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JUSTICE THURGOOD MARSHALL AND SCHOOL INTEGRATION: *GREEN* AND *KEYES* FROM A UNITARY STANDARD TO A DOUBLE STANDARD TO A UNIFORM NATIONAL DE FACTO STANDARD

*L. Darnell Weeden**

I. INTRODUCTION

The issue to be addressed is whether the Supreme Court has abandoned the affirmative duty to integrate public schools articulated in its *Green v. County School Board of New Kent County, Va.*[1] opinion forty years ago in 1968. One could reasonably construe the logic and rationale of the *Green* opinion as creating an affirmative duty on public school officials to dismantle the effects of the "separate but equal" racial doctrine in public education. The "separate but equal" theory of racial discrimination in public education was approved by the Supreme Court of Massachusetts in 1849 in *Roberts v. City of Boston.*[2] In 1954, one of my heroes, Thurgood Marshall, an excellent advocate of social justice and racial equality, persuaded the United States Supreme Court in *Brown v. Board of Education*[3] to reject the "separate but equal" doctrine in the field of public education. Justice Lewis Powell of the United States Supreme Court said, "Thurgood Marshall's record as an advocate for civil rights has no parallel."[4] In 1936, while working for the National Association for Advancement of Colored People ("NAACP") pro bono, Marshall won his first significant case by gaining law school admission for the first black law student at the University of Maryland.[5]

Part I of this article discusses Thurgood Marshall's exposure to racial discrimination in education prior to becoming a law student, and also Marshall's subsequent total commitment to integration in every aspect of public education. Part II evaluates the *Green* opinion and its "affirmative duty to integrate" rationale in de jure southern jurisdictions where racial segregation was historically required by law. Part III approaches the *Keyes* decision and examines how racially identifiable schools in the northern states

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1. 391 U.S. 430 (1968).
2. 59 Mass. 198 (Mass. 1849).
3. 347 U.S. 483 (1954).
4. Lewis F. Powell, Jr, *Tribute to Justice: Thurgood Marshall*, 44 STAN. L. REV. 1229 (1992).
5. *Id.* (citing *Pearson v. Murray*, 169 Md. 478, 182 A. 590 (1936)).

with no history of requiring schools to follow the "separate but equal" doctrine may have created a dual educational system in violation of the supreme court's "affirmative duty to integrate" mandate articulated in *Green*. Part IV considers how the Supreme Court implicitly abandoned the remedy announced in *Green*, namely, the "affirmative duty to integrate" public schools to achieve unitary schools.

II. THURGOOD MARSHALL'S EXPOSURE TO RACIAL DISCRIMINATION IN EDUCATION PRIOR TO BECOMING A LAW STUDENT INSPIRED HIS SUBSEQUENT TOTAL COMMITMENT TO INTEGRATION IN EVERY ASPECT OF PUBLIC EDUCATION

Professor James L. Hunt does an excellent job of describing the revolutionary nature of and the impact that the United States Supreme Court's opinion in *Brown v. Board of Education* had on the Southern white lifestyle, by rejecting racial discrimination in public education.[6] The meaning of *Brown* should not be downgraded to the litigation among the parties or the decision of the United States Supreme Court.[7] In order to fully understand the implications of *Brown,* one must share the experience of the individuals, who would either treat the *Brown* opinion with contempt or defend the opinion as the correct moral outcome.[8] The *Brown* decision is often regarded as an opinion with political underpinnings that demands an analysis of its "impact at the local level" and in the case of Thurgood Marshall, at the personal level.[9] One of the goals in studying both *Brown* and Justice Thurgood Marshall together is to join official legal progress with wide-ranging ideas in society about race, law, and politics.[10]

Macon, Georgia, in many respects, was a typical segregated Southern city in 1954.[11] Law and "tradition" compelled every element of life, which included public schools, employment, higher education, and churches, to be segregated by race.[12] "Like slavery, segregation operated through a complex and interrelated set of rules, each of which depended in some manner upon the others' enforcement."[13] As soon as the United States Supreme Court on May 17, 1954, decided in *Brown* that the "separate but equal" race-based segregation in public elementary and secondary education was illegal under the United States Constitution, the total structure of white supremacy, a system put in power by law in Macon and other Southern

6. James L. Hunt, *Brown v. Board of Education After Fifty Years: Context and Synopsis,* 52 MERCER L. REV. 549 (2001) (citing 347 U.S. 483 (1954)).

7. *Id.*

8. *Id.*

9. *Id.* at 549-50.

10. *Id.*

11. *Id.*

12. Hunt, *supra* note 6, at 550 (citation omitted).

13. *Id.*

communities, was subject to legal challenge.[14] White citizens in Macon immediately understood *Brown's* capacity to disrupt the settled order of white supremacy and the practice of "separate but equal."[15]

Macon symbolized the typical Southern society that was radically impacted by *Brown*. It included a sizeable African-American population; more than one-third of the total population.[16] Macon whites forcefully preserved segregation in all phases of the city's social, economic, and educational realms.[17] Race was the primary factor in deciding one's neighborhood, school, occupation, income, and church. Race was the controlling factor in either providing or denying access to helpful institutions and productive professions.[18] Racial segregation was equated with unchanging "heritage."[19] "Realizing the revolution that was at hand after *Brown*, white citizens desperately defended Southern 'traditions.'"[20]

The University of Maryland School of Law had refused to admit Marshall to its first-year class.[21] Professor Alfred A. Slocum believes that Marshall's denial of admission by the University of Maryland inspired Marshall to develop the legal talent necessary to create a new legal landscape for the civil rights movement.[22] Marshall left the state of Maryland to attend Howard University School of Law in Washington, D.C., where he met Charles Hamilton Houston, a law professor and Vice-Dean[23] who would become his mentor on how to use the law as a tool to promote racial and social justice.[24]

As Marshall's mentor, Houston, was motivated to study law because he thought law could be utilized as a tool for social engineering to challenge a legal system that allowed white children to ride to school on a bus, while similarly situated black children had to walk.[25] Houston's objection to racial discrimination extended far beyond inequity in transporting children to school.[26] Rather, Houston suffered pain because of the damage to the black children's psyches as privileged white children were given a ride on the school bus that was denied to black children.[27] Houston was determined to use the pain caused by racial segregation to teach jurisprudence at

14. *Id.* (citation omitted).
15. *Id.*
16. *Id.* at 556.
17. *Id.*
18. Hunt, *supra* note 6, at 556.
19. *Id.*
20. *Id.*
21. Powell, *supra* note 4.
22. Alfred A. Slocum, *"I Dissent": A Tribute To Justice Thurgood MarshallL*, 45 RUTGERS L. REV. 889, 891 (1993).
23. *Id.* (citing GENNA R. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 24 (1983)).
24. *Id.* (citing Randall Bland, *Private Pressure on Public Law* (1973) (dissertation, University of Notre Dame), reprinted in Roger Goldman & David Gallen, Thurgood Marshall: Justice for All 23 (1992)).
25. *Id.*
26. *Id.*
27. *Id.*

Howard that challenged Marshall and his law student peers to skillfully use legal concepts to establish truth and justice for every one living in America without regard to the color of his or her skin.[28]

Marshall's legendary status as a civil rights lawyer is closely identified with the personal discrimination he suffered in education because of school segregation.[29] In *Sweat v. Painter,*[30] Marshall effectively convinced the Court to require the University of Texas Law School to admit African-American law students. The Supreme Court's denunciation of the *Plessy v. Ferguson* "separate but equal" theory at the law school level laid the groundwork for *Brown v. Board of Education.*[31] "In *Brown*, Thurgood Marshall won his most famous victory, the result of which—the invalidation of government-imposed school segregation—assured him a prominent place in the history of our country."[32]

Professor Wendy Brown-Scott has correctly stated that an examination of Justice Marshall's way of life and the jurisprudence he cultivated in school desegregation cases shows a faithful and dependable devotion to the integrative model.[33] Professor Brown-Scott utilized the expressions "integrative" and "integrationism" to illustrate the plan for establishing equality for members of racial and cultural minority groups in the United States by expanding the potential for those minority groups to racially blend with white Americans.[34] "In its most radical form, integrationism results in the virtual assimilation of the minority group into the dominant culture."[35] Marshall possessed an undying conviction that the "integrative ideal" was the best way for African Americans to win equal treatment under the law.[36] As a direct result of his strong belief in the integrationism model, "in school desegregation cases, Marshall faithfully advocated for dismantling segregated systems of public education and making affirmative efforts to racially integrate schools."[37]

After the Supreme Court rejected the "separate but equal" doctrine of *Plessy v. Ferguson*, the real question of how to effectively end the effects of racial segregation that were established and implemented by a state under the "separate but equal" theory had to be addressed by the Supreme Court.

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28. *Id.* at 891-92.
29. Powell, *supra* note 4.
30. *Id.* (citing 339 U.S. 629 (1950)).
31. *Id.* (citations omitted).
32. *Id.*
33. Wendy Brown-Scott, *Justice Thurgood Marshall and the Integrative Ideal*, 26 ARIZ. ST. L.J. 535, 537 (1994).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (citations omitted).

III. THE *GREEN* OPINION AND ITS "AFFIRMATIVE DUTY TO INTEGRATE" RATIONALE IN DE JURE SOUTHERN JURISDICTIONS WHERE RACIAL SEGREGATION WAS HISTORICALLY REQUIRED BY LAW

A close analysis of the *Green* opinion and its "affirmative duty to integrate" schools with a history of de jure segregation and discrimination based on race represents a dream opinion by the Supreme Court for Justice Marshall and the supporters of the integration model for public education. *Green* created an affirmative duty to integrate that is much more expansive and challenging than a simple prohibition against discrimination on the basis of race.

According to Mr. Justice Brennan, who delivered the opinion of the Supreme Court in *Green,* the issue was whether a Virginia School Board's implementation of a "freedom-of-choice" plan permitting a student to select the specific public school of her choice fulfills the Board's constitutional obligation to develop a race-neutral system for admitting students to a public school, as required by the *Brown* decision.[38] In holding that a state could not comply with *Brown*'s requirement to end racial segregation in public schools under a "freedom-of-choice" plan, the Supreme Court may have inadvertently killed a pragmatic means of integrating schools in the South and throughout the nation. Southerners, who were, on the whole, very opposed to any form of racial integration in public schools, no doubt considered that it was a very practical and pragmatic concession to allow those blacks, who wanted to attend historically all white schools, to attend them, and that the concession was a necessary evil in order to protect their right to receive federal dollars to support local education. The Supreme Court's demand that both white and black schools be dismantled in favor of unitary schools that could not be identified on the basis of race was more than most Southern whites could tolerate. In other words, white Southerners could tolerate the idea that it may be appropriate to allow blacks to attend a white school that remained predominantly white, but they could not accept the concept of a race-neutral unitary school that posed a real risk of robbing white students of their white identity by being assigned to a unitary school that was a de facto predominantly black school.

In 1965, eleven years after the *Brown* opinion, the plaintiffs in the *Brown* case filed suit asking for injunctive relief against the School Board because it was operating a racially segregated school system in New Kent County in rural Eastern Virginia.[39] Approximately fifty percent of its total population of 4,500 was African American. New Kent County was without residential segregation, and members of both races lived throughout the county.[40] The school system consisted of two schools, New Kent School in the eastern section of the county, and George W. Watkins School located in

38. *Green*, 391 U.S. at 431-32.

39. *Id.* at 432.

40. *Id.*

the western part of the county.[41] Of approximately 1,300 students who attended the two county schools, 740 students were African-American and 550 students were White.[42] The school district consisted of one white united elementary and high school (New Kent) and one shared African American elementary and high school (George W. Watkins). New Kent County did not have attendance zones.[43] The districts for both schools operated throughout the whole county.[44] Twenty-one school buses provided transportation for the two schools with overlapping countywide routes.[45] The New Kent County segregated school system was instituted and upheld under Virginia constitutional and statutory terms requiring racial segregation in public schools.[46] Although any Virginia law requiring racial segregation was held unconstitutional in 1954, the New Kent County School Board continued its segregated schools under the authority of laws enacted by Virginia after the *Brown* decision to show that Virginia was opposed to integration, notwithstanding the Court's holding in *Brown*.[47] On August 2, 1965, five months following the start of the lawsuit against New Kent County School Board, school officials were inspired to implement a freedom of choice desegregation plan so that the school district could continue to qualify for federal financial assistance.[48]

The federal Civil Rights Act of 1964 includes different sections.[49] Title VI prohibits racial discrimination by those receiving federal funds.[50] Title VI is associated with sections 601 and 602 of the Act.[51] Section 601 prohibits racial discrimination in federally funded activities.[52] Section 602 empowers federal agencies to pass regulations to implement the prohibition against racial discrimination.[53]

Under the "freedom-of-choice" plan in Virginia, each student, excluding incoming first and eighth graders, could, once a year, select between the white New Kent and the black Watkins schools, and those students who failed to choose a school were automatically assigned to the school they formerly attended. Thus, under the "freedom-of-choice" plan, first and eighth grade students had to affirmatively pick a school.[54] The District Court approved the New Kent County 'freedom-of-choice' plan.[55] The

41. *Id.*
42. *Id.*
43. *Id.*
44. *Green*, 391 U.S. at 432.
45. *Id.*
46. *Id.*
47. *Id.* at 432-33.
48. *Id.* at 433.
49. Derek Black, *Picking Up the Pieces After* Alexander v. Sandoval*: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356 n.3 (2002).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Green*, 391 U.S. at 433-34.
55. *Id.* at 434.

Court of Appeals for the Fourth Circuit affirmed the District Court's endorsement of the New Kent County "freedom-of-choice" plan.[56]

Before the Supreme Court's opinion in *Green,* the constitutional footing for the "freedom-of-choice" strategy was uncertain because the character of the racial discrimination denounced in *Brown* was ambiguous.[57] Unlike some commentators, I maintain that *Brown* rejected racial discrimination in public schools based on the color of a child's skin. The clear message of *Brown* to states is that "thou shall not refuse to admit a child to a public school based on the color of her skin." A close reading of the *Brown* opinion strongly suggests that it did not require states and school boards to dismantle racially identifiable schools. *Brown* created an affirmative duty on public school officials to stop denying admission to white schools because of the color of a person's skin. I agree with the position taken by the Fourth Circuit in *Green* that establishing a race-neutral free choice plan complied with the requirements of *Brown* by not considering the magnitude of the integration actually accomplished.[58] Unlike the Fourth Circuit, the Fifth Circuit,[59] in a 1966 decision, and the Eighth Circuit,[60] in a 1968 opinion, concluded that desegregation must be defined by integration and that the sufficiency of a "freedom-of-choice" plan had to be evaluated by the totality of the integration resulting from the plan. The example of separate 'white' and 'black' schools in New Kent County operating as required under state law is precisely the blueprint of segregation *Brown* I and *Brown* II focus on, and which *Brown* I declared unconstitutionally deprived black school children of equal protection under the law.[61]

The Supreme Court correctly accused public school officials in New Kent County of operating a dual school system for blacks and whites that encompassed segregation in every component of school functions—students, faculty, staff, transportation, extracurricular events and services.[62] According to the Supreme Court, the New Kent County school system was rendered unconstitutional by *Brown* I, and *Brown* II held that states must

56. *Id.*

57. *The Supreme Court, 1967 Term — Free Choice and Free Transfer Plans for School Desegregation*, 82 HARV. L. REV. 111, 112 (1968).

58. *Id.* at 112-13.

59. *Id.* at 113 (citing United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd with modifications on reh'g en banc,* 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); Singleton v. Jackson Municipal School Dist., 355 F.2d 865 (5th Cir. 1966)).

60. *Id.* (citing Kemp v. Beasley, 389 F.2d 178, 181 (8th Cir. 1968); Kemp v. Beasley, 352 F.2d 14, 20-21 (8th Cir. 1965); *but see* Kelley v. Altheimer School Dist., 378 F.2d 483, 490 (8th Cir. 1967) (*reh'g en banc denied*) (rejection of request that school board be ordered to integrate classes immediately, the court stating: ". . . we are not prepared to hold at this time . . . that desegregation . . . cannot be accomplished if students are permitted to attend the schools of their choice"); Clark v. Board of Educ., 369 F.2d 661, 666 (8th Cir. 1966) ("[T]he constitutionality of [a desegregation] plan does not necessarily depend upon favorable statistics indicating positive integration of the races . . .. The [free choice] system is not subject to constitutional objection simply because large segments of whites and Negroes choose to continue attending their familiar schools")).

61. *Green*, 391 U.S. at 435.

62. *Id.*

abolish a racially identifiable dual operating public school system and transition to a school system free of racial discrimination.[63] Immediately after *Brown* II, the Supreme Court said it had a goal of rejecting the traditional practice of *preventing* African-American children from entering schools attended by white students of similar age.[64] Under *Brown* II, the immediate goal of allowing black children to be admitted to historically white public schools was only a necessary first step.[65] "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about."[66] The 'complexities' associated with transitioning to a unitary system of public education without racial discrimination or racial identification inspired the Supreme Court to adopt an 'all deliberate speed' approach to the implementation of the compulsory integration principles of *Brown* I for those schools with an immediate history of operating a dual race-based separate but equal public school system.[67]

I find it very problematic that the Supreme Court in *Green* would impose a compulsory integration duty as opposed to an obligation to stop the practice of excluding a student from a school of her choice based on race. The unitary school rationale articulated by the Supreme Court was doomed to fail because it required Southern Jim Crow states to take immediate steps to desegregate by dismantling the racial identity of public schools. No doubt, many Southerners in 1968 visiting the larger Northern cities of Chicago and New York knew that although those two school systems did not operate under the "separate but equal" requirements of Jim Crow laws, they contain constitutionally permissible racially identifiable schools. I am sure many Southerners were offended by the very idea that Northerners, or those "damn" Yankees could maintain de facto segregated schools by the simple expedient of freedom of providing "freedom-of-choice" or neighborhood schools. The *Green* message, that unconstitutional segregation in the South can continue under the equal protection clause even after public officials stop discriminating against their former black slaves and allow them to go to school with white children, was hard for many Southerners to accept. Southerners in 1968 were confused and bitter about how white parents in the North could virtually escape racial integrations in public schools by simply admitting the small number of blacks who were actually available to attend racially identifiable white schools by virtue of living in a white neighborhood. Unlike Northern whites, Southern whites, because of *Green*, were not given an opportunity to virtually escape integrated public schools by implementing good faith race-neutral school policies in existing predominantly white schools.

63. *Id.* (citing Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown* II).
64. *Id.* at 435-36.
65. *Id.* at 436.
66. *Id.*
67. *Green*, 391 U.S. at 436.

Charles L. Zelden, an associate professor of History at Nova Southeastern University, writes that the *Green* opinion unexpectedly and unintentionally created a transformation in civil rights law in education.[68] The *Green* Court approached public school integration from the perspective of group-based results rather than the right of the individual to attend the school of her choice free of racial discrimination, even if that student is a racial minority of one.[69]

Four cases[70] written by Fifth Circuit Judge John Minor Wisdom concluded that although a "classification based on race is inherently discriminatory and viola[tes] the Equal Protection Clause of the Fourteenth Amendment,"[71] it is not enough to stop discriminating on the basis of race and to establish race-neutral admission criteria for admitting students in public schools in order to satisfy an affirmative duty to promote integration immediately. Judge Wisdom articulated the belief that "the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration."[72] The approach taken by Judge Wisdom and adopted by the Supreme Court in *Green* created an affirmative duty on public school officials to classify students based on race in order to integrate schools immediately.[73] According to Judge Wisdom in *Green*, "[T]he time ha[d] come for foot-dragging public school boards to move with clarity toward desegregation."[74] The only relevant issue in school desegregation cases was "how far have formerly de jure segregated schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school children," declared Judge Wisdom.[75] Under the integration vision presented by Judge Wisdom, any desegregation arrangement that did not totally do away with the existing dual-system of "separate but equal" education was a less than adequate plan; "Faculties, facilities and activities as well as student bodies must be integrated,"[76] under Judge Wisdom's vision. Judge Wisdom's advocacy in dismantling the dual system of racially identifiable education that existed under the historically dual de jure system practiced in the Southern states was later doomed to failure by

68. Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968-1974*, 32 AKRON L. REV. 471, 486 (1999).

69. *Id.* at 471.

70. *Id.* (citing Singleton v. Jackson Mun. Separate Sch. Dist., 348 F.2d 729 (5th Cir. 1965) (hereinafter *"Singleton I"*); Singleton v. Jackson Mun. Separate Sch. Dist., 355 F.2d 865 (5th Cir. 1966) (hereinafter *Singleton II*); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *cert. denied sub. nom.*, Caddo Parish Sch. Bd. v. United States, 389 U.S. 840 (1967) (hereinafter *Jefferson I*); United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967), *cert. denied sub. nom.*, Caddo Parish Sch. Bd. v. United States, 389 U.S. 840 (1967) (hereinafter *"Jefferson II"*)).

71. *Id.* (quoting Dorsey v. State Athletic Comm'n, 168 F. Supp. 149, 151 (E.D. La, 1958) (Judge Wisdom writing for a three-judge court)).

72. *Id.* (quoting *Jefferson I*, 372 F. 2d at 836, 869).

73. *Id.* (citation omitted).

74. Zelden, *supra* note 68, at 483 (citing *Jefferson I*, 372 F.2d at 896) (quoting *Singleton I*, 348 F.2d at 729).

75. *Id.*

76. *Id.* at 483-84.

the Supreme Court. The Court concluded that racially identifiable schools in Northern states with any history of "separate but equal" law in education could be found to violate the equal protection clause prohibition against a dual educational system if the school is found to have adopted policies that promote de facto segregation. The Northern de facto system of race based education with racially identifiable schools did not overtly discriminate against students in the admission process, but any state-sponsored purpose promoting racial segregation in a school district may prevent a school district outside the South from achieving *Green*'s requirement of integration of students.[77]

IV. THE *KEYES* DECISION AND HOW RACIALLY IDENTIFIABLE SCHOOLS IN THE NORTHERN STATES WITH NO HISTORY OF REQUIRING SCHOOLS TO FOLLOW THE "SEPARATE BUT EQUAL" DOCTRINE MAY HAVE CREATED A DUAL EDUCATIONAL SYSTEM IN VIOLATION OF THE SUPREME COURT'S AFFIRMATIVE DUTY TO INTEGRATE MANDATE ARTICULATED IN *GREEN*

No doubt Northerners knew that if Southerners were required to dismantle racially identifiable schools, that it probably was just a matter of time before the Supreme Court would either extend the *Green* rationale of no racially identifiable schools to the North at the request of either resentful white Southerners or pro integrationist blacks. Five years after its *Green* decision in 1973, the Supreme Court held in *Keyes* that the Denver, Colorado school district, a school district outside of the South without a history of de jure discrimination, could be liable for racial discrimination if it could be established that school officials intentionally separated blacks and Hispanics from whites in some of the schools in the district.[78] The Denver, Colorado schools had never functioned with either a constitutional or statutory mandate to implement racial segregation in public education.[79] In June 1969, parents of Denver schoolchildren filed a desegregation suit alleging that the School Board used a variety of methods, including the manipulation of student attendance zones, school site choices, as well as neighborhood school guidelines, to either construct or preserve racially or ethnically segregated schools in the school district, thereby giving plaintiffs the right to seek a ruling directing desegregation of the whole school district.[80] Rather than extend the *Green* affirmative duty to integrate to all public schools where segregation existed and segregation could be reduced or eliminated to create a unitary school, the Supreme Court limited its affirmative duty to integrate public schools to those situations where the challenger can demonstrate that the state has intentionally engaged in a practice of racial discrimination and that the racial discrimination was a

77. Keyes v. School District No.1, 413 U.S. 189 (1973).
78. *Id.*
79. *Id.* at 191.
80. *Id.*

leading cause in creating a racially identifiable school without regards to the geographical local of the school district.[81]

In the *Keyes* opinion, the Supreme Court does an excellent job of describing how racial segregation may be implemented in those jurisdictions like Colorado, where a statutory dual system was never needed to maintain the existence of real world school segregation.[82] In a state where racial segregation by law has never existed, plaintiffs may prove that public school officials have implemented a systematic policy of segregation touching a significant percentage of the students, schools, teachers, and facilities inside the school district; it is only common sense to presume there exists a basis for finding that dual school systems exists as a way of life in Denver or other Northern cities.[83]

The Supreme Court identified factors that support the presumption of a dual system of education as a way of life in the North.[84] "First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white."[85] Second, the practice of building a school to a specific size and in a definite location with substantial knowledge that the school serves a racially segregated population has the foreseeable effect of promoting racial segregation in other nearby schools.[86] Third, utilizing mobile classrooms, preparing student transfer policies, student bus routes, as well as the assignment of faculty and staff because of their race will have an impact on the racial composition of residential neighborhoods, thereby creating racial concentration or racial segregation within the schools.[87]

Under a theory of de facto dual segregation, the Supreme Court concluded that Northern School districts may violate the Equal Protection Clause of the Fourteenth Amendment by implementing a practice of segregation impacting a substantial part of the school district.[88] Under *Keyes v. School District No. 1,* proof of systemic racial segregation in schools produces a rebuttable presumption that a dual system is present.[89] Once the Court makes the determination that a dual system is present in a system that did not require segregation by law, the defendant school district, under the rationale of *Keyes*, has the burden of producing sufficient evidence to overcome a presumption of a dual educational system.[90]

Any school district operating a dual de jure system in 1954 had an "affirmative duty to take whatever steps might be necessary to convert to a

81. *Id.* at 189.
82. *Keyes*, 413 U.S. at 201.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 201-02.
87. *Id.* at 202.
88. *The Supreme Court, 1978 Term —The Scope of the Affirmative Duty to Desegregate Schools*, 93 HARV. L. REV. 119, 120 (1979) (citing Columbus Board of Education v. Penick, 443 U.S. 456 (1979)).
89. *Id.* at 120.
90. *Id.* (citing *Penick*, 443 U.S. at 458).

unitary system in which racial discrimination would be eliminated root and branch." [91] The Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*[92] stated that the affirmative duty requirement is not met if one could identify white or black schools; the mere existence of black or white schools created a prima facie constitutional violation, thereby authorizing a court to grant an expansive integration remedy.[93] The drive toward unitary schools that could not be identified as black or white was the beginning of the end of the court's approval of school integration for integration sake. Under the school "for integration sake" model, a school district possessing black and white schools was presumed to be in violation of the constitution. Under *Green*'s "thou shall integrate" approach, even if a school system was free of racial discrimination because it was prospectively enforcing its policies prohibiting discrimination, the continuing existence of schools identified as either black or white would create the presumption of a continuing constitutional violation. For those taking part in the *Green*'s "thou shall integrate immediately" tactic, the only way to demonstrate that a school system had cured its history of either de jure or de facto discrimination was to destroy any visible evidence of either white or black schools by creating unitary schools free of any racial identity.

After the *Brown v. Board of Education* decision made racial segregation unconstitutional in public schools, courts and commentators failed to reach a consensus about the constitutional set of guidelines essential to understanding the rationale in *Brown*.[94] A number of people believed a violation occurred because of the way in which the racial segregation occurred: unequivocal state sponsored racial discrimination. According to the separate but equal interpretation, *Brown* recognized a constitutional concept of equality before the law and advanced the goal of a colorblind government.[95] The interpretation based on the rejection of the separate but equal theory made a distinction between unconstitutional de jure racial segregation in public schools required by law and constitutionally acceptable de facto segregation, which occurs for reasons other than governmental conduct.[96]

A different school of thought believed that *Brown* supported the theory that all "separate educational facilities are inherently unequal."[97] Under the "separate equals inherently inferior" school of thought, any racial separation in public schools, regardless of how it came into existence, was the evil condemned in the *Brown* opinion.[98] From this perspective, "the distinction between de facto and de jure segregation was illusory; the

91. *Id.* at 121; see *Penick*, 443 U.S. at 458; *see also* Green v. County School Bd., 391 U.S. 430, 437-38 (1968)).

92. 402 U.S. 1 (1971).

93. *Id.* at 18, 26 (citing *Penick*, 443 U.S. at 460).

94. *See* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/ De Jure Distinction*, 86 YALE L. J. 317 (1976).

95. *Reading the Mind, supra*, at 317.

96. *Id.* (citation omitted).

97. *Id.* at 318.

98. *Id.* (citation omitted).

black child in an all-black school in New York was no less victimized by his isolation than the black child in the segregated schools of Mississippi."[99]

In *Keyes v. School District No. 1*, the Supreme Court disappointed integrationists who desired a pronouncement that "there is but one Constitution" and a funeral for the de facto/de jure distinction.[100] If the majority of the Supreme Court had adopted the reasoning of the concurring opinions of Justices Douglas and Powell in *Keyes* integrationist would probably have been happy because those two Justices stated that the Equal Protection Clause of the Fourteenth Amendment, when applied to public school segregation cases, should not make any distinction between de facto and de jure segregation.[101] In 1973, many integrationists, no doubt, would have concluded that a rejection of the de jure/de facto distinction in the school desegregation cases would result in the *Green* affirmative duty to integrate unitary schools being applied nationally and would result in the elimination of racially identifiable schools in the de facto segregated North as well as in the de jure segregated South.[102]

In his concurring opinion in *Keyes,* Justice Douglas bluntly stated why he thought there was no constitutional separation between de jure and de facto segregation: because each form of racial isolation is the result of state conduct or policies.[103] If a "neighborhood" or "geographical" unit is racially identifiable because restrictive covenants hold back certain areas for the "elite" while forcing those considered "undesirables" to move elsewhere, state action exists under the constitution because the power of the law supports those covenants.[104] That is, state action exists under the Constitution when public funds are allocated by urban development entities to create racial ghettoes.[105] When a school district is racially integrated but the races are segregated in different schools, black teachers are assigned almost absolutely to black schools, the school board shuts down those schools located in racially diverse areas and builds new schools in either black areas or in outlying white areas, and the school board enforces a "neighborhood" school policy at the elementary level in segregated neighborhoods, state action exists.[106] State action advancing school segregation in the North is relatively different from the classical de jure type of Southern school segregation. Justice Douglas stated that labeling public school officials promoting segregation as "de facto is a misnomer, as they are only more subtle types of state action that create or maintain a wholly or partially segregated school system."[107] When a State helps create a racial

99. *Id.*

100. *Id.* (*See* Diamond, *Sclicol Segregation in the North: There Is But One Constitution,* 7 HARV. C.R.-C.L.L. REV. 1 (1972)); Karst, N*ot One Law at Rome and Another at Alliens: The Fourteenth Amendment in Xatiomvide Application,* 1972 WASH. U.L.Q. 383.

101. *Keyes*, 413 U.S. at 214-15 (Douglas, J., concurring).

102. *Id.* at 215.

103. *Id.* at 216.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Keyes*, 413 U.S. at 216 (Douglas, J., concurring).

"neighborhood," it is a mockery of justice to regard that neighborhood as free from the taint of state action.[108] Under the Constitution, a state is prohibited from designing racially identifiable ghettoes that decide whether or not one is compelled to attend a certain school.[109] Clearly, Justice Douglas believed that because state action is used to advance segregation in schools, *Green*'s duty to affirmatively create unitary schools that promote integration should be applied uniformly without distinction in both de facto and de jure jurisdictions.[110] In *Keyes*, Justice Powell, objected to the Supreme Court's continued recognition of the de jure/de facto distinction because he believed that the de facto rationale created a situation that impaired school desegregation in the North.[111]

The situation in Denver is comparable to other big cities in America with a substantial minority population where school desegregation has not been mandated by our federal courts.[112] The Court stated in *Keyes* that "[t]here is segregation in the schools of many of these cities fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half . . .[and] [t]he focus of the school desegregation problem has now shifted from the South to the country as a whole."[113] In spite of the South's history of foot dragging, more substantial progress in achieving school integration has been achieved in Southern States.[114] "No comparable progress has been made in many non-southern cities with large minority populations primarily because of the de facto/de jure distinction nurtured by the courts and the accepted complacency by many of the same voices that denounced the evils of segregated schools in the South ."[115] Justice Powell said, if America is truly ***involved*** in helping those who attend

108. *Id.*

109. *Id.* at 216-17.

110. *Id.* at 214.

111. *Keyes*, 413 U.S. at 218-19 (Powell, J., concurring in part and dissenting in part).

112. *Id.*

113. *Id.*

114. *Id.* at 192. According to the 1971 Department of Health, Education, and Welfare (HEW) estimate, 43.9% of Negro pupils attended majority white schools in the South as opposed to only 27.8% who attended such schools in the North and West. Fifty-seven percent of all Negro pupils in the North and West attend schools with over 80% minority population as opposed to 32.2% who do so in the South. 118 Cong.Rec. 564 (1972).

115. *Keyes*, 413 U.S. at 218-19 (finding that the 1971 HEW Enrollment Survey dramatized the segregated character of public school systems in many non-southern cities. The percentage of Negro pupils who attended schools more than 80% black was 91.3 in Cleveland, Ohio; 97.8 in Compton, California; 78.1 in Dayton, Ohio; 78.6 in Detroit, Michigan; 95.7 in Gary, Indiana; 86.4 in Kansas City, Missouri; 86.6 in Los Angeles, California; 78.8 in Milwaukee, Wisconsin; 91.3 in Newark, New Jersey; 89.8 in St. Louis, Missouri. The full data from the Enrollment Survey may be found in 118 Cong.Rec. 563-566 (1972); *Id.* 219; As Senator Ribicoff recognized: 'For years we have fought the battle of integration primarily in the South where the problem was severe. It was a long, arduous fight that deserved to be fought and needed to be won.'Unfortunately, as the problem of racial isolation has moved north of the Mason-Dixon line, many northerners have bid an evasive farewell to the 100-year struggle for racial equality. Our motto seems to have been 'Do to southerners what you do not want to do to yourself.' 'Good reasons have always been offered, of course, for not moving vigorously ahead in the North as well as the South. 'First, it was that the problem was worse in the South. Then the facts began to show that that was no longer true. 'We then began to hear the de facto-de jure refrain. 'Somehow residential segregation in the North was accidental or de facto and that made it better than the legally supported de jure segregation of the South. It was a hard distinction for black children in totally segregated

segregated schools in the North rather than for perpetuating the de facto/de jure legalism rooted in history and not contemporary reality, America and the Court must acknowledge that the evil of operating separate schools is no less in de facto Denver than in historically de jure Atlanta.[116] I believe the de facto/de jure distinction created a North-South double standard for achieving integrated public school that has lead to the demise of the *Green* unitary standard in school desegregation for all practical purposes.

V. How the Supreme Court Implicitly Abandoned Its "Affirmative Duty to Integrate In Public Schools to Achieve A Unitary Schools" Remedy

By 1975, the Supreme Court appeared to simply require public school officials to stop discriminating against students on the basis of race, and once the state demonstrates that it is no longer practicing intentional racial discrimination the Supreme Court will not require a state to remedy the continuing societal effects of Jim Crow and economic discrimination, regardless of the predominant racial identity of the school's student body.[117] In fact, an analysis of the 1975 decision in *Pasadena City Board of Education v. Spangler* reveals that public school officials do not have authority to use race conscious remedies to promote racial integration when the current school segregation is not the result of state sponsored or endorsed policies.[118] Justice Rehnquist, while serving as a Circuit Justice for the Supreme Court in *Pasadena City Board of Education,* apparently believed that a school could move from a century or decades of de jure segregation to a unitary school system by obeying a school desegregation order for four years and avoid the open-ended power of the trial judge who entered the desegregation decree.[119]

In my opinion, the *Pasadena School Board* decision was a signal that the Supreme Court was prepared to abandon the *Green* requirement that racially identifiable schools be dismantled and replaced with unitary schools that cannot be identified by race. In a 1996 law review article, one commentator, Bradley W. Joondeph, correctly observed that the 1995 *Missouri v. Jenkins*[120] decision by the Supreme Court represents a significant implicit or de facto abandonment by the Court of the *Green* desegregation remedy.[121] The *Jenkins* opinion demonstrates that the Court was committed to ending all far-reaching court-ordered desegregation remedies.[122]

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schools in the North to understand, but it allowed us to avoid the problem.' 118 Cong.Rec. 5455 (1972); *Id.* at 219.

116. *Keyes*, 413 U.S. at 219.

117. *See generally* Pasadena City Board of Educ. v. Spangler, 423 U.S. 1335 (1975).

118. *Id.*

119. *Spangler*, 423 U.S. at 1336.

120. 515 U.S. 70 (1990).

121. Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Desegregation*, 71 Wash. L. Rev. 597, 598 (1996).

122. *Id.*

The rationale articulated in *Jenkins* indicates a significant shift in the Court's remedy for school desegregation cases.[123] Prior to *Jenkins*, the Court created a presumption under its *Green* rationale that a previously segregated school district had an affirmative duty to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[124] Jenkins demonstrates the Court's hostile attitude toward the unitary school desegregation remedy and long-drawn-out judicial management of public schools.[125] Once school officials have put into operation a desegregation plan, the Supreme Court under *Jenkins,* unlike *Green,* implicitly presumes the district court should give local school officials the power to manage their schools as soon as possible, although the school may remain racially identifiable and not unitary because the effects of past discrimination remain.[126]

Jenkins demonstrates how the Court ended the era of court-enforced desegregation.[127] While ending court enforced school desegregation remedies, the Supreme Court has refused to provide an unequivocal reexamination of the constitutional theories that it provided as a justification to impose school segregation remedies in *Green* or *Keyes*.[128] According to Joondeph, the Court has engaged in a de facto, not a de jure, dismantling of federal court control of historically segregated school districts.[129] *Jenkins* represents the end of court-ordered desegregation. *Jenkins* is the ultimate decision in a trilogy of school desegregation cases implicitly ending federal courts supervision of school cases by the Rehnquist Court. In regards to *Board of Education v. Dowell*,[130] *Freeman v. Pitts*,[131] and *Jenkins*, the Court demonstrated a pattern of restricting desegregation remedies and accelerating the restoration of the management of historically segregated schools systems to local officials.[132]

Justice Scalia and Justice Thomas have urged the Court to reject the desegregation remedies approved by the Court in *Green*.[133] Justice Scalia and Justice Thomas assert that the foundation supporting the *Green* approach is now obsolete, and that the standards articulated in *Green* are not a true and accurate interpretation of *Brown v. Board of Education* or the

123. *Id.*

124. *Id.* at 598-99 (citing Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968); *see also* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972) (stating that formerly segregated school systems must effectuate nothing less than "complete uprooting of the dual public school system")).

125. Joondeph, *supra*, at 599.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* (citing Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (distinguishing de jure from de facto discrimination). More precisely, the Court has *intentionally* abandoned court-enforced desegregation, implicitly and incrementally rather than candidly and definitively.

130. Joondeph, *supra*, at 599 (citing 498 U.S. 237 (1991)).

131. *Id.* (citing 503 U.S. 467 (1992)).

132. *Id.*

133. *Id.* at 600.

Equal Protection Clause.[134] In 2008, I support the suggestion that a majority of the Supreme Court has been persuaded by Justice Scalia's and Justice Thomas' rejection of the *Green* desegregation remedy "but, due to *Green*'s symbolic importance, are unwilling to state so explicitly."[135]

The 2007 Supreme Court decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[136] sends the message that school integration is a permissible remedy as an incidental byproduct of those laws and school polices designed to implement a goal of prohibiting discrimination based on race.

The Seattle, Washington School District had never been subjected to a school desegregation mandate. The Seattle School Board used race as a factor when deciding how many children of a specific race could attend a particular school.[137] Jefferson County, Kentucky, had a history of being subjected to a court mandate to desegregate which ended in 2000.[138] Although Jefferson County was awarded unitary status by the court, it developed a race conscious plan to maintain a diversified racial balance in its schools.[139] Parents in Seattle and Jefferson County whose children were not admitted to certain schools because of race-conscious student assignments successfully filed a lawsuit alleging discrimination based on race.[140]

On June 28, 2007, the Supreme Court held the race-conscious assignment were a violation of the constitutional prohibition against racial discrimination. Justice Roberts' statement in the Seattle and Jefferson County, Kentucky cases that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[141] represents a new reality in school desegregation cases. The new reality simply means that the Constitution will only prohibit racial discrimination in public schools, and that public schools may someday become integrated as a byproduct of law prohibiting discrimination, but school integration has no independent legs of its own.

Some commentators conclude that "judicial desegregation in the U.S. faces an uncertain future."[142] I think the judicial fate of desegregation has been decided by both logic and experience. For the foreseeable future, the only thing certain about judicial desegregation is that school officials are required to stop discriminating against students and others in education; but the Supreme Court will not require any school to engage in compulsory integration in order to dismantle a segregated school unless the plaintiff

134. *Id.*

135. *Id.*

136. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (The decision involved the Seattle School District and a case from Jefferson County, Kentucky).

137. *Id.*

138. *Id.* at 2741.

139. *Id.*

140. *Id.*

141. *Id.* at 2768.

142. Stephen J. Caldas & Carl L. Bankston III, *A Re-Analysis of the Legal, Political, and Social Landscape of Desegregation from Plessy v. Ferguson to Parents Involved in Community Schools v. Seattle School District No. 1*, 2007 B.Y.U. EDUC. & L.J. 217, 255 (2007).

can demonstrate that a school is segregated because of an intentional governmental purpose.[143]

As all Americans debate the merits of school desegregation, a number of contemporary black American leaders challenge the belief that all-black institutions are inherently inferior, which they contend is the rationale for promoting school desegregation efforts at the expense of policies that prohibit racial discrimination.[144] In Topeka, Kansas, where some commentators believed the desegregation era was created, a former black superintendent points the finger at desegregation itself, on the 50th anniversary of the *Brown* decision, as being responsible for the poor academic performance of many African-American students. Furthermore, "the closing of black neighborhood schools—with their traditions, yearbooks, mottoes, fight songs and halls of fame" took away the desire for academic success in some African-Americans because of a loss of racial pride and identity.[145]

According to Professor Kimberly Jade Norwood, two considerable factors impair the academic development of Black youth: (1) societal and/or institutional discrimination, and (2) unhealthy conduct inside the Black community. The societal and/or institutional factors continue to increase.[146] The goal of *Brown v. Board of Education* is far from the ugly reality of race and class separation that exist in American public education today.[147] In 2008, America falls short of the disgusting legal standards approved in *Plessy v. Ferguson.* In 2008, public schools are unequivocally separate, but clearly not equal.[148] "Moreover, not only have schools retreated from active implementation of the goals of *Brown*, but even districts wanting to continue the legacy face attack."[149] "Governments are not spending the dollars needed to rebuild schools and educate children in nonfunctioning or poor functioning school districts."[150] Professor Norwood contends these external oppressors demand maximum preference on the 2008 civil rights agenda.[151] Professor Norwood correctly believes "that

143. *Id.*

144. *Id.* at 255. (citing STEPHEN J. CALDAS & CARL L. BANKSTON, FORCED TO FAIL: THE PARADOX OF SCHOOL DESEGREGATION 206-07 (2007) (quoting influential black leaders in the U.S. who have begun to question the theory of school desegregation which implies that blacks cannot receive a quality education in predominantly African American institutions)).

145. *Id.* (citing David E. Thigpen, *An Elusive Dream in the Promised Land*, TIME, May 10, 2004, at 32.)

146. Kimberly Jade Norwood, *Blackthink's™ Acting White Stigma in Education and how it Fosters Academic Paralysis in Black Youth*, 50 HOW. L.J. 711, 727 (2007).

147. *Id.* (citation omitted).

148. *Id.* (citing SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 208 (2004).

149. *Id.* (referring to Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007)).

150. *Id.* (citing Campaign for Fiscal Equity, Inc. v. State, 8 N.E.2d 50 (N.Y. 2006); see also David M. Herszenhorn, New York Court Cuts Aid Sought for City Schools, N.Y. TIMES, Nov. 21, 2006, at A1).

151. *Id.* at 728 (citing BEYOND ACTING WHITE: REFRAMING THE DEBATE ON BLACK STUDENT ACHIEVEMENT (2006); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004); JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 202-09 (2006); MANO SINGHAM, THE

even if we remedy every single external force of oppression, there will still be internally challenging behaviors that need to be confronted.[152] Societal and/or institutional discrimination does not thoroughly explain how some Black students do not want to be placed in advanced placement courses or do not want to perform well in school and on school exams because of a belief that such behaviors are acting White."[153]

Black America, we have a problem when we allow a significant number of African-American students in secondary education to equate academic success and scholastic achievement with "acting white." Any student, regardless of race or class, who believes that academic success and scholastic achievement is characterized by "acting white" should probably stop "acting dumb."

VI. CONCLUSION

Jim Crow schools will never return to the American landscape, but I think racially identifiable schools will remain part of the American landscape as long as there are racially identifiable neighborhoods. Dr. Richard Fry, a senior research associate at the Pew Hispanic Center, contends that the Supreme Court holdings in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County (Ky.) Board of Education* have created additional interest in the racial and ethnic makeup of the nation's public schools.[154] In the preceding 15 years, considerable change has occurred in the demographics of public schools.[155] The Census Bureau reports school enrollment (public and private) was at an all-time high in October of 2005 with approximately fifty-million students.[156] In 2005-06, Hispanic and black students attending public schools were likely to have very limited contact with white students.[157] In 2005-06, approximately fifty-six percent of Hispanic students attended public schools that were majority Latino, and the majority Latino schools only educated merely three percent of America's white students. In the same

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ACHIEVEMENT GAP IN U.S. EDUCATION: CANARIES IN THE MINE (2005); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF Brown v. Board of Education (2004); JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT 3-4 (2003); RONALD F. FERGUSON, TEACHERS' PERCEPTIONS AND EXPECTATIONS AND THE BLACK-WHITE TEST SCORE GAP, IN THE BLACK-WHITE TEST SCORE GAP 273-317 (1998); John U. Ogbu, *Collective Identity and the Burden of Acting White in Black History, Community, and Education*, 36 URB. REV. 1, 17 (2004); *Id.* at n.71.

152. *Id.* at 728.

153. *Id.* at 728-29. "Many of these behaviors were caused by societal and institutional oppression, but they are being sustained by the student. We have to be able to admit this and discuss this—without accusing the messenger of blaming the victim, or labeling the messenger as an Oreo, being seduced by oppression, or being branded an elitist out of touch with reality—if we are going to help Black youth get off the path of self-destruction and back on the path of self-worth. Such redirection is required to help Black youth take advantage of the academic opportunities bestowed upon them by countless freedom fighters in the struggle for educational equality." *Id.*

154. RICHARD FRY, THE CHANGING RACIAL AND ETHNIC COMPOSITION OF U.S. PUBLIC SCHOOLS 1 (Pew Hispanic Center August 30, 2007).

155. *Id.*

156. *Id.*

157. *Id.* at 6.

way, half of the nation's African American students were enrolled in majority-black public schools in 2005-06, and the majority-black public schools instructed only two percent of the white students in the United States.[158]

Justice Marshall's reputation strongly suggests that he supported the theory that the *Brown* decision requiring that all segregated schools be immediately dismantled to achieve equality, as articulated by *Green*, was mere a starting point. Although Justice Marshall joined the majority opinion in *Green,* I am sure he would extend the requirement of dismantling segregated schools to each and every state regardless of its historical de jure or de facto status if he had the power to do so.[159] I am convinced that the current Supreme Court under Justice Roberts has implicitly rejected *Green*'s mandate to integrate in favor of a color blind approach to school assignment at the secondary and elementary level. With all due respect to my hero Justice Marshall, the true legacy of *Brown* is an end to the enforcement of the separate but equal theory by law for the purpose of promoting segregation. Because of Thurgood Marshall's role in the *Brown* opinion, America has demonstrated the political will to end intentional state-imposed race based discrimination in public education, but America does not currently possess the political willpower to compel school integration wherever de facto segregation exists. The *Green* opinion represents an attempt by the Supreme Court to compel school integration in school districts in a historically de jure state, which had not reached unitary status. In its 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court's decision strongly suggests that *Green* is no longer followed by the Court as a practical matter.[160] The Court's implicit overruling of *Green's* goal of establishing unitary schools without racial identification has made de facto racial segregation constitutionally permissible under a uniform national standard. In abandoning *Green,* the Supreme Court relieves a school system of a duty to affirmatively create unitary schools unless that school system is engaging in intentional state sponsored racial segregation.

158. *Id.*
159. *Green*, 391 U.S. 430 (1968).
160. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).