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Under a Critical Race Theory Lens -- Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy

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Under a Critical Race Theory Lens

BROWN V. BOARD OF EDUCATION:
A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY
By James T. Patterson

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> Altogether, school desegregation has been a story of conspicuous achievements, flawed by marked failures, the causes of which lie beyond the capacity of lawyers to correct (p. 223).[1]

INTRODUCTION

With Brown v. Board of Education*: A Civil Rights Milestone and Its Troubled Legacy*, historian James T. Patterson anticipated the fiftieth anniversary of the U.S. Supreme Court's landmark decision *Brown v. Board of Education*.[2] In *Brown*, the Court unanimously held that racially segregated schools violated the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment. The decision in effect struck down de jure segregation in the United States.[3] In holding as it did, the Court declared that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[4] Not only does Patterson's book capture the essence of Chief Justice Earl Warren's opinion of the Court in *Brown*, but the book also addresses the developments that have come in the

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1. *Quoting* JACK GREENBERG, CRUSADERS IN THE COURTS 401 (1994).
2. 347 U.S. 483 (1954).
3. CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 310 (2004).
4. *Brown*, 347 U.S. at 495; s*ee also* Plessy v. Ferguson, 163 U.S. 537 (1896) (legal genesis of the Court's separate but equal doctrine).

wake of the famous case. Furthermore, Patterson's book offers an evaluation of the implications of *Brown* and its progeny. In light of the fiftieth anniversary of *Brown*, now is an appropriate time to consider Patterson's critical look at *Brown* and its legacy.

Accordingly, this Book Review argues that Patterson's narrative is a mostly balanced historical reflection. Here, the term *balanced* will refer to giving consideration to both the negative and positive aspects of the phenomenon in question. To advance its thesis, first, the Review will offer an overview of Patterson's historical narrative and evaluation of the *Brown* legacy. Second, the Review will analyze Patterson's conclusions through a Critical Race Theory lens. Given the focus of Critical Race Theory on race and the law, especially on how institutions perpetuate racism against social outsiders through the law, Critical Race Theory is an appropriate and valuable lens for considering matters that receive attention in Patterson's book.[5]

I.

PATTERSON'S HISTORICAL NARRATIVE AND EVALUATION OF THE *BROWN* LEGACY

Patterson begins his narrative by recounting the now-familiar story of a U.S. school system that tolerated racial segregation before *Brown* (p. 16). To help demonstrate the effects of such a system on minorities, Patterson points out that in 1954, even after some funding increases, black public schools in the South received only 60% of the money that white schools received (p. xvii). Because education requires adequate financial support, Patterson suggests that such an inequitable system of funding cannot have helped minority students.

Continuing the story, Patterson explains the strategy that attorneys at the NAACP's Legal Defense and Education Fund employed in *Brown*. Led by Thurgood Marshall and relying on controversial psychological studies, the attorneys argued that racial segregation in schools hurt minority children from an early age (p. 44). The U.S. Supreme Court ultimately agreed and, in a much-anticipated opinion, ordered an end to constitutionally sponsored segregation in public education (p. 66).

Brown is far from the end of Patterson's narrative because, as the author observes, shortly after *Brown* many problems with court-ordered desegregation developed. For example, some cities refused to desegregate. During the fall of 1954, the town of Milford, Delaware practiced token desegregation at its high school, admitting only eleven black students (p. 73). Also, racial harmony between white and black students in the newly "integrated" schools was strained, particularly among older students who had not grown up with

5. For more on Critical Race Theory, see Section II of this Book Review.

desegregated schools (p. 166). Moreover, many white families left the big cities and headed for the suburbs, leaving the children of black families to populate inner-city schools (p. 164). Indeed, these problems would not go away easily.

Although Patterson's historical narrative is insightful, the more interesting part of the book is Patterson's evaluation of the *Brown* case almost a half-century after the Supreme Court issued the opinion. Patterson's evaluation goes beyond the *Brown* opinion and attempts to evaluate the lasting imprint that the case has had on U.S. culture. Careful in weighing the evidence, Patterson comes to the tentative conclusion that *Brown* left much remaining work in the desegregation of U.S. schools and society more generally, but also achieved much with regard to race and the law.

In looking at several of the shortcomings of public education today, Patterson comments that "America's inability to desegregate many of its neighborhoods and schools . . . stood out in the early twenty-first century as the largest failure among efforts . . . to move toward greater interracial mixing" (p. 211). For instance, during the 1998-1999 school year, 90% of Chicago public school students were African American or Hispanic, and 90% of Detroit public school students were African American (p. 211). Moreover, during the 1996-1997 school year, 68.8% of black public school students attended schools where less than half of the student body was white (p. 212). Added to this background is the fact that judicially supervised desegregation in many public school systems in cities such as Cleveland, Dallas, Denver, Minneapolis, Buffalo, Nashville, Grand Rapids, Jacksonville, and Mobile has ended or will be phased out (p. 212).

In addition to what he calls "America's inability to desegregate" (p. 211), Patterson notes an important educational shortcoming linked to school desegregation attempts and the academic development of minority students. On standardized tests such as the SAT, Patterson claims that black students as a group, regardless of class, still perform more poorly than white students as a group (p. 215). Experts are unsure how to explain this phenomenon.[6] Thus, for many Blacks the hopes of the *Brown* era have become an "all-too-distant dream" (p. 220), leaving the color line to become "[t]he problem of the twenty-first century" (p. xxix).

Despite his obvious concern over the lasting effects of *Brown*, Patterson still sees the 1954 case as a landmark achievement. He notes that *Brown* "took aim at the heart of constitutionally sanctioned Jim Crow" and eventually helped to desegregate many schools in both border and Southern states (p. 221); the decision enabled the courts in subsequent cases to give "constitutional standing" to the changes that came with attempts at desegregation (p. 222).

6. For more on the discussion of the merits of standardized testing, see note 19.

Furthermore, *Brown* "had considerable, though incalculable, symbolic value, for liberal [W]hites as well as for many hopeful [B]lacks" (p. 222). In an attempt to reconcile his approval with his concerns, Patterson notes that while lawyers can work for social improvement, as in the case of the NAACP lawyers in *Brown*, they can do only so much. Society has its role to play as well (p. 223).[7] Overall, Patterson's evidence seems to agree with this point.

II.

ANALYSIS OF PATTERSON'S CONCLUSIONS THROUGH A CRITICAL RACE THEORY LENS

As noted above, this Book Review will employ Critical Race Theory to evaluate Patterson's critical narrative. Critical Race Theory is an appropriate intellectual tool for evaluating Patterson's conclusions because Critical Race Theory, like Patterson's book, deals with the intersection of law and race.[8] Specifically, Critical Race Theory addresses the law from the perspectives of racial outsiders, especially black individuals,[9] and considers how the law constructs race.[10] Critical Race Theory seeks to remind society "how deeply issues of racial ideology and power continue to matter in American life."[11]

Given its frequently negative focus,[12] Critical Race Theory is often outside the mainstream of U.S. legal thought; thus, one might think of Critical Race Theory as relatively radical in nature. This negative focus of many adherents of Critical Race Theory will be helpful in demonstrating more clearly how Patterson has taken a balanced approach to evaluating *Brown* and its progeny because, in addition to considering some of the negative aspects of history that many adherents of Critical Race Theory would address, Patterson also offers some positive aspects of *Brown*'s legacy. While not as activist as the work of many adherents of Critical Race Theory, Patterson's work is generally well-rounded.

Derrick Bell, the main founder of Critical Race Theory in the 1970s,[13] has

7. *Referring to* GREENBERG, *supra* note 1, at 401.

8. For more on the dimensions of Critical Race Theory from a variety of perspectives, see KIMBERLE CRENSHAW, NEIL GOTANDA, & KENDALL THOMAS, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995) and RICHARD DELGADO, CRITICAL RACE THEORY: THE CUTTING EDGE (1995).

9. BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 181 (1994).

10. CRENSHAW ET AL., *supra* note 8, at xxv.

11. *Id.* at xxxii.

12. *See* Derrick A. Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

13. CRENSHAW ET AL., *supra* note 8, at xi (quoting Cornel West). While many other theorists have embraced Critical Race Theory, due to the measured space of a book review and Derrick Bell's status as primary founder of Critical Race Theory, this Book Review mainly limits its discussion of Critical Race Theory to some of the key ideas about which Bell has theorized.

theorized about a number of insightful concepts that help to drive the analysis of this Book Review. Particularly appropriate for application to the material Patterson discusses are the ideas of equality of opportunity versus equality of result, involuntary black sacrifice, white self-interest, and single-race schools. This section of the Book Review will address these concepts in turn.

A. Equality of Opportunity Versus Equality of Result

Although not specifically using the terms, Patterson's book suggests that, in the wake of *Brown*, equality of opportunity has not led to equality of result for many minorities. As Bell notes, equality of opportunity does not guarantee, and often does not produce, equality of result.[14] Equality of opportunity is the requirement that the law offer the same chance to people of all races, while equality of result considers whether people of all races actually experience equality.[15] Bell claims that equality of opportunity alone is inadequate because it ignores "the political import and social significance of race and a long history of subordination and exploitation."[16]

The effects of school desegregation differ depending on whether one considers equality of opportunity or equality of result. In terms of equality of opportunity, the text of *Brown* itself clearly has put an end to legalized segregation in public schools. Chief Justice Earl Warren stated so in a succinct manner: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place."[17] However, Patterson's evidence suggests that equality of opportunity[18] has not led to equality of result. As noted above, Patterson points out that several major cities like Chicago and Detroit still have predominantly minority school populations (p. 211). In part, this result may be because Chicago and Detroit have large minority populations. However, the 90% figures are so one sided that one must ask what has happened. No doubt many well-to-do Whites have left the city limits (p. 164). Regardless, many minorities remain in inner-city schools and undoubtedly must face the problems of crime, drugs, and under funding. It is easy to imagine how such problems erode the learning of minority students.

14. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 136 (2000).

15. *Id.* *See also* Derrick Bell, *Xerces and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595 (1989) (addressing equality of opportunity and equality of result in the context of affirmative action).

16. BELL, *supra* note 14, at 136.

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

18. One could argue that equality of opportunity in terms of rights that the law protects is not the same as equality of opportunity in terms of the resources that the government owes to minority students. The legal opportunity can be present, but the material opportunity may not be. For example, a minority student may have the right to be free of racial discrimination in education, but the student may not have access to books, computers, well-trained teachers, and other resources that can help him or her succeed. Hence, the concept of equality of opportunity is a somewhat fluid one.

If, like Patterson, one can accept the traditional notion of standardized tests as an important measure of ability,[19] then the overall lower SAT performance by Blacks compared to the performance by Whites would be evidence of educational shortcoming (p. 215). Furthermore, the income prospects for Blacks, which are two-thirds of what such prospects are for Whites, look so bleak that many Blacks may have no motivation to succeed on tests such as the SAT (p. 216). This result might contribute to a self-fulfilling prophecy of failure. Thus, despite the noble words of *Brown*, Patterson's evidence shows that many minority students still face substantial obstacles to equality of result in education.

As Patterson points out, more recent Supreme Court jurisprudence appears to lack concern for equality of result as well. The 1992 case *Freeman v. Pitts*[20] illustrates this point. In *Freeman*, the plaintiffs sued because in one Georgia county over half of all students were attending schools that were 90% or more black. County officials claimed that private decision-making, not government action, led to resegregation of the schools. In reply, the Court held that private decisions that lead to resegregation are beyond the realm of constitutional concern (p. 198).

A Critical Race Theory critique of *Freeman* likely would point out that,

19. This assumption about standardized testing has come under scrutiny. *See, e.g.*, Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Idea*, 84 CAL. L. REV. 953 (1996) (arguing that a U.S. "testocracy" "abstracts data from individuals, quantifies those individuals based on numerical rankings, exaggerates its ability to predict those individuals' future performance, and then disguises under the rubric of 'qualifications' the selection of those who are more socio-economically privileged"). To develop their position, Sturm and Guinier have maintained that students whose parents can afford test preparation courses tend to do the best on standardized tests. *Id*. at 991. In addition, Sturm and Guinier argue that the correlation between standardized aptitude test scores like scores from the SAT and LSAT and first-year grades in academic programs like college or law school is lower than the correlation between a person's weight and his or her height. *Id.* at 971. On these last two points, according to Sturm and Guinier, standardized test scores tell more about a student's past than his or her future. *Id.* at 991. Furthermore, standardized testing assumes that only one "correct" way of doing something exists, even in cases of complex problems, and that humans have "objective" ways of evaluating such performance. *Id.* at 986-87. For some alternatives to the use of standardized admissions tests, see Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 611-14 (2001) (suggesting, among other approaches, making admissions tests optional, guaranteeing admission based on factors like grades, and admitting larger first-year classes).

Not all observers share this concern over standardized admissions tests. For arguments in favor of the status quo, see Dan Subotnik, *Goodbye to the SAT, LSAT? Hello to Equity by Lottery? Evaluating Lani Guinier's Plan for Ending Race Consciousness*, 43 HOW. L.J. 141 (2000) and Gail L. Heriot & Christopher T. Wonnell, *Standardized Tests Under the Magnifying Glass: A Defense of the LSAT Against Recent Charges of Bias*, 7 TEX. REV. L. & POL. 467 (2003). Given the sharp disagreement about traditional standardized testing, continuing examination of this issue is appropriate. Nonetheless, the assumption of the validity of testing still persists in academia and elsewhere.

20. 503 U.S. 467 (1992).

while the Court may recognize the right of children to attend integrated schools, the Court is unwilling to act in all cases to ensure such integration. Thus, the black children in the resegregated county have the legal right to attend integrated schools, but when the decisions of private individuals interfere with that right, the Court is not concerned with the problem. Critical Race Theory advocates may argue that it matters little whether governmental actors or private individuals are denying the children a well-funded and integrated education; the children still lose. With this point in mind, a Critical Race Theory perspective would observe that the government, here the Court, should act to remedy this problem because the harm remains; using the rubric of non-governmental action is an insufficient excuse for permitting children to lose life-shaping educational opportunities.

In fairness to the Court, one should note that this argument is particularly difficult to sustain because of the need for plaintiffs to prove state action in equal protection cases.[21] Unless the government somehow supports private action, no equal protection violation can result. Although the students lose out, legally there is no party at which to point a finger.

Thus, an application of the concepts of equality of opportunity and equality of result to the legacy of *Brown*, including the relatively recent *Freeman* decision, leads to essentially the same concerns over results that Patterson articulates in his book. Through *Brown* and its progeny, the law may support minority children, but many such children still suffer educationally. To a great extent, then, Patterson's analysis tracks analysis that would come from a Critical Race Theory perspective.

B. Involuntary Black Sacrifice

Although Patterson's analysis does not explicitly call upon the notion of involuntary black sacrifice, his analysis does indicate that desegregation has failed many black individuals. Nevertheless, his analysis also considers the positive moral stance of the *Brown* decision and its heirs. Involuntary black sacrifice is another idea that Bell offers in developing Critical Race Theory.[22] The concept of involuntary black sacrifice holds that, in an effort to reconcile their differences, various groups of Whites sacrifice black interests, much as humans in mythology would sacrifice animals to reconcile differences with the gods.[23]

One historical example of black sacrifice is the Civil War era emancipation of slaves. At first blush, freedom from slavery would look like a

21. The U.S. Constitution generally limits governmental rather than private action. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1107 (1998).

22. BELL, *supra* note 14, at 53-55.

23. *Id.* at 54.

major step forward for Blacks, but proponents of Critical Race Theory maintain otherwise.[24] Arguably, the process of freeing slaves allowed the North to weaken the South by undermining the southern social structure and thereby ultimately preserved the Union. However, the South retained its white-over-black hierarchy of Jim Crow. The North and the South settled their dispute and Blacks retained second-class status, if that at all, in the United States. Nowhere in the result did the parties with power seriously address the problems of African Americans.[25]

As suggested, Patterson sees *Brown* as a case whose legacy is mixed. On one hand, segregated inner-city school systems like the overwhelmingly black school system in Detroit illustrate the limits of *Brown* (p. 211). Clearly, this type of issue remains a problem. Additionally, Patterson discusses cases like *Milliken v. Bradley*,[26] in which the plaintiffs alleged inequities in the racial balance in Detroit schools to show how the Supreme Court began to back away from its liberal position of 1954 (p. 178). As Patterson points out, approximately 72% of inner-city school children in *Milliken* were black (pp. 178-79). The plaintiffs hoped to obtain an inter-district busing arrangement with Detroit's suburbs to remedy the problem. Although the Court found disparate treatment of white and black students in Detroit, the Court held that, absent any evidence that the suburban districts intended to discriminate, an inter-district busing remedy was inappropriate (pp. 179-80). In effect, the Court held that the plaintiffs had suffered a legal wrong but were not due a correction of that wrong. NAACP attorney Nathaniel Jones observed, "[t]he Court has said to black people[,] 'You have rights but you don't have a remedy.' We're back in the same position as we were before *Dred Scott*" (p. 180).[27]

On the other hand, despite shortcomings like these, Patterson views *Brown* as an opinion that "took aim at the heart of constitutionally sanctioned Jim Crow" and helped to desegregate many schools in both the border states and the South (p. 221). Additionally, Patterson points out that, in the wake of *Brown*, Title VII of the 1964 Civil Rights Act[28] has opened the door for

24. *Id.* at 54-55.

25. *See also* Derrick Bell, *"Here Come de Judge": The Role of Faith in Progressive Decision-Making*, 51 HASTINGS L.J. 1, 8-9 (1999) (considering slavery in the U.S. Constitution, the Compromise of 1877, and *Plessy v. Ferguson*, 163 U.S. 537 (1896), as other examples of involuntary black sacrifice); Derrick A. Bell, *California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 LOY. L.A. L. REV. 1447, 1455-56 (1997) (pointing to the recurring nature of involuntary sacrifice in the United States).

26. 418 U.S. 717 (1974).

27. Patterson adds that Justice William Douglas, dissenting in *Milliken*, claimed that the Court had labeled Detroit's schools "not only separate but inferior."

28. 42 U.S.C. §§ 2000e et seq. (prohibiting public and private employers from discriminating based on "race, color, religion, sex, or national origin").

minorities in the employment context, while the 1965 Voting Rights Act[29] has granted equal access in voting (pp. 124, 127). Today, few people would seriously challenge the notion that minorities are due the legal rights of discrimination-free employment and voting.[30] These points suggest that Patterson does not fully embrace the notion of black sacrifice in the post-*Brown* world.

In contrast, adherents of Critical Race Theory would go further than Patterson. They would argue that the results of *Brown* a half-century after the Court issued the decision show that Blacks are again victims of the reconciliation of tensions between white factions. In this case, the quarreling white parties were the segregationists and the desegregationists. The result in *Brown* pleased the desegregationists because schools had a new legal duty to integrate and, indeed, many schools adhered to that duty. However, the segregationists received a portion of what they wanted in that they were able to delay the process of desegregation. Moreover, today major inner-city school systems in cities like Chicago and Detroit are largely segregated. As the aforementioned points about Blacks gaining a weaker education in poorer inner-city schools and performing at lower levels on the SAT would suggest, African Americans—this time as students—are left behind once again. An adherent of Critical Race Theory could point out that this result is akin to the result of the infamous *Plessy v. Ferguson*[31] decision that came in the wake of the Fourteenth Amendment's[32] ratification; again, the white power structure has not kept its promises to the black minority.

Specifically, an adherent of Critical Race Theory would hone in on Patterson's *Milliken* example and argue that *Milliken* was just one more occasion for black sacrifice. Under this paradigm, the liberal desegregationists and more conservative separatist forces disagreed about what, if anything, to do about the disproportionately high number of black students in inner-city Detroit

29. 42 U.S.C. §§ 1971, 1973 (1965). For an unorthodox perspective on the beginnings of the Voting Rights Act, see Brian K. Landsberg, *Sumter County, Alabama and the Origins of the Voting Rights Act*, 54 ALA. L. REV. 877 (2003) (addressing the relationship between events in one Alabama county and the famous 1965 federal legislation).

30. One might point out that being entitled to these rights is not necessarily the same as being able to benefit from these rights. For example, a critique of voting rights in the United States would point out that many minority individuals in Florida were unable to enjoy their right to vote during the controversial 2000 presidential election. *See, e.g.*, John C. Knechtle, *"One Person, One Vote" Magnified*, 2 FLA. COASTAL L.J. 381, 385 (2001) (expressing concern about the equal protection voting rights of minorities in districts with less accurate voting machinery); Allan J. Lichtman, *What Really Happened in Florida's 2000 Presidential Election*, 32 J. LEGAL STUD. 221 (2003) (pointing out that ballots of black voters had a much higher set-aside rate than ballots of white voters).

31. 163 U.S. 537 (holding that racially separate public facilities were constitutional so long as they were equal).

32. U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection to all individuals, including Blacks).

schools. After the legal battle, the desegregationists received a blessing from the Court that their concern over racial discrimination in Detroit schools was legitimate. Meanwhile, the more conservative forces had their way in that they did not have to take action to solve the problem. In the end, the black students remained trapped in inner-city schools that were poorly funded and probably less safe than the schools in the Detroit suburbs (pp. 179-80). As such, the pendulum is swinging back in the direction of black sacrifice.[33]

Accordingly, although Patterson recognizes the limitations of the *Brown* legacy, he never maintains that, in light of *Brown,* various groups of Whites have settled their differences by ignoring the needs of Blacks. Indeed, Patterson argues that one can see the positive side of the *Brown* legacy. Thus, he considers both weaknesses and strengths of *Brown* and its ensuing legacy.

C. White Self-Interest

Although to a lesser extent than with involuntary black sacrifice, Patterson hints at the concept of white self-interest. Quite simply put, this Critical Race Theory concept is one in which Whites act in a way that benefits them and, if their action happens to be beneficial to Blacks or other minorities, then the result is merely a fortunate coincidence for minorities.[34] Under this concept, white actors do not actively consider the needs of racial minorities.

Several pieces of evidence in the book merely hint at white self-interest. For instance, Patterson notes that *Brown* created "feelings of guilt and responsibility" among many liberal Whites (p. 221). Assumedly, Whites wanted to purge these unpleasant feelings, although Patterson does not state so explicitly. Also, Patterson maintains that *Brown* "took aim at the heart of constitutionally sanctioned Jim Crow" (p. 221). This statement implies that the Whites who issued the decision may have enhanced their images by taking the high moral ground. Despite several more such references, Patterson never argues outright that *Brown* was self-serving of white interests.

An adherent of Critical Race Theory would be much more explicit than Patterson. Indeed, Bell has argued that much of the progress that followed *Brown* served the interests of the Whites who brought about the changes.[35] For

33. In fairness to the Supreme Court, a critique of this Critical Race Theory analysis would point out that the Court in *Milliken* faced a problem where the requested solution, inter-district busing, would have placed a burden on entities apparently not discriminating against black students. The Court found discriminatory intent in the Detroit schools but failed to find discriminatory intent in the suburban schools. Milliken v. Bradley, 418 U.S. 717, 744-45 (1974). Thus, the Court had to decide whether to hold non-discriminating schools responsible. Arguably, the Court decided against disciplining the schools in the Detroit suburbs for what the Detroit schools were doing.

34. BELL, *supra* note 14, at 205-08.

35. *Id*. Bell also has referred to this concept as the "interest convergence dilemma." *See* Derrick A. Bell, Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV.

example, *Brown* provided credibility to the U.S. government during the Cold War. The decision also gave governmental assurance to Blacks that the freedoms for which Blacks had fought during World War II would be available to them at home after the conflict ended.[36] With regard to these points, the U.S. government could avoid looking hypocritical; instead, it could take the high moral ground on the world stage. From this perspective, Whites in power did not have the interests of Blacks at heart.

To an extent, Bell's analysis can make sense, but implying that the decision rests on weaker moral ground because *Brown* served white interests misses an important point. In one way or another, acts of goodwill toward others are by nature self-serving. For instance, the social worker who works with the poor probably derives pleasure from helping people in need or from trying to achieve personal standards of morality. This pleasure is self-serving in a way, but the pleasure the social worker receives by helping others does not detract from the act itself; those helped still receive the aid. In the same vein, *Brown* was an act of goodwill from the white establishment towards the black community because the decision recognized that U.S. society had shortchanged many Blacks on educational opportunities. While one might describe *Brown* as self-serving, the decision still opened the door to helping Blacks make progress toward achieving a better place in society.

Although Patterson stops well short of making the argument that an adherent of Critical Race Theory like Bell would make, Patterson's hesitancy does not necessarily undermine his overall conclusion about the simultaneous presence of negative and positive implications of *Brown*. Given the noted limitation in the concept of white self-interest, one should not fault Patterson for largely omitting the argument.

D. Single-Race Schools

Finally, while he does consider options besides desegregation, Patterson does not address the concept of single-race schools. Bell discusses the concept of single-race schools as an alternative to integrated schools.[37] He notes that such schools aim to promote "a sense of cultural pride" among black students

L. REV. 518 (1980) (critiquing the *Brown* decision). For more on *Brown* and interest convergence, see Derrick Bell, Brown v. Board of Education*: Forty-Five Years After the Fact*, 26 OHIO N.U. L. REV. 171, 197 (2000) and DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 59-68 (2004) [hereinafter BELL, SILENT COVENANTS]. For more recent examples of white self-interest, see Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003) (looking at *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), as instances of white self-interest) and BELL, SILENT COVENANTS, *supra*, at 149-51 (focusing on Justice Sandra Day O'Connor's opinion in *Grutter*).

36. BELL, *supra* note 14, at 207.

37. The single-race schools of which Bell is thinking are those that exist by choice rather than those that have existed as a function of de facto segregation. BELL, *supra* note 14, at 222.

and are designed to address problems, including "discrimination, joblessness, poverty, and crime[,]" that Blacks often face disproportionately in comparison with members of other races.[38]

Although he does consider that desegregation might not have been the best remedy for addressing the situation of Blacks in the United States, Patterson does not say much about single-race schools. Specifically, Patterson offers the testimony of a black woman from Wilmington, North Carolina, who attended a black-only high school and was later concerned because, when her high school had to desegregate, Blacks felt like outsiders in their own school (p. 168-69). The implication is that desegregation may not always help minority students. Patterson also mentions that in the 1990s some black leaders questioned the assumption that desegregation was an appropriate remedy for educational shortcomings (p. 201). Nonetheless, this analysis leaves open the door to single-race schools as an alternative remedy.

An adherent of Critical Race Theory likely would take issue with Patterson's neglect of discussing single-race schools as a viable alternative to desegregation; indeed, such an adherent even may maintain that this type of neglect is illustrative of hidden white racism.[39] In focusing on desegregation—the major white solution to black educational problems—Patterson virtually ignores the minority solution of single-race schools and thus inadvertently stifles the minority voices in the discussion on how to remedy educational shortcomings.

This Critical Race Theory critique does make a point. Given that the nature of Patterson's historical evaluation stems from the quest of *Brown* to integrate schools, the author's focus on mixed schools is understandable. Yet, in considering the effects of *Brown* after a half-century, Patterson at least could offer a concise discussion of single-race schools as one possible alternative to integration. After all, Patterson admits that integration has not worked perfectly, as he suggests when he discusses black performance on tests such as the SAT (p. 215). Thus, Bell's point that single-race schools can help to address culturally specific problems merits serious attention.

CONCLUSION

As this Book Review has argued, Patterson has offered a mostly balanced, critical historical narrative in Brown v. Board of Education*: A Civil Rights Milestone and Its Troubled Legacy*. Analysis of Patterson's book through a Critical Race Theory lens has helped to test the conclusions of the book. Specifically, consideration of the notion of equality of opportunity versus equality of result led to much the same conclusion that Patterson reaches.

38. *Id.*

39. *Id.* at 139 (referencing Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987)).

However, an adherent of Critical Race Theory most likely would apply a harsher critique to the efforts at racial reform that have come in the wake of *Brown*, especially with regard to the concepts of involuntary black sacrifice, white self-interest, and single-race schools. While Patterson's work deserves some criticism for not discussing single-race schools as a serious alternative remedy, the radical nature of Critical Race Theory—which often focuses exclusively on the negative—leaves room for Patterson to address the positive aspects of *Brown* that adherents of Critical Race Theory would be inclined to ignore. Because his narrative considers both the negative and positive implications of *Brown*, Patterson comes acceptably close to presenting a balanced historical evaluation.

In summing up his position, Patterson effectively weighs the historical evidence by calling upon the following thoughts of former Legal Defense and Education Fund attorney Jack Greenberg: "'Altogether, school desegregation has been a story of conspicuous achievements, flawed by marked failures, the causes of which lie beyond the capacity of lawyers to correct. Lawyers can do right, they can do good, but they have their limits. The rest of the job is up to society.'"[40] Half a century after *Brown*, this is a relatively fair description of where the United States now stands.

40. *Quoting* GREENBERG, *supra* note 1, at 401.