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The Jurisprudence of Desegregation: Understanding the Recent Busing Developments

Jane C. Moriarty

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The Jurisprudence of Desegregation: Understanding the Recent Busing Developments

In the twenty-eight years since the Supreme Court decided Brown v. Board of Education,\(^1\) school desegregation has undergone a series of legal and social changes. The most recent of these changes has been a flood of anti-busing sentiment in the courts and legislatures.\(^2\) A further indi-

\(^1\)347 U.S. 483 (1954).

\(^2\)Among the most noteworthy developments:

a) Amendment No. 1250, titled the "Neighborhood School Act of 1982" which states that "assignment of students to public schools closest to their residence (neighborhood public schools) is the preferred method of public school attendance" for the reason that "court orders requiring transportation of students to or attendance at public schools others than the one closest to their residence for the purpose of achieving racial balance or racial desegregation have proven to be ineffective remedies to achieve unitary school systems." This amendment, which was approved by the U.S. Senate in February, 1982, also limited injunctive relief. 28 U.S.C. § 1651 was amended to provide that: "No Court of the United States may order or issue any writ directly or indirectly ordering any student to be assigned or transported to a public school other than that which is closest to the student's residence...."

b) Proposition I, an anti-busing amendment in California which provides that there must be a court-determined finding of a fourteenth amendment violation before transportation or assignment of students may be ordered. For an extensive analysis of Proposition I, see, Note, 10 GOLDEN GATE L. REV. 611 (1980).

c) Initiative 350, a referendum approved by the voters in the State of Washington, requires that no student attend a school which is not geographically nearest the student's place of residence. The constitutionality of Initiative 350 was successfully challenged in the District Court of Washington. State of Washington v. Seattle School Board, 473 F. Supp. 996 (1979). The finding of the district court was affirmed by the Court of Appeals for the Ninth Circuit, 633 F.2d 1338 (9th Cir. 1980), cert. granted, ___ U.S. ____, 102 S.Ct. 384 (1981).
cation of this new development has been the U.S. Justice Department's refusal to support the N.A.A.C.P. in a desegregation case for the first time since 1954.\footnote{In Seattle School Board, 633 F.2d 1338, the Justice Department supported the N.A.A.C.P. in the district court and Court of Appeals. Justice changed its position in its memorandum to the Supreme Court: "While the United States argued in the lower courts that such an initiative was unconstitutional, we have reconsidered that position since the decision of the Court of Appeals. We disagree with the majority below and its holding that Initiative 350 is unconstitutional." Memorandum for the Justice Department at 6.}

While anti-desegregation sentiment is hardly a new phenomenon since \textit{Brown},\footnote{See, e.g., Farley, School Integration and White Flight, (Brookings Institution Symposium, August, 1975); McKay, With All Deliberate Speed, 31 N.Y.U. L. REV. 991 (1956); Carter, Reexamining Brown Twenty-Five Years Later, 14 HARV. C.R.-C.L. L. REV. 615, 620 (1979) [hereinafter cited as Carter].} the vociferousness of those opposing busing is new, as is the support they are receiving nationwide.

This sentiment is most simply explained as either a reflection of the Reagan Administration's conservative stance, or as a return to the blatant racism of an earlier era. These explanations, however, are too facile for a legal issue of such complexity. While these new developments seem extreme, they may not indicate disapproval of integration as much as dissatisfaction with busing as an effective means of accomplishing integration.

One would hope that the last twenty-eight years have not produced a mere series of busing regulations, but have established certain ideals about equality within both the legal and social systems. To focus solely on the current...
developments in desegregation is misleading, for the situation today is best understood by focusing on the theoretical and historical processes by which these events have developed.

The discussion proceeds as follows. Section I, focusing on the theoretical and analytical framework, is composed of two parts. The first part briefly introduces the major concepts underlying the last twenty-eight years of desegregation decisions. The second part introduces the dialectical process as a useful metaphor in reviewing the history of desegregation. Section II integrates the theoretical and historical frameworks in order to arrive at a better understanding of past and present developments in desegregation law. Section III is a conclusion.

The central argument of this article is that the freedom of choice ideal, an integral part of our legal and social systems, was seemingly misplaced after the Court's decision in Brown. This ideal, however, has re-emerged to form the basis of the current debate over remedies to achieve racial equality. The current busing developments reflect the tension between the individual freedom of choice and the altruistic ideal of integration. These developments suggest that society may indeed be making another important turn on the equal protection spiral.
a. The "irreducible" concepts

In the historical perspective, it is first important to focus on what have remained "irreducible" concepts, those concepts which have a basic element of truthfulness and rightness about them. This rightness allows them to form the foundations of the law, irrespective of the changes or fluctuations to which they are subjected. Such concepts are what H.L.A. Hart terms the "minimum content of Natural Law." While Hart is referring to the law in general, certain concepts have emerged in this particular area to serve as the minimum content for equal protection in desegregation.

The minimum content in the area of desegregation consists of four concepts. The first is that no race is superior or inferior to another race. Race is not a factor in equality. Second, it is inherently wrong for the Government to impose or encourage racial segregation among its citizens. The third concept is that racism is a pernicious

5H.L.A. HART, THE CONCEPT OF LAW, 188-189 (1961) (Stating that: "Universally recognized concepts which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the minimum content of Natural Law.").


evil which has no place in our society. The fourth is the recognition that there is a need for a minimum level of cooperation in order to make these ideals effective. These four concepts have remained the underlying ideals throughout the political and judicial fluctuations since Brown.

b. The dialectical process

The history of desegregation may be characterized as a series of steps forward in race relations until recently, when the events have "taken a giant step backwards." The simplicity of this idea is appealing, but it is misleading. Conceptually, the current conflict in this area stems from two opposed ideals or visions which form the respective poles of a dialectical structure.

The dialectic begins with a thesis, a theory which is accorded general acceptance. Over the course of time, this original theory undergoes incremental changes, additions, and inquiries into its validity. The thesis is slowly eroded and eventually replaced by an entirely new thesis, or the antithesis. From these two extremes, a synthesis emerges. This synthesis is a new theory premised on the fundamental concepts gleaned from both thesis and antithesis.

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Professor Duncan Kennedy of Harvard Law School posits that there are two opposed modes for dealing with substantive issues in legal disputes: altruism and individualism. In the area of desegregation, the ideals of altruism and individualism are conceptual end-points on a continuum which form the respective poles of the dialectical structure. Altruism is defined by Kennedy as "the belief that one ought not to indulge a sharp preference for one's own interest over those of others." In short, altruism emphasizes the importance of the common good. The opposed concept, individualism, is described as making a "sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interest is legitimate, but that one should be willing to respect the rules that make it possible to co-exist with others similarly self-interested."

The history of racial inequality in this country and the legal response thereto has been characterized by the problem of achieving and maintaining a balanced tension between two ideals. One ideal encourages an individual's freedom to make choices; the other encourages behavior in furtherance of the common good.

11 Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976) [hereinafter cited as Kennedy].
12 Id. at 1717 (emphasis in original).
13 Id. at 1713.
The Supreme Court's stance on desegregation has been like a pendulum, swinging from the individualistic Plessy v. Ferguson\textsuperscript{14} decision to the altruistic decision of Brown. The trend from Plessy to Brown to the present will be examined against this theoretical framework in order to determine whether a synthesis is emerging from this dialectic, or whether a series of pendulum shifts is still occurring.

Section II

The Historical Spiral of Desegregation

In the 1896 Plessy decision, the Supreme Court established the well-known "separate but equal" doctrine. "We cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable. ..."\textsuperscript{15} Plessy arose from a constitutional challenge to an 1890 Louisiana law that required "equal but separate" accommodations for "white" and "colored" railroad passengers. Many of the theoretical ideals of Plessy were premised on notions of individualistic liberty:

The argument [against segregation] also assumes that social prejudice may be overcome by legislation, and that equal rights cannot be secured to the Negro except by enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.\textsuperscript{16}

\textsuperscript{14}163 U.S. 537 (1896).

\textsuperscript{15}Plessy, 163 U.S. at 550-551.

\textsuperscript{16}Id. at 551 (emphasis supplied). It is interesting to note that while the Court speaks of "voluntary consent," this was virtually impossible because of the segregation statutes which forbade most forms of public commingling. See, e.g., infra note 18.
As long as there were two separate facilities, there were no further constitutional requirements. *Plessy* established the minimum requirements of the mandate of the fourteenth amendment. Once this boundary had been established, there was still a wide realm in which discrimination could occur, as *Plessy* did not define equality in qualitative terms but rather in quantitative ones.

To the modern reader *Plessy* is unacceptable because of its thinly veiled racism. But it is easy to lose sight of the fact that this standard was the national norm, not only at the time it was written, but for many years thereafter. 17 *Plessy* was not shocking in its era; society had accepted that the government supported the white citizen's right to do as he wished. The Court was not ready to enforce commingling of the races on the altruistic proposition that social prejudice should be corrected.

Following *Plessy*, and even as recently as the 1940's, school officials were allowed to deny minorities entrance to white schools. In fact, they were often required to do so by statute. 18 The Court slowly began to limit the broad language of *Plessy*, however, and began to define what constituted equality in more substantive terms.

17 See Carter, supra note 4, at 616. (Stating that: "[B]latant, open, raw, racism, churlish and uncivilized, was a fact of life in the South....").

18 See, e.g., 70 Okla. Stat. (1941) §§ 455, 456, 457 which made it a misdemeanor to maintain or operate, teach or attend a school at which both whites and blacks were enrolled or taught.
The first attack on Plessy occurred in *Missouri ex rel Gaines v. Canada*,\(^1\) in which the Court held that Missouri had acted unconstitutionally when it denied a black student entrance to an all white law school and advised him to apply to black schools in adjacent states. The Court determined that Missouri's action did not fulfill the requirements of "separate but equal."

Nearly ten years later, another assault was made on the separate but equal doctrine, which resulted in a formidable limitation on the state's freedom to discriminate. In *Sweatt v. Painter*,\(^2\) a black applicant to the University of Texas Law School was denied entrance solely on the basis of race and subsequently sued the school officials. The state trial court held that denying him a legal education while granting it to others deprived him of the guarantees of the fourteenth amendment. Rather than grant admission, the court allowed the state six months in which to provide equal facilities. The petitioner brought suit after the facility was built, claiming the new black law school was not equal to the University of Texas school. The Supreme Court agreed, holding, "we cannot find substantial equality in the educational opportunities offered white and black law students by the State."\(^3\) It is particularly interesting that the Court for the first time did not limit itself to a superficial

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\(^{1}\) 305 U.S. 337 (1938).


\(^{3}\) Id. at 633.
quantitative comparison of respective facilities (e.g. that each had a library, student publications and classrooms). Rather a qualitative comparison was made, and the schools were determined to be unequal. The Court did not rest with its finding of inequality of resources but went on to discuss the intangible aspects of equality:

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.

Sweatt is crucial for two reasons. First, the Court limited the boundary of individualistic freedom to discriminate by giving substance to the meaning of the word "equal." No longer did the existence of a separate facility necessarily imply its equality. If the facilities were to be separate and equal, they each must have the same number and quality of opportunities. Second, the Court recognized that the intangible aspects of equality — interaction and sense of community — were perhaps even more crucial.

The companion case to Sweatt, McLaurin v. Oklahoma State Regents, further emphasized this "quintessence" of equality. McLaurin involved a black student at the University of Oklahoma Graduate School who was forced to sit apart.


23Sweatt, 339 U.S. at 634.

in a designated seat in class, in the library, and in the
lunch room. The Court found this decidedly unacceptable,
not because the facilities were unequal, but because the
blatant separation must have forced the student to feel
unequal. The argument that the other students would "volun-
tarily segregate" was not persuasive to the Court: "There
is a vast difference -- a Constitutional difference --
between restrictions imposed by the state which prohibit the
intellectual commingling of students, and the refusal of
individuals to commingle where the state presents no such
bar." The language of these two cases indicates the
Court's recognition of the realities of racism inherent in
the separate but equal doctrine.

Sweatt and McLaurin stand as a pivotal point between
the respective poles of individualism and altruism. Cases
such as these are jurisprudentially significant, as they
indicate the changing attitude of the Court. In these cases
the Court first recognized that it was not the difference in
facilities that was really at issue, but that the separate
but equal doctrine was symptomatic of the "greater and more
pernicious disease -- white supremacy." While Sweatt and
McLaurin can be viewed in retrospect as timid steps in
achieving desegregation, they were highly significant in
laying the foundation for Brown. What was still necessary

25 Id. at 641. See also Shelley, 334 U.S. at 13-14, which struck down
racially motivated housing convenants.

26 Carter, supra note 4, at 618.
was a specific overruling of the Plessy doctrine.

In 1954, the legal history of race relations changed dramatically when the Supreme Court decided Brown v. Board of Education. In Brown, a black student had sought the district court's assistance in gaining admission to a public school on a non-segregated basis, which the court refused to do. On appeal, the Supreme Court overturned the lower court and explicitly overruled Plessy: "We conclude that in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal." The Court held that the school's refusal to admit the plaintiff deprived him of the equal protection of the law as guaranteed by the fourteenth amendment.

Brown stirred up not only a societal hornet's nest, but a legal one as well. Yet looking back to Brown, the decision was clearly the next step on the continuum. Brown was the embodiment of an altruistic decision. The sphere of freedom to discriminate established in Plessy was eradicated

27 Brown, 347 U.S. at 495.

28 The Court's reliance on psychological and sociological data as a basis for proving inequality has been subject to a great deal of discussion and criticism. See Cahn, Jurisprudence, 30 N.Y.U. L. REV. 150 (1955); J. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY, 313 (1966); K.B. Clark, The Desegregation Cases, 5 VILL. L. REV. 224 (1959).

29 Legal Realism, a relatively new school in jurisprudence, underwent a crisis in its foundation because of Brown. See E. PURCELL, THE CRISIS IN DEMOCRATIC THEORY (1973). According to one commentator, since legal realists believed that "law reflects social forces, it was neither desirable nor possible for it to serve as a catalyst for social change." Horwitz, The Jurisprudence of Brown and the Dilemma of Liberalism, 14 HARV. C.R.-C.L. L. REV. 599, 602 (1979) [hereinafter acited as Horwitz].
in Brown. Instead, there was a specific mandate which forbade discriminatory action and rules were imposed which allowed no room for discretion. After Brown, no vestiges of this realm of discriminatory action established nearly sixty years earlier would remain. In Brown, the antithetical ideal to Plessy was established. Plessy was quite individualistic, and Brown was highly altruistic.

Those in favor of Brown at the time did not view it as an altruistic decision but as the only equitable solution. To put blacks on equal footing with whites, the two races had to be commingled educationally. If this social-political objective could be accomplished only by legal mandate, then that would be the route followed.30

More than twenty-five years later, the persuasiveness of this idea is not as easily accepted. The seemingly clear solution Brown provided has resulted in a myriad of complexities and transformations.

The first and logically sequential problem that arose was the issue of enforcing Brown. Although the Supreme Court had found segregation unconstitutional, there was no rush to desegregate. Brown was, in fact, ignored on a large scale.31 The reluctance to comply led to Brown v. Board of

30 It is hardly uncommon in the United States to resort to a legal forum in order to settle social controversy. According to certain commentators, American have always had a penchant for solving their social dilemmas in this manner. See TOCQUEVILLE, DEMOCRACY IN AMERICA, 89-103 (F. Bowen trans. 1956), (1st ed. Paris 1835).

31 See McKay, supra, note 4; and Bickel, A Decade of School Desegregation, 64 COLUM. L. REV. 193 (1964).
Education II, the implementation decision. Brown II imposed the duty of making a "prompt and reasonable start toward full compliance" with desegregation and directed the district courts to enforce this mandate "with all deliberate speed." This remedial approach to desegregation emphasized that rules had been established and not merely suggested guidelines.

It was not until 1968 that the Court heard the next major case on desegregation. In Green v. County School Board of New Kent County, a "freedom of choice" plan came before the Court. The plan permitted students to choose between attending a previously all-black school (George W. Watkins School) or a previously all-white one (New Kent School). In the three years prior to 1968, no white student had enrolled in the Watkins school and only fifteen percent of the blacks had enrolled in New Kent. There was no evidence that the state had tried to coerce children into attending one school or another, yet a unanimous court found this unconstitutional. Likewise, the Court was straightforward in its emphasis on "de facto" segregation; if the school was segregated, there was no need to determine if there had been segregative intent. "If the means prove effective, freedom of choice is acceptable, but if it fails


*33* Id. at 300.

*34* Id. at 301.

to undo segregation, other means must be used to achieve this end.\textsuperscript{36}

By its insistence that "segregated is unconstitutional," the Court allowed no room for justification, mitigation or explanation. At this point purification of the motive was not a goal; only the effectiveness of the plan was important. Looking back to 1968, the question is whether Green had gone beyond the altruism point on the altruism-individualism continuum, and entered into the realm of "saintliness."\textsuperscript{37} Individualists would probably answer this question in the affirmative. However, the altruist response is that the highly individualistic members of society are unwilling to make adjustments because they place too great a premium on personal choice and freedom. But in a society where personal choice and freedom are highly valued, the denial of personal freedom is not readily accepted.

In 1971, \textbf{Swann v. Charlotte-Mecklenburg Board of Educa-}

\textsuperscript{36}Id. at 440, quoting Bowman v. County School Board, 382 F.2d 326, 333 (4th Cir. 1967), (Sobeloff, J., concurring).

\textsuperscript{37}Kennedy, in his article \textit{Form and Substance}, supra note 11, at 1718, describes "saintliness" as an area in which all individual pursuit is subsumed by concern for the common good. This involves too much effort and expense without adequate justification. Saintliness is not acceptable to society, nor is the extreme of individualism, that which Kennedy terms "egotism." Egotism rests on the assumption that it is "impossible and undesirable to set any limits at all on the pursuit of self-interest." Id. at 1715.

Both individualism and altruism are functional concepts as endpoints on a continuum. When they exceed these endpoints and venture into the respective realms of egotism and saintliness, they become socially unworkable positions. \textbf{See also} Katz, \textit{Boundary Theory}, 28 \textbf{BUFFALO L. REV.} 383 (1979).
tion came before the Court. Swann involved the pairing of inner-city black schools with outlying white schools and some busing of children in both directions. This plan, fashioned by the district court, was upheld by the Supreme Court, as was the use of mathematical ratios as a starting point to eliminate segregated schools. The historical significance of Swann is that the Court began to shift its focus from effect (i.e. Green) to intent to segregate. Swann indicates that there may be more to consider than the effectiveness of the plan:

[I]t should be clear the the existence of some small number of one-race, or virtually one-race, schools within a dis­trict is not in and of itself the mark of a system which still practices segregation by law....; [But] the court should scrutinize such 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.

Although Swann seemed merely to be adding to what had been established by the Court in previous decisions, it was actually a retreat from the unequivocal language of Green. From Swann forward, the Court seemed to indicate that there might be room to consider factors other than effect.

One year later, the Court handed down its first non-unanimous decision in Wright v. Council of the City of Emporia. As mentioned previously, the Court in Green had

39 Id. at 26.
eliminated the sphere of discretionary behavior by focusing solely on effect. Although this focus might have been necessary for desegregation to be functional, it was not given continued support by the Court. The first rumblings of discontent are hinted at in Swann. In Emporia, they are openly expressed.

In this case, the city of Emporia tried to establish its own school system separate from that of the surrounding area of Greensville County. The pre-separation ratio of county-city schools was 66 percent black and 34 percent white. If the separation were adopted, the result would be a city ratio of 48 percent white, 52 percent black and a county ratio of 72 percent black and 28 percent white. In a five-to-four decision, the majority found this plan constitutionally unacceptable. The City's argument was that while race might have been an "ancillary" factor in the plan, the real aim of the program was to provide quality education. This position, a novel one, was flatly rejected: "This 'dominant purpose' test finds no precedent in our decisions." Furthermore, the Court reasserted that an inquiry into racial motive may be made concerning a non-racial justification, such as the "quality education" argument made by the City of Emporia. The Court noted, however, that a permissible purpose alone will not justify an impermissible effect:

The mandate of Brown II was to desegregate schools, and we have said that "the measure of any desegregation plan is its

41 Emporia, 407 U.S. at 461.

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effectiveness"... Thus, we have focused on the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system.

What makes Emporia especially noteworthy is Chief Justice Burger's dissent. The Chief Justice highlighted Emporia's desire to provide a higher quality of education. He did not believe there was any racial motive by the city: "The modest difference between the racial composition of Emporia's proposed separate school system and that of the county as a whole affords no basis for an inference of racial motivation." Furthermore, he found that the statistical composition which would result from Emporia's plan would adequately meet constitutional requirements, and found fault with the majority's emphasis on statistical results: "Obsession with such minor statistical differences reflects the gravely mistaken view that a plan providing more consistent racial ratios is somehow more unitary than one which tolerates a lack of racial balance." Since Brown II, however, the Court has been emphatic about not tolerating a lack of racial balance. The last paragraph of the dissent indicates that the retreat from Green's unequivocal and overly altruistic stance has begun:

Read as a whole, this record suggests that the District Court, acting before our decision in Swann, was reaching for some hypothetical perfection in racial balance, rather than the elimination of a dual school system. To put it in the simplest terms, the Court, in adopting the District Court's

42 Id. at 462.
43 Id. at 483.
44 Id. at 474.
The dissent marks not only the beginning of a trend away from the altruistic position, but also the emergence of the distinction between de facto and de jure segregation. By making this distinction more clear, the four dissenters shifted the focus from effect to cause.

The developing distinction came to the forefront in the first case of northern desegregation, *Keyes v. School District No. 1*. Unlike the previous cases, there was no statutory or state-imposed dual system. The Court held that something more than de facto segregation had to be shown. The concept of "intent to segregate," first enunciated in *Swann*, became of great importance in *Keyes*. "We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation to which we referred in *Swann* is purpose or intent to segregate." Although the burden was heavily on the school board to prove this lack of intent, the Court had made it clear that the focus of *Green* had decidedly shifted. Justice Powell articulates this in his concurrence:

> Unwilling and footdragging as the process of desegregation was in most places, substantial progress toward achieving integration has been made in the Southern States. No comparable progress has been made in many nonsouthern cities with large minority populations, primarily because of the de

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45 Id. at 474 (emphasis supplied).
47 Id. at 208 (emphasis in original).
facto/de jure distinction nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South.48

Since Keyes, the change in focus from effect to intent has been rapid. In the 1974 case of Milliken v. Bradley,49 the Court found that an interdistrict remedy to eliminate a segregated system was improper when the violation was not interdistrict. The Chief Justice, writing for the majority, insisted that the remedy exceeded the scope of the constitutional wrong: "without an interdistrict violation and an interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."50 This seems to be a rather weak basis for the decision. The mandate of Brown II to desegregate did not provide for qualifications of distance. If the city of Detroit were heavily one race and the outlying areas another, desegregation could only be achieved through an interdistrict remedy. In Milliken, the Court clearly retreated from the altruism of Brown and moved toward a much more individualistic ideal. The majority of the Court would not force the public to go this far in sacrificing their personal autonomy for the "common good." Justice Marshall states this in his dissent:

[P]ublic opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public

48 Id. at 218-219.
50 Id. at 745.
mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law.\footnote{Id. at 814 (emphasis supplied).}

Justice Marshall squarely addresses the issue of public sentiment and its effect on a subject which is so controversial. Despite the cloak of neutrality which the Court seeks to assume, it is integrally involved in society and by the very nature of this involvement, it is an impossible task for the Court to "neutrally" enforce the Constitution.\footnote{Horwitz, supra note 29, at 602-603, recognizes that assuming the capability of purely neutral constitutional decision making is a false assumption:}

\begin{quote}
[S]ince constitutional commands are not self-executing, we must abandon the assumption that we can easily distinguish between political and non-political, neutral and nonneutral, or result-oreinted and principled constitutional decision-making. . . . To some extent we must evaluate judicial decision on constitutional questions in light of our own substantive views of justice and not by whether they conform to a model of constitutional command applied in a neutral, nonpolitical manner.
\end{quote}

The standard established in \textit{Milliken} (that the remedy may not exceed the violation) was reiterated by Justice Rehnquist in \textit{Dayton Board of Education v. Brinkman} (Dayton I):\footnote{433 U.S. 406 (1977).}

\begin{quote}
\end{quote}
"only if there has been systemwide impact may there be a systemwide remedy." There, the Court determined that an evidentiary hearing was required on the issue of intent and remanded the case. Dayton returned to the Supreme Court (Dayton II) with a companion case, Columbus Board of Education v. Penick. In both, the burden of proving the system-wide pattern of intentional discrimination was met. These two cases seem at first glance to mark a slight change in the Court's attitude, yet the cases contain such a vast disparity of views and such convoluted language as to provide little guidance or precedent. Furthermore, they require such a rigorous burden of proving segregative intent that it would be quite difficult for most plaintiffs to meet this burden.

Whether the Court has achieved any "progress" with respect to desegregation since Green is questionable. It is interesting to compare the language of Green with that of Columbus to see the change of focus by the Court. In Columbus, the Court found that adherence to an established

54 Id. at 420.
57 One commentator describes the decisions as adding further to the "jerry-built edifice of the school desegregation doctrine...." Kurland, Brown v. Board of Education was the Beginning, 1979 WASH. U. L. Q. 309, 391. This same commentator describes the period from 1954 to 1979 in the area of desegregation as "from apostle to apostasy - however short lived - to apotheosis in a quarter of a century." Id. at 391-392.
58 See 118 CONG. REV. 5455, 563-566 (1972) which illustrates the segregated character of Northern public schools.
policy "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn."59 This arduous determination of motive seems a far cry from the mandate of Green: "The burden on a school board is to come forward with a plan that promises to work, and promises realistically to work now."60

In light of Milliken and Dayton II, the movement toward anti-busing legislation and the Justice Department's new position is not surprising. The Court, in its retreat from the altruism of Brown, and its movement toward the individualism of the recent decisions, has become increasingly unwilling to impose a heavy burden on the individual in the name of the common good.

Section III

Conclusion

In order to determine the significance of the recent events in desegregation, it is necessary to start with the decision in Plessy, which can be considered as the original thesis. As previously noted, Plessy was highly individualistic, even "egotistic."61 Over the course of time, there were attempts to compromise this extreme decision in such

59 Columbus, 443 U.S. at 255.

60 Green, 391 U.S. at 439 (emphasis in original).

61 Kennedy, supra note 11, at 1715.
cases as Missouri and Sweatt. These attempts to compromise the egotistic position established in Plessy eventually became so unsatisfactory that the destruction of the Plessy doctrine was necessary. The theory of Plessy was rejected and replaced with a new thesis, or antithesis, in Brown.

The evisceration of a legal doctrine which has no longer retained its legitimacy is akin to the process which occurs when new discoveries are made and accepted in science. In his work, The Structure of Scientific Revolutions, Thomas S. Kuhn focuses on this concept:

"[A] new theory, however special its range of application, is seldom or never just an increment to what is already known. Its assimilation requires the reconstruction of prior theory and the re-evaluation of prior fact, an intrinsically revolutionary process that is seldom completed by a single man and never overnight." 62

In overruling Plessy, Brown became the new but untested thesis. This decision in its "pure" form (i.e., not yet given a practicable dimension) was altruistic. Brown II gave the theory this practicable dimension.

It was not until Green that the theory passed from the acceptable boundary of altruism into the realm of "sainthood." 63 The command of Green to "come forward with a plan that promises to work, and promises realistically to work now" 64 did not leave enough room for individualist freedom.


63 Kennedy, supra note 11, at 1718.

64 Green, 391 U.S. at 439.
Even though egotism, the extreme of individualism, is an unacceptable position because it tends to lead to racism and segregation, certain principles of individualistic freedom remain deeply rooted in American social, political and economic thought. The need for a minimum level of voluntary cooperation is necessary to make the theory of Brown functional. To maintain Brown as a legitimate theory, it was necessary to bring forward from Plessy the notion of the "voluntary consent of individuals." 

The decisions subsequent to Green, including Swann, Emporia, Keyes and Milliken have all been attempts to curtail the "saintliness" of Green. Although these cases may look like a retreat from the theory established in Brown, they are not, because the principles of fairness and equal opportunity in education as secured by the fourteenth amendment and reaffirmed in Brown have been brought forward as "irreducible" concepts which are an integral part of our system of justice. These notions of justice are also too deeply embedded in the legal, social and economic systems to be cast aside.

The "crisis" presently occurring in desegregation is not in the theory established in Brown, but in the practical application of that theory which has since occurred. The

65 Kennedy, supra note 11, at 1714-1716.
66 Id. See also J. BENTHAM, THE THEORY OF LEGISLATION (Ogden ed. 1931).
67 Plessy, 163 U.S. at 551.
crisis concerns remedies; the method of desegregation, not
the concept of it.

The thesis of Brown will not necessarily crumble in the
attempt to refine the practical aspects. For as modern
philosophy has recognized, it is necessary to rigorously
test a concept to assure its validity, and to determine how
capable it is of withstanding a crisis in its foundations.
Martin Heidegger, among others, recognized this as an inte-
gral part of any discipline:

The level which a science has reached is determined by how
far it is capable of a crisis in its basic concepts. In
such immanent crises the very relationship between posi-
tively investigative inquiry and those things that are under
interrogation comes to a point where it begins to totter.
Among the various disciplines everywhere today there are
freshly awakened tendencies to put research on new founda-
tions. 68

It is inaccurate to state that the new wave of anti-
busing sentiment is a return to Plessy. Instead, it is more
correct to recognize that the history of desegregation has
been a slow and arduous process of trying to achieve a
synthesis of the two opposed ideals of altruism and indivi-
dualism.

Societal growth occurs through a dialectical movement
in many different areas. In the area of education, it may
be that busing is not the proper means to achieve this
synthesis of the ideals of equal educational opportunity
with the individual preference in education.

68 M. HEIDEGGER, BEING AND TIME, 29 (7th ed. Macquarrie and Robinson
trans. 1962) (emphasis supplied).
In the course of time, it is hoped that the dialectical structure of growth and development will produce an even further refinement of ideas leading to a more just and egalitarian society. In his article, "Structural Due Process," Professor Tribe articulates one vision of how societal growth occurs:

[This article] reflects a conception of the compact of social life as retaining legitimacy only if dialectically related to the generally shared values of the society as it develops. And such a conception in turn reflects a belief I have expressed elsewhere in an evolutionary process of growth in human awareness, a multidimensional spiral along which society moves successive stages, according to the laws of motion which themselves undergo transformation as the society's position on the spiral, and hence its character, changes.

In this "evolutionary process of growth in human awareness," we have moved in successive stages, from Plessy to Brown to the present. As society has adapted to these changes, the character of society has changed. Certain ideals have replaced others which did not retain their legitimacy. These new ideals form the basis for our current position on the spiral. It is hoped that these new ideals will lead to further understanding of the importance of equality and to a society which is concerned enough to make these ideals a reality.

Jane Campbell Moriarty

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71 Tribe, supra note 69, at 310.