HUMAN RIGHTS AND LIBERTIES:
50 YEARS AFTER
BROWN v. BOARD OF EDUCATION

KEYNOTE SPEAKERS

INTRODUCTION

Brown v. Board of Education was arguably one of the most influential Supreme Court decisions ever. The decision called for the desegregation of public schools and ultimately served as a catalyst to the modern civil rights movement. Fifty years later the Hastings Race and Poverty Law Journal devoted its second annual symposium to recognizing the historic decision and critically analyzing the effects it had in American society through an exploration of the juvenile justice system, predatory lending practices, education equity, and the treatment of prisoners in the Guantánamo prisons. The symposium was titled Human Rights and Liberties: 50 Years After Brown and the following transcripts are from our two distinguished keynote speakers Mark Rosenbaum and Erwin Chemerinsky. Mark Rosenbaum, Legal Director of the ACLU of Southern California, spoke of the inequity in education that persists in public schools and the horrendous conditions that many low-income students of color are exposed to in under-funded public schools. Erwin Chemerinsky, Duke Law Professor and distinguished legal scholar and author, discussed a growing trend towards segregation and inequality in the educational system as well as the federal court’s failure to prevent this seemingly inevitable outcome.
I want to talk about Brown v. Board of Education with you, and share some ideas with you. Fiftieth anniversary of Brown, 75th—it marks the 75th birthday of Martin Luther King, Jr. I do not suppose there is a school in this country that bears Martin Luther King, Jr.’s name that has adequate resources or sufficient qualified teachers or enough funds.

Let me start out by sharing some testimony from you. This is Alondra:

**Question:** “Can you tell me how those unfair conditions”—she talked about some conditions; you’ll see them in a moment—“affected your ability to learn in class?”

**Answer:** “Well, although Mr. Lee’s class was very fun, I didn’t really learn too much. Maybe I would have learned had we had some textbooks. Why do we also have to use paper that’s already been typed on? That doesn’t seem fair. It makes me—you know what, in all honesty, I’m going to break something down to you. It makes you feel less about yourself, you know, like you’re sitting here in a class where you have to stand up because there’s not enough chairs and you see rats in the buildings, the bathrooms is nasty, you’ve got to pay. And then, you know, like I said, I visited Marin Academy and these students—if they want to sit on the floor, that’s because they choose to. And that just makes me feel real less about myself because it’s like the state don’t care about public schools. If I have to sit there and stand in the class, they can’t care about me. It’s impossible. So in all honesty, it really makes me feel bad about myself. Obviously you probably can’t understand where I’m coming from.” Talking to the lawyer from the state. “But it really do and I’m not the only person who feels that. It really makes you feel like you really less than, and I already feel that way because I stay in a group home because of poverty. Why do I have to feel that when I go to school? No, there’s some real weak stuff going on.”

**Question:** “What do you think the state can do about that?”

**Answer:** “Increase school funding. That would help a lot. That could buy some chairs for us to sit down. They can afford to fix the tiles so I ain’t got to sit there and worry about if something’s going to fall on my head. They can get an extra janitor to clean the nastiness in that bathroom and they can do something about that smell. I mean, if you still smell—the smell is horrendous, and the money that they do increase it—monitor it like okay. Say they give whatever amount to the school district. I don’t know if

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they’re supposed to monitor or tell the schools what they’re supposed to spend it on. Like I said before, never, never once has anybody from the state ever came to my school, asked us did we need, what’s going good, what’s going bad, what do you think we should change? And if there’s a superintendent of all the schools, what the hell is your job if you’re not insuring that I’m receiving equal education? It’s no place for you to even be there. What’s your place? Nothing. I feel that the state, the state can set standards. You know, they set real low standards for us. They have to. If we don’t, if our test scores are the lowest, the standards are not set as high. So set high standards like private schools have, set high standards that Lowell has, set high standards that Marin Academy has, you know, set high standards for me. Don’t sit there and expect me to fail and then pass me old used up ass textbooks and expect me to achieve from that. I have achieved that because I can persever, obviously. I’ve been through a lot so I can persevere. I’m just saying it’s a lot they can do. I don’t understand why won’t they do it. You get paid enough. Do your job. But then again it’s probably just free money and they’re just sitting there doing nothing and why not get paid for it, huh?’

Or another student. This is Lizette:

**Question:** “Let’s talk about your honors trigonometry class. I think you indicated that there was a hole on top of a cabinet.”

**Answer:** “Yes.”

**Question:** “Was the hole in the wall, in the ceiling?”

**Answer:** “In the ceiling.”

**Question:** “How big was the hole?”

**Answer:** “About two to three inches in diameter.”

**Question:** “And do you know what caused the hole to be there?”

**Answer:** “A rat bit it or something. I don’t know. Well, the teacher said it was the rat who made it. I don’t see why a student or teacher would make the hole.”

**Question:** “And the teacher told you it was a rat that made the hole?”

**Answer:** “Yes.”

**Question:** “And you indicated that you saw a trap with a tail in it?”

**Answer:** “Yeah. She would buy her own traps and put them up there.”

**Question:** “This was Mrs. (teacher’s name)?”

**Answer:** “I think so. Well, they had also Mrs. Willis and Mrs. Weesy(?). You know, they had to share the same room sometimes at the same time.”

**Question:** “And on how many occasions in your honors
trigonometry class last semester did you see a trap with a tail in it?

**Answer:** "I think she only showed it to us once."

**Question:** "Do you recall when during the semester you saw this trap with a tail on it?"

**Answer:** "I don't remember."

**Question:** "What did your teacher do after she showed you the trap with the tail in it?"

**Answer:** "I don't know."

**Question:** "Do you know if your teacher in honors trigonometry ever spoke to anybody in the Maintenance Department?"

**Answer:** "I would assume but I don't know."

**Question:** "Do you feel that your education in trigonometry—imagine this question—do you feel that your education in trigonometry was affected by the trap that you saw?"

**Answer:** "Well, I was kind of disgusted but I think I got over it."

This is Manuel:

**Answer:** "Can I make one last comment?"

**Reply:** "Yes, you may."

**Answer:** "Because I want to make sure that the State of California guys hear this. Okay. This is pretty hard. Well, if they really care about us it won't hurt them to give us what they need. That little kid, that little kid from the press conference in Los Angeles, he needed a book. There's a lot of kids that need books. How does it hurt, how does it hurt California to provide that for us? I think there's enough money out there to give us what we need. Isn't education the number one priority? It should be the number one priority on the list. It should be the very number one priority. They should give us what we need because without education we don't get a future. That's basically it. All I'm asking is—just give us the books we need, proper facilities, and we'll try our best to you know, we'll try our best to come out on top. Because without education all we could do is go work in the fields, get some of them low-paying jobs, and we don't want the United States to be like this. We want to move along, we want to move forward, and hopefully this case will be won, and they'll give us what we need to go along. I really want that kid to go and be a teacher if that's his dream. If there's kids that want to be astronauts, why should the State of California, them guys, shatter their dreams? They should help them out with their dreams. That's it. I don't want to cry."

Fifty years after Brown, fifty years after Brown, what would the state of K through 12 public education be in California if the state hated its children? I'm not going to talk about Brown as desegregation in its purest, I suppose, sense. I think Erwin's going
to talk to you about that. I think you all know the numbers. Fifty years after Brown, 79% of white students attend schools that are majority white. In 1988, the high point of desegregation, 43.5% of kids were in desegregated schools. That number in 2001 is 30%, and it's dropping fast. But put that aside. Whatever one thinks about Brown and what little was said in Brown about the academic purposes of education, the Supreme Court did recognize this. It said—and I'm quoting—"Education is perhaps the most important function of state and local governments and the court declared that separate educational facilities are inherently unequal." What has happened?

In thinking about Brown I wanted to put it in a context that I think particularly the law students here might appreciate best, because you are not yet lawyers. What is the meaning of equality? What does it really mean? What is the meaning of equality in a constitutional democracy and how do you figure that out? How does doctrine change? If doctrine is not encased in amber, what are the methodologies and the strategies and the tactics that are available to alter the course of the law? I told the prior group that when I teach, one of the things I try to say to students is that I teach the casebook method and I believe in the casebook method, but do not believe it too hard because when you get those cases they have already been decided. And what I think gets lost sometimes in thinking about cases in that way is that doctrine is not necessarily inevitable, that it can move, that there are flex points in the law, and that part of our jobs as lawyers and as a community is to understand that. What are the choices that are available? What is the role of a civil rights lawyer, of a civil rights community, in making a real say in a definition of equality, in realizing the dream of Brown and insuring genuine, meaningful equal educational opportunity?

When I teach, I always start my 14th Amendment class by telling the story of Brown. And again, as some of you know from the prior session, I do that not because I think—now I should just sit down and let Erwin take over—I do it not because I think students are going to be doing desegregation in cases. I do not think desegregation is a growth industry in this country. But I think the most important point about Brown in certain respects is that it was not inevitable. Whatever one’s views about that case and the way it was litigated and what has happened since and even more particularly, what everyone’s views say about separate and inherently unequal as a formulation, it didn't have to be. That to me is a terribly important point.

Separate and inherently unequal—those words don’t appear in the text of the Fourteenth Amendment. We know that the congressional ratifiers of the Fourteenth Amendment in 1868 were
not uncomfortable with Jim Crow’s segregation. There was segregation in the schools in the District of Colombia. We know that at that time nobody in the Senate lifted up and tried to change those circumstances. *Brown* was argued twice and one of the specific questions between the first and the second argument that the Court posed to counsel after the first argument was how should the Court assess the fact that these D.C. schools were segregated at the time of ratification.

Historically, we know that after the first argument, the Court was divided. At the time, December 1952, there were 21 states that had school segregation laws, it affected some 12 million kids and 1,000 school districts. Just as Stanley Reed, to pick just one example, who had gone along a year earlier with a decision to desegregate restaurants, reportedly stated afterwards, “Why this means that a Negro can walk into a restaurant at the Mayflower and sit down to eat at the table right next to Mrs. Reed.” Chief Justice Vincent had said that he could not conceive that Congress did not have the problem of education in front of them because the discussion of schools had been prominent, and he said that he could not believe that they, Congress, had decided that schools shan’t be separate. When in fact on September 8, 1953, Chief Justice Vincent died from a massive heart attack, Justice Frankfurter reportedly stated, “This is the first indication I have ever had that a God exists.”

In a famous 1959 *Harvard Law Review* article, Herbert Wexler, maybe the preeminent constitutional scholar at the time, certainly one of them at Columbia, concluded that he saw no neutral principle that would justify ruling segregation unconstitutional. So it was no sure thing that *Plessy* would change. Even more particularly the strategy that asserted that separate must constitutionally mean unequal and the reliance upon social science evidence for a normative meaning of equality—that didn't have to follow either from an attack on *Plessy*.

Think about the cases that were brought subsequently: the predecessor cases, *Gaines*, *Sipuel*, *McLaurin*, *Sweatt*. A challenge to *Plessy* could be directed at the equal end of the formulation or the separate end—not say as *Brown* had it, on in fact just the separate piece itself. Now it can certainly be argued, and I think argued properly, that what *Gaines* and *Sipuel*, *McLaurin*, and *Sweatt* did was to have the doctrine collapse under its own weight. How much

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could the court in fact be engaged in in terms of measuring what was equal in case after case? But listen to what Robert Carter of the NAACP said in terms of how doctrine moves, how doctrine shifts, how it changes. Robert Carter of the NAACP, leading off the Brown argument said: "Here we abandon any claim. In pressing our attack on the unconstitutionality of this statute, we abandon any claim of any constitutional inequality which comes from anything other than the act of segregation itself." Again, my point is listen to how the doctrine was in the process of alteration. How, not by using specific words in the Constitution itself but how these lawyers, as part of the community and times that they were very much a part of, were moving to have the doctrine metamorphosize. And this is what Thurgood Marshall said: "First, I want you to listen to John Davis. John Davis was the Solicitor General, former Solicitor General of the United States." He was the lead lawyer for the other side. He was making basically a federalism argument. Then this is what Davis said:

I am reminded and I hope it won't be treated as a reflection on anybody of Aesop's fable of the dog and the meat. The dog with a fine piece of meat in his mouth crossed a bridge and saw the shadow in the stream and plunged for it and lost both substance and shadow. Here is equal education not promised, not prophesized, but present. Shall it be thrown away on some fancy question of racial prestige? I entreat them to remember the age old motto that "the best is often the enemy of the good.

And when Davis finished that argument, with tears coming down his face, a lawyer remarked to Marvin Frankel, later a famous federal district court judge, "My God, look at Davis, look at the tears that are pouring out of his cheeks." And Frankel, who had seen Davis argue scores of arguments, turned and responded, "That son of a bitch cries in every case he argues."

Marshall then responded, and this is what Marshall said:

As Mr. Davis said yesterday, the only thing the Negroes are trying to get is prestige. Exactly right. Ever since the Emancipation Proclamation, the Negro has been trying to get what was recognized in Strader v. West Virginia, which is the same status as anybody else, regardless of race. I got the feeling on hearing the discussion yesterday that when you put a white child in a school with a whole lot of colored children that the child would fall apart or something. Everybody knows that is not true. Those

7. National Association for the Advancement of Colored People.
8. 100 U.S. 303 (1880).
same kids in Virginia and South Carolina—and I have seen them
do it—they play in the streets together, they play on the farms
together, they go down the road together, then they separate to go
to school, then they come out of school and play ball together.
They have to be separated in school. There is some magic to it.
You can have them voting together, you can have them not
restricted because of law in the houses they live, you can have
them going to the same state university and the same college but
if they go to elementary and high school, the world will fall apart.
And it is the exact same argument that has been made to this
Court over and over again and we submit that when they charge
us with making a legislative argument it is in truth they who are
making the legislative argument. They can't take race out of this
case. They can't take race out of this case. From the day this case
was filed until this moment nobody has in any form or fashion,
despite the fact I made it clear in the open argument that I was
relying on it, done anything to distinguish this statute from the
Black Codes, which they must admit because nobody can dispute,
say anything anyone wants to say, one way or the other, the 14th
Amendment was intended to deprive the states of their power to
enforce Black laws. The only thing can be is an inherent
determination that people who were formerly in slavery,
regardless of anything else, shall be kept as near that stage as
possible and now is the time, we submit, that this Court should
make it clear that that is not what our Constitution stands for.

When Marshall learned of the *Brown* decision, *Brown I*, he said,
"I was so happy I was numb." He said in the *New York Times* the
next day that, "segregation would be stamped out in no more than
five years." He said, "By the hundredth anniversary of the
Emancipation Proclamation that all forms of segregation would be
eliminated." Now, I point that out to emphasize how much the
doctrine has changed, but in the context of *Brown*, what are the
present-day circumstances of public education?

Here is what is going on in California right now: for fourth-
grade kids on the national test, fourth grade kids reading 45th out of
51 states. Eighth grade reading, 44th out of 51 states. Fourth grade
math, 40th out of 51 states. Eighth grade math, 38th. In 2002 only
20% of California's 8th graders scored above proficient on the
national reading test, only one state did worse. The most recent
NAPE\(^9\) reports say that, for example, Los Angeles is below every
city but one, every major city but one in reading, every city but one
in math. In reading, 70% of Los Angeles kids read below grade
level, in math 58% below. California ranks 46th in the nation in
overall per pupil spending. It exceeds every other state in the
number of teachers with emergency, temporary, or provisional

\(^9\) National Association of Progress in Education.
credentials. It has the third most over-crowded classrooms in the country. According to Governor Schwarzenegger more than 1 million California school kids attended over-crowded schools or a school needing modernization. The California Department of Education shows that there are 1,000 school sites in 47 districts that are critically over-crowded. Some of the ramifications of that over-crowding—and I've been in these classrooms—kids taking AP exams, for example, because they have to be tracked in special ways to deal with the over-crowding, actually take the exams six weeks before their courses are finished. One thousand school sites in 47 districts across California are critically over-crowded.

The California Department of Education data says that of 794 California schools that operate with 20% or more teachers that lack full, nonemergency credentials, 5% of all elementary schools have one-third or more emergency-credentialed teachers with the lowest achieving schools. And you know which schools those are—30% of those schools have one-third or more teachers who lack full non-emergency teaching credentials. There are schools in the State of California that have as high as 86% teachers who are lacking those credentials. Approximately one-third of public school students in California don't have textbooks for their use.

A 2002 Harris poll of nearly 1,100 California public school teachers showed that nearly 12% of those teachers, teaching approximately 725,000 students, don't have textbooks for their students to use in class. 32.1% of teachers, nearly one-third, who teach approximately 1.9 million students don't have enough textbooks to send home with students for homework, although fully 92% of teachers say they do use textbooks as part of their instruction. There are 77,000 English Language Learners in California who receive no English Language Learner instructional services. I told the prior session that I took the deposition of the head of that program for the State of California, who said, for example, that Oakland has not had services, books, materials, proper teachers for over two decades and wouldn't know when in fact the school system would come into compliance. The number of English Language Learners receiving no English Language Learner instructional services of any sort is approximately one out of every twenty English Language Learners statewide. The California Department of Education has said that there are 205 districts around the state in which 10% or more of the districts' English Language Learners are not receiving any English Language Learner instructional services whatsoever.

What about the gaps? California's low-income students

10. Advanced Placement.
perform near the bottom among the states in every grade and every study, subject on the national test that I was talking about. California's low-income students rank 50th out of the 50 states and the District of Columbia. California's gap between Latino and white students NAPE results in reading ranks 38th out of 40 in reading, 38th out of 43 in math. In the California High School Exit Exam, 83% of white students passed the English Language Arts section, only 56% of African-American students, 53% of Latino students, 51% of low-income students passed that section of the exam. You all know that that exam has been suspended, and you all know the reasons why that is. Not that they are going to fix the education for the kids, but that they cannot deal with those sorts of results. Whereas 63% of white students passed the math section of the test, only 26% of African-American students, 30% of Latino students, and 31% of low-income students passed the math section. As early as the fourth grade in California, black students' reading and mathematics performance already lags two years behind their white peers. By middle school, it is three years. By the end of high school, black 11th graders read at a level at least four years behind their white peers.

Graduation rates for white students in California, 77.4%. African-American students—and everyone agrees these numbers are probably high-58.4%. Latino students, 58.4% as well. 83% of teachers working at schools serving small percentages of low-income students say they always have access to textbooks. Fifty-seven percent of teachers who work at schools serving a large population of low-income students said that they had access to textbooks, 43% say they do not. A 2002 Harris poll of nearly 1,100 California public school teachers showed that teachers with more than 30% English learners in their classrooms are as much as four times less likely than teachers with 30% or fewer English learners to have access to textbooks and instructional materials. Students in high-minority schools are seven times more likely to have under-qualified teachers than in low-minority schools. In more than—now I'm using state data—in more than 20% of the state schools, more than 20% of the teachers are under-qualified. I am quoting from the Department of Education. And the schools are disproportionately in high-poverty communities with large proportions of students of color and English Language Learners. The Little Hoover Commission in California in 2001 said that the number of unprepared teachers is growing and most of those teachers are assigned to schools with students with the greatest academic challenges. In districts with more than 90% minority enrollment in Southern California, just over 70% of the teachers have full credentials. If it is 40%, it is 90%.
One more set of numbers I want to give you. After Brown, after Serrano, California Department of Education data shows that the weighted mean expenditures per pupil for elementary and unified school districts are $6,700 and $6,900, respectively. In the upper range, after Serrano, school districts, California districts expend about $22,400 per pupil, $30,800 for elementary districts, in the lower range—and you know what schools we’re talking about—in the lower range, California districts expend roughly $4,300 per pupil for unified districts and $730 per pupil for elementary districts. For large districts that enroll over 500 students, the average daily expenditure is between $4,000 to over $15,000, a nearly 4/1 ratio. And again, you know who the schools are at the lower end. In San Francisco, the expenditure is $6,400 and change per student. In Sausalito, it’s $16,583 per student. In Bolinas, it’s $11,222 dollars per student.

I want to give you one school in particular. This is not even the worst of it. One school, Fremont High School, in Los Angeles. It operates a year-round schedule that has 17 fewer days of instruction. Course enrollments reach as high as 52 and even 60 students in core academic classes. Classes—and I have been there—have taken place in cafeterias, where one part of the cafeteria has to stay quiet while the other one does instruction, and they have to alternate back and forth so that the noise does not block out altogether. Teachers have to roam from classroom to classroom, use other classrooms during break periods. For at least three consecutive years, Fremont students have had textbook shortages in core subjects. In October 2000, foreign language students had no books. January 2001, special education needs books, grammar, and composition books. End of 2000-2001, Fremont did not have enough textbooks, but they said well, there’s more coming. In 2001/2002, Fremont did not have chemistry books, literacy books, and Spanish textbooks. A year later, students did not have chemistry books, Spanish books, and other core subjects. Mice, rats, roaches, and other vermin are so prevalent in that school that the school required service 80 times in a two-year period and in October 2000, for rats in eight different rooms. In this and one other school, students write, put their essays on the board, and those essays are about the rats in the class with pictures of the rats in the class.

Fremont has 15 fewer toilets available for student use than the law requires. It means at most only one toilet for every 105 girls to use during certain school periods. I have talked to kids and their

parents. Those kids have defecated on themselves because there are no toilets available. School records reflect persistent temperature problems, sometimes as high as over 100 degrees in classrooms. At the time, classrooms had not been painted for 14 years.

Where does Fremont stand academically? On the so-called API that I think many of you are familiar with, Fremont is at the very lowest, a decile of one. Only 11% of African-American students at Fremont passed the math portion of the high school exit exam. Nine out of ten kids, 89%, could not pass it. Fifteen percent of its Latino students and 16% of its low-income students were all that passed that section. 34% of Fremont’s black students passed the English Language Art section, two-thirds did not. Forty-five percent of Latino students did, 55% did not. Fifty-four percent of low-income students did not pass that section. Of the 5,000 students in that school, 87% are Latino, 12% are black, and 37% are English Language Learners. When asked about filling a Spanish teaching position, the school administration conceded it had been open all year. The principal said, “We’ve got a teacher in there teaching out of his subject area, and that’s the best we can do.”

When I talked about the school and the sorts of statistics that we are talking about with the lawyers from the state defending these practices, arguing in court that textbooks were not necessary for schools, the state has spent over $20 million to defend these sorts of practices—the lawyer for the other side, the lead lawyer for the other side, to me said, “Why I give them books? They can’t read anyhow.” Now—and I want to say one other thing—when they took a deposition of kids—here in the state of California, $20 million—when they took a deposition of a kid for three days, these are the sort of questions that they asked them in defending these practices. The student said she was tired. She was in her third day of testimony about these sorts of conditions. Sorts of questions were: “How many times did you see the rat? Every time you saw the rat, did that affect your education? Can you tell me in detail how seeing the rat affected your education?” Finally she became tired towards late in the afternoon and the lawyer said, “What were you doing last night?”

“I went to a prom.”

“Where? To a prom?” Question: “To a prom, to your senior prom?”

“Yes.”

The lawyer then said, “I certainly wasn’t out last night. I was in here at seven in the morning preparing for the deposition.” That is the sort of defense of these conditions. Now how did
we get to this place? How did we get to this place 50 years after Brown, where the transparently unequal, especially in the area of education, is commonplace for so many children of color and so many children from low-income families in California? And you know it is true across the country. And I think there are a lot of answers to that question, way beyond the scope of my discussion or Professor Chemerinsky’s discussion. And I certainly do not mean to blame the victim but I want to talk about the disjunction. That disjunction exists in our profession in terms of the concept of equality as we know it, as we think about it, when we care about one another and when we use it in plain understanding as to how we related to one another, and then the concept of equality as we too often speak about it in a courtroom.

What do we really think equality is all about? Why, for example, do we rightly champion Brown. On what dimensions and how do we advocate for equality in the courtroom? Think about, as a way of considering this, think about our responsibility as lawyers. The Black-Eyed Peas group, who said, “If you don’t know truth, you’ll never know love.” Well, think about Justice Harlan’s, the first Justice Harlan’s dissent in Plessy, often lauded as placing the Equal Protection Clause on its proper footing. This is what the first Justice Harlan said, often quoted:

The white race deems itself to be the dominant race in this country and so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and hold fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Now think about that. Is it possible, thinking of the many and varied forms of social domination that racism takes to mediate the existence of a dominant white race and the notion of color blindness? Or think about the overruling of Plessy itself, again in the complexities of racism as it infects a society. Can it be overcome simply by substituting one formalism for another where separate was once equal, now separate is per se unequal? Or thinking of Brown II. Can racism be cured by such a formula at war with itself with all deliberate speed? Look at the language of Brown, the language of Brown as it liberates but also particularly as subsequent courts have hacked away at its spirit, as it confines our understanding of equality. How—and this I think is the challenge to law students and lawyers doing this work—how our jurisprudence

has shrunk our capacity to frame racism as we know it exists, as a broadly shared cultural condition. Instead, as too many of the cases think about it, as something that is something that is outside the law itself, which therefore makes it free from any sort of anti-racist analysis.

How can it be that we must be constrained to reproduce the inequalities that the 14th Amendment was aimed to end? If you think about it, there is this endless regress in which the inequality in society makes rational further inequality by law. How do we think about equality when we really think about it? Equality isn’t whether groups are alike or unlike in some abstract. It is—I think if we assume equality, human equality on a group basis—it is whether or not a particular practice or a particular statute or policy promotes the socially disadvantaged of a historically disadvantaged or subordinate group. Do we talk about equality in those terms? It is to me obvious that it is in the interest of the privileged to decontextualize, to make abstract the analysis of equality.

What I think the Brown lawyers did understand and understood brilliantly was that the 14th Amendment, as doctrine shifted, shifted dramatically, creatively, and soulfully, that the 14th Amendment was about promoting equality, not countenancing a Constitution that reflected social inequality, by sorting people out by law in the very same ranks into which an unequal society had already classified them. Or think about it this way. I often say to my students if you were speaking to the Supreme Court, would you talk to the Court about morality? And in the twelve or fifteen years I’ve been teaching I’ve never had a student say, “Yes.” How can the principle of equality be drained of identifiable moral dimensions, as if morality were not a word to be uttered in constitutional explication, as if it were to be banned from our courtrooms altogether? We celebrate Brown as we should for, among other things, teaching us that our constitutional understandings within the framework of a community, within the framework of understanding, what it’s like on the ground, can be made for change and for inspiring us never to remain still in the face of inequality.

When you think that this is the fifth largest economy of the world, 50 years after Brown, how can it be that the conditions that I’ve talked about can continue to exist generation after generation? We know that there is no suffering like the suffering of a child. Fifty years after Brown the dream remains a distant reality. Yet I think what endures, what sustains us, is our unhallowed belief in the dignity and the potentiality of every child. Speaking for myself, what I love most about my life is its intensity, and it’s the privilege of being entrusted with the pain of neglect and indifference, the opportunity to share with others the joy of children discovering
themselves. For it is through that process, which is the process of Brown and it is a process of so many lives in this room, that we may take pause in our contention with the world and recall the democratizing purpose of education. The most elemental lesson of childhood, a childhood left pure and a childhood nourished, that the sound of the universe is the beat of a child’s heart. Thank you very much for having me.

ERWIN CHEMERINSKY

It is a tremendous honor and pleasure to be here. As America approaches the 50th anniversary of Brown on May 17th of this year, the reality is that American public schools are increasingly separate and unequal. The statistics here are startling. In the first decade after Brown, there was almost no progress towards desegregation. As of 1964, only 1.2% of African-American children in the Southern states that had been the Confederacy were attending schools where white children were present. In Alabama, Mississippi, and South Carolina in 1964, not one black child was attending school with a white child.

In the decade after 1964, progress began to be seen. Many reasons account for why there was the change. In 1964, the Supreme Court finally said there had been all too much deliberation and not enough speed and began to impose mandates on school systems to desegregate. In 1964, as part of the Civil Rights Act adopted that year, Title VI said that any recipient of federal funds could not discriminate on the basis of race. School districts that did not comply with desegregation orders would lose their federal funds, and that was a major incentive finally for compliance with the desegregation mandate. From 1968 to 1988, every year by every measure, there was an increase in desegregation. The number of African American and white children that were attending school together in Southern states increased, the number of African American children or white children attending schools of more than 90% of one race decreased.

But then in 1988, the trend began going in the opposite direction. From 1988 through 2003—we do not yet have 2004 statistics—every year there has been a decrease in desegregation and an increase in segregation. Harvard Professor Gary Orfield, who is comprehensively produced and studied these statistics, said in the decade between 1988 and 1998 almost all of the progress that had been achieved between 1964 and 1988 had been lost and as most recent statistics show, that since 1998 it is only getting worse. In just the last five years, the trend seems to be accelerating towards ever
increasing segregation of schools. And again, this is by every
measure of segregation. If you look at the number of black and
white children attending school together, the number of black and
white children attending schools in more than 90% one race, you
find a tremendous increase in the amount of segregation. Moreover,
the separate schools are also unequal.

Mark, in the last talk, presented the statistics about here in
California. Schools that ranged from an average $4,000 per pupil to
schools that range to $16,000 per pupil per year, and you find a
strong race correlation going with the expenditures. Nationally, on
average 20% less is spent on a black child’s elementary and
secondary schooling than the average white child’s elementary and
secondary schooling.

How did this come to be? Why have we failed so profoundly to
achieve the noble hopes and mandate of Brown? To some extent the
answer is political. There has never been the political will or desire
to do the things that would bring about desegregation. The reality
is no state legislature in the country has adopted an effective
desegregation plan. Congress has never adopted a law or to
desegregate the schools. Whether you point to the Republican
Presidents, such as Nixon and Ford and Reagan and Bush and Bush,
or the Democratic Presidents, Carter and Clinton, none have
advocated a national effort to bring about desegregation. Nor has
any President since Lyndon Johnson advocated major legislation to
deal with housing segregation, knowing of course that segregated
housing is a key reason why we have segregated schools. Nor has
any President or any Congress said we need a major national effort
to deal with inequality in school funding. But it is not surprising
that we do not find the solution from the political process. I noted
on the back of your program today the quote from footnote 4 of
Carolene Products,14 where it talks about a special judicial role in
safeguarding discrete insular minorities. The reality is it’s never
been the case in American history that the political process that is
majoritarian will efficiently protect minorities. That is the role of the
courts. That is what the Court so eloquently did in Brown.

But my thesis for you tonight is that it is really the courts that
have failed us. It is the courts that are responsible for the fact that
we have not achieved equal educational opportunity. There are
scholars like Gerald Rosenberg, in his very influential book, The
Hollow Hope,15 saying that the failure to achieve equal educational
opportunity shows the inherent limitations of the courts. My thesis

15. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL
tonight is that Rosenberg is just wrong. It is not that the courts had
to fail, it’s they did fail. The courts could have at key junctures over
the last half century brought about equal educational opportunity,
but they didn’t. What I’d like to do is look at three of those
junctures, the mid-1950s, the 1970s, and the 1990s. What I want to
talk about is how different things could have been if only the Chad
decided cases in a different way.

Let me start in the mid-1950s. We are here today to celebrate
Brown, but the story of Brown did not end on May 17, 1954. The
Supreme Court there imposed no remedy for segregation. Instead,
as you know, the Supreme Court set the case over for reargument
the next year as to what was the appropriate remedy. Thurgood
Marshall, on behalf of the NAACP, argued that the Court should
impose a mandate for immediate desegregation of schools. The
Supreme Court did not do that. The Supreme Court did not set a
timetable for desegregation. The Supreme Court did not prescribe
remedies for desegregation. Instead, all the Supreme Court said
was there should be desegregation ordered by the lower courts with
“all deliberate speed.” Now I have always thought that phrase “all
deliberate speed” is really an oxymoron, an internally contradictory
phrase like jumbo shrimp or airplane food. For deliberation
connotes being slow and careful. Speed is obviously exactly the
opposite. We now know that the phrase “all deliberate speed” was
suggested by Justice Felix Frankfurter, and Frankfurter said that it
was an old English phrase coming from common law. Many legal
historians have gone back and they cannot find any use of that
phrase in English common law.

One thing that is often forgotten is that Brown was not argued
for the first time in 1953. It was actually argued in the fall of 1952.
And then the Supreme Court could not come to a decision and
instead decided to set the case over for reargument in 1953, which
produced the decision on May 17, 1954. In a quote by none other
than William Douglas, who was a justice on the Supreme Court
then, in his autobiography, The Court Years,\textsuperscript{16} stated that when the
Supreme Court voted in the spring of ’53 on the issue of Brown, it
was 5 to 4 to uphold separate but equal. Douglas went on to say
that had the Supreme Court issued its decision as it was scheduled
to do by the end of June of 1953, it would have been 5 to 4 to uphold
what southern states were doing.

Chief Justice Fred Vincent died in the summer of 1953,
President Eisenhower appointed Earl Warren to sit and preside over
the Court. Warren did so as Chief, even though he had not yet been

\textsuperscript{16} \textit{William Orville Douglass, The Court Years, 1939 to 1975: The
confirmed by the Senate. According to many historians, most notably Richard Kluger in his wonderful book *Simple Justice*, Warren thought it was essential that it not be a 5-4 decision to order desegregation and that instead it needed to be unanimous. Warren went and persuaded Frankfurter, who was willing to vote for separate but equal, to change his mind. And then Frankfurter persuaded two other justices, Burton and Reed, to change their minds.

And that then left one holdout, Robert Jackson. Jackson, as I am sure you know, had a law clerk who was writing memos to him, urging him to uphold that separate but equal was constitutional. That law clerk was William Rehnquist. Warren went to see Jackson in his hospital room—Jackson was recovering from a heart attack—and Warren came away saying that Jackson had agreed to make it unanimous. What the Court did in May of 1955, when it just said that it was remanding the case to the lower court for remedies with all deliberate speed, was basically give no mandate, no guidance.

In fact, if you go back to the *New York Times* from the day after *Brown II* came down, you find the governors and the lawyers for the southern states all saying that it was a victory for them. They had been afraid that the Supreme Court was going to order an immediate end to segregation, and the Supreme Court didn't do it. They were afraid that the Court was going to set a timetable for desegregation. The Court did not do it. They were afraid that the Court was going to describe the remedies, reassigning pupils, redrawing attendance districts, reassigning teachers, and the Court did not do it. In fact, it was not until a decade later that the Supreme Court finally said, as I mentioned, that there had been all too much deliberation, and not enough speed. And it was not until 1971, seventeen years after *Brown*, in *Swann v. Charlotte-Mecklenburg Board of Education*, that the Supreme Court for the first time outlined the remedies that courts should use in bringing about desegregation. None of us can know how things might have been different had the Supreme Court done more in *Brown II*, but as we applaud *Brown I*, I think we also have to be very critical of the lost opportunities of *Brown II*.

The second critical juncture was in the 1970s. By the 1970s, for the first time, there was significant progress towards desegregation. The statistics show beginning in 1964 and accelerating in 1968, every year desegregation increased. Court orders were finally in place in almost every Southern state mandating desegregation. But three

problems became apparent by the 1970s. One was white flight. The reality is that in most major metropolitan areas white families were trying to avoid desegregation efforts by going to the suburbs. It meant that the city schools were increasingly comprised of minority students and without a significant number of white students present, it would not be possible to achieve desegregation.

The second problem was Northern school systems. The focus of Brown of course was on school systems where there had been laws mandating segregation of the races, which of course, as we all know, that does not mean that Northern school systems were integrated. The reality is whether it was a product of state laws, the way districts were drawn, or housing segregation, Northern school systems were just as segregated as southern ones were and the Supreme Court had not dealt with that problem.

Third, it was evident that there was tremendous inequality of school funding. Three professors at Boalt Hall, Coons, Clune, and Sugarman, wrote a stunning book called Private Wealth and Public Education\textsuperscript{19}—published in 1971—that documented the tremendous wealth disparity in schools, where poor areas had a tax at a high rate and still had little to spend on education, where wealthier areas got taxed at a low rate and had a great deal more to spend on education. The Supreme Court had the opportunity to deal with each of these three issues in the 1970s and in each instance the Supreme Court decided in exactly the wrong way to bring about equal educational opportunity.

With regard to white flight, the key case was Milliken \textit{v.} Bradley\textsuperscript{20} in 1974. It involved the Detroit public schools. Detroit was an area where there had been significant white flight from the central city to the suburbs, frustrating desegregation. The federal court imposed a metropolitan-wide desegregation plan. It meant that students could be taken from suburban schools and brought into the city. Minority students could be taken from the city schools and brought into the more white suburbs. The Supreme Court, in a 5-4 decision, held that the order for a metropolitan-wide remedy exceeded the judicial power under the Constitution. It is important to note that the five justices in the majority included the four recently appointed by President Nixon: Chief Justice Burger, Justice Blackmun, Justice Powell, Justice Rehnquist, joined by Justice Stewart. The Supreme Court said in \textit{Milliken} that a court could not impose an interdistrict remedy unless there was proof of an interdistrict violation. Unless it could be shown that the state intentionally drew districts to segregate students, there couldn't be

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\item \textit{Private Wealth and Public Education} (1971).
\item 418 U.S. 717 (1974).
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an interdistrict remedy.

The result is that in almost every area of the country interdistrict remedies weren't allowed. As city schools became increasingly comprised of children of color, as whites were predominantly in the suburbs, it was impossible to achieve any meaningful desegregation in most cities. In most major cities now the public schools are comprised of more than 80% minority students. When you have got 10% or 15% white students in the school system, no matter how you transfer people, you are not going to achieve effective desegregation. Charles Clodfelter of Duke University published a study last year in which he found that over 65% of all of the segregation that exists today is a result of the lack of interdistrict remedies. I grew up in Chicago so it is the school system that I know best. In the west suburbs of Chicago, just outside the city, you have got the Oak Park River Forest school system or the Hinsdale school system, which are almost entirely white. Just across the border in Chicago you’ve got the Austin neighborhood, which is almost entirely comprised of minority students. It would be very easy to transfer students across those lines but it’s not allowed because no interdistrict remedy is permitted because of Milliken v. Bradley. I have lived in Los Angeles for 21 years. I look at the Beverly Hills school system or the Santa Monica school system, which are predominantly white school systems. How easy it would be with an interdistrict remedy to transfer peoples from there into nearby predominantly minority areas and vice-versa? But because of Milliken, that is not permitted.

The second thing the Supreme Court did in the 1970s was consider northern school systems. In a case called Keyes v. School District No. 1, Denver, Colo., the Supreme Court said there could be judicial remedies for northern school systems if there was proof of intentional race discrimination. It is very difficult to prove discriminatory purpose. Certainly there is discriminatory impact to countless choices that states have made with regard to schools. The way in which the district lines are drawn, decisions with regard to housing, all of these contribute to segregated schools. But it’s enormously difficult to then go the next step and show that these actions were taken with the intent of causing segregation. But the Supreme Court said there could be desegregation remedies only if it could be shown that there wasn't just de facto segregation but it was de jure, preventing effective desegregation remedies for most northern cities.

The third thing the Court had to deal with in the early 1970s was the inequality of resources that was being spent on students’

education. *San Antonio School District v. Rodriguez*,\(^\text{22}\) in 1973, involved a challenge to the system of funding public schools largely through local property taxes. The litigation involved companion school districts in the San Antonio area. One school district was predominantly comprised of poorer students with a low tax base, but they had a high tax rate while still spending relatively little on education. A companion suburb with its school district had a very wealthy tax base. It taxed at a much lower rate but spent a great deal more on education. The issue was whether this lower rate violated the Constitution. The Supreme Court in a 5-4 decision ruled that it did not violate the Constitution. Justice Powell wrote the opinion for the Court, and it was the same split among the Justices as in *Milliken*. The four Nixon appointees—Powell, Burger, Blackmun and Rehnquist—were joined by Justice Stewart in finding no violation of the Constitution. Justice Powell’s majority opinion said that education is not a fundamental right under the Constitution.

In *Brown*, Chief Justice Earl Warren spoke so eloquently of the importance of education in our modern society. But just nineteen years after *Brown*, the Supreme Court declared that education is not a fundamental right, and the Supreme Court said discrimination against the poor does not violate Equal Protection. The Court in essence said the poor are not a discrete and insular minority. Only, to use the technical language, rational basis review is used for discrimination on the basis of wealth, not the strict scrutiny of race discrimination.

If you put *Milliken* and *Rodriguez* together, you see why we have separate and unequal schools. *Milliken* insures that we are going to have separate schools, inner city versus suburbs. *Rodriguez* insures that they are going to be unequal with regard to their funding. Again, it is always impossible to know how things might have been different had the cases come out a different way and yet I have got to believe had *Milliken* and *Keyes* and *Rodriguez* come out differently, we would have a very different reality now as we talk about the nature of American public education.

The third critical juncture was in the 1990s. Despite what I have discussed, there were effective desegregation plans imposed in many places around the country, especially in those areas where there had been laws mandating segregation. The issue the Supreme Court had to deal with in the 1990s was whether these desegregation orders that were effective should continue or whether they should end. This came before the Court in 1991 in *Board of*

\(^{22}\) 411 U.S. 1 (1973).
Education v. Dowell.\textsuperscript{23} Oklahoma was a state that had mandated segregation of the races in public education. In fact, the first desegregation plan for the Oklahoma City schools was not put in place until 1971, seventeen years after Brown. By the 1990s, it was a tremendously successful desegregation effort. As a result, virtually no black students attended schools that were more than 90\% black, almost no white students attended schools that were more than 90\% white. By every statistical measure of desegregation, it had been achieved in Oklahoma City.

However, the opponents of desegregation went to the federal court to end the desegregation order. The United States Court of Appeals for the Tenth Circuit said the desegregation order should continue. The Tenth Circuit said that the uncontroverted evidence of the case showed: that if the desegregation order ended, there would be the immediate resegregation of the Oklahoma City schools. If the school district stopped bussing pupils, if it stopped assigning pupils to achieve desegregation, segregation would result. The Supreme Court reversed the Tenth Circuit. The Supreme Court said that once a school system achieves unitary status, the desegregation order should come to an end, even if it means the resegregation of the schools.

The next year, the Supreme Court decided Freeman v. Pitts.\textsuperscript{24} It involved a school system in Georgia. It, too, of course, was a state where there had been a law that had mandated segregation of the races. Here the court had imposed a five-point plan for the desegregation of the schools. One part dealt with student assignment, one part with teacher assignment, one part dealt with equipment, and one part dealt with the building of facilities, and there was another part that dealt with the overall administration of the district. The school system was still under the desegregation order, and it wanted to build a brand new facility in the white area of the city that would predominantly benefit the white students at the expense of the black students. The school system went to the Supreme Court and said it had already been found to be in compliance with the court order with regard to desegregating facilities. So, it said, even though it did not yet have desegregation as to teacher assignment, and had not yet desegregated student assignment, there should not be federal court supervision with regard to facility construction. The Supreme Court, in a 5-4 decision, agreed with the schools and said once a school system has achieved compliance with part of a desegregation order, federal court supervision should end. Since they were previously in

\textsuperscript{24} 503 U.S. 467 (1992).
compliance with the facilities part of the desegregation order, the school system was allowed to build a facility in the white area of town, to predominantly benefit the white students and not the minority students.

Finally, in 1995, the Supreme Court decided Missouri v. Jenkins. It involved the Kansas City schools, again a school system where there had previously been a law mandating segregation of the races. Here, like in Oklahoma City, there was an order that effectively desegregated the Kansas City public schools, but the school system and the opponents of desegregation went to court and said that they wanted an end to the desegregation order because the system had achieved unitary status. The response was that there was still tremendous disparity in the standardized test scores between white students and minority students and that this showed that it really was not a unitary system, that the legacy of segregation, the badges and incidents of segregation still persisted. But the Supreme Court, in a 5-4 decision, ordered an end to the desegregation effort in Kansas City. The Court said proof of educational disparity does not show that it is still a dual school system, and the result has been a substantial resegregation of the Kansas City schools.

The lower courts have taken the signals from the Supreme Court. In court of appeals decisions and district court decisions all across the country, there have been orders to end desegregation programs, even effective desegregation programs. In Tampa and Charlotte and Rockford or other major school systems in the country, there has been now an end to the desegregation orders. In others there are motions pending to end the desegregation orders. Gary Orfield says that the statistics show that as a result of the end of the desegregation orders, segregation of schools is increasing across the United States at an accelerating rate.

During the 1970s a senator from Vermont by the name of George Akin said that what we should do with regard to the Vietnam War is declare victory and withdraw. I think what the Supreme Court did in the 1990s is simply declare victory over the problem of segregated schools and withdraw the federal courts. And they are withdrawing at an ever increasing rate.

I realize that Mark, and I have painted a very bleak picture, and I do not like to leave on a hopeless note. So I think the question is, "Is it hopeless?" And in answering this conclusion I break it down into two subparts. Are there things that can be done? And then, are there things that will be done?

As to the former, I think there clearly are things that can be
done. Courts can order equalization of school funding. Courts can effectively order desegregation of schools. Putting aside the reality of what will be done, I have a solution for American public education: require that every parent send his or her children to public school and require that all of the public schools be a metropolitan-wide public school. If every parent has to send his or her child to public school then those parents with resources will make sure that the public schools are adequately funded. But so long as the wealthiest among us can opt out of the public schools, the rich have no incentive to make sure that the public schools are adequately funded. Here I draw an analogy to our public health system. If everyone in society had to get their medical care from the public hospitals, the nature of medical care in public hospitals would be very different than it is today. But so long as the most wealthy and powerful among us don't have to use the public hospitals, there's going to be a dual standard of medical care, one for the poor and one for the rich. And that's exactly what we have with regard to education today.

Now I understand the constitutional objections to eliminating parochial and private schools. On the other hand, a compelling interest justifies the infringements of any right. And I would say education of our children is a compelling interest, and I see no less restrictive alternative. Now this is not going to happen in any of our lifetimes. In fact, I think the trend is very much in the opposite direction. One of the reasons that I am so critical of voucher programs and charter schools is they move us further away from a unitary school system, that what you end up having is with vouchers or charter schools is that people can opt out of the public school system but still take some of the public money with them.

Now if we cannot reach the ideal, are there things we can and will do? On the one hand, there is reason for pessimism. I do not see any of the major political candidates, not the Democrats or the Republicans in this presidential election, saying that schools should be a major priority in a way that makes a meaningful difference. I have not heard any of the candidates talk about the statistics that you have heard today with regard to segregation of schools or unequal educational opportunity. I do not see any likelihood that the Supreme Court as now constituted is going to go in a different direction than it's gone ever since the 1970s. But yet that does not mean it is hopeless either.
There is successful litigation going on in many states under state constitutions. The Williams case, in which Mark Rosenbaum was so instrumental, has really brought about a change here in California. There have been states like Connecticut, New Jersey, Texas, and other places, that have effective litigation under state constitutions and state courts. And the justices who are now on the Supreme Court, from my perspective, thankfully, are not going to be there forever. There will be another generation of lawyers that will devise arguments to really make a difference. The reality is that Brown happened because of courageous men and women like Thurgood Marshall and Constance Baker Motley, who were willing to dedicate their careers and their lives to making equal educational opportunity a reality. And I have no doubt that there are people in this room who will dedicate themselves to that and that there will be a time when it is much better than it is now, where the prophecy, the mandate of Brown, really will be realized. Thank you.

26. Williams v. State of California was a class action lawsuit against California for the state’s failure to provide public schools with adequate teaching materials, safe facilities, productive work environments, and sufficiently trained teachers. For more information, visit http://www.smfc.k12.ca.us/williams.html or http://www.cde.ca.gov/eo/ce/wc/index.asp.