

The Lessons of History

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I. INTRODUCTION

A short time ago, I acted as the narrator in a performance of Aaron Copland's moving piece "Lincoln Portrait." The words I read included those delivered by President Abraham Lincoln to the Congress on December 1, 1862, in the midst of the Civil War. The subject was slavery. Lincoln's famous speech concluded: "Fellow-citizens, we can not escape history."¹ On this important occasion honoring the life and legacy of one of the great figures of our period, the late Judge A. Leon Higginbotham, Jr. let me say that my special friend and esteemed colleague also knew well the value of looking back to move forward.

In his first masterful work, *In the Matter of Color*, Judge Higginbotham concluded the preface with Lincoln's admonition.² Later, in his final profound book, *Shades of Freedom*, he quoted a similar passage from the philosopher George Santayana, who said, "Those who cannot remember the past are condemned to repeat it."³ An astute scholar, Leon Higginbotham was such a serious student of history that he constantly used his vast knowledge of the past as a guide for himself and others.

Certainly, Lincoln's warning applies as much today as it did 140 years ago. Surveying the issues of "Race, Values, and the American Legal Process," we see disheartening indications that history is being ignored. Nowhere is this more apparent than in the field of civil rights, especially regarding the constitutional mandate to end racially segregated schools "root and branch."⁴

Segregation is retaking American schools.⁵ In city after city, the hard-won court victories to desegregate schools are being dissipated, and poor, black

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1. President Lincoln's Second Annual Message to Congress, *reprinted in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897 126, 142 (1897).

2. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* ix (1978).

3. A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM* 190 (1996).

4. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

5. *See, e.g.*, GARY ORFIELD ET AL., *HARVARD PROJECT ON SCHOOL DESEGREGATION, DEEPENING SEGREGATION IN AMERICAN PUBLIC SCHOOLS* (1997). Commenting on local elementary schools, John Grossman, president of the Columbus (Ohio) Education Association, ruefully noted, "We're re-creating the past and have not learned." Bill Bush, *Separate and Unequal*, COLUMBUS DISPATCH, June 25, 2000, at 1A. Similarly, Ray Miller, a black Ohio State Representative, noted the disparities between schools to which black students are relegated and other schools in the Columbus system when he concluded, "This [situation] is probably ripe for a lawsuit." *Id.*

children are once again faced with separate and unequal educational opportunities.⁶ Adding to the re-segregation problem are current so-called “reforms” of the education system, such as charter schools and voucher programs. Proponents of these self-described “educational enhancements” argue the purity of their motives, which allegedly spring from a desire to improve education for disadvantaged minority children.⁷ Contrary to the myth that they provide a better education, charter schools and voucher programs actually exacerbate the problem because these “reformers” miss a critical point: their “enhancements” minimize the importance of a racially diverse learning environment. They are, in effect, turning back the clock to the segregated world under *Plessy v. Ferguson*.⁸

The surge of support for charter schools and voucher programs flies in the face of the Supreme Court’s landmark 1954 *Brown v. Board of Education*⁹ decision that overturned *Plessy*. State-supported, racially-isolated education vitiates the pronouncements in *Brown* that education is a fundamental right and that state-sponsored segregation of schools is “inherently unequal.”¹⁰ Other important *Brown* teachings are similarly being ignored, such as the declaration that education is “the very foundation of good citizenship . . . [and] the principal instrument in awakening the child to cultural values”¹¹ It follows, of necessity, that educating children in environments that will prepare them to compete in a pluralistic society is fundamental. Before we herd black children once again into segregated schools, under any guise, there must be a serious review of our history in this area, a history, as Lincoln said, “we can not escape.”¹²

This is not the first time that blacks have been offered the chance to “trade off” their constitutional rights for momentary and often illusory gains. The sad situation is that many people who were themselves victimized by blatant and subtle forms of racial discrimination during their own education are nevertheless buying into the “reforms” myth.

At this point, the voice and pen of Judge Higginbotham are desperately needed. Were he here today, his deep, commanding baritone would call “time out” from such talk of “reform.” He would question the legality of states ceding authority to unaccountable groups of persons who implement racially-isolated

6. See, e.g., Bush, *supra* note 5.

7. It is beyond the purpose here to review the extensive and conflicting print literature and Internet information on charter schools and voucher programs. However, there are several books that offer general starting points for clarifying the viewpoints involved. See generally TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC (2001); THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS (2000).

8. 163 U.S. 537 (1896).

9. 347 U.S. 483 (1954).

10. *Id.* at 495.

11. *Id.* at 493.

12. See President Lincoln’s Second Annual Message to Congress, *supra* note 1, at 142.

The Lessons of History

schools.¹³ He would exalt the value of integrated education and the obligation of the judiciary to be true to the Constitution.¹⁴ He would admonish us to read with new eyes the bold decisions that squarely challenged *Plessy* and the “separate but equal” doctrine, decisions such as *Briggs v. Elliott*, the Clarendon County, South Carolina case decided in *Brown*.¹⁵ Always the teacher, Leon Higginbotham would encourage us to gain a thorough historical understanding before joining the current struggle over educational resources, equality, and race.

II. LOOKING BACK

Before we go further, let us focus for a moment on the conflicting words of *Plessy v. Ferguson* so that we may fully appreciate the strategies developed to attack its despicable constitutional gospel, which reigned for half a century. Writing for the majority, Justice Henry Billings Brown coldly stated:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.¹⁶

In stark contrast, the lone dissent of Justice John Marshall Harlan rang true:

Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves No one would be so wanting in candor as to assert the contrary.¹⁷

Although *Plessy* specifically dealt with segregated public travel, its “separate but equal” doctrine invaded all aspects of public life, especially education. History has shown Justice Brown’s fundamental misconceptions and Justice Harlan’s brilliance.¹⁸ The saga of *Plessy*, and the decades-long strategy to dis-

13. See, e.g., Andrew Welsh-Higgins, *Lawsuit: Charter Schools Illegal, Unconstitutional*, CINCINNATI ENQUIRER, May 15, 2001 (describing coalition of Ohio education groups and teachers unions charging Ohio charter school program as violating Ohio Constitution and state law due to schools operating outside state system of common schools without public accountability).

14. See Richard Rothstein, *If Tried, Real Integration Easily Proves Its Worth*, N.Y. TIMES, January 30, 2002, at B8.

15. *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951), *rev’d*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

16. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

17. *Id.* at 557 (Harlan, J., dissenting).

18. I note in passing that Justices Brown and Harlan, the principal protagonists in *Plessy*, once sat on the court on which I am now a member. Justice Henry Billings Brown served on the Sixth Circuit from 1891 to 1894, while Justice John Marshall Harlan of Kentucky served from 1866 to 1881. The similarity ends there. The irony is how remarkably the backgrounds of these two Justices contrasted with their public stances in *Plessy*. Henry Billings Brown hailed from the non-slave state of Michigan and held degrees from Harvard and Yale. John Marshall Harlan came from a slave-holding Kentucky family, attended the small Centre College in Danville, Kentucky, and then Cumberland Law School,

mantle that egregious decision, teaches us that there can *never* be equality in state-imposed racial segregation.

A. *The Initial Strategy to Overturn Plessy v. Ferguson*

Regarding the strategy to overturn *Plessy*, Judge Higginbotham was ever mindful that the judiciary is charged under the Constitution with protecting our rights, and he always directed our attention to the towering figures of Charles Hamilton Houston and his protégé, Thurgood Marshall, who initiated and led the legal campaign that exposed the lie of “separate but equal.” According to his biographer Genna Rae McNeil, Houston was convinced that “discrimination in education is symbolic of all the more drastic discriminations which Negroes suffer in American life.”¹⁹ Since public education was the institution that most systemically impacted the lives of black Americans, the challenges directed at segregated education paint a revealing picture of how Houston and Marshall exposed the fallacy of *Plessy*’s rationale.

Houston’s strategy, initially, was to make compliance with the “separate but equal” doctrine financially unfeasible. The lawyers zeroed in on segregated schools and forced states to spend the money to provide truly equal facilities for blacks. Early targets were the unequal salaries paid to black teachers and the rampant discrimination in higher education. Challenges to racially discriminatory practices commenced with the 1935 Maryland case of *Pearson v. Murray*, addressing the invidious combination of denying admission to the state’s only law school but giving a small scholarship for blacks to attend any out-of-state school.²⁰ The strategy continued with *Missouri ex rel Gaines. v. Canada* in 1938, challenging the similar practice of paying for blacks to attend law school in adjacent states rather than admitting them to the in-state school²¹; then *Sipuel v. Board of Regents*, in 1948, challenging denial of admission to the only Oklahoma state law school due to race²²; followed by *McLaurin v. Oklahoma State Regents for Higher Education*, in 1950, challenging admission of blacks to law school but only if they sat in separate classroom rows, and at separate tables in the library and cafeteria²³; and, lastly, Texas’s *Sweatt v. Painter*, also in 1950, challenging separate law school facilities for whites and blacks as unequal.²⁴ Finally, in *Sweatt*, the Supreme Court ordered that blacks must be granted

also in Kentucky. Yet it was the Northerner Brown who chose to uphold segregation and its underlying basis in prejudice, while the Southerner Harlan protested that under the 14th Amendment there could be no such thing as equality under segregation.

19. GENNA RAE MCNEIL, COMMON GROUND 134 (1983) (quoting Houston address “Proposed Legal Attacks on Educational Discrimination,” delivered to the National Bar Association, Aug. 1, 1935).

20. 182 A. 590 (Md. 1936).

21. 305 U.S. 337 (1938).

22. 332 U.S. 631 (1948).

23. 339 U.S. 637 (1950).

24. 339 U.S. 629 (1950).

The Lessons of History

complete and unfettered admission to a previously all-white state law school.²⁵

These cases dealt body blows to the fundamental assumptions on which *Plessy* rested and provided important building blocks for the ultimate attack on *segregation per se* in the *Brown* cases. One case in the *Brown* cluster, *Briggs v. Elliott*,²⁶ is particularly worthy of attention by contemporary observers because it shines the spotlight of history directly on the harm of segregation, when the tendency today is to minimize the recognition of that harm.

B. *Briggs v. Elliott—Shifting to a Full Frontal Assault on “Separate but Equal”*

To gain a deeper appreciation of the ravaging effects of segregation, Leon Higginbotham, the historian, would recommend that we read the *Briggs* record and study Richard Kluger’s book *Simple Justice*. In that classic work, one can both *see* the sophistication and cooperation that existed in the very poor school district of Clarendon County, South Carolina, and *feel* the courage of the remarkable black leaders who fought for “equal justice under law.”²⁷

Kluger’s description of the rural schools at the heart of the *Briggs* litigation cannot be repeated too often.

The black schools of South Carolina were a disgrace In the first place, it was an ordeal to get to them because there were no buses for black children [R]ickety schoolhouses . . . small, dark, leaking all over, heated by coal stoves, that sometimes smoked the children out of the building. In most places, the state or community did not even pay for the schools to be put up, or, as in Clarendon, for the coal or for even a single crayon [I]n Clarendon County the average white teacher earned two-thirds more than the average black one. On top of the advanced state of dilapidation of the schoolhouses was the inevitable waste of time because so many of the rural schools had only one or two teachers, who could tend to only one of several classes at a time while the rest of the crowded room went uninstructed.²⁸

Such was the undeniable evidence that South Carolina was prepared to concede, if only the federal court would block the black plaintiffs and their lawyers from obtaining judicial relief from the disparities. South Carolina’s new Governor, James F. Byrnes, along with the state legislature, tried to slow the assault on segregation through promises of state aid to black schools. What the State endeavored to do was deceptively simple: (1) hold to their legal position that separate schools based on race were a reasonable exercise of the State’s police power; (2) make a statement on the record conceding the inferior state of black school buildings, equipment, facilities, and curricula; but (3) have

25. *See id.* at 635-36.

26. *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951), *rev’d*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

27. RICHARD KLUGER, *SIMPLE JUSTICE* (1976). *See also* MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT* (1994).

28. KLUGER, *supra* note 27, at 13-14.

the court stay the issue of relief until the promises made by Governor Byrnes could be implemented, rather than taking any action against the policy of segregation. As *Plessy* was the law of the land, a majority of the three-judge panel agreed. There was clearly mischief at work.

Seeing through the ruse, Judge J. Waties Waring dissented from the panel's opinion.²⁹ In light of the evidence presented, including Dr. Kenneth Clark's famous doll test results on the effects of segregation on children,³⁰ Waring concluded:

From their testimony, it was clearly apparent, as it should be to any thoughtful person, irrespective of having such expert testimony, that segregation in education can never produce equality and that it is an evil that must be eradicated. This case presents the matter clearly for adjudication and I am of the opinion that all of the legal guideposts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education adopted and practiced in the State of South Carolina must go and must go now. Segregation is per se inequality.³¹

Although in dissent, Judge Waring's words were no small victory for the plaintiffs and would soon join Justice Harlan's lone voice to form the backbone of *Brown*. When one considers, as Leon Higginbotham would, all the social, political, and legal challenges facing black parents, community leaders, and attorneys in the 1940s and 1950s, one cannot help but develop a deep and enduring respect for those remarkable individuals who wrestled the State of South Carolina over school segregation—and won.³² Most important historically, though, is that it was in *Briggs* that the black community took the mammoth step of shifting their collective goal from merely seeking "equal" bus transportation, school facilities, pay for teachers, etc., to an all-out frontal assault on the institution of segregation.

During the *Briggs* litigation, Marshall and the NAACP National Board of Directors boldly announced for the first time that, forthwith, all education litigation would proceed on a new theory: that segregation was, per se, a violation of the Fourteenth Amendment. All branches and units of the NAACP were instructed that the NAACP could not take part in any legal proceeding which

29. *Briggs*, 98 F. Supp. at 538 (Waring, J., dissenting).

30. It was in the *Briggs* litigation that Dr. Clark reported his groundbreaking research on black and white dolls to demonstrate the impact of state-compelled segregation on the minds of children. Clark's research had a noticeable impact on Chief Justice Earl Warren, who chose to footnote the research in his unanimous *Brown* opinion, 347 U.S. at 494 n.11.

31. *Briggs*, 98 F. Supp. at 547 (Waring, J., dissenting).

32. Indeed, there are many fascinating aspects to *Briggs* that demonstrate the bravery of the sixty-six Clarendon County plaintiffs led by Dr. James Hinton, president of the South Carolina Conference of NAACP Branches, Rev. Joseph DeLaine, a school teacher, and Harry Briggs, the lead plaintiff. Thurgood Marshall commuted between New York and South Carolina to command the litigation and the determination of his top-notch team of lawyers—including Robert L. Carter, Spottswood Robinson III, Harold Boulware of Columbia, South Carolina, and others—in pursuing the case, despite extreme personal danger, speaks volumes about their dedication to eradicating segregation. See KLUGER, *supra* note 27, at 292-95.

The Lessons of History

sought to enforce segregation statutes or which condoned segregation in public schools. Henceforth, Marshall declared the policy would be that every education case should directly challenge the segregation statutes involved.³³ Further clarification from the National Board of NAACP came forth in 1950, when it resolved that “pleadings in all educational cases . . . should be aimed at obtaining education on a non-segregated basis . . . no other relief will be acceptable. . . .”³⁴ The shift was tectonic, shaking the very foundation of *Plessy*.

The new policy was risky, however, and particularly in *Briggs* because of the “soft segregation” strategy adopted by the South Carolina government. Unswayed by the promise of more money and resources, blacks held firm because segregated schools would have been reinforced. To the parties involved, the state of unequal education for South Carolina’s black children was so demonstrably and unarguably inferior that they were compelled to insist that the State not just acknowledge the problem politically, but dismantle it legally. Thus, those brave souls, even in their impoverished conditions, and the NAACP, in its legal wisdom, rejected the financial bait, and opted to bring down segregation. They refused to be bought off.

This brief history of race and education reminds us that, in the South, clever schemes of evasion were concocted to defeat the *Brown* mandate, but that desegregation continued nonetheless. As time passed, however, and the same desegregation obligations moved north, attempts to obtain compliance with *Brown*’s constitutional imperatives suffered brutal resistance. One case in particular, the early 1970s Detroit case of *Milliken v. Bradley*,³⁵ or *Milliken I*, provided this country with the first real opportunity to come to grips with the twin problems of historic segregation and its “partner in crime,” disparity of resources. Largely influenced by a public climate conditioned by attacks on pupil transportation, or “forced busing” as it was inappropriately characterized, in *Milliken I* the Supreme Court dropped the ball on metropolitan desegregation plans and sealed the fate of the nation.

Once the great protector of civil rights, the courts turned, taking a leading role in arresting the national movement toward integrated education and the equalizing of educational opportunities. Remarkably, just before the decision was announced, Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit foreshadowed the negative effect that *Milliken I* would have on the country. Speaking at the Harvard Law School on the occasion of the twentieth anniversary of *Brown*, he addressed the issue of desegregation remedies that crossed school district boundaries, declaring that if the Supreme Court were to hold metropolitan plans impermissible, “the national trend toward residential, political, and economic apartheid [has] not only

33. See KLUGER, *supra* note 27, at 293.

34. *Id.* at 293-94.

35. 418 U.S. 717 (1974).

[been] greatly accelerated, it has been rendered legitimate and irreversible by force of law."³⁶ Dissenting from the *Milliken I* opinion, Justice William O. Douglas echoed Judge Wright, stating, "When we rule against the metropolitan area remedy we take a step that will likely put the problem of the Blacks and our society back to the period that antedated the separate but equal regime of *Plessy v. Ferguson*."³⁷ How prophetic were Douglas's words.

For the edification of those who today are willing to return to the world of segregation out of frustration over the inferior quality of education being offered to black youngsters, I urge a reconsideration of President Lincoln's advice. Otherwise, this nation may very well repeat the mistakes of past state-sponsored racial division.

III. THE MYTH OF CHARTER SCHOOLS AND VOUCHER PROGRAMS

As there was fifty years ago, there is clearly mischief at work today. Currently, charter schools and voucher programs represent a new "movement" that could further undermine what remains of the *Brown* desegregation mandate. In *Briggs*, Judge Waring recognized South Carolina's "soft segregation" strategy as nothing more than a thinly-veiled attempt to have the court avoid the primary purpose of the suit, which was an attack on "separate but equal."³⁸ Likewise, today, neither charter schools nor voucher programs appear sensitive to the key importance of desegregation: integrated education. As reported by Darcia Harris Bowman in *Education Week*, "[T]he lack of conclusive evidence is only intensifying the debate over these new, more consumer-oriented approaches . . . [that] could change the meaning of public education."³⁹ In my opinion, the black parents of today's children have even less justification for accepting segregation in the name of supposedly improved education than did the black parents of Clarendon County years ago.

A. Charter Schools

Charter schools are, simply put, a new network of "pseudo-public schools"—educational institutions funded by the public, yet freed of standards and accountability required of regular public schools. These schools apply a double wallop to desegregation: first, many charter schools themselves are dis-

36. J. Skelly Wright, Promises We Keep, Address at the Harvard Law School Roundtable: "Twenty Years After *Brown*: A Roundtable on Desegregation and Education, 1974 and Beyond." (May 2, 1974) (speech available at the Library of Congress).

37. *Milliken I*, 418 U.S. at 759 (Douglas, J., dissenting).

38. *Briggs*, 98 F. Supp. at 540 (Waring, J., dissenting). The Judge wisely noted that the measures proposed by Governor Byrnes included the appropriation of funds to create a commission to oversee "educational facilities" and impose sales taxes, but "[n]owhere [was] it specifically provided that there shall be equality of treatment as between whites and Negroes in the school system." *Id.* at 547.

39. Darcia Harris Bowman, *Charter, Vouchers Earning Mixed Report Card*, EDUC. WEEK, May 3, 2000.

The Lessons of History

proportionately minority. Second, they drain resources and role models from the existing public schools where most of the poor and black children remain.⁴⁰ In fact, many charter schools reportedly have racial disproportions and physical disparities that would expose public school systems themselves to legal actions.⁴¹

My home state of Ohio is one that has been pressing charter schools as a viable educational alternative, and these schools have been attracting significant numbers of black students. Many parents and education reformers have expected that the supposedly wider range of program choices in charter schools would allow more children to thrive.⁴² Yet observers report that these schools are flunking the very test offered as their justification—a better quality of education for poor and black children.⁴³

Charter schools started in Ohio a few years ago. Commenting on the first two years of state proficiency examination test scores for charter school students, Ohio education officials declared the results “disappoint[ing]” and certainly not up to expectations.⁴⁴ Charter school administrators themselves echoed this disappointment⁴⁵ but responded that the public schools have had over a century to build their programs and their schools just need more time.⁴⁶ When the first scores came out in the spring of 2000, Tom Mooney, president of the Ohio Federation of Teachers, observed that “what [charter schools] have been doing is fostering *illusions* that there is something better out there, [while the low proficiency test scores] bring them back to earth.”⁴⁷ Recently, Sue Taylor,

40. Dana DiFilippo, *Charter Schools Threaten CPS*, CINCINNATI ENQUIRER, Jan. 2, 2000; Richard Rothstein, *The Other Side of Choice: After Top Students Leave*, N.Y. TIMES, Feb. 13, 2002, at B9.

41. The findings on charter schools, race, and segregative effects are mixed and may depend upon a person’s initial inclination toward the value of integrated education. See CHESTER E. FINN, JR. ET AL., CHARTER SCHOOLS IN ACTION 160-64 (2000).

42. Jennifer Mrozowski, *Charter Schools Get Low Grades on Tests*, CINCINNATI ENQUIRER, Dec. 24, 2001.

43. See, e.g., Reginald Fields, *Charter Schools Fail Proficiency Testing: Pupils Score Far Below Their Public-School Peers*, AKRON BEACON J., June 9, 2001; James Pilcher, *Charter Schools’ Scores Trail: Public Schools Out Perform on 4th-, 6th-Grade Proficiency Tests*, CINCINNATI ENQUIRER, June 23, 2000.

44. See, e.g., Mrozowski, *supra* note 42. Joni Cunningham, interim director in the Office of School Options, Ohio Department of Education, which oversees charter schools, stated, “These scores didn’t make anybody happy.” *Id.*

45. Fields, *supra* note 43.

46. See, e.g., Ruth E. Sternberg, *Petro: Fix Charter Schools; Auditor has 109 Ways to Improve Oversight*, COLUMBUS DISPATCH, Feb. 8, 2002, at 01A (quoting Steve Burigana, newly-appointed head of the Ohio State Office of School Options). Charter school advocates have also claimed that weak enabling legislation and poor state funding are partly to blame for problems in the movement. See, *Report: State Laws Weak on Charter Schools; Backers: Most Need More Freedom, Funds*, CINCINNATI ENQUIRER, Apr. 28, 2000 (discussing report of Center for Education Reform).

47. Pilcher, *supra* note 43. For example, Ohio’s fourth graders were tested in five areas: reading, writing, math, science, and citizenship. Of the 1,356 charter school fourth-graders who took the exam last March, the Ohio Department of Education reported that just 76 of them—or six percent—passed all five parts of the test. Fields, *supra* note 43. Compare this percentage with the state’s worst traditionally low-scoring large urban school district, Dayton, which still had an eight percent fourth-grader passage rate on all parts. *Id.* In Akron the dichotomy is even clearer: in the public schools, twenty-one percent of

president of the Cincinnati Federation of Teachers, stated what many people are thinking, namely, that “[charter schools] don’t have any proven success.”⁴⁸

Moreover, charter schools are costly and risky businesses. As of this month, Ohio has ninety-two charter schools with 23,000 students and the State estimates it will pay the schools about \$131 million this year.⁴⁹ Since the first charter school opened in Ohio in 1999, eight have closed, including several that were plagued by overspending. For example, State Auditor Jim Petro found that Ohio overpaid the Columbus-based Electronic Classroom of Tomorrow \$1.7 million during the Internet school’s *first two months*, and has recommended that the Ohio Department of Education “take over poorly run charter schools until they can reorganize and fix problems.”⁵⁰

Ohio Department of Education officials are apparently allowing five years for these schools to show what they can do.⁵¹ Some parents have not needed that long and have already moved their children back into the public schools, citing “busing problems, lack of discipline, too few teachers, promised services that were never provided, or students being pushed out so the school can keep test scores high.”⁵² These problems sound remarkably familiar to public school administrators, who see no educational enhancements or innovative actions, just a poor attempt at resolving difficulties that have traditionally plagued public schools.⁵³ Moreover, the return of charter school students into the public school systems has also placed an extra burden on historically tight public school finances, which are currently even tighter due to the reallocation of state education funds to pay for charter schools.⁵⁴

For today’s young students, history is being made before our eyes. I say we must be extra-vigilant about charter schools—how they are funded and for how long. Rather than enhancing education, they drain resources and role models from the schools that need both the most. In short, if the trends of failure continue without reversal, we will certainly be abandoning yet another generation of black students, both in the public schools and elsewhere, and that is history we need not repeat.

B. *Voucher Programs*

Like charter schools, voucher programs have been equally vexatious to integrated education since the idea was first advanced by conservative economist

all fourth-graders passed all parts of the test; in the charter schools, under three percent. *Id.*

48. Mrozowski, *supra* note 42.

49. Sternberg, *supra* note 46.

50. *Id.*

51. Mrozowski, *supra* note 42.

52. James Pilcher, *Some Students Return to CPS*, CINCINNATI ENQUIRER, Apr. 6, 2000.

53. *See* Mrozowski, *supra* note 42.

54. Jennifer Mrozowski, *Charter Schools Hinder CPS Cash Flow*, CINCINNATI ENQUIRER, Dec. 24, 2001.

The Lessons of History

Milton Friedman in 1955.⁵⁵ According to Wade Henderson, the Executive Director of the Leadership Conference on Civil Rights, “Voucher proponents offer *false* promise to poor parents because there are too few private-school slots to accommodate them, . . . and most voucher proposals fall short of covering the entire cost of top academies, leaving truly disadvantaged families without a full range of choices.”⁵⁶ Moreover, he recounts that most pro-voucher proponents, claiming concern over failing schools, have long fought efforts to improve school buildings, reduce class sizes, and raise teacher salaries, and “[m]any of the interests that are suggesting privatization of public resources and vouchers are the very forces that have helped to thwart the kind of meaningful education that *Brown* promised.”⁵⁷ In spite of some reports of African-American support for vouchers,⁵⁸ he says it is the wrong tool.⁵⁹ I agree. Judge Higginbotham would agree. And not just because voucher programs are bad policy, but also because they are unconstitutional.

On December 20, 1999, U.S. District Court Judge Solomon Oliver of the Northern District of Ohio struck down Ohio’s voucher plan on First Amendment grounds.⁶⁰ The court held that the voucher program, as implemented in Cleveland, violated the Establishment Clause because virtually all the schools in the program were religious schools, which were essentially the only type of schools that joined the program.⁶¹ Numerous public and private schools did not join in, and thus did not make their facilities available to participating students, who are overwhelmingly black in number. The clear effect of the voucher plan was to isolate poor, black students in public schools. Judge Oliver’s well-reasoned decision was upheld by the United States Court of Appeals for the Sixth Circuit, and the case was argued before the Supreme Court this term.⁶² The decision will be close, but in all likelihood the Court will also affirm, in part because, as the *New York Times* reported,

Many of the pupils who receive the tuition assistance were already attending parochial or other private schools, raising questions about whether the program is ending up assisting parents who had already found the ways and means to educate their children outside the public schools.⁶³

55. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123 (1955).

56. Jodi Wilgoren, *Young Blacks Turn to Vouchers as Civil Rights Issue*, N.Y. TIMES, Oct. 9, 2000, at A1 (emphasis added).

57. *Id.*

58. See Joan Biskupic, *Voucher Schools Under Scrutiny*, USA TODAY, Feb. 15, 2002, at 3A.

59. Wilgoren, *supra* note 56.

60. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 865 (N.D. Ohio 1999), *aff’d*, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 122 S. Ct. 23 (2001).

61. *Id.*

62. *Id.* The case was argued to the Court on February 20, 2002.

63. Jacques Steinberg, *Cleveland Case Poses New Test for Vouchers*, N.Y. TIMES, Feb. 10, 2002, at A1. See also Catherine Candisky, *Different Perspectives: State, Critics Prepare for Arguments this Week*, COLUMBUS DISPATCH, Feb. 17, 2002, at 01A.

As for these charter schools and voucher programs, at what price do we continue to abandon the public schools, to forsake the *Brown* mandate, to retreat to segregation? Fifty years ago, Judge Waring lamented the possible future under segregation:

If this method of judicial evasion be adopted, these very infant plaintiffs now pupils in Clarendon County will probably be bringing suits for their children and grandchildren decades or rather generations hence in an effort to get for their descendants what are today denied to them. If they are entitled to any rights as American citizens, they are entitled to have these rights now and not in the future.⁶⁴

Some twenty-five years ago, the National Advisory Commission on Civil Disorders, the “Kerner Commission,” concluded that “discrimination and segregation have long permeated much of American life; they now threaten the future of every American.” Has so little changed? Last April, the streets of my adopted home of Cincinnati erupted in violence, violence born of the same persistent frustration and anger that existed in 1967; violence, some would say, born of the same state-supported racial divisions that date back to the Civil War.

IV. MOVING FORWARD

I cite these experiences in support of Judge Higginbotham’s thesis about history proving a guide for the future. The pre-*Brown* “separate but equal” doctrine and the *Briggs v. Elliott* experiences of Clarendon County teach us that trying to reach equality in education by ignoring the issue of segregation is foolhardy. About twenty years ago, in *Milliken II*, the Supreme Court clearly acknowledged the disastrous effects of the segregated education to which black children had been relegated, even though the Court was too tepid to order its “root and branch” elimination.⁶⁵ It chose to “half step” by requiring state and local officials to underwrite the cost of closing the gap in educational facilities by funding programs from which monies had long been withheld. That alternative to metropolitan plans became the model that was followed in subsequent cases.

The recent settlement of the long-running Yonkers, New York, school desegregation suit presents a modern adaptation of the Supreme Court’s principles for addressing the basic problem of education disparities in a way consistent with *Brown*’s desegregation mandate.⁶⁶ The Yonkers consent decree orders the State to fully recognize, and pay for, remedying past segregation and eliminating the remaining vestiges of segregation.⁶⁷ Significantly, the remedy in that

64. 98 F. Supp. at 540 (Waring, J., dissenting).

65. *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).

66. *Yonkers Branch-NAACP v. City of Yonkers*, 251 F.3d 31, 39 (2d Cir. 2001).

67. See Winnie Hu, *Accord is Reached in School Bias Suit Involving Yonkers*, N.Y. TIMES, Jan. 9, 2002, at A1.

The Lessons of History

case does *not* seek to skirt the basic solution by flirting with “reforms” yet to prove workable and which reintroduce segregation. Rather, it reflects the caution advanced by the National Black Caucus of State Legislators when it warned against easy fixes.⁶⁸

V. CONCLUSION

The focus of this essay was to be on what President Lincoln and Judge Higginbotham bequeathed to us regarding the importance of recognizing the central role that history plays in our lives. Certainly, the compact this nation entered into when it amended the United States Constitution with the Thirteenth, Fourteenth, and Fifteenth Amendments binds us to take care that in pursuing solutions for educational disparities, we do not reintroduce a rationale for racially segregating our educational systems. For those of this generation who are prepared to compromise their constitutional rights for the illusive promises of educational “reform,” I conclude by adding one last lesson—the wise words of Roy Wilkins, the late Executive Director of the NAACP, who, in commenting on the nation’s treatment of black Americans, said:

The shocking statistics of inequality over the decades cannot, of course, tell us how many hundreds of thousands of Negro youngsters . . . have been cheated and crippled as men and as citizens by being deprived, wholesale, of the same education offered their white fellow citizens.⁶⁹

Today, I say to you what I know my dear friend Leon Higginbotham would say, that it is time we learn the lessons of history, for ourselves, our children, and our grandchildren and escape, once and for all, the vicious cycle of segregation. We cannot and should not turn back the clock.

68. Kitty Garber, *Equal Education Remains Illusive Years After Brown*, FORUM, Nov.-Dec. 2001, at “Trend Setter” section.

69. Roy Wilkins, Address at Cleveland City Club Forum (Apr. 16, 1960), in THE CRISIS, June-July 1977, at 259-60.

