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Public education in the United States in a post-Brown era: the antinomies of equal protection doctrine

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A Thesis Submitted to the

Department of Law

in partial fulfillment of the requirements for the degree of Master of Arts in International Human Rights Law

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Sarah Rizk

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ABSTRACT

In the United States, public schools are primarily financed by local tax on property. This property-tax-based system of finance is advantageous for people living in wealthy districts, as they benefit from greater educational funding resources. Residents of poorer districts, however, have the disadvantage of higher taxation that is needed to balance the deficit created by the lower value of property in these areas in order to finance local services. Through the use of local exclusionary planning and zoning powers, local governments can ensure that residents contribute a minimum amount of taxation to fund local services and to zone out "expensive students" who need more funds than their wealthier peers while their families contribute less to the local tax pool. In a society with a history of racial discrimination, this system has led to the creation of structural segregation in education that follows a pattern of residential segregation. Society's adoption of equal opportunity rhetoric since the successful challenge of legal segregation in *Brown* has masked this reality and made it more difficult for depressed minorities to explain their condition. The injustice is produced by the interplay between historical subordination and a vague suspicion that equality has been achieved when formal barriers were removed. The potential for change was both created and limited by engaging the rights discourse because the emphasis on formalism and colorblindness since *Brown* has rendered the achievement of formal equality an end in itself. This makes it very difficult to redress the lasting material disadvantage that resulted from a discriminatory past because the dominant theory of equal protection that is infused with an "anti-differentiation" understanding of the law often rules out remedial policies that use race-based classifications.

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I. Introduction

> Education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[1]

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. […] Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.[2]

> [T]he majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.[3]

The United States has a long history of racial segregation that formally ended in 1954 with the Supreme Court's promise in *Brown v. Board of Education*[4] to make education available to all on equal terms. Racial segregation was, however, not restricted to public education, and *Brown's* message that separate is inherently unequal was soon accepted as precedent beyond the education context to prohibit state-sanctioned racial discrimination in the entire public domain. Apart from education, segregation was most pervasive in the housing sector. For many years, the official policy of the federal government was to promote homeownership and single-family residence in place of low-income housing projects. By creating incentives for middle-class families to abandon the city for the suburbs, the government-sponsored housing program accelerated the decline of inner city

[1]Brown v. Board of Education (Brown), 347 U.S. 686, 483, 493 (1954).
[2]San Antonio Independent School District v. Rodriguez (Rodriguez), 411 U.S. 1 (1973).
[3]*Rodriguez*, 411 U.S. at 70 – 71, J. Marshall dissenting opinion.
[4]*Brown,* 347 U.S. at 483.

neighborhoods and forever altered the character of housing in the United States. The economic exclusion of racial minorities in the United States today coupled with the tradition of local school finance have ultimately led to the "re-segregation" of public schools that began when white and wealthy families abandoned the cities for the suburbs, causing the poor inner-city schools to deteriorate further.

This paper examines the legal system that allowed for economic exclusion to replicate previous racial exclusion and ultimately produced a problem of structural segregation in the American public education system. This problem is certainly more complex and multi-layered than government-mandated segregation of housing and public education. Whereas it was racism that was the driving force behind social change activism in the 1950s and 1960s, racism alone will not do as an explanation for the current plight of racial minorities that find themselves in a situation of economic exclusion. At the same time, the problem cannot be explained only in terms of economic exclusion and lack of access to public education due to disparities in income, because there is an evident racial dimension to the problem that cannot be ignored. The point is that just because the problems with public education in the post-*Brown* era cannot be solely attributed to race does not mean that race is irrelevant. It seems, however, that society's adoption of the rhetoric of equal opportunity law since the successful challenge of segregation in *Brown* has masked this reality and made it more difficult for depressed minorities to explain their condition.

Education jurisprudence after *Brown* will be analyzed in the paper in order to show how the potential for change was both created and limited by engaging the rights discourse to challenge unequal education. Since *Brown*, courts have adopted an approach to equal protection analysis that prioritizes colorblindness and race-neutrality over redressing the lasting effects of a history of racial subordination. Formal equality has been seen as an end in itself which made it more difficult to achieve a real break with the discriminatory past. Racial subordination lingers and takes on different forms after the repeal of segregation laws. The equal protection doctrine under the dominant anti-differentiation approach and its emphasis on colorblindness fails to redress this subordination because it cannot recognize it. The failure of equal protection to remedy current inequities between whites and racial minorities is evidenced by the fact that, as

will be shown, litigants in education reform cases have shifted their focus from equality to adequacy as the goal after the repeated failure of equal protection challenges in the aftermath of *Brown*.

In this sense, this research is essentially an inquiry into the relationship between law and equality and how a legal equality framework can be biased against groups with a history of racial subordination. Its objective is to ultimately show that *Brown* has failed as a framework for social change through the courts. It will be argued that racial minorities need a post-*Brown* strategy that is grounded in their particular reality because the insensitiveness of the present equal protection doctrine to the history of racial subordination coupled with its emphasis on colorblindness obstructs progress and stands in the way towards a more equal world.

II. The History of Public Education in the United States

A. Legal Segregation

Free public education is firmly rooted in the history of the United States. The concept was introduced in American society as early as 1643 when the State of Virginia instituted a system of compulsory apprenticeship for certain groups including orphans, poor children and children born out of wedlock.[5] By the middle of the nineteenth century, schooling in the United States had reached exceptionally high levels, among free Americans, and literacy was virtually universal, once again among the free population.[6]By contrast, slaves were categorically excluded from formal school instruction until 1865 when slavery was abolished by the Thirteenth Amendment to the Constitution, while free blacks attended – if at all – segregated schools which typically suffered from the lack of funds, trained teachers and equipment.

The Fourteenth Amendment to the Constitution improved the legal rights of blacks, in particular the freed slaves, by granting them the "equal protection of the law." In spite of the Fourteenth Amendment, many states throughout the South enacted so-

[5] U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Report of the Special Rapporteur on the right to education: Mission to the United States of America*, ¶ 4, U.N. Doc. E/CN.4/2002/60/Add.1 (January 17, 2002) (*prepared by* Katarina Tomašesvski).

[6] Claudia Goldin, *A Brief History of Education in the United State* 1 (Nat'l Bureau of Econ. Research, Historical Paper No. 119, 1999).

called "Jim Crow laws" that mandated segregation of whites and racial minorities in all public facilities. In 1892, one such "Jim Crow law" was challenged in court for the first time. In a train of the East Louisiana Railroad, a passenger, Homer Plessy, who was classified as "Black" according to Louisiana law refused to leave the car for whites which ultimately lead to his arrest. Plessy challenged the arrest in court, arguing that that the legal separation of blacks from whites on trains violated the Equal Protection Clause of the Fourteenth Amendment. In 1896, his case was heard by the United States Supreme Court in *Plessy v. Ferguson*[7]. By a vote of 8-1, the Supreme Court ruled against Plessy. In establishing the "separate but equal" doctrine for which it is famous, *Plessy* distinguished between *social* and *political* rights of citizenship:

> The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.[8]

Plessy established a framework which was used to justify a system of complex laws and regulations that assigned blacks an inferior position vis-à-vis their white peers not only in education, but in all walks of social life from public accommodation to water fountains and swimming pools. The "separate but equal" doctrine established in *Plessy* dominated the understanding of the Fourteenth Amendment's equal protection guarantee for more than half a century. However, in 1954, the United States Supreme Court overturned this doctrine in its landmark decision in *Brown v. Board of Education* by ultimately striking down the system of segregated public schooling. In *Brown,* the Supreme Court consolidated five separate cases involving black children whose admission to public schools attended by white children was denied on the basis of their race. The Court held that the "segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws

[7]Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
[8]MARVIN JONES, THE ORIGINAL MEANING OF BROWN: SEATTLE, SEGREGATION AND THE REWRITING OF HISTORY, UNIVERSITY OF MIAMI SCHOOL OF LAW 3 (2001), http://ssrn.com/abstract=1290667 (quoting Plessy v. Ferguson, 163 U.S. 537, 544 (1896)).

guaranteed by the Fourteenth Amendment."[9]Furthermore, the Warren Court declared that education is "the most important function of state and local governments,"[10] and found that "separate educational facilities are inherently unequal."[11] The Court argued that separating children from others solely on the basis of their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[12]

The Supreme Court's ruling in *Brown* transcended racial segregation, as it led to the implementation of equal opportunity in a wide range of educational policy areas, including school disciplinary practices and bilingual education.[13]*Brown* was also accepted as precedent beyond the education context to prohibit government-sanctioned racial discrimination in every other area of public life.[14] It provided the foundation for challenging unconstitutional practices in other social policy areas and extending egalitarian principles to other historically marginalized groups, such as women, the elderly and the disabled.[15] As desegregation and issues relating to equal educational opportunity became part of the courts' agenda, integrative remedies to overcome inequity were ordered by the courts on a number of occasions to implement the *Brown* mandate. Congress supported the courts' efforts to secure a meaningful educational opportunity to the victims of school segregation by enacting the first major education aid act (Title I of the Elementary and Secondary Education Act of 1965) and passing Title VI of the 1964 Civil Rights Act that empowered the government to cut federal funding to any school district that was involved in discrimination on the basis of race, color or national origin.[16]

B. Structural Segregation

Apart from public education, segregation was most pervasive in the housing sector. According to Kenneth Jackson, "[n]o agency of the United States government has had a more pervasive and powerful impact on the American people over the past half-century

[9]*Brown,* 347 U.S. at 483.
[10]*Brown,* 347 U.S. at 493.
[11]*Brown,* 347 U.S. at 495.
[12]*Id*.
[13]Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts,* 85 N.C. L. REV. 1490 (2006-2007).
[14]*Id*.
[15]*Id*. at 1491.
[16]*Id*. at 1494 – 1495.

than the Federal Housing Administration (FHA)."[17] In fact, segregation in housing was for many years an official policy of the federal government entrusted to the FHA which was created as part of the National Housing Act in 1934. Perhaps it is important here to dedicate a few paragraphs to explaining the role of the FHA in housing segregation in order to provide a fuller picture of how segregation in housing in the first half of the twentieth century helped transform de jure segregation into a problem of structural segregation in the education system that follows a pattern of residential segregation.

The FHA did not build houses, but it insured long-term mortgage loans that were made by private lenders to construct and sell homes against loss, "with the full weight of the United States Treasury behind the contract."[18] FHA-secured loans benefited the construction industry as well as potential homebuyers in many different ways with the result that the number of American families who could realistically consider the option of becoming homeowners increased substantially, as it oftentimes was cheaper to buy than to rent houses. First, as opposed to the time before the FHA began its operation when first mortgages were limited to one-half or two-thirds of the value of the property, a lender whose mortgage loan was insured by the FHA was able to grant credit that amounts to about 93 percent of the collateral.[19] This meant that the down payments mortgagors had to make did not exceed ten percent. Second, the repayment period of FHA-secured loans was extended to twenty five to thirty years.[20] Furthermore, because the risk to financial institutions if a loan was not repaid by the mortgagor was almost nonexistent, interest rates fell by two or three percentage points compared to the 1920s.[21] These changes together with the minimum standards for home construction that were established by the FHA revolutionized the construction industry and fundamentally altered production and consumption behavior in the housing market. Jackson goes even further: "the middle-class suburban family with the new house and long-term, fixed-rate, FHA-insured mortgage became a symbol, and perhaps a stereotype, of the American way of life."[22]

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[17] KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985) *in* GERALD E. FRUG, RICHARD T. FORD AND DAVID J. BARRON, LOCAL GOVERNMENT LAW: CASES AND MATERIALS (4TH ED.) 317 (2006).
[18] Jackson, *supra* note 17.
[19] *Id*. at 317 – 318.
[20] *Id*. at 318.
[21] *Id*.
[22] *Id*.

The obvious flipside of FHA programs was that they accelerated the decline of inner city neighborhoods by creating incentives for middle-class families to abandon the city for the suburbs. Absent an official anti-urban bias, the programs caused the financing stream to flow in the direction of single-family projects to the detriment of multi-family projects. Suburban favoritism was also the result of the "unbiased professional estimate" that was required by the FHA as a prerequisite to any loan guarantee.[23] This mandatory procedure included an evaluation of the property, the borrower and the neighborhood with the objective of guaranteeing that the value of the insured property would always exceed the amount of outstanding debt during the term of the mortgage.[24] Neighborhood appraisals, the most influential of these ratings in determining "safe locations" for insuring mortgages, had a lasting impact on the character of housing in the United States. Of the eight criteria established by the FHA for evaluating the desirability of residential areas for purposes of loan guarantees, "relative economic stability" and "protection from adverse influences" together accounted for sixty percent of the neighborhood evaluation.[25] According to Jackson, the interpretation of both was influenced by personal and agency bias in favor of all-white subdivisions and thus translated into clear prejudice against heterogeneous environments.[26] The FHA was concerned with racial disharmony in housing, as it feared that failure to maintain rigid white-black separation would close entire residential areas to financing.[27] For this reason, it openly recommended regulations and restrictive covenants as a way of prohibiting black occupancy until the United States Supreme Court ruling in *Shelley v. Kramer*[28] that these covenants were unenforceable and contrary to public policy.

By re-packaging racist tradition and discriminatory market attitudes against low-income housing as public policy, the FHA furthered the racial and economic segregation of suburbia and its actions radically altered the character of housing in the United States. However, the lasting damage done by the policies of the FHA is not confined to the housing market. It makes itself felt in the public services sector as well, primarily

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[23] *Id*.
[24] *Id*.
[25] *Id*. at 319.
[26] *Id*.
[27] *Id*. at 320.
[28] Shelley v. Kraemer, 334 U.S. 1 (1948).

education. Despite the shift in public discourse about racism brought about by the civil rights movement, racial and economic segregation still persists in America's cities and schools. The economic exclusion of racial minorities in the U.S. today coupled with the tradition of local education finance have led to the "re-segregation" of public schools that began when white and wealthy families abandoned the cities for the suburbs causing the poor inner-city schools to deteriorate further.

The system that allowed for economic exclusion to replicate previous racial exclusion can be explained as follows. In the United States, public schools are primarily financed by a local tax on property. Only about seven percent of a school district's funding comes from the federal government.[29] Schools do not get the majority of their revenues even from the states, as the ultimate decision about school finance is made by school districts.[30] This property-tax-based system of finance is advantageous for people living in wealthy districts, as they benefit from greater educational funding resources. By contrast, residents of poorer districts have the disadvantage of higher taxation that is needed to balance the deficit created by the lower value of property in these areas in order to finance local services. Of course, common sense would lead poorer families to contemplate purchasing smaller residential units in wealthy districts to benefit from the lower tax burdens and the quality services offered by the locality including public education. This option is, however, foreclosed by the use of local exclusionary planning and zoning powers which is an organizing principle in American local government law. To prevent poor families from "infiltrating" the locality, local governments can set a minimum lot size for property within their boundaries to ensure that residents contribute a minimum amount of taxation to fund local services and to zone out "expensive students" who need more funds than their wealthier peers while their families contribute less to the local tax pool.

The interplay between racial and economic factors in the production of structural segregation is explained by Richard Ford's economic model of a society which consists of only two groups, blacks and whites, where blacks, due to historical discrimination,

[29]Deric Wu, *Can International Human Rights Law Change the State of Minority Education in the United States?*, 8 RUTGERS RACE AND L. REV. 139, 141 (2006).
[30]Goldin, *supra* note 6, at 2.

tend to earn less than whites.[31] Ford's model assumes that this society has enacted a program of reform that has eliminated the legal sanction of racial discrimination, and has succeeded in eliminating racism altogether through a program of public education.[32] This hypothetical society also consists of geographically defined governments with extensive powers to levy local taxes and use the revenues to fund local services including public education.[33] Before the program of racial reform was enacted, this society was strictly segregated along racial lines, such that it consisted of entirely white and entirely black enclaves.[34] Against this background, it could be imagined that the elimination of *de jure* discrimination and racial prejudice would eventually lead to racial desegregation. According to Ford, however, even in the absence of racism, white neighborhoods would be eager to maintain their "whiteness" for purely economic reasons as long as substantial income differences between whites and blacks persist.[35] Whites would be reluctant to leave their white neighborhoods and move into poorer black neighborhoods with higher tax burdens and a lower quality of local services. As a result, racial segregation will be transformed into economic segregation.[36] "Thus, even in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism. […] Spatially and racially defined communities perform the 'work' of segregation silently."[37] The potency of this dynamic will, of course, become more apparent if we introduce real-life complications into this model, such as racial fear, local zoning powers, redlining and the preference of private developers to build affordable housing in white jurisdictions.[38]

Ford describes the problem with the present-day political geography of America as a problem of economic exclusion with a racial profile. This problem is certainly more complex and nuanced than government-mandated segregation of housing and public education. Whereas it was racism that was the driving force behind social change actions in the 1950s and 1960s, racism alone will not do as an explanation for the current plight

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[31] Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1849-1850 (1993-1994).
[32] *Id.* at 1850.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 1851.
[36] *Id.*
[37] *Id.* at 1852.
[38] *Id.* at 1853-1856.

of racial minorities that find themselves in a situation of economic exclusion. At the same time, the problem cannot be explained only in terms of economic exclusion and lack of access to public education due to disparities in income, because there is an evident racial dimension to the problem that cannot be ignored. The point is that just because the problems with public education in the post-*Brown* era cannot be solely attributed to race does not mean that race is irrelevant. As Ruth Gordon points out, race is a fluctuating and contingent concept because its meaning is constantly re-shaped as a result of social struggle.[39]It seems, however, that society's adoption of the rhetoric of equal opportunity law since the successful challenge of segregation in courts has masked this reality and made it more difficult for depressed minorities to explain their condition. The injustice is not produced by an identifiable discriminator anymore, but by the interplay between historical subordination and a vague suspicion that equality has been achieved when formal barriers were removed. The following section summarizes the court decisions that had the greatest influence on education law and policy following *Brown* in an effort to show how the potential for change was both created and limited by engaging the rights discourse. The discussion in the next part is intended as a framework for the main argument of the paper that the emphasis on formalism and colorblindness since *Brown* has rendered the achievement of formal equality an end in itself. This makes it very difficult to redress the lasting material disadvantage that resulted from a history of racial subordination because the dominant theory of equal protection does not capture the complexity of structural segregation. The failure of equal opportunity rhetoric to remedy current inequities between whites and racial minorities is evidenced by the fact that, as will be shown, litigants have abandoned equality as a standard for challenging the substandard education received by minority children.

III. The Shift From Equality to Adequacy

A. The Retreat from Brown: *Rodriguez*

Nineteen years after *Brown*, the ideological shift in the Supreme Court at the time of the Nixon appointments resulted in the Court's first open refusal to recognize that a right to

[39]Ruth Gordon, Foreword, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 838 – 839 (2000).

education is protected by the U.S. Constitution in its ruling in *San Antonio Independent School District v. Rodriguez*[40]. *Rodriguez*, one of the earliest school finance cases, was an unsuccessful class action challenge to local school finance brought by Mexican American parents of elementary and secondary school children in the Edgewood Independent School District on behalf of school children residing in Texas.[41] The main contention in this case was that the public education funding scheme in Texas resulted in the allocation of lesser funds per student in poorer districts compared to wealthier ones which amounted to a violation of the Equal Protection Clause of the Fourteenth Amendment. The funding system challenged by the plaintiffs in *Rodriguez* can be explained as follows. In addition to the state education funds provided to all school districts, the State of Texas permitted localities to generate revenues for education finance through a system of property tax within each district. Given that some districts were property-rich while others were property-poor, this system inevitably resulted in significant inter-district disparities in available education funds.[42]

The Court's decision in *Rodriguez* has been perceived as a retreat from *Brown's* commitment to equal educational opportunity. The Court acknowledged that the overwhelming majority of school children in Edgewood belonged to minority groups in contrast with Alamo Heights, the wealthy district, which was predominantly white.[43] The Court, however, chose to ignore the significance of the districts' racial make-up, and considered whether the Texas funding scheme discriminated on the basis of wealth in the provision of education. In this respect, the Court found that wealth was not a suspect classification arguing that there was no clearly defined disadvantaged class in *Rodriguez* that the financing system can be said to discriminate against. Thus, writing for the Court, Justice Powell concluded that "the Texas system does not operate to the peculiar disadvantage of any suspect class."[44] In reaching this conclusion, Justice Powell pointed out that the plaintiffs did not claim a complete deprivation of education, but that they were receiving a relatively poor quality of education compared to that available to

[40] *Rodriguez*, 411 U.S. 1.
[41] Wu, *supra* note 29, at 142.
[42] James A. Gross, *A Human Rights Perspective on U.S. Education: Only Some Children Matter*, 50 CATH. U. L. REV. 919, 922 (2001).
[43] *Id*.
[44] *Rodriguez*, 411 U.S. at 28.

children in wealthier districts.[45] In the Court's opinion, however, "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[46]

The Court then proceeded to consider whether education is a fundamental right under the Constitution. After recalling *Brown's* emphasis on the importance of education, Justice Powell noted that "the importance of a service performed by the State," however, "does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[47] Because courts are not in position to "create substantive constitutional rights in the name of guaranteeing equal protection of the laws," the key to determining whether education is a fundamental right is to assess whether a right to education is established either explicitly or implicitly in the Constitution.[48] Clearly, the U.S. Constitution does not explicitly recognize that education is a fundamental right. Alternatively, the appellees in *Rodriguez* argued that there is a nexus between education, on the one hand, and free speech and the right to vote on the other, and that without proper education citizens cannot fully participate in the political process.[49] The Court rejected the nexus theory advanced by the appellees and argued that "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short."[50]

Rodriguez signaled a turning point in American jurisprudence on education towards an increasingly limited role of the judiciary in recognizing a right to education under the Equal Protection Clause of the Fourteenth Amendment. Based on the finding that wealth is not a suspect class and that education does not qualify as a fundamental right, the *Rodriguez* Court rejected the application of strict scrutiny and following precedent decided to apply the rational basis test to the claim at hand. In doing so, the Court held that the state's reliance on property tax to finance education was rationally

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Brooke Wilkins, *Should Public Education be a Federal Fundamental Right?*, 2005 BYU EDUC. & L. J. 261, 271 (2005).
[50] *Rodriguez,* 411 U.S. at 36- 37.

related to the legitimate interest of the state to preserve local control of public schools.[51] As opposed to strict scrutiny, which imposes a substantial burden on the executive to justify the regulation on the basis of a compelling government interest, the rational basis review is a lenient standard that only requires a legitimate interest and the existence of a rational relation between the means and the end. Thus, as one commentator argues, "[g]enerally, if a regulation of a right is subject to rational basis scrutiny, in all likelihood the regulation will survive."[52] In the *Rodriguez* case, unequal public funding schemes based on property tax survived in the name of "local control," the very mechanism that allowed segregation to flourish in the pre-*Brown* era and that continues to do so until the present day.

B. From Equality to Adequacy: The State Courts' Response

In fact, the holding of the Court in *Rodriguez* foreclosed any opportunity for litigants to challenge discriminatory education finance schemes in the federal court system. Hence, in the decades following *Rodriguez* education reform litigation shifted to state courts. As a direct response to *Rodriguez*, individual states introduced explicit constitutional protections of the right to education in an attempt to remedy the problems facing the public education system in the United States.[53] In essence, litigants challenged local funding systems on the basis of either the equal protection clause or the education clause in state constitutions.[54] Plaintiffs bringing cases under equal protection clauses were, however, confronted with challenges similar to those in federal equal protection cases.[55] While finance inequality claims based on racial discrimination were usually found by the courts to be unconstitutional, the courts were reluctant to find constitutional violations if the government was able to offer a rational justification for the regulation in question.[56] The justification generally offered by the government was again local control.[57] Claims

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[51] Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 479 (1998).
[52] Wilkins, *supra* note 49, at 266.
[53] Angela Avis Holland, *Resolving the Dissonance of Rodriguez and the Right to Education: International Human Rights Instruments as a Source of Repose for the United States*, 41 VAND. J. TRANSNAT'L L. 229, 242 (2008).
[54] Wu, *supra* note 29, at 142.
[55] *Id*.
[56] *Id*.
[57] *Id*.

brought under the education clause in state constitutions were, however, more successful. In such cases, plaintiffs did not challenge the equality of the local school finance system in the conventional sense, but focused instead on the language of the education clause itself to assess whether there is sufficient funding for schools in poor urban areas to achieve state educational standards.[58]

Thus, it can be said that the litigation strategy in state finance distribution cases has shifted from challenging the equality of the distribution formula to questioning the adequacy of the formula in an effort to demonstrate that an education finance system based on property tax fails to meet the minimum level of education as required by the education clause in the state's constitution. Litigants have also argued that the inadequacy of the distribution system is evidenced by sub-standard student outcomes in poor urban schools.[59] The link between inadequate school facilities and low student achievement was made by plaintiffs in one of the recent adequacy lawsuits on the state level. In *Campaign for Fiscal Equity v. State of New York,*[60] the plaintiffs maintained that:

> If you ask the children to attend school in conditions where plaster is crumbling, the roof is leaking and classes are being held in unlikely places because of overcrowded conditions, that says something to the child about how you diminish the value of the activity and of the child's participation in it and perhaps of the child himself. If, on the other hand, you send a child to a school in well-appointed or [adequate facilities] that sends the opposite message. That says this counts. You count. Do well.[61]

In this case, the New York Supreme Court held that the local education finance scheme violated the constitution on the basis that the funding of New York City schools was inadequate. The case originated in a successful claim brought in 1995 by the Campaign for Fiscal Equity asserting that students in New York City schools were being denied a "sound basic education" as mandated by the state constitution. The New York Supreme Court decision was overturned by the appellate court on the basis that the state's obligation was limited to certain grade level proficiencies.[62] The litigation ended in 2006

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[58] R. Craig Wood and Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Distribution Formulas*, 27 U. ARK. LITTLE ROCK L. REV. 125, 134 (2004).
[59] *Id.*
[60] Campaign for Fiscal Equity v. State of New York, 719 N.Y.S.2d 475 (2001).
[61] *Id.*
[62] Wood and Baker, *supra* note 58, at 143.

when the highest court in the State of New York, the State Court of Appeals, issued its ruling in which it upheld the judgment of the trial court and directed the state to determine the cost of a "sound basic education" in New York City schools.[63]

An overview of state court decisions in cases where the constitutionality of education funding schemes relying on local property taxes was being challenged by litigants on the basis of inequality or inadequacy is beyond the scope and purpose of this paper. A few remarks on the outcome of these cases and its implications for future education reform litigation are, however, in order here. First, convincing the courts to recognize that wealth is a suspect class is an extraordinarily difficult task.[64] Courts recognized early on that establishing wealth as a suspect class would have a spillover effect on all other governmental services that could be subject to the same claim with great implications for society at large.[65] Furthermore, the recognition of education as a fundamental constitutional right by state courts is a remote possibility due to the existence of contravening federal precedent.[66] It is thus plausible to conclude that the success of challenges to local education finance systems largely depends on the adequacy/soundness/minimum level language of the education clauses in state constitutions. The reason for this is that courts have generally moved away from striking down unequal education finance mechanisms where plaintiffs fail to demonstrate that inequality produces inadequate education systems that are unable to train students to reach the state-set standards of education.

C. Adequacy and Equality Arguments

There are many possible explanations for the shift from equality to adequacy arguments in school finance litigation. While the shift in focus from equality to adequacy is in some cases arguably a matter of strategy, it seems to be motivated by a feeling of necessity in other cases where litigants return to court after having lost an equality argument.[67]The shift to adequacy has been generally embraced by the academic community. Professor

[63] *Id.*
[64] *Id.* at 144.
[65] *Id.*
[66] *Id.*
[67] James E. Ryan, *Schools, Race, and Money*, 109 YALE L. J. 249, 268-269 (1999-2000).

Peter Enrich, for example, has called for "leaving equality behind"[68] because adequacy may simply prove to be more attainable than equality in school finance reform largely due to the inherent difficulties in the concept of equity. Arguably, litigants have shifted their attention from equality to adequacy because equality has proven to be a disappointing tool in the struggle over education reform.[69] Enrich notes that equality arguments suffer from several weaknesses. The most important, perhaps, is the difficult task of giving the concept of equality specific content in the context of education because of the difficulty in establishing the link between cause and effect. The problem, in other words, is establishing that inequalities in the education received by white and minority children result from the disparities in the funding available to schools as a result of local wealth.

According to Enrich, "[t]he connection between the two is now mediated, not only by political decisions about how heavily to tax, but also by administrative judgments (and skill) in using the resources that are made available."[70] Equal educational services will not guarantee equal schooling because students show up at school with different needs that have to be addressed in order to realize the ideal of equal educational opportunity. In fact, many studies growing out of the 1966 Coleman Report[71] suggested that, by and large, academic achievement levels do not correspond to spending levels and the educational resources available at schools.[72] Enrich concludes that equality has proven too ambitious a standard in the context of education reform.[73] The growing disenchantment with the goal of equality in education, the argument goes, could only mean that the time has come for education reformers to leave equality behind and pursue the more modest, but more attainable, goals of adequacy.[74]

Enrich is correct in saying that unequal education cannot be solely attributable to disparities in the funding available to schools. The system of locally funded education is but one item on the list of factors that contribute to the problem of unequal schooling like de facto segregation in housing, zoning, economic exclusion and a long history of racial

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[68] Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995).
[69] *Id*. at 143.
[70] *Id*. at 149.
[71] JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).
[72] Enrich, *supra* note 68, at 150.
[73] *Id*. at 154.
[74] *Id*. at 182.

subordination. It is only natural that equal protection challenges do not yield the desired results because the factors that combine to produce unequal education are diluted by the emphasis on race-neutrality that is at the core of a formal understanding of equality. What Enrich fails to note is that the connection between unequal funding and substandard education is mediated by all of these factors and not only by taxing policies and administrative decisions about how to use the available resources. Enrich is right that equality has disappointed, but he errs in suggesting that adequacy should be pursued instead of equality as the goal for education reform because adequacy and equality are conceptually distinct and one cannot simply be substituted for the other. The fundamental difference between equality and adequacy is the comparative nature of equality. In other words, the equality approach to educational opportunity is concerned with *relative* deprivation, while the adequacy framework aims at the elimination of *absolute* deprivation. In practical terms, this means that the adequacy framework makes targeting additional resources to disadvantaged students above a certain threshold seem less justifiable.

William Koski and Rob Reich argue that the inequalities that exist above a threshold level of adequacy are objectionable because education is in large part a "positional good." This simply means that "one's position or relative standing in the distribution of education, rather than one's absolute attainment of education, matters a great deal."[75] Education is a positional good because it is a decisive factor in the competition for admission to higher education and for well-paying positions in the job market.[76] The admissions benefit reinforces the benefit of obtaining a high-paying job, and both together lead to greater job satisfaction, more civic engagement and better access to healthcare services on the long-run.[77]Koski and Reich argue that insofar as education is a positional good, adequacy threatens to compound the positional advantage of the wealthy.[78] Furthermore, adequacy fails to address the needs of the worse-off because only equality can account for unfair positional advantages in education.[79] For

[75] William S. Koski and Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why it Matters*, 56 EMROY L. J. 545, 549 (2006).
[76] *Id*. at 597.
[77] *Id*. at 597 – 598.
[78] *Id*. at 604.
[79] *Id*. at 605.

these reasons, "adequacy is an inadequate substitute for equality in education policy."[80] Or as Justice Marshall put it in the context of *Rodriguez*, it is "of little benefit to an individual from a property-poor district to have 'enough' education if those around him have more than 'enough'."[81]

It thus seems hardly possible to trade equality for adequacy if education reform is to have any meaning at all. All the same, it would be undoubtedly a wrong strategic move to argue that the substandard education received by children in poor and predominantly minority children violates the Fourteenth Amendment equal protection guarantee. It is generally not possible to attribute the transition from equality to adequacy in education reform jurisprudence to changes in the nature of the public education problem itself. The main features of the problem, with the exception of government sanctioned segregation, remain largely unaltered. What changed are rather the strategies and counter-strategies deployed by courts and litigants in trying to deal with the problem. Whereas the aim of desegregation cases was to achieve equality through integration, school finance cases focused on the disparities in the availability of resources for education.[82] Both sets of cases thus shared the initial goal of tying the fate of poor and minority students with that of their white and wealthy peers.[83]But as in desegregation cases, litigants in school finance cases shifted their attention to securing sufficient funds for a basic (read: adequate) level of education in the most economically and/or racially isolated school districts after the Supreme Court declared in *Rodriguez* that funding inequalities between school districts does not violate the U.S. Constitution.

Legal scholarship on education policy in the United States mostly oscillates between support for equal educational opportunity, adequacy arguments and efforts to combine both. But the fact remains that in education, adequacy is the new equality. Ever since *Rodriguez*, educational reform litigation has moved to state courts that provided an alternative forum for securing equal educational opportunity and adequacy. While educational equality litigation has continued on the state level, however, cases challenging the inadequacy of education have been more successful for education reform

[80] *Id*. at 613.
[81] *Rodriguez*, 411 U.S. at 114.
[82] Ryan, *supra* note 67, at 259.
[83] *Id*.

movements. But why has equality failed poor and minority schoolchildren, and why has it disappointed their advocates? Was it not the case for equality that gave us *Brown* after all?

The problem, it seems, lies not in the choice of equal protection as a tool for challenging inequities in the education system because education reform is not about adequacy at all. As Koski and Reich correctly argue, education is a positional good which makes inequalities above a certain threshold objectionable. The trouble, as will be shown in the following part, is with the formalistic approach to equality that dominates the jurisprudence on education. It will be argued that while society's adoption of equal opportunity rhetoric does not in and of itself entail a commitment to racial inequality, the belief in colorblindness created the unfounded conviction that a break with the past has been achieved with regards to segregation. As a result of the long history of racial subordination in the United States, minorities, primarily blacks, suffer from lasting material disadvantages. Yet, affirmative action programs that aim at remedying the effects of past discrimination are almost always invalidated by courts under the pretext that they send out a message of inferiority about minorities because race-neutrality is the rule. The reason for these paradoxical results, as will be discussed next, is that dominant theories about equal protection are based on an "anti-differentiation" principle that perpetuates racial hierarchy by prioritizing race-neutrality over the need to redress a history of subordination. Ultimately, the aim is to show that in education the process of social change through the courts has failed because while anti-subordination may be the aspiration, anti-differentiation is the reality that stands in the way towards a more equal future.

IV. The Equal Rights Discourse

Blacks made a serious ideological challenge to the dominant system at the time when they demanded their "rights": rights taken for granted by Americans, but routinely denied to blacks. Marvin Jones inquires into the meaning of segregation and concludes that segregation can be best described as a system of racial caste.84 The harm of segregation, the argument goes, is social stigma which is significant because it sends a message of

[84] Jones, *supra* note 8, at 18.

inferiority about blacks: "[s]egregation was rooted in slavery and slavery could only be rationalized […] by a story of black inferiority. Black inferiority in turn is simply the flip side of white supremacy. The message of segregation was a message of white supremacy, i.e. that blacks were an inferior order of human life."[85] The use of the rights rhetoric can thus be seen as a radical act and real, tangible changes have accompanied its advent. The government responded to the demands of the civil rights movement by removing most formal barriers that represented the subordination of blacks in society. These changes would not have materialized had the civil rights movement not engaged the rights discourse because the demands for change would not have reflected the dominant institutional logic at the time.

Yet while the adoption of equal opportunity rhetoric created the potential for change, it also defined its limits. As demonstrated previously, the problem of public education in the United States has evolved into a problem of structural segregation since Brown was decided. Legalized discrimination in education on ethnic and racial grounds was successfully challenged in the 1950s, but economic exclusion was never addressed and federal actors have been increasingly reluctant to recognize the nexus between race and poverty in devising education reform policies. The historical legacy of racism and segregation that took its most pervasive form in the housing and education sectors coupled with the tradition of local school finance produced a system of social institutions that breeds durable, cumulative, racial inequalities. The disadvantageous situation that poor and predominantly minority schoolchildren find themselves in as a result today can only be corrected if fundamental institutional changes were introduced. Unfortunately, the recognition of the need for deeper institutional changes by civil rights advocates came at a time when the public has begun to be convinced that the formal changes have successfully ended the subordination of blacks.[86]The same conviction has found its way into the equal protection doctrine. With its emphasis on colorblindness and race-neutrality, equal opportunity law as developed by the courts in the aftermath of *Brown* has been unable to redress racial subordination because it cannot recognize it.

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[85]*Id*. at 24.
[86]Kimberli Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1348(1987-1988).

A. America's Break with the Past

A good starting point for understanding why the problem of segregation in education has persisted despite efforts to reverse the course of discrimination against blacks is to ask: when can it be said that segregation has ended? The question put differently would be: what constitutes a break with the past in regard to issues of racial discrimination in America considering the fact that schools have virtually re-segregated since *Brown*? As a response to these queries, Marvin Jones suggests that while *Brown* formally resolved the segregation dilemma, it failed to define segregation. Specifically, the Court in *Brown* was caught between two possible approaches to defining segregation: "was it an evil of discrete decisions or an evil of its stigmatizing effects?"[87] By failing to address these questions, the Court left *Brown* unclear and the dilemma of segregation unresolved which led to the reproduction and resurfacing of this dilemma in the cases that followed because the courts never got beyond the text of *Brown*.

The doctrinal debate in *Parents Involved v. Seattle*[88] is a good example of the duality of equality that developed in the aftermath of *Brown* due to the latter's failure to resolve the question of segregation. In this case, the Supreme Court consolidated two cases that raised the same issue, one from Seattle, Washington and one from Jefferson County, Kentucky.[89] The question before the Court in *Seattle* was whether a school district, that has never operated legally segregated schools, could classify schoolchildren on the basis of race and then use this classification to allocate slots in high schools as a measure to achieve racial balance in the schools. In the Seattle case, the school board responded to a lawsuit brought by the National Association for the Advancement of Colored People (NAACP) in 1969 claiming that the board established and maintained a system of segregated public schools by a plan that included race-based transfers and mandatory busing. In 1977, the NAACP filed another legal complaint against the school board with the federal Department of Health, Education and Welfare's Office of Civil Rights (OCR) in the aftermath of which a settlement agreement was signed between the school board and the OCR to implement what came to be known as the "Seattle Plan." The Plan which began with mandatory busing in 1978 evolved by 1999 into an "open

[87] Jones, *supra* note 8, at 4 – 5.
[88] Parents Involved in Community Schools v. Seattle School District No. 1 (Seattle), 551 U. S. (2007).
[89] Jones, *supra* note 8, at 5.

choice" plan in which students rank their preferred schools. The district retained a racial "tiebreaker" for oversubscribed schools to achieve a desired racial balance in each school when a student's first choice cannot be accommodated. The petitioner in *Seattle*, Parents Involved in Community Schools, challenged the most recent plan, specifically the use of racial tiebreakers, under the State and Federal Constitutions. The Washington Supreme Court, the Federal District Court and the Court of Appeals for the Ninth Circuit rejected the challenge and ruled in favor of the Seattle School District.

In Jefferson County, the school had been under a court-ordered desegregation scheme beginning in 1975. The complex desegregation plan ordered by the District Court required redrawing school attendance zones, closing a number of schools and busing groups of students to schools outside their neighborhood. A decade later the school board revised its desegregation plan due to changing demographics in the community. It created new racial percentages, redrew district boundaries, added magnet programs at a few schools and adjusted the system for grouping and busing students. By 1991, the school board revisited the desegregation plan once more and came to the conclusion that assigning elementary school students to more than one school during their elementary years was unsound educational policy. To avoid the drawbacks of mandatory busing, the school board adopted a new plan emphasizing school choice. The choice plan that was modified again in 1996 expanded the transfer opportunities available to elementary and middle school students. Under this plan, students were assigned to the school they listed as their first choice, unless the school was oversubscribed or unless the assignment would tip the racial balance of the school. In 2000, the District Court dismantled the 1975 desegregation plan after reviewing the present plan. In 2003, the petitioner, Crystal Meredith, brought a lawsuit to challenge the constitutionality of the 1996 plan, but the challenge was rejected by both the District Court and the Court of Appeals for the Sixth Circuit which held the plan constitutional.

As mentioned previously, the Supreme Court in *Seattle* consolidated the two cases just discussed, as both involve the same issue: can a school district classify on the basis of race and take race-based measures to achieve racial balance in schools without violating the Fourteenth Amendment equal protection guarantee? To answer this question, the Court in *Seattle* examined the measures taken under strict scrutiny to determine whether

they were narrowly tailored to serve a compelling government interest. In applying the test, the majority held that while remedying past discrimination is a compelling government interest justifying the use of race-based classifications, such an interest cannot be said to exist here because the schools involved were never legally segregated nor subject to court-ordered desegregation.[90] The Court argued that race is an inherently suspect classification and rejected race-based classifications because they reinforce notions of racial inferiority and eventually lead to racial hostility.[91] To support its view that the harm of segregation is the *act* of dividing people by race itself, the majority quotes *Brown* as saying that segregation deprived black schoolchildren of equal educational opportunity because the classification and separation themselves denoted inferiority, regardless of whether other factors were equal.[92] In other words, it was not the inequality of the school facilities but the fact of legally separating children on account of their race that the *Brown* court held unconstitutional.[93] Essentially then, *Brown* was about the differential treatment accorded to children on the basis of their race or color and its conflict with the Fourteenth Amendment.

It is curious how Judge Roberts, speaking for the majority, talks about "American children" or "schoolchildren" as the group addressed and affected by the judgment in *Brown*. In astonishing denial of the unique historic experience of blacks with segregation and racial domination, Judge Roberts writes: "[b]efore Brown, schoolchildren were told where they could and could not go to school based on the color of their skin."[94] To this, Judge Stevens replies in his dissenting opinion: "[t]he Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools."[95] By adding this qualifier, namely that *Brown* was about black schoolchildren and not individual schoolchildren, to the discussion of race-based classifications and their compatibility with equal protection, the dissent in *Seattle* views differential treatment from a different standpoint. In contrast

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[90] *Seattle,* 551 U.S.at 12.The Court noted that the desegregation plan to which the Jefferson County schools were subject was dissolved.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] Parents Involved in Community Schools v. Seattle School District No. 1 551 U. S. 701 (2007), J. Stevens dissenting opinion.

to the majority who condemns any classification by race as inherently suspect, the dissent argues that any evaluation of differential treatment based on race should focus instead on whether such treatment imposes a *burden* on one of the races. The focus, in other words, should be on *exclusion* and not separation, on the *stigmatizing effects* of different treatment and not the decision to treat differently.

The doctrinal debate between the two sides of the Court thus becomes a discussion about competing conceptions of equality. In this debate, the majority and dissent talk past each other. The majority sees discrimination against blacks in particularistic terms and traces it back to discrete acts or decisions that violate the principle of colorblindness. Articulating the problem of segregation this way defines the solution narrowly. According to the majority, the remedy is to extend formal equality to all Americans and adopt strictly colorblind policies in regulating education. The solution, in other words, is for society to embrace the equal opportunity ideal, an objective which has been achieved by *Brown*. A completely different account of segregation is given by the dissent in *Seattle*. For the dissent, the lasting effect of different treatment is what gives any definition of discrimination its content. Judge Stevens' observation that *Brown* is about *black* schoolchildren and not individual children is meant to bring into the discussion about remedial measures of segregation the history of the hierarchical relationship between blacks and whites. It is meant to highlight the fact that segregation is a social etiquette based on exclusion that has long historical roots and that cannot possibly be traced to a set of discrete decisions. Shunning the universalism of the Court, the dissent contextualizes *Brown* and the experience of blacks as a powerless minority suffering from the stigma of a system of segregation imposed by the dominant racial group. The remedy for this social injury cannot be colorblindness because blacks as a group have been historically subjected to different treatment and because the effects of this treatment continued into the present.

Because constitutional interpretation is historical interpretation[96] and because the law never dictates which meaning attaches to it, the Court in *Seattle* is not divided by different legal interpretations, but rather by two different visions of society. What the majority and the dissent disagree about is what constitutes America's "break" with the

[96] Jones, *supra* note 8, at 9.

past when it comes to segregation. For the majority, segregation ended when formal equality was extended to all Americans regardless of color. Creating a break with the past seems to be the logic behind the majority's claim that discrimination cannot account for current inequities between whites and blacks because the situation of the 'actual' victims of discrimination has been remedied when formal inequality was repealed. The position of the dissent, on the other hand, is that colorblindness does not make sense at all in a society where the effects of past discrimination against an identifiable group of people have continued into the present. What the dissent in *Seattle* is trying to argue, in other words, is that society's adoption of equality rhetoric does not mean the end of racial inequality and that, far from being the break with the past, the significance of *Brown* is that it holds a promise yet to be fulfilled.

B. The Antinomies of Equal Protection

In the aftermath of *Brown*, courts have focused on the strong proclamation of the *Brown* Court that "separate is inherently unequal" and overlooked the fact that the main concern of the Court was how to redress the subordination of racial minorities. Ever since *Plessy*, the formal denial of equality to blacks has been a powerful tool in perpetuating the racial hierarchy and the exclusion of blacks from the vision of America as a community of equals. Demanding an end to different treatment and the removal of formal barriers was useful in the early race discrimination cases to challenge the subordination of blacks that was primarily manifest in segregation and other discriminatory practices that excluded blacks. One has to think of the "Whites Only" signs spread throughout American cities alone to recognize that much of what characterized discrimination against blacks under segregation was symbolic.[97] Removal of the symbolic manifestations of subordination that accompanied formal reforms was a significant gain to all blacks, as it renegotiated their position in the American political vision. Still, some benefited from these reforms more than others. As Kimberli Crenshaw has pointed out, "[t]he eradication of formal

[97]*See* Crenshaw, supra note 86, at 1377 – 1378. Crenshaw distinguishes between what she calls symbolic and material subordination. Symbolic subordination, according to Crenshaw, is the denial of formal political and social equality to blacks. Material subordination, on the other hand, refers to the perverse economic consequences of the discrimination and exclusion experienced by blacks. While these two aspects of oppression can be distinguished from one another, Crenshaw argues that both are rarely thought of separately. Specifically, she argues that "separate facilities were usually inferior facilities, and limited job categorization virtually always brought lower pay and harder work."

barriers meant more to those whose oppression was primarily symbolic than to those who suffered lasting material disadvantage."[98] The disappearance of "White Only" signs and other visual indicators of the subordination of blacks reflected society's acceptance of equal opportunity rhetoric, but it did not signalize the end of racial inequality. In fact, no talk of a "break with the past" would make sense until the racial nature of class ideology is revealed and something is done about the structural problems that account for current inequities between whites and blacks.[99]

Dominant theories of equal protection, however, see to it that achieving a break with the discriminatory past remains an aspiration at best. As the discussion of *Seattle* demonstrates, there are two conflicting principles embedded in the notion of equality: anti-differentiation and anti-subordination[100]. From an anti-differentiation perspective, it is inappropriate to subject similarly situated individuals to different treatment on account of their race or color. For proponents of anti-differentiation, colorblindness is the rule in developing and analyzing legislative and institutional policies.[101] Under the anti-subordination perspective, by contrast, it is inappropriate for members of a racial group to be relegated to a subordinate status in society due to their lack of power vis-à-vis the dominant racial group.[102] The crucial point here is that race-based reform measures that take the form of affirmative action are invalid under the anti-differentiation approach because they perpetuate racial stereotypes. Thus, the majority in *Seattle* argues that a school district's decision to divide children by race is unlawful "because such classifications promote notions of racial inferiority and lead to a politics of racial hostility,"[103] even if the function of these classifications is to achieve integration in de facto segregated schools. An anti-subordination analysis of the reform policies adopted by the defendant school districts in *Seattle* would produce very different results because under the anti-subordination doctrine facially differentiating – as well as facially neutral – policies are invalid *only if* they perpetuate racial hierarchy.[104]

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[98] *Id*. at 1378.
[99] *Id*. at 1384.
[100] *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).
[101] *Id*. at 1006.
[102] *Id*. at 1007.
[103] *Seattle*, 551 U.S. at 38 – 39.
[104] Colker, *supra* note 100, at 1007.

In an insightful article that compares equal protection analysis in race and gender cases, Ruth Colker criticizes the dominant anti-differentiation approach to equality and argues that equal protection cases should be analyzed from an anti-subordination perspective because it is consistent with the history of the equal protection clause and because it reflects an aspiration that will help society move towards equality. The main premise of her argument is that society has never set out to ban all distinctions. For example, distinctions based on intelligence or ability are not regarded as invidious, so Colker. Thus, distinctions are only prohibited when there is a good reason to believe that they are offensive or irrational, and it is group-based experiences that give content to this reasoning.[105] The anti-subordination principle gives voice to a depressed minority's own vision of equality and its views about why certain distinctions are invidious because it recognizes and draws on the particular historical experience of these groups. Anti-differentiation, on the other hand, does a disservice to the history of subordination and to the understanding of the law as a remedy to this history.[106]

In the early equal protection cases, the principle of anti-differentiation has, no doubt, been a powerful statement against segregation and other exclusionary practices because different treatment played a central role in perpetuating subordination.[107] But while the condition of black Americans has significantly changed ever since, no development in the case law reflecting these changes followed. Courts apply the strict scrutiny test in cases where issues of race are involved in order to ensure that no law or policy harboring an invidious purpose passes constitutional muster. The irony is, however, that taking race seriously has come with a very high price for the black American community on the long run. The almost complete lack of tolerance towards race-specific policies under strict scrutiny has led to the awkward result that virtually no affirmative action programs pass muster because the anti-differentiation principle that presently informs the courts' interpretation of the equal protection doctrine assumes that differentiation can only contribute to subordination and can never redress it.[108] As Ruth Colker points out, rejecting the elimination of subordination as justification for

[105] *Id*. at 1013.
[106] *Id*. at 1012.
[107] *Id*. at 1013 – 1014.
[108] *Id*. at 1033.

differentiating on the basis of race has "needlessly curtailed the means available to overcome a history of racial subordination."[109] She suggests therefore that courts analyze equal protection cases from an anti-subordination – not an anti-differentiation – perspective and to invalidate differentiating policies *only if* they perpetuate racial subordination.[110] Courts must also ask whether facially neutral policies have a disparate impact on racial minorities and invalidate such policies if they contribute to subordination in order to prevent rule-makers from hiding an invidious purpose behind facial neutrality.[111] This approach, the argument goes, is more faithful to the history of black subordination and entails a commitment to end racial inequality because it allows the strict scrutiny level in race cases to be preserved while recognizing that the only justification for facially differentiating policies is to overcome subordination.[112]

V. Conclusion

Anti-subordination may be the aspiration, yet anti-differentiation is the reality. "Whites Only" signs have been taken down: society embraced racial equality and courts denounced segregation. Success! But on who's terms? It was subordination that prompted the Supreme Court in *Brown* to respond with the strict ruling that separate is unequal, but the anti-differentiation principle that has been read into *Brown*'s equal protection analysis obscures the historical experience of minorities. The strict level of scrutiny in race cases has ruled out much needed remedial policies to overcome a history of racial subordination. As the most rigorous form of judicial review, strict scrutiny is supposed to afford racial equality the greatest protection available under the constitution. Oddly, beyond the invalidation of different treatment laws that perpetuated subordination under segregation, strict scrutiny reverses the course of equality because present equality protection analysis is infused with an anti-differentiation understanding of the law that concerns itself neither with lasting disadvantage nor with the means to redress it.

The rulings in *Seattle* and other similar cases that condemned race-based classifications in affirmative action programs as a violation of the Fourteenth Amendment

[109] *Id*. at 1053.
[110] *Id*. at 1007 – 1008.
[111] *Id*. at 1033.
[112] *Id*. at 1059.

demonstrate that equal protection analysis has evolved into a Frankenstein creature of sorts that is blocking the way towards equality. Well-meaning academics like Ruth Colker suggest that adopting an anti-subordination perspective on equality will help the American society to move forward on racial equality. They may be right. But, once again, anti-differentiation, formality and colorblindness are the rules of the game. As a civil rights visionary has observed, "a 'color-blind' society built upon the subordination of persons of one color [is] a society which cannot correct that subordination because it [can] never recognize it."[113] The tendency now is to regard inequities between blacks and whites as a fair measure of merit. As mentioned before, creating a break with the history of subordination provides the basis for the claim that current inequities cannot be the fruits of a discriminatory past because society no longer discriminates against blacks. The stigma of inferiority that resulted from the unique historical experience of blacks and the fact that blacks are worse off than whites reinforces the popular belief that the market is fair and impartial.[114] After all, non-differentiation is the rule and the market rewards the superior.[115] But all of these arguments are simply rationalizations for the failure to redress the lasting effects of subordination.

In retrospect, it is not difficult to see how *Brown* has failed as a framework for social change through the courts. This is not surprising because laws and courts play a major role in institutionalizing socio-economic power arrangements. Channeling complex issues to the legal arena silences the fundamental questions behind these issues and results in discussions that are apparently technical, neutral and devoid of politics. Race-based classifications that are used to redress historical subordination are subjected to "strict scrutiny" and almost never upheld as "necessary means" to achieving the "compelling government interest" of remedying the effects of past discrimination. Never mind that these measures are "necessary" for improving the future of racial minorities; the formula works. As some commentators have observed, *Brown* was not *the change* but merely a catalyst for the change that followed; it was "a spark to a revolution culminating

[113] Crenshaw, *supra* note 86, at 1346 – 1347 (quoting Alfred Blumrosen, Twenty Years of Title VII Law: An Overview 26 (April 18, 1985) (unpublished manuscript, on file at the Harvard Law Library)).
[114] *Id*. at 1380.
[115] *Id*.

in civil rights acts and erstwhile affirmative action programs."[116] *Brown's* was not a legacy of education made available to all on equal terms. This was a promise that remains unfulfilled. What racial minorities and their advocates need is a post-*Brown* strategy grounded in the reality of economic exclusion and perpetual, cumulative inequality above all the formalism and neutrality of the courts. Whatever this post-*Brown* strategy, it must not look at the legal arena as the only venue for change and rights discourse as the sole emancipatory possibility. If racial minorities in America are to succeed, they must succeed on their own terms and not the terms of a (color)blind legal community that is delusional about its own history.

[116] Jones, *supra* note 8, at 34.