Diversity as a Compelling Interest at All Educational Levels

“Today, education is perhaps the most important function of state and local governments.”


It has been 56 years since Brown v. Board of Education was decided, but schools across the country have still largely failed to integrate and remain so. Where the Supreme Court once issued desegregation decrees, the growing trend of repealing court-ordered desegregation has constituted a steady regression, and in many cases, re-segregation of schools at the elementary and secondary level. The Court has more consistently allowed institutions of higher education to take race into account in admissions, citing the importance of access to higher education, but not extended that compelling interest in diversity to schools at the elementary and secondary levels, particularly where separation can be linked to personal choice and housing patterns. Even in cases outside of the realm of equal protection, the Court has largely come down in favor of parental choice. In doing so, it has essentially found that re-segregation is permissible so long as it can be traced to individual choice and not any action on the part of the school. It is here that there continues to be controversy surrounding the effect of individual choice on the state of education in the United States. The courts have largely glossed over the effects of *de facto*
segregation on school age children and society as a whole, but it is worth it for the courts to examine this issue more closely? The answer to that question, and whether schools should be permitted to take that issue into account is yes. In examining those and many other questions raised by the ongoing issue of school desegregation it is necessary to begin with determining just why it is still important to have diverse schools at all levels, the promise of *Brown* and its subsequent implementation, and finally where we are today and what can be expected in the future.

While parents have a right to determine where their children will attend school, there is also a great responsibility of and toward society as a whole to ensure that children are exposed to some form of diversity. Diversity takes many forms, but the one upon which the focus nearly always falls is that of race. In *Brown*, the Court stated that education is “the principal instrument in “awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” If this is so, then does that not also mean that the state and local government have a continuing duty to ensure that the educational environment is one that will prepare a child to become a fully functioning citizen? In the years following *Brown* and *Brown II*, the promise of those decisions – ending segregation in public schools – has yet to be fulfilled.

In *Brown*, the Court looked to the effect that segregation had and still has on public education, rather than just the tangible factors like the facilities, the curriculum, and qualification of teachers among others. However, this view was limited to the negative impact that “separate, but equal” educational systems had on African American children, rather than also exploring the negative impact that segregation has on society as a whole. The notion of inherent inequality and the irreversible harm that it created was later extended to the plight of Latino students. *Brown*,
though an important step toward the improvement of the educational environment for minority children, was limited in its vision and execution such that even today, the scope of the remedial actions required by the Court is still a source of major debate.

Though the common tendency is to think of desegregation simply in terms of whether African-American and Latino children are benefitting, it is also important to look to the effects that integration has on the majority as well. Not only does segregation have a detrimental effect on the self-worth of students of color, it also harms the majority child by inflating the sense of undeserved privilege and does her a disservice in preparing her to exist in an increasingly diverse world. Minority students on average tend to perform at levels below that of their white peers. Lower graduation rates, poorly performing schools, diminished likelihood of attending college, and a general tendency to be poorer than their white peers are problems that minority students face, particularly in schools that are not diverse. These children are exposed only to those viewpoints, and thus are ill equipped to exist in society outside of the lower income neighborhood or school. It is no coincidence that the schools with the highest minority concentration also tend to be those with more low income students, and students at a language disadvantage. Additionally, white students suffer from the lack of diversity as well. It is well known that students tend to perform better and are better prepared for life beyond school when they have been exposed to a variety of people. So, in focusing on the harm done to minority students, it becomes rather easy to view studies showing that in some cases, minority students may be even less able to succeed in integrated schools in such a way that allows schools to determine that there is no real need to desegregate. This belief then translates into the notion that so long as the minority students are seeing some success, then all is well and there is no ongoing commitment to diversity.
That notion is patently false. It fails to take into account the many social factors that may affect a child’s achievement. For instance, when a student is bussed into a completely different environment which may move at a pace vastly different from that which she is used to, that particular student may suffer from feelings of inferiority that affect her schoolwork. That student may also be suffering from racism by either her teachers or her peers, and as the Court agreed in Brown, that type of attitude has lasting effects on the psyche of the child.

In Reviving the Goal of an Integrated Society: A 21st Century Challenge, Gary Orfield argues that a systematic neglect of civil rights policy and other related policies has led to the increase in the achievement gap between nonwhite students and white students. Moreover, that it is due to the belief that race should simply be ignored that was prevalent during the Reagan, Nixon and Bush eras that extended to the administration George W. Bush. This staunch belief in individual capabilities and individual determinism is exemplified in the affirmative action cases in which the use of race as a deciding factor in college admissions was repeatedly challenged. Though the Court has quite often ruled in favor of such admissions policies, the extent to which schools can consider race is very limited despite the fact that the effects of racism are widespread and run very deep. The Court recognized this in its unanimous ruling in Brown, but the 56 years since it was decided that “separate is inherently unequal” have shown a marked departure from that line of thinking.

It is the things that cannot be immediately measured that tell us the most about race, integration, and their effects on school children. School children grow and learn, and then become adults who will continue to shape the world around them. No person lives his or her life

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in a vacuum. All lives have the potential to make an impact on other lives. One of the ways in which this is abundantly clear is in the effects of race on how people live, work, play, and interact. The change in consideration of race and how it effects society as a whole came about due to the individualism mentioned above. As a reflection of the strong belief in individualism that shapes out culture, people would like to believe that we live in a “colorblind” or “post racial” society. As such, many people and the Court strongly favor choice by the parent of where children will go to school. Where the separation has come about because of individual choices, the Court will always decide in favor of the school’s policies unless there is some showing that the school’s action or inaction led to that separation.

In the aftermath of Brown II, elementary and secondary schools nationwide implemented a variety of desegregation plans in order to remedy past racial discrimination. These remedial measures were intended to remove barriers to education cased by racial segregation, provide equal opportunities for education to students who had been disadvantaged, and to give students and their parents’ educational freedom. For some time those goals were being met, but complete integration has not yet been achieved. Additionally, due to the limited reach of Brown, the power to enforce integration is limited only to those districts which operated dual school systems and had a history of de jure segregation. Under this scheme, the effects of de facto segregation are largely ignored. In Freeman v. Pitts, the Supreme Court declared that “racial balance is not to be achieved for its own sake” in determining that a district court need only maintain control over a school system in the categories in which it has failed to abide by its court-ordered desegregation plan.2 According to the Court, the ultimate goal of the district courts was to return control to the school systems, and this incremental approach was a systematic and orderly means that allowed

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the courts to focus more on the areas of noncompliance. The Court acknowledged that the vestiges of past segregation remained in American society and in the schools, but ultimately determined that as the *de jure* violation became more remote in time and the separation became more attributable to demographic forces, there would no longer be a duty to correct the racial imbalance. It is likely that the Court here, at least in 1992 was not rejecting the notion of racial balance as a legitimate educational goal so much as limiting the scope of the court’s remedial power with respect to segregation. As stated above, the 56 years since *Brown*, have shown a steadily increasing disregard of the effects of segregation at the elementary and secondary school level. As such, schools have not been allowed to take voluntary steps to remedy the problem of systemic racism, particularly where they were never found to have had a duty to take remedial action in the first place. Where Americans see less of a need for remedial action, the schools will be less able to justify any curative act.

Focusing merely on remedial measures does not do justice to school children who will suffer the effects of segregation, their parents, or society as a whole regardless of whether that separation had the color of law. The effects, though the policies may be facially neutral, are felt all the same. It also fails to take into account the fact that desegregation entails more than changing the makeup of the students themselves, but that of the environment as well. The problem with the limited scope under which remedial policies may exist is that it has led to several district courts abandoning school desegregation decrees. In 2007, the Supreme Court decided that school districts could not assign students to public schools solely for the purpose of achieving racial integration, refusing to recognize racial balancing as a compelling state interest.\(^3\) In this case, the Court held five to four that racial balance was not a compelling state interest that

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could justify the assignment of school seats based on race. The Court however, was clearly divided on this issue. Justice Kennedy, in his concurring opinion added that schools may make race conscious efforts to achieve diversity; the school district’s actions were not narrowly tailored to meet that end. The four dissenting justices agreed that while the Constitution requires no remedy for de facto segregation, it does not prohibit remedial measures.

In this case, which was decided alongside Meredith v. Jefferson County Board of Education, the Seattle school district had a plan in place which allowed high school students to choose a school to attend. When certain schools were so popular that there were not enough spots left, the school district used a tiebreaker system – the second most important of which was race – to determine who would gain admittance to the school. This tiebreaker would be triggered if the racial demographics of any school's student body deviated too far from those of Seattle's total student population, and all nonwhites were treated simply as a group of nonwhites with no distinctions made within that category. The Court held that this use of race was not permissible as it was not narrowly tailored to suit the district’s asserted goal of fostering educational and broader socialization benefits through a racially diverse learning environment. This was so particularly where the district’s reasoning was tied solely to the demographics of each school rather than some alternative justification. In Meredith, a similar scheme of placement based upon demographics was used. By holding not the schools districts’ enrollment plans unconstitutional despite using quotas in making their determinations, the Court established that schools cannot take steps to remedy de facto segregation unless they somehow take factors not solely related to race into account. In one of his parts of the opinion, Chief Justice Roberts distinguished the actions of the school district from the two compelling reasons that would justify the use of race:

4 See Parents Involved, 501 U.S. at 705.
1. Remediating past intentional discrimination, and 2. The interest in diversity in higher education as it was established in *Grutter v. Bollinger*.

As to the first compelling interest, Seattle was not a school district subject to any past desegregation orders. Where the Court finds no past intentional discrimination, a school will likely not be able to take the steps to remedy incidental discrimination that grows out of housing choices or any other neutral factors. Whether the attempts it made were too broad, Seattle’s interest in promoting diversity was legitimate. De facto, or incidental discrimination has the same effects overall on students as does de jure discrimination. It could even be argued that it has an even more damaging effect because currently. There is little recourse for students who suffer, nor is there for school systems that wish to be more proactive in remedying the racial disparities that exist without having once had the force of law. Even without the schools having been segregated by law, the views of race and class which have existed for centuries still exist.

In his dissent, Justice Stevens criticizes this decision as a misuse and misapplication of previous civil rights cases, most notably *Brown v. Board of Ed. of Topeka*. Stevens referred to the majority’s use of *Brown* as a sick irony in citing that case stating that schoolchildren were told where they could and could not go to school based on their skin color, whereas unlike PIICS, only black children were ordered from the schools in *Brown*. Stevens argues that the racial classifications in this case should be regarded differently as there is not distinct class suffering from the school district’s policy. Stevens goes on to state that all children benefit from receiving an integrated education, despite the fact that much of the focus on integration tends to be placed on the benefits that minority children receive.

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*5 See id. at 799.*
*6 See id. at 800.*
He also raises the point that while he stressed that it was important to confine a remedy for past wrongdoing to members of the affected class, what is at issue in PIICS is whether the actions of the school district advance the public interest in educating children for the future.\footnote{See id. at 801.}

Justice Stevens and Justice Breyer, author of the principal dissent, voice concerns that critics of the PIICS case and many of the cases following Brown rose concerning the effects of desegregation. If school districts are required to remedy the effects of past intentional discrimination, then they should also be able to prevent even those schools that did not intentionally segregate the students from re-segregating since the effects are still the same. So far, many schools across the country have dropped their desegregation plans, and many districts have moved toward systems of segregated neighborhood schools. If the courts and the schools themselves are aware, then it would stand to reason that they should be allowed to take some action to ensure that the school districts do not eventually end up operating dual systems. Dual systems overwhelmingly lead to disparities in funding which only serve to exacerbate the problems that the typically minority, poor, and increasingly English language learners face when it comes to keeping up with their majority peers. Many school districts such as Kansas City (Missouri v. Jenkins) have suffered from the disparities concerning race and class. Just this year, Kansas City closed half of its schools in response to its budget problem. Recently, Chicago Public Schools joined the ever growing list of school systems being released from their court-ordered desegregation plans.

In 2009, a federal judge threw out Chicago Public Schools’ desegregation consent decree, determining that CPS had achieved unitary status. The decree, which had been in place since 1980 required, among other things that CPS implement a voluntary desegregation plan that
would create and maintain as many racially integrated schools as possible. One of the ways that this was carried out was through the use of magnet schools. While the information regarding the impact of this decision is still sparse, critics of the decision are rightly concerned with what this could mean for the minority students who may no longer have access to selective enrollment schools if, following PIICS school systems are no longer allowed to take race into account when deciding school placement to increase diversity.

Diversity, in its many forms is an important part of the educational environment. It should not only be a compelling interest at the post secondary and graduate level, but also at the elementary and secondary stages of life. If one of the goals of education is to build citizens, and children are compelled to go to school beginning at a young age, the government also has a compelling interest in ensuring that the school environment is one that is conducive to that goal. The world that children live in grows more diverse every day. This diversity is not only limited to race, it includes class, gender, ability, belief, and national origin, and if it is the job of the school to help shape how people grow as citizens, it must also make certain that people are equipped to succeed and interact with all people regardless of those factors. That preparation for the world beyond school, while important at the college level is equally important before then and must occur at all levels of education.

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8 http://www.cps.edu/Pages/MagnetSchoolsConsentDecree.aspx