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Resurrecting the Promise of Brown: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools

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RESURRECTING THE PROMISE OF *BROWN*: UNDERSTANDING AND REMEDYING HOW THE SUPREME COURT RECONSTITUTIONALIZED SEGREGATED SCHOOLS

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The Supreme Court's decision in Brown v. Board of Education *held that separate educational facilities were "inherently unequal." After tolerating substantial delay and evasion of the requirements of* Brown, *the Court eventually required school districts to dismantle the dual systems by eliminating all traces of separate schools and creating integrated schools. In contrast to numerous scholars that have contended that many of the Court's later school desegregation decisions withdrew from or grew weary of school desegregation, this Article argues that the effect of many of the Court's leading school desegregation decisions was to reconstitutionalize segregated schools. Furthermore, the Court's recent decision in* Parents Involved in Community Schools v. Seattle School District No. 1 *will exacerbate this effect by making it substantially more difficult for school districts to remedy such schools. This Article concludes with a proposal for how the President and U.S. Department of Education could implement a comprehensive plan to resurrect* Brown*'s promise to end separate and unequal schools.*

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INTRODUCTION

Far too many of the nation's schoolchildren attend schools that remain separate and unequal, and racial isolation in schools is increasing.[1] Although the nation achieved significant desegregation in

1. *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT/*PROYECTO DERECHOS CIVILES* (UCLA), HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 3 (2007), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf ("The trends shown in this report are those of increasing isolation and profound inequality."); Susan E. Eaton & Gary Orfield, *Introduction* to DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* xiii, xiv (Gary Orfield & Susan E. Eaton eds., 1996) [hereinafter DISMANTLING DESEGREGATION] ("[M]ore that forty years after *Brown*, racial separation both between and within school districts is an ordinary, unnoticed fixture in K-12 education. And there is a great deal of evidence to support *Brown*'s basic premise that in American society, separate schools are inherently unequal."); Goodwin Liu, *"History Will Be Heard": An Appraisal of the* Seattle/Louisville *Decision*, 2 HARV. L. & POL'Y REV. 53, 73 (2008) ("Our public schools are still segregated, and they are still unequal."); Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 244 (2004) ("Today our schools are

some regions, approximately three-quarters of Black and Latino students currently attend a school in which a majority of the students are minorities.[2] Nationwide 38% of Black children attend schools that enroll 90 to 100% minority students with more than 51% of Black children in the Northeast and 46% of the Black children in the Midwest attending such schools.[3] Similarly, 39% of Latino students attend schools that enroll 90 to 100% minority students with more than more than 45% of Latino children in the Northeast and 41% of Latino children in the West attending such schools.[4] The South achieved the greatest desegregation; however, by 2005 the percentage of Black students attending majority White schools in the South had fallen below the level that existed in 1970 to 27% of Black students.[5] Scholars have thoroughly documented that the persistence of racial isolation in schools matters a great deal because of the negative impact that racial isolation inflicts on educational opportunities and outcomes.[6]

The Supreme Court recently issued a decision that will make it substantially more difficult for school districts to develop policies to combat the growing racial isolation in the nation's schools.[7] In *Parents Involved in Community Schools v. Seattle School District No. 1*,[8] the Court issued a 5–4 decision that struck down the race-based student assignment plans adopted by the school boards in Seattle and Louisville.[9] The decision will make it increasingly difficult for districts to create diverse school settings because the decision left only an exceedingly narrow avenue for using approaches that employ the most direct and effective measure—a racial classification—to

becoming segregated again while equality of educational opportunity has proved to be an elusive goal.").

2. *See* ORFIELD & LEE, *supra* note 1, at 28, 35.

3. *See id.* at 33.

4. *See id.* at 35–36.

5. *See id.* at 22–23.

6. *See, e.g.*, Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, *in* DISMANTLING DESEGREGATION, *supra* note 1, at 53, 64–71 (noting disparities in achievement and curriculum between racially isolated and suburban schools); Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 327–36 (2009) (summarizing research on the harms of racial isolation); Amy Stuart Wells & Erica Frankenberg, *The Public Schools and the Challenge of the Supreme Court's Integration Decision*, 89 PHI DELTA KAPPAN 178, 179–83 (2007) (providing the results of research that finds racially segregated schools are detrimental to students).

7. *See* Robinson, *supra* note 6, at 285–94.

8. 551 U.S. 701 (2007).

9. *Id.* at 732–36.

accomplish this goal.[10] Justice Kennedy's opinion, which provided the fifth vote for striking down the plans, sanctions the use of race-neutral means to promote diversity and avoid racial isolation.[11] His opinion, which is likely to serve as an influential decision in determining the constitutional future of efforts to create diverse schools,[12] will lead districts that pursue these goals to focus their attention and efforts on selecting the most effective race-neutral approaches.[13]

The growing racial isolation in the public schools and the recent Supreme Court decision in *Parents Involved* that makes even voluntary efforts to reduce racial isolation more difficult to pursue raise important questions about how the nation got to this moment in history and what can be done in the future to address this growing educational and social crisis. Numerous scholars have traced how the Court and other political and social events have allowed the nation to return to separate and unequal schools.[14] For example, one prominent argument, championed in substantial part by Gerald Rosenberg, is that the Court lacked the capacity to undertake the type of social change that was needed to desegregate schools.[15] Numerous scholars portray the Court as an institution that has withdrawn from school desegregation. For example, prominent constitutional law scholar Erwin Chemerinsky has argued that several of the Court's leading desegregation decisions deconstitutionalize school segregation because the federal courts are withdrawing from responsibility for school desegregation.[16] Mark Tushnet has contended that the Court's school desegregation jurisprudence has embraced a "we've done enough" theory that declares an end to school desegregation even

10. *See* Erica Frankenberg, *School Segregation, Desegregation, and Integration: What Do These Terms Mean in a Post-*Parents Involved in Community Schools, *Racially Transitioning Society?*, 6 SEATTLE J. FOR SOC. JUST. 533, 534 (2008); Robinson, *supra* note 6, at 280; Wells & Frankenberg, *supra* note 6, at 179.

11. *Parents Involved*, 551 U.S. at 788–92 (Kennedy, J., concurring in part and concurring in the judgment).

12. Kevin Brown, *Reflections on Justice Kennedy's Opinion in* Parents Involved*: Why Fifty Years of Experience Shows Kennedy is Right*, 59 S.C. L. REV. 735, 735 (2008).

13. Robinson, *supra* note 6, at 293–94 (arguing that the narrow legal avenue for racial classifications will lead districts to use race-neutral approaches to promoting diversity and avoiding racial isolation).

14. *See, e.g.*, Eaton & Orfield, *supra* note 1, at xiv; Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 3–5 (2007).

15. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 70–71, 155–56 (Benjamin I. Page ed., 2d ed. 2008).

16. Erwin Chemerinsky, *The Deconstitutionalization of Educatio*n, 36 LOY. U. CHI. L.J. 111, 112, 115–19 (2004) ("The federal courts are withdrawing from overseeing school desegregation; it is an area of profound deconstitutionalization.").

though desegregation has not achieved the results that the Court declared were required.[17] Similarly, Bradley Joondeph has argued that the Court abandoned court-enforced school desegregation even when desegregation had not remedied the segregation.[18] Such theories depict the Court as an institution that removed itself or the Constitution from school desegregation.

While some of these arguments are persuasive, this Article contends that rather than withdraw from desegregation, the effect of the Court's decisions can better be understood as decisions that reconstitutionalized the segregated schools that the Court had previously condemned. "Reconstitutionalize" captures when the Court validates or approves of an action that it previously declared unconstitutional. The affirmative nature of the totality of the Court's decisions is revealed only by their consistent effect. If the Court were intending to withdraw from school desegregation but were neutral as to the effect of its withdrawal, it seems likely that the Court simply could have refused to review lower court decisions in this area. Instead, the Court intervened in desegregation cases and unfailingly issued decisions that validated the failure to achieve integrated schools or approved of a swift return to schools that primarily educated students of one race. Thus, in contrast with other scholarly portrayals of a Court that withdrew from school desegregation, understanding that the effect of some of the Court's leading desegregation decisions was to reconstitutionalize segregation highlights the important role that the Court played in shaping the current educational landscape.

In arguing that the Court's decisions had the effect of reconstitutionalizing segregation, this Article does not contend that the Court currently would uphold a law that intentionally and openly segregates students between schools along racial lines. Undoubtedly, the Court would strike down such a law as unconstitutional. Rather, this Article argues that the totality of the *effect* of many of the Court's leading desegregation decisions has been to approve of student assignment plans that accomplish a similar result by condoning a failure to dismantle or a swift return to separate and unequal schools in school districts that had been intentionally segregated. Furthermore, the Court in *Parents Involved* exacerbated this effect by

17. Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 767 (1996).

18. Bradley W. Joondeph, Missouri v. Jenkins *and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597, 599 (1996).

making it substantially more difficult for school districts to remedy such schools.

After analyzing how some of the Supreme Court's leading desegregation decisions had the effect of reconstitutionalizing segregation, this Article proposes ways in which the executive branch could renew its efforts to remedy separate and unequal schools. This Article develops such proposals for two principal reasons. First, racial isolation in public schools is presently rising.[19] In fact, as leading education law scholar James Ryan has recently noted, "[s]chools today are as segregated as they were in the late 1960s before busing began."[20] The rise in racial isolation along with the subordinating effects that accompany it[21] need sustained attention from the federal government because the states generally have proven unwilling to remedy the growing racial isolation.[22]

Second, and more importantly, the role of the federal government in public schools has risen to historic heights in recent years. The second Bush administration was able to obtain bipartisan support for the No Child Left Behind Act ("NCLB")[23] despite the fact that it represented the most significant federal involvement in public elementary and secondary schools in the nation's history.[24] In spearheading this expansion, the Bush administration acted in direct contradiction to prior Republican efforts to limit the federal role in education.[25] One scholar has noted that passage of the NCLB occurred because both parties and the American public now realize that substantial federal action will be necessary to improve the nation's schools.[26] The widespread acceptance of an expanded federal role in public schools will help make federal action to reduce racial isolation in schools more palatable to the American public.

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19. *See, e.g.*, ORFIELD & LEE, *supra* note 1, at 3.

20. James E. Ryan, *The Real Lessons of School Desegregation*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 73, 73 (Joshua M. Dunn & Martin R. West eds., 2009).

21. Orfield, *supra* note 6, at 64–71 (noting disparities in achievement and curriculum in racially isolated and suburban schools); Robinson, *supra* note 6, at 327–36 (summarizing the research on the harms of racial isolation); Wells & Frankenberg, *supra* note 6, at 179–83 (explaining the negative effects of racially segregated schools).

22. *See* ORFIELD & LEE, *supra* note 1, at 8–11.

23. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1439 (codified as amended in scattered sections of 20 U.S.C.).

24. PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005, at 165–66, 179 (2006).

25. *Id.* at 169.

26. *Id.* at 165.

The proposals noted here are particularly timely because President Barack Obama's administration has continued to build on the increase in federal involvement in education through the stimulus bill entitled the American Recovery and Reinvestment Act of 2009.[27] The Act provided approximately $100 billion to education and is the largest single allocation of federal aid to education in the nation's history.[28] The funds provide support to address state budget shortfalls, assist low-income and special education students, as well as provide student financial aid.[29] In addition, part of those funds will be used for the Race to the Top Fund, which will allocate $4.3 billion through a competitive grant program to states that focus on four reforms:

> (a) Adopting internationally benchmarked standards and assessments that prepare students for success in college and the workplace; (b) Building data systems that measure student success and inform teachers and principals about how they can improve their practices; (c) Increasing teaching and principal effectiveness and achieving equity in their distribution; and (d) Turning around our lowest-achieving schools.[30]

The availability of these funds is already significantly influencing policy and legislative action within states that are implementing reforms which will enable them to qualify for the funds. These reform initiatives include raising or eliminating state caps on charter schools and removing legal obstacles that prevented the use of student achievement data to evaluate teachers.[31] Therefore, even without reauthorization of the No Child Left Behind Act,[32] the Obama administration is substantially influencing the education priorities of the nation's governors, chief state school officers, and school districts

27. Pub. L. No. 111-5, 123 Stat. 115 (2009).

28. Sam Dillon, *Education Agency Will Offer Grants for Innovative Ideas*, N.Y. TIMES, Oct. 7, 2009, at A21 (stating that the stimulus bill allocated $100 billion to education); Letter from Arne Duncan, U.S. Sec'y of Educ., to Governors and Chief State School Officers 1 (Apr. 1, 2009), http://www.ed.gov/programs/statestabilization/2009-394-cover.doc ("[T]his sweeping economic recovery package provides the largest one-time Federal investment in education in our nation's history, more than $100 billion to help save and create teaching jobs, preserve needed learning programs, and increase college access.").

29. U.S. DEP'T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT REPORT: SUMMARY OF PROGRAMS AND STATE-BY-STATE DATA 3 (2009), *available at* http://www.ed.gov/policy/gen/leg/recovery/spending/arra-program-summary.pdf.

30. Race to the Top Fund, 74 Fed. Reg. 59,688, 59,688 (Nov. 18, 2009).

31. Erik W. Robelen, *"Race to Top" Driving Policy Action Across States*, EDUC. WK., Dec. 23, 2009 (available online only through a paid subscription service).

32. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

through conditions attached to the stimulus spending.[33] Furthermore, the priorities that the Obama administration is establishing for reauthorizing the NCLB will likely build and expand upon the strong federal role established in the NCLB rather than abandon that role.[34] With this expanded federal role in education, new opportunities exist and will continue to arise for the current and future Presidents to support efforts to reduce racial isolation in schools.

This Article proceeds in three parts. Part I chronicles how the Court made separate and unequal schools unconstitutional. Part II challenges the portrayal of the Court's role as one of withdrawal and fatigue and instead reveals several ways in which the effect of the Court's decision was to reconstitutionalize segregated schools. Part II explains that the importance of understanding the effect of the Court's decisions is recognizing that the Court has played a central role in condemning and then validating segregated schools. It argues that given the Court's critical role in this history any effective plan to remedy segregated schools should include an examination of how to prevent the Court from serving as a roadblock to remedying such schools while also acknowledging that the judiciary is unlikely to be the branch of the federal government to remedy separate and unequal schools in the future. Part III contends that the executive branch would be the most effective branch to address this issue and proposes how the executive branch could begin to fulfill *Brown v. Board of Education* (*Brown I*)'s[35] promise to end separate and unequal schools.[36]

I. HOW THE COURT MADE SEPARATE SCHOOLS UNCONSTITUTIONAL

Part I presents the familiar history of how the Court made separate and unequal public elementary and secondary schools unconstitutional. As described below, despite the Court's promising start in *Brown I* declaring separate educational facilities "inherently unequal,"[37] the Court's decision in *Brown II* invited school districts to

33. *See* Sam Dillon, *Education Standards Likely to See Toughening*, N.Y. TIMES, Apr. 15, 2009, at A12.

34. *Id.* (noting that the Obama administration's revisions to the No Child Left Behind Act ("NCLB") will require a toughening of some requirements and that the federal government will play an increasingly prominent role in shaping education policy across the country).

35. 347 U.S. 483 (1954).

36. *Id.* at 493–95.

37. *Id.* at 495.

delay desegregation.[38] It took the Court more than a decade to declare an end to the delay that it had invited and to issue decisions that gave school districts sufficient guidance to understand their obligation to dismantle segregated schools.[39]

A. Brown I *and* II *and Their Immediate Aftermath*

In *Brown I*, the Supreme Court confronted whether *Plessy v. Ferguson*'s[40] approval of "separate but equal" facilities,[41] which the Court had extended to public education,[42] violated the Equal Protection Clause.[43] While the Court found the history of the Equal Protection Clause inconclusive on whether racially segregated educational facilities were unconstitutional, the Court's examination of the importance of education in training schoolchildren for professional success, developing good citizens, and instilling cultural values led the Court to determine that education is "a right which must be made available to all on equal terms."[44] Even when the tangible benefits were the same, racially segregated educational opportunities denied African American students "equal educational opportunities" because African American students were denied the intangible benefits of engaging in learning with their peers, and the segregation created a sense of inferiority that adversely affected the mental and educational development of the African American schoolchildren.[45] The Court unequivocally declared that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[46] As a result, the Court held that separate educational facilities denied the minority schoolchildren the Fourteenth Amendment's guarantee of equal protection of the laws.[47]

Given the complexity of the issues at stake, the Court in *Brown I* requested further argument on how it should guide the lower courts as they oversaw the dismantling of segregation.[48] Despite the Court's

38. *See infra* notes 52–67 and accompanying text.
39. *See infra* notes 110–47 and accompanying text.
40. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).
41. *Id.* at 550–52.
42. Gong Lum v. Rice, 275 U.S. 78, 85–86 (1927).
43. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 488 (1954).
44. *Id.* at 493.
45. *Id.* at 493–94.
46. *Id.* at 495.
47. *Id.*
48. *Id.* at 495–96.

invitation to delay implementation of *Brown I*, sizeable cities in several border states, such as Wilmington, Delaware; Baltimore, Maryland; and St. Louis, Missouri, and the District of Columbia began to desegregate shortly after *Brown I* and did not wait for the Court to issue a decision in *Brown II*.[49] However, the Court's decision to hear further argument on implementation makes it unsurprising that some states chose not to move forward with desegregation and instead awaited further guidance from the Court.[50]

When the Court did address the need to remedy the constitutional violations identified in *Brown I*, the Court placed an affirmative obligation on school districts to take action by directing school districts to undertake "a prompt and reasonable start toward full compliance."[51] However, the Court simultaneously undermined this obligation and invited delay in the implementation of *Brown I* in several ways. For instance, rather than focusing on the rights of minority schoolchildren that had been denied for generations, the Court focused in *Brown II* on the obstacles and problems that districts would encounter in implementing its commands.[52] The Court invited school districts to make a case to the district court that they needed additional time for implementation.[53] Once a school district had begun to desegregate, courts were given permission to approve of delays in implementation if a school district needed additional time to effectively implement the ruling.[54] Desegregation need not proceed expeditiously; instead, districts could proceed "with all deliberate speed" in admitting minority schoolchildren on a nondiscriminatory basis.[55] Therefore, *Brown II* made clear that delay would be not merely tolerated but understandable.[56] The Court's repeated emphasis on local problems that must be overcome, the "deliberate" nature of implementation, and the ability of districts to obtain additional time to desegregate overshadowed the Court's

49. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 345 (2004).

50. *See* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 299 (1955).

51. *Id.* at 300.

52. *Id.* at 298–300.

53. *Id.* at 300.

54. *Id.*

55. *Id.* at 301.

56. *See* David Crump, *From* Freeman *to* Brown *and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 WASH. L. REV. 753, 764 (1993).

genuflection toward a "prompt and reasonable start" at desegregation and to compliance "at the earliest practicable date."[57]

In addition to countenancing a slow implementation of *Brown II*, the Court invited delay in school desegregation in several other ways. The Court placed those in violation of the Constitution—the school districts—in charge of developing the remedy.[58] This placed those most invested in forestalling desegregation in charge of implementation.[59] In addition, although the Court charged federal judges with overseeing implementation and instructed them to follow equitable principles, the Court failed to provide judges with clear guidance on how desegregation should proceed, when districts must achieve full compliance, and how they should respond when districts refused to comply.[60] The absence of sufficient guidance also left lower courts to undertake the difficult business of translating the Court's decisions into a coherent body of constitutional law that defined the path that districts must follow to achieve desegregation.[61]

Many school boards, particularly those in the South, were not inclined to comply with the Court's decisions and faced substantial political and personal pressure to avoid enforcing the decisions.[62] Politically, school board members who disregarded public opposition to desegregation lost their jobs as well as faced pressure from state officials who threatened to end state funds or shut down schools if schools were desegregated.[63] Personally, the board members were required to live within communities that vehemently opposed desegregation, and many experienced personal hardships, including

57. *Brown II*, 349 U.S. at 300; *see also* Crump, *supra* note 56, at 764 ("The requirement of compliance expressed in such phrases as 'prompt' and 'earliest practicable date' was contradicted by authorizations of 'additional time' and the emphasis of a 'deliberate' pace. When the result was to happen was left as confused as what the result was to be." (quoting *Brown II*, 349 U.S. at 300–01)).

58. *Brown II*, 349 U.S. at 299 ("Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems . . . .").

59. As one scholar observed, "[u]sually, courts do not place the fox in charge of bringing the hen house into compliance with law." Crump, *supra* note 56, at 762.

60. *See* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 127 (2004); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 92, 113 (2001); Crump, *supra* note 56, at 764; James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 139 (2007) (describing the message to districts in *Brown I* and *II* as "famously ambiguous").

61. Robert L. Carter, *Equal Educational Opportunity for Negroes—Abstraction or Reality*, 1968 U. ILL. L.F. 160, 177–80; Crump, *supra* note 56, at 762.

62. KLARMAN, *supra* note 49, at 350.

63. *Id.*

physical attacks, harassing letters, and cross burnings.[64] In *Brown II*, these board members found ample legal support for continued delay in the face of community opposition.[65] Given the unpopularity of the decision, those school board members who did want to comply needed unequivocal clarity on what was required.[66] Instead, they received a vague Court decision that tolerated evasion.[67]

Although lifetime tenure offered federal judges some protection from political reprisals, these federal judges encountered political and personal pressure not to require desegregation.[68] In addition, the violence and school closures that accompanied some desegregation led judges to have few incentives to order desegregation.[69] Like school board members who supported desegregation, federal judges experienced personal acts of violence, hate mail, and sometimes cross burnings.[70] For desegregation to have proceeded after *Brown II* in the face of such opposition, the judges needed an unequivocal mandate from the Supreme Court.[71] But *Brown II* did not provide clear judicial guidance to these judges.[72] Instead, *Brown II* offered judges the opportunity to forestall desegregation, as constitutional history and law professor Michael Klarman has observed,

> Even judges who profoundly disagreed with desegregation might have followed unambiguous Court orders to impose it, out of a sense of professional obligation. . . . *Brown II*, however, was hardly an order to do anything. Its indeterminacy invited judges to delay and evade, which they were inclined to do anyway.[73]

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64. *Id.*

65. *Id.*

66. *Id.*; Crump, *supra note* 56, at 762.

67. KLARMAN, *supra* note 49, at 350.

68. *Id.* at 356; OGLETREE, *supra* note 60, at 127.

69. KLARMAN, *supra* note 49, at 356–57; PATTERSON, *supra* note 60, at 113.

70. KLARMAN, *supra* note 49, at 356; OGLETREE, *supra* note 60, at 131; PATTERSON, *supra* note 60, at 91.

71. KLARMAN, *supra* note 49, at 355–56; OGLETREE, *supra* note 60, at 127.

72. *See* MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT 85 (abr. ed. of FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 2007) ("[In *Brown II*] [t]he Court approved gradualism, imposed no deadlines for beginning or completing desegregation, issued vague guidelines, and entrusted (southern) district judges with broad discretion."); OGLETREE, *supra* note 60, at 125 ("*Brown II* provided no judicial guidance on remedies; it merely signaled that southern school boards could move gradually, 'with all deliberate speed.' " (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955))).

73. KLARMAN, *supra* note 49, at 355–56.

This gradual approach was the price that some Justices imposed for agreeing to *Brown I*.[74] Chief Justice Warren indicated that the phrase "all deliberate speed"[75] was adopted because the Court "realized that under our federal system there were so many blocks preventing an immediate solution of the thing in reality that the best we could look for would be a progression of action—and to keep it going, in a proper manner, we adopted that phrase."[76] Some of the Justices feared injury to the Court if it gave specific and immediate orders that were not or could not be enforced.[77] Additional primary concerns for the Justices included school closures and violence.[78]

In response to the Court's tentative and vague decision in *Brown II*, most of the South waged a campaign of "massive resistance" to the decision that included almost all of the congressmen and senators from the South signing a pledge that denounced and pledged to overturn *Brown*.[79] "That *Brown II* was a mistake from the Court's perspective was quickly apparent. The justices' conciliatory gesture inspired defiance, not accommodation."[80] Desegregation typically required litigation or threats of litigation against school districts, along with a federal judge who was willing to order desegregation; however, the lack of necessary funding and commitment required to pursue litigation and to order desegregation oftentimes left many communities, particularly in the South, without a way to enforce their rights.[81] In the border states, the North, and the West, desegregation

74. KLARMAN, *supra* note 72, at 80.

75. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

76. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 747 (Alfred A. Knopf rev. & expanded ed., 2004).

77. KLARMAN, *supra* note 72, at 80.

78. *Id.*

79. *See, e.g.*, OGLETREE, *supra* note 60, at 126, 128–31, 306–07; Peter F. Lau, *From the Periphery to the Center: Clarendon County, South Carolina,* Brown, *and the Struggle for Democracy and Equality in America*, *in* FROM THE GRASSROOTS TO THE SUPREME COURT: *BROWN V. BOARD OF EDUCATION* AND AMERICAN DEMOCRACY 105, 118–20 (Peter F. Lau ed., 2004) (describing the sustained resistance to desegregation in South Carolina); Waldo E. Martin Jr., *"Stretching Out": Living and Remembering* Brown, *1945–1970*, *in* FROM THE GRASSROOTS TO THE SUPREME COURT: *BROWN V. BOARD OF EDUCATION* AND AMERICAN DEMOCRACY, *supra*, at 321, 335 ("The ambiguous implementation decree in *Brown II*—to integrate the schools with 'all deliberate speed'—translated into southern white evasion, avoidance, and outright rejection: in effect, massive resistance." (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955))).

80. KLARMAN, *supra* note 72, at 86.

81. KLARMAN, *supra* note 49, at 351–52; Walter G. Stephan, *A Brief Historical Overview of School Desegregation*, *in* SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 3, 17 (Walter G. Stephan & Joe R. Feagin eds., 1980).

proceeded fairly smoothly in some areas—even though desegregation oftentimes still took several years—while in other areas in these regions communities resisted desegregation.[82]

Given the substantial continuing resistance to school integration within the South and elsewhere, some view the Court's slow approach to school desegregation as understandable.[83] On the other hand, although immediate and total school desegregation in 1955 probably would have proven elusive had the Court ordered it, the Court could have established a timetable that established an outer limit for when desegregation was to be completed, as Thurgood Marshall requested, or it could have required districts to submit desegregation plans within ninety days as recommended by the federal government.[84] Instead, the Court did not give a date by which the schools had to be desegregated nor did the Court indicate a date by which desegregation plans had to be submitted.[85] As a result, ten years after *Brown I*, less than two percent of Black schoolchildren in the South attended a desegregated school.[86]

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82. KLARMAN, *supra* note 49, at 345–48; OGLETREE, *supra* note 60, at 61, 126.

83. For instance, *Brown* historian Richard Kluger has commented that *Brown II*

> gave the South a great deal more of what it had asked at the final round of arguments than it gave to the Negro. Yet the Court's implementation decree . . . did not reduce the moral compulsion to end Jim Crow as soon as possible. It recognized, though, that what is possible in the everyday business of nations is rarely determined by what Felix Frankfurter called, in the Court's back-room deliberations over Brown II, "the mere imposition of a distant will."

KLUGER, *supra* note 76, at 749; *see also* PATTERSON, *supra* note 60, at 114–16 (noting while some contend that *Brown I* and *II* inspired a "backlash" against civil rights, most southern White local leaders were resistant to civil rights for Blacks in the mid-1950s which makes it unlikely that *Brown I* or *Brown II* delayed the development "of more progressive southern race relations in the 1950s").

84. KLUGER, *supra* note 76, at 748.

85. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01 (1955).

86. *See* KLARMAN, *supra* note 49, at 349 ("Although by 1963 the increased pace of desegregation was unmistakable, only 1.06 percent of southern black students yet attended desegregated schools."); ROSENBERG, *supra* note 15, at 52 ("Ten years after *Brown* only 1.2 percent of black schoolchildren in the South attended school with whites."); Martha Minow, *After* Brown*: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 617 (2008) ("[B]y 1964, integrated schooling reached only one in eighty-five black students in the eleven Southern states that had joined the Confederacy during the Civil War." (citing THE CIVIL RIGHTS RECORD 378 (Richard Bardolph ed., 1970))).

B. *The Court's Approval of Delay, Evasion, and Token Compliance with* Brown I *and* II

After *Brown I* and *II*, many southern districts adopted measures that resulted in little or no school desegregation.[87] The Court's response to such measures was equivocal at best. On the one hand, the Court made clear that outright defiance would not be tolerated in cases such as *Cooper v. Aaron*[88] in which the Court held that the implementation of a desegregation plan for Central High School in Little Rock, Arkansas, could not be suspended because of the outbreak of violence.[89] On the other hand, the Court did not clarify the nature of school districts' obligation to desegregate until more than a decade after *Brown I*.[90]

In addition, the Court's actions and inaction in the interim further exacerbated the delay that *Brown II* invited. The prevailing constitutional interpretation of the obligation in *Brown I* and *II* was that state-imposed segregation was forbidden; therefore, Black and White schoolchildren must have the option to attend school together, but further action was not required.[91] The Court's failure to denounce this as the appropriate interpretation of *Brown I* and *II* and its approval of token compliance allowed districts to continue to employ desegregation plans that accomplished very little or no integration of the schools.[92] For example, southern states adopted pupil placement plans in each state because such plans ostensibly assigned students based upon factors other than race, but consistently perpetuated one-race schools.[93] The Court approved of such plans in a summary affirmance in *Shuttlesworth v. Birmingham Board of Education*.[94] In addition, over the dissent of three of the Justices, the Court failed to

87. KLARMAN, *supra* note 49, at 325–26, 329–34, 348–49.

88. 358 U.S. 1 (1958).

89. *Id.* at 17; *see also* Bush v. Orleans Parish Sch. Bd., 187 F. Supp. 42, 44–46 (E.D. La. 1960) (per curiam) (overturning a Louisiana law that gave the legislature the authority to determine if schools would be racially segregated, gave the governor authority to take over a school board that a court ordered to desegregate, and authorized the withholding of funds from integrated schools), *aff'd*, 365 U.S. 569 (1961).

90. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968).

91. KLARMAN, *supra* note 49, at 358; OGLETREE, *supra* note 60, at 125.

92. *See* KLARMAN, *supra* note 49, at 324, 358 (describing how the Court refused to grant full review of most cases involving desegregation plans until 1963, which allowed districts to adopt plans unfavorable to desegregation); OGLETREE, *supra* note 60, at 127 (describing how *Brown II* allowed judges to approve desegregation plans that did not set a deadline for when desegregation had to be completed).

93. KLARMAN, *supra* note 49, at 330–31.

94. 358 U.S. 101 (1958).

overturn a lower court decision that upheld the Nashville, Tennessee, plan that desegregated grade-by-grade and that included a minority-to-majority transfer provision that enabled White students to avoid attending a predominantly Black school and that encouraged Black students to leave racially integrated schools.[95] However, the Court also refused to overturn a lower court decision that ordered immediate desegregation for all Black students who wished to attend integrated schools in Delaware.[96]

Many school districts also thwarted desegregation by adopting freedom of choice plans that purported to allow students to attend a school of their choice but that overwhelmingly maintained the status quo of racially separate schools.[97] Plaintiffs gave the Court several opportunities to overturn such plans.[98] However, the Court did not overturn freedom of choice plans until its 1968 decision in *Green v. County School Board of New Kent County*.[99]

The Court's equivocation on desegregation was compounded by its failure to issue clear guidance on the nature of the constitutional obligation to desegregate. The absence of unambiguous guidance led judges to waste time trying to convert the Court's decisions into applicable constitutional legal principles and obligations.[100] By

95. Kelley v. Bd. of Educ. of Nashville, 270 F.2d 209, 214–15, 228–30 (6th Cir. 1959), *cert. denied*, 361 U.S. 924 (1959) (Warren, J., Douglas, J., and Brennan, J., dissenting); KLARMAN, *supra* note 49, at 331–32; *see also* Moore v. Bd. of Educ. of Harford County, 152 F. Supp. 114 (D. Md. 1957), *aff'd sub nom.*, 252 F.2d 291, 291 (4th Cir. 1958) (per curiam) (allowing to stand a decision that approved a desegregation plan that provided two years for the desegregation of elementary school students and five years for the desegregation of high school students and that permitted transfers in the high school grades), *cert. denied*, 357 U.S. 906 (1958).

96. Ennis v. Evans, 281 F.2d 385, 393–94 (3d Cir. 1960), *stay denied*, 364 U.S. 802 (1960), *cert. denied*, 364 U.S. 933 (1961) (denying a stay and denying review of a decision that disallowed a grade-by-grade desegregation plan and that ordered immediate desegregation for all Black students who wished to attend integrated schools).

97. OGLETREE, *supra* note 60, at 125.

98. For example, the Court denied review of several Fourth Circuit decisions about a North Carolina law that purported to allow students to request a transfer to another school despite the fact that these decisions left schools virtually segregated outside of the handful of selected Black students who were allowed to transfer to formerly White schools. *See* Holt v. Raleigh City Bd. of Educ., 265 F.2d 95, 97–98 (4th Cir. 1959), *cert. denied*, 361 U.S. 818 (1959); Covington v. Edwards, 264 F.2d 780, 783 (4th Cir. 1959), *cert. denied*, 361 U.S. 840 (1959); Carson v. Warlick, 238 F.2d 724, 726–27 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

99. 391 U.S. 430, 439–41 (1968).

100. MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 373 (4th ed. 2002); *see* James J. Fishman & Lawrence Strauss, *Endless Journey: Integration and the Provision of Equal Educational Opportunity in Denver's Public Schools: A Study of* Keyes v. School District No. 1, *in* JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 185, 201 (Barbara Flicker ed., 1990) ("The court made clear

allowing the principles guiding desegregation to unfold in the district courts without clear guidance, the Court sanctioned a wide range of timetables that permitted lower courts to countenance substantial delay and ineffective remedies.[101] While the Court issued some per curiam decisions that forbade such evasive tactics as closing schools or operating private schools, such decisions lacked any guidance on the requirements for school desegregation beyond condemning these practices.[102] When the Court ultimately issued an opinion on school closings in 1964, the Court held that Prince Edward County's closing of the public schools and support of private White schools was unconstitutional and required "quick and effective" relief for the plaintiffs; however, the Court did not explain what was required to establish a school system "without racial discrimination."[103] The lack of guidance coupled with the Court's failure to overturn tactics that sought to delay and evade desegregation allowed all but a small percentage of Black and White students to continue to attend racially separate schools throughout the South in the decade following *Brown I* and *II*.[104]

C. *The Court Demands Integration in Formerly Intentionally Segregated Districts*

Eventually, a decade or so after *Brown I*, the Court began to make clear when desegregation must occur and what compliance with the Equal Protection Clause entailed. For instance, in the 1965 decision *Rogers v. Paul*,[105] the Court found the desegregation plan of the Fort Smith, Arkansas, school district unconstitutional when the plan had only desegregated one grade each year, leaving the tenth, eleventh, and twelfth grades segregated at the time of the Court's decision.[106] The Court indicated that delays in school desegregation

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in *Brown II* that its function was to offer general guidance on broad principles of constitutional law, but it was the responsibility of district courts to apply those principles to the case at hand. . . . Instead of specific guidelines, the Court has offered a number of maxims, which like most generalities, are subject to exception and ad hoc construction.").

101. YUDOF ET AL., *supra* note 100, at 375.

102. *See, e.g.*, St. Helena Sch. Parish v. Hall, 368 U.S. 515, 515 (1962) (per curiam); Orleans Parish Sch. Bd. v. Bush, 365 U.S. 569, 569 (1961) (per curiam).

103. Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 232–33 (1964).

104. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION 1954–1978, at 126 (1979) (" 'All deliberate speed' was a defensible starting point. Yet the Court neglected to monitor deliberate speed, to insist on more than token progress, or to have done with naked stratagems for evasion and delay." (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955))); *see supra* note 86.

105. 382 U.S. 198 (1965) (per curiam).

106. *Id.* at 199.

were "no longer tolerable," ordered the district court to allow the plaintiffs to transfer immediately to the White high school with superior course offerings, and indicated that the high schools in the district must be desegregated consistent with the recognition that leaving three high school grades segregated was unconstitutional.[107] However, this—along with one other per curiam decision that indicated that further delays in school desegregation were unacceptable[108]—did not result in school boards taking prompt action to desegregate, perhaps because the brief per curiam decisions may not have served as an effective vehicle to convey this important shift in the Court's approach to these issues.[109]

Instead, it was not until the 1968 decision in *Green v. County School Board of New Kent County*[110] that the Court finally issued a clear mandate that school districts must immediately desegregate. In that decision, the Court stated that school boards must "come forward with a plan that promises realistically to work, and promises realistically to work *now*."[111] The Court held that districts must eliminate racial discrimination "root and branch"[112] and noted that the obligation of district courts was " 'to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' "[113] The Court clearly indicated that a plan that met these requirements must create integrated schools, stating that the district must "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[114] The Court had hinted in *Brown II* that it envisioned more than simply an end to the legal mechanisms that effectuated segregation when it focused on the obstacles and challenges that districts would confront in desegregating;[115] such obstacles and challenges typically would not accompany a repeal of laws requiring segregation.[116] In *Green*, the Court finally moved beyond hints and suggestions of what the Constitution required and unequivocally

107. *Id.* at 199–200.

108. *See* Bradley v. Sch. Bd., 382 U.S. 103, 105 (1965) (per curiam) ("Delays in desegregating school systems are no longer tolerable.").

109. STEPHEN L. WASBY ET AL., DESEGREGATION FROM *BROWN* TO *ALEXANDER*: AN EXPLORATION OF SUPREME COURT STRATEGIES 218 (1977).

110. 391 U.S. 430 (1968).

111. *Id.* at 439.

112. *Id.* at 438.

113. *Id.* at 438 n.4 (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).

114. *Id.* at 442.

115. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 299 (1955).

116. Ryan, *supra* note 20, at 76.

demanded integrated schools in those districts that had previously been intentionally segregated.[117]

To guide the lower courts in operationalizing these requirements, the Court identified six facets of districts that must be examined to determine if school districts were desegregated: student assignment, faculty, staff, transportation, extracurricular activities, and facilities.[118] In addition, the Court indicated that desegregation plans would be judged by their effectiveness at dismantling a dual system and pointed explicitly to the fact that eighty-five percent of Black students still attended an all-Black school as a key reason for determining that the challenged plan was unacceptable.[119] The Court in *Green*, in a footnote, also recognized that two proposals from the plaintiffs, school consolidation and neighborhood assignments where residential segregation did not exist, could serve as possible means to remedy the constitutional violation and thus began to clarify what tools could be used to desegregate.[120] Requiring districts to create "just schools" and premising the Court's approval of neighborhood assignments on the absence of residential segregation made clear that neighborhood assignments that resulted in Black and White schools were no longer tolerable in districts that had intentionally segregated students.

Green is praiseworthy for several reasons. While the Court did not subsequently clarify which effects of school segregation had to be reversed or define when a district achieved unitary status,[121] the Court in *Green* made clear that the only way that it could determine that intentional discrimination had been eliminated was for districts to create integrated schools.[122] In addition, the decision undoubtedly increased the pace of school desegregation.[123] The Court's demand for immediate integration made clear that further delays were unacceptable, particularly when the Court reemphasized this point in

117. *Id.* at 77 ("[T]he Supreme Court announced in its 1968 decision in *Green v. New Kent County* that formerly segregated school districts must actually integrate their schools.").

118. *Green*, 391 U.S. at 435. However, Wendy Parker's research has found that district courts have oftentimes permitted faculty and staff to remain racially identifiable. *See* Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1650 (2003).

119. *Green*, 391 U.S. at 437, 441.

120. *Id.* at 442 n.6; *see also* WILKINSON, *supra* note 104, at 117 (noting that the Court's proposals of potential approaches to desegregation were "novel").

121. YUDOF ET AL., *supra* note 100, at 380.

122. *Green*, 391 U.S. at 439–42.

123. WILKINSON, *supra* note 104, at 126 (commenting that "*Green* marked the end of gradualism" in school desegregation but also acknowledging that the decision came "too late").

two subsequent decisions.[124] The Court's focus on effectiveness also shifted the attention of lower courts from process to results.[125] In particular, the Court's emphasis on the percentage of Black students remaining in all-Black schools as an indication of the district's continued maintenance of a dual system would influence lower courts to emphasize such statistics in future cases.[126] This shift in emphasis removed the burden of desegregation from the backs of schoolchildren, who under freedom of choice and other plans often had to choose an integrated school, and instead placed the burden of creating desegregated schools on school districts.[127] In the aftermath of *Green*, the Department of Health, Education, and Welfare ("HEW") issued hundreds of letters that required changes to desegregation plans.[128] While HEW's 1965 guidelines for desegregation informed school districts that the measure of an appropriate desegregation effort would be "actual integration," the guidelines focused on the use of "freedom-of-choice plans and the good faith efforts of local officials."[129] After *Green*, HEW revised its guidelines to prohibit freedom of choice plans that did not overcome the vestiges of segregation.[130]

The Court did not issue guidance on many important unanswered questions about possible tools to desegregate until

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124. *See* Carter v. W. Feliciana Parish Sch. Bd., 396 U.S. 290, 291 (1970) (per curiam) (rejecting requests to delay desegregation); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam) ("[C]ontinued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1954)).

125. WILKINSON, *supra* note 104, at 116 ("[T]he Court served notice, school plans would be judged not on paper or promise, but on performance."); Diane Ravitch, *The Evolution of School Desegregation Policy, 1964–1979*, *in* RACE AND SCHOOLING IN THE CITY 1, 13 (Adam Yarmolinsky et al. eds., 1981).

126. WILKINSON, *supra* note 104, at 125 ("*Green*'s insistence on statistical evidence that the duty to desegregate had been accomplished was to become characteristic of urban school litigation, both South and North."). Some scholars criticize *Green* for the coercive plans that followed the decision. *See* Stephen J. Caldas & Carl L. Bankston III, *A Re-Analysis of the Legal, Political, and Social Landscape of Desegregation from* Plessy v. Ferguson *to* Parents Involved in Community Schools v. Seattle School District No. 1, 2007 BYU EDUC. & L.J. 217, 230.

127. Wendy Parker, *Connecting the Dots:* Grutter, *Desegregation & Federalism*, 45 WM. & MARY L. REV. 1691, 1718 (2004).

128. Gary Orfield, *Why It Worked in Dixie: Southern School Desegregation and Its Implications for the North*, *in* RACE AND SCHOOLING IN THE CITY, *supra* note 125, at 24, 31.

129. ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-*BROWN* ERA 64 (1986).

130. *See id.*

Swann v. Charlotte-Mecklenburg Board of Education.[131] In *Swann*, the Court explicitly acknowledged that it had not previously clearly defined for school districts and courts the obligations of *Brown I* and the Court's subsequent requirement to dismantle segregated schools and create unitary schools "at once."[132] Instead, the Court admitted in *Swann* that the lower courts were left to make sense of its general pronouncements without any explicit guidance from the Court.[133]

In *Swann*, the Court explained several key points that served to guide school desegregation. The Court in *Swann* reviewed the lower court's approval of a desegregation plan for the Charlotte-Mecklenburg School District in North Carolina.[134] The Court reminded district courts that they retained broad and flexible authority to fashion remedies that correct the constitutional violation of state-imposed public school segregation.[135] The Court indicated its approval of school assignment plans that included the use of flexible ratios of White to Black students as one mechanism for remedying discriminatory student assignments,[136] while also noting that annual adjustments of the composition of schools were not required once discriminatory government action had been eliminated from the district.[137] Although the existence of one-race schools within a formerly segregated school system did not by itself establish a constitutional violation,[138] the Court explained that school districts and federal courts "should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools."[139] The Court also sanctioned the remedial revision of attendance zones to eliminate segregated schools.[140] The Court further approved of busing

131. 402 U.S. 1 (1971).

132. *Id.* at 6 ("These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once.").

133. *Id.* ("Meanwhile district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive.").

134. *Id.* at 10–11.

135. *Id.* at 15–16. The Court also noted that, even without a constitutional violation, school authorities may decide in their expertise "that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Id.* at 16.

136. *Id*; *see also* United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 235–36 (1969) (sanctioning the use of racial numerical goals for faculty desegregation).

137. *Swann*, 402 U.S. at 24–25, 31–32.

138. *Id.* at 26.

139. *Id.*

140. *Id.* at 27–28.

to dismantle a dual system as long as the transportation did not impair the health or education of the schoolchildren.[141] The Court's approval of busing empowered district courts to remedy the racially separate schools that neighborhood assignments often created as a result of racially-segregated housing patterns.[142]

Like *Green*, *Swann* is praiseworthy for several reasons. At last, the Court supplied much-needed guidance to lower courts on what tools were acceptable for desegregation, including busing and explicit racial goals for student enrollment. In the wake of *Swann*, plans that required busing were adopted in over 100 southern districts.[143] The decision also notified districts in the North and West that they must desegregate.[144] Additionally, *Swann* stated that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."[145] This inclusion of the term "vestige" indicated that both segregation and evidence of prior segregation should be eliminated from school districts.[146] Furthermore, like *Green*, *Swann* can be read to reinterpret *Brown* to not only require an end to segregated schools but also to establish a right to integrated schools.[147]

Despite the *Swann* Court's demand for integration and endorsement of busing, the decision planted the seeds for a return to racially separate schools. The Court tempered the requirement to integrate schools by noting that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[148] Furthermore, integrated schools need not be maintained over time because the Court did not require lower courts and school boards to make annual adjustments to the racial composition of schools after the school system had desegregated.[149] Eventually, the school districts would achieve unitary status and the

141. *Id.* at 30–31.

142. Ryan, *supra* note 20, at 77.

143. PATTERSON, *supra* note 60, at 158.

144. KLUGER, *supra* note 76, at 763.

145. *Swann*, 402 U.S. at 15.

146. *See id.*

147. Parker, *supra* note 127, at 1719 ("[In *Swann*] the Supreme Court had mounted an attack on *continued* segregation, not just the consideration of race. Fundamentally, the Court redefined the right of *Brown I* to include not just the end of assignment based on race, but also a right to integration." (internal citation omitted)).

148. *Swann*, 402 U.S. at 24; *see also* Ravitch, *supra* note 125, at 13 (noting this statement as one of the weaknesses of *Swann*).

149. *Swann*, 402 U.S. at 31–32.

measures approved in *Swann* would no longer be necessary.[150] Therefore, the Court portrayed desegregation and integrated schools as a short-term legal requirement rather than a permanent commitment.[151] Furthermore, the vestiges of segregation that must be eliminated remained undefined.[152] The Court also reminded the lower courts that "[a]s with any equity case, the nature of the violation determines the scope of the remedy."[153]

The limitations in *Swann* did not go unnoticed by those opposed to segregation.[154] Indeed, following the decision, a pro-segregation editorial in the *Richmond Times-Dispatch* highlighted many of these limitations as reasons for "hope for a restoration of sanity and stability to the pupil assignment systems of the South's public schools."[155] In addition, just a few months after *Swann* was decided, then-Chief Justice Burger highlighted some of these limitations when he reviewed a stay application from the Winston-Salem, North Carolina, School Board.[156] While denying the request to stay implementation of a desegregation plan for procedural reasons, the Chief Justice noted that the district court might have mistakenly believed that it had to obtain a fixed racial ratio throughout the school system.[157] The Chief Justice also noted that *Swann* had indicated that limitations could be set on busing.[158] The Chief Justice's ruling sent mixed signals to the South.[159] Later Supreme Court opinions were able to rely on the limitations in *Swann* regarding how long schools must be integrated and on the scope of the remedy to limit the reach of *Swann*.[160]

Despite the shortcomings of *Green* and *Swann*, together the two decisions,[161] along with additional enforcement efforts by HEW and the Justice Department, were crucial in helping to notify the South

150. *Id.* at 31.

151. Ryan, *supra* note 20, at 78.

152. *See Swann*, 402 U.S. at 15–16.

153. *Id.* at 16; *see also* Ravitch, *supra* note 125, at 13 (acknowledging that this phrase allowed the Court subsequently to weaken "the integrationist thrust of *Swann*").

154. *See* WILKINSON, *supra* note 104, at 148.

155. Editorial, *Beacons of Hope*, RICHMOND TIMES-DISPATCH, Apr. 25, 1971, at F6.

156. Winston-Salem/Forsyth County Bd. of Educ. v. Scott, 404 U.S. 1221, 1230–31 (1971) (Burger, J., opinion in chamber).

157. *Id.*

158. *Id.* at 1227.

159. WILKINSON, *supra* note 104, at 149.

160. Ravitch, *supra* note 125, at 13.

161. *See* CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 27 (2004); James E. Ryan, Brown, *School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1636 (2004).

that desegregation was unavoidable and in sparking a new wave of court orders requiring desegregation that lasted until the 1970s.[162] *Green* and *Swann* established a virtually irrebuttable presumption that existing segregation in schools was caused by prior unlawful segregation.[163] Interracial contact increased, particularly in the South, in the aftermath of these decisions and proactive federal enforcement.[164] Nevertheless, some Whites determined to escape desegregation fled to the suburbs or to private schools.[165]

Ultimately, the principal shortcoming of *Green* and *Swann* is that the decisions were issued too late to assist the many schoolchildren educated prior to the decisions who needed clear guidance from the Court for lower courts and school districts to recognize their rights.[166] As this Part has demonstrated, through numerous actions and inactions, the Court tolerated and even encouraged delays in school desegregation. Although the Court eventually issued decisions that clarified the obligations that *Brown I* and *II* imposed, Part II reveals how, shortly after *Swann*, the Court's decisions began to have the effect of reconstitutionalizing segregated schools.

II. HOW THE SUPREME COURT EFFECTIVELY RECONSTITUTIONALIZED SEGREGATED SCHOOLS

After the Court held in *Green* and *Swann* that districts that were intentionally segregated had to create integrated schools, the Court issued a series of decisions that had the effect of reconstitutionalizing separate and inferior schools for minority schoolchildren. This Part first analyzes how the effect of the Court's decisions was to reconstitutionalize segregated schools. Sub-Part A considers how the Court validated desegregation plans that were ineffective in creating

162. *See* Orfield, *supra* note 128, at 30.

163. *See* Frank Goodman, *Some Reflections on the Supreme Court and School Desegregation*, *in* RACE AND SCHOOLING IN THE CITY, *supra* note 125, at 45, 51; James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1666 (2003).

164. CLOTFELTER, *supra* note 161, at 26–27; KLUGER, *supra* note 76, at 763 ("By the following school year [after *Swann*] more than 46 percent of the black children in the southernmost states were attending schools in which the majority of students were white. No other sector of the nation had achieved anything near that degree of desegregation."); Minow, *supra* note 86, at 618.

165. Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 634 (2007); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1519 (2005); Ryan, *supra* note 161, at 1636–37.

166. *See* WILKINSON, *supra* note 104, at 126–27.

integrated schools in districts that had been intentionally segregated. Sub-Part B examines how the Court also sanctioned a return to segregated schools in formerly segregated districts. Sub-Part C then explores how the Supreme Court's decision in *Missouri v. Jenkins* served to reconstitutionalize the detrimental effect of segregation on student achievement. Sub-Part D explains how the Court's failure to remedy inferior schools further exacerbated those Supreme Court decisions that had the effect of reconstitutionalizing segregation. Finally, Sub-Part E analyzes how *Parents Involved* will further entrench this effect.

A. The Court's Approval of Ineffective Desegregation Plans

1. The Court Reconstitutionalizes Segregated Schools by Limiting Interdistrict Remedies

In *Milliken v. Bradley* (*Milliken I*),[167] the Court reviewed a desegregation plan that was designed to address the lower court's findings that the Detroit Board of Education and the State had engaged in intentional discrimination to create and perpetuate residential segregation and segregated schools.[168] The lower courts determined that an effective remedy could not be developed without including the suburban districts in the remedy given the increasing racial isolation in Detroit.[169] Therefore, the lower courts approved of a desegregation plan that included the surrounding suburban districts.[170] The in banc court of the Sixth Circuit noted that the State had committed intentional acts of discrimination and the State controlled the actions of those needed to remedy the intentional discrimination.[171] Given those findings, the court decided to include the neighboring districts in this way:

> In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial

167. 418 U.S. 717 (1974).
168. *Id.* at 724.
169. *Id.* at 735.
170. *Id.* at 722.
171. Bradley v. Milliken, 484 F.2d 215, 250 (6th Cir. 1973) (in banc), *rev'd*, 418 U.S. 717 (1974).

segregation along school district lines.

> There exists, however, an even more compelling basis for the District Court's crossing artificial boundary lines to cure the State's constitutional violations.... If we hold that school district boundaries are absolute barriers to a Detroit school desegregation plan, we would be opening a way to nullify Brown v. Board of Education ....[172]

Thus, an in banc panel of the Sixth Circuit unequivocally understood that an effective remedy required the participation of the surrounding suburban districts and that including these suburbs was appropriate in light of the State's intentional discrimination and its control over the suburban districts. Furthermore, the panel recognized that a contrary decision would render *Brown I* meaningless.

In spite of this lower court record, the Supreme Court overturned the interdistrict desegregation plan. The Court held that the plaintiffs must prove an interdistrict violation of the Constitution before a court could order an interdistrict remedy because the scope of the constitutional violation must determine the remedy's scope.[173] This required the plaintiffs to show that any district that was to be included in an interdistrict remedy had engaged in actions intended to segregate students between districts.[174] As the lower courts were focused on addressing discrimination by the State of Michigan and the Detroit school board rather than by the surrounding suburban districts, the Supreme Court determined that it was appropriate to limit the remedy to an intradistrict remedy.[175] Despite the lower court record that found that an intradistrict remedy would be ineffective, the Court indicated that an intradistrict remedy would restore the victims of discrimination "to the position they would have occupied in the absence of such [discriminatory] conduct."[176] In addition, the Court also emphasized the importance of local control, which the Court viewed as preventing the inclusion of the surrounding districts.[177] Upon remand, the lower courts ordered a variety of remedial educational programs be implemented in the school district, and the Court in *Milliken v. Bradley* (*Milliken II*)[178] upheld the

172. *Id.* at 249 (citations omitted).
173. *Milliken I*, 418 U.S. at 744–45.
174. *Id.*
175. *Id.* at 746.
176. *Id.*
177. *Id.* at 741–44.
178. 433 U.S. 267 (1977).

constitutionality of such efforts because they helped to address the effects of the intentional discrimination that the students had suffered.[179]

Milliken I eliminated the most, and oftentimes the only, effective desegregation remedy for many minority schoolchildren by removing the ability to order interdistrict relief.[180] Like the students in Detroit, most minority students in other northern and western cities were left without a school desegregation remedy after *Milliken I* because desegregation remedies were limited to a single district that lacked sufficient numbers of White students to desegregate the schools.[181] Data on segregation in metropolitan districts establishes that segregation within districts decreased from 1970 to 2000 while interdistrict segregation increased and that currently metropolitan interdistrict segregation substantially exceeds intradistrict segregation.[182]

Milliken I erected an almost uniformly insurmountable barrier to interdistrict remedies because proof of action to segregate African Americans into particular districts was quite difficult to obtain.[183] Since the mid-1940s, African Americans have oftentimes been concentrated in inner cities and certain neighborhoods within older suburbs while Whites have increasingly lived in different suburban

179. *Id.* at 275–79.

180. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1607 (2003); Ryan, *supra* note 161, at 1645 ("[I]interdistrict desegregation was rarely an option after *Milliken*.").

181. *See* Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1469 (2003); Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 102 (Jay P. Heubert ed., 1999) ("After *Milliken* there was no practical remedy for minority students concentrated in school districts with few white students; and that describes the experience of most minority students in the north and west."); Ryan, *supra* note 161, at 1645 ("The decision dealt a crushing blow to urban desegregation in the North and West, where school district lines separated urban and suburban schools, and where urban schools were increasingly dominated by minority students. Unable to include suburban schools, desegregation plans in urban areas were largely futile, for the simple reason that there were not enough white students left in public schools."); *see also* Bradley W. Joondeph, *Skepticism and School Desegregation*, 76 WASH. U. L.Q. 161, 164 (1998) (describing how *Milliken I* prevented meaningful integration of schools).

182. CLOTFELTER, *supra* note 161, at 64–65, 120. The *Milliken I* decision also had such a devastating effect because it offset the interracial interactions that intradistrict enforcement accomplished. *Id.* at 67.

183. Ryan, *supra* note 20, at 82.

districts.[184] Given the effectiveness of housing discrimination at limiting African Americans' access to much of the suburbs, proof of discrimination to keep African Americans out of suburban schools was often lacking because housing discrimination eliminated the need to change district lines to maintain suburban schools as White enclaves.[185] While many factors have led to housing segregation, including suburbanization,[186] economics, preferences,[187] and private discrimination,[188] government housing discrimination has played a substantial role in sustaining housing segregation.[189] Housing segregation and the preference for assigning students to schools within their neighborhood have served as the leading causes of racial isolation in schools.[190] By refusing to view school desegregation as a necessary remedy for housing discrimination in *Milliken I* and elsewhere, the Court erected a jurisprudential wall between the two issues and a virtual wall between the suburban and inner city school districts that prevented the Court from effectively addressing residential or school segregation.[191] The Court's failure to address housing discrimination led most lower courts to ignore this important

184. Gary Orfield, *Foreword* to JOSEPH FELDMAN ET AL., STILL SEPARATE, STILL UNEQUAL: THE LIMITS OF *MILLIKEN II*'S EDUCATIONAL COMPENSATION REMEDIES 1, 1 (1994).

185. Ryan, *supra* note 20, at 82; Ryan, *supra* note 163, at 1666–67.

186. Gary Orfield, *Segregated Housing and School Resegregation*, *in* DISMANTLING DESEGREGATION, *supra* note 1, at 291, 314–15.

187. *Id.* at 297.

188. *Id.* at 294.

189. *See id.* at 297 (describing the importance of the role played by governments in encouraging residential segregation); Ryan, *supra* note 20, at 83 (describing the various factors that lead to residential segregation); *cf.* Thomas F. Pettigrew, *Justice Deferred: A Half Century After* Brown v. Board of Education, 59 AM. PSYCHOLOGIST 521, 527 (2004) ("Racial discrimination in both rental and owner housing markets remains far more important than economic and preference factors combined.").

190. Ryan, *supra* note 20, at 83; *see* Orfield, *supra* note 186, at 314–15 (describing the role White flight played in ensuring school segregation).

191. *See* GARY ORFIELD & CHUNGMEI LEE, *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? 34 (2004) ("The Supreme Court's 5-4 decision drawing a line between city and suburbs for desegregation purposes and the failure to seriously address housing segregation build severe isolation of children into the life of our metro regions and mean that even minority families who can afford housing choice often end up in segregated, poorly-performing schools." (citing Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974))), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/b8/82.pdf; Pettigrew, *supra* note 189, at 523 (arguing that, by disregarding the fact that interdistrict segregation represents the primary type of urban school segregation, the Court allowed boundaries between predominantly minority cities and White suburban neighborhoods to "act as racial Berlin Walls."); *see also* Ryan, *supra* note 20, at 83 (noting that the Court also avoided the issue of housing discrimination in *Swann* by contending that the Court did not want the school desegregation remedy to carry too much "baggage").

contribution to school segregation and, thus, severely undermined the development of effective school desegregation remedies.[192]

Milliken I enabled most suburban school districts located outside of cities to circumvent desegregation by hiding behind district lines that exempted them from responsibility for participating in desegregation plans that would have provided the only opportunity for effective desegregation for city school districts.[193] The decision similarly gave Whites the opportunity to escape integrated schools by fleeing just beyond city school district boundaries.[194] Once Whites successfully moved out of urban districts and away from their substantial minority populations, *Milliken I* ensured that desegregation remedies would not come knocking at their doors because of the great difficulty in proving an interdistrict violation.[195] When many Whites and the suburban districts to which they fled could sidestep desegregation, integrated schools became an unattainable dream for minority schoolchildren remaining in urban school districts.[196] Similarly, suburban districts also could not be

192. *See* Ryan, *supra* note 20, at 83.

193. Pettigrew, *supra* note 189, at 523 ("What makes this [*Milliken I*] decision so regressive is that such remedies are the *only* means available . . . ." (citations omitted)).

194. *See* CLOTFELTER, *supra* note 161, at 67 ("By virtue of *Brown* . . . and the federal government's enforcement efforts, segregation within districts declined markedly. But whites who wanted to cushion or avoid the effect of these actions had several means of doing so. The principal one was to seek out whiter suburban school districts."); PATTERSON, *supra* note 60, at 181 (describing White flight to the suburbs of Detroit after the *Milliken* decision); Derek W. Black, *The Uncertain Future of School Desegregation and the Importance of Goodwill, Good Sense, and a Misguided Decision*, 57 CATH. U. L. REV. 947, 951–52 (2008) ("*Milliken* signaled to whites that they could avoid desegregation and build exclusive enclaves by simply moving across the school district line. In that, *Milliken* likely exacerbated segregation."); Chemerinsky, *supra* note 181, at 1470 ("*Milliken* effectively encouraged white flight to the suburbs. Whites who wish to avoid desegregation can do so by moving to the suburbs. If *Milliken* had been decided differently, one of the incentives for such moves would be eliminated.").

195. *See* KLUGER, *supra* note 76, at 767 ("Assured of protection by *Milliken* from hordes of African Americans who might otherwise have descended on them by bus, whites stepped up the pace of their abandonment of the cities."); Charles R. Lawrence III, *Segregation "Misunderstood": The* Milliken *Decision Revisited*, 12 U.S.F. L. REV. 15, 15–16 (1977) ("The *Milliken* decision not only assured middle-class whites that their mass exodus to the suburbs to seek refuge from blacks had not been made in vain, but the Supreme Court also made clear that they would not use school desegregation to invade the suburban fortress of housing for whites only." (internal citation omitted)).

196. *See* Chemerinsky, *supra* note 16, at 118 ("The social reality . . . is that many city school systems are now primarily comprised of minority students, while surrounding suburban school districts are almost all white. Thus, effective desegregation requires an inter-district remedy." (internal citation omitted)); *see also supra* note 181 (providing additional sources).

desegregated because too few minority students lived in those districts.[197]

When the Court held that the Detroit schools were not required to implement an effective desegregation plan that turned Black and White schools into "just schools,"[198] the Court reconstitutionalized segregated schools for the minority children in Detroit. The *Milliken I* Court made constitutional the racially identifiable schools that the Court had recently declared in *Green* and *Swann* must be eliminated.[199] While the Court alleged that this decision was necessary because the scope of the constitutional violation must determine the parameters of the remedy,[200] the remedies required by those cases were not limited by the constitutional violations.[201] Instead, those opinions focused on not only remedying the constitutional violation but also on eradicating the roots of discrimination and on removing any reminder or trace that the violation had occurred by demanding that districts eliminate all "vestiges" of discrimination.[202] Rather than eliminate the racial identity of the schools and eliminate the vestiges of the prior discrimination, *Milliken I* effectively reconstitutionalized segregated schools by making an effective remedy dependent upon proof that the surrounding suburbs had engaged in intentional discrimination that was extremely difficult to document.[203]

By placing the Court's imprimatur on a remedy that did not eliminate segregated schools, the Court established that lower courts also could adopt similarly ineffective desegregation plans.[204] The lower courts received the Court's message loud and clear. After *Milliken I*, although some of the existing interdistrict plans were continued, additional school districts did not choose to adopt interdistrict desegregation plans because *Milliken I* established that

197. Chemerinsky, *supra note* 181, at 1469.

198. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 442 (1968).

199. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1972) ("The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools."); *Green*, 391 U.S. at 442 ("The Board must be required to formulate a new plan ... which promise[s] to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools.").

200. Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 744 (1974).

201. Ryan, *supra* note 20, at 81–82.

202. *Swann*, 402 U.S. at 15; *Green*, 391 U.S. at 437–38.

203. *Milliken I*, 418 U.S. at 745; *see also supra* notes 183–85 and accompanying text (describing how it is difficult to obtain proof that suburban school districts engaged in intentional segregation).

204. *See Milliken I*, 418 U.S. at 744–48, 752–53 (refusing to allow a desegregation plan that incorporates surrounding school districts because a cross-district violation did not exist).

they were not required to do so.[205] Despite the Court's statement that it was adopting a remedy that would restore the Detroit schools to the state of affairs that they would have occupied without discrimination,[206] the Court in *Milliken I* failed to analyze how much integration the students in Detroit would have enjoyed if the State and district had not engaged in discrimination, including the housing discrimination found by the lower court.[207] The Court's failure to analyze this issue undoubtedly signaled to lower courts that they also need not undertake such an analysis nor did lower courts need to develop a clear benchmark for the state of affairs that they sought to achieve.[208]

Given the effect of the *Milliken I* decision, it is unsurprising that many scholars contend that the decision "is significantly responsible for the segregation of schools in the United States today."[209] In fact, scholars have pointed to the *Milliken I* decision more than any other decision as the ruling that allowed many American schools to return to the "separate but equal" doctrine that *Brown I* explicitly eschewed.[210] The Court in *Milliken I* did not merely allow a return to

205. PATTERSON, *supra* note 60, at 181.

206. *Milliken I*, 418 U.S. at 746.

207. *Id.* at 728 n.7.

208. *See id.*

209. Chemerinsky, *supra* note 180, at 1609. Some scholars argue that *Milliken I* did not have the devastating effect that many allege. For example, James Patterson contends that one cannot conclude that a different outcome in *Milliken I* would have significantly altered the educational experiences or relationship between the races in U.S. cities. PATTERSON, *supra* note 60, at 181. He contends that the political will in metropolitan areas was lacking for developing metropolitan-wide solutions to the economic problems that confronted cities and suburbs that compounded race and class disparities. *Id.* at 182. In addition, he argues that while metropolitan desegregation plans might have prevailed in smaller cities with low concentrations of minority students if *Milliken I* had been decided differently, metropolitan desegregation would have encountered severe opposition from Whites in large cities with majority minority populations. *Id.* at 182–83. James Ryan persuasively responds that although "it is impossible to know" if a different decision in *Milliken I* would have been resulted in greater metropolitan desegregation, evidence of successful metropolitan-wide desegregation plans in school districts such as Charlotte-Mecklenburg suggests that such plans may have proven effective. Ryan, *supra* note 20, at 83. Such examples provide evidence for rejecting arguments that the Court's decisions made little difference in school desegregation. *See id.* at 83–84. In addition, some allege that where desegregation was ordered it undermined desegregation because it caused White flight. *See, e.g.*, Orfield, *supra* note 186, at 314–15 (describing the effects of White flight). Others have argued that cities that adopted metropolitan desegregation plans experienced less White flight than those districts without such plans. *See* Pettigrew, *supra* note 189, at 526.

210. *See, e.g.*, CLOTFELTER, *supra* note 161, at 30 ("The year 1974 was surely a turning point in the federal government's stance on the policy of school desegregation, because in that year the Supreme Court issued the first of a series of decisions that would effectively put the brakes on government efforts to desegregate schools."); KLUGER, *supra* note 76,

"separate but equal" schools, it reconstitutionalized these schools by placing the Court's imprimatur on these schools.

The Court decision in *Missouri v. Jenkins*[211] further exacerbated *Milliken I*'s reconstitutionalization of segregated schools. The federal district court first entered its remedial order in 1985 to desegregate the Kansas City, Missouri, school district—more than thirty years after *Brown* declared segregation in public education unlawful.[212] The lower courts found that the State intentionally segregated students in the district and that this discrimination caused White flight and lower student achievement.[213] To remedy the constitutional violation, the lower courts concluded that the district should improve the educational opportunities provided to the minority students in the district and attract White students back to the district while redistributing some of the Whites that remained in the district.[214] The lower courts concluded that an effective remedy was impossible in the mostly minority school district without an interdistrict approach that offered magnet schools to attract the mostly White suburban students back to the district on a voluntary basis.[215] In fact, the Eighth Circuit went so far as to note that without the magnet schools the desegregation plan would be "stillborn."[216]

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at 767 ("*Milliken* had a quickly chilling effect on whatever hopes remained for a truly integrated America before the end of the twentieth century."); ORFIELD & LEE, *supra* note 1, at 8 ("The *Milliken* decision could be seen as the return of the doctrine of 'separate but equal' for urban school children in a society where four of five Americans live in metropolitan areas."); Brown, *supra* note 12, at 738 ("Chroniclers of the Supreme Court's school desegregation jurisprudence would likely point to the five-to-four decision of the Court in the 1974 case of *Milliken v. Bradley* as the opinion that effectively ended the hope of school desegregation for almost all major urban school districts."); Chemerinsky, *supra* note 181, at 1470 ("The reality is that in many areas, *Milliken* means no desegregation."); Malik Edwards, *Footnote Eleven for the New Millennium: Ecological Perspective Arguments in Support of Compelling Interest*, 31 SEATTLE U. L. REV. 891, 903 (2008) ("[*Milliken I* was] the beginning of the end to federal supervision of desegregation plans."); Michael Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 290–301 (2005) (arguing that *Milliken* effectively stopped school desegregation); James E. Ryan, Scheff, *Segregation and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 566 (1999) ("*Milliken I* made it difficult, if not impossible, to include suburban districts in desegregation decrees."); Ryan, *supra* note 60, at 140 ("*Milliken* effectively halted the progress of desegregation just a few short years after the Court became serious about it.").

211. 515 U.S. 70 (1995).

212. *Id.* at 74.

213. Jenkins v. Missouri, 11 F.3d 755, 759 (8th Cir. 1993), *rev'd*, 515 U.S. 70 (1995).

214. *Id.*

215. *Id.*

216. *Id.*

The plan the court adopted appeared to have avoided the approach that was invalidated in *Milliken I* because it did not require the interdistrict transfer of students. The Supreme Court disagreed and held that, given its prior limits on interdistrict desegregation in *Milliken I*, even attempting to attract voluntary attendance of White students to the district was an impermissible interdistrict goal in light of the absence of a proven constitutional violation that caused students to be racially segregated between neighboring districts.[217] The Court overturned the teacher salary increases and programs to improve the quality of the educational programs in the school system because they were designed to make the district more attractive to White students in the surrounding suburbs.[218] Echoing *Milliken I*, the Court's emphasis on local control in *Jenkins*[219] encouraged district courts to focus on promptly returning the governance of the school district to local school board officials rather than on adopting an effective desegregation plan.[220] Thus, the Supreme Court sanctioned a "stillborn" approach to desegregation that had the effect of reaffirming *Milliken I*'s reconstitutionalization of segregated schools.

2. The Court Reconstitutionalizes Segregated Schools by Defining the Achievement of Unitary Status on Effort Rather than Effect

The Court in the 1991 *Board of Education of Oklahoma City Public Schools v. Dowell*[221] decision shifted the inquiry of district courts from the effectiveness of a desegregation plan in dismantling segregated schools to how much effort a district exerted in implementing a plan.[222] The *Dowell* decision freed school districts from the obligation in *Green* and *Swann* to convert intentionally segregated schools to integrated schools.[223] As demonstrated below, the effect of *Dowell* was to reconstitutionalize segregated schools in districts that had been found to have engaged in intentional discrimination.

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217. *Jenkins*, 515 U.S. at 94–99.

218. *Id.* at 99–100.

219. *Id.* at 98 (quoting Milliken v. Bradley (*Milliken II*), 438 U.S. 267, 280–81 (1977)).

220. Alison Morantz, *Money and Choice in Kansas City: Major Investments with Modest Returns*, *in* DISMANTLING DESEGREGATION, *supra* note 1, at 241, 262.

221. 498 U.S. 237 (1991).

222. *See id.* at 249–50.

223. *See* Swann v. Charlotte-Mecklenburg County Sch. Bd., 402 U.S. 1, 15 (1971) (stating the goal is to remove "all vestiges of state-imposed segregation" from public schools); Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 442 (1968) (requiring the school board to develop a plan that results "promptly" in integrated schools).

The Court in *Brown II* unwittingly laid the foundation for the doctrinal shift from effectiveness to effort when determining unitary status when the Court instructed district courts to assess whether district administrators instituted the constitutional requirements of *Brown I* in good faith.[224] However, while the Court mentioned the good faith inquiry in the cases in the 1960s and early 1970s when the Court pushed districts to stop the dilatory tactics that impeded desegregation,[225] the Court measured good faith by the effectiveness of a district's actions in creating integrated schools.[226] For instance, the Court measured good faith compliance in *Green* by assessing whether the board's plan would completely dismantle segregated schools "at the earliest practicable date" and thereby provide effective relief.[227] In fact, the Court in *Green* further noted that even an effective plan alone was not enough to establish good faith because the availability of a more effective plan could demonstrate the absence of good faith and required a persuasive justification for the adoption of a less effective plan.[228] The Court in *Green* also made clear that it was focused on results rather than effort by defining the obligation of a school board in dismantling desegregation as "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[229] The Court also issued a demand for an immediate and effective desegregation plan that eliminated Black and White schools and created "just schools."[230] Thus, the Court's inquiry in *Green* was not on the subjective intent of the school board or the amount of effort that they put into desegregating. Instead, the Court measured good faith by the effectiveness of the desegregation plan and found good faith lacking if the board did not choose the most effective plan without a persuasive justification.

Similarly, in *Swann*, the Court mentioned the good faith inquiry twice but did not make it the cornerstone of the analysis of compliance.[231] By failing to focus on the good faith inquiry and how it

224. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 299 (1955).

225. *See, e.g.*, *Swann*, 402 U.S. at 13–15; *Green*, 391 U.S. at 439.

226. *See Swann*, 402 U.S. at 15 ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."); *Green*, 391 U.S. at 439.

227. *Green*, 391 U.S. at 439.

228. *Id.*

229. *Id.* at 437–38.

230. *Id.* at 442.

231. *Swann*, 402 U.S. at 12–13. The Court mentioned the good faith inquiry when it quoted *Brown II*'s instruction that district courts must assess whether the school board has

can be satisfied, *Swann* downplayed the importance of an inquiry into the good faith of school board members. Rather than focus on good faith, the Court in *Swann* again emphasized the effectiveness of a desegregation plan as the measure of compliance. The Court focused on effectiveness by defining the objective of school desegregation as "eliminat[ing] from the public schools all vestiges of state-imposed segregation."[232] Similarly, in addressing the legality of one-race schools, school districts and district courts were instructed to maximize desegregation and thus seek to eliminate such schools.[233] The Court also placed a heavy burden on the school district to show that student assignments to a one-race school did not reflect discrimination.[234]

In contrast, the Court in *Dowell* elevated an analysis of good faith compliance with desegregation decrees to one of the central inquiries for district courts to consider when they were determining unitary status.[235] The Court also instructed the district court to assess "whether the vestiges of past discrimination had been eliminated to the extent practicable."[236] The Court adopted this standard in a case in which a federal court had found that Oklahoma City had engaged in intentional segregation of the housing and schools in the city and that a neighborhood assignment plan was ineffective in desegregating the district.[237] To desegregate the district, the district court had ordered the implementation of a desegregation decree that created integrated schools by busing Black and White students.[238] After operating under the plan from 1972 to 1984, the school district sought to implement a neighborhood assignment plan under which many schools would primarily educate students of one race.[239] Under the school district's proposed plan, of the sixty-four elementary schools within Oklahoma City, twenty-two would enroll student bodies that were more than 90% White and other minorities, eleven of the schools would enroll more than 90% Black students, and thirty-one of

implemented the desegregation decree in good faith. *Id.* In addition, it noted that some "dilatory" actions were impeding the actions of those acting in good faith. *See id.*

232. *Id.* at 15.

233. *Id.* at 26.

234. *Id.*

235. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 249–50 (1991). The additional inquiry is "whether the vestiges of past discrimination had been eliminated to the extent practicable." *Id.* at 250.

236. *Id.* at 250.

237. *Id.* at 240.

238. *Id.* at 241.

239. *Id.* at 242–43.

the schools would be racially mixed.[240] Under this plan, over half of the Black students in the district would attend schools that were more than 90% Black.[241] The Tenth Circuit reversed the district court's approval of this plan because of the large number of schools that would return to being one-race schools.[242]

In response, the Supreme Court sent the case back to the district court to determine if the school district had implemented the desegregation decree in good faith and eliminated the vestiges of its intentional discrimination "to the extent practicable."[243] Although the Court failed to define when a school district had been made "unitary," the Court made clear that if the lower court found that the school district had met this standard, the court should terminate the desegregation decree and determine the challenge to the new neighborhood assignment plan by assessing whether the plaintiffs could show new allegations of intentional discrimination when they adopted the plan.[244] Once the school district's plan was upheld and implemented, the schools resegregated as had been anticipated.[245]

By focusing on the good faith efforts of the school board and the practicability of eliminating segregation, and by remaining silent on the return to a substantial number of schools that overwhelmingly educated either Black or White students, the Court freed school districts from the requirement in *Green* that districts must implement an effective desegregation plan that eliminates discrimination "root and branch,"[246] and from the *Swann* requirements that districts must "eliminate . . . all vestiges of state-imposed segregation" and achieve the "greatest possible degree of actual desegregation . . . ."[247] In place

240. *Id.* at 242; Dowell v. Bd. of Educ. of Okla. City Pub. Sch., 890 F.2d 1483, 1487 (10th Cir. 1989).

241. *Dowell*, 890 F.2d at 1510.

242. *Dowell*, 498 U.S. at 243–44.

243. *Id.* at 249–50.

244. *Id.* at 250–51.

245. Joondeph, *supra* note 18, at 655.

246. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 438 (1968).

247. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 26 (1971); *see* Philip T.K. Daniel & Patrick D. Pauken, *The* PICS *Decision—Academic Freedom v. Federalism: Consider the Constitutional Implications*, 18 TEMP. POL. & CIV. RTS. L. REV. 111, 123 (2008) ("The mandate of Supreme Court precedent before *Dowell* requiring school districts to remove all vestiges of past discriminatory practices was overruled. Subsequently, the Court only required the elimination of discriminatory vestiges to the extent 'practicable.' " (citing Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 246–47, 249–50 (1991) (internal citations omitted))); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1164–65 (2000) (noting that, despite the ways that the standard in *Dowell* is still "an exacting standard," *Dowell*'s emphasis on local control is remarkably different from prior Supreme Court decisions); Hon. David S. Tatel, *Judicial*

of these requirements, the effect of the Court's decision was to reconstitutionalize segregation by allowing school districts to be found in compliance with the Constitution if they tried, but ultimately failed, to create and maintain integrated schools.[248] Although this standard could have been interpreted as a rigorous one because it still required school districts to eliminate all vestiges of intentional segregation and districts could not be required to do the impractical,[249] the Court's emphasis on subjective intent coupled with a requirement that a district was only required to desegregate to the extent practicable viewed desegregation as something that must be attempted but that could be abandoned if the passage of time revealed that the plan had proven ineffective.[250]

Once the Court adopted the standard in *Dowell* and reconstitutionalized segregation, school districts could be released from court supervision if they could point to impediments that prevented their past good faith efforts from achieving their goal. One study of district court desegregation decisions from 1992 to 2002 found that, in applying the Court's desegregation standards, "district court judges seem very willing to accept inadequacies in result, even after decades have passed during the attempt."[251] In addition, the study found that despite their control over faculty and staff assignments, district courts in the study oftentimes did not require school districts to address persistent segregation of faculty and staff that mirrored the overrepresentation of students within the schools and that the courts did not assess whether this segregation could be eliminated.[252] Thus, the Supreme Court's focus on what could practicably be addressed was used by lower courts as a means to tolerate even those disparities that could readily be addressed.[253]

The Court adopted the *Dowell* standard while emphasizing the importance of local control.[254] The emphasis on local control exempted defendants from having to address persistent racial

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Methodology, Southern School Desegregation, and the Rule of Law, 79 N.Y.U. L. REV. 1071, 1109–10 (2004) (arguing that *Dowell* "eviscerate[d] several of *Green*'s and *Swann*'s key principles").

248. *See* Parker, *supra* note 247, at 1166–67; Ryan, *supra* note 163, at 1673–74.

249. *See* Parker, *supra* note 247, at 1164–65.

250. *See id.* at 1166; Ryan, *supra* note 163, at 1673–74 (noting that the intent of the Court's instruction in *Dowell* to eliminate the vestiges of discrimination "to the extent practicable" is to convey the longevity of the struggles with school desegregation and to restore local control without regard to the effect of segregation on current conditions).

251. Parker, *supra* note 118, at 1647.

252. *Id.* at 1649–50.

253. *Id.*

254. *See* Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 248 (1991).

segregation and expressed a "value choice"[255] by the Court that the need to end court-supervised desegregation was paramount[256] and that efforts to desegregate could be abandoned. Lower courts' acceptance of ineffective results is consistent with lower courts embracing local control as a paramount goal, and achieving this goal may have justified their acceptance of persistent educational disparities.[257]

Therefore, *Dowell*'s emphasis on effort and practicability sanctioned desegregation plans that never fulfilled the requirement to convert to "just schools."[258] The very schools that had been forbidden were now constitutionally acceptable. The next sub-Part explains how the Court effectively reconstitutionalized segregation when it did not require school districts to fully desegregate at one time.

3. The Court Reconstitutionalizes Segregation by Allowing Desegregation in a Piecemeal Fashion

The Court effectively reconstitutionalized segregation when it placed its imprimatur on district courts releasing school districts from court supervision in a piecemeal fashion. In *Freeman v. Pitts*,[259] the Supreme Court reviewed a decision in which the Eleventh Circuit held that a district court should retain jurisdiction over the DeKalb County, Georgia, school district until it simultaneously obtained unitary status in the six areas of school operations identified in *Green*[260] for several years.[261] The Supreme Court disagreed and held

255. Parker, *supra* note 247, at 1166 (quoting Erwin Chemerinsky, *The Supreme Court, 1988 Term Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 57, 73, 100 (1989)).

256. *Id.* at 1166, 1178 ("The value of local control further validates excusing a defendant's responsibility. In other words, the need to end oversight over school districts is a reason to pardon or disregard remaining segregation.").

257. Minow, *supra* note 86, at 620 (noting that, since the 1991 decision in *Dowell*, school boards subject to court-ordered desegregation plans have successfully sought and obtained an end to judicial oversight); Parker, *supra* note 118, at 1647. *But see* Parker, *supra* note 247, at 1189–93 (finding in a study of school districts from Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas that *Dowell* did not influence the number of school districts that requested or acquired unitary status). The effect of *Dowell* is typically viewed in conjunction with the effect of *Jenkins* and *Freeman v. Pitts*, 503 U.S. 467 (1991), and thus is discussed at the end of the next sub-Part. *See infra* Part II.C.

258. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 442 (1968); *see* Tatel, *supra* note 247, at 1115 ("Taken as a whole, *Dowell* strongly suggested that regardless of the resurrection of one-race schools, a finding of unitariness would be justified because the school system had complied with the desegregation order in good faith and because black students had been exposed to the court-ordered plan for some period of time.").

259. 503 U.S. 467 (1992).

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

that a district court may release a school district from court oversight in incremental stages before the school district achieves full compliance with its constitutional obligation to desegregate.[262] In allowing the district to be released from court supervision incrementally, the Court reinstated the district court's determination that it was appropriate to release the school district from court supervision over facilities, student assignment, extracurricular activities, and transportation while it retained authority over the quality of the education and faculty and staff assignments.[263] The Court in *Freeman* echoed the *Dowell* Court's focus on practicability by noting approvingly that the lower court found that the desegregation order "was designed to achieve maximum practicable desegregation."[264] Further echoing *Dowell*, the Court in *Freeman* emphasized that the lower courts should analyze compliance with past court orders and the need for court supervision in the future rather than the effectiveness of the school district's efforts to desegregate the schools.[265] In addition, the Court again heralded the importance of local control as "the ultimate objective" of courts as they assessed whether school districts had fulfilled their constitutional obligations.[266]

The effect of *Freeman* was to reconstitutionalize segregation because the decision exempted school districts from ever instituting a complete remedy of the constitutional violation.[267] Justice Blackmun captures this concern well in opening his concurring opinion by stating that "[i]t is almost 38 years since the Court decided *Brown* .... In those 38 years the students in DeKalb County, Ga., never

261. *Freeman*, 503 U.S. at 471. The Court identified the six areas of school operations that must achieve unitary status in *Green* as student assignment, "faculty, staff, transportation, extracurricular activities and facilities." *Green*, 391 U.S. at 435. The Court in *Freeman* also upheld the consideration of the quality of the educational programs as an appropriate consideration for determining unitary status even though this factor was not included as one of the *Green* factors. *Freeman*, 503 U.S. at 492; *see* Parker, *supra* note 247, at 1171. While this decision enabled district courts to assess whether vestiges of discrimination remained in the quality of the educational programs, just three years later in *Jenkins* the Court quickly eviscerated this requirement when it removed from consideration the effect of the quality of the educational programs on student achievement. *See infra* text accompanying notes 297–306.

262. *Freeman*, 503 U.S. at 471.

263. *Id.* at 492.

264. *Id.* at 493.

265. *Id.* at 491–92.

266. *Id.* at 489.

267. Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 765 (1993); Parker, *supra* note 247, at 1169.

have attended a desegregated school system even for one day."[268] In the case of the DeKalb County School System, the district court declared student assignment unitary despite the fact that thirty-eight of the ninety-six schools in the district enrolled student bodies that were eighty percent or more of one race.[269] The persistent segregation in the district meant that the majority of African American students always attended disproportionately African American schools.[270] The Court permitted this outcome by weakening the presumption that once unlawful segregation had been established the racial segregation in the district was attributable to the defendants.[271] In its place, the Court determined that current segregation could not be attributed to the defendants if the defendants had instituted desegregation for a short time or if the defendants could show good faith compliance with prior court orders.[272] This enabled demographic factors to rebut the presumption that school districts that had violated the Constitution caused any continuing segregation.[273]

As a result of *Freeman*, lower courts were empowered to approve of schools that overwhelmingly educated students of one race, and lower courts relied on the holdings in decisions such as *Freeman* as support for ending court-ordered desegregation.[274] Furthermore, after student assignment was declared unitary, even with substantial racial isolation in the schools that had never been integrated, any efforts to dismantle the other elements of the de jure system would be implemented within a district in which many schools were racially identifiable.[275] Therefore, the effect of the Court's decision in *Freeman* was to reconstitutionalize segregation because the decision sanctioned awarding unitary status incrementally despite

268. *Freeman*, 503 U.S. at 509 (Blackmun, J., concurring in the judgment).

269. *Id.* at 476–77 (majority opinion).

270. *Id.* at 509 (Blackmun, J., concurring in the judgment).

271. Parker, *supra* note 247, at 1170–71.

272. *Freeman*, 503 U.S. at 477, 491–92, 496; Parker, *supra* note 247, at 1170–71.

273. Parker, *supra* note 247, at 1170–71; Ryan, *supra* note 163, at 1671.

274. Black, *supra* note 194, at 952; Parker, *supra* note 247, at 1171. *But see* Parker, *supra* note 247, at 1187, 1193 (alleging that *Freeman* had little effect in her study of 192 school districts in six southern states in 2000).

275. *See* Lia B. Epperson, *True Integration: Advancing* Brown's *Goal of Education Equity in the Wake of* Grutter, 67 U. PITT. L. REV. 175, 186 (2005) ("Much as *Brown*'s message that 'separate but unequal has no place' has been undermined by present-day rhetoric that the ruling intended all programs to be color-blind, *Green*'s message to desegregate in several key areas has been subverted by the Court's incremental 'unitary' status determinations that *Pitts* permits." (first quoting Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954), then *Freeman*, 503 U.S. at 471)).

the school district's failure to eliminate Black and White schools and create "just schools."[276]

The contribution of *Freeman* to the reconstitutionalization of segregation is further evident in the failure of courts to require the elimination of segregation in faculty and staff assignments that was fully within the purview of school districts. In contrast to the difficulties in maintaining a stable student population, including managing demographic change and establishing workable bus routes, a school district does not face such obstacles when desegregating faculty.[277] Nevertheless, one study documented how, when reviewing whether a school district has desegregated, lower courts have acknowledged that faculty and staff remained concentrated in schools in ways that made them racially identifiable, and then the courts simply excused this remaining vestige of segregation.[278] This trend transformed the Court's ruling in *Freeman* that lower courts could release districts in a piecemeal fashion to an avenue that lower courts used to label a district constitutional despite the district's failure to remedy vestiges of discrimination that were undeniably within the school district's control. The Court's failure to require school districts to create "just schools" when determining the assignment of faculty and staff further reveals that the effect of *Freeman* was to reconstitutionalize segregation.

Other scholars have frequently noted the combined detrimental impact of several of the Court's desegregation decisions, particularly *Dowell*, *Freeman*, and *Jenkins*, and contend that together the three decisions signal that the Supreme Court has abandoned court-ordered school desegregation and that lower courts should end desegregation decrees.[279] Scholars have further noted that many lower courts read

276. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 442 (1968).

277. *See* Parker, *supra* note 118, at 1648 ("Difficulties and complications inherently present in the student assignment area—developing manageable busing routes, determining tipping points, managing demographic change—are entirely absent." (internal citations omitted)).

278. *Id.* at 1649 ("[D]istrict courts have continually recognized the continuing identifiability of faculty and staff and then excused that continuing vestige of discrimination.").

279. *See, e.g.*, Chemerinsky, *supra* note 180, at 1618 ("The three cases—*Dowell*, *Freeman*, and *Jenkins*—together have given a clear signal to lower courts: the time has come to end desegregation orders, even when the effect could be resegregation."); Joondeph, *supra* note 18, at 660–61 ("*Jenkins*, coming after *Dowell* and *Freeman*, cements this shift in the Court's approach; it fully reveals the Court's de facto abandonment of court-enforced desegregation."); Ryan, *supra* note 163, at 1669 ("All three decisions send unmistakable signals that district courts should begin winding up the process of desegregation.").

these decisions broadly and began ending court supervision of desegregation, sometimes prompted by a motion from the court itself, and many, if not most, of these school districts quickly abandoned the tools that they had adopted to integrate the schools.[280] The Court's emphasis on a return to local control also encouraged courts to end court supervision of school desegregation.[281]

However, the Court's decisions did not merely abandon school desegregation. They had the effect of reconstitutionalizing the segregation that it had previously condemned. The Court accomplished this by declaring constitutional those school districts that failed to implement an effective desegregation plan that created integrated schools. The Court approved of ineffective desegregation plans by severely limiting the ability to employ an interdistrict remedy that provided the only form of effective relief for some districts, focusing on effort and practicability rather than effectiveness in implementing a desegregation plan, and approving partial declarations of unitary status. The next sub-Part explains how the effect of the Court's decisions was to reconstitutionalize segregation by sanctioning a return to schools that predominantly educate students of one race.

B. The Court Validates a Return to Segregated Schools

Some of the Court's leading desegregation decisions also had the effect of reconstitutionalizing segregation when the Court sanctioned the implementation of student assignment plans that allowed many schools to quickly return to primarily educating students of one race after implementation of a desegregation plan.[282] For example, the

280. KLUGER, *supra* note 76, at 772; Danielle R. Holley, *Is* Brown *Dying? Exploring the Resegregation Trend in Our Public Schools*, 49 N.Y.L. SCH. L. REV. 1085, 1104 (2005) ("The district courts' emphasis on local control and minimizing the other interests in these cases is a clear consequence of the Supreme Court's decisions in *Dowell*, *Freeman*, and *Jenkins* where the Court prioritized returning school districts to local control."); Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1341–42 (2004); Parker, *supra* note 118, at 1628, 1633–34 (finding in a study of written desegregation decisions from 1992 to 2002 that lower courts granted all requests for unitary status from local school boards, with the exception of one decision that granted partial unitary status, consistent with the Court's emphasis on local control).

281. Joondeph, *supra* note 18, at 660–61; Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251, 295–96 (2008).

282. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434–35 (1976) (holding that a district court could not require a school district to maintain integrated schools four or five years after the school district implemented a desegregation decree

effect of the Court's decision in *Dowell* was to reconstitutionalize segregation when it chose not to hold the defendants responsible for the resegregation of more than half of the district's elementary schools.[283] By refusing to label resegregation a vestige of intentional segregation, the *Dowell* decision enabled other districts that had engaged in intentional discrimination to be declared unitary even when the school district sought to implement a plan that would restore much of the prior segregation.[284] Given the great difficulties in proving a vestige of discrimination, e.g., what portion of segregation could be attributed to the defendants, the Court's decision validated a return to segregated schools by refusing to attribute lingering disparities to the illegal conduct of the school board.[285]

The Court's failure to condemn a school district student assignment plan that returned over half of the elementary schools in the district to schools that predominantly educated students of one race must be understood in light of the fact that at the same time the Court also appeared to accept the contention that the school board did not plan to return to its former unconstitutional ways that had intentionally segregated the schools.[286] The combined effect of these actions signaled to lower courts that allowing the schools to resegregate could not be used as evidence that the school district was not planning to continue to fulfill its constitutional obligations.[287] In addition, the Court did not suggest an alternative measure for assessing whether the school district would return to unlawful practices.[288] This approach also had the effect of further validating a return to segregated schools.

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without a showing that the school district violated the court's original decree or that the school district took further segregative action).

283. *See* Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 242, 249–50 (1991); *see also* Chemerinsky, *supra* note 16, at 116 (stating that *Dowell* approved ending a desegregation order even though doing so would lead to "dramatic resegregation"); Holley, *supra* note 280, at 1092 (arguing that *Dowell* played a crucial role in sanctioning the resegregation of schools).

284. *See* ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, THE CIVIL RIGHTS PROJECT (HARVARD), A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 18–19 (2003), *available at* http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf (arguing that *Dowell* offered an interpretation of unitary status that permitted schools to resegregate and that after the decision many school districts asked courts to end their desegregation orders).

285. Parker, *supra* note 118, at 1646–47.

286. *Dowell*, 498 U.S. at 249.

287. *See id.* at 249–50.

288. *Id.* at 249.

The Court's decision in *Freeman* similarly had the effect of reconstitutionalizing segregation because it rejected the existence of any link between the intentional discrimination of the school board in DeKalb County, Georgia, and the existence of schools that primarily educated students of one race even though many of the schools within the district were never integrated.[289] Although the school district was found to still be violating its constitutional obligations, the Supreme Court enabled the district to implement policies that worsened existing racial disparities and isolation within the schools as long as the district did not exhibit new instances of intentional race discrimination.[290] As a result, the school district was allowed to build a new school that disproportionately benefited Whites without the Court being able to review this decision because the school district had been found unitary in the area of facilities.[291] After *Freeman*, school districts that had been found to violate the constitutional rights of minority schoolchildren could take steps that reestablished schools which overwhelmingly educated students of one race. As long as the district had been declared unitary based upon student assignment and the plaintiffs could not prove new allegations of intentional discrimination, school boards were free to ignore the placement of minority students thereafter.[292] Therefore, the effect of the *Freeman* decision was to reconstitutionalize segregation because the Court's decision refused to consider a return to segregated schools a vestige of discrimination.

The Court laid the foundation for these decisions in *Swann* when it stated that federal courts did not have to annually adjust the racial composition of schools once desegregation was accomplished.[293] Undoubtedly, court supervision of school decisions must come to an end at some point; however, the Court had declared that that point was when the school district had eliminated all vestiges of its prior

289. Freeman v. Pitts, 503 U.S. 467, 476–77, 493–94 (1992); *see also id.* at 509 (Blackmun, J., concurring in the judgment) ("[T]he students in DeKalb County, Ga., never have attended a desegregated school system even for one day.").

290. Joondeph, *supra* note 18, at 657–58.

291. *See Freeman*, 503 U.S. at 491–92; Chemerinsky, *supra* note 181, at 1465–66.

292. ORFIELD & LEE, *supra* note 1, at 7 ("A court can end a portion of a desegregation plan even if the rest of the plan was never implemented. As soon as the court makes that determination, actions that would have been illegal under the court order, such as creating a highly segregated neighborhood school system that leaves most whiles [sic] in good middle class schools and most nonwhites in segregated high poverty schools failing to meet federal standards, become legal.").

293. Swann v. Charlotte-Mecklenburg Sch. Dist., 402 U.S. 1, 31–32 (1971).

intentional segregation of the schools.[294] Rather than enforce the requirements from *Green* and *Swann* that all vestiges of intentional discrimination be eliminated and that formerly segregated schools must be integrated,[295] the Court's approach in such cases as *Dowell* and *Freeman* allows a school district that has been declared unitary to allow schools to resegregate upon termination of court supervision. Instead of embracing the need to remedy the deeply entrenched school segregation that had denied minority schoolchildren a high-quality education for generations, the Court's decisions treated court-supervised school desegregation as "a form of temporary penance . . . that, once it had been paid, reversion to racially separate schools was perfectly acceptable as long as it had not been the explicitly discriminatory intention of local policy-makers."[296] Therefore, the effect of some of the Court's leading desegregation decisions was to reconstitutionalize segregation because the segregation that school districts were required to remedy before they were declared unitary by judicial fiat was permissible after a declaration of unitary status.

C. *The Court's Effective Reconstitutionalization of Segregation's Adverse Impact on Student Achievement*

Although the Court in *Swann* required all vestiges of segregation to be eliminated,[297] the Court's decision in *Missouri v. Jenkins*[298] had the effect of reconstitutionalizing segregation's adverse impact on student achievement. In *Jenkins*, the lower courts found that the State's intentional discrimination caused a reduction in student achievement.[299] However, when the case reached the Supreme Court, it instructed the district court, and thus similarly situated lower courts, to "sharply limit, if not dispense with, its reliance" on an examination of the achievement of students within the district as a measure of the quality of the education programs provided by the district.[300] The Court noted that the district court failed to identify the extent of the

294. *Id.* at 15, 26; Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 442 (1968); Black, *supra* note 194, at 953 ("Court-ordered desegregation cannot operate in perpetuity. At some point, courts must return autonomy to local authorities. This return, however, is predicated on the elimination of racialized and unequal schools. Unfortunately, many districts have never fully accomplished this task."); *see also supra* notes 145–47 and accompanying text (explaining the holding in *Swann*).

295. *Swann*, 402 U.S. at 15, 26; *Green*, 391 U.S. at 442; *see also supra* notes 110–14, 145–47 and accompanying text (explaining the holdings of *Green* and *Swann*).

296. KLUGER, *supra* note 76, at 772.

297. *Swann*, 402 U.S. at 15.

298. 515 U.S. 70 (1995).

299. Jenkins v. Missouri, 11 F.3d 755, 759 (8th Cir. 1993), *rev'd*, 515 U.S. 70 (1995).

300. *Jenkins*, 515 U.S. at 101.

effect that segregation had inflicted upon minority student outcomes and thus could not quantify how much student achievement was reduced by segregation.[301] Given the myriad factors that influence student achievement, the Court concluded that the district court's attempt to improve the educational opportunities within Kansas City until the students reached national achievement norms must be abandoned to prevent the district court from inappropriately delaying the return of the school district to local control.[302]

In *Jenkins*, the Court shifted from applying a prior presumption that segregation caused any existing disparity absent contrary proof to an approach that declared a defendant in compliance with the Constitution unless the plaintiff could isolate what part of the disparity the defendant caused.[303] In light of the great difficulty, if not impossibility, in proving segregation's incremental effect on student achievement given the myriad factors that influence student achievement, the Court made segregation's impact on student achievement constitutionally permissible.[304] By failing to remand the case for the lower courts to at least attempt to gather the appropriate evidence, the Court signaled to lower courts that they should end any analysis of how segregation adversely affected student achievement rather than attempt to gather the proper factual record on this issue. By essentially instructing lower courts to ignore segregation's effects on student achievement, the *Jenkins* decision instructed districts to abandon its past requirement to eliminate the vestiges of discrimination "root and branch"[305] and allowed control to be returned to the school board even if vestiges of segregation still exist within the district.[306] Therefore, the effect of the *Jenkins* decision was to reconstitutionalize segregation's adverse effect on student achievement.

D. The Convergence of the Effective Reconstitutionalization of Segregated Schools and the Failure to Remedy Inferior Schools

Before turning to how acknowledging that the effect of several of the Court's key desegregation decisions was to reconstitutionalize

301. *Id.*

302. *Id.* at 102.

303. Parker, *supra* note 247, at 1172–73; *see* Ryan, *supra* note 163, at 1672–73 (discussing Wendy Parker's analysis of how *Jenkins* required courts to quantify how much segregation adversely affected the student achievement of minority schoolchildren).

304. Ryan, *supra* note 163, at 1673.

305. *Jenkins*, 515 U.S. at 100–01; Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 437–38 (1968) (ordering districts to eliminate segregation "root and branch").

306. Joondeph, *supra* note 18, at 653–54.

segregated schools enhances our understanding of *Parents Involved*, it is important to recognize that the Court's decisions in this area converged with the Court's failure to effectively address the inferior quality of segregated schools. The remedial educational programs that the Court approved in *Milliken II*[307] did not equalize the segregated schools that the Court's decisions in *Milliken I*, *Dowell*, *Freeman*, and *Jenkins* sanctioned.[308] In *Milliken II*, the Court upheld a desegregation plan for Detroit that included such compensatory elements as revising the testing procedures, providing additional professional development for administrators and teachers, implementing a remedial reading program, and creating counseling and guidance programs.[309] When faced with an inability to create integrated schools because of the obstacles that *Milliken I* erected to interdistrict remedies, *Milliken II* encouraged many plaintiffs' lawyers to seek *Milliken II* remedies rather than busing within a heavily minority district.[310]

However, the Court limited the ability to enact *Milliken II* remedies in *Jenkins* when it limited the availability of remedial programs to remedy segregation's impact on student achievement and when it held that such programs could not be used to attract White students to the district, even on a voluntary basis.[311] The *Jenkins* decision made clear that the Supreme Court would not uphold efforts to make racially isolated schools equal by improving the educational programming in segregated schools and thus effectively abandoned even a return to *Plessy*'s "separate but equal" doctrine.[312] This discouraged lower courts from continuing special programming to address the lingering effects of segregation.[313]

Furthermore, research on the implementation of these remedies found that they "have not evolved as systemic changes to the unequal opportunity structure *Brown* sought to eradicate" and instead they have served as a way for districts to enjoy a meaningless and short-lived punishment for intentional discrimination.[314] For example, in

307. 433 U.S. 267 (1977).

308. *See supra* notes 180–220, 235–50, 259–78 and accompanying text.

309. *Milliken II*, 433 U.S. at 272, 287–88.

310. Ryan, *supra* note 20, at 84.

311. *See supra* notes 211–20, 297–306 and accompanying text.

312. *See* Eaton & Orfield, *supra* note 1, at xv.

313. *See* Susan E. Eaton et al., *Still Separate, Still Unequal*, *in* DISMANTLING DESEGREGATION, *supra* note 1, at 143, 147 (noting how *Jenkins* made it more difficult for school districts to adopt desegregation measures to improve urban schools in order to attract suburban students).

314. *Id.* at 145–46.

Detroit, approximately $238 million was spent on *Milliken II* remedies over twelve years.[315] However, school officials acknowledged that, while the *Milliken II* remedies did result in some improvement of the educational opportunities within the Detroit schools, they did not effectively remedy the poor conditions within the school district.[316] Similarly, although in Kansas City during the *Missouri v. Jenkins* litigation over $2 billion was spent over twenty-three years on the district's remedial plan, the district remains racially isolated, and student achievement in the school district has remained stagnant or fallen further.[317]

The results in these cities do not prove that money does not matter because substantial research demonstrates that money wisely spent can positively influence student outcomes.[318] Instead, these results are unsurprising, as education law scholar Goodwin Liu has acknowledged in stating that "[i]t would be remarkable—and inconsistent with a large body of research—if tangible resources alone could entirely offset the complex and ineffable consequences of racial and socioeconomic isolation."[319] Given the inherent limitations of *Milliken II* remedies, they were unable to restore those who had been subject to discrimination to the situation that they would have enjoyed if they had not experienced intentional discrimination.[320]

Finally, the limited effectiveness of *Milliken II* remedies to improve the quality of racially isolated schools could have been mitigated if the Supreme Court had concluded that the Constitution

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315. *Id.* at 155.

316. *Id.*

317. JOSHUA M. DUNN, COMPLEX JUSTICE: THE CASE OF *MISSOURI V. JENKINS* 173–74, 182 (2008) (citing Jenkins v. Missouri, 216 F.3d 720, 733 (8th Cir. 2000) (Beam, J., dissenting)).

318. *See* JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 55–57 (2003) (identifying several studies that demonstrate increased funding can lead to a marked improvement in student performance). While critics point to Kansas City "as proof that there is no correlation between funding and educational outcome," two scholars have noted that "the primary focus of KCMSD [Kansas City, Missouri School District] desegregation plan was to increase desegregation. Therefore, in *Jenkins*, the court did not target funding on strategies which may have had a better chance of improving minority outcomes." Preston C. Green III & Bruce D. Baker, *Urban Legends, Desegregation and School Finance: Did Kansas City Really Prove that Money Doesn't Matter?*, 12 MICH. J. RACE & L. 57, 80, 100 (2006).

319. Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81, 103 (2006); *see also* Eaton et al., *supra* note 313, at 178 (concluding that properly designed and effective remedial programs combined with integration efforts can have a positive effect on educational outcomes).

320. *See* Eaton et al., *supra* note 313, at 173.

forbids disparities in school finance systems that resulted in some children receiving an inferior education. However, the Court rejected such arguments in *San Antonio Independent School District v. Rodriguez*.[321] In that case, the Court considered a challenge to the Texas school finance system that enabled wealthier school districts to spend significantly more on education than poorer districts.[322] The plaintiffs argued that the school finance system violated their rights under the Equal Protection Clause because the system discriminated against them on the basis of wealth, and it denied schoolchildren from the poor districts their fundamental right to an education.[323] The Court rejected the wealth discrimination challenge because it rejected poverty as a suspect classification,[324] and held that education was not a fundamental right because education did not find explicit or implicit protection in the Constitution.[325] As Texas was not denying the plaintiffs an education but instead was employing a funding system that resulted in school finance disparities, the school finance system would be reviewed under rational basis review, which it easily satisfied.[326] In addition, among other reasons, federalism cautioned against the Court recognizing a right that would immediately render each of the state's school finance systems constitutionally suspect.[327]

Erwin Chemerinsky has argued that *Rodriguez* and one other decision that rejected a challenge to school bus fees[328] were critical decisions that deconstitutionalized school finance disparities because the decisions failed to apply the Constitution to address "poor, African American city schools surrounded by wealthy, white suburban schools spending a great deal more on education."[329] This Article agrees that such decisions deconstitutionalized one aspect of education because the Court refused to apply the Constitution to remedy these disparities in educational opportunity. The Court's refusal to apply the Constitution to school finance disparities stands in contrast to the Court's clarion call in *Brown* and subsequent decisions that segregated schools are unconstitutional and that

321. 411 U.S. 1 (1973).

322. *Id.* at 12–13 (noting that the Edgewood Independent School District with 96% minority students spent $356 per pupil while the predominantly White Alamo Heights district spent $594 per pupil).

323. *See id.* at 19, 29.

324. *See id.* at 28.

325. *See id.* at 35–36.

326. *See id.* at 55.

327. *See id.* at 55–58.

328. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 461–63 (1988).

329. Chemerinsky, *supra* note 16, at 123.

integrated schools must be created, and in contrast to subsequent decisions that validated a failure to dismantle segregated schools or that sanctioned a swift return to such schools. The Court's effective reconstitutionalization of segregated schools exacerbated the Court's deconstitutionalization of school finance disparities[330] because the combined effect of these decisions sanctioned the operation of separate schools and failed to provide a remedy when a state provided poor or minority schoolchildren inferior educational opportunities. While the Court alone does not bear responsibility for the current pervasive presence of separate and unequal schools, the convergence of the Court's actions in these cases has substantially contributed to the deeply entrenched nature of segregation and inequality in these schools.

E. How Parents Involved *Exacerbates the Court's Effective Reconstitutionalization of Segregated Schools*

As noted in the introduction, the Supreme Court's recent 5–4 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* found that the use of race in deciding student assignments in Seattle and Louisville was unconstitutional.[331] Some, including the dissenting justices in *Parents Involved*, contend that the majority decision in *Parents Involved* should be viewed as a departure from the Court's prior decisions.[332] For instance, although courts had been ordering school districts that were desegregating to consider race to achieve integration in light of the Court's decisions in *Green* and *Swann*, the Court's decision in *Parents Involved* prohibits districts from using these same techniques the instant that the district is declared unitary.[333] In addition, the Court in *Swann* had sanctioned the voluntary use of race to achieve integration even if a district had not been segregated by stating that to do so "as an educational policy

330. *See id.* at 119–24.

331. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732–35 (2007).

332. *See, e.g.*, *id.* at 823–24 (Breyer, J., dissenting); Ryan, *supra* note 20, at 88 ("In some ways, the [*Parents Involved*] decision is a fairly radical departure from prior cases."); Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. MIAMI L. REV. 507, 534–35 (2009) ("This Essay argues that the Roberts' Court is signaling [in *Parents Involved*] a very different approach to both *Brown* and the Equal Protection Clause than the Rehnquist Court."); Cedric Merlin Powell, *The Future of School Integration in America: A Symposium Summary*, 46 U. LOUISVILLE L. REV. 559, 560 (2008) ("The decision in *Parents Involved-Meredith* represents a seminal doctrinal shift—the Court rejected the collective decisions of the political communities of Louisville and Seattle and concluded that race was employed unconstitutionally in both desegregation plans.").

333. Ryan, *supra* note 20, at 88.

is within the broad discretionary powers of school authorities."[334] Although this statement was certainly dicta because the Court in *Swann* was addressing the power of federal courts to order desegregation remedies, it cannot be gainsaid that the Court in *Swann* had unequivocally supported the very technique that it found unconstitutional in *Parents Involved*.[335]

Parent's Involved will make it very difficult for districts to employ the most effective and direct method of creating diverse schools.[336] When many of the Court's prior key decisions are viewed as decisions that had the effect of reconstitutionalizing segregated schools, the Court's decision in *Parents Involved* is consistent with these past decisions. The Court's past decisions on school desegregation had placed its imprimatur on a return to separate schools in districts like Louisville that previously had experienced de jure segregation. By using race in student assignments to change the composition of these schools, Louisville was indicating that these schools still needed to be changed in some way in spite of the Court's approval. In response, the Court's majority opinion essentially tells districts to stop changing that which it had previously sanctioned.[337] In this way, *Parents Involved* exacerbates the Court's past effective reconstitutionalization of segregated schools by sending a message that these schools should be left just as they are.

The *Parents Involved* decision also has been viewed as a departure from the Court's past decisions because the Court's prior decisions repeatedly noted the importance of local control in these matters, while the Court in *Parents Involved* appears to abandon its focus on local control by overturning a local democratic decision to create integrated schools.[338] Here, again, understanding the Court's effective reconstitutionalization of segregated schools sheds light on how the Court's decision in *Parents Involved* is consistent with past decisions. Given the Court's prior affirmation of a return to separate schools, *Parents Involved* uncovers how deep the Court's affirmation of such schools runs. *Parents Involved* reveals that this affirmation is sufficiently entrenched that the Court is willing to strike down the actions of school districts that seek to alter what the Court has

334. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

335. Ryan, *supra* note 20, at 88.

336. *See* Robinson, *supra* note 6, at 285–94.

337. *Cf.* Ryan, *supra* note 60, at 154 (noting that *Parents Involved* tells districts and communities seeking to integrate their schools that creating integrated schools "is wrong, or at best, distasteful").

338. Ryan, *supra* note 20, at 89.

approved even when the school districts are seeking to exercise the very autonomy that the Court had ostensibly guarded so zealously in past opinions.[339] Therefore, the *Parents Involved* majority decision builds upon and worsens, rather than contradicts, the Court's prior decisions that had the effect of reconstitutionalizing segregated schools.

III. A PROPOSAL FOR A RENEWED FEDERAL EFFORT TO PROMOTE DIVERSE SCHOOLS

Understanding the effect of some of the Court's desegregation decisions reaffirms two important issues that must be addressed when considering any effort to address the separate and unequal schools that exist today. First, those who seek to end such schools must consider how the courts, particularly the Supreme Court, will either impede or support such efforts. Second, the courts are extremely unlikely to be the branch that champions a new effort to end separate schools, and thus a new plan must be developed to achieve this goal. Because effective reform will not occur if the Court acts as an obstacle to reform, this Part first proposes how the federal government could best promote diverse schools and then considers how the Court might hinder or support such efforts.

A. The Future of the Federal Role in Reducing Racial Isolation in Public Elementary and Secondary Schools

The federal government has not initiated a nationwide substantial effort to address racial isolation in schools for several decades.[340] After requiring intentionally segregated districts to create integrated schools,[341] the effect of many of the Supreme Court's leading desegregation decisions was to reconstitutionalize and thereby entrench racial isolation in the schools.[342] While the presidential role in elementary and secondary school desegregation reached its zenith when President Eisenhower sent federal troops to

339. *See* Missouri v. Jenkins, 515 U.S. 70, 102 (1995); Freeman v. Pitts, 503 U.S. 467, 489 (1992); Bd. of Educ. of Okla. Pub. Sch. v. Dowell, 498 U.S. 237, 248 (1991); Milliken v. Bradley (*Milliken II*), 418 U.S. 717, 741–44 (1977).

340. ORFIELD & LEE, *supra* note 1, at 6 ("There has been no significant positive initiative from Congress, the White House or the Courts to desegregate the schools for more than 30 years.").

341. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."); Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 437–38 (1968) (demanding school boards eliminate discrimination "root and branch").

342. *See supra* Part II.

support the desegregation of Little Rock Central High School,[343] most historians agree that President Eisenhower was not a proponent of school desegregation,[344] and school desegregation received lukewarm support from Presidents Kennedy and Johnson.[345] Since the 1960s, Presidents have either actively opposed school desegregation or paid little attention to this issue.[346] The enactment of the Civil Rights Act of 1964 combined with a mixed record of enforcement efforts by the Department of Health, Education, and Welfare ("HEW") provided important weapons against segregated schools.[347] Since 1964, Congress has taken very little action to support integrated schools;[348] however, Congress did attempt to limit school desegregation when it passed a statute in 1974—albeit one that had little effect—that unsuccessfully attempted to prohibit the use of court-ordered busing that would require a student to attend school outside of her neighborhood.[349]

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343. PATTERSON, *supra* note 60, at 81–82.

344. *See* Lawrence J. McAndrews, *Talking the Talk: Bill Clinton and School Desegregation*, 79 INT'L SOC. SCI. REV. 87, 88 (2004) (noting that with limited exceptions the historical accounts of Eisenhower's involvement with school desegregation portray the president "as a reluctant follower of events"); Kenneth O'Reilly, *Racial Integration: The Battle General Eisenhower Chose Not to Fight*, J. BLACKS HIGHER EDUC., Winter 1997–1998, at 110, 110–12. *But see* David A. Nichols, *"The Showpiece of Our Nation": Dwight D. Eisenhower and the Desegregation of the District of Columbia*, WASH. HIST., Fall–Winter 2004–2005, at 44, 57–58 ("[The day after *Brown*, Eisenhower] expressed his 'very great interest' in desegregating the District's schools and ordered the [District] commissioners to act immediately to develop a plan to make Washington, D.C., a 'model for the nation.' " (quoting President Dwight Eisenhower)).

345. Dean Kotlowski, *With All Deliberate Delay: Kennedy, Johnson, and School Desegregation*, 17 J. POL'Y HIST. 155, 156 (2005) ("[R]egarding civil rights, both JFK and LBJ preferred to tackle issues such as voting rights and fair employment that they deemed more politically and legally congenial—and less emotional—than school desegregation.").

346. ORFIELD & LEE, *supra* note 1, at 6, 8 ("Five of the last seven Presidents actively opposed urban desegregation . . . ."); Chemerinsky, *supra* note 16, at 111 ("For decades, no President has addressed the problem of school segregation."); Chemerinsky, *supra* note 181, at 1462 ("Since the 1960s, no president has devoted any attention to decreasing segregation or to equalizing school funding.").

347. *See* YUDOF ET AL., *supra* note 100, at 375; Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146, 152–61 (2008); Kotlowski, *supra* note 345, at 174–75 (describing the desegregation guidelines promulgated by the HEW in the mid-1960s as representing a "compromise" and the subsequent more stringent guidelines and enforcement efforts by the HEW); McAndrews, *supra* note 344, at 90 (" 'The Department of Health, Education, and Welfare never had adequate staff to monitor Title IV activities . . . .' " (quoting JOSEPH WATRAS, POLITICS, RACE, AND THE SCHOOLS: RACIAL INTEGRATION, 1954–1974, at 16 (1997))).

348. ORFIELD & LEE, *supra* note 1, at 8 ("[T]he last significant federal aid for desegregation was repealed 26 years ago in 1981.").

349. Equal Educational Opportunities Act of 1974, Pub. L. 93-380, 88 Stat. 514 (codified at 20 U.S.C. §§ 1701–1758 (2006)); James E. Ryan & Michael Heise, *The Political*

The most notable exception to this trend of federal inattention to school integration has been the federal Magnet Schools Assistance Program[350] which provides approximately $106 million annually to support schools that are designed to eliminate, reduce or prevent racial isolation of minority schoolchildren in public elementary and secondary schools.[351] The federal government began providing support for magnet schools in the 1970s and Congress developed the Magnet Schools Assistance Program in the mid-1980s.[352] The Department of Education in fiscal year 2007 provided grants to forty-one school districts in seventeen states under this program.[353] The most recent data available for magnet schools indicates that magnet schools educate more than two million students in thirty-one states.[354] Approximately 4,000 magnet programs exist in the United States.[355] Researchers debate the effectiveness of magnet schools at promoting integration, and the Department of Education in a 2003 report conceded that the awards that it made to fifty-seven schools from 1998–2001 only modestly advanced the reduction of racial isolation.[356] While this congressional and executive branch support for diverse schools remains modest, the relatively longstanding and mostly consistent federal support for magnet schools reveals that some—albeit limited—congressional and executive support remains for a federal role in promoting diverse schools.

As scholars have considered the future of efforts to create diverse schools and have focused on which branch of the federal government could lead such efforts, some have argued that the

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Economy of School Choice, 111 YALE L.J. 2043, 2054 (2002) (noting that the statute had little effect on busing because courts still ordered busing to address de jure segregation).

350. No Child Left Behind Act of 2001, Pub. L. No. 107-110, §§ 5301–5311, 115 Stat. 1425, 180b-07 (codified as amended at 20 U.S.C. §§ 7231–7231j (2006)).

351. *See* Mark Walsh, *Use of Race a Concern for Magnet Schools*, EDUC. WK., Oct. 31, 2007, at 8.

352. *See* ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, THE CIVIL RIGHTS PROJECT/*PROYECTO DERECHO CIVILES* (UCLA), THE FORGOTTEN CHOICE?: RETHINKING MAGNET SCHOOLS IN A CHANGING LANDSCAPE, A REPORT TO MAGNET SCHOOLS OF AMERICA 11 (2008), *available at* http://www.magnet.edu/uploads/File/the_forgotten_choice_rethinking_magnet_schools.pdf; Epperson, *supra* note 347, at 173.

353. Press Release, U.S. Dep't of Education, Department Awards $100 Million in Magnet School Grants (Sept. 27, 2007), http://www.ed.gov/news/pressreleases/2007/09/09272007.html.

354. FRANKENBERG & SIEGEL-HAWLEY, *supra* note 352, at 6.

355. Walsh, *supra* note 351, at 8.

356. *See* Robinson, *supra* note 6, at 341 (citing research debating the effectiveness of magnet schools and citing BRUCE CHRISTENSON ET AL., EVALUATION OF THE MAGNET SCHOOLS ASSISTANCE PROGRAM, 1998 GRANTEES x–xiii (2003), *available at* http://www2.ed.gov/rschstat/eval/choice/magneteval/finalreport.pdf).

judiciary is the only branch of the federal government that could initiate such an effort because the nation simply lacks the political will to accomplish this goal through the legislative and executive branches.[357] Scholars have proposed a variety of approaches for addressing the array of shortcomings and limitations in the Supreme Court's desegregation case law and for using litigation to support integrated schools.[358] This Article agrees with scholars who have contended that numerous changes in the Court's approach to desegregation could have enabled the Court to serve as an important part of federal efforts to desegregate the schools. For example, one scholar has argued that the Supreme Court should strengthen and clarify how it defines the right to desegregation, ensure that plaintiffs receive an effective remedy, and make its remedial goals more prospective in nature so that courts adopt remedial orders that prevent discrimination in the present and the future.[359] Another scholar has recommended that the Court clarify whether racial stigma, racial isolation, or the lack of equal educational opportunity constitutes the violation in desegregation cases to clarify the scope of what district courts must remedy.[360] Others have criticized the Court's focus on discriminatory intent and intentional discrimination and have contended that the Court instead should interpret the Equal

357. *See, e.g.*, Chemerinsky, *supra* note 16, at 111, 134 ("In my opinion, the simple reality is that without judicial action equal educational opportunity will never exist."); McUsic, *supra* note 280, at 1335 ("Integration is a grand ideal, but conventional wisdom says that it is politically impossible to integrate schools by race or class.").

358. *See, e.g.*, Black, *supra* note 194, at 982–84 (arguing that a school assignment plan which seeks to desegregate based on "race, socioeconomic status, and geographic isolation" may be constitutional because it promotes equal educational opportunity); Maurice R. Dyson, *De Facto Segregation and Group Blindness: Proposals for Narrow Tailoring Under a New Viable State Interest in* PICS v. Seattle School District, 77 UMKC L. REV. 697, 712–13 (2009) (using the standards in the NCLB to argue that a substantial interest exists in reducing the performance gap between low and high achieving students and that this interest could support the lawful use of race-based measures to remedy this gap); Lisa M. Fairfax, *The Silent Resurrection of* Plessy*: The Supreme Court's Acquiescence in the Resegregation of America's Schools*, 9 TEMP. POL. & CIV. RTS. L. REV. 1, 51–52 (1999) (arguing that desegregation would be more successful if plaintiffs demonstrate the effect state-sponsored housing segregation has on school assignment, reduce the Court's emphasis on local control, and reemphasize the fact that integrated schools provide the best educational environment for all students); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 564–66 (1999) (arguing that desegregation litigation can be improved if plaintiffs more specifically define the right at issue and the amount of desegregation to be achieved and focus on eliminating prospective and current segregation); Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 285 (2002) (arguing that the Court should define more specifically the harms that desegregation seeks to remedy).

359. Parker, *supra* note 358, at 564–67.

360. Poser, *supra* note 358, at 284–85.

Protection Clause to require substantive equality.[361] In addition, if the Court in *Parents Involved* had not significantly limited the ability of districts to promote diversity and reduce racial isolation, the Court could have strengthened the legal and possibly political support for some existing efforts while encouraging other districts to adopt such efforts with greater assurance of their legal defensibility.[362]

While there was a time that changes to the Court's desegregation decisions might have reversed the effect that the Court's decisions had in reconstitutionalizing segregation, scholars have acknowledged that school desegregation litigation is coming to a close.[363] Therefore, in 2010, proposing new judicial standards for school desegregation would not likely have a substantial impact on racial isolation in schools today. In addition, many states and districts have turned their attention from school desegregation to other issues such as accountability, choice, and funding.[364] As a result, if avoiding the documented harms of racial isolation and promoting diversity are to be achieved,[365] avenues beyond school desegregation litigation must be explored that would return the attention of the states, school districts, and schools to the importance of diverse schools.

Before turning to this Article's proposals regarding how to reinvigorate efforts to create diverse schools, it is worth noting that some view the end of desegregation litigation and the diminished attention to racial isolation in schools as support for ending attention to the diversification of schools and for focusing on improving the educational opportunities offered in all schools or in schools that primarily educate minority schoolchildren.[366] For instance, respected

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361. *See, e.g.*, Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 564 (2006); Yousef T. Jabareen, *Law, Minority and Transformation: A Critique and Rethinking of Civil Rights Doctrines*, 46 SANTA CLARA L. REV. 513, 561–63 (2006).

362. *See* Robinson, *supra* note 6, at 285–94, 360; Ryan, *supra* note 60, at 155–56.

363. *See, e.g.*, HOCHSCHILD & SCOVRONICK, *supra* note 318, at 36; Liu, *supra* note 319, at 101 ("Fifty years after *Brown II*, school desegregation—both racial balancing under *Keyes* and remedial programs under *Milliken II*—has all but come to an end."); Ryan, *supra* note 20, at 86 ("[T]here is no doubt that court-ordered desegregation is in its twilight phase."). *But see* Parker, *supra* note 247, at 1160 ("[D]espite the forces indicating a desire to end or the futility of school desegregation litigation, desegregation cases still provide a strong vehicle for improving equality in our public schools.").

364. Ryan, *supra* note 60, at 132.

365. *See* SUSAN EATON, THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL 343–45 (2007); Robinson, *supra* note 6, at 327–36.

366. *See, e.g.*, Dora W. Klein, *Beyond* Brown v. Board of Education*: The Need to Remedy the Achievement Gap*, 31 J.L. & EDUC. 431, 436–37 (2002); Minow, *supra* note 86, at 623; Peter Tolsdorf, *If Separate, Then at Least Equal: Rethinking* Brown v. Board of

law scholar Derrick Bell has argued that *Brown* is dead and that it is a positive development that educators and parents are accepting that diversity is not an "essential component" of an effective school.[367] Similarly, Darnell Weeden contends that, given the substantial achievement gap, "it is absolutely necessary and proper to 'shift the national conversation away from . . . integration to new education strategies that deliver more equal education results' in an environment with zero tolerance for racial discrimination."[368] Others have taken a similar position.[369]

This Article eschews the arguments that reducing racial isolation should no longer be a critical component of efforts to promote equal educational opportunity because scholars have documented substantial evidence of the harmful impact of racial isolation and the benefits of integrated school settings.[370] Any effort to guarantee equal educational opportunity that does not recognize the importance of minimizing racial isolation in schools will likely fall short of accomplishing its objectives on a broad scale because some of the harmful effects of racial isolation will remain, and the benefits of diverse school settings will prove elusive.[371] As a result, this Article

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Education *and De Facto Public School Segregation*, 73 GEO. WASH. L. REV. 668, 669 (2005); Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 924 (2002).

367. Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053, 1053, 1064 (2005).

368. L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-Economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT. 297, 302 (2005) (alteration in original) (quoting Op-Ed., *Equal Access to Schools Fails to Equalize Education*, USA TODAY, Apr. 29, 2004, at A11).

369. *See, e.g.*, Klein, *supra* note 366, at 436–37 ("Today, as many desegregation cases are coming to an end, the ultimate goal of *Brown*—the creation of public schools that prepare all children to succeed in life—can perhaps best be served not by seeking to create racially balanced schools, but by seeking to eliminate racial disparities in academic achievement."); Joel B. Teitelbaum, Comment, *Issues in School Desegregation: The Dissolution of a Well-Intentioned Mandate*, 79 MARQ. L. REV. 347, 373 (1995) ("In an ideal society, of course, public schools would be both integrated and adequate. When it becomes clear that that goal is unattainable, however, one of the two elements must give way. And when one of the two elements has already served as the focal point for change [integration], but has failed to bring about the desired change, necessity and fairness require that the other element be given its due regard."); Tolsdorf, *supra* note 366, at 669 ("The practical solution to end the continuing equal protection violation is 'if separate, then at least equal.' " (quoting Plessy v. Ferguson, 163 U.S. 537, 552 (1895) (Harlan, J., dissenting))).

370. *See, e.g.*, Frankenberg, *supra* note 10, at 534; Robinson, *supra* note 6, at 317; Wells & Frankenberg, *supra* note 6, at 179–83.

371. As Richard Kluger has noted:

> Underscoring the dilemma for African American schoolchildren . . . was the total absence of evidence that segregated schools, even with better-paid staffing and

agrees with those who contend that a dual strategy of both ensuring equitable educational opportunities in minority schools and promoting diverse schools represents the most effective approach to ensuring equal educational opportunity.[372] This dual approach is particularly important in light of evidence that litigation that has gained equal funding for minority students has not resulted in ensuring that these students receive an equal education and that research shows that "integration is the best, and perhaps only, way to provide an equal educational opportunity."[373] Simply put, equal educational opportunity cannot coexist with the substantial racial isolation that exists in many schools because equal resources cannot negate the detrimental effect of racial isolation.[374] This Article focuses on how to increase diversity in public schools with the understanding that as racial isolation decreases, efforts to reduce racial isolation may lead states and districts to address some of the inferior educational opportunities provided in racially isolated schools.

Any new proposal to reduce racial isolation in public schools must recognize that reducing racial isolation no longer remains an important goal for most districts.[375] An effective proposal to increase school diversity must return school diversity to the agenda of states and districts that could develop diverse schools if they deliberately

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> enriched curricula, provide educational opportunities comparable to those at integrated schools.... Simply put, segregated schools are grim propagators of America's most persistent social pathology. The pity is that desegregation has proven, by and large, an effective antidote, yet the nation has been casting it aside as an inconvenience, with no appreciable protest from the black community.

KLUGER, *supra* note 76, at 773; *see also* HOCHSCHILD & SCOVRONICK, *supra* note 318, at 51 ("Although academic achievement for poor urban children was never certain to follow desegregation, it has proved very difficult to achieve without it."). This is not to deny that some schools with high concentrations of minority students are successful at achieving effective outcomes. *See, e.g.*, GERARD ROBINSON & EDWIN CHANG, THE COLOR OF SUCCESS: BLACK STUDENT ACHIEVEMENT IN PUBLIC CHARTER SCHOOLS 1–3 (2008), *available at* http://www.publiccharters.org/files/publications/NAPCS_ShadesofSuccessIB.pdf. However, these schools are applauded because they represent the exception rather than the norm. *Id.* at 1.

372. *See, e.g.*, Epperson, *supra* note 275, at 202 ("The strategy should have been, and should be today, a dual strategy of seeking both true integration and equality of resources."); Minow, *supra* note 86, at 623–24, 638, 646–47 (arguing for policies that continue to promote integration after *Parents Involved* while also emphasizing the importance of opportunities that offer "not just equality but excellence in schooling" for all students and particularly for majority-minority schools); Black, *supra* note 366, at 924 (arguing that educational institutions should seek to improve all students' education and that they should use diversity to improve educational outcomes).

373. McUsic, *supra* note 280, at 1355.

374. Liu, *supra* note 319, at 103.

375. Ryan, *supra* note 60, at 132.

undertook efforts to create such schools. Therefore, the discussion below develops and builds on proposals that would create incentives and requirements for states and districts to revisit this critical issue. Once states and districts refocus on the importance of decreasing racial isolation in schools, states and districts can consider a variety of approaches to create diverse schools.[376] Furthermore, the proposals discussed below are designed to operate at a national level to ensure that all states and districts reexamine how racial isolation might be reduced. Therefore, state mechanisms, such as referenda or state case law, are excluded from this analysis.

Other scholars that have considered how school diversity could be promoted have recently focused on how the No Child Left Behind Act ("NCLB")[377] might facilitate the reduction of racial isolation in schools. Some view the NCLB requirement that those within a persistently failing school must be provided an opportunity to transfer[378] as one avenue that might promote diverse schools because schools with high concentrations of minority students are being disproportionately classified as failing under the NCLB.[379] However, many have expressed skepticism that the NCLB will help to reduce racial isolation in schools for several reasons. Only 2.2% of eligible students have asked to transfer.[380] Furthermore, interdistrict transfers have been hindered by the lack of availability of schools that are not labeled failing.[381] While interdistrict transfers are permitted under the statute when a district does not make adequate yearly progress, the receiving school must voluntarily accept the transfer students, and the state must cover the costs of transportation.[382] As the failure to establish proficiency of any ethnic or minority group can require sanctions, greater diversity increases the likelihood that a school will

376. *See, e.g.*, Frankenberg, *supra* note 10, at 578–80; Robinson, *supra* note 6, at 336; Wells & Frankenberg, *supra* note 6, at 186–87.

377. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

378. 20 U.S.C. § 6316(b)(1)(E) (2006).

379. *See, e.g.*, Danielle Holley-Walker, *Educating at the Crossroads:* Parents Involved, *No Child Left Behind and School Choice*, 69 OHIO ST. L.J. 911, 933, 935 (2008) ("[T]he NCLB student transfer provision may be a tool for advocates of racially integrated schools."); Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 795 (2005) ("One other choice mechanism that has the potential to aid desegregation is a provision in the NCLB that establishes a right for parents of children who attend schools in need of improvement to transfer their children to better performing schools.").

380. Holley-Walker, *supra* note 379, at 935.

381. *Id.*

382. *Id.*

be identified for improvement.[383] Therefore, receiving schools lack incentives to accept students because these students may lower the proficiency scores of the receiving schools.[384] Furthermore, the Title I regulations for the NCLB require a district to obtain modification of a court-required desegregation plan if the plan would prevent the district from offering students in schools identified for improvement, corrective action, or restructuring the opportunity to transfer which may further limit the ability of school choice to promote diverse schools.[385]

In light of the end of school desegregation litigation,[386] this Article focuses on ways in which the executive branch could promote reducing racial isolation in schools apart from school desegregation litigation, although the effectiveness of some executive action may require additional funding that can only by authorized by Congress. Undoubtedly, revisions to existing statutes and new statutes that address this important issue could be developed and proposed.[387] For example, given the longstanding support for magnet schools, one congressional effort that may generate little opposition would be an expansion of the federal aid available under the Magnet Schools Assistance Program,[388] especially at a time when Congress recently authorized $100 billion in federal aid to education, which is the single largest disbursement of federal aid to education.[389] If such a congressional effort was combined with reforms to the Magnet Schools Assistance Program implemented by the Department of Education that increased the effectiveness of the program at reducing racial isolation,[390] Congress could help increase district attention to magnet schools as districts compete for the additional funding.

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383. Losen, *supra* note 1, at 290, 293; James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 962–63 (2004).

384. Ryan, *supra* note 383, at 962–63.

385. 34 C.F.R. § 200.44(a), (c) (2008); *see also* Losen, *supra* note 1, at 289–90 (explaining that states and school districts are required to pursue modification of a court-imposed desegregation remedy if the remedy prevented a student transfer authorized by Title I).

386. *See* Ryan, *supra* note 20, at 85 (noting that for over a decade the federal courts have been lifting desegregation decrees); *see also supra* note 363 (listing scholars who have stated that school desegregation has essentially ended).

387. In a future work, I may propose such statutes.

388. FRANKENBERG & SIEGEL-HAWLEY, *supra* note 352, at 50; Epperson, *supra* note 347, at 177.

389. Dillon, *supra* note 28; Letter from Arne Duncan to Governors and Chief State School Officers, *supra* note 28, at 1.

390. *See* FRANKENBERG & SIEGEL-HAWLEY, *supra* note 352, at 50–51 (recommending steps that would improve the effectiveness of magnet schools at reducing racial isolation).

Rather than focus on potential new congressional action to promote diverse schools, this Article develops steps that could be taken by the President and the Department of Education because such steps could be undertaken without new legislation, although the success of some of these efforts may require financial support from Congress to be successful as acknowledged below. Any effort to reinvigorate a federal agenda to promote diverse schools will undoubtedly provoke substantial opposition,[391] and thus it seems that the most prudent course of action would seek to build upon the nation's existing laws rather than propose new ones. Therefore, this Article agrees with those scholars who contend that the executive branch currently is the most promising branch of the federal government for pursuing the reduction of racial isolation in public schools.[392]

This Article proposes several avenues for executive branch action that scholars have left unexplored while also suggesting how some prior proposals might be strengthened. The proposals discussed below are divided into two sub-Parts: (1) potential action by the President and (2) potential action by the Department of Education. By developing an array of actions that the President and the Department could take, this Article recognizes that the deeply entrenched nature of racial isolation in American schools demands a multifaceted attack on this persistent blight on the American educational landscape.

1. How the President Could Lead the Nation in a Campaign to Promote Diverse Schools

This Article identifies several ways that the President could return the reduction of racial isolation in public schools to the national education agenda. Some will point to the history of recent presidential neglect or opposition to school desegregation[393] as sufficient reason to dismiss consideration of possible future presidential action on this issue. Despite this historical record, this Article includes proposals for how the President could promote reducing racial isolation in schools for several reasons. First, the

391. *See* HOCHSCHILD & SCOVRONICK, *supra* note 318, at 30–31.

392. *See, e.g.*, Epperson, *supra* note 347, at 173–74; Chinh Q. Le, *Advancing the Integration Agenda Under the Obama Administration*, *in* LOOKING TO THE FUTURE: LEGAL AND POLICY OPTIONS FOR RACIALLY INTEGRATED EDUCATION IN THE SOUTH AND THE NATION (forthcoming 2010); Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 730 (2010).

393. *See supra* note 346 and accompanying text.

President may be the critical actor that influences the protection, destruction, or neglect of civil rights within the United States.[394] Thus, it may be that the lack of sustained presidential attention to this issue has significantly contributed to the perpetuation of racial isolation in the nation's schools. Presidential leadership for the development of a new executive branch agenda to address racial isolation in schools may be a necessary predicate for effective reform.[395]

While presidential history suggests that significant presidential action may be unlikely, history sometimes surprises us. No one would have anticipated that a Republican President would usher in the greatest federal intrusion into America's public schools through the NCLB.[396] Similarly, the implausibility of an African American president—in a nation which laid its foundation upon the backs of millions of African slaves—perhaps should cause greater hesitancy in dismissing ideas as implausible or impossible.

Given that Barack Obama currently serves as President and he has only been in office for slightly over a year, it is worth briefly noting that although his education agenda does not currently include efforts to reduce racial isolation in schools, it includes an examination of issues that lay a foundation for including this issue in the future. For example, President Obama has emphasized the need for a high-quality education for all students. His inaugural address acknowledged that "our schools fail too many."[397] Evidence demonstrates that racially isolated schools typically obtain inferior and substandard outcomes compared to other schools,[398] and thus such schools typically fall within the failing schools that the President has noted need national attention. In his public remarks, he has acknowledged that "separate and unequal schools" stood in the way of the American dream, the persistence of a racial achievement gap, and the need to prepare all Americans with a competitive and

394. KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 185 (2001) ("[P]residential initiative played a decisive role in broadening the scope of civil rights policies, in a sequence of increasingly effective presidential responses, which ultimately pulled along both the courts and Congress [from Reconstruction through the 1965 Voting Rights Act]."); STEVEN A. SHULL, AMERICAN CIVIL RIGHTS POLICY FROM TRUMAN TO CLINTON 58 (1999) ("Presidents play a crucial role in shaping civil rights policy through their messages because only with presidential support are major and lasting policy changes likely.").

395. MAYER, *supra* note 394, at 185; SHULL, *supra* note 394, at 58.

396. Ryan, *supra* note 383, at 989.

397. President Barack Obama, Inaugural Address (Jan. 20, 2009) (transcript available at http://www.whitehouse.gov/blog/inaugural-address/).

398. Robinson, *supra* note 6, at 327–35; Wells & Frankenberg, *supra* note 6, at 179–83.

complete education.[399] Such statements could lay the foundation for him to address rising racial isolation in the schools.

Although this Article notes how an executive branch agenda to reduce racial isolation in schools would fit within the Obama administration's education goals, it is important to note that this Article is not aimed at any one administration. Instead, it argues that presidential attention to and action on the issue of reducing racial isolation in schools must establish a foundation for meaningful progress on this issue.[400] The participation of this office, rather than any one person serving as President, is the critical component. Only time will tell whether any President will bring renewed energy, resources, and attention to finally fulfilling *Brown*'s promise of equal educational opportunity.

a. The President Should Use the Bully Pulpit to Raise Awareness Regarding the Harmful Effects of Racial Isolation in the Nation's Schools

As separate and unequal schools have become an accepted fixture on the landscape of American education, dismantling the ways in which the Court made equality optional after *Brown I* will first require the nation to understand the harms associated with racial isolation in schools and the benefits of diverse educational settings.[401] Research on these issues should not stay within the hallowed halls of the academy, but instead it must be taken to state policymakers, city officials, district administrators, teachers, and ultimately families who

399. President Barack Obama, Remarks on Education at the United States Hispanic Chamber of Commerce (Mar. 10, 2009) (transcript available at http://blogs.wsj.com/washwire/2009/03/10/obamas-remarks-on-education-2/); *see also* President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009) (transcript available at http://www.nytimes.com/2009/02/24/us/politics/24obama-text.html?_r=1) ("[I]t will be the goal of this administration to ensure that every child has access to a complete and competitive education."); President Barack Obama, Remarks by the President on Strengthening America's Education System (Nov. 4, 2009) (transcript available at http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-americas-education-system) ("Meanwhile, African American and Latino students continue to lag behind their white classmates—an achievement gap that will ultimately cost us hundreds of billions of dollars because that's our future workforce. . . . It's time to make education America's national mission.").

400. *See* SHULL, *supra* note 394, at 58 (noting that presidential messages can substantially influence national policy on civil rights).

401. For a discussion of these harms and benefits, see Robinson, *supra* note 6, at 327–36; Wells & Frankenberg, *supra* note 6, at 179–83.

make decisions that shape the racial composition of schools and neighborhoods. The need for action will remain elusive without a common and widespread understanding of the cost that the nation is paying for maintaining separate and unequal schools and the benefits of diverse schools.[402]

Through the use of the bully pulpit[403] or what some scholars call "going public,"[404] the President can raise media attention to an issue and rally public opinion and support regarding a particular issue and a proposed reform.[405] Scholars have noted that the bully pulpit can be and has been used successfully to influence public opinion and congressional action,[406] although it is, not surprisingly, not always used successfully,[407] causing some scholars to question its effectiveness.[408] Presidents possess a unique ability to garner the

402. *See* Robinson, *supra* note 6, at 327–35. *See generally* THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION (Clive R. Belfield & Henry M. Levin eds., 2007) (quantifying the various public costs of inadequate education and recommending possible reforms for America's education system).

403. The term "bully pulpit" refers to the ability of Presidents to advance their policy goals through speeches and engagement of the press. Brian Gilmore et al., *The Nightmare on Main Street for African-Americans: A Call for a New National Policy Focus on Homeownership*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 262, 275 (2008) (citing David A. Crocket, *The President as Opposition Leader*, 30 PRESIDENTIAL STUD. Q. 245, 267 (2000)). President Theodore Roosevelt developed the phrase "bully pulpit." Michael Barone, *A Big Stick: TR's Sure Sense of America Sure Has Much to Tell Us Today*, U.S. NEWS & WORLD REP., Feb. 25, 2002, at 52, 52.

404. SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 2 (2d ed. 1993); Andrew W. Barrett, *GONE PUBLIC: The Impact of Going Public on Presidential Legislative Success*, 32 AM. POL. RES. 338, 338–39 (2004).

405. *See* David Mervin, *The Bully Pulpit, II*, 25 PRESIDENTIAL STUD. Q. 19, 19 (1995) ("From his elevated position in the bully pulpit the President can speak to the American people justifying, explaining and advancing his policies. Provided he has the skill, the aptitude and the desire he can mobilize public opinion behind his agenda thereby wielding a formidable weapon against those who would oppose him whether they are in Congress, the courts, the bureaucracy or the special interests."); Kant Patel, *Presidential Rhetoric and the Strategy of Going Public: President Clinton and the Health Care Reform*, J. HEALTH & SOC. POL'Y, Volume 18, Number 2, at 21, 24 (2003) ("By going public, the president can use his leadership skills to persuade the American public to support his policy agenda.") (citation omitted).

406. KERNELL, *supra* note 404, at 4, 121, 227–28; SHULL, *supra* note 394, at 57; Barrett, *supra* note 404, at 363; Brandice Canes-Wrone, *The President's Legislative Influence from Public Appeals*, 45 AM. J. POL. SCI. 313, 326 (2001); Jeffrey E. Cohen, *Presidential Rhetoric and the Public Agenda*, 39 AM. J. POL. SCI. 87, 87 (1995).

407. GEORGE C. EDWARDS III & STEPHEN J. WAYNE, PRESIDENTIAL LEADERSHIP POLITICS AND POLICY 115–16 (1994); Barrett, *supra* note 404, at 364–65; Patel, *supra* note 405, at 38 ("President Clinton's strategy of going public to generate public support for his reform proposal was a failure.").

408. *See* GEORGE C. EDWARDS III, ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT 241 (2003) (arguing that the bully pulpit is not an effective presidential tool for changing public opinion); Lee Sigelman & Carol K. Sigelman, *Presidential Leadership of*

attention of American society.[409] The bully pulpit may be particularly important to a successful presidency within the United States given the limited influence of the political parties and the separation of powers.[410] In the civil rights arena in particular, one scholar has noted that "Presidents play a crucial role in shaping civil rights policy through their messages because only with presidential support are major and lasting policy changes likely."[411]

To renew federal attention to the importance of developing diverse schools, the President should use presidential addresses, particularly those focused on education, to highlight the continuing importance of the nation completing the unfinished work of *Brown I*[412] and renewing its commitment to ending separate and unequal schools. The goal of the presidential addresses would be to raise this issue to the national consciousness and to set the stage for reform by encouraging the nation to understand and acknowledge the injustices of the existing structure. Through the bully pulpit, the President would need to emphasize the value of diverse schools for all Americans and would need to overcome the mistaken belief that hampered the success of school desegregation: "that equality for all and incorporation of the minority could only be accomplished by sacrificing individual achievement of the majority."[413]

In addition to calling attention to the harms of racial isolation, benefits of diverse schools, and need to reinvest in efforts to create diverse schools, the President would need to candidly acknowledge the considerable time, effort, sacrifice, and resources that creating diverse schools will require. Before a single policy reform is discussed, the President should acknowledge the deeply rooted and complex nature of the problem and the generations of government action and inaction that have contributed to the current challenges.[414] Setting the stage for a long battle against racial isolation in schools will be important for reducing expectations that a quick fix or easy solutions will make a significant contribution to addressing these longstanding issues.

Public Opinion: From "Benevolent Leader" to "Kiss of Death"?, 7 EXPERIMENTAL STUDY POL. 1, 16–22 (1981) (finding that an unpopular president can negatively influence public opinion).

409. Mervin, *supra* note 405, at 19; William K. Muir, Jr., *The Bully Pulpit*, 25 PRESIDENTIAL STUD. Q. 13, 14 (1995).

410. *See* Mervin, *supra* note 405, at 21.

411. SHULL, *supra* note 394, at 58.

412. 347 U.S. 483 (1954).

413. HOCHSCHILD & SCOVRONICK, *supra* note 318, at 50–51.

414. *See* Ryan, *supra* note 20, at 83.

In considering some of the disadvantages of using the bully pulpit, one challenge may be that the President may be unable to persuade the public of the need for action.[415] Calling attention to the issue also could galvanize opposition.[416] In addition, the bully pulpit is a device that must be used carefully because well-intended symbolism or rhetoric can backfire and negatively influence public opinion.[417] These potential risks must be borne because the lack of government attention to the harms of racial isolation in schools in recent decades demands that any significant government action must be preceded by a foundation that highlights the substantial harms of such learning environments and that explains the need for change.[418] The President's involvement in this effort is essential because the President enjoys a unique ability to address the entire American public and to attempt to persuade the public that the need for action outweighs these potential risks.[419] Furthermore, a popular President that is willing to use his popularity to advance a particular issue can effectively spend some of his popularity to garner support for sensitive social issues.[420]

Of course, presidential addresses that merely identify the harms of the current racial isolation and the need for sustained and sometimes difficult action to redress these harms would not accomplish much without adding effective government policies that seek to accomplish this goal. Instead, new government policies that tackle these challenging issues must be developed.[421] In the next sub-Parts, this Article explores how the President can establish a

415. EDWARDS, *supra* note 408, at 241.

416. *See id.* at 35–36, 153–54, 164 (providing examples of presidents' use of the bully pulpit inspiring the opposition).

417. For example, at the 1965 commencement for Howard University, President Johnson sought to support civil rights by stating that "[y]ou do not take a person who for years had been hobbled by chains and liberate him, bring him to the starting line of a race, and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair." Muir, *supra* note 409, at 15. However, some have noted that the metaphor unintentionally created an image of society that is composed of winners and losers and that the competitors should not stop to help out those who have fallen behind. *See id.* at 15.

418. Frankenberg, *supra* note 10, at 580; Robinson, *supra* note 6, at 327–36; Wells & Frankenberg, *supra* note 6, at 187.

419. Mervin, *supra* note 405, at 19; Muir, *supra* note 409, at 14.

420. Michael Bailey, Lee Sigelman & Clyde Wilcox, *Presidential Persuasion on Social Issues: A Two-Way Street?*, 56 POL. RES. Q. 49, 56 (2003).

421. Muir, *supra* note 409, at 17 ("[R]eal problems, like racial bigotry and severe inequality, do not suddenly disappear simply because presidents substitute an affirming public philosophy for a philosophy of despair. Rhetoric can not go it alone, but must be joined with government policies to make others' lives better.").

framework for developing effective government policies to reduce racial isolation in schools and to promote diverse schools. The next three sub-Parts proposes some possible government policies that could help to accomplish this goal.

b. The President Should Issue an Executive Order That Would Establish His Plan for Developing Government Policies That Will Help to Promote Diverse Schools

After laying the proper foundation for the need for the nation to take action to address the harms of racial isolation in schools and to harness the benefits of diverse schools, the President should move from rhetoric to action by issuing an executive order[422] that establishes a national agenda for developing new government policies that will help to achieve these goals. The order would establish a series of actions to which the President is committing the executive branch as it develops these policies and the timetable for those actions. Given the sensitivity of issues of race and student assignment, the executive order should include a mechanism for engaging public dialogue about how these difficult issues can be tackled, such as numerous town hall meetings. In addition, as discussed below, an executive order that seeks to reduce racial isolation in schools and promote diversity should establish a commission to study the current state of racial isolation in schools and to develop policy recommendations for reducing racial isolation and promoting diversity, appoint an advisor to spearhead the implementation of the policy recommendations, and direct the Department of Education to issue new guidance on the Title VI obligation to address this issue. Each of these possible actions is discussed separately in sub-Parts below.

There are several disadvantages that would attend using an executive order to initiate the development of policy regarding the harms of racial isolation and the benefits of diverse schools. One of the principal disadvantages of approaching this issue through an

422. The term "executive order" has been used broadly to refer to a variety of tools at the disposal of the President. This Article adopts the definition developed by Phillip Cooper who defined executive orders as "directives issued by the president to officers of the executive branch, requiring them to take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will henceforth be responsible for the implementation of law." PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT 16 (2002). Presidents draw the authority to issue executive orders from their Article II authority to manage the executive branch and use such orders to accomplish their policy agendas. *See* HAROLD J. KRENT, PRESIDENTIAL POWERS 51 (2005); SHULL, *supra* note 394, at 114.

executive order would be that a subsequent administration could reverse the policies developed under the order.[423] This problem attends to any approach pursued by the executive branch and also could be a basis for criticizing congressional or judicial action, although it is undoubtedly more difficult to obtain new legislation or overturn judicial decisions. If the executive order required a campaign to educate the public about the harms of racial isolation in schools and the benefits of diverse schools, the research and information disseminated through the campaign could not be withdrawn, although undoubtedly an administration hostile to efforts to reduce racial isolation could attempt to convince the public that racially isolated schools do not inflict substantial harms, highlight successful racially isolated schools, and focus on the importance of local control as a paramount value for American schools. Even if such a counteroffensive were launched, an effective initial campaign would still likely have a lasting effect on the hearts and minds of the American people.

In addition, executive orders cannot be enforced through private civil action.[424] Therefore, if the President declines to follow through on the executive order, the issue would likely remain dormant. This issue can be mitigated through the articulation of clear steps that must be undertaken by other government offices or institutions, such as a presidential advisor, a commission, or the Department of Education. Once those actions are identified, they should be undertaken even if the President's attention is focused on other matters.

Acting through an executive order instead of through an agency can focus criticism on the President.[425] This issue also can be mitigated by requiring action by the Department of Education and others such as a commission or an advisor. Ultimately, however, given how controversial this issue would undoubtedly be, an initiative to develop policy that would reduce racial isolation in schools would require sustained presidential support and attention, even in the face of significant hostility.

Despite these potential criticisms of an executive order that seeks to develop an agenda for how the executive branch will help to reduce the growing racial isolation in schools, this approach would

423. COOPER, *supra* note 422, at 78.

424. KRENT, *supra* note 422, at 51–52 (citing *In re* Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980)).

425. COOPER, *supra* note 422, at 74.

enjoy numerous advantages over alternative avenues for action. One crucial advantage of using an executive order for this purpose would be that Presidents have successfully used such orders in the past to initiate a broad range of executive action, including establishing binding and authoritative pronouncements to the executive branch, directing the development of regulations, initiating policy, delegating authority to executive branch officers or agencies, and creating, reorganizing, and eliminating federal agencies.[426] Executive orders have spearheaded a number of noteworthy and controversial national policy initiatives.[427] For instance, President Truman racially integrated the military in 1948 by issuing an executive order.[428] President Eisenhower issued an executive order that required the Secretary of Defense to order the National Guard to take the necessary steps to desegregate Central High School, along with the other public schools, in Little Rock, Arkansas.[429] President Kennedy created the Peace Corps through an executive order[430] after Congress had failed in its attempts to establish a similar program for three consecutive years.[431] President Johnson issued an executive order that prohibited racial and national origin discrimination by federal government contractors and that established the first requirement that federal government contractors and subcontractors use affirmative action to employ a nondiscriminatory workforce.[432] More recently, President Obama established the President's Economic Recovery Advisory Board,[433] the Council on Women and Girls,[434] and the White House Office of Urban Affairs[435] through executive orders. In addition, Presidents have issued numerous executive orders that have addressed education issues, including the establishment of the U.S. Department of Education,[436] the appointment of presidential advisory commissions

426. *Id.* at 21–37.

427. WILLIAM G. HOWELL, POWER WITHOUT PERSUASION 6 (2003). A study of executive orders from Franklin Roosevelt through William Clinton found that the presidents issued approximately sixty-eight executive orders per year, with an average of just more than one on civil rights per year. SHULL, *supra* note 394, at 120–21.

428. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

429. Exec. Order No. 10,730, 3 C.F.R. 89–90 (Supp. 1957).

430. Exec. Order No. 10,924, 3 C.F.R. 85–86 (Supp. 1961).

431. HOWELL, *supra* note 427, at 6.

432. Exec. Order No. 11,246, 3 C.F.R. 167–76 (Supp. 1965), *reprinted in* 42 U.S.C. § 2003e n. (2006).

433. Exec. Order No. 13,501, 74 Fed. Reg. 6893 (Feb. 11, 2009).

434. Exec. Order No. 13,506, 74 Fed. Reg. 11,271 (Mar. 16, 2009).

435. Exec. Order No. 13,503, 74 Fed. Reg. 8139 (Feb. 24, 2009).

436. Exec. Order No. 12,212, 3 C.F.R. 255 (1981).

regarding particular subgroups[437] or institutions,[438] and the initiation of new policies on certain subjects.[439]

Many Presidents have used executive orders on civil rights issues and oftentimes they have proven effective in implementing substantial policy changes.[440] While conflict sometimes arises over the particular use of an executive order, the use of executive orders has generally received widespread acceptance.[441] As one scholar noted, "[t]he courts now fully recognize the president's power to issue executive orders and agreements that concern both foreign and domestic policy. Indeed, powers of unilateral action have become a veritable fixture of the American presidency in the modern era."[442]

An executive order that requires the development of government policies that would reduce racial isolation and promote diversity in schools would call attention to the need for further action on this issue. The order also would notify the public that it should anticipate government action on this issue. Executive orders also are far easier to enact than the difficult task of moving legislation through Congress or navigating the administrative process to issue new regulations.[443]

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437. *See, e.g.*, Exec. Order No. 13,336, 3 C.F.R. 163–65 (2005) (establishing an "Interagency Working Group on American Indian and Alaska Native Education" to oversee implementation of the executive order directed to assisting American Indian and Alaskan Natives meet the standards within the No Child Left Behind Act of 2001); Exec. Order No. 13,230, 3 C.F.R. 802 (2002), *reprinted in* 20 U.S.C. § 3411 n. (2006) ("[I]n order to advance the development of human potential, strengthen the Nation's capacity to provide high quality education, and increase opportunities for Hispanic Americans to participate in and benefit from Federal education programs .... There is established ... the President's Advisory Commission on Educational Excellence for Hispanic Americans.").

438. *See, e.g.*, Exec. Order No. 13,270, 3 C.F.R. 242 (2003), *reprinted in* 25 U.S.C. § 1801 n. (2006) (establishing "the President's Board of Advisors on Tribal Colleges and Universities" and "the White House Initiative on Tribal Colleges and Universities"); Exec. Order No. 12,876, 3 C.F.R. 671 (1994) (establishing "the President's Board of Advisors on Historically Black Colleges and Universities (HBCUs)" to advise the President on the participation of HBCUs in federal programs and on how to improve private assistance to HBCUs).

439. *See, e.g.*, Exec. Order No. 13,398, 3 C.F.R. 216 (2007) (establishing a "National Mathematics Advisory Panel" within the Department of Education that will advise the Secretary of Education and the President regarding effective mathematics instruction); Exec. Order No. 13,153, 3 C.F.R. 265 (2001), *reprinted in* 20 U.S.C. § 6301 n. (2006) (requiring the Secretary of Education to establish a comprehensive strategy to provide technical and other assistance to school districts and states to aid them in their efforts to improve student performance in low-performing schools).

440. MAYER, *supra* note 394, at 182; SHULL, *supra* note 394, at 117 ("Ford, however, is the only contemporary president never to issue an executive order relating to civil rights.").

441. COOPER, *supra* note 422, at 25.

442. HOWELL, *supra* note 427, at 21.

443. COOPER, *supra* note 422, at 17, 58.

Ultimately, these important advantages of enacting an executive order on this issue outweigh the potential disadvantages.

However, an executive order that establishes an agenda for developing new policies and approaches for reducing racial isolation in schools and for promoting diverse schools, like the use of presidential addresses, would only be a starting point. Two of the key components that should be included in such an executive order are noted below.

c. The President Should Establish a Commission to Engage in a Public Dialogue Regarding the Harmful Effects of Racial Isolation and to Consider Potential Government Policies to Promote Diverse Schools

Through an executive order, the President should establish a commission to study the current state of racial isolation in schools, how it affects schools, and how racial isolation could and should be reduced within schools throughout the nation. Scholars have recognized that presidential commissions can serve a variety of functions, including gathering and organizing information, educating the public about a particular issue, and developing policy recommendations.[444] There is limited scholarship on presidential commissions.[445] Overall, presidential commissions appear to have a mixed record,[446] with some questioning the effectiveness of presidential commissions,[447] while others have noted and documented

444. *See* DAVID J. FLITNER JR., THE POLITICS OF PRESIDENTIAL COMMISSIONS 16 (1986) (noting the function of presidential commissions is to gather and organize information and to make recommendations for legislative or social reform); Hugh Davis Graham, *The Ambiguous Legacy of American Presidential Commissions*, PUB. HISTORIAN, Spring 1985, at 4, 8 (noting that the purpose of presidential commissions is to investigate facts and make policy recommendations); Gerald N. Grob, *Public Policy and Mental Illnesses: Jimmy Carter's Presidential Commission on Mental Health*, 83 MILBANK Q. 425, 444 (2005) ("The hope of every modern presidential commission is to turn the public's attention to an important problem while providing new policy initiatives designed to mitigate the prevailing difficulties."); Daniel A. Smith, Kevin M. Leyden & Stephen A. Borrelli, *Predicting the Outcomes of Presidential Commissions: Evidence from the Johnson and Nixon Years*, 28 PRESIDENTIAL STUD. Q. 269, 270–71 (1998) ("[A]ll of these commissions carry the same presidential mandate: to study and propose policy alternatives in response to a new and/or particularly difficult public problems.").

445. KENNETH KITTS, PRESIDENTIAL COMMISSIONS AND NATIONAL SECURITY: THE POLITICS OF DAMAGE CONTROL 6 (2006); Amy B. Zegart, *Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions*, 34 PRESIDENTIAL STUD. Q. 366, 367 (2004).

446. Graham, *supra* note 444, at 5.

447. KITTS, *supra* note 445, at 7; Smith et al., *supra* note 444, at 282; Zegart, *supra* note 445, at 366–67.

the influence of commissions on public policy.[448] For example, President Carter's Presidential Commission on Mental Health has been labeled a "successful" commission because, in spite of a subdued public reception to the report, President Carter supported the commission's recommendations and sent a message to Congress accompanied by a draft of a mental health systems act, and Congress eventually passed legislation on this issue.[449]

The President could develop a commission that would gather information about the extent and effect of racial isolation in schools and develop policy recommendations for addressing this issue. Such a commission could serve as a vehicle for educating the public about the harms of racial isolation in schools and for engaging the public in a dialogue about the most effective avenues for reform. One advantage of commissions is that they provide the opportunity to have a long-term public dialogue about an issue that is run outside of the White House.[450] Given the sensitivity of issues relating to racial isolation in public schools, a president that decides to tackle this issue may want to diffuse the controversy of addressing it by having the focus of public attention outside of the White House. The commission could conduct a public dialogue to inform the public of the current system's costs and the gains that may be won through sustained change. Furthermore, the President could require the commission to develop recommendations on what Department of Education policies and programs could better promote the reduction of racial isolation in the schools.

In addition to sparking dialogue, commission reports have the ability to spark significant reform.[451] A key example of such a report from a commission came from President Reagan's National Commission on Excellence in Education which produced *A Nation at Risk: The Imperative for Educational Reform*.[452] Although history indicates that President Reagan appointed the Commission to

448. COOPER, *supra* note 422, at 54 (listing several influential presidential commissions and noting that such commissions can create significant long-term responses); CARL MARCY, PRESIDENTIAL COMMISSIONS 2 (1945) (stating that the value of commissions "has long been recognized"); THOMAS R. WOLANIN, PRESIDENTIAL ADVISORY COMMISSIONS: TRUMAN TO NIXON 193 (1975) ("Commissions also had a broad and significant impact as educators of the general public, government officials, the professional community, and their own members.").

449. Grob, *supra* note 444, at 444–45.

450. COOPER, *supra* note 422, at 54–55.

451. *Id.* at 53–54.

452. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), *available at* http://datacenter.spps.org/sites/2259653e-ffb3-45ba-8fd6-04a024ecf7a4/uploads/SOTW_A_Nation_at_Risk_1983.pdf.

support his policy goals of reducing the federal role in education, the report instead sparked a crisis for American schools by highlighting the mediocrity of the schools and calling for significant reforms which ultimately ushered in a substantial expansion in the federal role in education.[453]

Commissions also enjoy the advantage of generating their own recommendations and thus may enjoy greater credibility than recommendations that solely came from the White House.[454] On such a sensitive issue as racial isolation in schools, recommendations from a cross-section of experts would likely be better received than a presidential directive. To ensure the independence of the recommendations, the President would need to avoid influencing the work of the commission and its resulting policy recommendations. While the President would lose the ability to determine the exact nature of the recommendations, the added credibility of the recommendations coming from the commission should help to gain public support for their implementation.

Furthermore, the new commission should draw upon some of the lessons learned from past commissions on how to increase commission effectiveness. For example, a commission can help to ensure that its report is favorably received by writing a unanimous, high-quality, and persuasive report; developing well-supported findings and recommendations; and avoiding criticism of the President to help garner presidential support.[455] The commission should avoid one of the challenges that confronted President Clinton's often-criticized advisory board on race,[456] which had a broad and somewhat vague mandate.[457] A commission focused on establishing a dialogue about and developing policies that would address racial isolation in schools would be sufficiently clear and narrow that the commission could recommend specific policy changes that sought to achieve concrete and measurable results. By taking lessons from prior commissions, a new commission could seek to join prior commissions that produced influential reports, generated useful information that is considered over time, and sparked significant long-term responses.[458]

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453. MCGUINN, *supra* note 24, at 43.

454. *See* COOPER, *supra* note 422, at 54.

455. WOLANIN, *supra* note 448, at 184–85.

456. *See* Exec. Order No. 13,050, 3 C.F.R. 207 (1998); SHULL, *supra* note 394, at 119.

457. SHULL, *supra* note 394, at 119–20.

458. *See* COOPER, *supra* note 422, at 54 (describing some previous successful commissions).

Finally, a presidential commission focused on reducing racial isolation in schools would have to confront a challenge that all commissions face. A commission is not a permanent creation and thus once it issues its report, it typically is disestablished.[459] However, this challenge may be addressed by charging the commission with assisting the Department of Education with developing new policies that the Department of Education would continue to address after the commission ceased to exist. Furthermore, as discussed in the next sub-Part, this challenge also may be overcome by appointing a presidential advisor that would oversee the commission's work and that would continue to advise the President on these issues once the commission has completed its work.

d. The President Should Appoint an Advisor to Lead the Nation's Efforts to Promote Diversity in Schools

Through an executive order, the President also should appoint an advisor[460] that would work with the commission as it engages in a public dialogue and develops recommendations for government policy about the need for the nation to reduce racial isolation and promote diversity in schools. The appointment of an advisor to the President on these issues would serve several purposes. The advisor would provide a communication link between the commission, the Department of Education, and the White House. The advisor could speak on behalf of the President on these issues and participate in public dialogues initiated by the commission. After the commission issues its report, the advisor also could make sure that the Department of Education is following through on any resulting policy changes or new regulations.

Policy advisors have come under fire recently because the Obama administration has appointed more than twenty such advisors and these advisors do not have to be confirmed by the Senate.[461] Some question the effectiveness of these advisors.[462] Others contend that the responsibilities of such advisors can remain unclear and

459. WOLANIN, *supra* note 448, at 157.

460. The media have labeled advisors appointed by the President that are not confirmed by the Senate as czars. *See, e.g.*, Michael A. Fletcher & Brady Dennis, *Obama's Many Policy 'Czars' Draw Ire from Conservatives*, WASH. POST, Sept. 16, 2009, at A6.

461. *See, e.g., id.*; Howard Kurtz, *Team Obama Pushes Back*, WASH. POST, Oct. 9, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/10/09/AR2009100901521.html.

462. HAROLD SEIDMAN & ROBERT GILMOUR, POLITICS, POSITION, AND POWER: FROM THE POSITIVE TO THE REGULATORY STATE 242 (4th ed. 1986) ("[A] 'super Cabinet' officer without political influence or statutory powers would have nothing going for him but the majesty of his title, unless he were accepted as the president's alter ego.").

create tension with administrative agencies if the advisor's responsibilities overlap with an agency.[463] However, a serious constitutional challenge to the use of such advisors has not been mounted. Given the fact that efforts to reduce racial isolation in schools would need to be sustained over a long period of time, such an advisor would serve as a critical mechanism for establishing ongoing attention to this issue within the White House. The executive order should delineate the responsibilities of the advisor so that his or her responsibilities complement rather than conflict with those of the commission and the Department of Education.

The aforementioned presidential actions would establish a necessary foundation for any action by the Department of Education that seeks to address the increasing racial isolation in public schools. Without such a foundation, any Department of Education efforts could meet surprise, stonewalling, and outright hostility. This Article now turns to proposals for Department of Education action that would promote diversity and reduce racial isolation in schools.

2. How the Department of Education Could Guide States and Districts to Promote Diversity in Schools

In addition to recommending presidential action to promote reducing racial isolation in schools, this Article also develops approaches that the Department of Education ("the Department") should take that would lead states and districts to develop new ways to reduce racial isolation in schools. This sub-Part addresses how enforcement of the disparate impact regulations under Title VI of the Civil Rights Act could be used to advance efforts to promote diverse schools. Any action by the Department or the Office for Civil Rights ("OCR") would build upon the foundation that presidential action would establish.

a. The Need for New Title VI Guidance on Remedying Racial Isolation in Schools

Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin,[464] represents the critical tool that the Department can employ to address discrimination and issues of race in education. In addition to prohibiting intentional

463. *See* John M. Broder & Charlie Savage, *Title, but Unclear Power, for a New Climate Czar*, N.Y. TIMES, Dec. 12, 2008, at A28.

464. 42 U.S.C. § 2000d (2006).

discrimination, under the Title VI regulations for the Department, a recipient of federal financial assistance may not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ."[465] As one scholar has noted,

> Title VI disparate impact regulations have been used to provide positive and negative injunctive relief in challenges to tracking, discipline, special education over-representation, and resource disparities. As a result Title VI remedies can require major changes in policy and practice designed to increase educational opportunities for minority students, as well as safeguards against segregative special education placements, unfair discipline, and other problems that would not necessarily register in achievement data.[466]

Title VI has been used to require education reforms that increase educational opportunities for minority students.[467]

The OCR should employ its authority under Title VI to promote the reduction of racial isolation in schools. First, the Department of Education should issue guidance on the permissibility of using race-neutral approaches to reduce racial isolation under Title VI.[468] The Court's decision in *Parents Involved* will encourage districts to adopt race-neutral approaches to reducing racial isolation because the Court's decision will make it difficult for school districts to adopt race-based student assignment plans that will survive strict scrutiny.[469] While the OCR issued a report that heralded race-neutral efforts to promoting diversity,[470] there remains an open question of whether such efforts will be reviewed under rational basis review because they do not use a suspect criteria or strict scrutiny because they have a racially discriminatory purpose.[471] Given the legal uncertainty of such efforts, the OCR should issue guidance that unequivocally gives school districts wide latitude to adopt race-neutral efforts to promote

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465. 34 C.F.R. § 100.3(b)(2) (2009).

466. Losen, *supra* note 1, at 283 (internal citations omitted).

467. *Id.*

468. In recommending this guidance, I agree with Epperson, *supra* note 347, at 177, but I propose a different approach for what this guidance should contain.

469. *See* Robinson, *supra* note 6, at 285–94.

470. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ACHIEVING DIVERSITY: RACE NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/b1/3f.pdf.

471. *See* Robinson, *supra* note 6, at 294–97 (describing the Court's mixed signals about the legality of race-neutral efforts and the debate among scholars about such efforts).

diverse schools under Title VI of the Civil Rights Act because such efforts help to ensure that federal funds are not used to promote discrimination while they avoid some of the harms of racial classifications.[472] Such guidance would reassure districts that seek to adopt such measures that they can adopt them without facing enforcement action from the OCR.[473]

In addition to issuing guidance that explains that districts may adopt race-neutral approaches to reducing racial isolation, the OCR also should issue guidance that establishes that a recipient of federal financial assistance may violate the disparate impact regulations if it fails to address racial isolation that imposes a racially disparate impact. To establish a disparate impact claim for subjecting individuals to discrimination, a plaintiff must establish that a neutral practice imposes a "racially disproportionate effect."[474] If the plaintiff carries this burden, then the defendant must establish an "educational necessity" for the practice.[475] A plaintiff may prevail if he or she can establish that an alternative practice is equally effective and inflicts less of a racially disproportionate effect or demonstrate that the practice is a discriminatory pretext.[476] The Supreme Court ruled in *Alexander v. Sandoval*[477] that plaintiffs may not directly enforce the disparate impact regulations in court because § 602, the Section of Title VI that the agencies relied upon to create disparate impact regulations, did not create individual rights.[478] The Supreme Court has not yet ruled on the split within the federal courts over whether plaintiffs may enforce the Title VI disparate impact regulations through 42 U.S.C. § 1983.[479] Therefore, the OCR is currently the only

472. *Cf. id.* at 351–60 (arguing that school districts should enjoy the freedom to adopt race-neutral student assignment plans and that courts should apply rational basis review for the constitutional analysis of benign plans because such efforts advance the purpose of the Equal Protection Clause while minimizing some of the harms of racial classifications).

473. Also, courts typically will accord the OCR's reasonable interpretation of Title VI substantial deference. *See* Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

474. Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).

475. *Id.* at 1417–18.

476. *Id.* at 1417.

477. 532 U.S. 275 (2001).

478. *Id.* at 293.

479. *Compare, e.g.*, Save Our Valley v. Sound Transit, 335 F.3d 932, 944 (9th Cir. 2003) (affirming the rejection of a Title VI disparate impact claim under § 1983), *and* South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774 (3d Cir. 2001) (holding that a Title VI disparate impact claim could not be enforced through § 1983), *with*

enforcement avenue available to all individuals who allege that a policy or practice has a disparate impact.

In issuing guidance that requires recipients of federal financial assistance to address racial isolation in schools that impose a racially disparate impact, the OCR would need to remind states and districts of their obligation under Title VI to remedy discrimination that inflicts a disparate impact on the basis of race, color, and national origin. The Clinton administration took action that reminded recipients of federal financial assistance of this obligation at the end of the administration when then-Secretary of Education Richard Riley sent a letter to all chief state school officers that called to their attention "long-standing racial and ethnic disparities in the distribution of educational resources."[480] The letter noted ethnic and racial disparities in such educational resources as funding, qualified teachers, instructional support, and programs and facilities.[481] Secretary Riley explained that not only do these disparities prevent the nation's schoolchildren from reaching their full potential, but he also stated that "[i]n some cases, these disparities may . . . raise legal concerns under our nation's civil rights laws" and specifically noted the obligation to ensure nondiscrimination under Title VI.[482] He concluded by encouraging states to examine disparities in educational opportunity and to work with education policymakers within the state to determine how the state can address these issues.[483] Therefore, the Clinton administration reminded recipients that Title VI and its implementing regulations impose an ongoing obligation for recipients of federal financial assistance to remedy disparate impact discrimination and suggested that states may be overlooking some of the issues that the regulations address.

The OCR would need to clearly articulate what action recipients that have racially isolated schools must take to reduce racial isolation to comply with the disparate impact regulation. In developing language that defines the nature of the obligation to remedy racial isolation, the OCR should assess any recommendations of the commission that analyze how to balance the need to remedy racial isolation in schools with the interests of states and school districts in

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Robinson v. Kansas, 295 F.3d 1183, 1187 (10th Cir. 2002) (permitting enforcement of a disparate impact claim through § 1983).

480. Letter from Richard W. Riley, Sec'y of Educ., to Chief State School Officers (Jan. 19, 2001) (on file with the North Carolina Law Review).

481. *Id.*

482. *Id.*

483. *Id.*

establishing attendance patterns that promote stability and parental involvement and satisfaction. The OCR could choose to reinvigorate the Court's requirements in *Swann* to integrate schools by requiring school districts to "make every effort to achieve the greatest possible degree" of integration.[484] Alternatively, the OCR could require districts to take affirmative steps to remedy racial isolation[485] although one obvious shortcoming of such a standard is that it could be satisfied with minimal effort by the district. Given the political opposition that such efforts may encounter, the OCR may want to adopt a moderate standard when it first raises the issue with the understanding that a more demanding requirement will be adopted at a later date.

Scholars have noted an important limitation in pursuing a disparate impact claim. When courts have considered the burden on the defendant in establishing an educational necessity, they have accepted justifications that are simply "educationally legitimate" by allowing defendants to defend their actions by pointing to a policy that merely "has a demonstrable relationship to a legitimate educational goal" and courts defer to the judgments of educators on this issue.[486] Thus, courts have infrequently sustained disparate impact claims.[487]

However, the OCR does not have to adopt the definition of educational necessity that courts have promulgated. In other areas, the OCR previously rejected a Supreme Court interpretation of legal obligations that it enforces. For example, the OCR's guidance on the obligation of districts to address sexual harassment noted that while the Supreme Court requires a victim of sexual harassment to prove that a recipient was deliberately indifferent to the harassment to recover monetary damages, the OCR will find schools in violation of their obligation under Title VI if sexual harassment limits or denies a student's access to a school's program on the basis of sex, whether or

484. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).

485. In relation to addressing the needs of limited-English proficient students, the OCR requires recipients of federal financial assistance to "take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970).

486. Ryan, *supra* note 163, at 1698; *see also* Losen, *supra* note 1, at 281 (noting that courts frequently defer to educational reasons for policies given by educators).

487. Losen, *supra* note 1, at 280; Ryan, *supra* note 163, at 1698.

not the recipient knew or should have known about the discrimination.[488]

In place of the current judicial definition of educational necessity,[489] the OCR could adopt a more rigorous requirement for educational necessity that requires a state or district to establish that the challenged practice is essential to the effective operation of the educational program. Such a definition of educational necessity would strongly encourage districts and states to explore and possibly adopt alternative student assignment policies that do not promote racial isolation. However, the standard also would allow districts to defend their student assignment plans if their existing plans are necessary for the educational effectiveness of the district.

Once the OCR issues new guidance that defines the obligation of school districts to reduce racial isolation in schools, several issues must be addressed for the OCR to serve as an effective mechanism for promoting the reduction of racial isolation. Historically, complainants do not frequently file complaints alleging a disparate impact claim.[490] The absence of complaints on this basis may simply be due to a lack of public awareness of the applicability of Title VI to policies and practices that have a disparate impact on a particular racial group. This shortcoming could be addressed by providing the public with greater information about the coverage of the Title VI regulations and through proactive compliance reviews that do not rely on outside initiation, which are discussed below.

The enforcement of the Title VI disparate impact regulations also has been highly subject to the priorities of the governing administration.[491] For example, a former investigator for the OCR has noted that a prior head of the OCR sent a memo to the staff that instructed them to avoid investigating complaints that alleged a race- or gender-based disparate impact.[492] Some have noted that enforcement of the disparate impact regulations has been weak, even during administrations that support such enforcement, and that

488. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001).

489. *See* Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1412 (11th Cir. 1993) (defining educational necessity as requiring practices that " ' bear a manifest demonstrable relationship to classroom education' " (quoting Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1418 (11th Cir. 1985))).

490. Losen, *supra* note 1, at 271–72.

491. *Id.* at 287–88.

492. *Id.*; Mica Pollock, *Toward Everyday Justice: On Demanding Equal Educational Opportunity in the New Civil Rights Era*, 67 OHIO ST. L.J. 245, 263 (2006) (citing Losen, *supra* note 1, at 288).

compliance reviews based upon a disparate impact theory were infrequent.[493] Therefore, the proposed approach would only be viable under an administration that is committed to addressing how the growing racial isolation adversely affects minority schoolchildren by increasing enforcement of the Title VI disparate impact regulations.

Despite the challenges that the OCR enforcement would encounter, enforcement through the OCR enjoys an important institutional advantage. The OCR is required by statute to try to obtain voluntary compliance before it issues a finding that a recipient has violated Title VI.[494] As a result, the OCR engages in a "partnership process" that typically reaches negotiated settlements that avoid official findings of Title VI violations.[495] The partnership approach is designed to generate lasting positive solutions, and the resulting negotiated settlements enjoy the advantage of avoiding labeling individual parties as racially discriminatory.[496] One scholar contends that by avoiding labeling a party as discriminatory, negotiations become more effective at reaching solutions than if they had to reveal a discriminatory motive or identify a cause for the disparate impact.[497] Therefore, the OCR's ability to negotiate a recipient's voluntary compliance may enable it to work effectively with states and districts to remedy racial isolation in the nation's schools.

b. The Department of Education Should Provide Technical Assistance That Encourages Districts to Reduce Racial Isolation

To increase state and school district attention on creating diverse schools, the Department of Education could provide technical assistance that encourages states and districts to reduce racial isolation in schools. This assistance could be provided by Equity Assistance Centers ("Centers") or the OCR. The Centers currently provide training and technical assistance on how to protect civil rights in the areas of race, national origin, and sex discrimination to districts that request it.[498] The Centers also offer training and technical

493. Losen, *supra* note 1, at 270, 272 (citations omitted).

494. 42 U.S.C. § 2000d-1 (2006).

495. Losen, *supra* note 1, at 271, 273.

496. *Id.* at 273.

497. *Id.* (citing Richard Lazarus, *Civil Rights in the New Decade: Highways and Bi-Ways for Environmental Justice*, 31 CUMB. L. REV. 569, 575–76 (2000)).

498. OFFICE OF COMMC'NS AND OUTREACH, U.S. DEP'T OF EDUC. GUIDE TO U.S. DEPARTMENT OF EDUCATION PROGRAMS 302 (2009), http://www.ed.gov/programs/gtep/gtep.pdf; *see also* U.S. Dep't of Educ., Training and Advisory Services—Equity

assistance on the issues that arise in school desegregation.[499] The Department of Education also provides one-time grants to school districts to support revisions to their student assignment plans in a manner that is consistent with *Parents Involved*.[500] The Department allocation for these grants for fiscal year 2009 was close to $9.5 million which represented a more than $2.5 million increase over the 2008 allocation.[501] The Department anticipated that in fiscal year 2009 it would provide ten to fifteen new grant awards and continue funding ten additional awards.[502]

A renewed federal effort to promote diverse schools should build and expand upon this preexisting resource to help states and districts reconsider existing student assignment plans and develop new approaches that will better foster diverse schools. While the Centers currently rely on school district requests to initiate training and technical assistance,[503] an expansion of the federal effort to promote diverse schools should include increasing the number of districts that receive technical assistance and training from the Centers by having the Department of Education contact districts that the Department identifies as in need of assistance in reducing racial isolation. Additional support for these efforts could be provided if the President successfully encouraged Congress to authorize supplemental funds for districts that need financial assistance to revise their student assignment plans.

Similarly, the OCR currently provides assistance on civil rights compliance to educational institutions through a variety of approaches, including conferences, in-person consultations, and dissemination of materials on civil rights obligations.[504] Technical assistance sometimes helps the OCR identify noncompliance and can lead to compliance agreements between the OCR and a recipient.[505] In 2008, the OCR gave more than 185 technical assistance

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Assistance Centers, http://www.ed.gov/programs/equitycenters/index.html (last visited Feb. 25, 2010) (describing Equity Assistance Centers).

499. OFFICE OF COMMC'NS AND OUTREACH, *supra* note 498, at 302.

500. *Id.* at 301–02.

501. *Id.* at 301.

502. *Id.* at 302.

503. *Id.*

504. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ANNUAL REPORT TO CONGRESS OF THE OFFICE FOR CIVIL RIGHTS FISCAL YEARS 2007–08, at 14 (2009), http://www.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf.

505. MICHELLE LEIGH AVERY ET AL., EQUAL EDUCATIONAL OPPORTUNITY AND NONDISCRIMINATION FOR MINORITY STUDENTS: FEDERAL ENFORCEMENT OF TITLE VI IN ABILITY GROUPING PRACTICES 38 (1999), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/d2/80.pdf.

presentations at 150 events.[506] The U.S. Commission on Civil Rights previously commended the OCR "for ... actively and effectively conducting Title VI education and outreach and technical assistance ...."[507] Technical assistance definitely represents one of the OCR's institutional strengths.[508]

Under an executive branch effort to promote diverse schools, the OCR also should provide technical assistance to states and school districts that seek to develop plans to reduce racial isolation. The technical assistance should include dissemination of information about effective efforts to reduce racial isolation, presentations at conferences on the obligation to reduce racial isolation, and on-site assistance to recipients. The effectiveness of such assistance would depend on adequate funding for technical systems and an outreach effort by the OCR to contact districts to offer technical assistance.

c. Compliance Reviews That Ensure Districts are Meeting Their Obligation to Reduce Racial Isolation Under Title VI

The OCR conducts reviews of the civil rights compliance of recipients of federal financial assistance on issues that have a nationwide impact or that are particularly serious.[509] The OCR determines where to conduct compliance reviews based upon information that it receives from parents, the public, education groups, community groups, and the media and targets sites that will impact the greatest number of students.[510] The OCR has found that such reviews supplement the complaint resolution process because they benefit substantial numbers of students when compared to complaints that sometimes only address one student.[511]

506. OFFICE FOR CIVIL RIGHTS, *supra* note 504, at 14.

507. U.S. COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? 8 (2004), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/0e/36.pdf.

508. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: THE PRESIDENT'S 2006 REQUEST 14 (2005), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/0e/3f.pdf (noting that the OCR surpassed its target goals for technical assistance in 2004).

509. OFFICE FOR CIVIL RIGHTS, *supra* note 504, at 10.

510. *Id.*; U.S. COMM'N ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY AND NONDISCRIMINATION FOR STUDENTS WITH LIMITED ENGLISH PROFICIENCY: FEDERAL ENFORCEMENT OF TITLE VI AND *LAU V. NICHOLS* 86 (1997), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/26/51.pdf.

511. OFFICE FOR CIVIL RIGHTS, *supra* note 504, at 10.

Given the low numbers of complaints that have historically been initiated to enforce the disparate impact regulations,[512] an effective effort by the OCR to reduce racial isolation should include compliance reviews on this issue. While the OCR initiated 152 compliance reviews in 1997 and resolved 140 reviews, the OCR initiated 42 compliance reviews in 2008 and resolved 38.[513] The OCR has been criticized for weak monitoring of compliance with Title VI and for devoting inadequate resources to such reviews.[514] Additional staff and resources would have to be allocated to compliance reviews to enable them to be an effective mechanism for encouraging states and districts to reduce racial isolation.

B. The Role of the Courts in Future Efforts to Create Diverse Schools

As many of the Court's leading desegregation decisions had the effect of reconstitutionalizing segregation, it is important to consider the role of the courts in future efforts to promote diverse schools. The Court's decision striking down the race-based student assignment plans in *Parents Involved*[515] will make it exceedingly difficult for school districts to continue to use a racial classification because such efforts are unlikely to survive the Court's current interpretation of strict scrutiny under the Equal Protection Clause.[516] The majority opinion coupled with Justice Kennedy's endorsement of race-neutral efforts to end racial isolation in schools has led some districts to adopt race-neutral approaches to achieve this goal.[517]

If such efforts are to continue, it will be important for the Court to adopt an understanding of the Equal Protection Clause that at a minimum allows districts to pursue such approaches.[518] Under such an understanding of the Equal Protection Clause, school districts would be given wide latitude to adopt race-neutral approaches to student assignment that reduce racial isolation and promote diversity because such efforts will help school districts advance the goals of the Equal Protection Clause while they avoid many of the potential harms of

512. Losen, *supra* note 1, at 271–72.

513. OFFICE FOR CIVIL RIGHTS, *supra* note 504, at 3.

514. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL TITLE VI ENFORCEMENT TO INSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS 198, 215 (1996).

515. 551 U.S. 701, 732–36 (2007).

516. *See* Robinson, *supra* note 6, at 285–94.

517. Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, § 6 (Magazine), at 38, 40, *available at* http://www.nytimes.com/2008/07/20/magazine/20integration-t.html?_r=1; Susan Eaton, *Diversity's Quiet Rebirth*, EDUC. WK., Aug. 18, 2008 (available online only through paid subscription service).

518. *See* Robinson, *supra* note 6, at 351–60.

racial classifications.[519] If the Court were to apply a very demanding interpretation of the requirements of the Equal Protection Clause, the Court could erect a constitutional roadblock to such efforts and further entrench the ways in which its decisions had the effect of reconstitutionalizing segregated schools.[520]

In addition to ensuring the constitutionality of any voluntary efforts to reduce racial isolation in schools, the executive branch would need to make sure that any approach that it adopts is legally defensible. If the executive branch decided to take action to enforce the disparate impact regulations under Title VI by initiating efforts to reduce racial isolation in schools because of the harmful effects of such schools, the Department of Education's reliance on the disparate impact regulations might lead a plaintiff to challenge the validity of these regulations as a valid basis for authorizing the Department's actions. The Court in *Alexander* avoided deciding whether the disparate impact regulations were valid when it held that the Title VI disparate impact regulations did not authorize a private right of action against the Alabama Department of Public Safety's official policy that required drivers' license examinations to be administered in English.[521] The Court was able to avoid deciding this issue because the petitioners did not raise the issue, and the Court was able to decide the case before it without reaching the issue by presuming that the regulations were valid.[522] The Court reached this conclusion by recognizing that Title VI only prohibits intentional discrimination and that the disparate impact regulations could not be enforced through the private right of action that enforces the prohibition against intentional discrimination because the disparate impact regulations forbid action that the prohibition on intentional discrimination permits.[523] The Court then reviewed the statutory Section that authorized the disparate impact regulations and found it void of any intention to create a private right of action.[524] Therefore, the plaintiffs could not enforce the disparate impact regulations through a private right of action.[525]

The rationale for the Court's determination that Title VI did not authorize the creation of a private right of action based upon

519. *See id.*
520. *Id.* at 361.
521. Alexander v. Sandoval, 532 U.S. 275, 279, 293 (2001).
522. *Id.* at 279, 281–82, 286, 293.
523. *Id.* at 281–86.
524. *Id.* at 288–93.
525. *Id.* at 293.

disparate impact suggests that the Court might find the disparate impact regulations invalid.[526] Justice Scalia strongly suggested that the regulations were invalid when he noted "how strange it is" to contend that the disparate impact regulations seek to enforce Title VI's prohibition on intentional discrimination when the prohibition on intentional discrimination "permits the very behavior that the regulations forbid."[527] The opinion suggests that the Court could find the disparate impact regulations invalid under Title VI. However, given the fact that the Court previously held that Title VI is a legitimate exercise of congressional authority under the Spending Clause,[528] Congress could overturn the Supreme Court's invalidation of the disparate impact regulations by enacting an amendment to Title VI that prohibits disparate impact discrimination.[529] Such legislation could include a private right of action to enforce this prohibition. Indeed, legislation that would accomplish this has been proposed in Congress, but the proposed legislation has not been enacted.[530] A Supreme Court decision that invalidated the disparate impact regulations might be sufficient to galvanize enough support to enact such legislation.

If the Supreme Court invalidates the Title VI disparate impact regulations it could undermine efforts to promote diverse schools and further entrench the effect of prior decisions. While Congress could take action to overcome a Court decision that invalidated the disparate impact regulations, this Article's recognition that the

526. *See* John Arthur Laufer, Note, Alexander v. Sandoval *and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1614 (2002).

527. *Alexander*, 532 U.S. at 286 n.6.

528. Lau v. Nichols, 414 U.S. 563, 568–69 (1974).

529. The Supreme Court in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), recently held that a fire department could not discard results from a promotional examination that had a disparate impact on minorities without a "strong basis in evidence" that the fire department would be liable under the disparate impact regulations under Title VII of the Civil Rights Act of 1964 ("Title VII"). *Id.* at 2681. Justice Scalia acknowledged in a separate concurring opinion that the Court's decision delayed the Court's assessment of whether the disparate impact regulations under Title VII are consistent with the Equal Protection Clause, and he acknowledged ways in which the regulations could be inconsistent and thus unconstitutional. *Id.* at 2682–83 (Scalia, J., concurring). For example, Justice Scalia argued that the disparate impact regulations require employers to make race-based decisions that are themselves discriminatory. *Id.* at 2682. Given this concurrence, Justice Scalia might find that congressional enactment of a statute that prohibits disparate impact discrimination violates the Equal Protection Clause's prohibition on intentional discrimination. However, given the refusal of the remaining justices to join his concurrence, Justice Scalia might not be able to garner enough votes to make his view the law of the land.

530. Civil Rights Act of 2008, S. 2554, 110th Cong.; Civil Rights Act of 2008, H.R. 5129, 110th Cong.

Court's prior decisions had the effect of reconstitutionalizing segregation highlights the importance of the Court's role in the development or maintenance of diverse schools. Even if the executive branch leads a renewed effort to create diverse schools, any such effort must consider the potential role of the Court in hindering or supporting such efforts.

CONCLUSION

The effect of many of the Supreme Court's leading school desegregation decisions was to reconstitutionalize segregated schools for minority and White schoolchildren. When coupled with the Court's failure to address school finance inequities,[531] the Supreme Court's decisions laid a constitutional foundation that has led to many minority schoolchildren receiving a separate and inferior education.[532] Moreover, racial isolation in schools is increasing,[533] and thus the future is likely to see more minority schoolchildren in substandard schools.

A renewed federal effort is needed to reverse the growing racial isolation in schools. Given the obstacles that the Court erected to effective school desegregation and the great difficulty that new legislation would face in Congress, such an effort should be led by the President and the Department of Education. To ensure that the nation understands the need to remedy racial isolation in schools, the President should use the bully pulpit to increase public attention to this issue. Then the President should issue an executive order that establishes the blueprint for executive action to promote diverse schools. The President should establish a commission to study and engage the public in a dialogue on these issues and to make policy recommendations. In addition, the President should appoint a presidential advisor that would ensure that the commission's recommendations are implemented.

Among the possible policy reforms, the Department of Education should issue guidance under the Title VI disparate impact regulation that identifies a failure to address racial isolation as a potential violation of the regulation. The Department of Education also should apply a rigorous definition of "educational necessity" that encourages districts and states to consider if they can accomplish their educational goals while simultaneously diversifying their schools. The

531. *See supra* notes 321–30 and accompanying text.
532. Liu, *supra* note 1, at 73; ORFIELD & LEE, *supra* note 1, at 5, 11.
533. ORFIELD & LEE, *supra* note 1, at 3.

OCR should offer technical assistance on how to comply with the disparate impact regulation, and the Equity Assistance Centers also should increase their technical assistance to assist districts in understanding how they can best promote diverse schools. Finally, compliance reviews that enforce the disparate impact regulations would help to ensure that the requirement is satisfied.

The greatest obstacle to a renewed federal effort to promote diverse schools will be garnering the political will to raise and champion this important issue.[534] The political will may only develop—if it develops at all—when the nation understands the many well-documented costs associated with the growing racial isolation in schools and the benefits of diverse school settings.[535] Scholars have also documented the high costs that the nation pays for the disparities in educational opportunities.[536] In the face of such evidence, the executive branch and ultimately the American people may still choose the status quo. Such a choice would further betray *Brown*'s promise of equal educational opportunity and solidify the deeply entrenched inequities that hinder the nation's schoolchildren from reaching their full potential. It is not only schoolchildren but also the entire nation that loses if we fail to address the growing racial isolation and the accompanying inequities in our schools. However, if the political will can be generated, a renewed federal effort to promote diverse schools should be pursued because creating diverse schools has proven to yield important benefits and has enabled many Americans to receive a high-quality education and achieve the American dream.[537]

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534. *See* HOCHSCHILD & SCOVRONICK, *supra* note 318, at 29, 31.

535. *See* ORFIELD & LEE, *supra* note 1, at 1; Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1743 (2007) ("Reform advocates could develop a successful campaign to address inequitable educational opportunities if the nation experienced a wake-up call similar to the one it experienced after the release of the 1983 report *A Nation at Risk* . . . ."); Robinson, *supra* note 6, at 325–36; Wells & Frankenberg, *supra* note 6, at 179–83.

536. *See generally* THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION, *supra* note 402 (suggesting that poor educational opportunities result in lower productivity of the labor force, reduction of incomes and tax revenues, and increased public expenditures on healthcare, crime, and public assistance measures).

537. HOCHSCHILD & SCOVRONICK, *supra* note 318, at 29 ("If it were politically feasible, a continued effort along these [desegregation] lines would be educationally beneficial. Ending legal segregation in schools and other public facilities, fostering real, not just legal, desegregation, did more to move the American dream from ideology to practice than has any other public policy or private effort.").