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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*

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*

Stephen J. Caldas, Ph.D.[*] *and Carl L. Bankston III, Ph.D.*[**]

ABSTRACT

This article re-examines the legal, political, and social history of school desegregation from the *Plessy v. Ferguson*[1] decision of 1896 through the most recent 2007 Supreme Court ruling in the Seattle and Louisville desegregation challenges.[2] We first consider the initial legal rationale and justification for school desegregation that was presented to the Supreme Court in 1954, and look at how rationale shaped its historic *Brown I* decision.[3] Following a critical look at the desegregation experience from *Brown I* and *Brown II*[4] to the turn of the twenty-first century, we consider how the Connecticut Supreme Court case of *Sheff v. O'Neill*[5] set the stage for radical change in the direction of future desegregation litigation. We also

[*] Professor, Department of Foundations, Leadership and Policy Studies, Hofstra University.

[**] Professor, Department of Sociology, Tulane University.

1. Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (holding that facilities for blacks and whites could be "separate but equal" and that the Fourteenth Amendment was not intended to secure social equality).

2. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007).

3. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 494 (1954) (rejecting the "separate but equal" proposition).

4. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (ordering southern school districts to implement *Brown I* with "all deliberate speed").

5. Sheff v. O'Neill, 678 A.2d 1267, 1285 (Conn. 1996) (holding that the legislature must take responsibility to remedy de jure and de facto segregation in public schools).

consider the potential impact on school desegregation of the 2003 *Grutter v. Bollinger*[6] and *Gratz v. Bollinger*[7] Supreme Court decisions involving affirmative action in admissions at the University of Michigan. Finally we weigh the potentially huge impact of the 2007 decision overturning the Seattle and Louisville desegregation plans that used race of students in making school assignment decisions.[8]

I. INTRODUCTION

In this article we take a fresh look at the legal, political, and social history of school desegregation beginning with its antecedents in the *Plessy v. Ferguson*[9] decision of 1896, which legalized racial discrimination through its "separate but equal" holding. We re-visit the legal rationale and justification for school desegregation that was presented to the Supreme Court in 1954, and consider how these arguments shaped its historic *Brown I* decision.[10] We carefully re-examine the half-century of struggle to desegregate America's schools in relation to the larger social and political context within which the desegregation drama was being played out. Our analysis concludes with the most recent 2007 Supreme Court desegregation decisions, which struck down the Seattle, Washington and Louisville, Kentucky desegregation plans that considered the race of students in assignment to schools.[11] Overall, we conclude that coercive desegregation orders in general have not worked, that major Supreme Court desegregation decisions have often been significantly influenced by the social and political milieu of the times, and that top-down efforts to desegregate schools have often exacerbated rather than remedied the racial segregation of schools. Many policy makers fail to understand that schools are the products of the social contexts in which they are situated, and are not easily manipulated as instruments to socially reconstruct society. As for efforts to redistribute students on

6. Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003).
7. Gratz v. Bollinger, 539 U.S. 244, 276 (2003).
8. *Parents*, 127 S. Ct. at 2768.
9. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).
10. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
11. *Parents*, 127 S. Ct. at 2768.

socioeconomic grounds, the history of the socioeconomic balancing of schools is not sufficiently extensive to conclude on empirical grounds that the redistribution of students on socioeconomic grounds rather than racial grounds will not work. However, the logic of our examination suggests that top-down efforts aimed at socioeconomic balancing to desegregate schools will be no more successful than desegregation efforts aimed directly at race have been.

In Section II, we begin our discussion with the "separate but equal" doctrine of *Plessy* to its legal demise in *Brown I*. Then, we create a typology of sorts, and classify the subsequent history of desegregation into six distinct periods, describing key legal, political, and social developments within each time-frame. These periods are:

1) the time span from *Brown I* (and subsequently *Brown II*) to the Civil Rights Act of 1964,[12] when many southern school systems resisted school desegregation (Section III);[13]

2) the "freedom of choice" period immediately following the Civil Rights Act of 1964,[14] when school systems were prodded to begin the process of desegregating schools or face the consequence of losing federal funding (Section IV);[15]

3) the period of more "affirmative" federal involvement in school desegregation beginning with the 1968 *Green* decision (Section V);[16]

4) the period of decreasing federal activism in desegregation starting in the mid-1970s and extending through the 1980s (Section VI);[17]

5) the unitary (i.e., ostensibly "integrated") status era of the late 1980s into the early 2000s, characterized by minimal governmental involvement in school racial composition. During this period the Court facilitated the attainment of unitary

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12. Civil Rights Act of 1964, Pub L. 88-352, 78 Stat. 241 (1964).

13. STEPHEN J. CALDAS & CARL L. BANKSTON, FORCED TO FAIL: THE PARADOX OF SCHOOL DESEGREGATION 28–29 (2007) [hereinafter FORCED TO FAIL].

14. Civil Rights Act of 1964, Pub L. 88-352, 78 Stat. 241 (1964).

15. GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 341 (1969).

16. Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968) (holding that the "freedom of choice plan" failed to satisfy the school board's responsibility to end segregation in schools).

17. Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 745 (1974) (ruling out cross-district desegregation remedies, such as cross-district busing, to further integrate districts charged with de jure violations).

status of desegregating school districts by allowing them to redress past de jure violations "to the extent practicable"[18] (Section VII) and finally;

6) the current and expected trends in school desegregation in the light of significant judicial action by the Connecticut Supreme Court in *Sheff*,[19] the Supreme Court's 2003 rulings on affirmative action in *Grutter*[20] and *Gratz*[21], and its 2007 desegregation rulings in the *Seattle/Louisville*[22] decisions (Section X).

II. PRE-*BROWN* SEGREGATION: THE "SEPARATE BUT EQUAL" DOCTRINE

A. Institutionalization of the Doctrine

By the time of the *Plessy v. Ferguson*[23] "separate but equal"[24] decision of 1896, the white-dominated governments in the South had already largely undone any progress made toward integrating freed blacks into southern society during Reconstruction.[25] In the time after *Plessy v. Ferguson* and before *Brown I*, American history had an uncanny resemblance to the legal Apartheid of South Africa.[26] Jim Crow legislation in states and localities across the South both disenfranchised blacks politically and slowly separated blacks from whites in many social spheres including restaurants, public transportation, and housing.[27] Armed with majority political control, white power-elites who dominated local and state governmental institutions ensured that blacks were politically

18. Bd. of Educ. v. Dowell, 498 U.S. 237, 241 (1991).

19. Sheff v. O'Neill, 678 A.2d 1267, 1275 (Conn. 1996).

20. Grutter v. Bollinger, 539 U.S. 982, 343–44 (2003).

21. Gratz v. Bollinger, 539 U.S. 244, 276 (2003).

22. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007).

23. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

24. The phrase "separate but equal" actually comes from Justice Harlan's dissenting opinion in Plessy v. Ferguson, 163 U.S. at 552 n.29 (Harlan, J., dissenting).

25. RICHARD WORMSER, THE RISE AND FALL OF JIM CROW 29–41 (2004).

26. In 1948, South Africa passed legislation banning mixed-race marriages: the Group Areas Act of 1950 separated blacks and whites and the Separate Amenities Act of 1953 permitted separate buses, hospitals, schools, and universities.

27. DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 26 (1998).

barred from challenging the "separate but equal" doctrine.[28] With the removal of northern troops in 1877 and the end of "Radical Republican"[29] efforts to reconstruct the South, black rights were gradually stripped away and blacks were increasingly relegated to their own institutions and social spheres, separate from whites. Thus, in *Plessy v. Ferguson*,[30] the Supreme Court in a sense simply validated and rendered constitutional the social reality already prevalent throughout most of the South: blacks were indeed "separate."[31] However, allowing states and localities to ignore de facto (actual) segregation problems and adopt de jure (legal) segregation policies opened a Pandora's Box that would take fifty years to legally shut. It was not long after the *Plessy* ruling that legal segregation was extended to schooling. In 1899, the Supreme Court upheld a Georgia school board's action to close a black high school and build two black elementary schools in its place.[32] The only option available for the displaced black high school students was parochial education.[33] In a legal rationale that echoed the states' rights philosophy prior to the Civil War, the Supreme Court did not interfere in the board's decision to prohibit black students from attending the white high school, ruling that the entire issue was a state, not a federal, matter.[34] Nine years later, in the case of *Berea College v. Kentucky*,[35] the Supreme Court upheld a Kentucky law that prohibited educational institutions of higher learning from teaching

28. *Id.* at 154–55.

29. *See generally* HANS LOUIS TREFOUSSE, THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE (1975).

30. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

31. Stephen J. Caldas, *The* Plessy *and* Grutter *Decisions: A Study in Contrast and Comparison*, 67 OHIO ST. L.J. 66, 69 (2006) [hereinafter *The* Plessy *and* Grutter *Decisions*].

32. Cumming v. Sch. Bd. of Richmond County, 175 U.S. 528, 545 (1899).

33. *Id.* "[P]arochial education refers to the schooling obtained in elementary and secondary schools that are maintained by Roman Catholic parishes, Protestant churches or Jewish organizations; that are separate from the public system and that provide education based on sectarian principles." Britannica Online Encyclopedia, Parochial Education, http://www.britannica.com/eb/article-9058547/parochial-education (last visited Oct. 15, 2007).

34. *Cumming*, 175 U.S. at 545 (stating that "any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land").

35. Berea Coll. v. Kentucky, 211 U.S. 45, 58 (1908).

blacks and whites if classrooms for each race were less than twenty-five miles apart.[36] Thus, in the *Berea College* ruling the Supreme Court significantly extended the *Plessy* "separate but equal" doctrine to include institutions of higher education.[37] Still, blacks did maintain their own healthy social and political institutions, most notably the black church[38] and black communities, though separate, remained strong. In 1909, the NAACP was founded by a committee, which included W.E.B. DuBois, to protect blacks from lynching and to defend and extend civil rights to blacks.[39]

B. 1930s-1954: Diminishing the Doctrine of "Separate but Equal"

It was during the 1930s that the first significant legal fissure in the "separate but equal" doctrine appeared. In *State of Missouri ex rel. Gaines v. Canada*, the NAACP mounted a Fourteenth Amendment challenge against a Missouri State Supreme Court ruling that upheld the University of Missouri's law school policy of not admitting blacks.[40] At this time there were law schools for blacks within the state (in other words, there was no "equal" black institution).[41] The Supreme Court overturned the state ruling, arguing that blacks had to be admitted to the all white law school since no "separate" facilities were available for blacks.[42]

World War II marked growing sensitivity among blacks about their inherently unequal status at home as they fought foreign oppression in the European and Pacific theatres only to return to a country where racial discrimination was still practiced on a broad scale.[43] Following the war, black leaders like Walter White of the NAACP and labor organizer A. Philip Randolph publicly demanded an end to the practice of segregated military units.[44] President Truman ultimately

36. *Id.* at 60.

37. *See id.*

38. ERIC C. LINCOLN & LAWRENCE H. MAMIYA, THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE 8 (1990).

39. MINNIE FINCH, THE NAACP: ITS FIGHT FOR JUSTICE 4 (1981).

40. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 342 (1938).

41. State *ex rel.* Gaines v. Canada, 113 S.W.2d 783, 784–85 (Mo. 1937).

42. *Missouri*, 305 U.S. at 352.

43. NORMAN COOMBS, THE BLACK EXPERIENCE IN AMERICA 181–82 (2004).

44. *Id.* at 185.

granted their petition in 1948 when he signed Executive Order 9981, mandating the racial integration of America's armed forces.[45] In 1950, the American military began racially integrating fighting units at the outset of the Korean War.[46]

In that same year, the Supreme Court's decision in *Sweatt v. Painter* dealt an unprecedented legal setback to the "separate but equal" doctrine of *Plessy v. Ferguson*,[47] when the Court recognized that separate schools were not necessarily equal.[48] In *Sweatt*, a black man sued for admission to the University of Texas law school, since there was no Texas law school for blacks.[49] The state of Texas set up a separate law school for blacks and the Texas state courts held that this new law school was "substantially equivalent."[50] Sweatt pressed his case for admission to the all-white University of Texas law school, which prompted the Supreme Court to rule that the new black law school was hardly "equal" to the white law school.[51] The case set a precedent acknowledging that "separate" educational facilities for blacks were not necessarily equal.[52] The reality was that they were almost never equal.[53]

III. BEGINNING THE ERA OF DESEGREGATION: THE *BROWN* DECISIONS

The NAACP hoped that with *Sweatt*, Southern school districts would move to upgrade and equalize black educational facilities. When they didn't, the NAACP launched a frontal assault on the "separate" part of the "separate but equal" doctrine.[54] The *Brown v. Topeka Board of Education*[55] (*Brown I*) decision of 1954 marked the opening shot in the modern school desegregation era, and presaged the Civil Rights Movement. In the case, plaintiff Linda Brown sought

45. Exec. Order No. 9981, 13 Fed. Reg. 4313 (Jul. 26, 1948).
46. COOMBS, *supra* note 43, at 185–86.
47. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).
48. Sweatt v. Painter, 339 U.S. 629, 634–35 (1950).
49. *Id.* at 631.
50. *Id.* at 632 (internal quotation marks omitted).
51. *Id.* at 634–35.
52. *Id.*
53. COOMBS, *supra* note 43, at 190.
54. *Id.*
55. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954).

admittance to an all-white school.[56] The Supreme Court concluded that "[i]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[57] The *Brown* decision declared, in effect, that virtually every public school system in the South was in violation of the law due to their de jure—i.e., legally enforced—racially separate educational systems.[58]

A. The Reasoning Behind Brown

Brown I was elegant in its minimalist simplicity. The decision resulted in a school district plan where "school children irrespective of race or color shall be required to attend the school in the district in which they reside and that color or race is no element of exceptional circumstances warranting a deviation of this basic principle."[59] The plan endorsed both the concept of the colorblindness of Justice Harlan's dissenting opinion in *Plessy*,[60] as well as the concept of every child in a given district attending the same school, which could be construed as an endorsement of neighborhood schools.[61] The gist of the *Brown* ruling was that blacks who lived in the same geographical locality as whites could not legally be prohibited from attending the local school with whites solely on account of their race.[62] This simple colorblind concept was not accepted throughout much of the segregated South, and prompted governors like Jimmy Davis of Louisiana to consider closing down the public schools rather than allow white and black children to be educated together.[63]

When it became clear that simply ordering schools to abide by the Supreme Court's ruling was not enough to change

56. *Id.* at 486.

57. *Id.* at 495.

58. *See id.*

59. Brown v. Bd. of Educ., 139 F. Supp. 468, 469 (1955).

60. In his famous dissent from the majority decision in *Plessy v. Ferguson*, Justice Harlan stated, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

61. Christine J. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36(2) WM. & MARY L. REV. 613, 613–14 (1995) [hereinafter *Convergence of Black and White Attitudes*].

62. *See Brown I*, 347 U.S. at 493–94.

63. LIVA BAKER, THE SECOND BATTLE OF NEW ORLEANS: THE HUNDRED YEAR STRUGGLE TO INTEGRATE THE SCHOOLS 328 (1996).

decades of segregation-like educational practices, the Supreme Court issued a second ruling in 1955, sometimes referred to as *Brown II*.[64] This second ruling ordered districts to desegregate with "all deliberate speed," and charged federal district courts with crafting appropriate remedies and overseeing implementation of the Supreme Court's ruling, marking the beginning of federal judicial involvement in school desegregation.[65]

B. Federal Involvement and Desegregation Orders

As Southern intransigence toward desegregation continued and even deepened,[66] the federal government intervened. In 1957, President Eisenhower took the unprecedented action of ordering National Guard troops to escort nine black children into a formerly all white high school in Little Rock, Arkansas, when Arkansas Governor Orval Faubus defied the court order to desegregate.[67] This audacious federal intervention seemed to simply embolden southern segregationist leaders, some of whom used Little Rock as a rallying cry in their election campaigns.[68] For example, in his 1958 campaign for governor of Mississippi, staunch segregationist candidate Ross Barnett stated, "I would rather lose my life than see Mississippi schools integrated."[69] The Virginia Assembly passed legislation authorizing the closing of any school that allowed blacks and whites to attend together.[70] Then, in 1959, the Prince Edward County school board in Virginia did just that: it shut down the entire school system for five years rather than allow black children to sit next to white children in the same classroom.[71]

Not all Southern white leadership during this era was militantly segregationist (though most Deep South governors

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

65. *Id.*

66. Earl Black, *Southern Governors and Political Change: Campaign Stances on Racial Segregation and Economic Development*, 1950–69, THE J. OF POL. 707 (1971).

67. David L. Kirp, *Retreat into Legalism: The Little Rock School Desegregation Case in Historic Perspective*, 30 THE J. OF POL. SCI. & POL. 443, 443–47 (1997).

68. Black, *supra* note 66, at 715.

69. *Id.* at 710.

70. VA. CODE ANN. § 22-188.3 et seq. (1958), *invalidated by* Harrison v. Day, 106 S.E.2d 636, 646–47 (Va. 1959).

71. Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 221 (1964).

were),[72] with leaders ranging from the segregation or die philosophy of the aforementioned Governor Barnett of Mississippi, to Governor John Connolly of Texas, who southern political expert Earl Black classified as a non-segregationist.[73] Some limited school desegregation in the South began taking place in the early sixties without the need for federal government involvement. For example, New Orleans drew national attention when it finally allowed blacks to attend formerly all-white schools in 1961 (in spite of Governor Davis' segregationist bluster, and white parents who called themselves "the cheerleaders" harassing black children enrolling for the first time in all white schools).[74] Evidence of the coming tidal wave of changes in race relations was presaged by Martin Luther King's "I Have a Dream" speech at the Lincoln Memorial in 1963,[75] which attracted a quarter-million whites and blacks who sought for more full inclusion of African-Americans in mainstream American society.

Although in some cases federal intervention was not necessary, the widespread need for federal involvement led to anti-discrimination legislation that extended to every public school. The Civil Rights Act of 1964 provided advocates with an effective tool to hasten the desegregation of schools against Southern states which continued to be intransigent. With the passage of this act, much began to change. The Civil Rights Act allowed the federal government to withhold federal funding from schools that discriminated on the basis of *race*, religion, or national origins (emphasis added). With the passage of the Elementary and Secondary Education (ESEA) Act of 1965,[76] which included billions of dollars in new federal programs such as Head Start, the Free and Reduced Price Lunch Program, and Title I compensatory educational funds, the feds now had a very big carrot . . . and an equally big stick.[77] School districts

72. Black, *supra* note 66, at 713.

73. *Id.* at 712.

74. BAKER, supra note 63, at 413–15.

75. Martin Luther King, Jr., I Have a Dream Speech, Address at the March (Aug. 28, 1963), in WE HAVE A DREAM: AFRICAN-AMERICAN VISIONS OF FREEDOM 167 (Diana Wells ed., 1993).

76. Elementary and Secondary Education (ESEA) Act of 1965, *Pub. L.* No. 89-10, 79 *Stat.* 77 (codified as amended at 20 U.S.C. § 240 (2000)).

77. We discuss in much more depth how federal government involvement in schools has been steadily increasing in all areas of education since the *Brown* decision in our article, Stephen J. Caldas & Carl L. Bankston, *The Evolution of Federal*

that complied with the law had access to additional funds to help desegregate their schools, but those who did not desegregate risked losing all federal funding.[78]

C. Social Acceptance of Brown *and Desegregation*

The job of breaking down white southern resistance to school desegregation was made ever easier by the changing tides of societal and political attitudes towards civil rights for blacks. Scenes of peaceful civil rights protesters contrasted sharply with images of southern white policemen brutally enforcing segregationist policies against nonviolent white and black resisters. In the early and mid-1960s it was clear to an increasing number of Americans which group had the morally superior position. Memories of burly cops bludgeoning helpless black protesters for merely sitting at the "wrong" restaurant counter were seared deeply into the American collective consciousness. There is empirical evidence that resistance to racial segregation was breaking down throughout the South in the early to mid-1960s. For example, during the period 1962-65 half as many militant segregationist governors were elected in the South as in the previous four year period, compared to a four-fold increase in the number of non-segregationist governors.[79] The way was being prepared for more federal legislation and Supreme Court edicts that would further the desegregation of schools.

In 1964, the Supreme Court ruled against the Prince Edward County school board, ordering the district to reopen schools closed since 1959.[80] The *Griffin* ruling outlawed state action authorizing the closing of schools to avoid desegregation, as well as forbidding districts from publically funding private schools for whites-only.[81]

Involvement in Local Schools, 42 SOCIETY 49–53 (May/June 2005) [hereinafter *The Evolution of Federal Involvement*].

78. Michael B. Wise, *School Desegregation: The Court, the Congress, and the President*, THE SCH. REV. 159, 160 (Feb. 1974); GARY ORFIELD, *supra* note 15, at 319.

79. Black, *supra* note 66, at 716.

80. Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 234 (1964).

81. *See id.*

IV. THE FREEDOM OF CHOICE ERA AND REMEDYING DE JURE SEGREGATION

Within several years after passage of the Civil Rights Act of 1964, most de jure (legally enforced) school segregation came to an end as southern school systems lifted their legal bans on blacks and whites attending school together. The 1960s has been referred to as the "freedom of choice" era in American educational history, since schools remedied de jure segregation by giving students the "choice" about whether or not to attend a school with children from another race.[82] There is evidence to suggest that during the "freedom of choice" period, most southern school systems effectively complied with the 1954 *Brown* decision by dismantling their dual de jure segregated systems based on race.[83] In other words, most southern blacks were no longer barred from attending schools in their district solely on account of their race.

However, freedom of choice did not remedy the long standing effects of de facto segregation (segregation caused by reasons other than legal fiat) in every school. In reality, there was intense social pressure among whites, and to some extent even among blacks, to attend schools populated by students from their own race, which prevented the freedom of choice remedy from causing significant racial integration in schools that were formerly segregated by law.[84] Also, blacks and whites simply tended to live (and still tend to live) in different areas, so attending a school in one's neighborhood district often meant (and often still means) attending a majority one-race school.[85] This de facto segregation of the races is still widespread in many parts of the U.S.[86] In the context of the social activist climate of the late 1960s, and in light of the very influential 1966 study, "The Coleman Report," which suggested that racially integrated schools should help blacks

82. JEFFREY A. RAFFEL, HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION 108–09 (1998).

83. CHRISTINE H. ROSSELL, *The Evolution of School Desegregation Plans Since 1954, in* THE END OF DESEGREGATION? 52 (Stephen J. Caldas & Carl L. Bankston III eds., 2003) [hereinafter *Evolution of School Desegregation*]; *Convergence of Black and White Attitudes, supra* note 61, at 613–63.

84. *Convergence of Black and White Attitudes, supra* note 61, at 615.

85. DOUGLAS MASSEY AND NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 83 (1998).

86. *Id.* at 83–114.

academically,[87] the Supreme Court handed down *Green v. County School Board of New Kent County*[88] in 1968. This decision would have consequences for schools and communities almost as profound as *Brown*, and the current discourse around schools and race "probably owe their intellectual origins to *Green* not *Brown* . . . ."[89] As noted by desegregation expert Christine Rossell, it was *Green* that "decided that eliminating de jure racial discrimination was not enough to establish a unitary system,"[90] and that creating racially mixed schools would be required by school systems even after they had ended the racial discrimination practiced under their former dual-systems.[91]

V. *GREEN*: AN AFFIRMATIVE DUTY TO DESEGREGATE

In *Green,* the Supreme Court ruled that the New Kent County, Virginia school board's "freedom of choice" desegregation plan was neither working nor constitutional.[92] That it was not working, at least as a meaningful desegregation device, was beyond question. As the Court noted, "[i]n three years of operation not a single white child has chosen to attend Watkins school . . . and 85% of the Negro children in the school system still attend the all-Negro Watkins school. In other words, the school system remains a dual system."[93] Neither was the New Kent County school system unique. In systems across the South, and to some extent in the North as well, most whites and blacks attended schools where their race represented 90% or more of the student body prior to the *Green* Decision.[94]

Beyond finding the freedom of choice remedy to de jure segregation inadequate, the Court found that there was an even greater responsibility on schools to desegregate by making

87. JAMES S. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 22 (U.S. Department of Health, Education, and Welfare 1966).

88. 391 U.S. 430 (1968).

89. *Convergence of Black and White Attitudes, supra* note 61, at 616.

90. *Id.*

91. *Id.*

92. Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968).

93. *Id.* at 441.

94. Christine Rossell & David Armor, *The Effectiveness of School Desegregation Plans: 1968–1991*, 3 AM. POL. RES. 267, 271 (1996).

them reach "unitary status" in order to be considered desegregated. This concept was first introduced by Green "as a standard that segregated school systems could strive to attain."[95] In *Green* the Supreme Court ruled that such school boards were "clearly charged with 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* . . . ."[96] Moreover, the Court added that any desegregation plans had to promise "*immediate* progress toward disestablishing state-imposed segregation,"[97] toward the end that systems did not have "a 'white' school and a 'Negro' school, but just schools."[98]

In this holding we see the implicit assumption that had there never been "state imposed" segregation, then schools would have been naturally integrated along racial lines. This is an assumption that both subsequent and previous history (as was the case in segregated northern schools from before *Brown* up till the present time) simply has not and did not justify.[99] From a public policy perspective, the Supreme Court was embarking upon the creation and implementation of a specific policy. An important measure of the success of this policy was the degree to which black and white children occupied the same classrooms, and not, in our estimation, of whether the policy was efficient, politically feasible, or even equitable[100] (let alone constitutional). By their own measures of effectiveness, however, the coercive plans that followed in the wake of the *Green* decision were decidedly none of the above.[101]

Since most Southern school systems had either "white schools or black schools," enforcing the Court's order to *immediately* undo so systemic and ingrained a reality would be the educational equivalent, in our opinion, of the unsettling

95. Gary Orfield, *Turning Back to Segregation*, *in* RACE AND ETHNICITY IN THE UNITED STATES: ISSUES AND DEBATES 135, 149 (Stephen Steinberg ed., 2000).

96. *Green*, 391 U.S. at 437–38 (emphasis added).

97. *Id.* at 439 (emphasis added).

98. *Id.* at 442.

99. *See generally* FORCED TO FAIL, *supra* note 13 (addressing the theme that the roots of racial segregation are cultural and socioeconomic as well as state-imposed).

100. See Christine J. Rossell, *Using Multiple Criteria to Evaluate Public Policies: The Case of School Desegregation*, 21 AM. POL. RES. 155 (1993) for an excellent discussion of how these three evaluation criteria can be used to judge the value of desegregation programs.

101. *Id.*

social revolution then sweeping the country.[102] The *Green* decision listed six facets of school operations where the Kent County School District was racially segregated, and thus still a dual system.[103] The decision stated that

> [r]acial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations - faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part 'white' and part 'Negro.'[104]

These six facets have become known as the "Green Factors," and in order to be declared "unitary," school boards charged with operating dual systems have since had to demonstrate that they have desegregated each of these distinct areas of school operations.[105] The Court decision specifically mentioned re-zoning as a legitimate desegregation tool,[106] seeming to move away from the *Brown I* decision, a ruling which can be interpreted as supporting the concept of neighborhood district schools.[107] With the *Green* decision, the Supreme Court seems to have gone significantly beyond the letter and spirit of the law elucidated in *Brown*. De jure segregated school districts like New Kent County, Virginia and hundreds of others that would follow, were ordered to immediately create desegregated schools at what would ultimately seem to be any cost.[108] *Green* marks the beginning of the period of most active and at times intrusive involvement by the judiciary in the day-to-day

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102. Much has been written about the disruption caused by coercive desegregation orders. *See, e.g.*, CARL L. BANKSTON III & STEPHEN J. CALDAS, A TROUBLED DREAM: THE PROMISE AND FAILURE OF SCHOOL DESEGREGATION IN LOUISIANA (2002) [hereinafter A TROUBLED DREAM]; FORCED TO FAIL, *supra* note 13. The lead author experienced these disruptions first hand as a student in three different systems in three different states that were in the very early phases of racially desegregating, including one school where he was part of a small vanguard of white students bused to a formerly all black school. There were race riots and the very real threat of race riots in two of the three desegregating schools he attended.

103. Green v. County Sch. Bd., 391 U.S. 430, 435 (1968).

104. *Id.*

105. KERN ALEXANDER & M. DAVID ALEXANDER, PUBLIC SCHOOL LAW 913 (2005).

106. *Green*, 391 U.S. at 441.

107. *Convergence of Black and White Attitudes, supra* note 61, at 614–15.

108. See Paul Ciotti, *Money and School Performance: Lessons from the Kansas City Desegregation Experiment*, CATO POLICY ANALYSIS NO. 298 11 (Cato Institute, 1998) [hereinafter *Money and School Performance*], for a study on just how much money a school district could spend in a largely fruitless effort to racially desegregate schools.

operations of local school districts.[109]

VI. THE PERIOD OF SETTING LIMITS TO AFFIRMATIVE DESEGREGATION

The Green decision paved the way to the decade of greatest extension in judicial power over local school districts ordered to desegregate during the 1970s. However, there were also several seminal cases during this era that defined the limits of court action. The *Swann* decision, while legalizing several affirmative desegregation remedies, including busing, also stated that school districts could not be held responsible for racial imbalances caused by demographic factors beyond a school board's control, and "[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of school bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[110] In other words, once a system was declared unitary, it did not need to constantly re-adjust the racial balance of schools according to previously set court ratios.

Among the most pivotal decisions of the 1970s that set judicial restraints was *Milliken I*, which banned cross-district desegregation remedies.[111] The significance of the 1974 *Milliken* Court decision cannot be overstated. The Court of Appeals had ruled with the plaintiffs that in order to meaningfully desegregate the majority black Detroit City School District, cross district busing with the fifty-three majority white suburban districts would be necessary.[112] Had such an action been ruled constitutional and enforced, it is conceivable that the Detroit metropolitan area would look quite different today.[113] With forty years of experience and hindsight

109. *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33, 37 (1990); Davis v. East Baton Rouge Parish Sch. Bd., 721 F.2d 1425, 1441 (5th Cir. 1983); Trahan v. Lafayette Parish Sch. Bd., 244 F. Supp. 583, 588 (W.D. La. 1965).

110. Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1, 4 (1971).

111. Milliken v. Bradley, 418 U.S. 717, 745 (1974).

112. *Id.* at 718.

113. *See generally* FORCED TO FAIL, *supra* note 13 (asserting that where governmental agencies try to orchestrate racial balance in schools through coercion, white flight from the suburbs have demographically transformed the metropolitan landscape).

to inform us, it is highly likely that as lower socioeconomic students filled Detroit's suburban schools, many affluent blacks and whites would have either put their children in nonpublic schools, or fled the Detroit metropolitan area altogether.[114]

More significantly, however, had *Milliken I* been decided in favor of the plaintiffs, a precedent would have been established allowing cross-district busing in many metropolitan areas whose core-cities were found to operate a de jure segregated school system. Thus, not only would the schools and communities of Detroit's metro area have been transformed, but it is possible that the schools and communities surrounding Denver, Boston, Los Angeles, New Orleans, Baton Rouge, Dallas, Houston, the District of Columbia, and many other metropolitan areas would have been radically changed as well.[115] Had this been the judicial decision, it is possible that not only would public schools in Baton Rouge be predominantly poor and African-American today, but so would the schools in its two white majority bedroom communities.[116] These two suburban districts received much of the white flight streaming from Baton Rouge as a consequence of a coercive and disruptive desegregation order, because the fleeing parents preferred the middle class schools beyond the reach of the federal mandate.[117] The Supreme Court's overriding principle established in *Milliken I* was that "the scope of the [desegregation] remedy is determined by the nature and extent of the constitutional violation."[118] In other words, the punishment had to fit the crime.

The principle in *Swann*, which stated that there were limits to judicial reach in dismantling dual school systems, was applied and elaborated upon in the case of *Pasadena City Board of Education v. Spangler*.[119] The Pasadena California school board, which had been found to have unconstitutionally segregated schools, submitted a plan in 1970 that racially

114. *Evolution of School Desegregation*, *supra* note 83, at 60-62.

115. *See generally* FORCED TO FAIL, *supra* note 13.

116. *Id.*

117. Stephen J. Caldas & Carl L Bankston III, *East Baton Rouge, School Desegregation, and White Flight*, 8 RES. IN THE SCHS. 21 (2001) [hereinafter *East Baton Rouge, School Desegregation*].

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

119. 427 U.S. 424 (1976).

balanced all schools in the district.[120] Four years later, however, the original plaintiffs in the case brought suit against the board because the minority population in several schools once again exceeded fifty percent.[121] In reviewing the court of appeals decision, the Supreme Court ruled in favor of the board, which it decreed had no control over the subsequent resegregation of Pasadena's schools.[122] It cited from the earlier *Swann* principle: "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished . . . ."[123]

Importantly, the Court recognized that once a system had in good will imposed a desegregation plan that was approved by all parties in a case,[124] the district could not be held accountable for subsequently shifting racial compositions of schools resulting from changing residential demographics.[125] Had the Court ruled differently, the desegregation histories of many districts could have evolved radically different than was the case. The disruptive and incoherent desegregation experience of East Baton Rouge Parish (EBR), a district that did indeed spend years fruitlessly chasing ever-elusive target racial ratios,[126] may have been a far more typical case.

VII. MOVING FORWARD ON JUDICIALLY IMPOSED DESEGREGATION

A. More Aggressive Approaches to Desegregation

The Supreme Court case of *Swann v. Charlotte-Mecklenburg Board of Education*,[127] handed down in 1971, had elements that were remarkably practical, like for instance the

120. *Id.* at 425.

121. *Id.* at 431.

122. *Id.* at 435.

123. *Id.* at 436 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31–32 (1971)).

124. The court ruled that the Oklahoma City School Board had likewise acted in good faith in implementing a court-ordered desegregation plan and was ruled to be unitary in *Board of Education v. Dowell*, 498 U.S. 237, 249 (1991).

125. *Spangler*, 427 U.S. at 436–37.

126. *East Baton Rouge, School Desegregation*, *supra* note 117, at 21–32.

127. 402 U.S. 1 (1971).

acknowledgement that districts should not be required to constantly adjust school racial ratios as a consequence of changing demographics beyond their control. Other elements of the ruling, though, would ultimately prove to be unrealistic and even destructive. *Swann* was the Supreme Court's first explicit endorsement of busing as a legal remedy to end racial desegregation in formerly de jure segregated school districts.[128] Additionally, the justices in the *Swann* ruling upheld the constitutionality of "pairing" and "grouping" of noncontiguous school zones (gerrymandering), endorsed majority to minority transfers with mandatory transportation, and allowed the use of racial target ratios as desegregation tools.[129] In *Swann*, the "moral momentum" of the civil rights movement reached a pinnacle with regards to the Court's actual manipulation of schools as instruments to redesign not only attendance zones, but society itself.[130] The sheer speed and weight of the movement carried individuals and groups along for a ride that was not always easy to steer or resist.

B. Expanding the Definition of De Jure Segregation

The 1973 Supreme Court desegregation ruling in *Keyes v. School District No. 1, Denver, Colorado*[131] was the first to involve a non-Southern school district. The Supreme Court significantly expanded judicial involvement and oversight in local school district affairs through its holding in this case when it found that the Denver school district—which had never operated an explicitly de jure racially dual system—was in fact a dual system due to racially segregative practices that affected a *substantial* portion of the city's student body.[132] After *Keyes* it became easier to find that non-Southern school districts were guilty of operating dual de jure systems, though there may have been no formal history of school segregation, and though racially segregative practices did not affect all of a district's students. In short, with *Keyes* the Court extended the

128. *Id.* at 29–30.

129. *Id.* at 25.

130. Whereas *Brown* was revolutionary in ordering districts to allow students to attend schools in their neighborhoods without regards to race, *Swann* was revolutionary in actually forcing students to attend governmentally designated schools (which were not necessarily neighborhood schools) based on their race.

131. Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 191 (1973).

132. *Id.* at 201.

definition of de jure segregation to include situations where state imposed segregation was less obvious.[133] The Court ruled that the Denver school board "by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools . . . ."[134]

The *Keyes* case thus expanded the definition of de jure segregation to include school systems across the entire United States, provided it could be proven that "school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities with the school system . . . ."[135] On the one hand, the Courts were finally acknowledging the reality that racial discrimination in educational opportunities for blacks and Hispanics, however subtle the discrimination, was not just limited to the South. On the other hand, the vast judicial efforts to redesign school districts that had focused on the South would now take on a more national scope. School districts charged with racial discrimination were almost always found guilty of de jure segregation if any actions the district took tended to increase racial segregation, like building a black school in the center of a black community.[136] According to at least one well-known desegregation scholar, simply the existence of racially identifiable schools was in itself sufficient evidence of a discriminatory and culpable system, even if one-race schools were simply the result of a "neighborhood school policy."[137] In order to be declared unitary on the *Green* factor of "student assignment," Northern and Western school systems ordered to desegregate were, like their Southern counterparts, mandated to achieve, and in some cases maintain, certain specific racially balanced ratios.[138] This would prove an almost impossibly elusive feat, just as similar racial juggling acts had

133. *Id.* at 210–12.

134. *Id.* at 191.

135. *Id.* at 201.

136. *Evolution of School Desegregation*, *supra* note 83, at 54.

137. *Convergence of Black and White Attitudes*, *supra* note 61, at 614–15 (stating that neighborhood schools were "race neutral because students were assigned to schools on the basis of their residence, not their race").

138. *Evolution of School Desegregation*, *supra* note 83, at 54.

failed throughout much of the South.[139]

C. White Backlash Against the New Approaches

Shortly after *Keyes* the Boston school district was found guilty of de jure segregation in 1974, and was ordered to implement a mandatory student reassignment plan.[140] The reassignment plan was probably the most extensive plan based on race in U.S. history.[141] Following rioting and bus burnings,[142] whites began fleeing the system by the thousands, never to return.[143] The percent of white students in the average minority child's classroom in Boston decreased every single year from the beginning of forced busing in 1974, where it was 57% white, to the turn of the twenty-first century when it went to 15%.[144] The Boston school system was at last declared unitary in 1989.[145] Following the end of race-based school assignments in 2000 (a practice abandoned due to a parent-initiated lawsuit),[146] the Boston school system was sued again in 2002. It was sued for still considering the race of students in school admissions—only now it was accused of discrimination against white and not black students.[147]

D. Problems with Governmental Remedies to Social Inequality

The imposition of change by governmental agencies, while it resulted in sometimes necessary change, overlooked the fact that schools are not just expressions of political goals, but social environments embedded in' American social networks and structures.[148] Policies like forced busing cannot succeed if

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139. *See* FORCED TO FAIL, *supra* note 13, at 155–79 (documenting the failure of desegregation orders to maintain racial balance in a sample of several well-known non-southern districts including Indianapolis, Los Angeles, Milwaukee, and New York).

140. *Evolution of School Desegregation*, *supra* note 83, at 59–62.

141. *Id.* at 60.

142. *See generally* JACK TAGER, BOSTON RIOTS: THREE CENTURIES OF SOCIAL VIOLENCE (2001).

143. *Evolution of School Desegregation*, *supra* note 83, at 60–62 (documenting white flight as a direct result of Boston's desegregation plan).

144. *Id.* at 62.

145. *Id.*

146. McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001, 1003 (D. Mass. 1996).

147. Boston's Children First v. Boston Sch. Comm., 183 F. Supp. 2d 382. 382 (D. Mass. 2002).

148. FORCED TO FAIL, *supra* note 13, at 73.

they are inconsistent with social trends or the interests of social groups and communities, at least not in democratic societies where individuals have the means to choose alternative courses of action other than the undesirable government plan.[149] Certain central beliefs stemming from the idealism of the Civil Rights Era, like the idea that all schools should be racially balanced, became institutionalized in governmental policy and judicial rulings like *Green*, *Swann*, and *Keyes*. As in the case of researcher David Armor discussed below, this reality made it increasingly difficult to voice opposition to unproductive policies without seeming racist, narrow-minded, or cold-hearted.[150] However, it did not stymie the silent opposition of white and middle-class flight from school districts under coercive desegregation orders.[151] James Coleman, the very researcher whose influential study had been used to justify coercive desegregation techniques like busing, reluctantly arrived at this sober conclusion in the mid-1970s.[152]

The case of Professor David Armor in 1971-72 provides a sense of how the popular assumptions of the civil rights paradigm, like the efficacy of busing, influenced the political climate in academia.[153] Armor, who was an associate professor at Harvard University in the early 1970s, was told by the *Harvard Education Review* that his Boston desegregation study could not be published because the journal had just published a previous controversial article on race, and did not want to follow it up with yet another controversial piece—regardless of its merit.[154] Armor's study found that a sample of black students in Boston were not benefiting from the huge

149. *Id.* at 109 (discussing in detail the political economy of American schooling and the strategies families use to choose their children's schools).

150. *See generally* SHELBY STEELE, WHITE GUILT 105 (2006) (discussing the psychological pressures prohibiting whites, in particular, from voicing opposition to any programs initiated during the Civil Rights movement).

151. *See* FORCED TO FAIL, *supra* note 13, at 135 (studying the implementation of desegregation court orders in fifteen separate school districts, and documenting significant white flight as a consequence of these court-ordered plans in the large majority of these cases).

152. James S. Coleman, *Trends in School Integration*, 4 EDUC. RES., 3, 9 (1975).

153. David Armor, *Reflections of an Expert Witness*, *in* THE END OF DESEGREGATION? 3, 4–5 (Stephen J. Caldas & Carl L. Bankston III eds., 2003) [hereinafter *Reflections*].

154. *Id.* at 4.

busing experiment.[155] He was told not that his study was flawed, but that his findings were too controversial.[156] However, Armor had a chance meeting on an airplane with then Senator Daniel Patrick Moynihan,[157] who knew from first-hand experience how a study with unpopular findings involving race could generate heated controversy.[158] Moynihan listened to Armor's story and then encouraged him to submit his article to the more widely circulated *Public Interest,* which agreed to publish Armor's findings.[159] Armor's evidence that busing was not working briefly created a national buzz and prompted an academic adversary at Harvard to go as far as stealing his data.[160] Even the respected sociologist James S. Coleman came under fire for publishing his empirical 1975 article, which questioned the wisdom of busing students if the end result was white abandonment of public schools.[161] According to Nobel Prize winning economist Gary S. Becker, "Some prominent members of the American Sociological Association moved to have Coleman expelled for daring to reach this conclusion."[162]

One of the most counter-productive desegregation orders ever handed down by a federal district court was foisted upon the East Baton Rouge Parish School Board (EBR) in *Davis v. East Baton Rouge Parish School Board* in the early 1980s.[163] When it settled in 2003, *Davis* was the longest running desegregation lawsuit in U. S. history.[164] *Davis* represents perhaps the greatest extent of judicial reach in the half century of U.S. district court rulings because the EBR system was

155. *Id.*

156. *Id.*

157. *Id.* at 4–5.

158. DANIEL P. MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 17, 29 (U.S. Department of Labor 1965) (concluding in a controversial report that the black family was disintegrating, and that this demographic factor was one of the root causes of "the tangle of pathologies" affecting black Americans).

159. *Reflections*, *supra* note 153, at 4; David Armor, *The Evidence on Busing*, 28 THE PUB. INT. 90 (1972).

160. *Reflections*, *supra* note 153, at 3–23. *See* Editorial, *Dangerous Orthodoxy*, N.Y. TIMES, July 5, 1972.

161. *See* Coleman, *supra* note 152.

162. Obituary, *James Coleman, Sociology*, 14 THE U. OF CHI. CHRON., Mar. 30, 1995.

163. Davis v. E. Baton Rouge Parish Sch. Bd., 721 F.2d 1425, 1441 (1983).

164. *Id.*

micro-managed by a federal court judge over a period of approximately twenty years. The system was ordered almost yearly to continuously re-adjust school zones, bus schedules, and target racial ratios in a completely fruitless attempt to meaningfully desegregate the schools.[165] This Louisiana episode is a reminder of just how disruptive and ultimately destructive judicial micro-management of a system could be. Even as whites fled with each judicially ordered desegregation remedy, the EBR school system was constantly ordered to adjust school zones throughout a quarter century in a futile effort to achieve certain court-mandated racial ratios.[166] The EBR system went from 69% white the year prior to forced busing and school rezoning, to only 20.5% white twenty-four years later when the system was finally declared, somewhat ironically, to be racially "unitary."[167]

The Baton Rouge desegregation experience seems a prime example of what can happen when the interests of the community are ignored for un-realistic and unattainable ideals. Indeed, two largely middle-class adjoining suburban school districts of Baton Rouge owe their astounding growth and prosperity in part to white flight caused by the desegregation debacle in EBR.[168] As for the quality of the school system left behind in the wake of Baton Rouge's fleeing middle-class, desegregation expert Christine Rossell observed, "I do not believe that I have ever been in a school system where the schools were in such poor condition as a result of taxpayer non-support."[169]

VIII. THE RISE OF SOCIOECONOMIC REDISTRIBUTION THROUGH SCHOOLS

The federal government not only deemed efforts to

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165. *East Baton Rouge, School Desegregation*, *supra* note 117, at 24–25.

166. *Id.* at 26.

167. *Id.* at 23 (outlining the desegregation experience of East Baton Rouge). The most recent student enrollment data by race was obtained from the ANNUAL FINANCIAL AND STATISTICAL REPORT produced by the Louisiana Department of Education and available on-line at http://www.doe.state.la.us/lde/uploads/7558.pdf.

168. *East Baton Rouge, School Desegregation*, *supra* note 117, at 26 (analyzing the direct influence of EBR's desegregation order on the phenomenal growth of the Ascension and Livingston Parishes); *see generally* A TROUBLED DREAM, *supra* note 102.

169. CHRISTINE H. ROSSELL, IMPROVING THE VOLUNTARY DESEGREGATION PLAN IN THE BATON ROUGE SCHOOL SYSTEM 6 (Oct. 27, 1999).

redistribute the social capital of middle class America through the assignment of its children to schools populated by disadvantaged minority children as constitutional, but it also weighed in on the redistribution of educational funding. The Supreme Court in its 1973 ruling in *San Antonio Independent School District v. Rodriguez* first addressed the issue of inequitable district funding as a violation of the Fourteenth Amendment Equal Protection clause.[170] In *Rodriguez*, the plaintiffs argued that poorer districts, which were heavily populated by minorities, could not fund schools to the same level as richer districts, which could raise more money through property taxes.[171] The Supreme Court ruled in favor of Texas, stating that "the Texas system does not operate to the peculiar disadvantage of any suspect class."[172] The Court added that inequitable education funding was not a violation of the Fourteenth Amendment since, "[e]ducation, of course, is not among the rights afforded explicit protection under our federal constitution."[173] Thus, this school finance issue appeared settled, and at the time similar cases against other states were dropped.[174] However, in *Rodriguez* the Court did not close the door on challenges that inequitable school district funding might violate *state* constitutions that *did* explicitly guarantee the rights of citizens to an equal education.[175]

Following *Rodriguez*, several state supreme court cases found that unequal funding of local school districts, as a consequence of the unequal distribution of wealth, was a violation of state law. Among the more celebrated cases were the California case of *Serrano v. Priest*,[176] and the Texas case of *Edgewood Independent School District v. Kirby*.[177] Moreover,

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170. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973).

171. *Id.* at 5.

172. *Id.* at 28.

173. *Id.* at 35. The Constitution makes no reference to education. Thus, the Tenth Amendment has typically been interpreted by courts and policy makers as giving to states the primary responsibility of deciding how to deliver educational services to their citizens. *See The Evolution of Federal Involvement in Local Schools*, *supra* note 77, at 49–53.

174. *E.g.*, Shofstall v. Hollins, 515 P.2d 590 (1973); Milliken v. Green, 203 N.W.2d 457 (Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973).

175. KERN ALEXANDER & M. DAVID ALEXANDER, PUBLIC SCHOOL LAW 807 (2004).

176. Serrano v. Priest, 5 Cal. 3d 584, 619 (1971).

177. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 399 (Tex.1989).

in *Papason v. Allain*,[178] the Supreme Court seemed to backtrack a bit on its earlier *Rodriguez* decision. The Court ruled that the plaintiffs' charge against the state of Mississippi for inequitably distributing state funds from sixteenth section lands[179] to local districts was indeed a Fourteenth Amendment equal protection issue.[180] The distinctions made by the Supreme Court justices in these two funding cases seem minute, and are perhaps even a question of legal hair-splitting. In actuality, the Court's position in *Papason* could be construed as a shift in favor of plaintiffs' charges that unequal district wealth needed to be more fairly distributed to provide more equitable educational outcomes.[181] Since *Rodriguez*, many state education funding programs have been challenged as inequitable under either federal or state law.[182] The most recent funding-related case in Connecticut, discussed *infra*, linked the state constitutional provision for equitable educational opportunities to both funding and the socioeconomic integration of certain student groups.[183] The courts have been fairly evenly split against plaintiff school districts and state defendants, with a trend toward more judicial scrutiny of state legislative disbursement of educational monies.[184]

The Supreme Court desegregation case of *Freeman v. Pitts* specifically addressed equitable funding when it established a "seventh" factor to *Green's* six factors for determining unitary status.[185] This seventh factor was termed "quality of education,"[186] which included "certain educational resources" such as teacher qualifications and experience, library books, student outcomes as measured on standardized tests, and "per pupil expenditures."[187]

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178. Papason v. Allain, 478 U.S. 265, 285–86 (1986).

179. The Land Ordinance of 1785, passed by the Continental Congress, set aside the sixteenth section of each surveyed township for school purposes. *See* United States v. Wyoming, 331 U.S. 440, 443 (1947).

180. *Papason*, 478 U.S. at 282.

181. ALEXANDER, *supra* note 105, at 800–01.

182. *Id.* at 806–09.

183. Sheff v. O'Neill, 678 A.2d 1267, 1337 (1996).

184. *See* ALEXANDER, *supra* note 105, at 806–08.

185. Freeman v. Pitts, 503 U.S. 467, 482 (1992).

186. *Id.*

187. *Id.* at 482–84.

The Kansas City, Missouri School District (KCMSD) is an extreme case that highlights the occasional absurdities associated with futile attempts to reduce the black-white achievement gap in efforts to seek unitary status. In *Missouri v. Jenkins*, the district court judge's directive to the KCMSD to spend two billion dollars over a twelve-year period was upheld by the United States Supreme Court.[188] Since the local district was virtually bankrupt due to white flight and the failure of voters to pass school tax increases, a federal judge held the state partially liable for both the segregated school system and the cost to fix it.[189] The federal judge also ordered the local property taxes doubled, and an income tax surcharge on all those working in Kansas City but living elsewhere.[190] The Supreme Court ruled that such draconian measures were constitutional and necessary to overcome state sponsored segregation.[191] According to a very thorough Cato Institute policy analysis of the KSMSD desegregation spending program,

Kansas City spent as much as $11,700 per pupil—more money per pupil, on a cost of living adjusted basis, than any other of the 280 largest districts in the country. The money bought higher teachers' salaries, 15 new schools, and such amenities as an Olympic-sized swimming pool with an underwater viewing room, television and animation studios, a robotics lab, a 25-acre wildlife sanctuary, a zoo, a model United Nations with simultaneous translation capability, and field trips to Mexico and Senegal. The student-teacher ratio was 12 or 13 to 1, the lowest of any major school district in the country.[192]

According to the gist of the Cato study, in the ensuing twelve years in the KSMSD, white flight continued, black achievement was no better, and the black-white achievement gap had not been reduced.[193] Even the original federal court judge on the case had to admit that the massive spending had made little difference in school achievement, and that the district had done everything in its power to undo vestiges of

188. Missouri v. Jenkins, 495 U.S. 33, 55 (1990).
189. Jenkins v. Missouri, 672 F. Supp. 400, 408 (W.D. Mo. 1987).
190. *Id.* at 413.
191. Missouri v. Jenkins, 495 U.S. 33, 54 (1990).
192. *Money and School Performance*, *supra* note 108, at 1.
193. *Id.*

past de jure segregation.[194] In *Jenkins II*, the Supreme Court ultimately restricted the federal court's far-reaching powers in the case, ruling unconstitutional the use of state funds to raise KSMSD teacher salaries to higher levels than the surrounding districts.[195] *Jenkins II* also ruled that the district did not have to raise minority achievement scores to the national average to meet the "quality of education" desegregation target, but only undo that part of the black-white achievement gap caused by previous de jure segregation.[196] In 2003, the new judge on the case declared the school system was unitary when he ruled that the black-white achievement gap had been sufficiently reduced, undoing all vestiges of the past de jure injury.[197]

As we see in the KSMSD, economic redistribution in school desegregation efforts often did not deliver the promised equality of educational outcomes. Indeed, it is difficult to find any specific instances where school desegregation worked according to plan.[198] More generally, Erik Hanushek's thorough research on educational inputs and outputs finds only a weak correlation between educational spending on the one hand, and higher student achievement on the other.[199] His meta-analyses suggest the limits of resource reallocation efforts to reduce what still remains a sizable minority-white achievement gap into the twenty-first century.[200] Thus, we see that the high hopes some idealistic policy makers had of erasing educational inequality through both the redistribution of students via aggressive desegregation plans, and the efforts to redistribute school funding, fell far short of expectations.[201]

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194. Jenkins v. Missouri, 672 F. Supp. 400, 403 (W.D. Mo. 1987).

195. Missouri v. Jenkins (*Jenkins II*), 515 U.S. 70, 71 (1995).

196. *Id.* at 101.

197. Tracy Allen, *Judge Grants School District Unitary Status*, THE CALL, Aug. 15, 2003, http://www.kccall.com/news/2003/0815/Front_Page/027.html (last visited Oct. 9, 2003).

198. *See generally* FORCED TO FAIL, *supra* note 13. We investigated many of the most celebrated desegregation cases, discussed case by case in chapter 7, and did not identify even one that achieved the goals of racial balance and educational equity for all students, regardless of race.

199. *See* Eric A. Hanushek, *Assessing the Effects of School Resources on Student Performance: An Update*, 19 EDUC. EVALUATION & POL'Y ANALYSIS 141–64 (Summer 1997); Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. OF ECON. LITERATURE 1141–77 (Sep. 1986).

200. Hanushek, *Assessing the Effects*, at 141.

201. *See* FORCED TO FAIL, *supra* note 13, at 114–17.

IX. THE WEAKENING OF UNITARY STATUS AND THE END OF OVERSIGHT

From early in the American school desegregation drama, some school districts' desegregation plans, like those for districts such as Iberia Parish, Louisiana in 1970, were deemed adequate under a unitary status analysis to undo previous vestiges of de jure segregation, and were released from federal judicial oversight.[202] At the other extreme were systems like Lafayette Parish, Louisiana, which was just granted unitary status in April 2006 after forty-one years of court supervision.[203] The Supreme Court itself recognized the importance of local control over schools, stating in *Board of Education of Oklahoma City v. Dowell* that "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."[204] In the same ruling, the Court stressed that desegregation orders were meant to be temporary, and not extended indefinitely to address changing community racial characteristics.[205]

The process by which a formerly "dual system" school board could be declared "unitary" had to be worked out in the courts on a case-by-case basis. The parameters set forth in the 1968 *Green* decision[206] were among the first specific guidelines for determining whether or not a system could be declared unitary.[207] An issue that arose early on was the length of time that the federal district courts could exercise oversight after a school system came into compliance with the court-ordered plan.[208] In 1961, Oklahoma City was charged with operating a dual segregated school system, and eleven years later, in 1972, it was found to still have vestiges of its dual system in place.[209]

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202. Henderson v. Iberia Parish Sch. Bd., 245 F. Supp. 419, 422 (1965).

203. Sebreana Domingue, *Desegregation Case Closure Brings a New Day*, DAILY ADVERTISER, Apr. 25, 2006, at A1; *see* Stephen J. Caldas & Carl L. Bankston, *An Evaluation of the Consequences of School Desegregation in Lafayette, Louisiana*, 10 RES. IN THE SCHS. 41, 41–52 (2003) (studying the effects of the long running Lafayette, Louisiana desegregation suit).

204. Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991).

205. *Id.* at 241.

206. Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968).

207. *Id.* at 435.

208. Dowell v. Sch. Bd. of Okla. City Pub. Sch., 219 F. Supp. 427, 447 (1963).

209. Dowell v. Bd. of Educ. of the Okla. City Pub. Sch., 465 F.2d 1012, 1016 (1972).

The court ordered the board to adopt a more stringent desegregation remedy, which the board faithfully implemented to the satisfaction of the court.[210]

Five years later, in 1977, the district court released the Oklahoma City school system from court oversight, ruling that substantial compliance with the constitutional requirements had been achieved.[211] However, five years later another suit was filed against the board to reopen the case, due to a new student assignment policy that the board adopted.[212] The case eventually wound its way to the Supreme Court in *Board of Education of Oklahoma City v. Dowell*, which ruled that since Oklahoma City had been decreed unitary, the case could not be reopened unless the school system was found, once again, to be in violation of the equal protection clause of the Fourteenth Amendment.[213] The Court declared that "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination"[214] and "such decrees . . . are not intended to operate in perpetuity."[215] Another important principle elucidated by the Supreme Court in the *Oklahoma City* case was that districts only had to eliminate vestiges of past de jure discrimination "to the extent practicable."[216] This would seem to rule out some of the more outlandish plans, such as the Kansas City plan, which cost $2 billion, but failed to reach its target goal of raising black achievement to the national norm.[217]

Another major issue resolved in the 1990s was whether or not a system could be released piecemeal from court supervision. In other words, could a system be freed from court oversight on one or more *Green* factors, while the courts continued supervision on those factors not yet adequately addressed? In the case of *Freeman v. Pitts*, the DeKalb county school system had achieved its racial balancing goal in the first year of implementation, but due to subsequent, dramatic

210. Dowell v. Bd. of Educ. of the Okla. City Pub. Sch., 606 F. Supp. 1548, 1551 (1985).

211. *Id.*

212. Bd. of Educ. v. Dowell, 498 U.S. 237, 241 (1991).

213. *Id.* at 246.

214. *Id.* at 247.

215. *Id.* at 248.

216. *Id.* at 250.

217. *Money and School Performance*, *supra* note 108, at 13.

demographic shifts in the county, could not meet its stated objective in each of the following sixteen years.[218] Still, the district court declared that the DeKalb county system was unitary in student assignment, since the system had undone the previous de jure injury.[219] The court also declared the system unitary on every other *Green* factor except teacher assignment and resource allocation.[220] The case was appealed by both parties, and eventually landed on the Supreme Court's docket, which ruled that desegregating systems could be released piecemeal from judicial oversight.[221] The Supreme Court went on to affirm that systems could not be held accountable for shifts in residential housing patterns beyond their control, and that "[r]acial balance is not to be achieved for its own sake,"[222] seeming to backtrack on the redistribution approach of earlier, more coercive desegregation orders.[223]

In 1999, a federal district court judge ruled that the Charlotte-Mecklenburg System (CMS) was at last unitary on student assignment, and could no longer use race-based student assignment to schools or school programs.[224] Ironically, the system was declared unitary after the parents of a white child filed a lawsuit claiming that the district was discriminating against their child based on race.[225] The six year old was refused admittance to a gifted program because "*slots reserved for one race will not be filled by students of another race.*"[226] The Fourth Circuit Court of Appeals eventually upheld the lower court ruling.[227] The court of appeals ruling was itself appealed to the Supreme Court, which refused to hear the case.[228] On closer examination, though, the CMS system was not as desegregated as it appeared on paper, as it had practiced extensive student tracking, thus recreating

218. Freeman v. Pitts, 503 U.S. 467, 478 (1992).
219. *Id.* at 492.
220. *Id.* at 482.
221. *Id.* at 492.
222. *Id.* at 494.
223. Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968).
224. Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228, 232 (1999).
225. *Id.* at 284.
226. *Id.* at 287 (emphasis in original).
227. Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 312 (4th Cir. 2001).
228. Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 535 U.S. 986 (2002).

segregation within its school system.[229] Moreover, as soon as the CMS schools were declared unitary, the system began to resegregate almost immediately,[230] suggesting that without coercive court oversight many parents were not interested in the court's vision, and had only been reluctantly complying with it. Additionally, there remains an enormous black-white achievement gap among CMS students,[231] though one of the explicit justifications for attempting to desegregate the system in the first place was to close this gap.[232]

X. DESEGREGATION ENTERS A CONTENTIOUS FUTURE

A. Connecticut and Missouri

After more than half a century of judicially mandated school desegregation efforts, the early lofty vision of the Supreme Court to not have "a 'white' school or a 'black' school, but just schools"[233] has still not been fully realized, and indeed, based on resegregation patterns, may be more elusive than ever.[234] What does the future of desegregation litigation hold? The Connecticut case of *Sheff v. O'Neill*, and its tentative settlement in 2003 may provide a glimpse into the new age of desegregation type litigation.[235] In this unique case, the Connecticut Supreme Court potentially opened up a new era in school desegregation by ruling that the Hartford public school system violated students' rights by not providing an equal educational opportunity to its largely poor black and Hispanic

229. Roslyn Arlin Mickelson, *White Privilege in a Desegregating School System: The Charlotte-Mecklenburg Schools Thirty Years After Swann*, *in* THE END OF DESEGREGATION? 106, 106 (Stephen J. Caldas & Carl L. Bankston III eds., 2003).

230. STEPHEN SAMUEL SMITH, BOOM FOR WHOM? EDUCATION, DESEGREGATION AND DEVELOPMENT IN CHARLOTTE 60 (2004).

231. CHARLOTTE-MECKLENBURG SCHOOLS PERCENT OF STUDENTS AT ACHIEVEMENT LEVELS FOR END-OF-COURSE TEST RESULTS (2007), http://www.cms.k12.nc.us/departments/instrAccountability/EOC06-07/2007EOCDistrictAll.pdf (showing only 49.8% of black students in the CMS scored at proficient levels, compared to 83.6% of white students).

232. SMITH, *supra* note 230, at 203.

233. Green v. County Sch. Bd., 391 U.S. 430, 442 (1968).

234. Amelia E. Lester, *Still Separate After All These Years?*, HGSE NEWS, May 1, 2004, http://www.gse.harvard.edu/news/features/orfield05012004.html.

235. Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996).

students, as prescribed in the state's constitution.[236] In *Sheff*, the court ruled that the de facto racial, ethnic, and economic segregation of Hartford's schools was unconstitutional, and ordered cross-district desegregation remedies to rectify the racial and ethnic segregation of the capital city's schools.[237]

Sheff removed the desegregation issue from the federal courts and made it a state issue —placing on the state of Connecticut the onus of providing an equal educational opportunity to all Connecticut students in accord with the state constitution.[238] The plaintiffs brought the case against the Hartford school district in 1989, and the Supreme Court of Connecticut ruled in favor of the plaintiffs in 1996, ordering Hartford's schools to desegregate.[239] In 2003 the plaintiffs in the case won a partial victory, with the Connecticut Supreme Court awarding a tentative settlement of $45 million to the impoverished Hartford district over a four-year period to decrease de facto racial and economic segregation.[240] However, the state of Connecticut's Office of Fiscal Analysis estimated that the cost of the desegregation remedies, which included building two new magnet schools[241] per year for four years, was likely to soar to $89 million dollars,[242] an amount that proved to be an underestimate.[243]

Since the case focused on both de facto and socioeconomic segregation, *Sheff* could inspire similar lawsuits against other states in which districts are segregated into rich and poor, but have been exempt from desegregation litigation due to there being no history of de jure segregation. *Sheff* could also

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236. *Id.* at 1281–82.

237. *Id.* at 1290.

238. *Id.* at 1281–82.

239. *Id.*

240. CONNECTICUT OFFICE OF LEGISLATIVE RESEARCH, QUESTIONS ABOUT SHEFF V. O'NEILL SETTLEMENT (Feb. 13, 2003), http://www.cga.ct.gov/2003/olrdata/ed/rpt/2003-R-0214.htm.

241. "'Magnet schools,' as generally understood, are public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality." Missouri v. Jenkins, 495 U.S. 33, 40 n.6 (1990) (citing Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL'Y REV. 291 (1987)).

242. CONNECTICUT OFFICE OF LEGISLATIVE RESEARCH, *supra* note 240.

243. *Lawmakers Won't Vote on Sheff Settlement*, BOSTON GLOBE, July 21, 2007, *available at* http://www.boston.com/news/education/k_12/articles/2007/07/21/lawmakers_wont_vote_on_sheff_settlement.

conceivably inspire lawsuits against systems that have eliminated vestiges of de jure segregation, but are still socioeconomically segregated. According to Richard Kahlenberg, this could potentially re-open the legality of cross-district busing,[244] something ruled unconstitutional for racial desegregation purposes in the 1974 *Milliken I* case.[245] More recently, Kahlenberg has argued that metropolitan socioeconomic desegregation remedies could be entirely defensible, and could free plaintiffs from previous federal court rulings which severely limited desegregation strategies based on race.[246]

We agree with Kahlenberg that the *Sheff* case may indeed have tremendous implications for re-instituting cross-district busing and other "affirmative" type strategies for the purpose of socioeconomically integrating school systems. However, in states where poverty and race are closely correlated, there is little material difference between socioeconomic and racial segregation.[247] As such, it would seem that similar undesirable consequences would follow from the affirmative type desegregation remedies proffered by Kahlenberg. *Sheff* already has some unsettling similarities with the $2 billion Kansas City, Missouri case.[248] One similarity is the open-ended nature of the settlement. After the prior settlement expired without the school district reaching its desegregation goals, the plaintiffs in the *Sheff* case tentatively settled for an additional $112 million to be spent on magnet schools, charter schools, and other programs over the next five years to help further desegregate the city's schools.[249] Another similarity with the Kansas City episode and *Sheff* is that the magnet schools being built in Hartford to comply with the settlement are counting on the surrounding suburban districts to supply middle class students, thus increasing the percentage of minority students

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244. RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 216–17 (2001).

245. Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 745 (1974).

246. Richard D. Kahlenberg, *Economic School Integration, in* THE END OF DESEGREGATION? 149 (Stephen J. Caldas & Carl L. Bankston III eds., 2003).

247. *See generally* A TROUBLED DREAM, *supra* note 102.

248. Missouri v. Jenkins, 495 U.S. 33, 55 (1990).

249. *Lawmakers Won't Vote on Sheff Settlement*, *supra* note 243. The prior desegregation goal was to have at least 30% of the students enrolled in racially integrated schools by the settlement's expiration date, but as of 2007, only 9% of the students attended schools that qualified as racially integrated. *Id.*

attending racially integrated schools from 10% to at least 30%.[250] In the event that the students in the surrounding suburban districts do not participate in the "build it and they will come" plan to the extent envisioned, the Hartford district, like Kansas City, could be left with the full bill to run half empty schools including transportation costs, which are conservatively projected to run into the millions of dollars.[251]

B. The Michigan Cases

The year 2003 saw other landmark cases that could potentially impact the future of school desegregation in the United States. In the University of Michigan cases *Grutter v. Bollinger*[252] (law school admissions) and *Gratz v. Bollinger*[253] (undergraduate admissions), the Supreme Court handed down its most momentous affirmative action decision since the *Bakke* case[254] of 1978. In *Gratz*, the Supreme Court ruled that the University of Michigan's undergraduate admission policy of awarding points solely based on an applicant's race was unconstitutional.[255] However, in *Grutter* the Supreme Court held that the university's "compelling interest" in fostering diversity met the "strict scrutiny" standard required by the Fourteenth Amendment when governmental bodies make distinctions based on racial categories.[256] Thus, the Court upheld the university's law school policy of giving preferences to minorities in its admissions procedures, as long as race was but one factor among many considered in the admissions process.[257] This legal allowance for public institutions to racially discriminate between individuals has ensured that the controversy swirling around state efforts to promote diversity (whether in K-12 or university settings) would continue for

250. CONNECTICUT OFFICE OF LEGISLATIVE RESEARCH, SHEFF V. O'NEILL SETTLEMENT (Jan. 27, 2003), http://www.cga.ct.gov/2003/olrdata/ed/rpt/2003-R-0112.htm.

251. *Id.*

252. Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003).

253. Gratz v. Bollinger, 539 U.S. 244, 276 (2003).

254. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978) (this is a landmark decision where the Supreme Court bars quota systems in college admissions while affirming the constitutionality of affirmative action programs giving an advantage to minorities).

255. *Gratz*, 539 U.S. at 270–71.

256. *Grutter*, 539 U.S. at 333.

257. *See Gratz*, 539 U.S. at 270–71; *Grutter*, 539 U.S. at 337.

some time to come.[258]

While the Supreme Court's rulings in the *Grutter* and *Gratz* cases do not directly implicate K-12 schools, they do have potential implications for elementary and secondary education. For example, in light of the *Gratz* ruling, Little Rock Arkansas officials were considering dropping using race as the sole criteria for admittance to some magnet schools.[259] On the other hand, the *Grutter* ruling reiterates the high court's position that if the state has an interest in diversifying the racial composition of state institutions they can consider the race of individuals in a government selection process. Justice Ruth Bader Ginsburg, in her dissension from the Court's ruling in the undergraduate *Gratz* case, stated, "The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital."[260] Ginsburg thus reveals that there is thinking on the Supreme Court that the vestiges of racial oppression which school desegregation has been attempting to undo still linger.[261] Moreover, her statement implies that governmental action to undo these vestiges is still necessary, and indeed, "vital."[262] Thus, we still see a judicial orientation at the highest levels of American government that is favorable to upholding the use of race as a factor in school admissions.

Justice Sandra Day O'Connor, speaking for a majority of the court in *Grutter*, did indicate that she thought the end of racial preferences in university admissions was in sight—but were still necessary for the time being.[263] She wrote, "We expect that in 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[264] It would be interesting to know upon what logic

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258. *The* Plessy *and* Grutter *Decisions*, *supra* note 31, at 67. Technically, the controversy could rage until at least 2028, the date at which Justice O'Connor's "sunset clause" would end, and, according to the former Supreme Court justice, we will no longer need affirmative action type policies. *Id.*

259. Caroline Hendrie, *City Boards Weigh Rule on Diversity*, EDUCATION WEEK ON THE WEB, November 5, 2003, http://www.edweek.org/ew/ewstory.cfm?slug=10Deseg.h23.

260. *Gratz*, 539 U.S. at 276.

261. *Id.*

262. *Id.*

263. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

264. *Id.*

O'Connor based this prediction.[265] Does she envision the elimination of the minority-white achievement gap within a quarter century, so that minorities will be able to compete on the level playing field of university academic admissions requirements? If so, her position would imply that she foresees a significant improvement in k-12 minority education. However, given the trend toward the continued re-segregation of American public schooling, and the association of segregated minority schooling with inferior academic outcomes[266]—especially for African American and Hispanic students—O'Connor's vision seems overly optimistic. One outcome of the *Grutter* decision seemed more certain: in the words of another legal scholar it will likely "lead to confusion, to controversy, and to litigation."[267]

C. The Seattle/Louisville Case

The litigation came soon, but with a conservative twist. By the second half of the first decade of the twenty-first century, the Court had moved from deciding whether schools would be forced to redistribute their students to whether they would be allowed to do so. At the end of 2006, the Supreme Court began to hear the cases of *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Education*.[268] Seattle, Washington had not been under a desegregation order, but its school board had decided voluntarily to take race into consideration when setting limits on how many children of each race could go to each school.[269] Jefferson County, which contains Louisville, Kentucky, had been under a court order to desegregate from 1973 to 2000.[270]

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265. Upon close scrutiny, Justice O'Connor's assertion seems more based in wishful thinking than in sound empirical social science. *See* Carl L. Bankston III, Grutter v. Bollinger, *Weak Foundations?* 67 OHIO ST. L.J. 66 (2006).

266. *See* Carl Bankston III & Stephen J. Caldas, *Majority African American Schools and Social Injustice: The Influence of De Facto Segregation on Academic Achievement*, 75 SOC. FORCES 535, 535–55 (1996).

267. David Schimmel, *Affirming Affirmative Action: Supreme Court Holds Diversity to Be a Compelling Interest in University Admissions*, 180 EDUC. L. REP. 401, 415 (2003).

268. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2740 n.1 (2007) (deciding both the Seattle School District and the Jefferson County case).

269. *Id.*

270. Haycraft v. Bd. of Educ. of Louisville, No. 7291, 489 F.2d 925, 932 (6th Cir.

The latter district had been declared unitary but its school board, which had fought desegregation in the 1970s, had chosen to maintain its own plan to re-assign students in order to maintain racial balance in the schools, even after it was no longer required to do so.[271] Parents in both locations whose children were unable to enroll in nearby or desired schools as a result of race-conscious assignment sued, maintaining that this was discriminatory.[272]

On June 28, 2007, the Court decided the issue in *Parents Involved in Community Schools v. Seattle School District No. 1.* The Court ruled against school board procedures of race-conscious assignment, and Justices Breyer, Stevens, Souter, and Ginsberg dissented from the decision, convinced that the school boards' strategies of race conscious assignment did indeed serve a compelling state interest.[273] Justice Kennedy concurred with the decision in this case, arguing that schools may sometimes use race conscious approaches, but that the districts did not sufficiently tailor their plans to achieve their goals.[274] Justice Roberts seemed to dismiss the use of race in assignment altogether, remarking that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[275]

The split decision of the Court on the question of whether racial redistribution of students would even be allowed, much less compelled, indicated that American desegregation law had moved from commitment to uncertainty. If there is any certainty with regards to the future of school desegregation litigation, it is that we can almost certainly expect it. Justice Kennedy's concurring opinion leaves the door open for more officially sanctioned governmental discrimination based on race, and the consequent claimed injury of individuals who will protest the injustice of said discrimination. Kennedy expounded, "In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a

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1973).

271. *Parents*, 127 S. Ct. at 2741.

272. *Id.*

273. *Id.* at 2800–01.

274. *Id.* at 2788.

275. *Id.* at 2764.

diverse student body, one aspect of which is its racial composition."[276]

XI. UNCERTAIN FUTURE: PREDICTIONS

As judicial desegregation in the U.S. faces this uncertain future, Americans debate its merits and alternatives. Some current black American leaders question the notion that all-black institutions are somehow inferior, which they suggest is implied by school desegregation efforts.[277] In fact, in Topeka, Kansas, where the desegregation era was born, the former black superintendent blamed the continuing poor academic performance of black students on desegregation itself, stating on the 50th anniversary of the Brown decision that "the closing of black neighborhood schools—with their traditions, yearbooks, mottoes, fight songs and halls of fame—ripped the centerpiece out of those communities."[278]

With the desirability and possibility of racial desegregation open to question from so many quarters, some have focused their hopes on the redistribution of students by class, rather than race.[279] Will the courts pursue the socioeconomic desegregation of schools as a means of attempting more racial desegregation? If so, this could entail a new round of extensive judicial intervention in American schools aimed at redistribution on socioeconomic rather than racial grounds.[280] If, as we argue here, racial redistribution has not worked to meaningfully desegregate schools, there is no reason to believe that the socioeconomic version would, even if race and socioeconomic status were not so intertwined in American society.

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276. *Id.* at 2792.

277. FORCED TO FAIL, *supra* note 13, at 206–07 (quoting influential black leaders in the U.S. who have begun to question the theory of school desegregation which implies that blacks cannot receive a quality education in predominantly African American institutions).

278. David E. Thigpen, *An Elusive Dream in the Promised Land*, TIME, May 10, 2004, at 32.

279. *See* Richard D. Kahlenberg, *Economic School Integration*, *in* THE END OF DESEGREGATION? 149, 149–75 (Stephen J. Caldas & Carl L. Bankston III eds., 2003).

280. Socioeconomic integration policies would not need to meet the "strict scrutiny" test required when governments use racial classification schemes, only the "rational basis" test.

With the retirement of Sandra Day O'Connor from the Supreme Court, a voice for moderation who represented the so-called "swing vote" on controversial court rulings like the *Grutter* decision, and her replacement with the more conservative jurist Samuel Alito, the Supreme Court's orientation to school desegregation has taken a more conservative, strictly constructivist orientation. We see this increased conservative influence in the 2007 Seattle/Meredith decisions. However, if desegregation activists take their cause to state courts, as they have in Connecticut, the composition of the Supreme Court may make little or no difference in future desegregation litigation. If this later scenario develops, we may be in for many more tumultuous years of contentious, expensive, divisive, and potentially counter-productive desegregation litigation.

To summarize, in 1954 the United States embarked on a long and sinuous legal road in its efforts to undo the "separate but legal" legacy left in the wake of the *Plessy v. Ferguson* decision of 1896. Whereas the majority of de jure school racial segregation has been eliminated, in places like Louisiana, almost two-thirds of the state's districts were still under court supervision to desegregate in 2007.[281] Moreover, de facto segregation was the norm across much of the country, with meaningful school integration stagnating, and school racial resegregation taking place in many parts of the country.[282] Though plaintiffs in the future may shift legal strategies and file suit against states for allowing de facto racial segregation to persist, legal strategies, as we have seen in the Connecticut *Sheff* case, have limits as to their effectiveness in creating meaningfully integrated schools. Until the U.S. deals with the underlying causes of school racial segregation, namely socioeconomic stratification, which according to the government's latest figures has never been greater,[283] we are likely to continue to see racially identifiable schools long into the twenty-first century.

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281. Chris Kirkham, *Civil Rights Struggle Lives on in La.'s Public Schools*, NEW ORLEANS TIMES-PICAYUNE, July 28, 2007, http://blog.nola.com/times-picayune/2007/07/civil_rights_struggle_lives_on.html.

282. Amelia E. Lester, *supra* note 234.

283. Greg Ip, *Income Inequality Gap Widens*, WALL ST. J., Oct. 12, 2007, at A2, *available at* http://online.wsj.com/article_email/SB119215822413557069-lMyQjAxMDE3OTEyMjExNTI4Wj.html.