 347 U.S. at 493-94 & nn.10-11.

*14* See infra notes 32-35 and accompanying text.

*15* In *Brown,* segregation had been imposed by mandatory statutes. Schools were designated as white or black, district lines were gerrymandered, and children were required to attend a particular school despite the fact that another school might be closer to their homes. 347 U.S. at 486-88. In *Bolling,* “minors of the Negro race . . . were refused admission to a public school attended by white children solely because of their race.” 347 U.S. at 498.
This Article analyzes the parameters of equal protection in the context of public education. After identifying and separating the various normative and doctrinal strands that have pervaded judicial analysis since 1954, it recharacterizes the constitutional right against racial discrimination in education as a right of equal educational performance. It then demonstrates why the remedy of busing is inadequate to compensate fully for a violation of that right. Finally, this Article proposes principles upon which to frame an alternative remedy that responds to both the normative premises of the right and the underlying causes of educational deprivation.

II. STATE RESPONSIBILITY AND THREE FORMS OF SEGREGATION

Courts have perceived the denial of educational rights primarily in terms of racial segregation ever since Brown. Segregation in schools, however, is not a simple, single phenomenon; it may be the product of several different causes. Different forms of segregation may be classified according to the extent of the government's role in creating racially identifiable demographic patterns. Although the Court has not adequately distinguished among these various forms of segregation, an analysis of the underlying constitutional right requires that they be carefully defined.

The first form of segregation invalidated by the Supreme Court was the product of a governmental policy, either explicit or covert, to separate the races in public schools. Explicit segregation, sometimes referred to as "southern segregation," exists when a state or school district designates particular schools as "white schools" or "black schools" and requires students to attend the schools "appropriate" for their race. A covert policy of segregation, occasionally termed "northern segregation," may be effected if, for example, a local school board racially gerrymanders school attendance zones, so that race and school coincide. These forms of affirmative segregation, which I shall term first order segregation, eschew an economically rational neighborhood assignment policy; although a neighborhood might be integrated, the government purposefully expends effort and resources to create a segregated educational system.

The Supreme Court also has held a second form of segregation to be constitutionally cognizable. Such racial separation, which I shall call second order segregation, reflects the demographic effects of past invidious state action. Gerrymandered attendance zones, for example, designed to achieve a segregated educational system, might influence the development of residential patterns. Whites might be discouraged from locating in an area that,

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16 Brown, 347 U.S. at 487-88, 495.
18 See, e.g., Green v. County School Bd., 391 U.S. 430 (1968) (governmental "free choice" policies resulted in segregated school system despite existence of integrated neighborhoods).
under an economically rational school assignment policy, would have been served by a racially mixed school, but because of segregative gerrymandering, was served by an all black school. Similarly, blacks might be economically foreclosed from residing in areas served by all white schools. A school district formerly without discrete, racially identifiable neighborhoods might develop segregated residential patterns if the invidious governmental policies are sufficiently long-lived to work their evil effects. These demographic patterns linger even after the offending governmental entity ceases its affirmative discriminatory practices.

Thus, second order segregation is the product of a contemporary policy of neighborhood school assignment implemented in a system encompassing segregated residential patterns shaped by past invidious state actions. The extent of second order segregation is that increment of segregation caused by the proscribed past state actions. Current invidious intent plays no role in defining a second order constitutional violation.

In the final category of segregation, or third order segregation, neither current invidious intent nor past state policy plays a doctrinally relevant role. Third order segregation in public schools exists whenever a school district applies a neighborhood assignment policy to segregated neighborhoods, thus yielding segregated schools. How those neighborhoods originally became segregated is irrelevant. Under a constitutional doctrine proscribing third order segregation, any segregation in the public schools would be illegitimate. State remedial responsibility would be triggered whenever a school district operates a segregated system, regardless of whether segregated communities were promoted in the past.

III. THE BROWN/BOLLING DICHOTOMY

A. Two Theories of Right

The Supreme Court legitimized first order segregation when it extended the *Plessy v. Ferguson* doctrine of "separate but equal" to public education. Affirmative state action to separate school children by race was held

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19 Economists suggest that price is a function of supply and demand. Property values would increase in the area surrounding a school designated for white children because of greater competition among white families for those homes. Less wealthy black families who might previously have lived there would be forced to relocate.


21 In the case of a second order violation, current intent may be benign or even remedial. Second order segregation is defined solely by past invidious intent and the current consequences of actions undertaken with that intent.

22 For a discussion of third order segregation and principles of "state action," see *infra* note 159.

23 163 U.S. 537 (1896).

constitutionally permissible so long as the state provided equal tangible facilities to each group.\textsuperscript{25} Equal protection doctrine, however, did not remain static. Beginning with the Japanese internment cases after World War II,\textsuperscript{26} courts began to scrutinize racial classifications with special care. Under this mode of analysis, courts presume that racial classifications are employed with constitutionally proscribed discriminatory intent. This presumption can be rebutted only if such classifications are tailored to promote compelling governmental interests.\textsuperscript{27} In 1954, a challenge to racial segregation in education succeeded under this developing body of equal protection doctrine; in \textit{Bolling v. Sharpe},\textsuperscript{28} the Court declared segregation in public education to be unconstitutional.\textsuperscript{29}

\textit{Bolling}, however, has been all but forgotten in the body of law defining unconstitutional discrimination in the realm of public education. In \textit{Brown v. Board of Education},\textsuperscript{30} decided on the same day as \textit{Bolling}, the Court also declared segregation unconstitutional, but rested its holding on an entirely different legal theory. \textit{Brown}'s legal premise—ambiguous, unique in the contemporary constitutional context,\textsuperscript{31} and encompassing a powerful remedial potential—has shaped and confused the development of the doctrine ever since.

Although the \textit{Brown} court concluded that "in the field of public education the doctrine of 'separate but equal' has no place,"\textsuperscript{32} the Court did not repudiate the doctrine of "separate but equal" in principle. Rather, the Court found as a factual matter that purposeful racial separation stigmatizes minority children, promotes their self-perception of inferiority, and thus deprives them of equal educational opportunity.\textsuperscript{33} In establishing \textit{Brown}'s critical legal premise—that the state must provide minority children with the

\textsuperscript{25} \textit{Brown}, 347 U.S. at 488 ("'Under [Plessy's] doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate.'").

\textsuperscript{26} See, e.g., \textit{Korematsu v. United States}, 323 U.S. 214 (1944).

\textsuperscript{27} \textit{Id.} at 216.

\textsuperscript{28} 347 U.S. 497 (1954).

\textsuperscript{29} \textit{Id.} at 500. The Court held that "'[s]egregation in public education is not reasonably related to any proper governmental objective.'" \textit{Id.}

\textsuperscript{30} 347 U.S. 483 (1954).

\textsuperscript{31} The significant disparity in the legal rationales of these two cases has perhaps been obfuscated by \textit{Brown}'s renowned use of social science data to support its factual presumption that purposeful segregation psychologically harms minority students. See, e.g., G. \textit{Gunther, Constitutional Law} 717 (1975) (discussion of social science data and factual presumption).

\textsuperscript{32} \textit{Brown}, 347 U.S. at 495.

\textsuperscript{33} \textit{Id.} at 493-94. "To separate [school 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." \textit{Id.} at 494.
opportunity to learn as effectively as white children learn—the Court departed from the definition of "equality" envisioned under the regime of Plessy. The Constitution no longer required equality merely in tangible facilities; rather, it required that blacks and whites benefit equally from public education. Under the rationale of Brown, affirmative segregation was constitutionally infirm only because it impeded the educational potential of minority children; the constitutional evil in Brown resulted from the fact that minority children did not have the opportunity to learn as much as white children. Had the Court not invoked its factual theory of psychological harm, separation would not have been deemed to impede educational opportunity, and in the context of Brown's analytical framework, segregation might have remained within the discretion of local officials.

In focusing on the separation side of the "separate but equal" equation, the Court logically fashioned a remedy eliminating the state-imposed segregation. The Court might, however, have authorized a remedy addressing the equality component of the equation. Because the policy of racial separation was constitutionally proscribed only because of its effect on educational opportunity, the Court might have sought other forms of relief which could equalize educational opportunity for minority children. The Court arguably could have achieved the desired result by requiring the government to provide tangibly superior facilities for students in minority schools. By thus balancing the advantages gained from superior tangible facilities against the impediments to learning caused by forced separation, the Court could have cancelled out inequalities, providing "net" equal protection to black students. But the Court chose the alternative route—it presumed equal tangible facilities, postulated inequality engendered by separation, and in Brown II, required a remedy attacking segregation. District courts were directed to

34 For a similar analysis of the right defined in Brown by a central participant in the 1954 litigation, see Carter, A Reassessment of Brown v. Board, in SHADES OF BROWN 20 (D. Bell ed. 1980):

While we fashioned Brown on the theory that equal education and integrated education were one and the same, the goal was not integration but equal educational opportunity. Similarly, although the Supreme Court in 1954 believed that educational equality mandated integration, Brown requires equal educational opportunity. If that can be achieved without integration, Brown has been satisfied.

Id. at 27 (emphasis added).

35 If the right consists of equal educational opportunity, segregation is unconstitutional only if it denies that right.

36 See Bell, A Model Alternative Desegregation Plan, in SHADES OF BROWN 125 (D. Bell ed. 1980); Carter, supra note 34, at 27.


38 In Brown's context of first order segregation, see Brown, 347 U.S. at 484 n.1, the Supreme Court surely chose the more appropriate remedy. If the state compromised equal educational opportunity by imposing psychological harm through segregation, such educational harm may be most easily and effectively remedied by eliminating segregation. Legislation mandating or permitting segregation may be
issue decrees requiring that minority children be admitted to public schools in a racially nondiscriminatory manner "with all deliberate speed."

Bolling and Brown thus were predicated on distinct theories with divergent emphases. Bolling employed the classification analysis typical of contemporary equal protection doctrine. Its ultimate concern was legislative intent and the legitimacy of the "democratic" process. Brown, however, focused not on the classifications employed, but on the substance of the education provided by the state and the disparate benefit received by minority and white children. By retaining the analytical framework of "separate but equal," which developed before the expansion of equal protection doctrine in the area of racial classifications, the Court focused on a notion of substantive equality. Brown's significant contribution was in changing the substance of what the Constitution required from equal tangible facilities to equal educational opportunity.

B. The Extent of State Responsibility

The Brown/Bolling dichotomy is significant not simply because the two cases are predicated on different theories of right and pursue different values, but also because the cases imply different predicates of state responsibility. repealed, gerrymandered district lines redrawn, and students admitted to neighborhood schools on a nondiscriminatory basis. Such action eliminates the theoretical basis of the psychological harm, thus curing the unequal educational opportunity.

A remedy that addressed the equality component of the "separate but equal" principle would not as effectively vindicate the particular deprivation in Brown's first order setting. A remedy seeking to compensate for psychological learning impediments by providing superior tangible facilities is no more than an indirect, band-aid solution. Indeed, such an approach could even exacerbate the psychological harm by demonstrating how much the white majority is willing to pay to remain isolated from the black majority. Moreover, a remedy requiring tangible superiority would be inappropriate in the context of first order segregation because it necessitates additional state initiative into uncharted territory. By ordering the elimination of gerrymandering and unifying school attendance zones, the Court simply seeks to undo what has affirmatively been done. The remedy prescribed by the Brown court thus eliminates the constitutionally proscribed harm in an administratively efficient manner. In the context of second and third order segregation, however, a remedy focusing on tangible superiority has quite different implications. See infra notes 127-35 and accompanying text.

39 Brown II, 349 U.S. at 301.

40 Why did the Supreme Court employ the developing "suspect classification" equal protection analysis in Bolling and the more substantively-oriented analysis in Brown? Perhaps the Court had been waiting for the opportunity to create an equal protection component within the fifth amendment. Furthermore, the far-reaching analysis of educational opportunity was more appropriately placed in the context of the fourteenth amendment because the states were the predominant violators of the constitutional right.

41 For a discussion of the definition of equal educational opportunity, see infra text accompanying notes 98-112.
Although Bolling's equal protection analysis logically proscribes only first order segregation, the remedial implications of Brown extend to third order segregation.

Bolling's doctrine, concerned with the classification of individuals according to the criterion of race, reflects the principle that the government may not act with discriminatory intent. The intent to treat people differently because of race corrupts the democratic process. Because the doctrine proscribes discriminatory intent, and not differential treatment per se, courts will uphold racial classifications if they are shown to be necessary to achieve a compelling governmental objective. A doctrine that values democratic decisionmaking, and that examines governmental actions only to uncover invalid motivation, logically should consider only contemporary governmental intent. If the government acts with legitimate purpose today, any discriminatory impact caused by the effects of past action should be irrelevant. Once contemporary classification and discriminatory intent cease, the democratic process is pure, and Bolling's principles are no longer implicated.

The Brown decision has far broader implications for the extent of state liability. Although Brown was decided in the context of first order segregation, contemporary state intent was not an element defining the underlying right. Plaintiffs' constitutional rights were violated because their educational progress was inhibited by intentional segregation. Minority students interpreted the government's intent to separate as a mark of inferiority. Thus stigmatized, their sense of self-worth, and consequently their motivation and educational potential, were smothered. In determining whether a school district had violated the rights of the plaintiff class, the Court asked whether black students received the same benefits from public education as did white students. The constitutional question focused on whether intentional segregation had impeded the educational progress of black students. Invidious state intent was merely the factual predicate causing the constitutional evil of unequal educational opportunity.

It might be argued, however, that because the government did intend to establish racially segregated schools, Brown cannot stand for a right which proscribes discriminatory educational impact unrelated to discriminatory governmental intent. But this argument confuses the intent to accomplish a legitimate goal with the intent to accomplish a proscribed goal. The government always intends to accomplish certain objectives. When those objectives are not illegitimate, neither is the underlying intent. In Brown the intent to separate had no more significance than the intent to provide public education or the intent to provide equal tangible facilities to each group; in

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42 See Korematsu v. United States, 323 U.S. 214, 223-24 (1944). In Korematsu, the Court held that although "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," id. at 216, the challenged classifications were legitimate wartime security measures.
43 Brown, 347 U.S. at 494.
44 See supra notes 32-35 and accompanying text.
separating the races, the government simply intended to accomplish an otherwise legitimate objective.

The government's intent to separate played a significantly different role in *Bolling* than it did in *Brown*. Under the *Bolling* branch of equal protection, the intent to treat racial groups differently is itself the proscribed evil; the intent to separate is itself the proscribed element of governmental conduct. In *Brown*, the Court did not consider whether the defendant school boards had acted with the intent to hinder the educational progress of minority students. The intent to separate was irrelevant because separation itself was not at issue. Intent thus played no doctrinal role in *Brown*; it was not a legal element defining the underlying right and the governmental violation.

*Brown* thus can be read to imply a third order right, a right with powerful remedial implications. By changing the focus of equality in the "separate but equal" equation from tangible resources to educational quality, *Brown* can be interpreted to stand for the principle that a group of disadvantaged minority children has the right to benefit from public education to the same extent as does a relevant group of whites.45 Any contemporary educational deprivation suffered by minority children would violate a third order constitutional right.

**IV. DEFINING THE CONSTITUTIONAL RIGHT: JUDICIAL DOCTRINE**

**A. Swann: The Watershed Toward Second Order Confusion**

Although first order segregation was slowly eradicated in the years following *Brown* and *Bolling*, segregated schools remained. Second and third order segregation, irrelevant in the context of *Bolling*’s concern with the process of governmental decisionmaking, become significant in the context of *Brown*’s concern with educational quality if they impede equal educational performance.

In *Swann v. Charlotte-Mecklenburg Board of Education*,46 the Supreme Court declared that the Constitution required more than the elimination of first order segregation. In a move unprecedented in the doctrine of equal protection, the Court created a second order right.47 The Constitution now proscribed the continuing effects of past intentional discrimination in public education.

*Swann* began as a case about first order segregation. Prior to 1954, the Charlotte-Mecklenberg school system had been operated under a regime of segregation mandated by state and local law.48 In purporting to discharge its

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45 For a discussion of principles defining equality of average educational performance among groups of minorities and whites, see infra note 107 & Section VI A.2.


47 *Id.* at 20-21, 26, 28.

48 *Id.* at 5-6. The case was litigated in two phases. After the initial phase involving first order segregation, see Swann v. Charlotte-Mecklenburg Bd. of Educ., 243 F.
responsibilities under *Brown* and *Brown II*, the school board implemented a system of geographical school attendance zoning between 1962 and 1965, but failed to bring ten schools within the geographical assignment system. These ten black schools remained governed by the old system of race-conscious assignment modified by a "free choice" transfer plan permitting students to opt out of their assigned schools. Black school children and their families challenged the board's remedial measures as constitutionally inadequate, alleging that the school board's recent rezoning and its failure to eliminate affirmatively imposed segregation from those ten schools were motivated by invidious intent.

At this stage, *Swann* presented a clear first order violation. A school board had allegedly gerrymandered attendance zones to maintain school assignments, thus perpetuating a dual system. The board continued to assign children to schools according to their race. Under a *Bolling* conception of individual right and governmental violation, the board was treating people differently because of race, thus acting with constitutionally proscribed intent. The educational right framed in *Brown* also was violated because the government continued to pursue actions that could psychologically harm minority students and impede their educational opportunity. The remedy, simple and logical, was to require racially neutral and economically rational school assignment of students, teachers, and staff. Yet the right pursued and the relief imposed by the courts were not so limited. The district court,

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49 *Swann*, 369 F.2d at 30.

50 The plaintiffs claimed that the school zoning process was undertaken with segregative intent, and that the boundaries were racially gerrymandered to perpetuate the segregated system. *Swann*, 243 F. Supp. at 668. They further challenged that the board's failure to bring the remaining 10 black schools within the geographical zoning scheme and its teacher assignment practices were motivated by invidious intent and perpetuated an unconstitutional dual system. *Id.*

51 Courts have presumed that racial "neutrality" requires an integrated assignment of teachers. *See*, e.g., United States v. Montgomery Bd. of Educ., 395 U.S. 225, 232 (1969) (upholding district court's order that "in each school the ratio of white to Negro faculty members [must be] substantially the same as it is throughout the system"). Yet commentators have argued that a middle class white teacher cannot effectively teach impoverished black children. *See generally* Edmunds, *Effective Education for Minority Pupils: Brown Confounded or Confused*, in *SHADES OF BROWN* 109 (D. Bell ed. 1980). Edmunds emphasizes the importance of a teacher's support, rapport, and high expectations in promoting a student's educational success. These characteristics are more likely to be manifested by a teacher whose cultural background is similar to that of the student. *Id.* at 121.
the court of appeals, and the Supreme Court, all participating in a doctrinal revolution, held that the Constitution proscribed not only current invidious intent to segregate, but also segregation that reflected the continuing effects of past intentional discrimination.52

This second order doctrine is unique in American constitutional law. In no other area of equal protection has the Supreme Court deemed the continuing effects of a past violation to be relevant in defining a contemporary violation and framing a constitutionally required remedy.53 The Supreme Court, by

52 "'The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.' *Swann*, 402 U.S. at 15. The Court held that it was proper for the district court to consider the effects of invidious policies that "promote[d] segregated residential patterns" in fashioning a remedy. *Id.* at 21. A remedy might require abandoning the concept of neighborhood zoning.

The notion that the Constitution proscribes the continuing effects of past segregation apparently originated with the affirmative remedial duty recognized in *Green v. County School Bd.*, 391 U.S. 430 (1968). See *Swann*, 402 U.S. at 7 ("The present proceedings were initiated in September 1968 by petitioner Swann's motion for further relief based on *Green* . . . and its companion cases. All parties now agree that in 1969 the system fell short of achieving the unitary school system that those cases require.") (citation omitted).

This reading of *Green* 's affirmative duty, however, far exceeded the limits of the court's rationale in that case. The court simply held that when a locality transformed its method of affirmative segregation from explicitly labelling schools as "black" or "white," to covertly assigning individual students on the basis of race, even if the students had the choice to opt out of their assignment, the locality had not fulfilled its duty. An affirmative duty to cease contemporary intentional segregation in no way implies an affirmative duty to eliminate the continuing effects of past intentional acts. *See infra* note 71.

53 Although second order language has been employed in some cases concerning segregation in public housing, the Supreme Court has not defined a constitutional violation and remedy in terms of the effects of past discrimination. In the litigation that culminated with *Hills v. Gautreaux*, 425 U.S. 284 (1976), for example, plaintiffs had challenged public housing locations chosen by the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD) as intentionally segregative. Plaintiffs had demonstrated a pattern of discriminatory housing policy by a pattern of past practices. See *Gautreaux v. Chicago Housing Auth.*, 296 F. Supp. 907, 913 (N.D. Ill. 1969). The Supreme Court stated that "'[i]n order to prohibit future violations and to remedy the effects of past unconstitutional practices, the [district] court directed CHA to build its next 700 family units in predominantly white areas of Chicago and thereafter to locate at least 75% of its new family public housing in predominantly white areas inside Chicago or in Cook County.'" 425 U.S. at 288.

The constitutional propriety of the district court's order against the CHA based on the fourteenth amendment, however, was not at issue in the Supreme Court. 425 U.S. at 296 ("'HUD does not . . . question the appropriateness of a remedial order designed to alleviate the effects of past segregative practices . . . .'"). Rather, the issue before the Supreme Court concerned the remedial obligation of HUD under the
implication, confirmed the special status of the educational right in Washington v. Davis. There, plaintiffs alleged that the personnel test employed by the District of Columbia police force to screen job applicants violated the requirements of equal protection because it disproportionately disqualified black applicants. The Court distinguished between governmental action motivated by discriminatory intent and neutral actions having a discriminatory impact on disadvantaged minorities. After canvassing existing doctrine in a number of areas, the Court held that the principles of equal protection proscribe only actions motivated by invidious purpose.

In discussing the school desegregation cases, however, the Court implicitly acknowledged that in the context of education, the Constitution proscribes not only contemporary invidious intent, but a current offensive condition caused by past invidiously motivated acts: "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." In the school desegregation area alone, proof of past intent provides a sufficient predicate of a governmental violation if such intent can be shown to have caused a

fifth amendment and Title VI of the Civil Rights Act of 1964. Indeed, the Court later indicated that the cause of action in Gautreaux was derived "directly from Title VI." See Cannon v. University of Chicago, 441 U.S. 677, 702-03 n.33. Second order statutory principles, of course, are common. Thus, Gautreaux provides scant support for the proposition that the Constitution requires the elimination of the effects of past discrimination in the realm of public housing. Cf. Schnapper, Perpetuation of Past Discrimination, 96 Harv. L. Rev. 828 (1983) in which the author, seeking to justify the argument that "the Constitution prohibits the causal connection of past discrimination" in general, id. at 831, relied on cases predicated on the Constitution only in the context of racial segregation in public education. In other contexts, the Court had considered second order principles rooted in federal statutes. See, e.g., Rome v. United States, 446 U.S. 156 (1976) (Voting Rights Act of 1965); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII of the Civil Rights Act of 1964); Gaston County v. United States, 395 U.S. 285 (1969) (Voting Rights Act of 1965).

See, e.g., Wright v. Rockefeller, 376 U.S. 52 (1964) (requiring proof of legislature's invidious intent in drawing allegedly gerrymandered electoral districts); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (requiring proof of contemporary invidious intent in discriminatory administration of a facially neutral statute); Strauder v. West Virginia, 100 U.S. 303 (1880) (requiring proof of invidious intent for unconstitutional discrimination in systematic exclusion of black jurors).

Such actions would include the contemporary administration of an invidiously motivated statute or the contemporary invidious administration of a racially neutral statute. Even the neutral administration of a statute passed long ago with discriminatory intent constitutes contemporary invidious purpose. Each implementation of that invidiously motivated democratic will constitutes a renewal of its proscribed purpose.

Davis, 426 U.S. at 240 (emphasis added).
current undesirable condition, even if current governmental policies are undertaken without discriminatory intent.

Although the Supreme Court in *Davis* rejected the argument that the principles of equal protection proscribe neutral governmental practices that disproportionately disqualify minority applicants, it failed to consider whether the second order right recognized in the educational context might be more generally applicable. Would it have been appropriate for the Court to have recognized a second order right proscribing the effects of past governmental discrimination if the plaintiffs had alleged and proved that past governmental violations in providing unequal educational opportunity caused the disproportionate disqualification of black applicants to the District of Columbia police force? The District of Columbia had operated a dual system until *Bolling*, and did not effectively dismantle that system until well after 1954. The predicate harm postulated in *Brown*—unequal educational opportunity created by a state-induced psychological sense of inferiority—arguably had stigmatized those black applicants who had been educated in the District. Their disproportionate disqualification by the District of Columbia’s personnel test thus could be viewed as a continuing effect of past governmental discrimination. In operating a police selection system without discriminatory intent today, the state continued to disadvantage persons whom it purposefully disadvantaged in the past.

But the harm at issue in *Washington v. Davis* can be distinguished from the predicate harm in *Brown* and *Swann*. *Davis* was concerned with disadvantage in an application for employment. *Brown* and *Swann* defined educational rights. When the Court in *Swann* held that the government has an affirmative duty to cure the lingering effects of past segregative acts, it meant only those effects relevant to education. Disparate impact in employment, even if an effect of past educational discrimination, is not a relevant effect, because it falls beyond the Court’s core policy concern with education.

58 For a consideration of the remedial implications of a right defined in terms of pure discriminatory impact, see Perry, *The Disproportionate Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977). Perry envisioned a remedy that would be circumscribed by considerations of “practicality.” Courts would scrutinize governmental actions to determine whether the state had struck an appropriate balance between practicality and a group’s right to be protected from discriminatory impact. Perry emphasizes that governmental practices with a discriminatory impact should be examined to determine whether the governmental decisionmakers properly considered the discriminatory impact in making their decisions. *Id.* at 558-61, 586-89. Perry’s version of an impact right thus relies more heavily on the *Bolling* branch of equal protection than on the principles of *Brown*. Governmental decisions are tested for the propriety of the decisionmaking process rather than for the substance of what the state provides.

59 For a further discussion of the concept of relevancy, see *infra* text accompanying notes 87-97.

60 The primary concern with education is certainly justifiable. One justification is utilitarian. Education is fundamental in determining the status of groups and individ-
B. Compromising the Second Order Right: An Intent "Trigger"61 Toward Third Order Deprivation

The second order right established by Swann rendered constitutionally infirm segregation that could not be reached under Bolling's process-oriented brand of equal protection. But even a doctrine that proscribes the harmful educational effects of past intentional segregation reaches only so far; a principled pursuit of a second order right would leave much segregation intact. The Supreme Court has not, however, pursued its purported second order doctrine in a principled fashion.

Second order segregation, defined as the continuing demographic effects

...
of past intentional discrimination, implies a "but for" definition of right, violation, and remedy. This emphasis on causation constitutes the essential distinction between second and third order rights; only effects causally linked to past invidious state acts are constitutionally prohibited by a second order right, whereas all relevant aspects of contemporary deprivation are cognizable in a third order regime. This theoretically critical distinction has been blurred in application. The Court has obfuscated the second order doctrine with notions of the "systemwide violation" and the "affirmative duty," requiring offending localities to achieve an ideal racial balance. It has thus created principles reaching toward the proscription of third order segregation.

1. The Systemwide Violation

A systemwide violation, or "dual system" of education, may be found to exist in the context of both northern and southern segregation. If a state or locality had an explicit statutory policy of racial segregation in 1954, it has presumptively committed a systemwide violation. In cases involving northern segregation, a plaintiff can show a systemwide violation by proving that a school board engaged in purposefully segregative actions "in a mean-

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62 A strictly defined remedy for second order segregation would be concerned only with that increment of present segregation caused by the past improper conduct of government officials. This would require identifying the unconstitutional state action, hypothesizing its effects, and estimating current reality "but for" such action.

63 For a consideration of the concept of "relevancy" see supra text accompanying notes 58-59; infra text accompanying notes 87-97.

64 The "ideal" racial balance reflects racial proportions throughout the entire system. See infra note 80.

65 See, e.g., Keyes v. School Dist. No. 1, 413 U.S. 189, 200 (1973) ("[W]here plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in Brown I, the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' "') (quoting Brown II, 349 U.S. at 301) (citation omitted).

It should be noted, however, that the premises for inferring systemwide intent from a permissive statute are far weaker than those supporting this inference from a mandatory statute. A mandatory statute requires segregation, and thus creates a segregated system regardless of the underlying demographics of the area; such a presumption cannot reasonably be made when segregation is merely tolerated. But, the Court accords as much presumptive weight to the latter as to the former. This paradox might be partially explained by noting that an explicitly permissive statute could impose as much psychological harm on minority students as a statute requiring segregation. Although explicitly mandatory and permissive statutes were significant for Brown's values in the context of first order segregation, the relevance of their second order consequences for equal educational opportunity remains an unanswered question.
Such actions may include gerrymandering attendance zones, implementing race-based school location policies, and establishing mobile and temporary classrooms or optional attendance zones. The finding of a systemwide violation creates a presumption that all segregation at the time of the violation was the product of illegal acts, and eliminates the need to prove that the government's invidious acts infected all schools in the district. If a plaintiff establishes a prima facie case of a meaningful portion of a school system.


See Dayton II, 443 U.S. 526, 537 (1978). The presumption of a dual system from proof of invidious intent in a "meaningful portion" of a school district is not predicated only on assumptions about the subjective psychology and motivation of school boards. If a board acted invidiously in one part of town, it is not presumed to have so acted in all parts of town. Rather, the effects of invidious intent in a substantial portion of a district are presumed to have a segregative impact in all areas of that district. Id. at 201-03. This presumption establishes as only secondary considerations the possibilities that segregated neighborhoods might have pre-dated the segregative actions in question, that the predominant proportion of current segregation might be unrelated to state action, and that the "but for" increment of segregation might be small. Furthermore, a presumption justified by a ripple effect theory cannot escape the physical fact that a ripple loses its intensity as it travels farther from its source. Proof of segregative intent in one part of town might justify finding segregative effects within a reasonable buffer zone, but presuming more seems irrational.

One might, however, seek to base a systemwide violation on the presumption that if a northern board acted invidiously in a significant portion of a school district, it would have done so in all parts if this were necessary to ensure a segregated system. Similarly, if segregation were mandated by statute, a board would have foregone an economically rational neighborhood policy in all integrated areas where affirmative measures were necessary to achieve racial segregation. In the North, where there were no explicit segregative statutes, a board that manifested a desire to segregate could be presumed to have done so throughout the system if segregated neighborhood patterns had not already existed.

But the presumptions supporting the systemwide violation in both southern and northern circumstances implicate hypothetical "what if" intent. These presumptions suggest that if reality had not been as it was and if community patterns were originally integrated, the government would have despoiled the situation with tainting intent throughout the district. But "what if" intent is inconsistent with a scheme predicated on "but for" causation. In the context of a mandatory statute, a presumption of
systemwide violation, the defendant school board may rebut this presumption by establishing that the school district had been divided by geographical or natural boundaries "into separate, identifiable, and unrelated units." The circumstances under which a board could successfully rebut this presumption, however, are rare.  

2. The Affirmative Duty

The legal fiction of a systemwide violation is most significant not because it presumes a broader past violation than a plaintiff has proved, but because it triggers an affirmative remedial duty circumscribing the discretion of future governmental actors. Once a locality commits a systemwide violation, it thereafter bears "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." Under this affirmative obligation, intent is not justified when community patterns already were segregated and affirmative action played no role in effecting segregation. Finding a systemwide violation simply because there once was a mandatory statute presumes intent where it never existed. The "but for" concept is corrupted. Similarly, in a district that never operated under a statutory mandate, presuming districtwide intent from proof of discriminatory intent in a "meaningful portion" of the district suffers from the same infirmity. Cf. Mount Healthy School Dist. v. Doyle, 429 U.S. 274, 287 (1977) (Invidious intent will not fatally taint a decision unless it was the "but for" cause of the decision.).

70 Id.
71 Green v. County School Bd., 391 U.S. 430, 437-38 (1968). In Dayton II and Columbus, the Court squarely tackled the issue of when the affirmative obligation becomes effective and held that the affirmative duty binds officials from the moment a dual system is created. A board's subsequent actions will be evaluated according to this duty. Failure to meet these standards exposes a school board to judicial intervention. See Dayton II, 443 U.S. 526, 537-38 (1979) ("Given intentionally segregated schools in 1954, . . . the Board was thereafter under a continuing duty to eradicate the effects of that system."); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458 (1979).

The notion of an "affirmative duty" was first enunciated in the context of first order segregation. See Green v. County School Bd., 391 U.S. 430, 437-38 (1968). In Green, a local school board had abandoned an explicit policy of mandatory segregation after Brown and purported to eliminate the dual system by adopting a "free choice" transfer plan. Id. at 432-33. Starting point pupil assignments continued as they had under the mandatory system, but students were given the choice of opting out of their initial assignments. Id. at 433. Since there was no significant segregation of community patterns, all continuing vestiges of school segregation resulted from continuing affirmative state action. The board in Green essentially had transformed itself from a "southern" segregator to a "northern" segregator.

There was, therefore, no second or third order segregation in New Kent County. A shift from overt to covert discrimination surely did not discharge the board's affirma-
the locality must eliminate not just present segregative practices, but "all vestiges of state-imposed segregation."  

The affirmative duty significantly expands the standard of a board's constitutionally required conduct from mere neutrality to affirmative remedial action. This obligation must be discharged despite the fact that the school board may now be acting with immaculate racial impartiality, and may, in fact, have been acting impartially since Brown. Courts will evaluate actions undertaken to discharge the affirmative duty in terms of their effects rather than the school board's underlying intent. If the board fails to adequately discharge its duty, a court may find a continuing violation and will fashion an appropriate remedy with its broad equitable powers.

The Supreme Court has not explicitly defined the extent of the state's affirmative remedial obligation. Nevertheless, the Court's analyses in Dayton II, Columbus Board of Education v. Penick, and Swann imply

tive duty to create a unitary system. At the very least, the board should have terminated economically irrational pupil assignments with segregative effects. Adoption of a neighborhood assignment scheme, given the demographics and location of schools in the system, would have produced a system that was integrated in fact.

The implications of an affirmative remedial duty in the context of second and third order segregation are significantly different.

74 This was the clear message of Columbus and Dayton II. Although the respective boards continued to perpetrate invidious acts after 1954, the Court indicated that subsequent intent, whether invidious or benign, was irrelevant: "The measure of the post-Brown conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." Id.
75 Swann, 402 U.S. at 15.
76 The duty might be framed in three different ways. First, a locality might be required to take no action that would increase segregation. Under this view, particular school location decisions, for example, could not legitimately reinforce second order segregation. Second, a locality might be required to choose the most integrative alternative of all possible actions. Here, given two possible school locations, a board would be compelled to choose the alternative with the greatest integrative effect. This standard is problematic because the concept of "action" is imprecise. See infra note 126. Third, a locality might be required to take all action necessary to reach some optimally integrative end. None of these formulations bears any relationship to the notion of second order segregation. All are forward-looking remedies triggered from the moment a systemwide violation has been committed. Generally, the last is more integrative than the second, and the second more than the first.
77 443 U.S. 526 (1978). In Dayton II, the Court combined the Keyes presumption, inferring a past systemwide violation from purposeful discrimination in a substantial part of that system, with the Swann requirement that current effects of past discrimination be eliminated. If a school board committed sufficient discriminatory acts to
that once a locality commits a systemwide violation, it thereafter bears an affirmative duty to take all actions necessary to achieve the goal of systemwide racial balance. All current segregation is presumed to derive from past violations. Because rebuttal of this presumption is so unlikely, and because the current condition of segregation is the only component of a violation over which contemporary governmental actors have control, a locality can safely insulate itself from judicial intervention only by eliminat-
ing all current manifestations of segregation. Any board that once committed a systemwide violation is essentially obligated to create a system that is integrated in fact.

Although the Court has explicitly adhered to the "but for" principle in

83 This view was confirmed in Dayton II when the Court stated that during the period of affirmative duty, pupil assignment policies must not perpetuate or reestablish the dual system. 443 U.S. at 538. Yet the affirmative duty's ideal is limited by concessions to practicality. The Court in Dayton II noted that a board's failure to take all necessary integrative actions may be justified if the board bears the "heavy burden of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends." Id. In Swann, the Court placed a similar limit on judicial remedial power, recognizing that the continued existence of "one race schools" in a judicial decree or a board's remedial plan might be valid depending on the variety of circumstances in the particular case. See Swann, 402 U.S. at 26-27, 27 n.10.

84 A narrower reading of the duty, requiring for example, that a school district choose the most integrative alternative for all actions taken, would create several doctrinal problems. First, because this duty is narrower than the scope of judicial remedial discretion which permits a court to impose a regime of optimally integrative goals throughout the system, see Swann, 402 U.S. at 25; supra note 79, restricting the scope of a locality's duty would essentially establish a "good faith" defense. It is not clear when such a duty would be completely discharged, because it envisions no proper end-state or guidelines for termination. See Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (considering the termination of a judicially created integrative remedy). See infra note 147. This conception of the duty, therefore, serves as a means of holding off judicial interventions, as long as the board does its best to compensate for past wrongs. But the Court clearly stated in Dayton II that the measure of whether the affirmative duty is being discharged should be the effectiveness and not the intent of a locality's actions. 443 U.S. at 538. The notion of a "good faith" defense is inconsistent with a standard of effectiveness.

Second, it is necessary to limit or define the notion of the "most integrative alternative for all actions taken." Does "action" include "inaction"? If so, the most integrative alternative is integration. It may be argued that "actions taken" should be limited to decisions such as new school construction and teacher assignment. This minimal conception is contradicted by Swann, which cited examples of more integrative alternatives that the Board could have and implicitly should have taken:

The final board plan left ten schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort. . . . [T]he Charlotte board was under an obligation to exercise every reasonable effort to remedy the violation, once it was identified, and the suggested techniques are permissible remedial devices. Additionally, . . . the board plan did not assign white students to any school unless the student population of that school was at least 60% white. This was an arbitrary limitation negating reasonable remedial steps. Swann, 402 U.S. at 24 n.8.

Thus, the board's failure to adopt more integrative alternatives subjected it to judicial remedial discretion. It could have insulated itself from judicial intervention only by assigning students according to a formula seeking systemwide racial balance. The Court, therefore, has apparently imposed on offending localities a comprehensive duty of taking all actions necessary toward an ideal integrative end.
defining the theoretical scope of the underlying right, notions of causation have been all but ignored in doctrine developed to administer the purported second order right. Presuming a causal connection between current segregation and past illegal acts based on a finding of a systemwide violation is inconsistent with a right theoretically limited to curing the effects of past invidious state action. These presumptions bypass the inquiry into “but for” causation logically required by a second order doctrine. They deem constitutionally infirm current segregation that might have developed independently of intentional segregative acts. Past intent has served merely as a formalistic “trigger”\(^8\) for third order remedial responsibility.

This lack of concern with causality, despite its theoretical importance in a second order regime, suggests that other considerations have motivated the Court in shaping the definition of a constitutional violation. Because “but for” causation is difficult to prove, the Court might be seeking to safeguard the underlying second order right with doctrinal overkill. The concepts of systemwide violation and affirmative duty, creating remedial liability beyond the probable extent of causal responsibility, certainly ensure that the government will not compound the effects of its past invidious acts. But such a rationale for tacking third order administrative principles to a second order right is unsatisfactory. If the courts seek to protect a narrow constitutional right by prophylactically employing broader proof rules and remedial duties, that underlying right may lose whatever integrity it once had as a legal concept. When society, through its constitution, protects a putatively narrow right with broad mechanisms of enforcement, it is, perhaps, without acknowledgement, seeking to protect broader values. If one shoots at horseflies with a shotgun, one just might be more concerned about killing horses than flies.

V. **Fulfilling the Promise of Brown: A Third Order Right of Equal Educational Performance**

What values has the Court pursued in creating the constitutionally unique second order right? What is the purpose of its concern with past governmental intent? Why has it transgressed the rational limits of second order doctrine with presumptions reaching toward third order deprivation? Is contemporary doctrine normatively justifiable? Would an alternative conceptualization of the constitutional right more appropriately resolve the doctrinal tension created by the *Brown/Bolling* dichotomy?

A right is like a vector. It has both direction, or substantive orientation, and magnitude. The substantive orientation of a right refers to the condition that it seeks to preserve or prevent, the characteristic of the beneficiary to which the right responds. The extent of a right refers to the conditions under which the government will be held liable for preserving or correcting the

\(^8\) See *supra* note 61.
beneficiary's relevant condition. To extract the essential principles lurking in doctrinal development since 1954, an analyst should distinguish between the substantive orientations of the rights created by Brown and Bolling and their extents.

In focusing on the continuing effects of past unconstitutional acts, and in transcending the definitional limits of a second order principle with presumptions and affirmative remedial duties that reach toward third order segregation, doctrinal development since 1954 has been concerned almost exclu-

86 A distinction between a right's substantive orientation and its extent must be made in the context of its underlying goals. For example, values underlying the substantive purpose of a right may compete with the normative foundations of doctrine defining the extent of liability. This is true whenever the Constitution recognizes substantive values but defers to democratic discretion over a significant range of substantive modes of implementation. If adherence to the democratic process is of the highest priority, it is perhaps justifiable to limit the extent of governmental liability, even when a condition is contrary to underlying substantive goals. Under such a process orientation, if the "democratic" branches of government choose not to address a condition, judicial intervention would not be legitimate. Limitations on the extent of governmental liability may also be predicated on principles of fiscal conservatism. See infra note 92.

In the context of a first order right, the concepts of nature and extent are inseparable. Protected groups have a right only to governmental process untainted by discriminatory intent. Similarly, the government will be held responsible only for those actions that it undertakes with discriminatory intent. See infra notes 88-89.

The substantive orientation of a right and its extent are also in some sense inseparable in the third order context. Both the substance and extent of a third order right—in which the government bears an affirmative remedial duty despite the absence of any past or present discriminatory intent—must be supported by a compelling normative foundation. For example, under hypothetical circumstances in which Congress had authorized neither welfare nor unemployment benefits for those without jobs, and millions were starving and homeless, the Court might feel compelled to "create" a constitutional right to a minimum standard of living for those who would starve or freeze to death, but for governmental assistance. The moral force of a principle that protects people from starving in a "civilized" society argues against limiting governmental responsibility to those cases in which the government has in some sense created, or can be held "responsible" for, the starving person's plight. The substantive orientation of the right and its extent cannot be separated.

The distinction between substantive orientation and extent is most significant for the second order right. A doctrine proscribing the effects of past discrimination must be supported by normative principles that define which effects are relevant. These principles relate to the substantive purpose of the right. Since the government is obligated to rectify only those relevant circumstances caused by past discrimination, a different normative premise must support this limitation on the extent of governmental liability. See infra notes 87-92 and accompanying text. The normative soundness of a second order right depends on the compatibility of the principles defining which effects are relevant with those principles limiting the remedial responsibility to relevant conditions caused by past discrimination.
ersively with the issue of extent. The Court has failed to make a consistent choice between two dichotomous theories of governmental responsibility. Thus, Brown's concern with the substance of education and Bolling's doctrine of governmental process-oriented equal protection have interacted uneasily since 1954. Values underlying the substantive orientations of these rights must be identified before their appropriate extent can be considered. Only by identifying underlying normative premises can the full vector be properly plotted.

A. The Substantive Constitutional Relevance of Second and Third Order Segregation: Theories and Values

The Bolling branch of equal protection is concerned with the legitimacy of the democratic process. It presumes the optimality of decisions made by the so-called "democratic" institutions of American government. Judicial intervention is appropriate only if democratic actors predicated their decisions on constitutionally proscribed factors such as an intent to treat "discrete and insular" minorities differently from the faceless majority. Thus, the substantive orientation and extent of governmental liability under predominant equal protection doctrine, because they are both concerned not with the substance of decisions but with the process by which decisions are made, are supported by consistent normative precepts.

Although discriminatory intent in enacting a law or performing a governmental function comprises the constitutional violation in first order doctrine, past intent causes a contemporary constitutionally offensive condition in a second order regime. But because the constitutionally proscribed condition is merely one of the many "effects of past discrimination," a second order doctrine is an empty concept without criteria for defining relevant effects. Thus, criteria of relevancy must relate to substantive constitutional values other than legislative intent and the purity of governmental process—a concern such as educational opportunity.


88 See Tussman & tenBroek, supra note 12, at 358-59 (The equal protection clause "erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility, or, alternatively, of favoritism, and partiality . . . . When and if the proscribed motives replace a concern for the public good as the 'purpose' of the law, there is a violation of the equal protection prohibition against discriminatory legislation.").

89 Bolling and its ilk justify constitutional and judicial limitations on the discretion of democratic bodies on the ground that the discretion to act does not include acting with a proscribed intent. Underlying motivations can make otherwise legitimate democratic decisions illegitimate. A second order doctrine is inconsistent with this emphasis upon democratic process. Although local officials may be acting with
Segregated housing patterns, for example, are direct effects of past intentional segregation in public education. Nevertheless, these patterns—the essence of second order segregation—have not been deemed a constitutional evil and do not trigger an affirmative remedial duty to provide integrated housing facilities. Similarly, disadvantage in the employment market may be an effect of past discrimination against minorities educated in segregated systems, but such disadvantage is not constitutionally cognizable. Rather, the Court has remained concerned only with the impact of past governmental violations on education and has limited its definition of contemporary violations to segregation in the classroom.

Although the proscription of second order segregation does not rest on the theoretical premise of Bolling’s equal protection analysis, it need not necessarily rest upon Brown’s value of equal educational opportunity. The Court could have viewed second and third order segregation as educationally harmful because children had no opportunity to learn with, and live with, children of other ethnic backgrounds. The substantive orientation of the educational right might have been to promote racial harmony. But the Court has never justified doctrinal developments since 1954 on the value of ethnic diversity in education.

legitimate intent to implement the democratic will, their actions will be restricted by prior acts of former officials, who once represented a majority that no longer rules. This compromises the principle of limited intrusion on the democratic process.

90 Intentional discrimination in providing public housing, of course, does implicate housing segregation as a relevant decisional factor for determining whether the government acted with discriminatory intent. Cf. Hills v. Gautreaux, 425 U.S. 284 (1976) (considering HUD’s remedial responsibility for housing segregation under Title VI of the Civil Rights Act of 1964); see supra note 53.

91 See supra notes 54-60 and accompanying text (discussion of Washington v. Davis).

92 The intent component, therefore, which separates second and third order segregation, plays no principled role in defining the substantive orientation of the educational right being pursued. It also plays no principled role in defining the extent of governmental liability, as it did in Bolling. See supra note 86. At most, the intent requirement serves as a cap of convenience which limits the extent of governmental liability, perhaps reflecting a limited commitment to the underlying substantive values. Because it relates to the extent of society’s commitment rather than to an independent normative principle defining appropriate conditions of group entitlement or social responsibility, the second order intent limitation is vulnerable to attack on the ground that it limits the attainability of powerful moral goals without being supported by its own competing moral predicate.

For a discussion of the relationship between the intent trigger and the “state action” component of traditional equal protection doctrine, see infra note 159.

93 Educational diversity has, however, been recognized as a legitimate goal of considerable merit in other contexts. See University of Calif. Regents v. Bakke, 438 U.S. 265, 311-12 (1978) (separate opinion by Powell, J.) (consideration of race as factor in achieving goal of educational diversity constitutionally legitimate in higher education admissions process).
The Court, rather, has continued to pursue the value of equal educational opportunity on which Brown was predicated. It has deemed second and third order segregation constitutionally relevant because of their impact on the educational performance of minority students. This conclusion is strongly supported by Milliken v. Bradley, in which the Supreme Court was confronted with a school system encompassing a racial demography that made "meaningfully" integrated schools impossible. The Court had no choice but to examine the constitutional relevance of second and third order segregation in order to define principles for framing a constitutionally appropriate alternative remedy. After invalidating a student assignment remedy that included surrounding districts where no predicate of past discriminatory intent had been found, the Court affirmed the remedy imposed by the district court which not only integrated Detroit's schools to the maximum practicable extent, but also mandated programs to address the substantive deficiencies in the education provided to the disadvantaged minority students. In Milliken II, the Court noted that "[p]upil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures." The Court thus reaffirmed the substantive orientation of equal protection in the realm of education. Fair process is not enough; untainted democratic decisionmaking is inadequate. The Constitution requires equal educational opportunity.

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[95] As of 1974, the city of Detroit was 71.5 per cent black and 26.4 per cent white. Id. at 271 n.3. In the first round of litigation, the Supreme Court overturned the district court's interdistrict remedy on the ground that a predicate of liability had not been established for the surrounding districts. Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) [hereinafter cited as Milliken I]. The lower court had found that meaningful integration would have been impossible if the remedy were limited to Detroit. Id. at 732-33. On remand, the district court found that "educational components" of a remedy addressing desegregation "are essential for a school district undergoing desegregation" and are "needed to remedy effects of past segregation." Bradley v. Milliken, 402 F. Supp. 1096, 1118 (E.D. Mich. 1975).
[97] Despite Milliken II, the presumed link between second and third order segregation and educational opportunity has never been as clearly established as the presumed link between the sense of inferiority engendered by intentional segregation and a minority student's depressed educational performance. Perhaps entrenched in its dogma that "separate educational facilities are inherently unequal," Brown, 347 U.S. at 495, the Court ignored the possibility that second and third order segregation might be only marginally relevant to the depressed educational performance of minority students, with other aspects of education being far more significant. See infra note 127.
B. Opportunity, Performance, and Equality

_Brown_ established a constitutional requirement of "equal educational opportunity."[^98] But when the Court stated that "[s]eparate educational facilities are inherently unequal,"[^99] it referred to inequality in the context of first order segregation, created because intentional segregation impedes the ability of minority children to learn.[^100] Because the Court has never explicitly articulated the relationship between second or third order segregation and educational opportunity,[^101] the concept of equal educational opportunity must be further explored.

What does it mean to say that one person has less opportunity to learn than does another? If students _W_ and _B_ are of equal "intelligence"[^102] and social background, but student _W_ is provided with two books and student _B_ with only one, student _B_ clearly has been given less opportunity to learn than has student _W_. When both students finish their course of study, student _B_ will have learned less than student _W_; if each is tested on the information contained in the two books, student _W_ will perform in a superior fashion.

In _Brown_, however, unequal educational opportunity was not caused by a disparity in the facilities and learning materials provided to blacks and whites. In assuming equal tangible facilities, the Court determined that unequal educational opportunity resulted from a condition in the disadvantaged student's mind—a sense of inferiority caused by intentional segregation—that produced unequal educational performance. Thus, although student _B_ may have had two books, he or she might have been motivated to read only one, or half of each. When given the same test as student _W_, student _B_ would, of course, perform less effectively.

In a contemporary educational system, second and third order segregation

[^98]: "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." _Brown_, 347 U.S. at 493; see also Fiss, _Racial Imbalance in the Public Schools: The Constitutional Concepts_, 78 Harv. L. Rev. 564, 588-98 (1965) (arguing that _Brown_ established a principle of equal educational opportunity while other equal protection analysis examines the "inherent arbitrariness" of racial classifications).

[^99]: _Brown_, 347 U.S. at 495.

[^100]: Segregation of white and colored children in public schools has a detrimental effect upon the colored children . . . [T]he 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. _Id_. at 494 (quoting district court's factual finding).

[^101]: See _supra_ note 97.

[^102]: Equal "intelligence" in this context means that given the same stimuli, the brains of both people would respond in an equally efficient manner.
reflect a deeply rooted condition of social disadvantage. These forms of segregation reflect underlying segregated communities. The demographic segregation of minorities is symptomatic of ghettos. The linguistic dialects and cultures\textsuperscript{103} of the impoverished residents are distinct from those of the middle class mainstream, which devises the tests, defines the jobs, hires the employees, and creates the real world hurdles for which education is the primary preparation.\textsuperscript{104} The criteria of achievement and distinction in economically isolated minority cultures may well be unrelated to success in public school curricula. Students may speak solely Spanish, Chinese, or dialects such as "Black English," which would inhibit their progress in an educational system tailored to the needs of middle class "Anglo" students.\textsuperscript{105} If a middle class white student and a ghettoized black student both

\textsuperscript{103} See generally Lewis, The Culture of Poverty, in On Understanding Poverty 187 (D.P. Moynihan ed. 1969). The "culture of poverty," as I use the term, is emphatically to be distinguished from an impoverished culture. I make no evaluation of cultures, but merely note that members of a culture developed in a context of poverty are necessarily placed at a disadvantage in a competitive system conducted according to the rules and values of the middle class. See infra notes 104-05.

\textsuperscript{104} See Milliken II, 433 U.S. at 287 ("Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community.").

\textsuperscript{105} There is considerable theoretical and empirical support for the premise that children brought up speaking non-"standard" dialects of English are severely disadvantaged if their reading instruction fails to account for their spoken language. See, e.g., Gillet and Gentry, Bridges Between Nonstandard English and Standard English with Extensions of Dictated Stories, in 36 The Reading Teacher 360-64 (Jan. 1983) ("[C]hildren can make the connection between spoken and written language more easily if the language written down matches the patterns of their speech . . . ."); Schorr, Recent Outstanding Books for Young Readers from Spanish-speaking Countries, in 36 The Reading Teacher 206-09 (Nov. 1982) ("An increasing number of empirical studies strongly suggest that the initial reading experience of Spanish-dominant children should be in Spanish and that their Spanish and English reading skills can improve concurrently with their increased knowledge of English . . . ."). Indeed empirical studies that have failed to demonstrate a correspondence between speaking Black English and learning to read have been severely criticized for simplistic methodology. See Troutman and Falk, Speaking Black English and Reading—Is There a Problem of Interference?, in 51 Negro Educ. 123-33 (1982).

Minority educational performance can also be affected by the skills and attitudes of teachers. Instructors who are familiar with the home culture of their students can foster their educational development. Unskilled instructors can unwittingly crush the incentive to learn. See, e.g., Shields, The Language of Poor Black Children and Reading Performance, in 48 Negro Educ. 196-208 (1979) ("Teachers should know the parameters of [Black English] so that communication is assured where children 'switch' from forward to more casual styles when appropriate. Teachers also need to
are provided with the same book, but that book is written in "standard" English, the black student will suffer from unequal educational opportunity; since the black student is unfamiliar with the dialect in which the book was written, he or she will find it difficult to comprehend. When tested on the subject matter of the book, the black student will not perform as well as the white student. Thus, second and third order segregation do not impose educational impediments because they render schools racially identifiable; rather, second and third order segregation reflect the fundamentally isolated social condition of the students who attend those schools. These forms of segregation are symptomatic of other impediments to equal educational opportunity.

The concept of "equal educational opportunity" has no independent meaning; it does not specify which group attributes should be considered "unfair impediments to opportunity" for which the government is remedially responsible, and which should be considered just "tough luck." Because society recognizes the equal innate abilities of all racial and ethnic groups, the ultimate definition of equal educational opportunity envisions a school system that will enable minority students to learn as effectively as do whites. If an educational structure psychologically inhibits the motivation of minority students because of their status in society, or fails to account for cultural differences that impede their performance, the minority students have less opportunity to learn than do those of the cultural mainstream. In defining the parameters of equal educational opportunity, opportunity and performance collapse into the same concept. Thus, if blacks perform worse on tests because they have not learned the required curriculum as effectively as have whites, the government arguably has not provided equal educational opportunity.

examine their attitudes concerning [Black English] and the children who use it."). Indeed, teacher attitude can be a major determinant of the success or failure of minority students. See Washington, An Analysis of the Attitudes of White Prospective Teachers Toward the Inner-city Schools, in 46 NEGRO EDUC. 31-38 (1977) (arguing that many white teachers "possess attitudes that impede the learning process and academic achievement of the inner-city child"); supra note 51.

106 Indeed, in Plessy, the Court considered a theory of psychological impact on minorities caused by intentional segregation and rejected it as legally insignificant:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . 'When the government . . . has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it is organized' . . . . Legislation is powerless to eradicate racial instincts . . . .

163 U.S. at 551 (quoting People v. Gallagher, 93 N.Y. 438, 448 (1883)).

The Plessy Court refused to hold the government responsible for the psychological impact of its actions or for any impediment to opportunity caused by that impact. This position was rejected in Brown.
In defining the right of minorities to be free from discrimination in education, should equal educational opportunity mean equal educational performance? Should the government be constitutionally obligated to fulfill this ultimate definition of equal educational opportunity? Some, no doubt, would cringe at this end-oriented definition of "opportunity," a concept that seems to be concerned primarily with "fair process." A right that requires equal group performance imposes an affirmative remedial duty of heroic proportions by holding the state responsible for causes of educational disadvantage that it did not directly create. Nevertheless, Brown can be interpreted as requiring the government to remedy any characteristic of the educational process that exacerbates, or fails to compensate for, those aspects of a group's disadvantage that rendered the group's educational performance inadequate. The state in Brown did not intend to engender a sense of inferiority. It did not directly create the impoverished and stigmatized social condition of minority students that was a prerequisite if intentional segregation was to have an adverse psychological effect on minorities and impede their educational opportunities. Thus, because a segregated structure yielding unequal educational performance was constitutionally illegitimate in Brown, any educational structure yielding unequal educational performance is arguably illegitimate.

Furthermore, this pure remedial conceptualization of racial discrimination in the realm of education is normatively compelling and appropriately constitutional. The ultimate concern in defining the constitutional right against discrimination in education should be to eliminate the caste-like quality of race in America. The Constitution establishes the framework for a just

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107 "Equal performance" refers to performance in a broad range curriculum. Because the right to equal educational performance ultimately should ensure the integration of the American economic structure, a school system should provide substantially similar curricula to "Anglo" and minority students so that members of each group will be proficient at performing marketable skills. In defining substantial similarity, however, a distinction can be made between fundamental skills and secondary knowledge. Fundamental skills include reading, speech, and mathematics. Secondary knowledge consists of learning gained through the employment of fundamental skills. If two students were equally proficient at reading, for example, one might choose to study English literature and the other African history. If equally proficient in mathematics, one might pursue physics, and the other accounting. A right to educational performance should require equal performance in the fundamental curricular areas at a minimum, and could arguably extend to include comparable secondary areas.

108 For a discussion of the principles defining the government's remedial duty, see infra notes 149-57 and accompanying text.

109 This conceptualization of the appropriate focus of constitutional rights in education is hardly unique. Other commentators have framed the goal as that of improving the educational performance of blacks. See, e.g., Fiss, supra note 98, at 604 (educational opportunity can be evaluated, in part, by "scores on standardized tests"). But cf. Yudof, Equal Educational Opportunity and the Courts, 51 Tex. L.
social structure. All groups should have the same opportunity to participate in American society, and to compete for its many benefits and rewards. *Brown* was a signal that the Constitution no longer would tolerate a dual society. In predating its holding on the principle that unequal educational opportunity constituted the proscribed inequality, the *Brown* Court envisioned ideals that reach farther than integration just in the nation's classrooms. The spirit of *Brown* compels the integration of the economic structure of American society. The educational system should fully equip minorities to compete—blacks must benefit from education equally with whites—so that they will no longer be disproportionately denied the benefits of living in American society.

Without significant reform of the education provided to disadvantaged minorities, there will always be a Harlem, a Watts, and a Roxbury, from which individuals rarely can escape. Race in America, like caste in India, can pose insurmountable social, economic, and political barriers. The relevant problem lies not in the perpetual existence of an underclass, but in the perpetually disproportionate correspondence between race and membership in that underclass. Ours is a society concerned more about racial disadvantage than about deprivation randomly distributed throughout the population. The fourteenth amendment's special prohibition against racial discrimination and the Court's expansion of this right in the realm of education reflects this value preference.

It is entirely appropriate for the Constitution to impose such a broad affirmative duty in the context of the right against racial discrimination in

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Rev. 411, 499 (1973) ("The courts should not attempt to address the inequalities in academic performance between socio-economic and racial groups; they should respond where racial inequality and unequal access to school resources is demonstrated."). Yudof thus seems to advocate a return to *Plessy*'s concern with equality in tangible resources rather than *Brown*'s concern with educational performance.

Fiss predicates his philosophy on the special deprivation of historically depressed groups in American society. See Fiss, *Groups and the Equal Protection Clause*, 5 Phil. and Pub. Aff. 107, 147-52 (1976). Underlying Yudof's concern with segregation is his view of a just social structure in which the economic status and demographic distribution of racial and ethnic groups in American society are not affected by "white hostility." See Yudof, *Nondiscrimination and Beyond*, in School Desegregation 108 (W. Stephan & J. Feagin eds. 1980) ("Integration is part and parcel of the undoing of a caste system that consistently, over long periods of time, has disadvantaged Black Americans.").

Nevertheless, these commentators have not carried their views to the logical conclusion. Mere improvement of educational performance will not necessarily catalyze the demise of racial caste. Relative deprivation will remain if improved performance does not become equal performance. See infra notes 127-35 and accompanying text. Similarly, integration alone, even if it promotes racial harmony, is hardly sufficient to eliminate systemic racial disadvantage. The mitigation of white hostility addresses only first order deprivation. It will not eliminate the deeply-rooted economic disadvantage that characterizes the caste-like status of race in America.
As the root of achievement, education serves as the means by which a person acquires the skills rewarded in society. Only a right of equal educational performance can ensure the elimination of racial deprivation, and can guarantee that societal disadvantage, if it is to exist at all, will be spread evenly among all racial groups. If the Constitution does not impose an affirmative duty on the government to ensure that the educational system does not perpetuate pervasive social disadvantage, it deems caste to be acceptable in the American social structure.

C. Ending the Tyranny of Past Intent

If the substantive orientation of the constitutional right is concerned with equal educational performance, is a second order limitation on the extent of governmental liability normatively justifiable? The intent limitation bears no relation to the normative premises of either Brown or Bolling. What positive function does the intent limitation serve? Do its benefits outweigh

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110 See supra note 60.

111 This is, to be sure, a broad notion of right, but it is not an unprecedented characterization of a governmental affirmative duty. Even after Washington v. Davis, scholars continued to advocate a general definition of equal protection based upon discriminatory impact rather than discriminatory intent. See generally Perry, supra note 58. A right of equal educational opportunity might be viewed as a right against discriminatory impact limited to the realm of education.

112 A performance-oriented interpretation of the right against racial discrimination in public education is not inconsistent with the Supreme Court's holding in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 30-37 (1973), in which the Court rejected the argument that education is a "fundamental right." In Rodriguez, the Court upheld the constitutionality of a system that funded public schools by taxing property wealth within each district, and thus provided children in property poor districts with fewer resources to support their education than those in property rich districts. In rejecting this challenge, the Court considered only the constitutionality of discrimination on the basis of residence in a property poor district. Racial discrimination was not the issue:

Appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities... or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. Id. at 28 (citation omitted). The Court noted that "in the context of racial discrimination," Brown had recognized "education as perhaps the most important function of state and local governments." Id. at 29 (quoting Brown, 347 U.S. at 493).

113 See supra notes 86, 92 & text accompanying notes 43-45.

114 See supra notes 89, 92.
the negative impact that the intent requirement has on achieving Brown's constitutionally rooted educational goals?

Predicating the remedial obligation on past illegal government action does not preserve democratic discretion in a principled fashion, even though the conditions of judicial intervention are limited. The second order intent requirement simply serves as a practical limitation on the extent of the government's remedial responsibility to pursue substantive goals. It may thus be viewed as a speed limit on a highway which must be obeyed despite the urgency of reaching a destination. As there are sound safety reasons that justify a speed limit on a highway, so are there, generally, sound fiscal reasons for adhering to a doctrine that limits a result-oriented affirmative duty. Since the government has limited resources, it cannot be responsible for curing all social ills at once.

But although a speed limit imposes an optimal compromise between the competing goals of getting from here to there, and protecting the lives of all travellers on the road, the intent requirement serves a relatively narrow function in the context of a right against racial discrimination in education. The issue is not whether the Court should adopt a right against "discriminatory impact" in all constitutional contexts. That position was considered and rejected in Washington v. Davis, in which the Court recited the parade of horribles that would ensue if the government were held responsible for the unintended discriminatory impact of all laws. An educational right, however, is especially important and manageably narrow. Moreover, the intent requirement, unrelated to the substantive goals of that right, has pernicious consequences that undercut the very possibility of achieving that goal. The second order intent requirement not only ensures that the goal of equal educational performance will be more slowly reached, it ensures that it can never be reached.

The remedial limitations of second order doctrine are nowhere more evident than in the cases of Milliken and Milliken II. Because the

115 See id.
117 The Court stated that
[a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another, would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
Id. at 248 (citation omitted). But cf. Perry, supra note 58 (disputing the Court's presumption that laws having a disparate impact must be supported by a compelling justification). Professor Perry argues that courts should scrutinize laws having a disparate impact for more than mere rationality, but for less than compelling necessity. Id. at 586-87; see infra note 152.
district court determined that the Detroit school system did not have enough white students to create an educationally meaningful remedial racial balance,\textsuperscript{120} it imposed a student assignment remedy extending beyond the boundaries of Detroit. The court thus took jurisdiction over students in school districts where the predicate of discriminatory intent had not been proven. The Supreme Court, however, refused to permit the lower court to extend the Keyes presumption beyond district lines.\textsuperscript{121} Although proof of discriminatory intent in a "significant portion" of a school district would support a presumption that school assignments throughout the system were similarly tainted, surrounding districts could not be included in a remedial decree without a particularized showing that invidious acts within one district produced "a significant segregative effect in another district."\textsuperscript{122} Thus, in the context of defining past discriminatory intent sufficient to trigger a broad remedial obligation, the school district boundary has devastating implications for the rights of educationally disadvantaged students.\textsuperscript{123}

\textsuperscript{120} During the relevant period, the student population of Detroit was over 71.5\% black and 26.4\% white. \textit{Id.} at 271 n.3.

\textsuperscript{121} See \textit{Milliken I}, 418 U.S. at 744-47. In Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), in which discriminatory intent motivated governmental actions in a "substantial portion of a district," the Court upheld the lower court's presumption that all segregation within the system was a consequence of those intentional acts. Citing values of local control in \textit{Milliken I}, the Court determined that the segregative effects of such illegal acts should not be presumed to travel beyond the district boundary. \textit{Id.} at 741-42.

\textsuperscript{122} \textit{Milliken I}, 418 U.S. at 744-45. The Court's holding that a locality in which no predicate of past intent had been proven could nevertheless be included in an interdistrict remedy if it suffered from the effects of action taken by officials in an adjacent district is, indeed, curious. Why should the fact that the intentional acts of officials in a neighboring locality had an impact on the demography of an "innocent" locality circumscribe the latter's democratic discretion? How can this principle be reconciled with the value of local democratic discretion? The Court did not establish principles supported by clear normative precepts defining the amenability of such "innocent" districts to judicial intervention.

\textsuperscript{123} The Court's treatment of local governmental entities has been criticized as an unsupported formalism. See Lee, \textit{The Federal Courts and the Status of Municipalities: A Conceptual Challenge}, 62 B.U.L. Rev. 1, 57-73 (1982). Because municipalities have no constitutional status independent of the states, and thus can create no greater barrier to federal courts' remedial powers, \textit{id.} at 61, the source of the Court's deference to their autonomy is unclear. This is particularly anomalous in the context of \textit{Milliken I}, in which the state was found to have violated the fourteenth amendment. \textit{Id.} at 58. Lee therefore concludes that the Court's focus on district boundaries in \textit{Milliken I} was mere "artifice." \textit{Id.} at 73.

Lee further argues that if the Court had not treated municipalities in such a formulaic manner, it would have been forced "to define, unambiguously, the contours of a violation of equal protection, the harm caused by the violation, the terms in which it could be measured, and the remedy." \textit{Id.} This conclusion is not quite accurate, for it confuses the substantive orientation of a right with its extent. It is
The Court’s ruling left Detroit and other similarly situated school districts without options for meaningful integration. If racial imbalance alone caused the educational deprivation, the children of Detroit would have been left without any constitutional remedy. Since racial imbalance is only one element of educational disadvantage, however, the court was able to impose a remedy that addressed the quality of education provided to the students of Detroit.\textsuperscript{124}

It is unlikely, however, that an overwhelmingly black and poor school district, without enough white families to achieve "meaningful" integration, would have sufficient financial resources to fund a constitutionally mandated program. In \textit{Milliken II}, the Court required the state to pay for half the cost of all remedial programs.\textsuperscript{125} But what recourse would the children of Detroit have had if the state had not been held responsible? The local taxpayers would have been forced to fund their own remedy, a remedy necessitated by the past illegal acts of their public servants. Even if it were just to make the victims pay for their remedy, they would have been financially unable to do so.

The essential contradiction of this scenario is clear. \textit{Even if a locality acted with past invidious intent and is therefore subject to the second order remedial duty, and even if it acted so egregiously that its past unconstitutional acts have yielded a school district that is overwhelmingly black and poor, that locality will not have the necessary resources to achieve either an adequate integrative remedy or an adequate educational remedy.} The locality that has been guilty of the worst constitutional violation will be unable to effect a remedy; the state or federal government, although able to fund a remedy, is not obligated to provide one. The Court thus has created a constitutional doctrine that pursues values implicating the very essence of the American social structure. But when confronted with the most severe instances of deprivation, the second order doctrine precludes the constitutionally necessary remedy.\textsuperscript{126}

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\textsuperscript{124} The Court required the school district to improve facilities and provide remedial educational programs. \textit{Milliken II}, 433 U.S. at 287.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} A first order doctrine could conceivably reach second and third order segregation, but only under circumstances so elusive that the remedial value will be negligible. Could invidious intent be proven if the school district created a maximally integrative \textit{neighborhood} system, but did no more?
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Because the moral imperative of remedial ideals is most compelling in the context of racial discrimination in the realm of education, the Court has implicitly recognized the inappropriateness of the intent limitation. Intent played no doctrinal role in Brown. Although central in the traditional doctrine reflected in Boiling, invidious governmental intent is only tenuously linked to the second order right. This link was snapped altogether when the Court created the notion of the "systemwide violation" and imposed a broad remedial duty when such violations were found. The Court's actions suggest that the intent requirement is a nuisance to be averted rather than a doctrine meriting principled adherance. The time has come to recognize that the intent requirement has no positive role to play toward effecting the ideals of Brown. For a vector representing the educational right, substantive orientation is meaningful only when extent is unbounded.

VI. CONTOURS OF A REMEDY FOR Brown's THIRD ORDER RIGHT OF EQUAL EDUCATIONAL PERFORMANCE

A. Equal Educational Performance and Third Order Segregation: Is There A Rational Connection?

Educational deprivation has been conceived in terms of segregation since Brown and Boiling. Although courts and commentators have presumed that segregation impedes the educational performance of minority students, the

established if the following elements were proven: first, that the school officials knew that minority students would in some way be harmed by attending schools reflecting segregated community patterns, and second, that these officials operated the school system not in spite of this knowledge, but because of it. Cf. Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 278-80 (1979) (upholding Massachusetts' preference to veterans for state civil service positions despite the disproportionate impact).

Proving current invidious intent in the operation of a neighborhood school system will almost always be impossible. The state of sociological knowledge about educational harm is far too unsettled to serve as the predicate for a finding that the board necessarily believed its actions would harm minority children. Furthermore, even assuming some knowledge or belief of such harm, it seems unlikely that school officials would operate a neighborhood system because of this harm, rather than in spite of it. Cf. id. at 278-80. There are, after all, sound reasons of economic efficiency for operating a community school system. See Mount Healthy School Dist. v. Doyle, 429 U.S. 274, 287 (1977) (invidious intent will not fatally taint a decision unless a "but for" cause of the challenged action).

It also should be noted that the educational harm envisioned in this theory of current invidious intent is, of course, not the same educational harm envisioned in Brown. Discriminatory intent in Brown was the predicate, the cause of educational harm. But under a first order right that proscribes only current discriminatory intent in operating a neighborhood school system, the educational harm serves as the predicate for finding intent. Government officials must be charged with the specific
root of this harm has never been specified.\textsuperscript{127} Despite the fact that the Court has abandoned the requirement of contemporary purposeful segregation in the context of second and third order deprivation, and has postulated no alternative to the theory of psychological harm, separation still serves as the criterion for identifying unconstitutional discrimination.

Integration alone could cure the performance gap between blacks and whites only if segregation were the sole cause of unequal educational performance. Although third order segregation may contribute to educational harm,\textsuperscript{128} it clearly does not define the nature and extent of that harm. Educational disadvantage stems primarily from the impoverished status of minority groups in society. Isolated from the culture of the “Anglo” mainstream,\textsuperscript{129} minorities are saddled with starting point disadvantages in the educational process.\textsuperscript{130} This lack of knowledge of the culture of pow-

intent to harm minority students because they believed those students would be educationally disadvantaged in neighborhood schools reflecting segregated community patterns and chose the neighborhood system precisely because of that harm. The harm caused by segregated community patterns would have to exist independently of current invidious intent. It must thus exist inherently in the social situation of ghettoized minorities. See infra notes 127-135 and accompanying text.

\textsuperscript{127} Even in Milliken II, in which the Court explicitly established the link between the educational right and educational performance, the causal connection between second and third order segregation and educational disadvantage was not identified. The premise that second and third order segregation impede minority performance has remained unsupported by a strong theoretical foundation. Empirical study of the educational impact of busing remains the only significant attempt to examine that presumed relationship. See, e.g., N. St. John, School Desegregation: Outcomes for Children 16-41 (1975) (considering studies measuring the effect of desegregation on academic achievement). St. John concludes that desegregation is a complex phenomenon without a clearly identifiable or explainable impact on educational performance. \textit{Id.} at xi.

\textsuperscript{128} Third order segregation might simply be a symptom of the source of the depressed educational performance of minority children—such as “cultural isolation.” Whether segregation itself causes any educational harm remains the subject of a raging empirical debate. See, e.g., N. St. John, \textit{supra} note 127, at 36 (The “causal relation between school racial composition and academic achievement” has not been empirically demonstrated. “More than a decade of considerable research efforts has produced no definitive positive findings.”).

\textsuperscript{129} See supra notes 103-105.

\textsuperscript{130} This theory of educational deprivation has served as the predicate for remedial action when educational rights have been guaranteed by federal statute. In \textit{Lau v. Nichols}, 414 U.S. 563 (1974), for example, the Court considered § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), and its applicability to an educational curriculum geared toward middle-class “Anglo” students. The Supreme Court held that § 601 requires that non-English speaking children receive some instruction in their native language. 414 U.S. at 565-66. The Court reasoned that “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are
er\textsuperscript{131} precludes minority children from benefiting as fully as white children from a curriculum geared toward the white majority.\textsuperscript{132} Even if integration can promote an improvement in minority performance, it cannot fully compensate for starting point disadvantage. Busing alone cannot yield equal performance, even in a thousand years. Relative disadvantage will remain.\textsuperscript{133}

effectively foreclosed from any meaningful education." \textit{Id.} at 566. The Court viewed the Chinese students’ unfamiliarity with English as an impediment "which denies them a meaningful opportunity to participate in the educational program." \textit{Id.} at 568.

Although language difficulties provide the most obvious, and perhaps the most significant, barrier to equal educational performance, other cultural variations may impede minority adaptation to a curriculum designed by and for members of the "Anglo" culture. Such variations might include different values regarding academic achievement as well as a general disinterest in European history and culture. The principles underlying the \textit{Lau} decision could conceivably be extended to require that educational opportunity not be impeded by these other cultural variances.

The analogy between the constitutional right of equal educational performance and the educational rights framed by 42 U.S.C. § 2000d is appropriate in this context. The statute has been interpreted as imposing an affirmative duty on recipients of federal funding to ensure that non-English speaking minority students do not "receive fewer benefits than the English-speaking majority" from a public educational system. \textit{Id.} Thus, although the legal predicate of educational rights under 42 U.S.C. § 2000d is different from that underlying the constitutional right developed in this Article, the substantive orientations of both rights are compatible.

\textsuperscript{131} The notion of cultural isolation must be distinguished from any suggestion of cultural deprivation, which would imply that black or Hispanic ghetto culture is in some way deficient when compared with middle class "Anglo" culture.


The purpose . . . of bilingual education is to integrate students into the educational system and to provide them with the same opportunity to learn, advance, and become functioning citizens of this Nation as is afforded those who have the advantage of having English proficiency. Not to address the linguistic/cultural needs of these students would be to put them at a social and legal disadvantage.

In considering the issue of bilingual education, however, a distinction should be made between assimilation into the educational system and assimilation into the predominant culture. Whereas the former is necessary for full access to social power and economic benefits, the latter may not be. Bilingual education poses significant questions about cultural integrity and individual autonomy. See infra Section VI E.

\textsuperscript{133} It may seem paradoxical that black students, educated in the same classrooms with white students, can be said to receive an unequal education. This presumes, however, that to treat people identically is to treat them "equally." Giving a starving
As long as disadvantaged minority students perform at a lower average level of achievement than do whites, the government has failed to fulfill its affirmative remedial obligation. A successful remedy, therefore, must focus on performance. It must address those components of a curriculum that can compensate for the effects of cultural isolation and provide minority students with the skills necessary to compete in the American meritocracy. Integration may be relevant, but only to a limited extent. Far more significant is the substance and method of educational instruction. Since the deprivation is substantive, so must be the remedy.

B. Equal Educational Performance: Defining a Violation

In order to define a breach of the educational right, the following two questions must be addressed. First, what characteristics determine whether a group is entitled to remedial education? And second, against what “control group” should educational performance be compared?

1. The Victim Class

The fourteenth amendment is especially concerned with the social and political disadvantage of “discrete and insular” minorities. Its group orientation suggests a concern with the macrostructure of society, based not primarily on the existence of an underclass, but on the disproportionate membership of disadvantaged minorities in that underclass. The demographic isolation of socially disadvantaged minority populations is an inevitable symptom of the caste-like quality of race in America. Segregated neighborhoods are almost uniformly ghettos, where poverty, unemployment, and illiteracy are passed from generation to generation. It is these conditions which the right of equal educational performance is intended to redress. The right, therefore, should protect any discrete neighborhood of disadvantaged man and a fat man each a piece of bread will not result in “equal” treatment if there is an affirmative duty to ensure that each lives a healthy life. Similarly, identical treatment may be inappropriate if a right requires equal performance. For a discussion of the ambiguities in the concept of equality, see Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537, 542 (1982) (Equality is a concept of little value, wholly dependent on independent substantive choices.). The concept of equality becomes meaningful only in the context of defined relevant circumstances—are the men receiving the piece of bread in the above hypothetical similarly situated, or is one starving and one fat? The selection of the relevant circumstance reflects an underlying normative choice. The educational right thus should not be viewed in terms of the obfuscating notion of equality, but in terms of its underlying substantive goals and values.

134 See supra note 107.

135 Thus, busing might be part of a constitutionally required remedy, but only as one element addressing the secondary causes of unequal educational performance.

136 Should the children of a poor black family in Montana, who do not live in a ghetto with a significant number of other minority families, be included as members
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vantaged minority students whose culture, language, and impoverished social status\(^1\) have rendered the typical middle class "Anglo" educational program unresponsive to their educational needs.\(^2\) The right is breached of the constitutionally entitled class? A justification for their remedial entitlement would be somewhat different from that underlying the right as applied to disadvantaged groups. A normative principle envisioning the just achievement of all individuals but for the effects of cultural isolation could exist independently of any consideration of race. Cf. Serna v. Portales Municipal Schools, 499 F.2d 1147, 1150, 1153 (10th Cir. 1974) (disadvantaging effects on one student can preclude meaningful education). But see Lau v. Nichols, 414 U.S. 563, 572 (1974) (Blackmun, J., dissenting) (substantial numbers of children must be affected to find violation). Why should a poor black individual be compensated for the effects of his poverty and cultural isolation but not a poor white individual? An argument might be made that the black individual's plight, in all likelihood, is an effect of past racial discrimination, and that society should be obligated to compensate for this particular cause of disadvantage. This justification, however, is backward looking as it focuses on the perpetrator's blameworthiness. A concern with disadvantaged individuals who do not reside in racially identifiable neighborhoods ignores the central role of segregation in perpetuating the caste-like condition of race in America. In a third order regime, past blameworthiness is irrelevant. The unacceptability of racial caste remains the critical principle.

A disadvantaged minority student who does not reside in a segregated ghetto has, in a significant sense, escaped from a critical condition characterizing racial caste. The plight of this student may in some sense be important, but its constitutional relevance is limited given the third order right's concern with the self-perpetuating characteristics of racial caste—cultural isolation, inferior education, and poverty—which are most severe and systemic in minority ghettos. See supra note 60 (discussion of educational right versus employment right).

\(^1\) Should a group of poor and unskilled Haitian refugees entering the United States in 1983 be ensured equal educational opportunity by the Constitution? If the right were predicated on a remedial obligation triggered by past discrimination by the government or by society in general, the Haitians' remedial entitlement could not be justified. If, however, the educational right were predicated on the ideal of a multicultural society in which there is no correspondence between race and socio-economic status, then the remedial entitlement might be justifiable. Without appropriate education, the plight of a group of Haitian refugees may well become that of the perpetually impoverished black or Hispanic. Whether in black Harlem or Haitian Harlem, the constitutional issue concerns the impropriety of racial caste in a multicultural society and the disproportionate correlation between ethnicity and economics. The entitlement of a new minority group would be predicated on a prophylactic concern with the potential development of additional disadvantaged castes in America.

\(^2\) A definition of remedial entitlement that requires residence in a segregated community might create incentives promoting the perpetuation, and perhaps even the augmentation, of segregated housing patterns among the disadvantaged. Although this result may be superficially similar to the role that first order segregation plays in promoting second order segregation, see supra notes 19-21 and accompanying text, the potential increase in segregation is not unambiguously undesirable. A minority family's decision to remain in a segregated neighborhood because of
whenever such a demographically isolated population of minority students performs substantially below the relevant average white student population\textsuperscript{139} in significant areas of education.\textsuperscript{140}

2. Unequal Performance Compared to Whom?

Since a special concern with the educational disadvantage of minorities is based upon the goal of destroying the correspondence between race and class, the educational right requires that the average performance of blacks and the average performance of whites be equalized. Several different benchmarks will arguably achieve this goal. Each has different implications for the constitutionally required performance level of local minority populations.

An obvious potential benchmark would be the national average white performance. Because it is a national average, however, this benchmark would produce anomalous results. If the average white performance in a particular locality exceeded the national average, the constitutional rights of the victim class would be satisfied despite the fact that local black performance continued to trail the average white performance. Conversely, if the average white performance in a particular region were lower than the national average, the local black population there would, by virtue of the constitutionally required remedy, be entitled to perform at a higher level than local whites. Thus, since the academic performance of southern whites trails the national average, southern blacks would eventually perform at a higher level than southern whites. More significantly, however, blacks would remain educationally disadvantaged in the north, and in other areas

\textsuperscript{139} See infra Section VI B.2. (defining relevant average white student population).

\textsuperscript{140} See supra note 107.
where white performance exceeded the national average. A benchmark imposing a national standard of required minority performance is thus undesirable; it would preserve the foundations of racial caste in significant portions of the nation.

Local disparity could be averted, however, if the required performance level for minorities were measured by the average white performance in each locality. A local benchmark would be entirely consistent with the normative underpinnings of the third order right. Local fluctuations in white performance are not generally attributable to a long history of discrimination or to cultural isolation. The difference between minority performance and white performance in each local region will reflect the degree of educational deprivation attributable to a minority group's cultural isolation.

C. The Alternative Remedy: Tailoring Education to the Needs of the Victim

An appropriate remedy for eliminating inequality in minority educational performance must serve two educational goals. The first is remedial—it must compensate for the effects of cultural isolation by equalizing the educational receptivity of black and white students. The second is developmental—it must teach minorities those skills necessary to compete in the achievement arenas of American society.

In achieving these goals, the governmental body responsible for discharging the remedial obligation must consider the special conditions of the community whose rights have been violated. What is the nature of the community's cultural isolation? What is the source of its students' depressed educational performance? Language, the cultural criteria of status and achievement, and other ethno-cultural factors, all may contribute to the inadequacy of an education oriented toward the middle-class "Anglo" student. The cause of educational deprivation in one community may not be identical to that in another. Remedial education for a black community would be significantly different from a remedy designed for Hispanics. If one school served blacks, Hispanics, and Asian-Americans, for example, a different remedial strategy might be appropriate for each subgroup within that community.

If culturally specific remedies for unequal educational performance are required, some classrooms within schools will be segregated. As children progress through the grade levels, however, the compensatory elements of the remedy should become less necessary. As minority students become more literate in "standard" English, their need for a culturally specific remedy will gradually fade away. When the appropriate curricula for students begin to coincide, education can proceed in a common classroom on a common ground.

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141 For a discussion of which governmental entities will bear the responsibility of discharging the remedial duty, see infra notes 158-64 and accompanying text.

142 This is also the goal of bilingual programs. See Cintron v. Brentwood Union
Devising a remedy that adequately addresses the unequal educational performance of a disadvantaged minority population will require careful analysis of the educational areas in which the group's performance lags. Programs must be developed to diagnose and compensate for the causes of depressed educational performance. Such a diagnostic methodology is far from unprecedented in state and federal statutory law. The Education of All Handicapped Children Act, for example, requires participating states to develop annual "individualized educational programs" to meet the special educational needs of handicapped children entitled to governmental assistance.

This federal statute can provide a procedural model for devising appropriate curricular responses to the educational deprivation suffered by minority populations. It cannot, of course, provide the substantive principles for determining the causes of performance gaps and what should be done to cure them. These issues must be left to educational experts. Law can provide the constitutional principles, goals, and required end-states. It can require procedures for achieving those goals. But in devising a substantive response to the causes of educational deprivation, the lawyer must yield to the educator.

D. Required End-States and Instrumentalism: Federalism, Separation of Powers, and Adequate Measures

A third order right of equal educational performance requires the consideration of two questions regarding the allocation of administrative responsibility. First, what role should the federal judiciary play in vindicating the right of equal educational performance? Second, how should responsibility

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Free School Dist., 455 F. Supp. 57, 59-60 (E.D.N.Y. 1978) (Bilingual program "expected to produce a level of language proficiency such that by the time the student reaches the sixth grade, all courses can be taught entirely in English.


Section 1401 provides:

[T]he term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals,. . . . (C) a statement of the specific educational services to be provided to such child, . . . (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.


"End-state" refers to the social condition which satisfies the government's affirmative remedial duty.
for discharging the affirmative remedial duty be allocated between the states and localities, traditionally responsible for providing public education?146

1. Process, End-States, and Affirmative Instrumentalism

Whereas predominant equal protection analysis proscribes the intrusion of illegitimate considerations into the decisionmaking process, the educational right created by contemporary judicial doctrine envisions a required end-state. Once the government engages in significant actions motivated by discriminatory intent, it bears an affirmative duty to create a system that is integrated in fact. The notion of an affirmative remedial duty presumes an ultimate goal, whether that end-state consists of the system as it would have existed "but for" past discrimination, a systemwide racial balance, or a condition of equal educational performance.

A court's ability to determine whether a governmental body is adequately endeavoring to fulfill its affirmative duty depends on the speed with which the required end-state can be achieved. When that end-state is defined purely in terms of racial balance, it will be evident whether a locality has undertaken measures that will eventually eliminate the vestiges of a dual system. Racial balance can be quickly achieved through busing or other similar means. When the required end-state demands equal educational performance, however, it is more difficult to determine whether the responsible governmental body is appropriately seeking to discharge its duty.147 Educational performance cannot be equalized overnight. Once the responsible authority has taken identifiable steps toward achieving that end, the reviewing court must determine the adequacy of those steps toward discharging the constitutional obligation.

2. Discharging the Affirmative Remedial Duty: Conditions of Judicial Intervention

Since the required end-state of equal educational performance cannot be immediately achieved, the government's failure to eliminate depressed

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146 See infra notes 158-64 and accompanying text.
147 The question of whether the remedial duty has ultimately been fulfilled, rather than whether the duty is being adequately addressed for that moment, can most easily be answered if the constitutionally required end-state is defined in terms of equal group performance. If the required end-state is racial balance, however, it is difficult to define standards for determining whether the government has completely vindicated the rights of minority students. Perhaps because the ultimate goal of the right remains unclear, the Court has not adequately defined the conditions under which the affirmative duty may be deemed ultimately fulfilled. Thus, the Court has left uncertain the constitutionally required period during which racial balance must be maintained before the duty has been discharged. But cf. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (remedial duty discharged when terms of rigid remedial plan literally fulfilled).
minority performance should not itself be sufficient to trigger judicial intervention. Some range of democratic discretion should be preserved. The existence of a performance gap, therefore, should trigger an affirmative remedial duty on the part of the "democratic" branches of government. Those branches will have committed a violation warranting judicial intervention only if they fail to satisfy this affirmative remedial duty. Courts must, therefore, determine whether the remedial process chosen by the entity responsible for discharging the duty is constitutionally adequate. This judicial responsibility requires a definition of the standards by which these "democratically" chosen remedial measures should be evaluated. At what rate must improved minority educational performance be accomplished? What commitment of governmental resources is adequate? What substantive programs fulfill the constitutionally imposed affirmative duty?

A third order right is justifiable because the interests of the class it seeks to protect are paramount. Because of the extreme moral compulsion that justifies a right's third order status, the range of legitimate democratic discretion in choosing a remedial process should be pegged around an axis of practicability—what can possibly be achieved—rather than of practicality—what can "efficiently" be achieved. If courts were to define

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148 It can hardly be denied that the American system values democratic decision-making over the judicial process when other fundamental values would not be compromised. The people, in general, are more trusted than are platonic guardians. Once the democratic process has been appropriately circumscribed to take account of those competing values, further restriction of democratic discretion would not be justified.  
149 Cf. Dayton II, 443 U.S. at 537 (commission of systemwide violation triggers continuing duty to eradicate effects of that system).

The end-state of equal educational performance more clearly establishes principles for defining ultimate compliance than does the end-state of integration. Because the governmental obligation is predicated on the illegitimate correspondence of race and class, its duty will have been finally discharged when equal educational performance has been achieved for a sufficient time to ensure that the social mobility of the victim class is proportionate to that of the white population. Principles for defining constitutionally adequate means toward that end, however, must be developed.

150 See supra note 86.

151 Title VII, for example, defines concerns about the discriminatory impact of facially neutral acts around an axis of practicality. Employment criteria may legitimately impose a discriminatory impact on disadvantaged minorities only if those criteria are related to skills necessary for job performance. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). But whether a hiring examination such as the one used to select police officers in Washington v. Davis, see supra notes 54-60 and accompanying text, selects "over-qualified" recruits, or whether it is precisely "job related," it can still
their standard of review around an axis of mere practicality, they will have created a balancing test without a calibrated balance. Other governmental goals might then legitimately be weighed against the goal of achieving equal

have a discriminatory impact. Job-related exams simply reduce the severity of the impact. Title VII does not reflect a second order principle. Employers are responsible for manifestations of societal discrimination in general, not just those for which they are directly responsible.

In considering the government’s remedial obligations in the context of a second order right, the notion of job-relatedness is theoretically irrelevant. The government must make victims whole “but for” the effects of its past transgressions. The postulation of a second order right to be free from the continuing effects of past unconstitutional action logically implies a remedy that goes beyond merely requiring job-relatedness. The issue concerns the continuing disadvantage caused by past governmental actions suffered by applicants in current governmental programs. If there is a constitutional right to be free from such lingering effects, then the government should cure the disparate impact.

One might, nevertheless, eschew a slavish adherence to principle, and advocate a limited remedy for a violation of the second order right. Individual rights must be balanced against social costs and needs, and the criterion of job-relatedness perhaps might provide the appropriate balance. Individual rights could thus be balanced against social costs and needs. An argument can be made that hiring quotas should never be mandated when unqualified persons would be selected to perform important public tasks, even if those hired by the quota were unqualified solely because of past governmental wrongs. But the validity of limiting the scope of remedial responsibility by considerations of social necessity is not self-evident. When a right has been violated because of past governmental misconduct, and the government has been deemed to have a continuing obligation to remedy the lingering effects of this past misconduct, an appropriate remedy would arguably require the government to do everything possible to place disadvantaged applicants in the position they would have enjoyed “but for” past unconstitutional acts. The social costs of placing less than qualified persons in positions of public responsibility will be spread evenly among the entire population, just as any compensation to private victims of past governmental harms should be. Police detectives might not find as many criminals and firemen might not extinguish fires as quickly, but harmed individuals will be compensated, and constitutional rights vindicated. The burdens of past societal wrongs will be borne by society as a whole.

Surely, however, even if the scope of a right includes all “but for” effects, the form of its remedy need not be specific compensation. If exigencies of life require a minimal competence of important public functionaries, social justice must yield to social realities. But this observation argues against the form—not the scope—of the remedy. If there is a right to be free from the continuing effects of past state wrongs, then the appropriate remedy will not necessarily be a “but for” specific performance, but some reasonable compensatory substitute—perhaps damages. The issue of damages raises numerous complex issues of causation and the normative concern of individual compensation versus compensation to all members of a status group. See generally B. BITTKER, supra note 1, at 59-67, 71-90. Damages could conceivably be awarded to the entire group of unsuccessful black applicants, discounting the award by an amount representing the chance that any person would have been unqualified
educational performance. The social disadvantages of waiting a half-century to achieve educational equality could be legitimately counterbalanced against the advantages of building a new highway or reducing property taxes. If such inquiries were permitted, the affirmative remedial duty would be toothless. Like the rights of free expression and the free exercise of religion, and the right against intentional racial discrimination, the right of equal educational performance should be playable as a constitutional trump card. If a legislatively chosen remedial program falls below the realm of the practicable, the government should at least be forced to demonstrate a compelling countervailing interest in order to justify its actions.

Thus, to determine whether the government is discharging its affirmative remedial duty, courts should ask whether the responsible governmental entities have adequately diagnosed the causes of unequal educational performance and whether they have prescribed a remedial program that will compensate for these causes as quickly as practicable. But how can a reviewing court determine whether the government is satisfying the requirement of practicability? Under what circumstances should the court be permitted to substitute its own notions of a constitutionally adequate remedy

even without past invidious state acts. A discussion of damages in this context raises significant questions of sovereign immunity, of course, but otherwise they would constitute a reasonable substitute remedy. Victims will be made whole, or compensated to the greatest extent possible. The burden of compensation will be spread evenly throughout society.

If the employment right were not limited to the "but for" effects of past governmental discrimination, but instead extended to preclude all disparate impact, the theory underlying this right and the class of persons to which the right extended would be broader. No predicate of governmental causation would be needed; rather, the primary concern would be to redress the starting point disadvantages suffered by members of chronically deprived groups.

Professor Perry has advocated a definition of discrimination under the fourteenth amendment reaching governmental actions that were not undertaken with discriminatory intent but that do impose a discriminatory impact on minorities. He expressed the view, however, that the Constitution should not proscribe all such actions but only should require that government officials take due account of the disproportionate impact of their acts, and to balance that impact against other policy considerations. Under his theory,

the bare fact of disproportionate impact has limited significance. The fact of disproportionate impact does no more than trigger application of the disproportionate impact standard of review. At this point, factors other than disproportionate impact become crucial, principally the private interest, in relation to which there is a disproportionate impact, and the public interest, the pursuit of which by means of the challenged law or practice has a disproportionate impact. Perry, supra note 58, at 563. Perry left unclear, however, the criteria for determining whether a particular interest is sufficient to justify the disproportionate impact. See supra note 58.
for that chosen by the "democratic" branches of government? The determination of how much educational progress is practicable raises difficult questions; reviewing courts could be confronted by the conflicting views of educational "experts." But courts need not choose among competing educational theories in reviewing a challenged remedial process. Because the question is raised in the context of a right requiring a particular end-state, the adequacy of a challenged program can also be evaluated by its results. If the responsible governmental entity has selected a program that achieves little or no narrowing of the performance gap after a diagnostically significant period of time, the program should presumptively be invalid. If, however, a program

153 If the responsible governmental entity has not initiated some form of diagnostic and remedial program aimed at eliminating the performance gap, and if a plaintiff could establish the government's affirmative remedial duty by proving the existence of such a gap, a reviewing court should find a violation as a matter of law and exercise its remedial discretion to implement an affirmative remedy. Under such circumstances, a court could order the responsible governmental entity to devise a remedial plan, or could rely exclusively on court-appointed experts to devise its own plan. See Swann, 402 U.S. at 7 (discussing fact that district court had ordered school board to present plan for faculty and student desegregation); Milliken II, 433 U.S. at 271 (after remedial decree struck down by Court, state and local defendants ordered to submit new desegregation plans). The standard used by courts to evaluate a plan devised by a locality once a violation has been found should be more stringent than that used to evaluate proposals developed and implemented prior to judicial intervention. Once a violation has been established, the judiciary need not defer to democratic decisions.

154 Such a basis for ascertaining the adequacy of a remedial program, especially when the constitutional standard consists of practicability, would be wholly unsatisfactory. The range of professional disagreement is broad and judicial expertise is minimal. See infra note 155.

155 Although this might suggest that a remedial program cannot be challenged until after it has been in effect for a period sufficient to allow empirical evaluation of constitutional adequacy, the program might be challenged earlier on purely theoretical grounds. Plaintiffs presenting such a challenge would face a heavy burden of proof, and might even be faced with the task of proving a locality's bad faith. Bad faith might be demonstrated if a defendant could present no reputable body of educational theory that would support its diagnosis and chosen program. Because of the significant range of professional disagreement over theories of educational harm and remedial responses, see generally Dillingofsky, Sociolinguistics and Reading: A Review of the Literature, in 33 The Reading Teacher 307, 308-11 (Jan. 1979) (survey of theories on relationship between language and reading achievement), a challenge predicated solely on educational theory without any empirical evidence would rarely be successful.

Defining a diagnostically significant period of time is an important judicial task. Courts could, for example, develop a "sliding scale" approach for evaluating remedial programs. A program that had not produced results shortly after its inception would be entitled to less deference than one challenged before implementation. Alternatively, courts might establish a two-tier approach, designating programs that
triggers significant improvement in the educational performance of disadvantaged minorities, the program should be presumptively valid. In challenging such a successful program, plaintiffs should bear the burden of proving that another educational strategy will yield better results.\textsuperscript{156}

By pegging the stringency of judicial review to the results achieved, courts can strike the appropriate constitutional balance between the values underlying the third order right and those that favor decisions made by the democratic process. The more progress the government makes toward achieving equal educational performance, the more likely that it is fulfilling its affirmative obligation to ensure equal educational performance at the maximum practicable rate. Judicial intervention would then less likely be warranted. Good faith efforts to achieve equal educational performance at the maximum practicable rate would likely yield significant results, and therefore can insulate the democratic process from judicial intervention.\textsuperscript{157}

3. Allocating Remedial Responsibility

The responsibility for ensuring equal educational performance must be allocated among different levels of government. This Article has posited a third order right of equal educational performance. Governmental remedial responsibility is predicated not on contemporary or past discriminatory intent, but on the state’s decision to provide education.\textsuperscript{158} As in \textit{Brown}, if

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\textsuperscript{156} Such proof might include establishing the fact that better results had been achieved by other school districts that had employed different remedial approaches. Plaintiffs should bear the burden of proving that the causes of educational harm in their home districts were similar in relevant aspects to those achieving better results.

\textsuperscript{157} A good faith standard of review, however, would be far too deferential. By attaching the presumption of validity to programs yielding significant results, courts can strike an appropriate balance between the compelling remedial entitlements of the plaintiff class and the discretion of the defendants while remaining within the limits of special judicial competence.

\textsuperscript{158} Could a state evade remedial responsibility simply by ceasing to provide public education? Could it reduce its obligation by providing public education only through grade six? Because such actions most likely would be undertaken with the intent to evade its obligation to disadvantaged minority students, a state that ceased to provide public education would be acting with the discriminatory intent proscribed by first order equal protection analysis. Given the history of public education and the fact that state programs, though perhaps not constitutionally mandated, are nevertheless universal, the motivation behind cessation or reduction of public education in the face of an affirmative remedial duty would be transparent. \textit{Cf.} Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). The Court in \textit{Arlington Heights} stated that “[s]ometimes a clear pattern, unexplainable on grounds
members of disadvantaged minority groups benefit less from that education than do white students, the government must discharge an affirmative remedial duty.\footnote{\textsuperscript{159}}

\footnote{\textsuperscript{159}The issue here is not whether the absence of an intent requirement violates the traditional "state action" concerns of the fourteenth amendment. The "state action" doctrine has served primarily to distinguish between private acts and public responsibility. It has defined the circumstances under which the state may be accountable for the acts of "private" citizens, see, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (agency of the State of Delaware liable under the fourteenth amendment for racial discrimination practiced by a "private" restaurant tenant in public facility); Polk County v. Dodson, 450 U.S. 963 (1981) (suit under 42 U.S.C. \$ 1983 against local government alleging malpractice of a public defender dismissed for want of state action), and those circumstances under which a "private" party may be held accountable for standards imposed by the government, see, e.g., Flagg Brothers v. Brooks, 436 U.S. 149 (1978) (private warehouseman's sale of goods to satisfy a debt pursuant to permissive statute held not state action). Although at least one commentator has argued that "the de facto-de jure distinction presents a state action decision in pristine form" because "de facto" segregation was caused by private acts, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 471 (1978), this argument was made in the context of a traditional conceptualization of the underlying right. Furthermore, even in that context, the argument is fallacious. The intent requirement is far more restrictive than the "state action" issue; state deci-}
Because the states, by long-lived common practice, have provided education through local school districts, it is appropriate that local school districts bear the burden of diagnosing the educational problems of local minority populations and prescribing adequate remedial responses. Indeed, local authorities, already familiar with local conditions, are well-situated to diagnose the causes of unequal educational performance and to tailor effective remedial programs to meet particular local concerns. This initial allocation of discretion in choosing remedial policies is consistent with the value of local control that has pervaded several Supreme Court cases.

Local school districts should not bear the costs of developing and implementing remedial programs, however, because it is hardly just to place the burden of a constitutionally required remedy on the victims. Furthermore, Milliken I and Milliken II demonstrate that the locality in which deprivation is most severe will be least able to achieve a remedy on its own. Thus, because the third order right eliminates the remedial limitations imposed by predicating remedial responsibility on past invidious intent, the states, having undertaken the ultimate responsibility for providing public education, must bear the extra costs incurred toward achieving equal educational performance. In this way, the broadest possible segment of society will bear the burden of a just reconstitution of the American social structure.

Solutions might cause segregation as an unintended consequence of actions undertaken toward implementing other goals.

Rather, the issue here concerns whether the Constitution has imposed a responsibility upon the government. State responsibility may be determined only in the context of the asserted underlying right: "[c]onstitutional rights define the characteristics of unconstitutional state action." L. Tribe, American Constitutional Law 1159 (1978). The issue for establishing state and local liability for unequal educational performance does not rest on a distinction between "private" and "public" acts, but rather on defining the extent of the governmental obligation. Clearly, the government is a public actor. Equally clear is the fact that a third order right imposes an obligation on the government that will be breached if education fails to benefit disadvantaged minority students as much as their white counterparts.

160 See Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our nation is committed to the control of state and local authorities.").
162 See supra notes 118-26 and accompanying text.
163 The state's affirmative obligation is predicated on its provision of public education through local instrumentalities. It bears the ultimate remedial responsibility. Because a third order remedial obligation does not depend on a predicate of invidious intent, past or contemporary, the distinction between state and local decisionmaking, central in Milliken I, is irrelevant.
164 This raises the issue of whether a third order right of equal educational performance can and should apply to the federal government. Imposing such an obligation would certainly spread the costs of discharging the remedial obligation throughout all
E. Equal Educational Performance and Cultural Legitimacy

The presumption that the achievement of equal educational performance requires equal competency in traditional English language, reading, and expression is not without serious normative consequences. It can be force-
of American society, and therefore would impose the smallest burden on the beneficiaries. It would thus arguably allocate the remedial obligation along more just and rational principles.

Why should the affirmative remedial obligation be predicated on a prior choice to provide public education? Are the normative premises of a third order educational right consistent with such a limitation or are they, indeed, undermined by that limitation? If the government does not provide public education, will there not be even greater disparity between the educational development of disadvantaged minorities and members of more privileged groups? Is not the provision of public education, therefore, the first essential affirmative obligation toward eliminating racial caste?

There are primarily two arguments against constitutionally defining such an affirmative obligation. First, to impose a governmental obligation where there is no prior governmental involvement may seem to be the most radical example of pulling rights from the air. Unlike a situation in which the government provides education that imposes a disparate impact on different cultural groups, and in which, therefore, the government can be said to be actively disadvantaging minority students, it cannot be said that the federal government is actively disadvantaging minority students here. Yet, although traditional equal protection doctrine focuses on the affirmative actions of the government, such a limitation in the context of a third order right would be more formalistic than normatively rational. Under a third order right, governmental responsibility is predicated on the acute remedial needs of the beneficiary class. See supra note 133. To argue that the government bears an affirmative duty to satisfy those needs because it provides education but does not bear such an obligation if it chooses not to provide public education is to lose sight of ultimate goals.

Professor Tribe’s analysis of the preliminary issue in “state action” analysis is relevant here as well. See supra note 159. The proposition that “constitutional rights define the characteristics of unconstitutional state action” may logically extend to the conclusion that the parameters of a constitutional right should dictate the extent of governmental obligation. In the context of a third order right, the requirement of prior state involvement as a predicate for an affirmative remedial duty would be logically and normatively unnecessary.

Second, imposing a remedial obligation on the federal government is arguably a greater intrusion on the democratic process than is a third order obligation imposed on states and localities. The provision of primary and secondary education has traditionally been a concern of state and local governments. Nevertheless, because the democratic decision to provide education is so taken for granted and so far removed from a decision to ensure equal educational performance, imposing the affirmative remedial duty on the federal government arguably infringes on the democratic process no more than does imposing it on states and localities. Preservation of the democratic process has been a subordinate value in the Court’s pursuit of educational rights, and indeed should be, given traditional concerns for “discrete and insular minorities” and their incapacity in democratic forums. See United States v.
fully argued that the constitutional violation should rest not on society’s failure to indoctrinate disadvantaged minorities into middle class “Anglo” culture, but on its failure to incorporate minority cultures into its economic power structure. Fluency in Spanish, competency or even poetic artistry in Black English, have little value in the marketplace only because those with market power are part of a different culture. How different American society would be if those of ghetto cultures controlled the economic resources.

In confronting the dilemma of how best to ensure the elimination of racial caste, the issue of cultural genocide must be considered. Given the existing market structure, does the achievement of competitive economic parity among various racial and ethnic groups require a homogenization of American cultures, and the concomitant elimination of minority cultures? Must the home cultures of ethnic minorities be displaced by an external culture?

Displacement is not inevitable. Bilingual education can provide a meaningful model for multicultural education, enabling children to maintain their home cultures while gaining familiarity with the culture of the economic power structure. Both multicultural education and education monogradually provided, however, will compromise the autonomy of minorities to some extent. Although it may be argued that minority students should not

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Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). Federal responsibility is implicated by a third order right which unambiguously favors the value of educational equality over that of democratic discretion. Ironically enough, the textual foundation for such an “anti-democratic” affirmative duty rests in the due process clause of the fifth amendment, into which an “equal protection component” was incorporated by Bolling. See supra note 40.

Such a theory of governmental responsibility, predicated on the discriminatory impact created when public education is not provided, obviates the necessity of finding discriminatory intent if the government were to attempt the abolition or retrenchment of public education in order to evade its constitutional obligation. See supra note 158.

Although bilingual education has been advocated in pursuit of cultural pluralism, it also has been promoted as a means of achieving the assimilation of different cultural groups. See, e.g., Otheguy, Thinking About Bilingual Education: A Critical Reappraisal, 52 HARV. EDUC. REV. 301, 303 (1982). The distinction is primarily one of emphasis, for some degree of bilingual education is necessary if English is to be taught effectively. Bilingual education can, but need not necessarily, encompass bilingual education. The issue, therefore, is whether the subjects taught are diversified beyond the employment of a child’s home language and the “Anglo” language. See also Foster, Bilingual Education: An Educational and Legal Survey, 5 J. OF L. & EDUC. 149, 154-55 (1976) (considering range of structures and purposes of bilingual programs).

That is, by requiring a person of one culture to learn the rudiments of another, there is inevitably a degree of displacement of the home culture. By living in a society in which competence in the majority culture is necessary for success in the arenas of achievement, those of minority cultures are faced with the choice of learning a
be forced to learn the essentials of "Anglo" culture, some individual choice must be sacrificed as long as our multicultural society is ruled by a monocultural structure of economic power. Criticizing a multicultural curriculum because it requires effective exposure to the "Anglo" culture ignores the choice-limiting aspects of the contemporary exclusion from social and economic power.

Indeed, members of the white majority could eventually face similar issues of cultural independence. As minority students become better equipped to compete effectively for jobs and other economic benefits, economic stratification will begin to lose its correspondence with race and ethnicity. Members of minority cultures will begin to control economic resources, and those cultural characteristics that are demanded and rewarded will be redefined. English might ultimately lose its monopoly as the linguistic prerequisite for success in America; monolingual individuals could well be left at a professional or business disadvantage.

These issues of educational policy implicate fundamental questions about the nature of American society and the meaning of equal protection in a nation built upon many cultures. To what extent should the government recognize and foment cultural orthodoxy? Should the government bear an affirmative duty to preserve the integrity of different cultures while promoting equal educational performance? These issues are necessary consequences of Brown's implicit concern with racial caste and the structure of American society. They must be considered whenever a society commits itself to eliminating economic stratification that corresponds with cultural variation. But although cultural legitimacy is clearly an important issue, it is hardly the preeminent problem in a context of intractable social and economic deprivation. Toward the goal of achieving true cultural integrity, in which all cultural groups are equal in the structure of American society, the first and most essential step is to ensure equal educational performance.

VII. CONCLUSION: DEMOCRACY, CONSTITUTIONAL CHOICE, AND THE END OF RACIAL CASTE

By elevating substantive values to a level of special protection, the Constitution impinges upon the democratic process. If Congress may not establish a national religion or prohibit abortion, for example, the range of democratic discretion has been circumscribed. The Constitution defines the limits of democratic legitimacy. Some decisions may be made; others may not.

In 1954, the Supreme Court recognized the tension between democratic discretion and another preferred constitutional value. By predicating the invalidation of first order segregation on two distinct rationales, the Court posed a normative dilemma that begged resolution. Bolling reflected the different language and culture or failing to enter into the network through which social benefits are distributed. In the long run, cultural displacement might become a concern of the "Anglo" majority.
fundamental constitutional principle that democratic decisions should be viewed as legitimate unless they were undertaken with discriminatory intent. Brown, however, elevated equal educational opportunity to the

167 Under no theory of constitutional interpretation can judges avoid normative choice. The school of constitutional interpretation that perceives the judicial process as simply a value neutral monitor of the democratic process, see, e.g., Bolling 347 U.S. 497; United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4; J.H. ELY, DEMOCRACY AND DISTRUST (1980), inadequately accounts for the values implicated in the choice of criteria by which the democratic process is monitored.

Perhaps the most significant example of the non-neutrality of Bolling's process-oriented equal protection principles occurs in the choice of those "discrete and insular" groups entitled to special constitutional insulation from invidious democratic decisions. Before the development of these equal protection principles in the 1940's and 1950's, blacks could not rely on special judicial scrutiny of the democratic process. The decision to elevate blacks as a protected group was itself a judicial value choice. The decision not to elevate other groups to a level of special protection is a similar value choice. The Supreme Court's failure even to address the question of whether gay people constitute a minority subject to popular animus, and thus whether they are entitled to constitutional protection, reflects the fact that the process school of equal protection, no less than Plessy's and Brown's substantive-oriented school, is far from value neutral. See, e.g., Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976) (Supreme Court affirmed without oral argument or opinion a lower court ruling upholding the application of criminal penalties to private consensual sex between men in Virginia.). The district court's choice of values in failing to recognize the arguably invidious nature of the challenged statutory application is evident in its statement that

[with no authoritative judicial bar to the proscription of homosexuality—since it is obviously no portion of marriage, home or family life—the next question is whether there is any ground for barring Virginia from branding it as criminal. If a State determines that punishment therefor, even when committed in the home, is appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not free to do so. 403 F. Supp. at 1202. The Supreme Court, nevertheless, deemed it appropriate to strike down Virginia's antimiscegenation statute, arguably predicated on similar state interests of protecting acceptable family life, on process-oriented equal protection grounds because the statute invidiously discriminated on the basis of race. See Loving v. Virginia, 388 U.S. 1 (1967). Race, therefore, defines a class which the Court has recognized as entitled to special constitutional protection. Sexual orientation, however, although defining a class similarly subject to first order discrimination, has not been recognized as an illegitimate factor in legislative decisionmaking. The distinction in the treatment of these two classes rests in the application of judicially chosen values.

Thus, with respect to the contention that judicial selection of protected constitutional values is illegitimate, the "process" school of equal protection analysis is as vulnerable to attack as is the "substance" school. That the courts are choosing values must be recognized, and those values must be justified as appropriately constitutional on their merits in the context of the purpose of the Constitution in the American system. For an excellent exposition of the argument that normative choice
status of a preferred constitutional value. The intent to treat the races differently was not at issue. Rather, 
*Brown* was concerned with the adverse impact on disadvantaged minority students of an educational system tailored to the needs and desires of the white majority. Minority students had to benefit from public education as much as did their white counterparts. Affirmatively imposed segregation, because it precluded equal benefit, was held unconstitutional.

In seeking to reconcile the competing values reflected in the *Brown/Bolling* dichotomy, the Court has created a constitutionally unique second order doctrine which undermines the integrity of both theories of right. The contemporary doctrine protects *Bolling*'s concerns with democratic discretion in an unprincipled fashion. It renders unattainable *Brown*'s ultimate ideal of a casteless society. The goal of achieving true integration, not merely in the classrooms but throughout all economic strata of society, is implicit in the spirit of *Brown*. *Brown*'s powerful moral force, the normative irresistibility of principles seeking to eradicate disadvantage in education disproportionately suffered by "discrete and insular" groups, appropriately should prevail over the value of democratic control. The intent "trigger" should be abandoned.

A clear definition of the educational right toward which the Court has been groping for nearly three decades yields principles for framing an appropriate remedy. A third order right, requiring the government to ensure that average minority educational performance equals average white educational performance in essential curricular areas, implies a remedy that compensates for the educational effects of the particular conditions of disadvantage suffered by minority populations. Democratic discretion remains, circumscribed to a large extent by the affirmative remedial duty, but protected from judicial intervention so long as there is meaningful progress toward the constitutionally mandated end.

Why is this right appropriately constitutional? Why is this interpretation of the fourteenth amendment based on *Brown* and subsequent cases legitimate? A third order right of equal educational performance resolves the normative contradictions that have plagued judicial doctrine since the inception of the *Brown/Bolling* dichotomy. It reflects substantive choices about what implicitly has been deemed unacceptable in the structure of American society. It promotes the interests of traditional beneficiaries of special constitutional protection—those who cannot depend on the democratic process to treat them without malice, let alone to promote their just social elevation. Democratic decisionmaking does not define the extent of legitimacy in a constitutional system that embraces substantive values. If the structure of American society is to be integrated, if the caste-like quality of race is to be eliminated, the impetus must come from values imposed on the polity. The source must be constitutional.