AMERICAN JOURNAL
of LAW *and* EQUALITY

"SEPARATE IS INHERENTLY UNEQUAL" An Unfortunate Legacy

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The *Brown v. Board of Education*[1] decision concerned two distinct matters regarding education: segregation and integration, and equality. The decision contained ambiguities about both that obscured what exactly was being declared unconstitutional, muddying the waters for subsequent decisions concerning segregation/integration and educational equality and, because of the decision's iconic status, contributing to public confusion about both integration and equality.

In addition, the decision proposed a relationship between equality and integration: that equality is brought about by integration. In doing so, and on top of the confusions about integration/segregation and educational equality, it left to the future what I will argue is a misleading way of understanding their relationship. The confusions are memorably expressed in the decision's perhaps most-cited pronouncement, which rejected the 1896 *Plessy v. Ferguson*[2] holding: "[I]n the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[3] I will call the latter sentence the "inherency statement" and will refer to the related view it implies—that integration is the linchpin of equality in education—as "integrationism."

Taken literally, the inherency statement is inaccurate. A school serving one population can be equal in quality to another serving a different—racially different—population, so

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1 Brown v. Bd. of Educ., 347 U.S. 433 (1954); Brown v. Bd. of Educ., 349 U.S. 294 (1955).

2 Plessy v. Ferguson, 163 U.S. 537 (1896).

3 *Brown*, 347 U.S. at 495.

https://doi.org/10.1162/ajle_a_00075

separate cannot be *inherently* unequal, which implies unequal in every circumstance of separation.

I. HOW THE JUSTICES CAME TO SEE SEPARATION AS "INHERENTLY" UNEQUAL

Let us first look at what the Justices might have meant by that apparently inaccurate statement. First of all, *Plessy*'s "separate but equal" doctrine was a sham. In no life domain within the Jim Crow Segregation system were accommodations and provisions for Blacks virtually ever equal to those of whites. (I will use "Segregation" to refer to the specific social order of the American South in the Jim Crow period, lasting roughly from 1890 to 1960. I use "segregation" for the concept of a social order of that kind based on racial separation and inequality.) So the "separate but equal" doctrine acquired a warranted taint of falsehood and hypocrisy, contributing to a difficulty in finding anything possibly positive in it.

Two cases decided on the same day in 1950 aimed to challenge Segregation itself, but the Supreme Court ruled on them within the "separate but equal" framework, acknowledging the broader challenge to that social order but declining to take it up. These cases set the stage for how the *Brown* Court came to view separate as "inherently" unequal.

In *McLaurin v. Oklahoma*,[4] the Court ruled that the University of Oklahoma failed to provide a Black student an "equal" education at this white-serving university when the University compelled him to sit separately from his peers in classrooms, the library, and eating areas. The Court found that these restrictions "impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general to learn his profession."[5]

In *Sweatt v. Painter*,[6] the (also unanimous) Court ruled that a Black law student's education in a law school built specifically for Blacks could not be equal to one in the mainly white-serving law school. The latter would continue to be superior in "those qualities which are incapable of objective measurement but which make for greatness in a law school," such as the "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."[7]

Both decisions distinguished "tangible" (qualifications of faculty, library holdings) from "intangible" (reputation, interaction with fellow students) features of institutions and said that equality in both were required to meet the "separate but equal" standard.

The Justices in *Brown* appeared to see in the logic of the *McLaurin* and *Sweatt* decisions something the Justices in those cases declined to acknowledge. While a genuine attempt to provide equality under the separateness involved in Segregation could be successful with regard to tangible matters—though standardly it was not—equality of intangibles was impossible.

4 McLaurin v. Okla. State Regents, 339 U.S. 637 (1950).

5 *Id.* at 641.

6 Sweatt v. Painter, 339 U.S. 629 (1950).

7 *Id.* at 634.

Black institutions, such as the proposed Texas law school in *Sweatt*, would never possess public standing equal to white ones in a Segregationist social order because Black institutions, and Blacks themselves, were seen as inherently inferior to whites as long as Segregation persisted. The *Brown* Justices took the next logical step and proclaimed that impossibility—the impossibility of intangible effects being "separate but equal"—under Segregation. And this might make plausible sense of their saying "separate is inherently unequal."

But the *Brown* Justices might also have had a further point in mind in the inherency statement, on top of the necessary inequality in intangibles under Segregation. They might have thought that McLaurin's being required to sit apart from his peers at the University of Oklahoma (in an adjacent room, near enough to hear the professor but partly separated by a door clearly marking the deliberate separation) not only hindered McLaurin's ability to interact with them but also conveyed the plain meaning that Black students are (regarded as) inferior and degraded, not fit to sit with their white peers. This type of stigmatic harm, an assault on Black people's dignity that pervades every aspect of the Segregationist social order, is distinct from and over and above (though not unrelated to) the more material, if intangible, harms—such as not being able to learn one's profession properly because of having inadequate access to peers and mainstream white legal institutions (as in *McLaurin*) or not being able to reap the rewards and obtain recognition of equivalent accomplishments because Black institutions were never viewed as equal in quality to white ones (as in *Sweatt*).

But if the *Brown* Justices regarded the inherency claim as meaning that separation is always unequal within the social structure and meaning system of Segregation, in either of these two senses (inevitably unequal intangibles, pervasive devaluing of Blacks), it is noteworthy that they did not say so explicitly. By contrast, in two other notable cases, that view was given explicit expression: (1) Justice Harlan's famous dissent in *Plessy* stated that the "real meaning [of the Louisiana legislation requiring separate train cars for Blacks and whites] [is] that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."[8] (2) In the 1967 *Loving v. Virginia*[9] decision that ruled Virginia's prohibition of interracial marriage unconstitutional, the Justices pointed to the white-supremacist character of the Segregationist social order as integral to the unconstitutional wrong of Segregation.[10] There is no comparable explicit recognition of Segregation as a distinct, white-supremacist social order in *Brown*.

8 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Harlan was pointedly disputing the majority's explicit denial that Segregation constituted an oppressive, white-supremacist system. They had denied "the assumption that the enforced separation of the races stamps the colored race with a badge of inferiority" (as the plaintiff alleged), asserting that such stamping is "solely because the colored race chooses to put that construction upon it." *Id.* at 551.

9 Loving v. Virginia, 388 U.S. 1 (1967).

10 "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." *Id.* at 11.

The *Brown* Justices failed to delineate the inherency statement's precise scope and meaning in two ways. First, there is very little characterization of Segregation as a distinct social order—how it arose, how it functions, what values its social arrangements are understood as publicly expressing.[11] There is some discussion of Segregation's psychological effects on students—e.g., "to separate [Black students] from others of similar age solely because of their race generates a feeling of inferiority as to their status in the community." But this empirical observation, even if accurate, fails to capture the deeper truth: that the very character and purpose of Segregation was to declare whites the superior race and Blacks the inferior, and to express that declaration through consigning Blacks to second-class citizenship.[12] Segregation was far from simply an arrangement that placed whites and Blacks in separate spaces. It was a system of white power over, subordination of, and constant assaults on the dignity of Blacks in every aspect of their lives, sustained by law, custom, and violence. The evil of Segregation lay not fundamentally in its actual psychological effects on members of the demeaned group but in the harm constituted by that enforcement and declaration of inferiority—far beyond the (inevitable) inequality in intangibles.[13]

The decision did not make fully clear (and perhaps did not mean to) that what was being declared unconstitutional and in violation of the "equal protection of the laws" was precisely the white-supremacist system of Segregation itself in its educational manifestation.[14]

The Justices' second oversight was their failure to make clear that the inherency of inequality in separation is limited to a segregationist system. Outside of such a system, separate facilities or accommodations do not *necessarily* signify systematic and public devaluing of one social group in comparison to another. Different racial groupings can be separate from one another and be provided with separate and even unequal accommodations of various kinds (schools, neighborhoods, transportation, commercial

11 Randall Kennedy, *Brown as Senior Citizen, in* Say It Loud! On Race, Law, History, and Culture 412 (2021).

12 The empirical claims about psychological damage to Black children under Segregation played some role in the opinion but have met with criticism both at the time and subsequently. *See* Daryl Scott, Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche 1880–1969 chs. 6, 7 (1997); Martha Minow, In Brown's Wake: Legacies of America's Educational Landmark ch. 6, 138–68 (2010); Waldo E. Martin, Jr. *Introduction: Shades of Brown: Black Freedom, White Supremacy, and the Law, in* Brown v. Board of Education: A Brief History with Documents 16–17 (Waldo E. Martin, Jr. ed., 1998) (DuBois's view).

13 Leon Litwack, Trouble in Mind: Black Southerners in the Age of Jim Crow (1998), provides an excellent description of the lived social order of Jim Crow Segregation.

14 Chief Justice Warren, relatively newly appointed to the Court (after an initial presentation of the case the previous year), refrained from taking a stronger stand against school segregation in the opinion, favoring keeping on board possible dissenters and making the final opinion unanimous. Kennedy, *supra* note 11, at 414 (stating that Warren wanted the opinion to be "non-accusatory"); Justin Driver, The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind 253 (2018).

establishments, parks) without inequality being embedded in the public meanings of or "baked into" those differences in the way Segregation does. In that sense, separation is, therefore, *not* "inherently" unequal outside a segregation system.

The inherency declaration in the decision, generally taken as its central ruling, has hampered subsequent thinking about integration, equality, and the relationship between them. By itself, the statement can plausibly be taken to imply that any institution serving only or primarily Blacks or Indigenous peoples (or perhaps any other group of people of color) will always and necessarily be of inferior quality. But outside the Segregation context, it is evident that some all-Black or all-Indigenous educational institutions are equal in quality to comparable all-white institutions. Storied Black educational institutions such as Dunbar High School in Washington, D.C., and Morehouse College and Indigenous schools such as the (Navajo) Rough Rock Demonstration School are examples of excellent separate educational institutions specifically created to serve distinct Black and brown student populations and their communities.[15]

These schools are excellent not only by reference to criteria, such as resources, quality of educational program, and quality of faculty, that are used to assess white-dominant institutions but also regarding the ways they serve their specific populations. For example, the schools can function as community centers serving their local communities; can enable and support cherishing their Black or Navajo students in ways integrated schools are less likely to do; and can craft social and educational programming around the needs, histories, and heritages of those specific groups. "Separate is inherently unequal" is false in light of such institutions, and its both tacit and explicit establishment as a normative foundation for education policy makes this difficult to acknowledge.[16]

II. EGALITARIAN PLURALISM

In rendering excellent all-Black schools invisible, the inherency doctrine, and the *Brown* decision more generally, also failed to engage with—and implicitly rejected—a major strand in Black social and educational thought. This strand, egalitarian pluralism, does

15 On the Rough Rock Demonstration School, see Lawrence Blum & Zoë Burkholder, Integrations: The Struggle for Racial Education and Civic Renewal in Public Education 68 (2021).

16 A version of this point applies even under Segregation, and indeed Dunbar High School was originally established under Segregation. Even if separate Black schools were always viewed by white society as inferior to their white counterparts so segregative barriers prevented their graduates from reaping the full occupational and mobility-related benefits of an excellent education, *some* Black schools could in fact be equal or superior to their white counterparts in significant respects; for example, they could have superior teachers and excellent educational programming. Vanessa Siddle Walker, Their Highest Potential: An African American School Community in the Segregated South (1996).

not embrace integration as a vital educational aim. With roots in nineteenth-century African American thought, an early and influential articulation can be found in W.E.B. DuBois's classic, the 1903 *Souls of Black Folk*.[17] Egalitarian pluralism seeks full civic and political equality for African Americans in the major domains of American life, including the educational realm. In addition, it seeks the acknowledgment, preservation, and flourishing of African Americans as a distinct people with its own history, culture, traditions, and sense of identity and community. Egalitarian pluralists regard both equality and group preservation/flourishing as attainable, at least aspirationally, in Black-dominated educational institutions.[18]

Although egalitarian pluralism was developed as an explicit perspective primarily by African Americans, many Latinxs, Indigenous people, and Asian Americans embraced it also. Of those groups, Indigenous peoples were the most concerned about culture-preserving educational institutions because of all groups, they had suffered the most extensive attacks on their cultures for much of American history, often abetted by educational institutions.[19] Indigenous peoples often favored the creation of separate tribal schools that focused on the history and culture of their particular group and on American indigenous groups more generally.[20] Latinxs and Asian Americans were often more concerned to ensure sufficient numbers of their groups in their schools to support ESL programs than they were with integration with whites.[21] But all these groups sometimes favored integration with whites on instrumental grounds.[22] That is, they sometimes saw it as their best route to equality, as long as these institutions recognized their distinctive cultures and histories.[23]

The presence of egalitarian pluralism as a major historical current of thought should give pause to advocates of integrationism and the inherency doctrine. For these views do

17 Egalitarian pluralism draws on traditions of communal self-determination and cultural assertion in nineteenth-century "Black nationalist" thought, while not necessarily embracing the more fully separatist strands in that tradition. For discussion of this history, see Tommie Shelby, We Who Are Dark: The Philosophical Foundations of Black Solidarity (2005); Michael Dawson, Black Visions: The Roots of Contemporary African-American Political Ideologies (2001).

18 For recent articulations of egalitarian pluralism, see Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform (2004); Roy Brooks, Integration or Separation? A Strategy for Racial Equality (1996); Shelby, *supra* note 17; Andrew Valls, Rethinking Racial Justice (2018). For more general works defending a difference-sensitive approach to equality in general, see Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law (1990); Iris Marion Young, Inclusion and Democracy (2002).

19 Blum & Burkholder, *supra* note 15, at 23–31.

20 On federal policy now supporting separate Indigenous tribal schools, see Minow, *supra* note 12, at 100.

21 Blum & Burkholder, *supra* note 15, at 64–92.

22 *Id.*

23 *Id.*

not simply provide reasons to favor integration over separation in a matchup with egalitarian pluralism as two competing paths to educational equality. Rather, they render separation in service of equality an incoherent position, ruled out by separation being "inherently" unequal.

Egalitarian pluralism thus rejects Segregation as a social order premised on Black subordination and inferiority but does not reject "separation." This is because it regards equality among groups physically separated (in both schools and society more generally) as certainly possible and often as a goal to be sought. The inherency doctrine collapses or at least blurs the Segregation/separation distinction.

That conflation is also expressed in a familiar tendency within post-*Brown* educational discourse to refer to both Segregationist and contemporary demographically "separate" schools and systems as "segregated." Such terminology misleadingly imports the specific moral opprobrium rightly attached to Segregation to the particular forms of inequity and injustice involved in the quality differences typically (though far from universally) characterizing contemporary white-dominant and Black-and-brown-dominant schools. The contemporary order of educational inequality exemplifies serious racial injustice and subordination (though, as I will argue, the injustice does not centrally concern the racial demographics of different schools). And it is indeed very important to work out the specific character, including the particular moral character, of this regime of educational injustice. But we cannot engage in that task properly if we are locked into thinking, even if often only implicitly, that it is essentially the same as that of the Segregationist order.

This point does not speak directly to the particular *constitutional* infirmities of the two types of racially unjust social order (Segregation and post-Segregation). In his concurring opinion in the 2007 *Parents Involved*[24] case (and perhaps elsewhere), Justice Thomas also distinguishes the Segregation order from the current racial/educational arrangement, which he characterizes as "racial imbalance" (reflecting standard usage in integration cases), in that many schools are one-race dominant. But he finds nothing of constitutional concern in racial imbalance and claims that the *Brown* decision has no implications for it.

I agree with him about a distinct moral difference between the two educational regimes, and I also agree that mere racial imbalance is not purely by itself a reason for moral concern.[25]

24 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Thomas, J., concurring).

25 I am translating Thomas's constitutional concern into moral concern in case he also agrees about that, as his opinions sometime imply. For example, in his opinion in *Parents Involved*, he characterizes Breyer's dissent favoring permitting school boards in Seattle and Louisville to use students' racial identities to increase integration in their school systems as "an approach reminiscent of that advocated by the segregationists in *Brown*. . . . This approach is just as wrong today as it was a half-century ago." This formulation implies morally wrong, not only constitutionally wrong. *Id.*

But where I very much disagree with the Justice is that I think our current educational landscape is riven with structural racial injustice and that it is urgent that we understand the character of that injustice. I draw the distinction between the current situation and the form of moral injustice under Segregation not to cast every racial order other than Segregation as not warranting concern but to free our thinking about the current form of injustice from a confused conflation with Segregation.

In addition, keeping in our sights the horrific wrong of Segregation as a white-supremacist, caste-like social order, and viewing it as the central target of *Brown*, provides some protection against the color-blind reading Justices Thomas and Roberts give of the *Brown* decision (in their *Parents Involved* opinions). For they, although not consistently, state the wrong in question as the bare use of racial classification in a government policy, or as "discrimination on the basis of race." Both understand that expression as equivalent to the color-blind view that either (1) race can never be relevant to a constitutional purpose, or (2) under Segregation, white students were as wronged as Black students because, in Roberts's words, "[b]efore *Brown*, school children were told where they could and could not go to school based on the color of their skin," and this was as true of white as of Black students.

I do not imply that it is impossible to read *Brown* and other race cases in a sense-(1) color-blind way, even if (contrary to (2)) one acknowledges the particular and racially asymmetric wrongfulness of Segregation. But I suggest that an explicit recognition of it as a racial caste system would provide one obstacle to doing so. Would either Justice have felt comfortable saying that a system consigning Blacks to second-class citizenship (reflected in education policy) is "just as wrong" as one creating greater integration partly by relying on students' self-ascribed (or parent-ascribed, but not simply assigned by the state) racial identities to assign them to school? In fact, if one reads the opinion closely, both Justices sometimes do state the wrongfulness of Segregation in a way that expresses the "racial caste" way of characterizing it, but without recognizing that this is not equivalent to the color-blind way of doing so.

I note that in race jurisprudence, whether a current inequity is a product of official government action (de jure) is often used as a criterion for whether the inequity is unlawful and requiring remedy. For example, in the 1973 *Keyes* case, the majority ruled that in Denver, Colorado, which as a western city was not part of the Segregation system in the South that all previous post-*Brown* school-segregation cases concerned, a school board was found to have used unlawful discriminatory, segregative policies to produce an inequitable, separationist result.[26] I am in no way disputing that whether something is supported by law is a valid criterion in ruling whether a certain pattern of school assignment should be declared unconstitutional. I am saying only that this criterion underdetermines the moral

26 Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

and political character of the social order produced by such laws. The social degradation of Blacks was significantly harsher in the South during the Jim Crow period than it was in Denver, Colorado, in the early '70s due to the discriminatory and segregative policies of the school board, though both were a product of law.[27]

Because of the increasingly frequent use of the term "white supremacy" in academic and to some extent popular discourse, I want to clarify that I do not use it as Charles Mills influentially defined it: a system of white socioeconomic-political advantage maintained by multiple processes but not necessarily propped up by an ideology that affirms the appropriateness of this arrangement. Rather, I use the more traditional meaning: a system of white dominance and Black subordination propped up by an ideology of white superiority and Black inferiority and widely recognized as such and accepted and embraced by most whites.[28]

Cannot the reply to the claim that the moral character of today's racially unequal social order differs from that of the Segregation era be that current forms of educational racial inequity are a *legacy* of the Segregation period—that is, that many of the resource disparities between schools with separated racial demographics can at least in part be traced back to that period? The historical point is no doubt true, although many distinct, subsequent processes also contributed to the current disparities.[29] But saying that contemporary inequities are a legacy of the past does not entail that they are the same forms of wrong as the past system of which they are a legacy. After all, overall resource disparities between whites and Blacks have their origins in the slavery period, when Black people owned nothing. But that does not mean that the contemporary racial wealth gap has the same moral character, warranting the same opprobrium, that we attribute to the slave system.

The both factual and moral conflation of Segregation and separation is also expressed in a widespread practice of reporting school *racial demographics* as if they were facts about *unjust disparities*. Consider, for example, this statement: "[B]y 2001, the percentage of black students attending racially identifiable black schools [schools with a preponderance of black students] jumped to 37%."[30] Although such schools are indeed often poorly resourced, it is the resource deficit that constitutes the inequality, not the racial demographic itself. The constant repetition of such demographic statistics conveys the message that

27 At the same time, I am not disagreeing with those, like Breyer in his *Parents Involved* dissent, who think the de jure/de facto distinction is often drawn in an overly simplistic and superficial way.

28 I am not critical of Mills's definition of "white supremacy," which is quite useful in certain contexts, but it must be kept distinct from the distinctive, American, historical form of white supremacy in Segregation discussed here.

29 An influential work in the vast literature documenting the multiple processes causing educational performance disparities is Whither Opportunity? Rising Inequality, Schools, and Children's Life Chances (Greg J. Duncan & Richard J. Murnane eds., 2011).

30 Sheryll Cashin, The Failures of Integration: How Race and Class Are Undermining the American Dream (2004).

there is something wrong with Black students attending schools with other Black students and that Blacks are fundamentally negative influences on each other's educational success. The egalitarian pluralist outlook is a valuable counterweight to this stigmatic practice, implying as it does that educational discourse should stop reporting demographic data as if they were data about inequality and, more generally, stop using "segregation" and "inequality" almost interchangeably (and also stop using "segregation" for "separation").

If our society is set up to send inadequate educational resources (such as insufficient funding and unqualified teachers) to schools with predominantly low-income students of color, that is a correctable injustice in the resource-allocation system. As egalitarian pluralism implicitly advocates, schools with predominantly Black students, such as Dunbar High School, can be well-resourced and produce excellent education for their students. Integration by moving the students of color to the well-resourced predominantly white schools is not the only way to bring adequate resources to a student population. The resources can be moved to where the students already are.

III. THE INHERENCY DOCTRINE CLOSES OUT ANY INQUIRY INTO THE ACTUAL CONDITIONS FOR EQUALITY, SPECIFICALLY SOCIOECONOMIC ADVANTAGES AND DISADVANTAGES, SUCH AS OUTSIDE-OF-SCHOOL FACTORS

Thus the inherency doctrine, by almost definitionally yoking inequality to separation and equality to integration, impedes clear thinking about the nature of equal opportunity in education and the role of school racial demography in fostering or undermining it. More specifically, the inherency doctrine, and the larger *Brown* decision that it encapsulates, closes out an inquiry into the actual conditions that create inequality and what would be required to bring about equality in light of those conditions. They imply that such an inquiry is unnecessary because we already know that separation is the cause of inequality and integration its remedy.

This article is of course not the place to engage the vast literature subsequently produced on equality and inequality in education. But I want to highlight one important category of inequality-producing factors masked by the inherency doctrine whose absence continued in the subsequent Supreme Court cases concerning integration and equality of education: the economic circumstances of the student's parents and neighborhood.

Students having too little to eat, nonnutritious food, inadequate health care, stress caused by parents not having work or by inadequate income, an unstable living situation, no quiet place to study—all these outside-of-school factors inhibit learning, and all are related in some way to a family's economic circumstances.[31] Parents also have differential ability to help their offspring in school, partly depending on their own level of education

31 WHITHER OPPORTUNITY?, *supra* note 29.

and partly related to the nature and hours of their jobs. Outside-of-school factors are not confined to disadvantages related to low income; they include distinctive advantages of higher income. Upper-middle-class parents have greater social and cultural capital, enabling them to work the system to the educational benefit of their offspring more readily than working-class and low-income parents can.

This out-of-school system of advantage and disadvantage is primarily socioeconomic rather than racial in character. For example, offspring of better-educated parents of any race are advantaged compared to less-educated parents of any race. But this system is itself also a strong component of racial stratification in education since Blacks, Latinxs, and Indigenous people are as groups significantly economically disadvantaged, a result of historical (and current) racism. So this class- but also race-based system of advantage and disadvantage has a substantial impact on the ability of students to make the most of the education they are exposed to in school. In that way, student success in learning is not affected solely by pedagogical and other processes that go on inside the classroom and school, as *Brown* implies.

Put differently, the operation of schooling as an overall system involves its interacting with other social systems, such as health and health care, employment and income, and housing. Therefore, educational equality and justice require some degree of economic, health, and housing justice also.

Educational actors and policymakers have increasingly come to appreciate these connections. A particularly robust example is the community-schools movement, which brings social services, often community based, into and in partnership with the school in ways that improve the lives of, mute the deleterious impact of class-based disadvantages on, and thereby improve the school performance of, its students.

> Community School leaders and their [community] partners recognize that students who are hungry, who can't see the blackboard due to poor vision, who are missing school regularly due to health or housing challenges, or who are stressed because of difficult family situations, will face critical challenges in the classroom. They recognize that there are certain things a school can and should do to help: provide an extra meal, connect mom or dad to job training, or enroll a student in an afterschool program.[32]

The school-site clinics and community-service organizations serve parents as well as students from economically disadvantaged backgrounds, recognizing that student

32 Office of the Mayor et al., New York City Community Schools Strategic Plan: Mayor Bill De Blasio's Strategy to Launch and Sustain a System of Over 100 Community Schools Across NYC by 2017, https://www.nyc.gov/assets/communityschools/downloads/pdf/community-schools-strategic-plan.pdf (last visited May 20, 2024).

performance is tied to parental health, housing and job stability, and absence of economic stress. These are racial-equity-producing interventions that have nothing to do with integration.

Such programs are relatively recent, but the core insight regarding socioeconomic background harks back to the 1966 Coleman Report on equality of educational opportunity.[33] The report was commissioned as part of the 1964 Civil Rights Act. This Act aimed to put teeth into civil rights enforcement in the South, which was called for by the *Brown* decision but resisted throughout the South. Coleman's central finding was that students' own educational and socioeconomic background and that of their schoolmates had a substantial impact on student achievement.[34]

Brown's discourse of "equality" does not engage with these advantages and disadvantages that the student brings to the school. The decision tacitly assumes that once Black students are brought into the same school as whites, their exposure to the same teachers, curriculum, and pedagogy will result in "equal educational opportunity" for them. Nor does the decision recognize that due to differences in socioeconomic background, not all *white* students have equal opportunity to access the proffered education. And these assumptions are carried into the entire post-*Brown* jurisprudential tradition in cases about integration and educational equality. This is true of both the "liberal" decisions of 1968–73 (*Green v. New Kent County*,[35] *Swann v. Charlotte-Mecklenburg School District*,[36] *Keyes v. Denver School District No. 1*) that called for more proactive measures to increase the co-presence of different racial groups in schools ("integration") and the "conservative" decisions in successive decades, which both released schools and districts from the requirement to integrate and constrained their ability to do so voluntarily. All these cases proceeded on the assumption that educational opportunity is provided purely through in-school processes, perhaps supplemented by extra in-school academic support but not significantly affected by student socioeconomic background.

Thus the entire *Brown*-initiated tradition of concern with educational equality proceeded without making contact with the Coleman-initiated recognition of out-of-school, class-based factors conferring background advantages and disadvantages to students in their pursuit of education. Perhaps this failure stemmed from limitations related to the constitutional concerns relevant to that tradition. But it does suggest that because Supreme

33 James S. Coleman et al., Equality of Educational Opportunity (1966), https://files.eric.ed.gov/fulltext/ED012275.pdf.

34 In Coleman et al.'s words: "[T]he apparent beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background of and higher educational aspirations that are, on the average, found among white students." *Id.* at 318–19 (quoted in Minow, *supra* note 12, at 202 n.160).

35 Green v. New Kent Cnty., 391 U.S. 430 (1968).

36 Swann v. Charlotte-Mecklenburg Sch. Dist., 402 U.S. 1 (1971).

Court decisions, and especially iconic ones such as *Brown*, affect general public discourse, the inherency doctrine—"separate is inherently unequal"—and the integrationist educational program built on it constrained judicial and popular thinking about the sources of educational equality and inequality. More generally, this jurisprudential tradition inhibited recognition of the ways that the lives of racial groups are deeply affected by class-based factors and inhibited development of a discourse that could incorporate class and race into an integrated framework bearing on education.[37]

IV. *BROWN*'S POSITIVE CIVIC LEGACY BUT FAILURE TO LINK THE CIVIC PURPOSES OF EDUCATION TO ITS INTEGRATED CHARACTER

A third legacy of the *Brown* decision and its iconic status in American history and culture concerns the *civic* significance of integrated education. The *Brown* Justices said that to decide whether equal protection applies to education in the then present, it would not be enough to "turn the clock back to 1868" when the Fourteenth Amendment was adopted, nor even to look at what education meant in society at the time of *Plessy*, when the "separate but equal" doctrine was articulated (though not explicitly applied to education).[38] The Justices said that "today education is perhaps the most important function of state and local governments." Supporting that importance, the decision says that such (public) education is "required in the performance of our most basic public responsibilities" and "is the very foundation of good citizenship."[39]

The Court saw civic importance as a reason to apply equal protection in the educational domain and to prohibit discriminatory provision of education to Blacks. This affirmation of the civic importance of education, though not particularly elaborated in the decision (in line with its overall deliberate brevity), is a vital positive legacy of the decision.

However, the decision does not specifically link the integrated character of its mandated educational arrangements to those civic and democratic purposes. It does not say that the civic dimension of education is enhanced for both (or either) Blacks or whites by the fact that the two groups will now be sharing schools and classrooms. From the decision's point of view, Blacks were inadequately prepared for citizenship in Segregated schools because of the overall inferior quality of their education in those schools, not because the lack of reciprocal interaction with white students diminished the quality of the Black students' civic education (and vice versa).

37 For a discussion of integrating race and class into a common framework, see Lawrence Blum, *Race and Class Together*, 60 Am. Phil. Q. 381 (2023).

38 Plessy v. Ferguson, 163 U.S. 537 (1896).

39 Brown v. Bd. of Educ., 347 U.S. 433, 493 (1954).

Yet there are ample civic benefits to integrated education. These civic benefits were succinctly stated in a memo from the Obama administration's Departments of Justice and Education in 2011:

> As the Supreme Court has explained, elementary and secondary schools . . . are 'pivotal to sustaining our political and cultural heritage'; they teach 'that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all'. Racially diverse schools provide incalculable educational civic benefits by promoting cross-racial understanding, breaking down racial and other stereotypes, and eliminating bias and prejudice.[40]

This language echoes that of the Supreme Court's majority in the 2003 *Grutter*[41] decision, where fostering these civic purposes was taken to support affirmative action in higher education.[42] But if cross-racial understanding, eliminating bias, and breaking down stereotypes are civic benefits of diversity and integration in higher education, they are even more so at the K–12 level, governed by *Brown*. Many more students attend K–12 than higher education. So they would encounter these civic benefits from a younger age and for a longer period than if the benefits were confined to higher education.[43] These civic benefits are entirely in keeping with the *Brown* ruling, but they are not articulated or even suggested within the decision.

The civic value of integrated education points to a further unfortunate legacy of the "separation is inherently unequal" doctrine beyond confusing equality and integration. The doctrine implies that the prime or even sole value of integration in education is in bringing about equality of educational opportunity. That view discourages us from examining whether integration can serve educational values *other than* (but not contradictory to) equality.

40 Lawrence Blum, High Schools, Race, and America's Future: What Students Can Teach Us About Morality, Diversity, and Community 238 n.19 (2012).

41 Grutter v. Bollinger, 539 U.S. 306 (2003).

42 The conception of the civic and moral benefits of integrated education in both the *Grutter* decision and the Obama memo somewhat understates the range of civic benefits. For example, it does not note that integrated education would also facilitate learning about the different ethnoracial groups in society, both their historical experience and their positioning in the current social order. Nor does it make sufficiently clear how integrated education can promote positive interracial attitudes of respect, caring, and appreciation (not merely tolerance and absence of prejudice), as well as competences such as the ability to work with racial others in interracial groups and settings.

43 Justice Breyer's multifaceted dissent in the *Parents Involved* decision discusses democratic citizenship in a multiracial democracy as one important defense of the integration program that the majority declared unconstitutional, and he brings the affirmative action argument to bear on the K–12 situation.

While of course racial equality is an, even possibly the most, important value relating to race and education, it is not the only one. The civic purposes of education are also a vital and distinct (non-equality) value, suggesting an important perspective on our earlier discussion of excellent single-race schools and of egalitarian pluralism more generally. Recall, integrationism and the inherency doctrine claimed that integration was the only path to educational equality, resulting in a failure to see that all-Black or all-Indigenous educational institutions could be educationally sound. But the civic perspective points out a drawback of those schools and a dimension of schooling inadequately appreciated in the egalitarian pluralist tradition. Excellent single-race schools' lack of racial diversity renders them nonoptimal settings for important aspects of civic education. Students do not encounter classmates from other racial groups from whom they can learn about other experiences, life situations, and heritages to motivate, and aid in, reducing prejudice and bias and encouraging cross-racial respect and appreciation; to form friendships and other cross-racial relationships that can foster cross-racial civic attachment as adults; and to expand their civic horizons about the character of the polities they will inhabit as adults. This deficiency characterizes both predominantly white and predominantly Black, Latinx, or Indigenous schools.

This civic superiority of the integrated school should not be overstated. Civic knowledge, capacities, and competences can be taught in the all-Black or all-Indigenous school (and in white-dominant schools too), if perhaps not as fully or readily. And in-group racial solidarity among Black and brown students, naturally (though not inevitably) occurring in such schools, can be an important resource for civic engagement and racial justice. For example, Black students as a group can spearhead civic-informed attention to a race-related public issue in and for the larger school community. The multicultural education movement has made significant strides in crafting a particularity of focus on different student groups of color inside integrated schools. This brings a degree of egalitarian pluralism inside the integrated school, affirming and recognizing distinct ethnoracial student groupings, though not to the extent that a separate racially identifiable school can do. But it is not a form of what I am calling integrationism, since it is valuing the interracial interaction for civic and moral reasons, not as a path to equality.

A larger point is the wider tapestry of education-related values beyond equality—for example, civic education and affirming/recognizing particular ethnoracial groups—that can be realized in integrated schools. The *Brown* Court did not engage these values, and they tended to play no more than peripheral roles in subsequent K–12 integration and equality rulings and cases (though sometimes appearing in dissents.[44]). And the inherency doctrine serves to render them invisible by collapsing the value of integration into equality.

44 *See* note 43, *supra*.

An important feature of the civic benefits of integrated education is that they are symmetrical across racial groups. Students of all racial groups benefit from the presence of all others. All—whites, Blacks, Indigenous people, Asian Americans, Latinxs, Middle Easterners and North Africans (MENAs)—learn more about each and all of the other groups. The integrated school provides a more favorable setting than the single-race school for reducing bias and prejudice and forming positive interracial attitudes and attachments between and among all racial and ethnoracial groups, not only with regard to white students' attitudes toward students of color, the focus of most concern in the research tradition concerned with the impact of integration on students' racial attitudes.[45]

This symmetry contrasts with a common argument for integration arising from the integrationist tradition: that disadvantaged Black and brown students benefit from the superior capital (financial, human, social, cultural) of advantaged white students in the integrated school.[46] That argument has been challenged on several grounds, one being that it fails to recognize the perspectives and personal strengths that disadvantaged students of color bring to the educational encounter with white students, from which the latter benefit educationally, personally, and morally. This argument differs from but complements the civic argument.[47]

The capital view informs the standard use of "racial isolation," a chacterization applied almost solely to Black- or brown-dominated schools. This characterization highlights the

45 As we have known since the early days of school integration, mere physical co-presence in classes is not sufficient to reduce bias and prejudice. Teachers and school officials must create a setting within the school, including through curricula and pedagogy, that fosters that result. Allport's *Nature of Prejudice*, from the same year as the decision, famously proposed conditions within schools and classrooms that made prejudice reduction a more likely outcome of contact (called the "contact hypothesis") that have been developed and reworked in much subsequent research. The *Brown* Court did not recognize the concern for how Black students would be treated once attending the integrated schools, nor that equitable treatment was necessary for providing the "equal education" they assumed those students would receive. The year after the decision, W.E.B. Du Bois stated this concern in harsh terms: "In successfully mixed schools [Black parents] know what their children must suffer for years from Southern white teachers, from white hoodlums who sit beside them and . . . who hate and despise them." He added that, despite this, these parents know they need to comply in order to achieve the equality promised with the end of Segregated schooling. W.E.B. DuBois, *200 Years of Segregated Schooling*, 9 Jewish Life 7, 9 (1955), *reprinted in* Eugene F. Provenzo Jr., Du Bois on Education (2002). Du Bois had voiced the same concerns in 1935, in parting ways with the NAACP over his failure to embrace its integrationist strategy: "A mixed school with poor and unsympathetic [white] teachers, and no teaching of truth concerning black folk, is bad." Brown v. Board of Education: A Brief History with Documents, *supra* note 12, at 16–17.

46 Elizabeth Anderson provides an excellent version of the capital argument for integration. Elizabeth Anderson, The Imperative of Integration (2010) (throughout but especially pages 31–38). The capital argument can actually be traced back to the Coleman Report. The Report's finding that students were affected by the socioeconomic status of other students was used at the time as an argument for integration.

47 This and other criticisms of the capital argument are provided in Blum & Burkholder, *supra* note 15, at 130–59 (ch. 4, The Capital Argument).

ways a student's demographic group is disadvantaged by nonaccess in such schools to forms of capital disproportionately possessed by whites. But the characterization applies equally to white-dominated schools if we keep the civic dimension in mind. White students are educationally and civically disadvantaged by white-only schooling, as Black and brown students are by the analogous racial isolation, by virtue of lacking racial interchange with other racial groups. They all equally benefit from learning in integrated settings, as highlighted by the civic argument.[48]

CONCLUSION

The main legacy of the *Brown v. Board of Education* decision was captured well in its time by the *Chicago Defender*, an influential Black newspaper: "Neither the atom bomb nor the hydrogen bomb will ever be as meaningful to our democracy as the unanimous declaration of the Supreme Court that racial segregation violates the letter and spirit of our Constitution."[49] Nevertheless the decision's central affirmation, "[s]eparate is inherently unequal," has confused thinking about integration, equality (of educational opportunity), and the relation between them. I have focused on five aspects of that unfortunate legacy: (1) the conflation of schools with one-race-dominant demographics with "Segregated" schools (schools in the Jim Crow Segregation system), with the implication that the forms of injustice and subordination involved in the former are of the same moral character and severity as those of the latter; this conflation arises from the decision's failure to recognize that separation is "inherently" unequal only within a segregation system; (2) the tacit and poorly defended assumption that integration is the sine qua non and linchpin of equality of educational opportunity; (3) the failure to take seriously the egalitarian pluralist tradition especially in African American educational thought, which promotes both equality and separation; (4) a masking of the vital role of outside-of-school factors related to students' socioeconomic background that hinder the achievement of such equality; and (5) a failure to recognize that integration can be educationally valuable for reasons other than its (alleged or actual) links to equality, in particular as a distinctly favorable setting for civic education that prepares students for life and participation in a multiracial democracy.

48 So the Justices failed to note three distinct types of potential impacts of white students on Blacks: prejudice toward them, possible capital benefits from contact with them, and potential benefits for civic education of having the two groups together.

49 Driver, *supra* note 14, at 248 (quoting the *Chicago Defender*).