INTRODUCTION

In a concurring opinion written shortly after the end of World War II, Justice Black argued that a law which singled out aliens of Japanese ancestry for discrimination was unconstitutional under the equal protection clause of the fourteenth amendment of the United States Constitution. Not content to rely on the American constitutional tradition, Justice Black referred to the commitment of the United States to human rights in the international sphere:

[We have recently pledged ourselves to cooperate with the United Nations to “promote . . . universal respect for, and ob-

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servance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?2

His reference was specifically to articles 55 and 56 of the United Nations Charter which was ratified by the United States, albeit it was not self-executing and hence did not have the force of domestic federal legislation.3 This national and international commitment to nondiscrimination was affirmed by the United Nations General Assembly when that body unanimously adopted the Universal Declaration of Human Rights4 less than a year after Justice Black wrote. Since that time there has been a continued and gradual evolution of the elastic concepts of human rights by international bodies, including those related to racial discrimination,5 and that evolution has been paralleled by the expansion of civil liberties and minority rights under the American Constitution over roughly the same period of time.6 The most notable example of the former evolution is the Interna-

6. See generally D. BELL, RACE, RACISM AND AMERICAN LAW (1973); H. COMMAGER,
tional Convention on the Elimination of All Forms of Racial Discrimination.\textsuperscript{7} The latter is best understood through analysis of the 1954 landmark decision of the United States Supreme Court in \textit{Brown v. Board of Education}\textsuperscript{8} which declared “separate-but-equal” public schools for black and white children to be unconstitutional, and through the judicial decisions and federal statutes emanating from \textit{Brown}.\textsuperscript{9} This Article examines only one aspect of racial nondiscrimination under international and American national laws; that aspect relating to questions of discrimination in primary and secondary education institutions.

In a loose sense, the American civil rights movement and the international human rights movement received considerable impetus from World War II and the immediate post-war experience.\textsuperscript{10} In recent years, these movements diverged significantly, particularly as the influence of the Western bloc and its civil libertarian ideology declined, and as the emphasis in international human rights instruments tended to focus on economic, cultural, and social rights. Perhaps it is more accurate to say that in defining human rights and American constitutional rights, decisionmakers have faced similar sets of problems. For example, in vindicating the principle of nondiscrimination, should only individuals be entitled to nondiscriminatory treatment or do racial and other minorities have group entitlements?\textsuperscript{11} Is the entitlement primarily one of equality of access or treatment by gov-

\textsuperscript{7} Convention on Racial Discrimination, \textit{supra} note 5.


\textsuperscript{10} Some scholars note that both movements were considerably strengthened by the totalitarian excesses in Italy, Germany, and Russia. \textit{See generally} H. Commager, \textit{supra} note 6; J. Vander Zanden, \textit{Race Relations in Transition} (1965). It would be facile, however, to equate the etiologies of the two movements. The experiences of blacks in military service may also have been a factor. \textit{See} Roberts, \textit{The Impact of Military Service Upon the Racial Attitudes of Negro Servicemen in World War II}, 1 SOC. PROB. 65 (1953).

government or one of rough equality of outcomes (socioeconomic status, income, school achievement) among diverse groups within the population? Is the goal homogeneity or heterogeneity, or some delicate balance between the two? Should the protected entitlements include not only basic civil and political rights but also economic and social rights against the state? Does a child have a "right" to education, and if so, what sort of right? What of the rights of parents to make child rearing decisions for their offspring?

The approach will be schematic, outlining the basic American orientation toward race and education questions, while noting the parallels and divergencies in the international human rights sphere. The United States is one of the few countries in the world with extensive experience in attempting to resolve the complex problem of racial discrimination in public schools. American courts have been called upon to define discrimination and to fashion and implement remedies for twenty-five years. On the other hand, much of the nondiscrimination law in international human rights instruments is new and abstract, and has not been elaborated upon through a decisional process. In almost every instance, including the United Nations Charter, there are few, if any, race and education decisions: the law remains pristine in the original declarations, covenants, and treaties. As more precise concepts of international human rights develop, international bodies may look to the American experience in the school


desegregation cases as a source of guidance with respect to both its strengths and weaknesses. Member states, in fashioning domestic policies in accordance with national and international standards, should also be mindful of the American experience. Finally, the international human rights concepts of nondiscrimination in education may assist American decisionmakers in their continuing efforts to eradicate racial discrimination and may encourage the United States Senate to ratify international human rights instruments with the appropriate understandings, reservations, and declarations.

I. THE AMERICAN CIVIL RIGHTS REVOLUTION: 1954-1964

In an infamous United States Supreme Court decision of 1896, the Court held in *Plessy v. Ferguson*\(^6\) that governments were constitutionally permitted to provide "separate-but-equal" facilities for blacks and whites. The context was one of a state law requiring the segregation by race of passengers on private railroad cars. In reaching this conclusion, the Court interpreted the fourteenth amendment of the United States Constitution, enacted shortly after the American Civil War:

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\text{No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.}^{17}
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Despite the absence of any direct reference to blacks or former slaves, the amendment undoubtedly was enacted primarily to bridle state governments from enacting laws hostile to blacks.\(^18\) But the precise question before the Court, as it perceived it, was whether state mandated separation of the races constituted such hostile and injurious treatment as to justify invalidation of the law. The Court denied that mere separation branded blacks as inferior to whites or otherwise injured them. In an often quoted passage, Justice Brown, writing for the majority of the Justices, offered this observation:

> 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

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\[17. \text{U.S. CONST. amend. XIV.}
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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. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races.\footnote{19}{163 U.S. at 551.}

The Court did not concern itself much with the problem that facilities for blacks and whites were almost invariably unequal, and that the Louisiana law forbade voluntary integration—a far cry from state coerced integration.\footnote{20}{See generally D. Kirp & M. Yudof, Educational Policy and the Law 287-89 (1974); R. Kluger, supra note 8, at 80-81.}

In an equally famous dissenting opinion, Justice Harlan argued that the purpose and effect of the Louisiana law was to assign blacks to an inferior position in American life. The idea was not to keep whites from entering railroad cars reserved for blacks, but to isolate the whites from unwanted association with blacks. This was legislation "unfriendly" to blacks in every sense, and not just a figment of a paranoid imagination on the part of blacks. Harlan charged that the majority of the justices were placing a constitutional imprimatur on a racial caste system. He argued that government enactments which treated blacks as inferiors were not simply manifestations of social inequalities not amenable to legislation; rather he feared that approval of the \textit{Plessy} law would lead to enforced segregation of the races in almost every sphere of human activity. Subsequent to \textit{Plessy} the trend toward segregation of the races accelerated. In 1927, the Court explicitly sanctioned the segregation of minority and white children in separate schools, drawing on \textit{Plessy} and a few earlier precedents.\footnote{21}{See Gong Lum v. Rice, 275 U.S. 78 (1927).}

In a number of later decisions the Supreme Court began chipping away at the \textit{Plessy} separate-but-equal doctrine as it applied to public education.\footnote{22}{See generally D. Kirp & M. Yudof, Educational Policy and the Law 287-89 (1974); R. Kluger, supra note 8, at 80-81.} These decisions examined tangible and intangible factors\footnote{23}{Among many factors, the Court considered physical facilities, library size, curriculum, institutional prestige, and opportunities for intellectual commingling. McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637, 641 (1950).} which rendered the separate treatment of the races less than equal, albeit the decisions were confined to state supported institutions of higher learning. The culmination of the erosion of the separate-but-equal doctrine occurred...

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in *Brown v. Board of Education*, a case in which black plaintiffs from the states of Kansas, South Carolina, Virginia, and Delaware sought "the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis." In each case, state laws required or permitted local school districts to assign students to schools according to their race irrespective of parental choice, geographical proximity to the schools, or other factors. Lower federal courts had denied relief in all of these cases.

In 1954, Chief Justice Earl Warren delivered the opinion of a unanimous Court, declaring the laws in question to be unconstitutional under the fourteenth amendment. Without explicitly overruling the separate-but-equal doctrine in all areas of government action, the Court held "that in the field of public education the doctrine of separate but equal has no place." The most obvious interpretation of the *Brown* language, despite the caveat limiting its application to education, is that race is an impermissible, stigmatizing factor which governmental bodies may not take into account in making public policy decisions. This conclusion is buttressed by the multitude of cases following *Brown*, involving a myriad of governmental activities and services in which race-based criteria were declared unconstitutional (e.g., parks, golf courses, beaches, public waiting rooms).

Regrettably, perhaps because of the boldness of the Court's effort to abolish segregated schools, the *Brown* decision is considerably more complex than it would appear at first glance. First, the Court opined that the circumstances of the adoption of the fourteenth amendment were unclear with respect to whether the framers of the amendment intended to reach such practices as state mandated segregation in public schools. The historical evidence was "inconclusive," particularly in the light of the fact that there were few public schools supported by general taxes in existence in the South at the time of the adoption of the fourteenth amendment in 1868. This has led to substantial debate among scholars about the textual and historical justifications for the *Brown* decision. The prevailing wisdom is that the equal protection clause is sufficiently open-textured to support the *Brown* conclusion.

Second, the Court placed great emphasis on the importance of education

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25. 347 U.S. at 487.
26. Id. at 486 n.1.
27. Id. at 495.
28. "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 it does." Id. at 493.
30. *See*, e.g., articles and books cited note 18 supra.
in a modern democratic society. There is some extrinsic evidence that Chief Justice Warren considered *Brown* to be as much or more an education case as a race case.31 Yet, as previously noted, *Brown* was extended far beyond the boundaries of public education. Roughly twenty years after *Brown*, the Supreme Court held, in contrast to the Universal Declaration of Human Rights and the United Nations Covenant on Economic, Social and Cultural Rights, that education was not a fundamental right embraced by the United States Constitution.32 Once education is offered, however—as it is in all American states—race may not be made the basis for disparate treatment within public education systems.

Third, the expressed concern for education, the unwillingness to overrule directly the separate-but-equal doctrine, and perhaps the felt need to rebut the intuitive sociological and psychological views embodied in *Plessy*, seduced the Court into considering the effects of segregated schooling.33 The Chief Justice noted that the separation of black children from white children "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."34 Reliance was placed on fledgling social science studies for these conclusions, and the Justices specifically noted the inconsistency of "modern authority" with the psychological conclusions reached by the *Plessy* Court, and rejected the latter. This aspect of the analysis further confused the issues. To some, it appeared that *Brown* rested on empirical evidence as to the injury wrought by segregation—the impact on learning, on motivation, on mental devel-

34. 347 U.S. at 494.
development, and on psychological well-being. If this were the case, the result should change if the social science evidence yielded new and contrary insights into the outcomes of a segregated education. This approach, however, has been sharply criticized by scholars, and given short shrift by the Supreme Court. Alternatively, if separation of the races in public schools were itself the evil, then the mere existence of segregation—irrespective of whether governments overtly or covertly mandated this result (de jure segregation) or whether it was, in some sense, fortuitous (de facto segregation)—should suffice to trigger judicial intervention. Indeed, assuming that integration cures the ills of segregation, court mandated integration—racial balance of student bodies in public schools—would be a logical extension of Brown.

The consideration of the outcomes of segregation and the curative value of integration serve to blur the distinction between an individual entitlement to nondiscriminatory treatment by race and a group entitlement to integration. That is, the vindication of the personal right is dependent upon creating a school environment in which the races are dispersed, thereby, in a sense, making the dispersion of minority children the ultimate aim of desegregation litigation. This ambiguity is reinforced by the failure of the Supreme Court in Brown to adopt immediately a nondiscrimination remedy. Rather the Court postponed consideration of a remedy until a year later when it delivered a separate decision on the appropriate relief.

In Brown II the Court did not order the black plaintiffs admitted to those schools from which they had been excluded solely on the basis of race. This would have been the typical form of relief to

35. See, e.g., Van Den Haag, Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark, 6 Vill. L. Rev. 69 (1960); Honnold, Book Review, 33 Ind. L.J. 612 (1958).
which successful plaintiffs would be entitled. Indeed, it was precisely the sort of relief that Thurgood Marshall, now a justice on the Supreme Court, requested for his clients.

While stating that school districts must "admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases," the Court in fact delayed the implementation of any remedy for individual parties. Instead the Court spoke in terms of the need of local school district authorities to devise plans to implement Brown, plans which would involve such matters as the physical condition of school facilities, the school transportation systems, personnel policies, and revision of school attendance zone boundaries. The question, however, is why such plans were necessary. If the object were truly a nondiscriminatory student assignment policy, then the Court could have simply ordered the admission of black plaintiffs and perhaps others similarly situated who had been denied the opportunity to attend a particular school solely on the basis of their race. There would be no need for complex plans, consideration of local differences, or deference to local school officials.

Perhaps the answer is that the Court wished to proceed slowly with the remedy, fearing the political ramifications of immediate enforcement of a desegregation order. But there are other possibilities. Most plausible is that the Court naively thought that nondiscrimination would inevitably lead to integration. That is, if race could not be taken into account, then this would guarantee racial balance in public schools. If so, its assessment was hopelessly utopian, given the fact that blacks tend to live together in the same neighborhoods (most notably in urban areas) and that traditional geographic assignment of students to neighborhood schools would inevitably mean that most schools would remain segregated. Less plausibly, even as early as 1955, the Court may have been moving in the direction of requiring racial balance, despite its emphasis on nondiscrimination. The whole notion of delaying a remedy for the individuals injured by segregationist practices and looking forward to complex remedies for the masses of black children is consistent with such a group protection approach.

Whether Brown was aimed at desegregating schools (insuring that students and, later, faculty were not assigned on the basis of race) or integrat-

41. See A. Bickel, The Least Dangerous Branch 247 (1962).
42. Brown II, 349 U.S. at 301.
43. See generally Hartman, supra note 11; McKay, "With All Deliberate Speed": A Study of School Desegregation, 31 N.Y.U. L. REV. 991 (1956); Yudof, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, 42 LAW & CONTEMP. PROB. 57 (1978).
44. Justice Black once stated in an interview that the "deliberate speed" formula "delayed the process of outlawing segregation" and that "the Court should have forced its judgment on the counties it affected that minute." W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 1339 (4th ed. 1975). See also R. KLUGER, supra note 8, at 740.
45. See E. Warren, supra note 31.
ing them (providing for a racial balance in all or nearly all schools within a school district), it failed miserably during the first ten years of its implementation.\textsuperscript{46} Resistance to the \textit{Brown} decision existed in the federal district courts,\textsuperscript{47} the executive branch,\textsuperscript{48} and the Congress,\textsuperscript{49} while the Supreme Court withdrew itself from the fray. The people appeared to view desegregation as a "Southern problem," not national in scope. There was, however, some shift in public opinion toward desegregation as a result of the \textit{Brown} decision.\textsuperscript{50} Given the visible signs of resistance to desegregation and the miniscule number of blacks and whites going to school together in 1964,\textsuperscript{51} racial discrimination continued to be a dominant school policy in many parts of America.

The next breakthrough in the effort to achieve nondiscrimination in public education occurred when the Civil Rights Act of 1964 was passed by the United States Congress and signed into law by President Johnson.\textsuperscript{52} The most significant provision in the Act provided:

\begin{quote}
No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
\end{quote}

The Act further provided for the initiation of or intervention in judicial proceedings by the United States Attorney General upon complaint by


\textsuperscript{48} See R. Kluger, supra note 8, at 753. President Eisenhower was never a \textit{Brown} enthusiast, and intervened to enforce a desegregation order in Little Rock, Arkansas, only after violence erupted.

\textsuperscript{49} See generally R. Kluger, supra note 8, at 754; G. Orfield, supra note 47, at 15-22; J. Vander Zanden, supra note 10, at 88-94. Many Southern congressmen signed a manifesto critical of \textit{Brown}, and efforts to pass a viable civil rights act were unsuccessful. Lyndon Baines Johnson was one of only three Southern Senators to decline to sign the manifesto. \textit{Id.}

\textsuperscript{50} See G. Orfield, \textit{Must We Bus?} 108-09 (1978).

\textsuperscript{51} It is estimated that in 1964 only 2.14% of black students in elementary and secondary schools attended integrated schools. H. Horowitz \& K. Karst, supra note 6, at 240. Such crude statistics may hinge on the flexible concept of "desegregated school," and if the goal is to ensure that no child is treated on the basis of his or her race, the statistics have very limited meaning anyway. \textit{See generally H. Rodgers \& C. Bullock, supra note 46.}


black Americans that their children had been victimized by racist practices of state and local school authorities. The Act was of enormous symbolic significance. For the first time since the *Brown* decision, the executive and legislative branches of the federal government joined the judiciary in declaring that racial discrimination in public schools and in other public institutions and programs was inconsistent with the Constitution, laws, and ideals of the American people. If America had not solved its "dilemma," as Gunnar Myrdal had put it, it had taken a giant step towards realizing the ideal of racial equality. After passage of the Act, school desegregation advanced far more quickly.

Perhaps the most important thing to note about the 1964 Civil Rights Act is that it appeared to embody the nondiscrimination standard of *Brown*. There was much legislative history and language in the Act itself indicating that its objective was not to achieve racially balanced or integrated schools: it was designed to eradicate racial discrimination. Over time, this construction was abandoned. As school districts remained recalcitrant about desegregation and as HEW had to find means of monitoring compliance in thousands of such districts, HEW turned toward numerical definitions of nondiscriminatory, "unitary" school districts. Plans that worked tended to be identified with those that placed a certain percentage of black students in schools with white students. The subterfuges of local school districts and the need for uniform management techniques combined for this purpose. Some lower courts began construing the ban on racial imbalance embodied in the 1964 Civil Rights Act as applying only to de facto segregation—fortuitous segregation not emanating from state action. Racial balance came to be approved by lower...
courts, and ultimately by the Supreme Court as a measure of willingness to desegregate and as a remedy. Thus, by the mid-1960s America had clearly embraced a nondiscrimination standard, but there was ambiguity surrounding the question as to what circumstances might require the dispersion of racial minorities.

II. EVOLVING CONCEPTS OF HUMAN RIGHTS: RACE AND PUBLIC SCHOOLING IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, 1945-1978

A. Overview

Concepts of nondiscrimination and education in international human rights instruments have undergone substantial change and modification since the establishment of the United Nations in 1945. During the infancy of the United Nations and its various constituent organizations, thinking about racial discrimination and the public schools was largely dominated by American and Western European education traditions. The emphasis was on universal and compulsory education and on the opportunity of all students to compete on an equal basis in public schools. Education was the lever which would allow for socioeconomic advancement, adequate shelter and health care, and the fulfillment of other economic and social needs. It was also a means of inculcating good citizenship, including promotion of "understanding, tolerance and friendship among all nations . . . [and] racial or religious groups. . . ." In short, education was part of a fair process of competition among individuals, and people were entitled only to the process and not to preconceived outcomes. Among the elements of fairness were the illegitimacy of racial criteria in school decisions and the opportunity of parents to influence the education of their

60. See, e.g., Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972); Northcross v. Board of Educ. of Memphis, 466 F.2d 890 (6th Cir. 1972); Andrews v. City of Monroe, 425 F.2d 1017 (5th Cir. 1970); Singleton v. Jackson Mun. Separate School Dist., 425 F.2d 1211 (5th Cir. 1970); Adams v. Mathews, 403 F.2d 181 (5th Cir. 1968). But see Ellis v. Board of Public Instruction, 423 F.2d 203 (5th Cir. 1970).


62. See generally D. Kirp & M. Yudof, supra note 20, at 281.


64. Universal Declaration of Human Rights, supra note 4, art. 26(2).

65. See, e.g., United Nations Declaration on the Elimination of All Forms of Discrimi-
The Western emphasis on equal educational opportunity, akin to Western traditions with regard to civil and political liberties, was in sharp contrast to the views of Communist nations. As Professors Buergenthal and Torney have stated: "[T]he Soviet Union would not agree to any international codification of human rights that did not include economic, social, and cultural rights. The proposition that individuals had 'rights' to economic, social or cultural benefits was opposed by many Americans in the late 1940's and 1950's as 'socialist doctrine'..." The inclusion of the Soviet perspective was one reason for the refusal of the United States to ratify human rights instruments, or where ratified, as in the case of the United Nations Charter, the failure to make those instruments self-executing. Additionally, the separate-but-equal doctrine which prevailed in the United States prior to Brown v. Board of Education and the unhappy and unsuccessful early experience in implementing Brown put the United States in an awkward position with respect to endorsing nondiscrimination requirements in international human rights instruments. The United States, upon ratification, clearly would have been in violation of those instruments, but perhaps no more so than UN member states that did ratify those instruments.

By the mid-1960s a number of developments brought changes to the concepts of human rights in the education sphere. The passage of the Civil Rights Act of 1964 in the United States made America far more sympathetic to international nondiscrimination standards. The same forces that led to the adoption of the Civil Rights Act influenced developments in the related sphere of international human rights. The United States became an international advocate of human rights and nondiscrimination, though the Congress jealously preserved its domestic lawmaking functions by declining to ratify nearly all human rights instruments. The second major development was the change in the composition of the membership of the United Nations with the admission of scores of third world nations. Many of these nations had been victimized by apartheid policies under white, Western European colonialism, and were staunch advocates, at least

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66. See, e.g., Convention Against Discrimination in Education, supra note 5, art. 5(1)(b); Declaration of the Rights of the Child, supra note 63; Universal Declaration of Human Rights, supra note 4, art. 26(3).
68. T. BUERGENTHAL & J. TORNEY, supra note 3, at 87.
69. Id.
70. Id.
71. Id. at 92.
72. Id. at 92-98.
in theory, of nondiscrimination by race. These nations were often governed later by authoritarian, noncolonial regimes with little sympathy for traditional Western civil and political liberties. Indeed, when physical survival may be the issue of first importance, such process oriented objectives may be perceived as luxuries unaffordable until more substantial economic and social progress has been made. Thus, these nations tended to be sympathetic to the claims pressed earlier by the Communist nations for an international system of human rights which emphasized economic, social, and cultural rights for individuals and groups. But the limits of their resources apparently dampened their enthusiasm for establishing meaningful international sanctions for the failure to provide such entitlements.

B. International Human Rights Instruments

The United Nations Charter speaks of "international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Almost identical language is employed in article 2 of the Universal Declaration of Human Rights, adopted by the General Assembly in December, 1948. Article 2, however, adds the categories of political opinion, national or social origin, property, birth, or other status, to the list of impermissible distinctions with regard to rights and freedoms. Article 26 of the Declaration deals specifically with education. The three paragraphs of the article exude traditional Western approaches to education. There is a right to education, but functionally this means that education will be universal, compulsory, and free. The purposes of education are to develop the human personality, to strengthen respect for human rights and fundamental freedoms, and to promote understanding, tolerance, friendship, and peace. Understanding among religious and racial groups is included. In other words, education is the key to good citizenship, to personal development, and, more ambiguously, to the promotion of human rights. The latter is mentioned in the preamble wherein the states parties commit themselves to "strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance. . . . " Its importance lies in the fact that human rights are defined to include such economic and social rights as an adequate standard of living, the right to security against unemployment, and the right to medical care and social services. Hence, as in traditional thinking about the

73. See Green, supra note 67, at 234-35.
74. Id.
75. U.N. CHARTER art. I.
76. Universal Declaration of Human Rights, supra note 4, preamble para. 8.
77. Id. art. 25.
American common school, public education is the link to socioeconomic justice: it is the process by which individuals may fulfill their needs.

The legal status of the Declaration of Human Rights is unclear because it was adopted in the form of a nonbinding resolution of the United Nations General Assembly. Perhaps this explains the inclusion of both a traditional equal opportunity concept of education and nontraditional concepts of economic and social entitlements favored by Communist nations. Some have argued that the Universal Declaration is binding as an authoritative interpretation of the UN Charter. Without resolving the broad legal issue, it seems clear that the nondiscrimination provisions of the Charter and the Universal Declaration have a binding quality to them. As the International Court of Justice stated in the 1971 advisory opinion on Namibia, the establishment and enforcement of "distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, color, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter." If this is the case, there is a strong argument that apartheid policies of deliberately separating white and black children in public schools were a violation of international principles virtually from the founding of the United Nations. In a sense, the Universal Declaration was a precursor to the United States Supreme Court decision in Brown v. Board of Education, if Brown is treated as standing for the proposition that racial discrimination in public schools is unlawful.

What was implicit in earlier human rights instruments was made explicit in the Declaration of the Rights of the Child, proclaimed by the General Assembly in 1959. Principle 1 of the Declaration set forth various education and other rights of children, and explicitly affirmed that those rights could not be abridged on the basis of race. Principle 7, the education provision, expressly embraced the equal educational opportunity model for children:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsi-

78. See T. BUERGENTHAL & J. TORNEY, supra note 3, at 48-49.
79. Buergenthal and Torney note that international lawyers and "in theory at least, a majority of governments" treat the "Universal Declaration . . . [as] an authoritative interpretation or definition by the UN Member States of the 'human rights and fundamental freedoms'" affirmed in the UN Charter. Id. See also Schwelb, The International Court of Justice and the Human Rights Clauses of the Charter, 66 AM. J. INT'L L. 337, 351 (1972).
81. Id. at 57.
82. Declaration of the Rights of the Child, supra note 63.
bility, and to become a useful member of society.\textsuperscript{83}

As in the earlier Declaration of Human Rights, stress was laid on the role of parents in guiding the education of the child, notwithstanding the compulsory nature of principle and its explicit emphasis on socialization to acceptable national and international norms. This is in keeping with the tension between the need of governments to promote education and the danger of taking too much power from parents in the upbringing of the young.

The equal educational opportunity model reached its zenith and began its decline in the Convention Against Discrimination in Education.\textsuperscript{84} This convention was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in December, 1960. The explicit goal of the Convention, stated in article 6, is to "define the measures to be taken against the different forms of discrimination in education" and to ensure "equality of opportunity and treatment in education."\textsuperscript{85} The themes of nondiscrimination and equality of opportunity were inextricably meshed, and what was left was a more precise explanation of subsidiary principles. Article 1 specifically treated the maintenance of separate educational systems or institutions for racial and certain other groups as a violation of the Convention. Racial groups could not be subjected to an inferior education, and indeed, they could not be separated out for forms of education "which are incompatible with the dignity of man."\textsuperscript{86} The words of these provisions might well have been written by the Chief Justice in the \textit{Brown} decision six years earlier.

As if to presage the Civil Rights Act of 1964, article 3 of the Convention required states parties to enact legislation to ensure "that there is no discrimination in the admission of pupils to educational institutions."\textsuperscript{87} Other provisions of the Convention are in keeping with the themes of earlier human rights instruments. Homage is paid to the inapplicability of the nondiscrimination principles to private institutions established for religious or linguistic reasons and less clearly, to private institutions "if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by public authorities. . . ."\textsuperscript{88} The latter provision may apply to all private schools pursuing legitimate educational objectives, even if racial and other minorities are excluded. Alternatively, the reference may be to "part-time" pri-

\textsuperscript{83} \textit{Id.} prin. 7 (emphasis added).
\textsuperscript{84} Convention Against Discrimination in Education, \textit{supra} note 5.
\textsuperscript{85} \textit{Id.} art. 6.
\textsuperscript{86} \textit{Id.} art. 1 (f)(d).
\textsuperscript{87} \textit{Id.} art. 3(b). One mechanism for accomplishing this objective was the public purse: 
"[States parties may not] allow in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular [racial] group. . . ." \textit{Id.} art. 3(d).
\textsuperscript{88} \textit{Id.} art. 2(c).
private school programs which supplement "full-time" public school programs such as after school offerings. Mention is also made of the rights of parents to choose private schools for their children and to direct their moral and religious training, and "no person or group or group of persons should be compelled to receive religious instruction inconsistent with his or her conviction. . . ." Assuming children are persons, this provision, as under prevailing American law, manages to obfuscate possible conflicts in convictions between parents and children, failing to tell us whose convictions should prevail under a given set of circumstances.

The Education Convention also contains language, however ambiguous, suggesting some shift from earlier equal educational opportunity theories. States parties are obliged in the preamble not only to eradicate discrimination "but also to promote equality of opportunity and treatment for all in education." Discrimination includes distinctions which have the "purpose or effect of nullifying or impairing equality of treatment in education." Together, these provisions may suggest that equal opportunity may not be enough; the words "effect" and "treatment" may signify a shift from notions of access to notions of equality of resources or some other unspecified outcomes.

Article 4 speaks of making "standards of education" equivalent in all public institutions of the same level. But article 5 affirms the rights of national minorities to carry on their own educational activities, including the maintenance of separate schools. This recognition of the need to maintain pluralism strongly suggests some limits on the "melting pot" idea of the common school. By its nature, this appears to be a recognition of group rather than individual rights. These inchoate themes were amplified in the later International Convention on the Elimination of All Forms of Racial Discrimination.

The International Convention on the Elimination of All Forms of Racial Discrimination, approved by the United Nations General Assembly the year after the enactment of the Civil Rights Act of 1964 in the United States, reaffirmed the nondiscrimination or antiapartheid principles embodied in earlier human rights documents. It has been ratified by ninety nations, with the United States and China being the only major powers.

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90. Convention Against Discrimination in Education, supra note 5, art. 5(1)(b).
92. Convention Against Discrimination in Education, supra note 5, preamble.
93. Id. art. 1(1).
failing to do so.\textsuperscript{96} Article 3 of the Convention specifically contemplates the eradication of racial segregation and apartheid within the jurisdictions of the states parties. Article 2, section 1(a) appears to embrace an even broader concept of prohibitions on racial discrimination: "Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."\textsuperscript{97} As Professor Nathanson has noted, articles 2 and 3 are generally consistent with constitutional and statutory developments in the United States.\textsuperscript{98}

Despite the similarities between American law and the International Racial Convention, there are a number of points of departure—some relating to racial discrimination and schooling. This analysis requires some parceling of the provisions of the Convention, with an attempt to relate that scheme to the education context. First, article 1 of the Convention defines racial discrimination in terms of distinctions, restrictions, or exclusions, "based on race" which have "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."\textsuperscript{99} This definition has interesting ramifications for the types of issues raised by Brown. Most significantly, article 1 would not seem to require purposeful, deliberate, or knowing discrimination in the sense that the relevant actors knew or should have known that such discrimination would result. A benign, nondiscriminatory purpose would not save a law or practice if the effect were to disadvantage a racial group with respect to human rights and political freedoms. This would appear to indicate that policies of assigning children to schools—whether based on geographic zones, ability groupings, interest grouping, parental choices, or whatever—which resulted in segregated schools might be in violation of the Convention.\textsuperscript{100}

Article 1 could also be read as requiring a distinction based on race (or descent, national origin, or ethnic origin) but such a distinction would be tested under the purposes or effects standards. If this were the case, article 1 would fail to address the problem of surrogates for race in the treatment of public school students, and indeed would violate at least one reading of Brown. That is, it would not embody a blanket rule prohibiting classificat-

\begin{footnotes}
\item[97] Convention on Racial Discrimination, supra note 5, art. 2(1)(a).
\item[99] Convention on Racial Discrimination, supra note 5, art. 1.
\item[100] Caution is necessary in reaching this conclusion because a preliminary finding would have to be made that segregation itself constituted discrimination.
\end{footnotes}
tions of individuals on the basis of their race (the nondiscrimination principle); rather it would require an ad hoc determination in each case as to whether the purpose or effect were to injure a racial group, and only injurious racial classifications would be forbidden (and hence described as "racial discrimination"). This would invite the sort of searching for harms that put the United States Supreme Court into such muddied waters in the Brown decision. Further, it is implicit in this formulation that some types of race-based decisions would not be characterized as "racial discrimination" and hence could be justified. Indeed, the preamble, in a circular fashion, states that there is no scientific basis for "racial discrimination" (meaning race-based decisions which disadvantage racial groups), implying that there may be scientific justification for racial classifications which advance the interests of racial groups.

What is implicit in the preamble and the first section of article 1 is made explicit in section 4 of that article:

Special measures taken for the sole purpose of securing advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This presumably would mean, for example, that the explicit assignment of students to government schools by their racial characteristics would be justifiable if integration or special programs were thought to advance the human rights and other interests of the racial group. Racial segregation, however, could not be so justified because article 3 specifically prohibits it. The difficulty is that the concept of color conscious dispersion of the races to achieve integration finds little independent support in the Convention except in a nebulous article 2, section 1(e) which states: "Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations. . . ." It appears that most nations have not equated racial


102. Convention on Racial Discrimination, supra note 5, art. 1(4).
justice with racial integration.\textsuperscript{103}

 Nonetheless, this line of reasoning is extremely significant. While the phrase “adequate advancement” is not defined, this might well include explicit racial assignments to secure school integration or compensatory education in order to remedy past wrongs visited upon a racial group. This interpretation is reinforced by the indication in section 4 that the use of benign racial criteria should continue only until “the objectives for which they were taken have been achieved.” This suggests a catching up phenomenon: an effort to bring a racial group to the same starting point as others in the race of life.\textsuperscript{104}

 The reference to the racial group in article 1 recalls another reading of Brown. The emphasis may be on the advancement of the racial group and on the remedying of past wrongs committed against the group rather than against specific individuals. This is a construction of racial discrimination which has been much disputed in American constitutional law and Civil Rights Act cases involving group preferences for minorities in, for example, employment and admission to institutions of higher learnings.\textsuperscript{105} It finds virtually no explicit recognition in desegregation cases, even those requiring a racial balance remedy. The matter is further complicated by the fact that in American constitutional law the right to an education has not been deemed a fundamental human right, unless there is unequal treatment of a racial minority or some other “suspect” class.\textsuperscript{106} Such a right is an apparent premise of article 1 when read in conjunction with article 5 which refers to the “right to education and training.”

 Apart from the emphasis on both group and individual entitlements, section 4 appears to embody a concept of equality of outcomes rather than equality of opportunity. It speaks of “adequate advancement” and not the opportunity for adequate advancement. It speaks of “equal enjoyment of human rights” including the rights to work, to protection against unemployment, to medical care, to social services, and to education contained in article 5, not to the equal opportunity to compete for these benefits. This suggests a scheme in which racial groups within the population are, in some sense, to share equally in government and nongovernment benefits,

\textsuperscript{103} See D. Kirp, Doing Good by Doing Little: Race and Schooling in Great Britain (1979); Glazer, supra note 94, at 97-100.

\textsuperscript{104} See generally books and articles cited note 101 supra.


even perhaps if the states parties to the Convention are not able to meet the minimum needs of any group.

In the case of education, the concepts of opportunity and outcome are not easily separated; far more refinement of those concepts is required. Perhaps these clauses in article 2 mean no more than racial minorities must be afforded the same rights to a free public education as the dominant racial group. The thrust of section 4 could, however, be construed in this context as meaning equality among groups in terms of years of schooling, academic achievement, cognitive and affective development, and the like. This would embody more of a socialist concept of equality, rejecting the opportunity model so prevalent in earlier human rights instruments.¹⁰⁷

Finally, the definition of discrimination in the Racial Discrimination Covenant is expanded in article 2 to include nongovernmental, private discrimination. Presumably this means that privately financed schools in the jurisdiction of a state party may not engage in racial discrimination. The 1964 Civil Rights Act applies, by definition, only to those entities receiving federal funds—generally governmental entities themselves.¹⁰⁸ Only within the last few years has the Supreme Court, pursuant to the earlier post-Civil War civil rights statutes, moved to outlaw racial discrimination by nongovernmentally owned and operated education institutions.¹⁰⁹ This area has been particularly troublesome in the United States given the general notions (also embodied in earlier human rights instruments) that the fourteenth amendment and the Bill of Rights are applicable only to "state action."¹¹⁰ The Constitution protects the freedom of association by individuals¹¹¹ and the right of parents to choose private schools for their children.¹¹² The right of free exercise of religion, including the establishment of private religious schools, is guaranteed by the first amendment.¹¹³ Nonetheless, there is strong evidence that the United States Government is moving aggressively to end racial discrimination in private schools.¹¹⁴

The description of the International Racial Convention in the context of

¹⁰⁷. See generally Yudof, supra note 11.
race and schooling has been somewhat cryptic and speculative in nature. The provisions governing this matter are often ambiguous and sometimes in conflict. Like so many human rights concepts, they are articulated at a level of abstraction that makes it difficult to fashion concrete answers to concrete questions. These factors are exacerbated by the fact that the enforcement provisions of the International Convention on the Elimination of All Forms of Racial Discrimination are, like its predecessors, relatively weak. They are largely limited to reports to and recommendations by the Committee on the Elimination of Racial Discrimination.\textsuperscript{115} There is a provision, article 22, declaring that disputes between states parties not settled by the Committee or otherwise by negotiation may be referred to the International Court of Justice for decision. Many parties to the Convention, particularly communist and third world nations, acquiesced in the Convention, however, only with the reservation that they would not abide by article 22.\textsuperscript{116} Indeed, the Committee may receive complaints from individuals and groups within the jurisdiction of the states parties only if the accused state party "recognizes the competence of the Committee" to do so.\textsuperscript{117} Thus, in contrast to the myriad of constitutional decisions by American courts on racial discrimination in education, there has been little opportunity for elaboration of broad concepts through an ongoing decision making process. The situation is further confused by the fact that many nations ratified the Convention (the United States has not) only with the understanding that the provisions of the document were subordinate to their national constitutions and laws.\textsuperscript{118}

About one year after passage of the Convention on Racial Discrimination, the General Assembly adopted the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{119} The emphasis, once again, is on creating conditions for the enjoyment of economic, social, and cultural rights, and not on creating conditions for the equal opportunity to enjoy these rights.\textsuperscript{120} To be sure, there is some discussion in article 6 of training

\textsuperscript{115}. Convention on Racial Discrimination, \textit{supra} note 5, arts. 8-16, 22. \textit{But see} Buergenthal, \textit{supra} note 96.

\textsuperscript{116}. \textit{See} N. Nathanson \& E. Schwelb, \textit{supra} note 98, at 60-86 (for example, Bulgaria, Cuba, Czechoslovakia, Egypt, Iraq, Lebanon, Spain).

\textsuperscript{117}. Convention on Racial Discrimination, \textit{supra} note 5, art. 14(1).

\textsuperscript{118}. \textit{See} N. Nathanson \& E. Schwelb, \textit{supra} note 98, at 60-86 (for example, Jamaica, United Kingdom, France).

\textsuperscript{119}. Covenant on Economic Rights, \textit{supra} note 5, arts. 2(1), 6-7, 9-13.

\textsuperscript{120}. \textit{Id.} Professors Buergenthal and Torney note that Western nations have become more sympathetic to such egalitarian principles:

\[\text{The United States and countries with similar political systems have since 1948 increasingly come to recognize that comprehensive social welfare legislation and the provision of economic assistance to the needy are legitimate governmental functions. As Morris B. Abraham, the former U.S. Representative to the UN Commission on Human Rights put it in 1969: "Twenty years ago, when the Universal Declaration was first adopted, most Americans had psychological difficulties with some of its concepts. The Universal Declaration seemed a startling statement because it melded the civil and political rights . . . with economic and social}\]
and guidance programs as a means of achieving the objectives of the Covenant, but the document is primarily addressed to ways of guaranteeing social and economic rights within the available resources of states parties. For example, article 7 provides for rights to "safe and healthy working conditions" and to remuneration for public holidays. The treatment of education is more or less a regurgitation of principles of earlier human rights instruments, with the emphasis on "the full development of the human personality," effective participation in a free society, and "full realization of the "right of everyone to education." There is also some emphasis on group rights, particularly in article 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural developments." The implications of this group right for education are not elaborated upon.

Finally, in 1973, presumably in response to the recalcitrance of governments in southern Africa, the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid, which condemned apartheid and specifically referred to measures "denying to members of a racial group or groups basic human rights and freedoms, including . . . the right to education . . ." Thus, in the last two human rights instruments of significance to race and schooling questions, the General Assembly declined to continue the refinement of human rights process begun in the International Convention on the Elimination of All Forms of Racial Discrimination.

C. Unresolved Issues

This survey of human rights instruments dealing with race and education questions reveals many areas of ambiguity in international human rights standards. There is some detectable movement toward a concept of group outcomes as a measure of educational equality, and certainly the war on racist practices continues. But beyond this, much remains unresolved:

1. Under what circumstances will a law or practice in the education sphere constitute racial discrimination even though there is no explicit reference to race in the policy?
2. Do all forms of racial segregation constitute discrimination?

guidelines. . . . We thought of adequate housing or sufficient leisure as very fine goals, but we asked 'In what sense are these rights?' Two decades later, we have gradually accepted these rights in the terminology of the Universal Declaration.'

T. BUERGENHALT & J. TORMER, supra note 3 (citing J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS 13 n.18 (1970)).

121. Covenant on Economic Rights, supra note 5, art. 13.
122. Id. art. 1(1).
123. But see Convention Against Discrimination in Education, supra note 5, art. 5 (1)(c).
124. International Convention on the Suppression and Punishment of the Crime of Apartheid, supra note 5, art. II.
Must the segregation in some sense be intentional or is it sufficient that it is a result of official action or inaction?

3. Where discrimination is detected, what is the appropriate remedy? Does racial justice require dispersion of the races or racial balance in each school as the remedy for racial segregation? If so, within what geographic area? To what extent must wrong and remedy be precisely matched?

4. Is the objective one of simply eliminating discrimination or one of advancing integration? Is this a group right or an individual right? Is integration consistent with cultural pluralism and the convenience and choices of parents and children?

The next section addresses the answers that American courts have given to these and related questions.

III. NONDISCRIMINATION AND BEYOND: THE SEARCH FOR PRINCIPLED DECISIONS IN SCHOOL DESEGREGATION CASES IN THE UNITED STATES

If Brown stands for the proposition that school authorities may not assign students to public schools on the basis of their race to maintain a segregated school system, the simplicity of that principle is belied by the complexity of applying it in the circumstances currently facing federal judges. In the original challenges to the dual school system, discrimination was explicit and generally embodied in state law and regulations. Today, although racial isolation in schools is still common in America, the question of racial motivation is more problematic as school assignments are justified on the basis of neighborhood attendance zones, overcrowding, ability grouping, parental choice, and the like. The factual and legal issues now confronting the Supreme Court are more subtle than those confronting its predecessor. The Court must decide when facially neutral policies that produce or maintain segregated schools should be assimilated, morally and legally, to the concept of racial discrimination.

The question of remedies, once racial discrimination in pupil assignment has been satisfactorily demonstrated, is also more complicated today than it was in the Brown era. The most attractive remedy for racial discrimination is to require racial neutrality. If black youngsters are denied admission to a school that they are otherwise eligible to attend, a federal court can simply order their admission to that school and prohibit school authorities from taking race into account in the future. The problem of unmasking subtle racial discrimination, whereby segregation is preserved in spite of apparent implementation of the remedy, remains and is compounded by the difficulty of determining compliance with the principle of nondiscrimination.

The Supreme Court has indicated its dissatisfaction with application of the nondiscrimination principle, because it leaves segregated schools largely intact. Despite protestations to the contrary, the Court has required that the constitutional offense of deliberately segregated schools be remedied by assuring racially balanced schools within the area affected by the original wrong. Race must be taken into account in order to accomplish this objective, and racially neutral criteria that do not produce the desired result are not acceptable. This has required the Court to examine two causal questions: To what extent has present demographic segregation been caused by past, explicit racial discrimination? To what extent does racial discrimination in a portion of a school district or state lead to segregation in other parts of the district or state? In other words, when are superficially neutral criteria really racially discriminatory due to past segregative acts? Should the racial balance remedy be applied to the entire school district or metropolitan area, or should it be limited to the schools and areas in which the violations took place? Despite the statements in Brown that the dual school system is inherently harmful to black children, subsequent decisions have not relied on the hypotheses that segregated schools injure blacks, either cognitively or affectively, and that integrated schools undo such harms. Nor has the Court explicitly created a right to an integrated education.

The Court has failed to justify clearly its apparent expansion of the definition of intentional segregation and its requirement of racial balance or dispersion of the races in the public schools. Three possible justifications for this remedy exist. First, integration is necessary to remedy the present and past wrongs of racial discrimination, meaning that the public schools would have been integrated but for those wrongs. More expansively, it may mean that the public schools would have been integrated but for discrimination in public and private housing, school assignments, and employment. Alternatively, integration is necessary to undo educational, stigmatic, or other injuries to black children caused by past segregation. Second, racial balance is required because of the fear that government decisions will be corrupted by racial discrimination, however well hidden.

129. In a community that has settled prejudice of one sort or another . . . , the [political process] machine will inevitably break down because there is no way of excluding these preferences based on prejudice from affecting the process. If prejudicial preferences are counted, then the personal preferences of those against whom the prejudice is directed are not counted equally in the balance; they are discounted by the effect of the prejudice. . . . A constitutional right is created among other reasons for this reason: We know that there is a high antecedent probability that the political judgment reached about a particular matter will not
Third, concern for the welfare of blacks as a group and an interpretive judgment as to their historic treatment leads to the conclusion that integration and not just nondiscrimination should be fostered by constitutional decisions under the fourteenth amendment.\footnote{Dworkin, supra note 36, at 28-29.}

The difficulty with the Court's remedial theory articulated in the desegregation cases of the past decade—that school districts must racially balance their schools in order to remedy past and present discrimination—is that it appears to rely upon causal hypotheses which are difficult to support. In its strongest form, the hypothesis is "if there had not been de jure segregation in the past, there would now be de facto integration."\footnote{See generally Fiss, supra note 11; Yudof, supra note 11.}

Somewhat weaker is the hypothesis that "past . . . de jure segregation may be presumed to be part of the causal chain that has produced (perhaps through affecting residential patterns, perhaps in other ways), de facto segregation of today."\footnote{Dworkin, supra note 36, at 27.} The concept of remedy would be similar to that found in contract law: Remedies should be designed to put the innocent parties (black children) in the position that they would have occupied (integrated schools) but for the wrongful conduct (racial discrimination) of the defendants (school authorities).

In theory, the investigation and illumination of such causal links should be the stuff of social science since the constitutional questions have been formulated in instrumental terms. There are, however, manifest problems with this remedial theory. Whatever the theoretical scope of social science inquiry, the complexity of these causal links is such that it is unlikely that social science methodologies will ever allow the drawing of such causal inferences with a reasonable degree of confidence. Indeed, the evidence and research thus far accumulated suggest the implausibility of the "but for" theory, albeit there is no consensus among researchers.\footnote{Id.}

The reasons for segregated schools are complex, involving not only discrimination in schools, but socioeconomic isolation, choices to live among people of the same race, employment discrimination, preferences among public goods, and public and private housing discrimination. The primacy or influence of de jure discrimination in the segregated pattern of schools is not at all clear. Furthermore, the remedial theory violates the very principle it seeks to vindicate—the principle of nondiscrimination.

The Court's theory becomes more attenuated as black children today are reassigned to integrated schools as a remedy for discrimination against fairly reflect the kind of preferences that rightly make up the general welfare, but will give influential expression to preferences based on prejudice. We create constitutional rights of one sort or another to guard against this.

Dworkin, supra note 36, at 28-29.

130. See generally Fiss, supra note 11; Yudof, supra note 11.
131. Dworkin, supra note 36, at 27.
132. Id.
133. G. Orfield, supra note 50; See, e.g., Farley, Residential Segregation and Its Implications for School Integration, 39 LAW & CONTEMP. PROB. 164 (1975); Wolf, Northern School Desegregation and Residential Choice, 1977 SUP. CT. REV. 63.
past generations of black students. One set of persons constitutes the class of victims of the discrimination, while another set constitutes the class of beneficiaries of the remedy.\textsuperscript{134} The local educational authority or school board that implements the court ordered remedy may well be an entirely different board than the one that committed the original wrong. Moreover, the traditional theory of remedies assumes that the relief granted will bring about an improvement in the current situation created by the breach of a legal obligation; otherwise the wronged party would be unlikely to seek legal redress. The evidence that blacks are better off in integrated schools in academic, psychological, or other terms, however, is mixed.\textsuperscript{135} Finally, the vindication of the constitutional interest is made to turn on the vagaries of empirical research, with all the attendant instability and difficulties that this imports into the law.

A more expansive view of the theory, one not yet adopted by the majority of the Court, is that integration of the public schools is necessary, not simply because of past de jure practices in the public schools, but as a means of undoing the accumulated discrimination in both the private and public sector. The theory has particular appeal if government is held accountable not only for its own acts of racial discrimination, but also for tolerating or permitting racial discrimination by private individuals and entities. The predicate for the theory is sound: there is no denying the sordid history of discrimination practiced against black people in virtually all aspects of American political, social, and economic life. The difficulty is in moving from the predicate to the conclusion. Why should the remedy be integration of public schools if school related racial discrimination is simply one of many wrongs suffered by blacks? More importantly, in what sense does school integration or dispersion of the races make up for employment or housing discrimination, discrimination in the enforcement of criminal laws, social ostracism and the like? Such a theory is supportable only by the assumption that school integration leads to progress for blacks in these other areas. This assumption, however, remains unproven.\textsuperscript{136}

Rephrasing the remedial theory in interpretive terms makes it more plausible: Segregation in the public schools is stigmatizing and symbolic of a hostile attitude by powerful whites against relatively powerless blacks. The issue then is not one of causal relationships, but one of the impact of

\textsuperscript{136} Compare N. St. John supra note 135 and F. Mosteller & D. Moynihan, supra note 135 with M. Weinberg, supra note 135. See generally G. Orfield, supra note 47.
the current patterns of racial isolation in public schools.\textsuperscript{137} If integrated schools remove the stigma and symbols of inferiority, integration is a justifiable remedy for discrimination. Unless it is assumed, however, that many white and black Americans view all racial isolation as indicative of the racial inferiority of blacks, a dubious proposition,\textsuperscript{138} even this noninstrumental refinement of the remedial theory poses difficulties. Without evidence that segregation is the result of racial prejudice, why should racial separation be deemed harmful to blacks? Even if there has been official racial discrimination in the past, should such isolation be interpreted as injurious to blacks if there is little causal connection between that and present racial isolation? One might be able to construct a theory that adventitious segregation is more stigmatizing in a school district that previously practiced explicit discrimination,\textsuperscript{139} but this intuitively appears unsound. Such reformulations of the remedial theory are bottomed either in notions of the corruption of the political process or on the affirmative value of integration for its own sake.

Professor Dworkin justifies integration as a prophylactic device designed to counter the likelihood that superficially race-neutral decisions resulting in segregation are the product of a corrupt process of government decision-making.\textsuperscript{140} The corruption flows from the interpretive judgment that blacks have not made such decisions for themselves and that racial prejudice remains rampant in America. His view finds little support in judicial opinions, though it does avoid the causal relationship quagmire. Perhaps the case that can be most easily construed to support Dworkin is \textit{Green v. County School Board of New Kent County},\textsuperscript{141} the first Supreme Court opinion pointing toward an integration remedy rather than a non-discrimination remedy.

The difficulty with the corruption theory, even if one assumes that it accurately describes the pervasiveness of prejudice and the relative powerlessness of blacks, lies in formulating the appropriate remedy. In \textit{Green} the Court did not order the implementation of a neighborhood pupil assignment policy; rather it dwelled on the idea of compelling school districts to adopt plans that promised to work—“working” apparently meaning that some substantial progress had to be made toward achieving racial balance in the schools. The Court moved to an outcome remedy for

\begin{itemize}
  \item \textsuperscript{138} See Bell, \textit{Waiting on the Promise of Brown}, 39 Law & Contemp. Prob. 341 (1975).
  \item \textsuperscript{139} See generally Goodman, \textit{supra} note 12, at 295.
  \item \textsuperscript{140} See Dworkin, \textit{supra} note 36.
  \item \textsuperscript{141} 391 U.S. 430 (1968). In \textit{Green} the school board’s decisions were indeed corrupted by racial prejudice, in that the board rejected geographic and other traditional criteria for assigning pupils precisely because they believed the freedom of choice plan would maintain segregation. This racial prejudice in governmental decisionmaking itself constitutes a stigmatic harm to blacks. \textit{See also} Raney v. Board of Educ., 391 U.S. 443 (1968); Washington Parish School Bd. v. Moses, 456 F.2d 1285 (5th Cir. 1972).\end{itemize}
a constitutional wrong rooted in the decisional process. Professor Dworkin, however, is prepared to defend such integration remedies even though he characterizes them as "arbitrary:"

Suppose, however, that . . . prejudice has not lessened much and blacks do not have the kind of political power that would cancel any antecedent probability of corruption. What else would persuade us to disregard that probability in any particular case? Only one thing: the outcome. If the decision actually produced by the political process was of a sort itself to negate the change [sic] of corruption, then we could withdraw, for that case, the judgment that the process was too corrupt to allow it to continue.

We must understand a court order to integrate, even an order based upon a mechanical formula that otherwise has no appeal, in the following way. The order speaks to those in political power and says this: 'If you refuse yourself to produce an outcome that negates the antecedent probability of corruption, then we must impose upon you such an outcome. The only decision that we can impose, given the nature of the problem, is a decision that requires integration on some formula that is evidently not corrupt even if it is just as evidently arbitrary.'

If I am right, then objection to these decisions based on doubt about the various causal hypotheses I identified are misguided, because these decisions do not rest on causal hypotheses. They rest on interpretive theory. Until the background changes in one of the two ways I suggested—until our sense of prejudice abates or blacks have the political power to make decisions in question—until that happens, then integration is required as the only thing that can sustain the burden of proof rising from the antecedent probability of corruption.142

What is baffling about Dworkin's theory is not its predicate but its conclusion. While it is true that sometimes predominantly black or integration-minded white school boards have been charged with de jure segregation and held to a racial balance remedy, the notion that many school boards hide behind superficially neutral criteria, when they are actually influenced by racial prejudice, seems entirely plausible. If the observation is rephrased to argue that American boards of education rarely assign a positive value to racial integration in making decisions, the observation is essentially irrefutable. But why should the failure to treat integration as a positive value injure blacks? How is it stigmatizing? Green is far removed from this situation. There, the policies resulting in segregation would not have been adopted but for racial prejudice.143 Perhaps in


such cases the "arbitrary" remedy of racial dispersion has some merit. It is a
guarantee that racial prejudice is not at work, although it is also a guar-
antee that race will be taken into account. Even in these circumstances,
however, the outcome remedy is not compelling. The harm could be un-
done by requiring school districts to adopt those racially neutral policies,
such as the choice of school construction sites and the drawing of attend-
ance zone boundaries that most advance racial integration. The corrup-
tion and hence the stigma could be relieved without mandating a race
conscious policy of racial balance of student bodies as the remedy.

Dworkin, with his customary breadth of vision, attempted a tour de
force in explaining and justifying modern American desegregation deci-
sions. He sought to vindicate a process interest through an outcome rem-
edy, while declining to be taken in by a fragile instrumentalism. In this, he
has not succeeded. All that is left is a theory based on the outcomes them-
selves; both constitutional wrong and remedy should be rooted in the fail-
ure to achieve integration. This theory is premised on the interpretive
judgment that segregation itself is the evil and that integration is necessary
to undo that evil.\textsuperscript{144} Adherence to this theory is an extension of traditional
equal protection analysis in race cases, an extension that a number of com-
mentators have found troubling.\textsuperscript{145} On the other hand, the theory does not
rely on the instrumental premises of the remedial theory, such as the idea
that segregated education impedes the achievement of black youngsters,
but upon the interpretive judgment that affirmative values such as racial
peace and equality between the races are not attainable so long as the races
are physically separated in important private and public institutions.\textsuperscript{146} In
this sense, it is a judgment about American history and about the type of
government and society to which Americans should aspire. Separation—
insularity—of blacks may leave them open to the full measure of white
hostility.\textsuperscript{147} Integration of public schools is justified not because of
prejudice against individuals but because of the need to protect a racial
group against the historical forces that have isolated and hence oppressed
it. Integration is part and parcel of the undoing of a caste system that has
consistently disadvantaged black Americans over long periods of time.

The Supreme Court, however, has failed to justify a racial balance rem-
edy under any of the foregoing theories. Indeed, it has seemingly done all
that is within its power to obfuscate the underlying bases of its decisions.
In some cases, the vigor with which the racial balance remedy is pursued
suggests the group protection theory for integration. The language of the
opinions, however, often indicates otherwise. At times the Justices (or
some of them) have used social science research to prove or disprove the

\textsuperscript{144} See generally Fiss, supra note 11; Van Dyke, supra note 11; Yudof, supra note 11.
\textsuperscript{145} See, e.g., Brest, supra note 6; Simon, supra note 143.
\textsuperscript{146} See Yudof, supra note 11.
\textsuperscript{147} See generally M. YUDOF & D. KIRP, PATERNALISM AND GENDER POLICY (1978)
(unpublished manuscript).
causal assumptions of the remedial theory,\textsuperscript{148} while at other times they have declined to rely upon such evidence.\textsuperscript{149} They have created evidentiary presumptions against school board decisions that result in segregation—seemingly reflecting a view that governmental processes are likely to be corrupted by racial prejudice—and then ignored such presumptions in subsequent cases.\textsuperscript{150}

A majority of the Justices have relied on the nondiscrimination principle to justify particular remedies, though there are sharp divisions among them about the propriety of requiring racial balancing, the circumstances in which this remedy should be required, and the scope of the remedy. Some Justices appear to attach a positive value to integration and a negative value to segregation, while others see only the need to remedy specific harms.\textsuperscript{151} There is also disagreement about what constitutes an unacceptable level of social, political and economic cost in the implementation of a racial balance remedy. With few exceptions, there has been a lack of candor among the Justices in explaining the reasons for desegregation decisions.

The evolution of desegregation law since the Court's 1971 decision in \textit{Swann v. Charlotte-Mecklenburg Board of Education},\textsuperscript{152} some three years after \textit{Green}, illustrates the point. In \textit{Swann} there had been a long history of separation of the races in the public schools, but in 1965 the lower courts approved a plan based upon geographic zoning (neighborhood attendance) accompanied by a free transfer program (blacks could transfer to majority white schools). The official policy was one of nondiscrimination by race. Yet in 1969 the matter was reopened because approximately two-thirds of the 21,000 black students in the city of Charlotte attended schools which were ninety-nine percent or more black. Chief Justice Burger, in the enigmatic \textit{Swann} opinion, emphasized that the Court was laying down guidelines for lower courts and boards of education in remedying past discrimination: federal judicial power may be exercised "only on the basis of a constitutional violation," and "the nature of the violation determines the scope of the remedy."\textsuperscript{153} While denying that racial balance in each school

\begin{footnotesize}
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\item[152.] 402 U.S. 1 (1971). For a fascinating account of how this "mushy opinion" came to be written for a unanimous Court, see B. WOODWARD & S. ARMSTRONG, THE BRETHREN 95-112 (1979).
\item[153.] 402 U.S. at 16.
\end{itemize}
\end{footnotesize}
was required or even desirable, the Swann Court affirmed a wide-scale busing plan which largely accomplished that result. As Professor Fiss observed:

The net effect of [Swann] is to move school desegregation further along the continuum toward a result oriented approach. . . . The Court moved from (a) the undisputed existence of past discrimination to (b) the possibility or likelihood that the past discrimination played some causal role in producing segregated patterns to (c) an order requiring the complete elimination of those patterns. *The existence of past discrimination was thus used as a "trigger"—and not for a pistol, but for a cannon. Such a role cannot be defended unless the primary concern of the Court is the segregated patterns themselves, rather than the causal relation of past discrimination to them. The attention paid to past discrimination can be viewed as an attempt by the Court to preserve the continuity with Brown and to add a moral quality to its decision.*

The argument that the Court was moving toward integration per se rather than simply remedying past acts of discrimination is reinforced by the Keyes decision. Keyes was the first non-Southern desegregation case to reach the Supreme Court, and the majority, relying on a remedial theory similar to Swann, ordered the integration of the public schools of Denver. Denver never had set up or maintained a dual school system such as those so prevalent in the pre-Brown South and border states. Perhaps the Keyes Court concluded that the cumulative circumstances indicated that racial prejudice was a factor in the board's policy decisions (parts of the opinion are consistent with use of the corruption theory). If so, this conclusion is questionable since the board then in power had passed three resolutions which sought "to desegregate the [predominantly black] schools in the Park Hill area. . . ." Yet despite the language of the opinion, Keyes can only be explained on the basis that school districts have an affirmative duty to integrate, or that undoing plans to integrate students constitutes enough evidence of racial prejudice to justify a racial balance remedy. No Justice relied on the latter theory. Without relying on any social science evidence, without articulating, elaborating, or defending

154. *Id.* at 24.
157. Most of the evidence showed a pattern of failing to act to remedy segregation rather than pursuit of an independent segregationist policy.
158. L. GRAGLIA, *supra* note 39, at 161. "Not only was separation according to race never required in the Denver schools, but it was from the beginning explicitly prohibited by the Colorado constitution." *Id.*
159. One major problem with the application of the corruption theory in Keyes is that the segregation in the inner city preceded the alleged unlawful acts and therefore could not have been caused by the acts. See L. GRAGLIA, *supra* note 39.
160. 413 U.S. at 192.
a corruption or group protection theory, and without any real admission that it was going beyond Brown, the Court implied that the equal protection clause of the fourteenth amendment mandates integration of the races in the public schools.

One year and one month after Keyes, the Court, in Milliken v. Bradley, rejected a metropolitan-wide remedy for Detroit’s de jure segregated public schools system. The Court could easily have refused to require the amalgamation of the separate surrounding school districts in Milliken, without undermining the Swann and Keyes precedents by noting that restructuring local governmental entities, redrawing political boundary lines, and drastically altering their operations to achieve integration all create unacceptably high costs in terms of maintaining federal-state relations under the American constitutional scheme of federalism. The Milliken Court, however, declined to engage in this sort of analysis to any significant extent. Rather, the Court’s opinion reflects a certain schizophrenia, criticizing lower courts for the implementation of the Court’s own decisions. The Court accepted the proposition that there was de jure segregation in the Detroit public schools. In so doing, it largely followed the definition of intentional discrimination propounded in Keyes. If Keyes and that part of the Milliken opinion dealing with the actions of the Detroit school authorities mean that relatively isolated acts of discrimination accompanied by a failure to take actions which would have alleviated segregation suffice to require a racial balance remedy, the Court simply ignored this proposition when it came to the actions of both the surrounding school districts and the state of Michigan.

With regard to the appropriate remedy, the Court did not question the Swann/Keyes racial balance approach within Detroit itself. Yet, it introduced a new element with regard to the metropolitan relief requested by the plaintiffs. The Court held that “[t]he controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation.” The Court may have expounded this principle in Swann and Keyes, but it certainly did not abide by it in those cases. No serious attempt was made in the earlier opinions to quantify the incremental segregation caused by past acts of discrimination and to tailor the remedy only to that increment. Busing for racial balance was then the order of the day, and this was accomplished by an expansive definition of intentional discrimination and by presuming that the discrimination had a substantial impact beyond the particular schools where discriminatory acts were proven.

161. 418 U.S. 717 (1974). The Detroit area contained many independent school districts, with blacks dominant in the city itself and whites dominant in the suburbs. There were insufficient whites in Detroit to create majority white public schools without drawing in the surrounding suburbs.
163. 418 U.S. at 744.
What appeared to change was the underlying principle which the Court was applying in desegregation cases. In *Swann* and *Keyes*, the Court had emphasized the likelihood that the political processes would be corrupted by racial prejudice, and had sought to guarantee an integrated education to as many black children as possible by distorting the nondiscrimination principle. Followed to their logical conclusion, the system-wide integration remedies required in *Swann* and *Keyes* should have dictated a like remedy in *Milliken* since there simply were not enough white students in Detroit alone to provide a racially integrated experience for the masses of black children in that school system. In *Milliken*, however, the Court focused on the nondiscrimination language of earlier opinions and refused to uphold the order for a metropolitan area remedy. In so doing, the Court, in effect, retreated from the *Keyes* presumptions and required specific proof of intentionally discriminatory acts and of an actual nexus between those acts and any proposed remedy.

Further evidence of a shift away from the racial balance remedy toward the nondiscrimination principle could be seen in *Austin Independent School District v. United States*. Following *Keyes* and disregarding those aspects of *Milliken* inconsistent with it, the Court of Appeals for the Fifth Circuit ordered the adoption of an integration plan which would have achieved a degree of racial balance in every school. The Supreme Court, over the dissents of Justices Brennan and Marshall, vacated the judgment of the court of appeals and remanded the case for reconsideration in the light of *Washington v. Davis*, a leading employment discrimination case holding that underrepresentation of blacks in certain job categories, standing alone, does not constitute proof of racial discrimination.

Justice Powell, in a concurring opinion joined by Chief Justice Burger and Justice Rehnquist, stated: "[T]he plan is designed to achieve some predetermined racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities." The three Justices doubted that the Austin school system would ever have achieved the degree of integration called for by the plan, even if there had
been no constitutional violation, since in the causal language of *Milliken* the primary reasons for segregation were not attributable to school authorities. Significantly, Powell attributes no importance to the fact that the school board adopted a neighborhood assignment plan knowing that it would lead to segregated schools. The "knowing" standard of *Keyes* is rejected in favor of the "intentional" discrimination standard of *Milliken*. Furthermore, not only must the remedy be reasonably commensurate with the wrong, but lower courts must attempt to determine hypothetically what the racial composition of the schools would have been had there been no unconstitutional discrimination. This formula is applied for the first time to a city which at one time did have an official policy of separating the races in the public schools. It is patently inconsistent with *Swann*. Powell does not overtly say that nondiscrimination, and not integration, is the exclusive remedy for discrimination, but he comes quite close to that conclusion.

Two 1979 cases, however, dispell the notion that a shift away from the racial balance remedy is in progress. In *Dayton Board of Education v. Brinkman (Brinkman II)*172 and *Columbus Board of Education v. Penick*,173 the Court imposed system-wide remedies under factual circumstances similar to those found in *Keyes*,174 despite the fact that the Court in 1976 had vacated a system-wide remedy for the Dayton schools in *Brinkman I*.175 Interestingly, the Court relied upon the finding that both cities had operated "dual systems" when *Brown* was decided and held that the repeated failures to fulfill their affirmative duty to disestablish these systems constituted continuing constitutional violations. Neither Dayton nor Columbus operated a de jure segregated system after 1954. The *Brinkman II* and *Columbus* cases have reaffirmed the *Keyes/Swann* remedial approach by equating the need to correct pre-1954 violations with current racial imbalance.176 Evidence of racially motivated school board actions is

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174. In *Brinkman II* the Supreme Court agreed with the court of appeals that racially unbalanced schools, optional attendance zones, board rescission of antisegregation resolutions, staff assignment policies, school construction, grade structure and reorganization, and pupil transfer plans all constituted convincing evidence of continuing system-wide effects.
175. 433 U.S. 406 (1977). The surprisingly unanimous *Brinkman I* decision was written by Justice Rehnquist and accused the court of appeals that racially unbalanced schools, optional attendance zones, board rescission of antisegregation resolutions, staff assignment policies, school construction, grade structure and reorganization, and pupil transfer plans all constituted convincing evidence of continuing system-wide effects.
176. Justice Rehnquist reads the cases as meaning that:

*Racial imbalance* at the time the complaint is filed is sufficient to support a system-wide, racial balance school busing remedy if the district court can find some evidence of discriminatory purpose prior to 1954, without any inquiry into the causal relationship between those pre-1954 violations and current segregation in the school system.

cited in *Columbus*, but there is again no explicit reliance upon a corruption theory.

The overall impression is that the Justices were unable to agree on a majority opinion on the merits in *Brinkman I*, and *Brinkman II* is still one more case in a long line of cases that cast doubt on the underlying legal principles being applied by American courts in school desegregation cases.

IV. INTEGRATED PUBLIC SCHOOLS IN THE UNITED STATES: THE NEW AMERICAN DILEMMA

If the integration model for racial justice in the public schools is accepted, the results in America are mixed.\(^{177}\) Whites continue to flee from predominantly black inner cities, albeit it is hotly debated whether integration accelerates such flight in the long run.\(^{178}\) In any event, Washington, Newark, and Atlanta have black majorities, and most of the fifty largest cities have rising proportions of minority people. In New England and the Mid-Atlantic states, central cities experienced a ten percent decline in white population and a forty-five percent increase in black population in the 1960s.\(^{179}\) Given the exodus of whites, and the higher birth rates and lower average age of Latinos and blacks, it is not surprising to learn that the five largest central cities in the United States (New York, Chicago, Los Angeles, Philadelphia, and Detroit) serve more than one-fifth of all black and Latino public school students.\(^{180}\) Many of America’s largest cities already have predominantly minority enrollments.\(^{181}\)

As the United States noted in its Report to Questionnaire on Implementation of the UNESCO Questionnaire on Discrimination in Education 1965-1971, “In 1971 *de facto* segregation remains in many parts of the

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177. 443 U.S. at 460-65.
180. *Id.* at 52-53.
181. *Id.* at 68. (Atlanta (85%); Baltimore (72%); Chicago (71%); Cleveland (60%); Dade County (Miami) (56%); Dallas (55%); Denver (53%); Detroit (74%); District of Columbia (95%); Gary (81%); Houston (61%); Kansas City (62%); Los Angeles (58%); Memphis (71%); Newark (89%); New Orleans (81%); New York City (64%); Philadelphia (66%); St. Louis (70%)).
The report, however, further stated that: "In the fall of 1970, only 12.5% of all students in public schools, white and minority, were isolated in all-white or all-minority schools, compared to 19% in 1968." This is impressive if nondiscrimination is the standard, and the figures reflect a good faith effort by local and state authorities to meet that standard.

Ironically, the major gains for integration have occurred in the South, particularly in rural areas. By the 1971-1972 academic year over forty-four percent of southern black students attended integrated schools. In the same year, in northern and western states only twenty-nine percent of black students attended white-majority schools, a less than two percent improvement over the previous four years. Professor Orfield made the following national estimates for 1974:

1. Sixty-seven percent of all minority students (6.6 million out of an estimated 9.8 million, including blacks, chicanos, and other racial and ethnic minorities) attended predominantly minority group schools.

2. Forty-one percent of black students and thirty percent of the Latin students attended schools with ninety percent or more minority enrollments.

3. Only twenty percent of the blacks in large districts (more than 38,000 students enrolled) attended predominantly white schools. The figure was fifty percent for smaller school districts.

The 1974-1975 statistics showed that urban segregation continued to decline in the South, worsened in the Northeast, and remained virtually unchanged in the Midwest. In short, with few exceptions, the pattern of minority dominated inner cities and white dominated suburbs continues unabated, and school integration would require extensive busing and/or reorganization of local school districts. Only less populous and rural areas of America can achieve integration without such drastic measures.

In the face of these demographic trends, the response of the United States Supreme Court has been equivocal. Until we are expressly told otherwise, the prevailing legal "wisdom" is that racial balance is required within school districts—even if they are overwhelmingly populated by ra-
cial minorities. Yet racial isolation between black inner cities and white suburbs is permissible. This no-win solution is a reflection of the dissensus among Americans, both black and white, as to the appropriate path to racial justice in public education. A majority of Americans appear to feel that, in the long run, nondiscrimination and integrated schools would best serve the ideals and aspirations of the nation. Gunnar Myrdal's "American dilemma," the conflict between egalitarian ideals and discriminatory attitudes toward blacks, has in large measure been overcome. But the nondiscrimination principle, at least as formulated and applied over the last twenty-five years, has not resulted in integrated schools in many parts of the nation. Why not? It appears, although there are many who disagree, that the elimination of nearly all racial prejudice in American education policymaking—from choosing sites for schools to defining student attendance zone boundaries—would still leave substantial racial isolation in urban public schools, and that past discrimination in public schools is a relatively small factor in present urban school segregation. The essential problem is segregated housing: a problem attributable to wealth disparities, personal preferences, prejudice, and other factors, and which appears impossible to resolve in the foreseeable future.

If integrated neighborhoods are not foreseeable, the primary ways to achieve integrated public schools are to take racial characteristics into account and to transport students from their segregated neighborhoods and school districts in order to achieve racial balance. This means that the nondiscrimination principle must be violated and that neighborhood schools, particularly at the primary or elementary school level, must frequently be abandoned in favor of more complex school assignment policies. In spite of a strong belief in integrated education, most Americans are unwilling to abide these methods of achieving it. The issue is often stated in terms of "massive cross-town busing," costing many millions of dollars in the largest urban centers. While the convenience and cost ele-

191. Id. at 108-09.
192. See G. MYRDAL, supra note 55.
194. Id. at 113. Orfield notes:
By the time of the 1972 election, [survey] responses [designed to test public sentiment on busing] were overwhelmingly negative even when the question was carefully phrased:
In areas where the courts have found unlawful segregation of white and black school children the courts have ordered desegregation, including busing where necessary, so that whites and blacks will not be kept from attending school together. Do you favor or oppose such busing?
Favor  Oppose  No Opinion
21%  70%  9%
Numerous surveys since that time have shown similar polarization. A February 1976 national poll, for example, found that 71 percent, when asked if they favored "racial integration of the schools . . . even if it requires busing," were opposed.
Id. (citations omitted).
ments for pupil transportation are not unimportant, they are not at the heart of the opposition to plans to achieve integration.\textsuperscript{195}

The reality is that the present school desegregation situation is probably as much a function of socioeconomic as racial tensions.\textsuperscript{196} Despite recent gains, blacks are still disproportionately poorer than whites.\textsuperscript{197} Middle class whites, and perhaps middle class blacks, may fear that there will be physical violence in schools with large numbers of poor blacks or whites, that educational standards will decline, and that their children will achieve less well in racially and socioeconomically integrated schools.\textsuperscript{198} Blacks may well fear racial prejudice in integrated schools, and be reticent about sending their children to schools where they are not welcome. "Natural" integration, achieved through integrated neighborhoods as blacks are able to afford more costly housing (and as racial discrimination in employment and housing declines), is not only the gradual method of achieving integration, it also promises substantial socioeconomic homogeneity in public school student bodies. Thus, the new American dilemma is not so much that Americans favor racial integration of public schools, while opposing the most feasible way of achieving it (busing);\textsuperscript{199} it is that they favor racial integration but not substantial socioeconomic integration of the affluent and the poor. Poor whites, of course, may fear integration with poor blacks on racial and other grounds. The paradox is that civil rights leaders sought school integration in order to overcome the low social and economic status of racial minorities, in order to gain access to jobs, housing, income, status, and dignity. Yet the high degree of overlap between poverty and race stands as the greatest single obstacle to the attainment of racial integration. Moreover, the social scientists tell us that racial integration of poor whites with poor blacks is unlikely to improve black educa-

\textsuperscript{195} See generally id. at 137-40. But see L. Graglia, supra note 39, at 263-65.

\textsuperscript{196} Professor Graglia notes:

Proponents of compulsory integration would characterize . . . opposition [to increased integration] as racism, but the opposition would probably be very little less today if all differences in color should somehow disappear overnight while the individuals involved remained the same. Differences in economic status and cultural background and in standards of behavior would remain. . . . [C]ompulsory school racial integration typically amounts to compulsory class integration.

L. Graglia, supra note 39, at 266 (citations omitted).

\textsuperscript{197} See generally B. Wattenberg, The Real America (1974).

\textsuperscript{198} See L. Graglia, supra note 39, at 266-70. Professor Graglia states that:

There is much in the American ideal that looks to a classless society, but also much that recognizes the desire to attain and enjoy economic and cultural advantage as legitimate, or even as essential to progress. Realism, unhappily, demands a recognition that compulsory school integration asks of many that a significant portion of this advantage be given up, and that it asks it as to a peculiarly sensitive area, the welfare of one's children.

\textit{Id.} at 266-67. There is no solid social science evidence that integration hampers the academic achievement of whites. \textit{See generally} G. Orfield, supra note 50, at 119-50. But see L. Graglia, supra note 39, at 267.

\textsuperscript{199} See G. Orfield, supra note 50, at 108, 115.
tional achievement because the middle class peer group with its higher educational aspirations and better educated parents is a critical resource for poor children, both black and white.\textsuperscript{200}

If this description of the new American dilemma is correct, the "desegregation problem" will not be resolved until there are fundamental changes in attitudes or until poverty is substantially reduced without resort to racial and socioeconomic integration of public schools. Americans may abandon their integrationist hopes in favor of the nondiscrimination ideal. Middle class Americans, both black and white, may change their attitudes toward the poor, both black and white. Other approaches to eliminating poverty or the animus toward the poor may be more successful than those of the past. Until changes occur along these lines there can be no new consensus on the meaning of racial justice in the public schools. Without such a consensus, coherent principles and policies for school desegregation are impossible. Thus, although Americans are a notoriously impatient people, the refinement of constitutional and statutory principles in the light of a new understanding of racial justice remains the first order of business some twenty-five years after the decision in \textit{Brown v. Board of Education}.\textsuperscript{200}

\section*{V. Reflections on Human Rights and School Desegregation in the United States}

The discussion of the racial discrimination cases demonstrates how difficult it is to apply abstract principles of racial justice, similar to many of the principles embodied in human rights instruments, to concrete situations in which those principles must be vindicated. Some of those difficulties may be relatively unique to the United States. For example, the traditions of judicial review of constitutional matters by courts and the system of federalism, with its emphasis on a federal-state partnership, may introduce decisional distortions easily avoided by other nations. On the other hand, other problems are not easily avoided. How does a government body detect racial discrimination as it becomes more subtle? Should a nation tolerate segregation even if it is not the product of direct government action? How should segregation be remedied? Is a good faith effort at nondiscrimination enough? Or should the actual physical mixing of the races in public schools be the objective? Are we concerned primarily with justice for individual members of a racial group, or should we seek to advance the interests of the entire group and perhaps sacrifice the well-being of individuals over the short term?\textsuperscript{201} Does group justice require integration or compensatory education programs or both?

The answers to these questions will depend, in large measure, upon the history and aspirations of the national and international communities. If

\begin{footnotesize}
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\item[200.] \textit{See, e.g.}, J. Coleman, supra note 39, at 307-10.
\item[201.] \textit{See Wolff, The Concept of Social Injustice} in \textit{From Contract to Community} 65 (F. Dallmayr ed. 1978).
\end{itemize}
\end{footnotesize}
there is a belief that historically the isolation of racial minorities, whatever the cause, has led to infliction of harms upon them by the dominant racial groups, perhaps only an interweaving of the fates of the races can accomplish racial justice. For example, whites may no longer be able to inflict injuries on black children once their own children attend the very same educational institutions. Assimilation makes the perpetuation of a caste system more difficult. Conversely, perhaps the aspiration should be in the direction of a national and international community in which the color of a person's skin is simply irrelevant to public policy, and governments should not take any measures, however benign in purpose, which perpetuate the need to employ racial criteria. The latter view would have the advantage of fostering cultural pluralism and allowing homogeneity and heterogeneity to operate side by side.

Moving from these generalities, desegregation law in the United States, despite its maturation with historical experience, remains essentially ambiguous. Nondiscrimination certainly remains a fundamental element, but in facing the tough questions which arise in the wake of acceptance of the nondiscrimination principle, American courts have been pragmatic, inarticulate, and uncertain. Comparisons with international human rights instruments, as they have evolved, are not made easily. For one thing, in the school desegregation cases, the national preoccupation in the United States is with whether schools should have racially balanced student bodies and faculties and what sort of balance there should be, while the question of integration receives only passing mention in human rights documents. Furthermore, from an American perspective these documents reflect an incredibly naive view of the world. Perhaps because attention is riveted to the harsh apartheid experiences in Southern Africa, there is a simple minded assumption that racial discrimination is easy to identify. Once it is identified, it is easily corrected: the offending governments need only stop their racist policies. This is a far cry from the present day experience in the United States and, most likely, a far cry from the situations that international bodies and other nations will face in the future. They will have to ask the sorts of questions that American courts, legislators, and executive officers have been forced to ask.

There are only hints of answers to these questions in human rights instruments. For example, they rarely discuss precise remedies. While race apparently may be considered to advance the interests of racial groups previously victimized by discrimination, the absence of emphasis on integration may indicate that remedial programs, special classes to allow disadvantaged students to reach higher levels of achievement, or racial preferences for higher education would be chosen. Thus, the interest of a racial group, as opposed to the right of an individual to nondiscriminatory treatment, may not mean racial dispersion in schools. One might well ask whether the nations of the world would be willing to accept an approach that required that virtually no public schools be populated largely by the
members of one race, one ethnic group, or perhaps one religion. In a
vague way, this result would be inconsistent with the emphasis on main-
taining different cultures and on self-determination of peoples.

With respect to racial discrimination in the guise of superficially neutral
government policies, international human rights documents are largely si-
lent. With respect to whether the disadvantaging of a racial group in pub-
lic schools must be intentional, the letter of these instruments may indicate
that purpose or intent is irrelevant: only outcomes count. But this may
change when concrete factual circumstances are addressed.

Perhaps the most important lesson Americans can learn from their own
experience and from international human rights documents is the inter-
twining of social and economic entitlements, equal educational oppor-
tunity, and civil and political liberties. Recognition of human rights should
entail not only the establishment of "a distance from oppressive structures
and regimes . . . [to] enable human flourishing to take place," but also
state fostered "contributions designed to provide . . . for 'enjoyment' of
life."202 The new American dilemma arises from the link between race
and poverty and the ambivalence about the choice between integration
and nondiscrimination. While international human rights documents have
little to say about the latter, they appear to recognize the former in terms
more explicit than in the United States. In this regard, consider the atti-
tude of the present American government toward ratification of the Intern-
ational Convention on the Elimination of All Forms of Racial
Discrimination.

As President Carter noted in his letter of transmittal to the Congress
recommending Senate ratification of the Convention, "The Racial Dis-
crimination Convention deals with a problem which in the past has been
identified with the United States; ratification of this treaty will attest to our
enormous progress in this field in recent decades and our commitment to
ending racial discrimination."203 In other words, the United States had
made great progress toward racial justice in the last twenty-five years,
however much remains to be done. On the other hand, nonratification of
the treaty, in the eyes of a watchful world, might be misinterpreted as a
lack of commitment to ending racial discrimination. The problem is that
once the symbolic commitment has been made, what does the Racial Dis-
crimination Convention have to say about the implementation of the non-
discrimination principle? Here the ambiguity of the instrument and the
failure to address concrete questions pose problems for the United States.
The treaty in some ways reflects a stage of historical evolution in race rela-
tions that has already been passed in America.

Consider the declarations, understandings, and reservations recom-

203. President's Message to Congress Transmitting Human Rights Treaties, 14 WEEKLY
mended in the letter of submittal from the State Department which was attached to the President's transmittal letter. First, the United States declares its understanding that the Racial Discrimination Convention permits but does not require "affirmative action" programs. This reflects the unsettled law with regard to race preferences in different contexts under the Constitution and laws of the United States. Second, no caveat is attached to the antiapartheid provisions of the Convention except that the principle is limited to situations where governments assist the activities, or the laws of the United States require, nondiscrimination in the private sector. Given the judicial extension of the nondiscrimination principle to private schools under Congressional statutes, this is tantamount to full acceptance of the antiapartheid principle in the field of education with, perhaps, some questions remaining as to the application of the principle to private religious schools. Third, the State Department accepts the notion that national, state, and local governments will not seek to incite racial discrimination, but, in accordance with the first amendment, the government will not attempt to silence private individuals and groups that preach racial hatred. Fourth, a reservation is recommended to preserve American principles of federalism, making it clear that the federal government will not exercise powers over the states which it does not constitutionally possess.

The most important points in the letter of submittal, however, are those not mentioned. No definition of racial discrimination is discussed beyond explicit racial criteria to disadvantage a racial group. The treaty does not contain such a refined definition, and this leaves intact the current and ambiguous American law on this subject. Similarly, the United States endorses the commitment to require the "effective protection" of treaty rights and to grant remedies for their violation through appropriate government tribunals and institutions, but there is no further elaboration on these commitments. The treaty is silent on the difficult remedial questions, and calls for no clarification of the hazy American principles on remedying racial discrimination. Nothing beyond a commitment to end racial discrimination is required or addressed.

The letter of submittal also recommends that the Racial Discrimination Convention not be self-executing, making it clear that domestic legislative and judicial decisions have precedence over its provisions. Obviously, this proviso reflects many historical and pragmatic concerns. The reservation may also be a reflection of the undeveloped nature of international human rights with regard to racial discrimination in the schools and elsewhere, and the inability to predict the direction of their future evolution.

With regard to the link between poverty and race, the State Department communication takes an interesting turn. It is recommended that there be an understanding attached to the economic and social entitlements em-

braced by the Racial Discrimination Convention: "The obligation assumed under Article 5 is not designated [sic] primarily to protect or guarantee the several enumerated rights as such, but rather to assure equality and non-discrimination in the enjoyment of those rights."\(^{205}\) Presumably this means that the federal government does not undertake to guarantee housing, adequate income, medical care or education, but only to assure nondiscrimination in access to whatever public sector benefits are offered by local, state, and federal governments. But the word "equality", differentiated from nondiscrimination in the document, is a word of many meanings. It certainly leaves open the door to further development of social and economic entitlements. Furthermore, the failure to link the questions of race and poverty clearly evidences the underlying dissensus on this matter in the United States.

What is needed in international and American law is a more precise formulation of secondary principles emanating from the primary nondiscrimination principle. Without a universally recognized natural law to guide us, reference must be had to utility, intuition, culture, and historical experience. This process has begun in the United States, but the process is far from complete and the intermediate results are far from clear. The process has been much slower in the international sphere, in part reflecting the different historical and cultural contexts in which racial discrimination questions have arisen in other national and international settings. If the Racial Discrimination Convention is ratified, perhaps the initial step will have been taken in accelerating those processes and in drawing them closer together. The question of racial discrimination is of such a magnitude that no body of international or national law and experience should be ignored.

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