EQUAL EDUCATION OPPORTUNITY— AN OVERVIEW

By ROBERT L. CARTER

IN 1954 IN *Brown v. Board of Education*,[1] the United States Supreme Court declared racial segregation in publicly supported schools unconstitutional. Yet, today, less than two decades after that historic pronouncement, there is more school segregation in the nation than ever before. Black Americans believed that the means for achieving their basic objective of equal quality education had been realized with the *Brown* decision. Now, however, after 17 long years of frustration and disillusionment, there is a growing conviction that the only way black children will have any realistic hope of obtaining quality schooling is for the schools black children attend to become community based and black controlled. This does not imply a rejection of integration, although integration has never been an objective or goal in and of itself. Prior to *Brown* many blacks, indeed most blacks, felt that the way to achieve equality was for blacks to become a part of the white man's world. That policy has now been undermined in part because of the hard realization that school integration as an element of national policy is not taken seriously by the white community and in part because of a growing black awareness of self and a determination to assert themselves as black people.

Brown made possible this increased black awareness because of the elimination of constitutional support for racial discrimination. The right of blacks to claim equality of treatment as a constitutional guarantee was assured. The law now was the basis for blacks to demand equal educational opportunity free of the onus of enforced racial segregation. The fallout effects of *Brown* tend to foster black militancy and an impatient insistence on equal treatment. However, the direct consequence of *Brown* in respect of equal education has been merely to shift the basis for racial segregation from open state enforcement to covert activity.

Even more distressing to black Americans is the realization that despite *Brown's* historic pronouncement that racially segregated education was at war with constitutional precepts, yet another generation of black children is being "processed" through segregated schools that do not educate — schools that are mere custodial centers, devoid of any meaningful attempt at education. Moreover, although tactics may have regional variations, *Brown* revealed that in all sections of America, North and South, black children were being shortchanged educationally. Indeed, instead of improvement in this respect, the post *Brown* period appeared to have brought about an even worsening of the quality of education heretofore available. This, of course, was probably not true, but the heightened general awareness of blacks because of *Brown* as to their educational due under the Constitution and laws of the United States made the situation appear worse than before.

Confronted with the dual realization that while America will not tolerate inte-

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

gration and has even less intention of paying the enormous price required to insure quality within black schools, it is not surprising that black Americans have turned inward.

IN THE PAST, blacks had merely attempted to achieve the elusive goal of equal educational opportunity by improving the quality of black schools. Being politically powerless, however, blacks were at a decided disadvantage in competing with whites for their fair share in the distribution of available educational resources. Thus, in general these resources were distributed to the overwhelming disadvantage of the politically impotent. Traditionally, this means blacks were shortchanged educationally, openly and deliberately in the South, and less openly but as deliberately in the North. The justification for this deprivation was the general assumption that blacks were not entitled to the same opportunities for upward mobility as whites; that in the main they were the basic source of the country's unskilled labor supply and thus brawn not brain was their necessary asset.

This worked for a while. Blacks were able to survive so long as American industry maintained an insatiable thirst for unskilled and semi-skilled manual labor; blacks could sell their physical labor and thereby make a living. Recently, however, the situation has changed drastically. Increasingly, our society has become less reliant upon manual labor and, with technological improvements and modernization, is turning to mechanical equipment to perform its more unpleasant tasks. Today, education, therefore, has all but become a synonym for employability with a growing positive relationship between the level of education and the degree of economic success. Indeed, there are strong correlations between more formal education and many other incidents of a better life, such as physical and mental good health. Federal studies have also noted an inverse relationship between the level of education and anti-social conduct. Thus, the maldistribution of educational resources between blacks and whites has become one of the central issues involved in the entire struggle for equality and equal treatment. Without a decent education, upward social mobility is impossible, and thus blacks as a group are threatened with becoming a permanent underprivileged underclass — a position from which there is no hope of escape.

Those directly involved in the legal struggle for equality of educational opportunity were quick to note these trends. As a result, legal action was instituted to define and expand the constitutional concept of "separate but equal." These efforts culminated in a series of Supreme Court rulings starting in 1938 with *Missouri ex rel Gaines v. Canada*[2] and ending in 1950 with *Sweatt v. Painter*[3] and *McLaurin v. Oklahoma State Regents.*[4] If complied with, the effect of these decisions would have placed burdensome restrictions upon segregation in public education for they required that equal facilities and educational opportunities in fact be provided as a pre-condition to the maintenance of a dual school system. This clearly meant more than equal numbers of books or pupil-teacher ratios, for in both *Sweatt* and *McLaurin* the basic constitutionally impermissible differences were the intangibles incapable of objective measurement, not the tangible facilities themselves. These decisions destroyed the fallacious underpinning of the "separate but equal" doctrine and formed the rationale for the principles enumerated in *Brown v. Board of Education.*

Like *Gaines,* the *Brown* decision failed to achieve the goal of quality education for black children and for essentially the same reason. Most white parents were simply not willing to accept the racial integration of their schools. Most feared that the education of their children would be lowered by the presence of black children. Indeed, one of the major factors

2. 305 U.S. 337 (1938).
3. 339 U.S. 629 (1950).
4. 339 U.S. 637 (1950).

in white America's flight to suburbia, has been attempted avoidance of the increasingly inferior education offered by inner city school systems. Those who remained in school systems with a substantial black population resorted to a variety of schemes, such as ability groupings, careful zoning to maintain intact as many white enclaves as possible, and other such devices to thereby insure continued segregation in public education.[5]

In *Brown* the Court employed broad language suggesting that segregation in education was constitutionally forbidden whether or not state mandated because of the educational harm done to black children. The injury is the denial of an equal educational opportunity which results from and is caused by segregation. But it is important to note that *Brown* dealt with segregation merely as a cause of the denial to blacks of their right to equal educational opportunity.

In the North and West the impact of *Brown* was avoided by creating a legal sophistry between *de jure* and *de facto* or adventitious school segregation. By centering on the specific cause of interference with the right to equality of education, instead of the right itself, federal courts in the North and West simply held *Brown* did not apply. Thus, the very injury condemned in *Brown* was permitted merely because it was produced covertly rather than overtly. Surely basic and fundamental constitutional rights are made of sturdier substances than this. To tell a black child that his inferior education is constitutionally permissible because produced by factors other than affirmative state laws diverts justice from reality to a world of illogic and fantasy.

The illogic of *Bell v. School Board of Gary, Indiana*[6] — a leading case on the point — perverted the central meaning of *Brown* in yet another way. In *Brown* the Court first decided the rights of black school children and then in a separate opinion[7] ascertained the duty of the school officials to secure those rights. In *Bell* the lower court completely reversed the process and first decided what were the duties of the school officials. Then, and only then, were the "rights" of the black children defined. Thus, the children's rights were limited by the strictures of the school boards' duties. Because the duty of officials is limited to remedying intentional discrimination, the *Bell* court held, blacks may be unintentionally segregated even though segregation denies them equal educational opportunities. Although a few lower federal courts in the Northeast have recognized the fallacies of the *Bell* theory,[8] unhappily it is clear that *Brown* has had almost no impact on the rapid increase in the incidence of school segregation in the North and West.

Unfortunately, *Brown* has also had a frustrating history in the South. To start with, in *Briggs v. Elliott*,[9] one of the original cases involved in *Brown*, Judge Parker employed word magic to create a distinction between integration and segregation. Most lower courts and school boards quickly adopted Judge Parker's decision and refused to move affirmatively on the grounds that the Constitution did not require integration but merely forbade segregation. In effect, *Briggs* meant there could be no remedy for past or present discrimination.

What *Briggs* did not do was explain how a black child's constitutional right to equality of education could be secured — when an incident of that right is a desegregated education — if courts were powerless to require integration. In reality, there is no such distinction. Courts integrate school systems as part of a remedy, not as a right in itself. To deny black children their constitutional rights be-

5. See e.g., *Hobson v. Hansen*, 269 F. Supp. 401 (D. D.C. 1967) aff'd. *sub nom.; Smuck v. Hansen*, 408 F. 2d 175 (D.C. Cir. 1969); *Blocker v. Board of Education of Mahasset*, 226 F. Supp. 208 (E.D. N.Y. 1964); and *Branche v. Board of Education*, 204 F. Supp. 150 (E.D. N.Y 1962)

6. 213 F Supp 819 (N.D. Ind.), aff'd. 324 F. 2d 209 (7th Cir. 1963), *cert. denied* 377 U.S. 924 (1964).

7. *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294 (1955)

8. *Blocker v. Board of Education of Mahasset, New York, supra* n.5; *Branche v. Board of Education of Town of Hempstead supra* n.5. *Barksdale v. Springfield School Committee* 237 F Supp 54 (D. Mass. 1964).

9 132 F Supp 776 (E.D S.C 1955)

cause the only meaningful remedy is not constitutionally required in *haec verba* is a clear example of judicial sterility.

Legislatively, southern school districts were quick to enact a series of procedural requirements to frustrate the efforts of black children to vindicate their rights under the *Brown* decision. Since the burden of securing *Brown's* implementation was left largely on blacks, the devices ground the desegregation process to a halt. At best, only a token number of black children were allowed to end the school isolation which *Brown* had held to violate the fundamental law. These bureaucratic delays were not invalidated until 1963 when the Supreme Court decided *McNeese v. Board of Education for School District 187.*[10] Although such school board delay finally was disapproved by the Supreme Court, school segregation was perpetuated for another nine years. Indeed, the fact that they finally lost and were destined to lose the judicial struggle was of little importance to southern school districts armed with an infinite variety of plans (such as "freedom of choice") that did not work and which provided the basis for litigation *ad infinitum* while segregation continued. Thus, though every judicial battle went against it, the South won the "war."

ESSENTIALLY, the reason for the success in frustrating effectuation of the constitutional principle enunciated in *Brown* was the failure of the United States Supreme Court to require school authorities to undertake a total reorganization of school districts in transforming their districts from the dual school system to one free of segregation. Instead, school authorities were allowed to assign children to schools on the same basis as had heretofore existed under the dual school system with black children, therefore, being required to seek reassignment out of the black school to a white school. The Court explained in *Green v. County Board of Education*[11] that this policy had been decided upon deliberately and had been designed to enable black children courageous enough to break with tradition to obtain a position in the white schools. Yet, this is precisely why the policy was in error. Because it would take courage for black children to assert themselves in vindication of what the Court had declared to be their rights, the Court should have devised a policy for the transformation from the dual system which would not have required black children and their parents to carry the burden virtually alone. The constitutional obligation *Brown* imposed was on the state, and school authorities should have been required at the outset to reassign all children white and black on the basis of *Brown's* standards. In the long run this probably would have made for no difference in result, but the Court might have seen sooner than it did that a new approach was necessary if the constitutional goal *Brown* set was to be realized.

By 1964 it was clear that *Brown* was a dismal failure. With hindsight the Court began to realize that it made a fundamental mistake when it placed the major responsibility for achieving integration on individual school boards. Considerations of federalism aside, the Court showed itself to be politically naive in believing that elected school board officials (or those appointed by elected officials) would voluntarily take steps to end segregation. Another mistake was the Court's decision to limit the lower federal courts to a passive role. They were to pass on the specific plans of individual school boards by applying the vague and subjective standards of "good faith" and "all deliberate speed." By inference, lower federal courts were to allow school officials to determine the course and pace of desegregation with only an after the fact power to say no. Even more fundamental was the Court's error in shifting the judicial emphasis from the desegregation of school systems as required by *Brown* to the integration of individual black children into white schools. Deseg-

10. 373 U.S. 668 (1963).
11. 391 U.S. 430, 436 (1968).

regation, like segregation, is a class phenomenon; it must of necessity affect the entire class if it is to succeed. Nor is the act of segregation, or its remedy, aimed at the individual but rather at the class. Thus, individual remedies are inconsequential, except for the specific individual involved. To be successful a remedy must reach the discriminatory system, not just the individual. What the Court was hoping for was a miracle of sorts. Somehow they expected the South voluntarily to turn away from the raw racism upon which its social institutions had been founded.

In any event, the Court finally recognized that a new approach was needed in a series of more recent cases, including *Bradley v. School Board of Richmond,*[12] *Rogers v. Paul*[13] and *Green v. County School Board.*[14] These decisions place emphasis on results and on plans that will work. To achieve this the lower federal courts have been given a much more active role to eliminate dual school systems. Now, they are to determine which plan among all is best suited to produce integration for all school children.

Congress also recognized that *Brown* was not having the expected impact on school segregation. It, therefore, enacted Title VI of the Civil Rights Act of 1964,[15] which provides for a cut-off of federal funds to any school district that segregates black school children. Slowly at first, and then more rapidly, the power of the purse appeared to succeed in achieving what the Court's mandate alone could not. Recent developments show, however, that Title VI is also being successfully evaded. Although schools have been desegregated, classrooms have been resegregated. Tracking systems have been put into widespread use throughout the South. School construction programs and zoning following the contours of housing segregation, such as the program approved in *Broussard v. Houston Independent School District,*[16] insures that yet another generation of black children will attend segregated schools in every major urban center.

Under Presidential orders and to further Presidential politics, the Department of Health, Education and Welfare has terminated virtually all fund cut-offs as a technique for insuring the desegregation of school districts. Instead, present plans call for reliance upon the more costly, more time consuming, and less effective route of desegregation court litigation. To complete the retreat, President Nixon on March 24, 1970, publicly stated his Administration's school policy — *"De facto* racial separation, resulting genuinely from housing patterns, exists in the South as well as the North; in neither area should this condition by itself be the cause for Federal enforcement actions."[17]

The President's statement is characteristic of the politics of education and a clear recognition of the current weakness of blacks as a political force in America. No administration attuned to political expediency as this one could be expected to make any serious moves to enforce the desegregation of American schools when it is certain that a majority of white voters are strongly opposed to such enforcement and large numbers of blacks are unregistered or wed to a single party. The difference between executive action under the current administration in the effectuation of Title VI is that President Nixon encourages resistance to desegregation and delay by attempting to appease the South in his formulating policy in respect to school desegregation. It may not work to his advantage simply because of his evident ambivalence which is *reflected* in the confusing and conflicting expressions of administration desegregation policies that are announced.

THUS implementation of *Brown's* mandate has not succeeded through court or executive action. Success at the executive level would be eased with increased po-

12. 382 U.S. 103 (1965).
13. 382 U.S. 198 (1965).
14. See note 11, *op. cit. supra.*
15. 42 U.S.C.A. §2000e, *et seq.*
16. 395 F. 2d 817 (5th Cir. 1968).
17. *N.Y. Times,* Mar. 25, 1970, p. 27, col. 2.

litical power in local and national politics being acquired by blacks. The failure at the judicial level is perhaps more ominous because it may indicate a loss of influence and prestige by the United States Supreme Court and a general loss of respect and faith for law.

As some commentators have observed, the Court could acknowledge its own failure and withdraw from the arena. Such a move would eliminate a major point of contention between the Court and its detractors and in the process reconcile the Court with many white Americans. On the other hand, it would be yet another sign to all black and white Americans alike that equality and justice in America, *circa* 1970s, is as it was and has always been: equality and justice among all men — that rallying cry for independence in the 1770s — means equality and justice among white men. That things have remained so unchanged during the nearly two hundred year existence of the American republic is one of the basic reasons for current black alienation and bitterness. The Court cannot cease being the voice of America's moral conscience in the realm of civil rights. If it does, as a means of satisfying majoritarian demands, the whole society will be harmed. If the country is no longer to be exhorted to aspire at least to reach democratic goals of a society free of racism, an important prod to its conscience that at times produces results will be gone.

What then is the future of the Court in the struggle for equal educational opportunity. As has been noted before, the Court must adopt a functional role and deal with reality instead of legalisms. First it must deal with the issue of school districting if equal educational opportunity is to be achieved. Cities and surrounding suburban areas which function as an economic and social unit for most other purposes, must be joined to pro duce the necessary funding and students to upgrade and improve all areawide schools. Since local governmental entities are mere creatures of the state and the state is ultimately responsible for education, there should be no serious legal difficulty in producing this result. Within this approach, there is a great deal of room for experimentation with the Princeton Plan, educational parks, and the other forms of school organization.

Realistic standards governing the burden of proof should also be adopted by the Court. If *Brown* meant what is said — that racial segregation is one way of denying black children an equal educational opportunity — then the Court should require school officials to justify a proven racial imbalance with some overriding governmental interest or hold the segregation impermissible. The Court should also follow up its *Green* decision by instituting a "cause or effect" test for school cases similar to that applied to the voting cases.

Under such a rule any action which was the cause or had the effect of segregating black children would be constitutionally invalid. Questions of motivation or intent would no longer be material. Results would be the only important criteria by which to judge the permissibility of a particular educational structure or plan. Under such a test it is obvious that there would have to be affirmative considerations of race as a factor in the effort to insure equal educational opportunity for black children. This should pose no serious legal or administrative problem. For here race is not utilized to secure an invidious result, but is used as data to be taken into account to do what the law requires.

One other issue the Court will have to consider is the wide intrastate disparity in school funding. There exists wide per pupil dollar disparities among school districts in each state. The rich school districts spend considerably more per pupil than do the poor districts. Although two cases have supported such funding schemes, the Supreme Court has yet to face the question squarely. The constitutional obligation of equal educational opportunity is imposed on the States, and it cannot evade that responsibility by delegating and diffusing its power among sev-

eral state entities where these entities produce disparate financial support for school purposes. The basic fault is the reliance on property taxation for local support of education. The elimination of this source of support and having all school funds come from statewide taxation with the funds equitably distributed would eliminate the disparity, and this may be the ultimate legislative answer, if the Court or the public demands that it act.

Equal educational opportunity has been the constitutional guaranteed right of blacks since the adoption of the Fourteenth Amendment. That guarantee has not yet been achieved. The Court and much of the American public thought that *Brown* had finally made good on the Constitution's promise. While *Brown* has failed to achieve that result, it did afford blacks the basic rationale upon which to develop a reliance in themselves as equals under the law. Indeed, this may be the great achievement of the *Brown* decision, for as a result of the law being clearly on their side in their quest for equal educational opportunity, blacks may develop the technique of politics that will help secure them equality in education and in other areas as well.

Addendum

SINCE WRITING the above, several legal and political developments have occurred which deserve comment. It is clear that Title VI with its overall threat of a cut-off of federal funds, even with a half-hearted adiminstrative effort, has been a more successful inducement to school desegregation than the case by case method of court action. By the 1963-1964 school term, only 1.7% of the black children were attending school with white children in the eleven states of the old Confederacy. See *United States v. Jefferson County Board*[18] for a comprehensive analysis of the rate of change. That figure had grown to 25% by September, 1969, chiefly as a result of the impact of Title VI, and by September, 1971 there was greater desegregated schooling throughout the South than in the North, where de facto school segregation had become even more widespread. However, desegregated schooling does not mean full desegregation, since in many instances, North and South, black children attending the same school as white children are kept in segregated classrooms. Nor, it should be added, does this accelerated rate of desegregation process insure equal educational opportunity. Discriminatory treatment, lack of teacher interest and sensitivity, northern experience has demonstrated, may chill the black child's interest, initiative and sense of worth. Thus, the current picture does not prove that equal educational criteria and standards are more likely to be effectuated on a wide-scale basis through the administrative process than through court action.

On April 20, 1971, the United States Supreme Court decided *Swann v. Charlotte-Mecklenburg Board of Education.*[19] The significance of this case lies in its objective and realistic treatment of the question of busing. Anti-busing sentiment had become very widespread, and the public is being led to believe that busing is a new phenomenon, utilized only to accomplish desegregation. The Court put the matter in its proper perspective. It said, through Mr. Chief Justice Burger:

> The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court, and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public educational system for years, and was perhaps the single most important factor in the transition from the one room schoolhouse to the consolidated school. Eighteen million of the nation's public school children, approximately 39%, were

18. 372 F. 2d 836, 854 (5th Cir. 1966).
19. 91 Sup. Ct. 1267 (1971).

transported to their schools by bus in 1969-1970 in all parts of the country.[20]

It seems clear from this statement that transportation of children to school by bus cannot be and is not objected to per se. The real objection is the desegregation process at the end of the bus ride. There is no great outcry, it should be added, when black children are taken by bus to segregated schools.

Chief Justice Warren Burger also ruled out the irrational and the impractical in lower court approval of busing plans. The opinion continues:

> An objection to transportation of students may have validity when the time and distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan . . . . It hardly needs stating that the limits on travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.[21]

This ultimately seemed to be a rational and sane approach to an issue which had become distorted by emotionalism. The Court was following the expected pattern of speaking to the country with calm determination and realism. With that opinion there was hope that the "busing" question would be removed from politics.

THAT HOPE, however, was not to be realized. Despite the fact that President Nixon has placed great emphasis on law and order, he chose to seek whatever political gains might exist in an anti-busing stand, and thereby undercut the Court's opinion and attempted to have the question considered solely in terms of its educational efficacy. The President announced that those on the HEW staff, concerned with Title VI enforcement were subject to dismissal in seeking to accomplish desegregation through any extensive use of busing. The Chief Justice helped abet Presidential politics by writing an opinion denying a stay of a lower court order requiring busing to achieve desegregation in which he pointed out that the *Swann* opinion had not been intended to require lower courts to approve of busing and the limits put upon the court's discretion in approving a busing plan. The opinion was mailed to every U.S. District Court and federal judge in the South. There was nothing that had been left unsaid in the *Swann* opinion, and the Chief Justice's more recent pronouncement on the subject added nothing new. Its negative tone, emphasis on what *Swann* did not require, and coming on the heels of the President's anti-busing pronouncement was surely intended to and did in fact bolster anti-busing public sentiment in the South.

Perhaps the most important development in this area, however, was the recent decision of the California Supreme Court holding unconstitutional the current method of public school funding in operation in the State.[22] The decision is of significance because every state public school funding formula is basically the same as California's. Each school district raises its own local funds for public education by tax on property of local residents. Local funds are supplemented by grants from the state. The result has been that a wide variation exists among the districts in each state as to the funds available on a per pupil basis for education. It has been estimated that some districts are spending eight times more per pupil than are other school districts in the state. This kind of disparity has been lessened in recent years with increased state grants to bridge the gap between the rich and poor school districts, but it has not been closed. A current myth has been that the higher per pupil expenditure results from the local residents' interest in quality education and a willingness to tax themselves at a higher level for its

20. *Id.* at 574.
21. *Id.* at 575.
22. Serrano v. Priest, 5 Cal. 3d. 584, 487 P. 2d. 1241 (1971).

achievement. This is not true in many of the poorer districts with an inadequate tax base. Local residents are required to tax themselves heavily to maintain a school system of indifferent quality, while some districts are far better favored in respect of property and can tax its residents lightly to operate a school system of the highest quality.

As STATED in the main article, the basic fault is the reliance on property taxation for chief support of local public school system. The California Supreme Court agrees. If the United States Supreme Court agrees with this opinion, it will mean that responsibility for equality in re access to all other aspects of equal educational opportunity will remain at the state level where it belongs. If the California view is adopted by the United States Supreme Court as a requirement of the federal constitution, future emphasis will be placed on concrete indicia of equal educational opportunity — for example, whether District A is afforded sufficient state funds to enable it to make per pupil educational expenditures on the same level as Districts Y and Z. Inevitably there will be less concern with integration itself as a facet of the concept of equal opportunity. Since this is the trend in any event, perhaps not much will be lost. Certainly equal facilities will be closer to reality if the school funding formula must at least provide for equal per pupil expenditure throughout the state.