EDUCATING OUR CHILDREN "ON EQUAL TERMS": THE FAILURE OF THE DE JURE/DE FACTO ANALYSIS IN DESEGREGATION CASES*

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INTRODUCTION

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.

Chief Justice Earl Warren, Brown v. Board of Education

Thirty years after the United States Supreme Court announced the above principle, the promise of an equal educational opportunity is, as yet, unfulfilled. A common method of equalizing educational opportunity has been to desegregate schools by busing. Busing, however, has been challenged as being too result oriented; proposals to curb this remedy have proliferated. Even the Justice Department has expressed a new policy: rather than

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3. The Education Amendments of 1974, 88 Stat. 484, established a priority of remedies to be used by federal courts and agencies in implementing desegregation. Basically, the amendments endorsed neighborhood schools, and barred any order requiring transportation to a school other than the school closest or next closest to the student’s place of residence. They also contained a proviso stating that it was "not
pursuing the traditional busing remedy to equalize educational opportunities, it plans to enforce students' civil rights by challenging inferior education in predominantly black and other minority schools. Nonetheless, children educated in "racially impacted minority," "barrio," "ghetto," or "inner city" schools continue to be labeled as educationally disadvantaged.

Although the Supreme Court has made an effort, it has not solved the basic problem of inequality. This Article will analyze two components of educational equality: fairness of the process and equality of the results rendered by the process. It will demonstrate that the equal protection analysis of each differs, not only with respect to the initial question of whether a given situation is held to be unconstitutional, but also with respect to the fashioning of an appropriate remedy. In the first component, a court evaluates the fairness of a process, considering notions of efficiency as well as intentionality of the unfairness. This might affect the question of whether a given action is held to be unconstitutional and it might also affect the scope of the remedy granted. However, in reviewing the second component, i.e., the results or condition rendered by the process, a different analysis comes into play. Judicial review of results entails an examination of the inequality created regardless of whether the process followed in achieving the result is efficient or tainted by "wrongdoing." The courts are concerned with unintentional as well as intentional unfairness.

This Article will describe the narrow process oriented analysis and contrast it with the broader analysis of both the process

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6. Professor Fiss uses these terms to describe two interpretations of anti-discrimination laws:

Antidiscrimination laws are capable of two basic interpretations. One interpretation—call it process-oriented—emphasizes the purification of the decisional process. . . . A second interpretation—call it result-oriented—emphasizes the achievement of a certain result. . . .

DESEGREGATION

and the results. It will demonstrate the different conceptual framework involved in evaluating each component. This Article will show how the Supreme Court has viewed educational equality following Plessy v. Ferguson. Initially, the Court's evaluation was quite perfunctory, but it became increasingly strict. By 1954, the Court in Brown v. Board of Education was well on its way toward evaluating the results as well as the process. Since Brown, the Court has vacillated between reviewing only the purity of the educational process and evaluating the equality of the results, especially when considering the appropriateness of a remedy. Despite judicial intervention, sociological data are examined which indicate that in general minority children today continue to receive an inferior education.

The theme of this Article is this: the equal protection guarantee is an affirmative promise that goes beyond protecting merely a fair process of educational administration. Equal protection goes further and requires a close examination of the educational results. Only in this manner can minority children benefit to the fullest extent from state-mandated education and begin to participate fully in society.

I. PROCESS-ORIENTED REVIEW

The Supreme Court was initially very deferential in its early review of state action under the equal protection clause. Legislatures were given great leeway in how they chose to treat different groups of citizens. The Court later began to change its view of the limits imposed by the state action requirement of the Fourteenth Amendment and began to require that states justify their disparate treatment of individuals by treating all citizens fairly. By the time Brown v. Board of Education was decided, the Court had begun to gauge the fairness of legislative actions by the "results" of the process and by equality of condition. In the school desegregation context, this meant that school administrators not only had to be free from racial animosity in their processes, but racial or ethnic groups had to be afforded an equal educational opportunity or an equality of condition as well.

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7. See infra notes 14-66 and accompanying text.
8. See infra notes 92-105 and accompanying text.
10. See infra notes 14-66 and accompanying text.
12. See infra notes 57-66 and accompanying text.
13. See infra notes 67-87 and accompanying text.
14. See infra notes 18-48 and accompanying text.
15. See infra notes 49-66 and accompanying text.
17. See infra notes 49-66 and accompanying text.
A. "Separate But Equal"

The Court first announced the "separate but equal" doctrine in *Plessy v. Ferguson*\(^\text{18}\) which involved the enforced separation of the races on railroad passenger cars. First, the Court analyzed Plessy's claim that enforced separation of the races violated the Thirteenth Amendment\(^\text{19}\) and read the Amendment as merely abolishing slavery and involuntary servitude.\(^\text{20}\) Noting that the Thirteenth Amendment equally forbids Mexican peonage and the Chinese coolie trade when they amount to involuntary servitude, the course went on to say that the Fourteenth Amendment was devised to meet the "exigency" of the Thirteenth Amendment which did not sufficiently protect blacks from certain laws which had imposed "onerous disabilities, burdens, and curtailed their rights in the pursuit of life, liberty, and property."\(^\text{21}\) The Court summed up its analysis of Plessy's Thirteenth Amendment claim:

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist as long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races or reestablish a state of involuntary servitude.\(^\text{22}\)

In other words, only "legal equality" is guaranteed by the Thirteenth Amendment and only a state of involuntary servitude is outlawed.\(^\text{23}\) The only clear principle is that "equality" (whatever

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\(^{19}\) U.S. Const. amend. XIII, § 1:

Neither Slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

\(^{20}\) The Court said that slavery implies involuntary servitude, and defined the latter as:

a state of bondage: the ownership of mankind as a chattel, or at least the control of the labor and services of man for the benefit of another, and the absence of a legal right to the disposal of his own person, property or services.

163 U.S. at 542.

\(^{21}\) Before concluding its evaluation of Plessy's thirteenth amendment claim, the Court quoted Justice Bradley in the Civil Rights Cases, 109 U.S. 3 (1863), who said, "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain. . . ." 163 U.S. at 543.

\(^{22}\) 163 U.S. at 543.

\(^{23}\) First of all, "legal equality" is undefined. What is its antithesis? Illegal equality? Legal inequality? The search for meaning in the opinion is useless because the Court decides what is "legal" when it decides as it did 58 years later in *Brown*, that separation of the races is "illegal" (i.e., unconstitutional). Blacks would, thus, under the Court's ruling, not be forced to be separated from whites. Second, the Court's causal analysis is superficial and circular. A statute which implies a "legal distinction" because of color has no tendency to destroy legal equality. A distinction
DESEGREGATION

that term may mean) was the intended goal in abolishing slavery.

The Court's analysis of Plessy's Fourteenth Amendment\(^{24}\) claim was disingenuous. First, the Court held that the object of the amendment "undoubtedly [is] to enforce the absolute equality of the two races before the law."\(^{25}\) The Court went on to give examples of situations not within the stated objective: "[B]ut in the \textit{nature of things} [the Amendment] could not intend to abolish distinctions based upon color to enforce social, as distinguished from political equality, or a commingling of the two races on terms unsatisfactory to either."\(^{26}\) The Court then cited a "common instance" of permissible segregation: separate school systems for blacks and whites, which many states had supposedly up- held.\(^{27}\) The Court distinguished \textit{Strauder v. West Virginia},\(^{28}\) which held that prohibiting blacks from sitting on jury panels was unconstitutional. The Court implied that since \textit{Strauder} involved a prohibition rather than a separation, the precedent was inapplicable.\(^{29}\)

The Court then considered Plessy's third theory. Plessy argued that the reputation of being a white person and being allowed to sit in a white coach was a property right of which he was being deprived. The Court disregarded the suggestion that upholding the statute would justify a states' requiring separation of persons with different colored hair and other such separations by saying that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for

\begin{itemize}
\item \textit{U.S. CONST. amend. XIV:} All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
\item 163 U.S. at 544.
\item \textit{Id.} (emphasis added).
\item The case example used was a Massachusetts Supreme court case, Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849), decided before the Civil War and before the fourteenth amendment's passage. The Court cited inapposite state decisions alluding to laws prohibiting racial intermarriage and citing \textit{one} state case which upheld that law. 163 U.S. at 545. The cases the Court cited include Leech v. Brum- mell, 15 S.W. 765 (Mo. 1891) (decided after passage of the fourteenth amendment); Ward v. Flood, 48 Cal. 36 (1874) (California Supreme court decided that negro children may not be excluded from the public schools specifically set aside for them); Bertonneu v. Board of Directors of City Schools, Case No. 1,361, 3 Woods 177 (1878) (decided after passage of the fourteenth amendment); People v. Gallagher, 93 N.Y. 438 (1883) (decided after passage of the fourteenth amendment); Cory v. Carter, 48 Ind. 327 (1874) (decided after passage of the fourteenth amendment); Dawson v. Lee, 83 Ky. 49 (1884) (the Kentucky court held that using tax revenues rom whites' salary for white schools and blacks solely for black schools would result in inferior schools for black children and was therefore unconstitutional).
\item 100 U.S. 303 (1879).
\item The court went on to cite state cases upholding laws requiring separation of the two races upon public conveyances.
\end{itemize}
the promotion for the public good, and not for the annoyance or oppression of a particular class.\textsuperscript{30} The Court concluded that the Louisiana separation statute met this test because, when gauged by established "usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order," the law was no more unreasonable or obnoxious than the acts of Congress requiring separate schools for "colored children."\textsuperscript{31} The Court criticized Plessy's argument that the underlying assumption that enforced separation of the races stamps the "colored race" with a badge of inferiority\textsuperscript{32} and made the observation that this was so only because the "colored race" chose to construe it in that manner.\textsuperscript{33}

The Court erred in its assertion that enforced separation of the races did not stamp the black race with a badge of inferiority. Clearly, the only reason for passing separatist laws was the perceived inferiority of the black race.\textsuperscript{34} Also, the Court, by asserting that social prejudice would not be overcome by an enforced commingling of the races, missed the point of the statute. It was not a statute which prohibited forced commingling; rather, it required forced separation.

The Court made a questionable distinction between each race's "civil and political" rights, which must be equal, and their "social rights," which the Constitution did not protect. None of these terms was defined. The Court's references to "commingling," "intermarriage," and "segregated schools" as being within legislative regulatory power implies that the Court felt such matters were examples of "social rights" which the state could regulate with wide discretion. The privileges and immunities, due process, or equal protection clauses could not interfere. The Court's reference to blacks on jury panels intimates that this is an example of the political equality the Constitution guarantees.

With all its faulty logic, the court did not stray far from an "equality" principle. The opinion can be explained on the grounds that the Court perceived that separation was a fair process.\textsuperscript{35} As long as blacks were not totally denied the same privileges as whites, as in Strauder where blacks had been totally precluded from sitting on the jury panel, they were treated fairly. Thus, the government could have much leeway, limited only by its

\begin{itemize}
\item \textsuperscript{30} 163 U.S. at 550.
\item \textsuperscript{31} \textit{Id.} at 550-51.
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} See generally M. Herskovits, \textit{The Myth of the Negro Past} (1971) and C. Woodward, \textit{The Strange Career of Jim Crow} (1975).
\item \textsuperscript{35} See supra notes 8-9 and accompanying text for an explanation of how this paper defines process.
\end{itemize}
DESEGREGATION

obligation to be “fair.” The opinion can be criticized in that it is inefficient to separate the two races. Of course, given the social and political climate of the time, the inefficiency was not present because of the social disruption which would have probably resulted in the absence of separation.  

Cases subsequent to Plessy demonstrate that the Court 1) gradually changed its perception of “fairness,” becoming less perfunctory in its analysis; and 2) gave indications of evaluating the results of the challenged procedure in order to determine whether the challenged process was ultimately fair.

B. Early Deferential Approach

The first Supreme Court case after Plessy which directly challenged unequal educational facilities was Cumming v. Board of Education. There, the plaintiffs challenged the School Board’s closing of a black high school and replacing it with black elementary schools. Essentially the plaintiffs’ argument was that the School Board, in subsidizing private white high schools with tax funds, discriminated against black high school students. Because tax funds were not being used for the education of blacks, the plaintiffs sought an injunction to prevent the collection and expenditure of taxes to support the school system.

The Board answered that for “purely economic reasons in the education of the negro,” it felt it necessary to close the black high school which had been used to educate only sixty high school students. In its place, the Board opened an elementary school which would accommodate two hundred black students. The Board had, at the same time, resolved that it would reinstate the high school “whenever in their judgment the Board could afford it.”

The Court made three points in denying plaintiffs relief. First, the School Board had wide discretion in how it chose to allocate its money. The Court concluded that it had not set out to establish a high school system in which blacks were denied education. Rather, the Board had allocated money to support private


37. Justice Harlan’s dissenting opinion is noteworthy because it describes all the implications of Louisiana statutes, e.g., “A white man is not permitted to have this colored servant with him on the same coach. . .”; and it demonstrates the public function of railroads. He then equivocates by saying that the Louisiana statute was unreasonable and concludes with an essay on the theme of a “color blind constitution” noting that a distinction based solely on race is unconstitutional. 163 U.S. at 552.

38. 175 U.S. 528 (1899).

39. Id. at 530.

40. Id. at 533.

41. “In our opinion, it is impracticable to distribute taxes equally.” Id. at 542.
schools in which white children were educated. The fact that the
Board had chosen to educate a greater number of black grade
school children for the same amount of money that it had previ-
ously used to educate fewer black high school students was found
to be within their prerogative.\textsuperscript{42} Second, the Court stated that the
relief which plaintiffs had requested would result in taking away
educational privileges from white students without giving black
children additional educational opportunities.\textsuperscript{43} Third, the Court
did not find any evidence that the Board had any desire or pur-
pose to discriminate against any of the school children on account
of their race.\textsuperscript{44}

In effect, the Court looked at the process. The Board simply
had a limited amount of tax funds and while it made the decision
to educate a greater number of black children using these funds, it
could not be helped that the white high schools chosen were al-
ready existing private schools. The Board did not create a system
where only white children were allowed an education but merely
divided the funds in the way they perceived was most effective.
Thus, it seems that efficiency in the use of educational facilities
played a part in the Board's decision to close the school. The pro-
cess seemed free of intentional or purposeful discrimination and
was a reasonable method of allocating funds.

Had the Court chosen to examine the results of the School
Board's decision, it would have probably found the conditions so
inequitable as to demand judicial intervention. The effect of the
School Board decision—to preclude black children from ob-
taining a high school education—could hardly be perceived as
equitable.

The Court's next education case, \textit{Berea College v. Kentucky},\textsuperscript{45}
involved the legality of a state statute which imposed fines upon
educational institutions operating integrated schools. Berea Col-
lege had been found guilty of "unlawfully and willfully" permit-
ting and receiving both white and black students. Berea College
argued that the statute was unconstitutional insofar as it had the
effect of depriving persons of their right to attend an educational
institution of their choice. The State of Kentucky argued that the
statute's purpose was to enforce the separate education of the races.
According to the state, voluntary association of the races was not

\textsuperscript{42} \textit{Id.} at 544.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} The Court left open the question of what effect purposeful discrimination
would have on the outcome. \textit{Id.} at 545. The Court also refused to reconsider the
separate but equal doctrine because it had not been raised in the pleadings.
\textsuperscript{45} 211 U.S. 45 (1908).
DESEGREGATION

1984]

guaranteed by the Fourteenth Amendment.\textsuperscript{46}

The Court avoided the questions of whether the state could infringe on an individual's right to an education of his choice and whether voluntary association is guaranteed by the Constitution. Instead, the court ruled that since Berea was created by and subject to the state's incorporation statutes, the subsequently enacted statute prohibiting the co-education of the two races amended or repealed Berea's charter. This was held to be within the state's police power.

Again, the Court looked at the state's process of administering education. The enforced separation of the races had already been held to be within the State's power. Since it was construed as merely regulating the state's corporations, the Court deferred to the legislative judgment and held that the process did not violate the Constitution. Of course, had the Court looked at the effect of the statute, which barred students from attending the school of their choice and thus denied black students the opportunity to attend college, it would have had to conclude that the results effectuated by the statute were inequitable.

Another education case was initiated by the parents of a Chinese student who wanted their child to attend the white school in the area. In \textit{Gong Lum v. Rice},\textsuperscript{47} the plaintiffs said that separatist laws were created to preserve the purity of the dominant (white) race. They argued that this privilege should be afforded to other races; color was a reasonable basis for classification but colored meant one race, and that was the negro race.\textsuperscript{48} The defendants demurred on the ground that plaintiff was Mongolian or yellow and therefore not entitled to attend Mississippi schools provided for white or Caucasian children. The Court looked perfunctorily at the curriculum and the number of months in the school term. Determining that they were the same for white and colored schools, the Court found no denial of equal protection because separate schools for white and colored races had been upheld before. The Court reasoned that Martha Gong Lum was yellow; because yellow is not white, she had no right to attend the white school.

The opinion is difficult to justify. The Court's deference can be seen as the desire to avoid the difficult task of determining which groups were "white" and which "colored." It was easier for the School Board to determine that white was white and every one else was "colored." The very perfunctory examination of the

\textsuperscript{46} 211 U.S. at 52.
\textsuperscript{47} 275 U.S. 78 (1927).
\textsuperscript{48} \textit{Id.} at 79.
School Board's method of assigning children to schools illustrates the extreme laxity of the review by the Court.

C. The Court's Shift

In 1927, the Court in *Nixon v. Herndon*,49 which did not involve education, began to shift its perspective about "fairness." The Court invalidated a Texas statute prohibiting blacks from voting in primary elections. The Court relied on the equal protection clause to hold that the statutory classification discriminated against blacks on the basis of race. The Court did not look for possible justification for the statute and hence did not engage in its usual deference. The Court stated:

States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.50

Although the analysis in this opinion was sparse, it seems the Court considered the nature of the right—i.e., the fundamental right to vote—that was being trammeled. Rather than using the Fifteenth Amendment to hold the statute directly violated the right to vote, the Court looked to the Fourteenth Amendment's equal protection clause to find that the result or effect of the state statute denied blacks a right afforded to whites. The Court ignored the legislature's intent in passing the statute and instead looked to the results or practical effect of the statute.

Twelve years later, in 1938, the Court showed further indications that it would no longer merely evaluate procedures to assure that they were free of intentional animosity toward blacks. In *Missouri ex rel. Gaines v. Canada*,51 plaintiff, a black male, wanted to go to law school. There was no black law school in the State of Missouri. When he applied to the white law school, the registrar rejected his application and referred him to a statutory provision which provided for state aid to blacks to seek an out-of-state education when it was not available in Missouri. The statute also provided that the Regents should set up programs not available to blacks in the state whenever it deemed it necessary or advisable. The Court did not look at the legislative intent or the intent of the Regents. Rather, the Court looked at the statute's effect on the plaintiff:

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders

49. 273 U.S. 536 (1927).
50. Id. at 541.
51. 305 U.S. 337 (1938).
facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.52

Had the Court looked to the intent of the legislature with the same deferential view it had in previous cases, the plaintiff might have been denied relief. It would have been difficult to show purposeful animosity as intent is hard to prove, and it was not economically sound to open a law school for one black law student. The downfall of the separate but equal rule was imminent.53

In Sweatt v. Painter,54 the Court looked at the actual facilities provided to black students and ignored the process for assigning students to their respective schools. In this case and its companion, McLaurin v. Oklahoma State Regents,55 the Court came much closer to overturning the separatist doctrine. In Sweatt, the Court denied the state’s argument that a newly opened law school satisfied the equality mandate of Plessy. The Court looked at the actual facilities supplied by the state, found them to be unequal in quality, and ordered the disparity remedied. The Court ordered Sweatt’s admission to the University of Texas Law School.56 In

52. Id. at 351 (emphasis added).
53. Ten years later, in Sipuel v. Board of Regents of the University of Oklahoma, 332 U.S. 631 (1948), the Court merely cited the Gaines case in holding that Oklahoma must provide a legal education through its state institutions “in conformity with the equal protection clause of the Fourteenth Amendment and provide as soon as it does for applicants of any other group.” This was a dramatic illustration of the Court’s ignoring the process and simply looking to the end results. Since the petitioner was not afforded an equal educational opportunity, the court reasoned that the state must provide one.
56. The Sweatt Court said:

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most
McLaurin, the Court ordered that the black petitioner not be isolated from the white student body by having separate instruction in separate classrooms or at separate times. In McLaurin, the plaintiffs had not challenged the results of the school's actions but challenged the actions themselves. The Court did not analyze the school's administrators for unconstitutional intent. Rather, it looked to the condition of plaintiff's education to determine that he was entitled to relief.

D. The Court Evaluates the Results as Well as the Process

Brown v. Board of Education, the landmark case in the school desegregation context, has been criticized and praised by commentators. Brown marks the beginning of the current mode of analysis used by the Supreme Court in school desegregation cases. In Brown, the Court ordered a change in the process, and did so by examining the results or condition of the plaintiffs. The Court accepted the lower court's findings that the facilities involved and other "tangible" factors were or were becoming "equal." The Court then stated: "We must look. . .to the effect of segregation itself on public education." The Court declined to "turn the clock back to 1868 when the Amendment was adopted" or "to 1896 when Plessy v. Ferguson was written," but instead considered "public education in light of its full development and its present place in American life throughout the Nation."

After discussing the importance of education in American society, the Court posed the question of whether segregation, solely on the basis of race, deprived minority children of equal educational opportunities even though tangible factors might be equal. The Court discussed previous cases which had required

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339 U.S. at 633-34.
59. 347 U.S. at 492 (emphasis added).
60. Id.
61. Id. at 493. "Only in this way," the Court said, "can it be determined if segregation in public schools deprives these plaintiffs of equal protection of the laws." Id.
62. Id.
DESEGREGATION

states to afford blacks equal educational opportunities by ordering their admission to white schools if there were no equivalent black schools available. The Court alluded to intangible factors which were not equal in segregated schools. It then cited “modern authority” which supported the notion that segregation has a tendency to retard the educational and mental development of blacks. Since the effect on blacks was detrimental, and hence unequal, the separate part of the separate but equal doctrine was overruled.

E. The Court Retreats

Since Brown, the Court has never openly stated that it would evaluate the results of educational process. However, it has frequently looked to the results in determining whether the process was defective. The Court has used a de jure/de facto analysis with respect to desegregation maintaining that de jure actions by the government (i.e., intentional actions or actions sanctioned by law) violate the Fourteenth Amendment while de facto situations of inequality do not. The Supreme Court has not made a clear distinction between the two types of inequality and has often been very result-oriented in finding “de jure” discrimination. The latest Supreme Court statement on the issue is equivocal and the Court seems very willing to defer to the lower court’s findings to determine whether there is de jure discrimination.

1. De Jure/De Facto Distinction

The Court, immediately after Brown, rarely spoke on the issue of desegregation but simply ordered schools to comply with Brown without specifying whether that meant merely to cease operating segregated schools and having a segregationist process

63. "To separate them [children] from others of similar age and qualifications solely because of their race generates a feeling as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.
64. See Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 CAL. L. REV. 275 (1972), for a critique of the paucity of the literature upon which the Court relied.
65. 347 U.S. at 494.
66. Id. at 495.
68. In Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II), the court ordered that all necessary and proper actions be taken to admit the black petitioners "to public schools on a racially nondiscriminatory basis with all deliberate speed . . . ." Id. at 301.
or whether it meant to achieve a non-segregated result.\textsuperscript{69} The first case to outline extensive guidelines in complying with \textit{Brown}'s mandate was \textit{Green v. County School Board}.\textsuperscript{70} This opinion focused on the effects rather than on the intent or good faith of the desegregation efforts. A small rural school district with two schools, located in a county where half of the residents were black, adopted a “freedom of choice” plan in 1965. After three years, no white child had chosen to attend a former black school and about 85\% of the black children remained in the all black school. Justice Brennan, writing for a unanimous Court, emphasized that identification of the schools by color remained complete. He stated: “The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about. . . .”\textsuperscript{71} Hence, the court was examining results in attempting to create a remedy.\textsuperscript{72} \textit{Green} can be read as establishing an affirmative duty to create desegregated schools.\textsuperscript{73} This is consistent with an interpretation that the Fourteenth Amendment guarantees equality of condition, not just that the rules be free of unfairness. However, a consideration of the social climate of the times reveals that if the results were unfair, in all likelihood the process was also unfair.\textsuperscript{74} Later cases illustrate that the opposite might also be true.\textsuperscript{75}

The next major case to deal with the desegregation issue was \textit{Swann v. Charlotte-Mecklenburg Board of Education}.\textsuperscript{76} In \textit{Swann},
the Court specifically left open the question of whether a showing of school segregation without any discriminatory action by the school authorities is a constitutional violation requiring remedial action by a school desegregation decree. The Court, therefore, made no statement as to the appropriateness of evaluating the results of school board actions to determine whether the conditions give rise to an equal protection violation. Instead, the Court clung to the requirement that plaintiffs must show discriminatory intent to succeed. Interestingly, the Court did look to the results in determining whether the discriminatory purpose existed: "The court should scrutinize [one-race] schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." The results, i.e., the existence of one-race schools, were a significant showing in plaintiff's case.

After making the determination that there was an equal protection violation, the Court again looked at the results in fashioning a remedy: "When school authorities present a district court with a loaded game board, affirmative action in the form of remedies altering attendance zones is proper to achieve truly non-discriminatory assignments." Thus, upon the initial determination that the process is unfair, the results can be analyzed to determine the proper remedy necessary to achieve truly non-discriminatory results.

Keyes v. School District No. 1, Denver, Colorado, involved a school system which was segregated because neighborhoods were segregated and not because of any statutory scheme. This was an example of segregation which was not "de jure" in its traditional sense. The Court explained that the real difference between de jure and so called de facto segregation is purpose or intent to segregate. While seemingly retaining the de jure/de facto distinction and thus retaining a requirement that the process be tainted before

77. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. 402 U.S. at 23.
78. Id. at 26.
79. Id.
82. I.e., "by sanction of law."
an equal protection violation is found, the Court left open the question as to whether a neighborhood policy by itself justified racial or ethnic concentrations without any school district action. The question of whether inequitable conditions alone would be a constitutional violation was left unanswered.

Justice Powell, concurring and dissenting in part, argued in *Keyes* that the decisions from *Brown* to *Green* and *Swann* undercut whatever origins supported the *de jure/de facto* distinction. Justice Douglas agreed. Powell maintained that *Swann* imposes obligations on southern school districts to eliminate conditions which are not regionally unique but are similar both in origin and effect to conditions in the rest of the country. Under his theory, a certain condition or result would trigger a constitutional violation. He maintained that the *Brown* doctrine had now evolved into a right derived from the equal protection clause "to expect that once the State has assumed responsibility for education, local school boards will operate integrated school systems within their respective districts." This means that school authorities must make and implement their customary decisions with a view toward enhancing integrated school opportunities. He went on to describe what a school district could do to respect this right. He also emphasized the difficulty of trying to prove the elusive element of segregative intent. Justice Powell's argument rested largely on the Court's increased focus on the results of school board actions in desegregation cases.

Despite Justice Powell's urging the Court to eliminate the *de jure/de facto* distinction, the Court has continued to insist there is a difference between *de jure* and *de facto* discrimination and that only *de jure* discrimination constitutes a constitutional wrong.

2. Presumption Analysis

The latest elaboration from the Supreme Court is *Columbus Board of Education v. Penick*. The Court did not do away with the requirement of a finding of *de jure* discrimination before imposing a remedy. However, guidelines for the lower courts in analyzing *de jure* discrimination cases were articulated. These guidelines involved a unique set of presumptions allocating the burden of proof in the lawsuit.

The plaintiffs alleged in *Penick* that the school board's actions had both a discriminatory purpose and effect. The showing

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83. 413 U.S. at 212.
84. Id. at 217.
85. Id. at 225-26.
86. Id. at 232-35.
at trial could have allowed the Court to hold that a discriminatory effect of the school board's actions was enough to find a constitutional violation. However, the Court did not do so. Instead, it affirmed the District Court and the Court of Appeals' findings that the school board's conduct at trial was animated by a discriminatory purpose; it also found that the evidence showed a discriminatory effect broad enough to warrant a system-wide remedy. The Court, in effect, separated the process and result inquiries. Upon a showing of an improper process, the Court looked to the segregative effect to fashion its remedies.

The Court allocated the burden of proving the discriminatory purpose in an interesting way. Evidence of disparate impact and foreseeable consequences, while not constituting a constitutional violation standing alone, were relevant in examining the process. "Adherence to a particular policy or practice with full knowledge of the predictable effects is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." After making a prima facie showing with respect to the effects of the school board's practices, the burden shifted to the school board to show that it did not engage in discriminatory practices. As with all presumption analysis, if the school board fails to carry this burden, it loses the lawsuit.

In sum, while the de jure/de facto distinction still exists, more than a mere evaluation of the process is required to find non-discrimination or non-favoritism. The effects can still be used to evaluate the actual fairness of the process.

II. MINORITY CHILDREN IN THE EDUCATIONAL PROCESS

Sociological data indicate that despite court ordered desegregation, minority children still do not, on the whole, receive an equal educational opportunity. Minority school children do not generally thrive in a newly integrated environment. Many of their special needs are unmet. For example, bilingual education programs for Hispanics are often sacrificed for desegregation. Hispanic children are often classified as white, so that desegregation can result in a school consisting of primarily black and His-

89. Id.
panic children. Tracking and other methods of classifying students often leads to "resegregation." White flight has ensured that desegregated schools do not maintain a mixed population. The de jure/de facto distinction has further confused the problem.

III. PROCESS/RESULTS REVIEW: A DICHOTOMY

A. Fair Process

Currently, when courts review the process of administering education, they do so by evaluating the "rules." These rules must be fair. This can be seen as a check on a capitalist society which demands efficiency in its procedural processes: A commentator has described a capitalist system as follows:

[If a market economy is functioning properly, people simply get out of it what they put into it. And, the resulting differences are acceptable and fair, perhaps even ideal. Fair games have losers as well as winners.

The notion is that as long as the rules are fair, the different outcomes, on an absolute level, are justified. This is because a cooperative system trying to maximize its production will choose the ends which can produce the highest return from the use of a given means. Efficiency of the process is thus the underlying consideration when the fairness of a process is reviewed. For example, the due process clause, in its procedural role, sets out rules of fairness so that the litigation "game" is fair. When courts review


97. Hence, a person who can more effectively use a resource as a means of production should have greater claim to it. Assigning resources of production to those most able to use them is likely to result in the largest production and is socially equitable in the sense that those who receive the largest input of resources from a cooperative system should be the ones who produce the largest amount for the system.


99. Many of our laws serve to maximize such an economically efficient system. Restitution principles in contract law reward those who have performed an economically valuable service. Divorce cases which allocate the obligation of spousal support depending on ability to pay maximized an economically efficient system (much more efficiently than a welfare system). The doctrine of "substantial performance" relieves entities who have performed an economically beneficial service from liability for minor defaults, thus, encouraging persons to enter into contracts without fear of non-payment. Antitrust laws are an example of an attempt to effectuate an efficient economic system.
these rules, efficiency is always considered as a factor in determining the legitimacy of the "rules."[100]

Carrying this fairness/efficiency principle into the educational context requires that the process of administering education be efficient as well as fair. An example of such a rule regulating the process is that states may not intentionally discriminate in administering education, i.e., the de jure/de facto distinction.[101] Taking affirmative steps to desegregate the schools is not consistent with an efficient "color blind" process of assigning pupils to schools. This, however, is not a principle of equality. The authors of the Fourteenth Amendment injected pure equality values into an economic system (i.e., capitalism) in which efficiency and fairness in the process are most applicable.[102] Thus, there is a tension between the two values.[103]

At first blush, an adherence to an equality principle does not seem to infringe on efficiency/fairness principles. After all, should not every person be afforded an opportunity to compete without external favoritism or discrimination? Is this not consistent with efficiency/fairness principles which would distribute education in an efficient manner to the most deserving? Under this interpretation, no one would be barred from the "game." As long as the "game" is played fairly (i.e., without discrimination or favoritism) efficiency/fairness principles are satisfied.

The Fourteenth Amendment, however, goes beyond guaranteeing a fair "game." It established an equal protection principle:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.[104]

Guaranteeing each person an equal educational opportunity does not depend merely on the fairness of the rules of the competition (if one can characterize education as a "competition"), but rather the focus is on the individual and on the outcome of the "game."

100. Goldberg v. Kelly, 397 U.S. 254 (1970) (not too great a burden on the state to afford welfare recipients an evidentiary hearing before the termination of benefits); Boddie v. Connecticut, 401 U.S. 371 (1971) ("The formality and procedural requirements for the hearing can vary, depending on the interests involved and the nature of the subsequent hearings.") quoted in footnote 8 of Board of Regents v. Roth, 408 U.S. 564 (1972) (holding that a non-tenured teacher was deprived of no properly interest upon termination); Mathews v. Eldridge, 424 U.S. 319 (1976) (a balancing test weighing private interests with government interest including fiscal and administrative burdens).

101. See supra notes 67-86 and accompanying text.

102. See supra notes 95-101 and accompanying text.

103. C. ORKUN, EFFICIENCY AND EQUALITY: THE BIG TRADEOFF 78 (1979). Dr. Orkun, in his essay, describes the tension in detail. His thesis is that society is frequently obligated to trade between efficiency and equality and he elaborates on the difficult choices this tradeoff necessitates. He attempts to delineate the outlines of the tension inherent in the two competing values and the compromises which society must make to accommodate the two.

104. U.S. CONST. amend. XIV.
B. Equality of Condition

All individuals are theoretically afforded equal justice and equal political rights, without inquiry into whether it is the most efficient use.105 Citizens are guaranteed more than just fair rules. It is difficult to defend as "fair" the provision of public education at all taxpayers' expense including the childless or persons who send their children to private schools. Moreover, the provision of counsel for indigent criminal defendants can hardly be seen as a cost-efficient method of conducting the judicial process; rather, criminal defendants are placed on a somewhat more equal footing.106

A rationale for evaluating the results is that no matter how fair the rules of the game seem to be, the results cannot always be reconciled with the equality principle.107 A few considerations should therefore be kept in mind. First, it is impossible to determine in advance who can use educational resources most effectively. Also, what is "effective use?" Is the goal to turn out educated persons who will be the most valuable to society or is it to turn out the most "intelligent" in an absolute sense? Furthermore, since some persons begin the game with a "handicap," the rules are, at the outset, weighed against them. Finally, and most importantly, it is literally impossible to devise an absolutely fair game. Courts must therefore evaluate the results if they are to gauge the true fairness of the process. If the results do not comport with the equality dictate, the process must be carefully scrutinized. The reasons for the imbalanced results must be isolated, if possible. The impact of the need for efficiency at the expense of fairness must be reweighed.

The causation aspect also differs in a result-oriented evaluation. Evaluating the "results" entails evaluating the outcome with no immediate inquiry into what or who caused it. The notion is that some aspect of the process caused the harm. The lawsuit is less a "witchhunt" for wrongdoers and more an affirmative search for remedy to an institutional harm.

In the context of school desegregation situations, even a cursory review of the various pupil assignment plans reveals that the

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From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. Id. at 339.

results do not yield an equal educational opportunity to all. There are obvious disparities which are demarcated along racial and ethnic lines. A "harm" or inequality clearly exists.

Evaluation of the results and the elimination of the de jure/de facto distinction is desirable because evaluating the outcome of the process would make it easier to determine whether the process was in fact fair. For example, a neighborhood school policy which yields a dual segregated school system does not eliminate the evils of segregation. Something more is needed.

There are a two basic arguments against using a result-oriented approach in school desegregation cases. The first is an uncertainty about the desirability of the goals to be achieved. Questions as to the desirability of the goals have been raised as a rationale for the Court's refusal to analyze the results. When the purity of the process is evaluated and integration occurs as a result, little justification is required because integration is merely the consequence of affording each person "fair" rules. Under a result-oriented approach, the results themselves must be justified, and there is wide disagreement as to what constitutes fair results. Some argue that as long as there is no intentional discrimination, the results are, by definition, fair. Others argue that as long as there are some minority children in a school system, it is not segregated and the results are therefore fair.

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109. Fiss, The Fate of An Idea Whose Time Has Come: Anti-discrimination Law in the Second Decade After Brown v. Board of Education, 41 UNIV. OF CHIC. L. REV. 742 (1974). There is ample sociological and educational literature delineating educational goals for students. Certain educational experts have examined a multitude of goals which education ought to achieve for students while others have described perceived community goals. See Wilson, Social Class & Equal Educational Opportunity, 38 HARV. EDUC. REV. 77, 84-90 (1968); Bowles & Levin, The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence, 3 J. HUMAN RESOURCES 1 (1968).

110. See supra notes 95-100 and accompanying text.


112. See supra notes 87-88 and accompanying text.

Others argue that the goal is to eliminate all-minority and all-white identifiable schools. \textsuperscript{114} Objections by minority groups have caused courts to worry about whether integration will benefit them after all. \textsuperscript{115} The Court has gotten around these problems by retaining the process-oriented nature of its evaluation. \textsuperscript{116}

All of these concerns, however, fail to address the fact that it is the equal protection clause itself which imposes the goal to be achieved by the states. The clause imposes a goal of unequal conditions as well as unequal treatment. Segregation has undesirable effects that afford minority children unequal treatment whether or not it is intentional. Segregation stigmatizes. \textsuperscript{117} It deprives children of important educational contacts. Children in segregated schools are prevented from interacting with a significant segment of society. \textsuperscript{118} This lack of exposure to other races and cultures leads to ethnocentricity and an inability to understand other groups. \textsuperscript{119} Finally, the existence of segregated schools often results in schools that are, in fact, inferior in quality. \textsuperscript{120} This can be explained in many ways, but the fact that this tends to happen mitigates against allowing segregated schools to continue.

Segregation, and its accompanying dangers, can be avoided but the costs and administrative burdens associated are admittedly high. Particularly when integration is imposed as a remedy in school desegregation lawsuits rather than as an objective for the school board to consider in implementing its policies. If the school board were to recognize that operating integrated schools is a constitutional goal and steps were taken at the administrative level to achieve that goal, the administrative costs and burdens would be significantly less than court enforced desegregation because they would be undertaken as part of the regular school administration. If the Supreme Court were to eliminate its \textit{de jure}/\textit{de facto} distinction and make a statement that the results of a school board’s administrative decisions will be subject to scrutiny, the school board might make a conscious effort to comply with its constitutional mandate.

The second major objection to a result-oriented approach is

\begin{footnotes}
\item[114] See Justice Powell’s dissent in Green v. County School Board, 391 U.S. 430 (1968).
\item[116] See supra notes 87-88 and accompanying text.
\item[120] See, e.g., \textit{Bills to Further the Achievement of Equal Educational Opportunities: Hearings Before the General Subcomm. on Education of the Comm. on Education and Labor, House of Representatives, 92d Cong., 2d Sess., H.R. 13195, 13983 & 15299 (1972).}
\end{footnotes}
DESEGREGATION

the fear of harming innocent white children who must be bused into minority schools to achieve desegregation. Children throughout rural America are bused with no harmful effects. The only real objection has to be the condition of the schools. However, it hardly seems fair to allow minority children to remain in conditions which white parents will not allow their children to experience. Of course, this problem would cease to exist if the schools were, in fact, equal in condition. If the schools were required to afford equality of condition in all ways, the problem would cease to exist. Viewed on a systemic level, integration and equality of condition are the utopian goals to which society should strive. The goals can be achieved in many creative ways. Facilities can be upgraded, magnet schools can be created and schools can be integrated.

California courts have adopted a result or effects analysis in determining that the California State Constitution imposes an "obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." In that regard, the California approach is similar to the approach advocated in this Article. Simplifying the litigation by eliminating the de jure/de facto distinction and looking to effects or results to determine whether minority school children are receiving an equal educational opportunity has proven to aid a great many minority school children. For example, in *Larry P. v. Riles* the Ninth Circuit ensured that black school children will no longer be subjected to biased I.Q. tests which resulted in a disproportionate number of normal black children being enrolled in classes for the educable mentally retarded. Then Attorney General George Deukmejian made several arguments—some of which were racist—to explain differences in I.Q. test scores. First, he relied on a genetic argument: natural selection has resulted in black persons having a gene pool with lower intelligence than

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121. See, e.g., L. MARSHALL, THE ROLE OF CAREER EDUCATION IN DESEGREGATING SCHOOLS IN LARGE CITIES, ERIC ED156 915 (1978). The author studies a voluntary desegregation plan in Dallas, Texas which used career education in "magnet schools" which offered special programs. The plan, drawn up by a task force of Mexican-Americans, blacks, and whites was successful: Students were enthusiastic, reading and comprehension scores improved. Problems encountered were insufficient parental involvement and difficulty in attracting enough whites to the schools.

122. Id.


whites. The district court found the argument "highly suspect" and noted that the defendants were unwilling to admit reliance on this theory for policy making purposes. Second, the Attorney General argued that because of blacks' lower socio-economic status, they are at a greater risk for diseases due to malnutrition and insufficient medical attention. The district court found the facts did not support this theory as they did not explain why more severe mental retardation does not occur in greater proportions among blacks and the poorer sections of the population.

It can be seen that the attempts to rationalize disproportionate results of a process (i.e., the I.Q. test) were ad hoc at best. The court did not have to define "intent" to find unconstitutional results. The relief granted did not point to a wrongdoer. The district court simply ordered an elimination of disproportionate black enrollment in classes for the educable mentally retarded. The manner in which these results are to be achieved was left to the school authorities' discretion.

Taking the focus off of "wrongdoing" allows courts and school districts to focus on the real issue: the quality of educational conditions. Courts need not punish segregative intent by using a busing remedy. Instead, they can simply evaluate an educational inequality and fashion a remedy to rectify it.

CONCLUSION

It is a conceptual line that distinguishes analysis of the process as opposed to the educational results. Although the Supreme Court has come far in analyzing the results, it has, regrettably, not abandoned its required finding of de jure discrimination or segregative intent before concluding that a constitutional violation exists. This Article has argued that the de jure/de facto distinction ought to be eliminated. Instead, inquiry should be made into both the process and the results for evidence of inequality. This approach would bring equality of conditions for minority children who presently suffer from the discriminatory effects of the past. Brown's promise of an equal educational opportunity would be one step closer to being fulfilled; all our children might then receive an education "on equal terms."

125. Id. at 955.