

## *Milliken, Meredith,* and Metropolitan Segregation

Myron Orfield



### ABSTRACT

Over the last sixty years, the courts, Congress, and the President—but mostly the courts—first increased integration in schools and neighborhoods, and then changed course, allowing schools to resegregate. The impact of these decisions is illustrated by the comparative legal histories of Detroit and Louisville, two cities which demonstrate the many benefits of metropolitan-level cooperation on issues of racial segregation, and the harms that arise in its absence. Detroit, Michigan, and Louisville, Kentucky, both emerged from the riots of the 1960s equally segregated in their schools and neighborhoods with proportionally sized racial ghettos. In 1974-75, the Supreme Court overturned a proposed metropolitan school integration plan in Detroit, but allowed a metropolitan remedy for Louisville-Jefferson schools to stand. Since that time, Louisville-Jefferson schools and neighborhoods, like all the regions with metropolitan plans, have become among the most integrated in the nation, while Detroit's schools have remained rigidly segregated and its racial ghetto has dramatically expanded. Detroit's experience is very common in the highly fragmented metropolitan areas of the midwestern and northeastern United States. Black students in Louisville-Jefferson outperform black students in Detroit by substantial margins on standardized tests. Metropolitan Louisville has also grown healthier economically, while the City of Detroit went bankrupt and both the city and school district were taken over by state authorities. The Article concludes with a call to modernize American local government law by strengthening the legal concepts of metropolitan jurisdictional interdependence and metropolitan citizenship.

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## INTRODUCTION

In 1973, the Court of Appeals for the Sixth Circuit affirmed city-suburban, metropolitan school desegregation orders in Detroit, Michigan, and Louisville, Kentucky.<sup>1</sup> Both regions were roughly 20 percent black and equally racially segregated.<sup>2</sup> Both had racial ghettos that were proportional in size, had experienced recent race riots, and were struggling to maintain their stability. In July 1974, in *Milliken v. Bradley*,<sup>3</sup> the U.S. Supreme Court overturned the Detroit decision, but nine months later allowed the Louisville-Jefferson County remedy to stand.<sup>4</sup> In the following four decades, Louisville's schools and neighborhoods became dramatically more racially integrated and black students' test scores substantially improved, while Detroit remained rigidly segregated, its schools collapsed in failure, and its ghetto grew to encompass not only the entire city, but many of its older suburbs as well.<sup>5</sup>

Louisville's experience mirrors the fifteen major metropolitan areas that adopted metropolitan, or near metropolitan, school desegregation plans in the 1970s. In these metropolitan areas, integrated schools fostered stably integrated neighborhoods, better academic achievement, comparatively smaller ghettos, stronger fiscal conditions, and better race relations.<sup>6</sup>

Detroit's trajectory, the far more common experience, was of continuing rigid segregation, white flight, educational failure, a rapidly expanding racial ghetto, urban and inner-suburban decline, and abandonment. Its experience is emblematic of central cities and their schools when they are surrounded by dozens of uncooperative suburban cities and school districts.

The *Milliken* decision represented both a watershed moment and a window into America's urban history and its future. From 1964 to the election of President Richard Nixon in 1968, the courts, Congress, and the executive cooperated to reduce segregation in the nation's schools. This progress was reflected in a sharp decline in the educational achievement gap between blacks and whites that improved each year in which integration increased or was sustained. The year after the *Milliken* decision, however, the trend toward more racially integrated pub-

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1. *Milliken v. Bradley (Milliken III)*, 484 F.2d 215, 258 (6th Cir. 1973); *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson Cnty. (Newburg I)*, 489 F.2d 925, 932 (6th Cir. 1973).
  2. *See infra* Part II.A.
  3. *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 752–53 (1974).
  4. *Bd. of Educ. of Louisville v. Haycraft*, 421 U.S. 931 (1975); *Bd. of Educ. of Jefferson Cnty. v. Newburg Area Council, Inc.*, 421 U.S. 931 (1975).
  5. *See infra* Parts VI–IX.
  6. *See infra* Parts VI–IX.

lic schools in the United States stopped.<sup>7</sup> As the Supreme Court dismantled school desegregation plans, American schools resegregated and the achievement gap increased.

This Article is about the Supreme Court's school desegregation decisions and their effect on the schools and neighborhoods of metropolitan America over the last sixty years. It details how the courts, Congress, and the President—but mostly the courts—first increased integration in schools and neighborhoods, and then changed course, allowing schools to resegregate. The impact of these decisions is illustrated by the comparative legal histories of Detroit and Louisville, two cities that demonstrate the many benefits of metropolitan-level cooperation on issues of racial segregation, and the harms that arise in its absence. On the one hand, stable metropolitan integration not only helps individuals but is also deeply beneficial to communities and regional economies. On the other hand, it is clearer than ever that segregation destroys individuals and communities and deters economic growth. Advocates and elected officials should use these lessons to build political consensus to legislatively shape more racially integrated and successful regions. In parallel, scholars, advocates, and courts must reform nineteenth century local government to fit the realities of twenty-first century metropolitan America, and in doing so, acknowledge the interdependence of its cities and school districts.

Part I begins with the history of the role of the Supreme Court, Congress, and executive branch in creating racial integration in American schools from 1954 to 1974, with a particular focus on the Nixon presidency. Title VI of the 1964 Civil Rights Act,<sup>8</sup> together with the Supreme Court decision in *Green v. County School Board*,<sup>9</sup> created powerful legal tools to make *Brown v. Board of Education*'s<sup>10</sup> mandate real, and the American South moved from having the most racially segregated schools to the most racially integrated. But as the civil rights movement attempted to integrate the schools of large metropolitan areas, courts had to face the complex pattern of growing racial ghettos, surrounded by unstably integrated residential areas and sharply segregated white residential suburbs. In the North, this pattern was further complicated by the governmental fragmentation of metropolitan areas into dozens, sometimes hundreds, of independent school districts and municipalities with zoning powers.<sup>11</sup>

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7. See *infra* Part II.

8. Civil Rights Acts of 1964, 42 U.S.C. § 2000d *et seq.*

9. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 441–42 (1968).

10. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

11. See *infra* Part I.B.

Richard Nixon's presidential campaign in 1968 capitalized on a growing racial backlash among the nation's white blue-collar voters, and the future president promised to appoint a Supreme Court that would do as little as possible to integrate the schools.<sup>12</sup> Yet Nixon's first two appointments were initially reluctant to slow the movement toward integrated schools. *Swann v. Charlotte-Mecklenburg*<sup>13</sup> was a doctrinally revolutionary decision creating a powerful result-oriented framework that effectively responded to the geographic pattern of residential segregation in large metropolitan areas.<sup>14</sup> *Wright v. City of Emporia*<sup>15</sup> declared that white flight must be taken into account in a court's remedial plan and that separate suburban school boundaries could not be allowed to impede the effectiveness of a desegregation remedy.<sup>16</sup> *Keyes v. School District No. 1*<sup>17</sup> created the presumption that discriminatory acts in one part of a district implied district-wide discrimination.<sup>18</sup> Nixon's next two appointments to the Court were explicitly screened to oppose the expansion of court-ordered integration, and Nixon made his disappointment with *Swann* clear to the Chief Justice.

Part II describes the watershed of racial integration in America's schools represented by the Supreme Court's decision in *Milliken v. Bradley* in 1974. As the Court in *Milliken* confronted the problem of education segregation in the governmentally fragmented North, its forward momentum on school integration abruptly stopped. Its opinion was legally unprincipled and factually dishonest.<sup>19</sup> *Milliken* ignored a century of black letter local government law that declared school districts were state administrative conveniences, not sovereign governments whose boundaries limit the remedial jurisdiction of a federal court enforcing the Fourteenth Amendment. The Court grounded its ruling in the long tradition of local control, but in all other contexts continued to classify these same local governments as state administrative conveniences or, in the words of Justice Rehnquist, mere "governmental techniques."<sup>20</sup> In so doing, the Court sharply undercut the meaning of its four most recent integration decisions.

*Milliken* held that state housing discrimination would justify a metropolitan remedy. The district court, after ten days of testimony, made an explicit finding that such discrimination was present. The Court, in the words of the law clerks

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12. See *infra* Part I.C.

13. *Swann v. Charlotte-Mecklenburg Bd. of Educ. (Swann I)*, 402 U.S. 1 (1971).

14. *Id.* at 22–31.

15. 407 U.S. 451 (1972).

16. *Id.* at 464–65.

17. 413 U.S. 189 (1973).

18. *Id.* at 207.

19. See *infra* Part I.C.

20. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 383, 391 (1978).

of Justices Powell and Rehnquist, “willfully ignored” these findings. Ignoring its decision in *Wright*, the Court denied the legal propriety of considering white flight in order to justify a metropolitan remedy, but nevertheless relied on the existence of such flight to limit the scope of a Detroit-only remedy.<sup>21</sup>

Part III describes Louisville-Jefferson County’s metropolitan remedy. Decided in the same circuit as *Milliken*, and alleging interdistrict violations that seemed little different than those in the previous case, *Board of Education of Jefferson County v. Newburg Area Council*<sup>22</sup> had the advantage of coming later and reframing its order in light of *Milliken*’s requirements for an interdistrict remedy.

Part IV outlines the dismantling of integration in American schools that was concurrent with the Supreme Court decisions between 1990 to 2007. In the early 1990s, in *Board of Education of Oklahoma v. Dowell*<sup>23</sup> and *Freeman v. Pitts*,<sup>24</sup> the Supreme Court allowed lower courts to end desegregation injunctions before school districts had complied with remedial court orders. The need to remedy the intentional segregation’s consequences was replaced by a new imperative to return local control to the offending school district as fast as possible. *Dowell* and *Freeman* mark the beginning of the resegregation of America’s public education system.

Part V shows that the Court’s resegregation decisions flew in the face of clear evidence that racial integration had improved nonwhite academic achievement, high school graduation rates, college attendance, middle-class earnings, race relations, and produced significant benefits with no harms to whites.

Part VI outlines how the Court ignored evidence of continuing educational and housing discrimination by local, state, and federal governments, and indulged itself in the increasingly vivid fantasy that school segregation was caused by unreachable private housing discrimination and the individual racial preferences of white and nonwhite citizens.<sup>25</sup>

Part VII shows the effectiveness of court-ordered integration plans in integrating schools, improving student performance, and reducing white flight, when they are metropolitan in scope. In many American urban areas, most of the neighborhoods that were integrated in the 1970s, 1980s, and 1990s are now majority nonwhite, creating untenable, poor, nonwhite schools in the cities. As resegregation occurred, the nation’s previously-narrowing achievement gaps began

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21. See *infra* Part I.

22. *Newburg Area Council v. Bd. of Educ. of Jefferson Cnty.*, 510 F.2d 1358 (1974).

23. 498 U.S. 237, 266 (1991).

24. 503 U.S. 467, 468 (1992).

25. See *infra* Part IV.

to widen again.<sup>26</sup> But in Louisville, where a regional remedy was allowed to stand, suburban schools were integrated and most urban schools were both majority middle class and academically strong, undermining the rationale for white flight. Thus, in Louisville—as in other regions with metropolitan integration plans—virtually all neighborhoods that were integrated in 1970 or thereafter have remained stably integrated.

Part VIII details how the Supreme Court moved from dismantling desegregation to forbidding elected officials from deciding to integrate local schools. In 2001, Louisville was released from its court-ordered metropolitan-level integration, but locally elected school board members, with the support of the regional business community, decided to maintain Louisville's integration program.<sup>27</sup> In 2007, in *Meredith v. Jefferson County Public Schools*,<sup>28</sup> the Roberts Court distorted *Milliken's* so-called principle of local control of education into a ratchet that could be used to entrench racial segregation, but was unavailable to ameliorate segregation. *Meredith* prevented Louisville's elected school board from exercising its local control to maintain a pattern of stable, successful racial integration. Only Justice Kennedy's complex concurrence prevented the Court from forbidding local school districts from integrating their schools absent proof of intentional discrimination. Whereas the earlier Burger Court had given local school boards a free hand to voluntarily integrate their schools, these same plans were now declared "discrimination by race."<sup>29</sup> In Chief Justice Roberts's America, state and local governments must helplessly watch what the Court calls "private discrimination," "individual racial preferences," and the "unknown and unknowable" causes of housing segregation destroy the lives of its nonwhite citizens, the strength of its once-great cities and school districts.<sup>30</sup>

Part IX details lesson of *Milliken* and *Meredith* by examining Detroit and Louisville from 1974 to 2013. Today, the harms *Milliken* did to America's cities have spread into the suburbs that sought its protection. As Detroit's ghetto surged passed the city line, the progeny of whites who fled Detroit in the 1970s and 80s today flee its diverse suburbs for newer, whiter enclaves at the metropolitan periphery. These same patterns are occurring throughout the older suburbs of the nation's large metropolitan areas, except in those rare cases in which comprehensive city-suburban cooperation in schools or housing is present. Ironically, while the Court's vision of local control could not durably protect the first-tier

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26. See *infra* Part IV.

27. See *infra* Part IX.

28. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 736 (2007).

29. *Id.* at 748.

30. See *infra* Part VIII.



suburbs from expanding ghettos, by 2013 it would eviscerate local control for the citizens of Detroit, when the city and its school district were taken over by the state of Michigan.<sup>31</sup> Louisville's tax base relative to its suburbs was five times as great per capita than Detroit's. Louisville-Jefferson County is well governed by an elected multiracial school board and a metropolitan city government with a strong local tax base and a Aa1 bond rating.<sup>32</sup>

This Article concludes with the argument that metropolitan school integration is highly beneficial to individuals, neighborhoods, regions, and to the economy. Had *Milliken* been decided differently, the nation would undoubtedly be less segregated and socioeconomically unequal. Although we cannot rewrite history, we can use this evidence to build political support for a more fair, racially integrated America. Outmoded nineteenth century legal structures and jurisprudence, reinforced by the doctrinal incomprehensibility of *Milliken*, need attention from legal scholars and advocates. Judges who ideologically oppose racial integration and who will distort the law to frustrate efforts of elected officials to shape an integrated society should no longer be appointed to the federal courts. The *Milliken-Meredith* story demonstrates that we have to re-conceptualize and strengthen the concepts of jurisdictional interdependence and metropolitan citizenship. Such a movement is not only in the interest of society as a whole, but clearly and immediately in the interest of the diverse cities and diverse suburbs where a majority of Americans live.

## I. THE RACIAL INTEGRATION OF AMERICAN SCHOOLS: THE SUPREME COURT, CONGRESS, AND THE EXECUTIVE FROM 1954 TO 1974

### A. From *Brown* to *Green*: 1954 to 1968

The Supreme Court, the executive branch, and Congress took turns providing momentum for school desegregation. *Brown's*<sup>33</sup> constitutional principle empowered activists, influenced public opinion, and led to executive and congressional action.<sup>34</sup> Actions by the other branches in turn emboldened the

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31. See *infra* Part IX.

32. See *infra* Part IX.

33. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

34. See generally TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 124–25 (1988); David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151 (1994); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173 (1994).

Court to return to and lead school desegregation efforts when they withdrew in the face of public backlash.

There was only token integration of schools before the passage of Title VI, the fund-withholding provisions of the 1964 Civil Rights Act.<sup>35</sup> Some scholars attribute the early slow progress to the “hollow hope” that courts can shape large social reforms.<sup>36</sup> Judicial intervention lacking a broad public mandate, they argue, creates backlash that forestalls durable progress that would otherwise be made by elected government.<sup>37</sup> The legal history of school desegregation demonstrates that this view is too simplistic. The three branches were partners in progress, with the Court’s role likely the most important one.<sup>38</sup> *Brown* led to Title VI. When President Nixon refused to withhold funds from discriminatory school districts, federal courts forced him to do so.<sup>39</sup> Moreover, the Court in *Green*,<sup>40</sup> *Swann*,<sup>41</sup> *Wright*,<sup>42</sup> and *Keyes*<sup>43</sup> sweepingly expanded the meaning of *Brown* and Title VI in the face of hostile executive and legislative branches.<sup>44</sup>

The Court initially faced the staggering political, logistical, and legal complexity of *Brown*’s mandate in 1955 in *Brown v. Board of Education of Topeka (Brown II)*.<sup>45</sup> The Court prudently announced that local school districts and legislative bodies would be given an opportunity to respond to *Brown* “with all deliberate speed.”<sup>46</sup> After a reasonable time had elapsed without a good-faith response, *Brown II* declared that lower courts had authority to use their broad and flexible equity powers to shape remedies related to school administration, personnel, physical plant, transportation systems, and most notably, the power to consider remedies involving the “revision of school districts and attendance areas into compact units” and the “revision of local laws and regulations” in order to

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35. U.S. COMMISSION ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965–66, at 1–2 (1966) (the fund withholding provisions prohibited the federal funding of discriminatory activities).

36. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 362–63 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42–54 (2nd ed. 2008); Gerald N. Rosenberg, *Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict through Litigation*, 24 LAW & INEQ. 31, 35 (2006).

37. See KLARMAN, *supra* note 36; ROSENBERG, THE HOLLOW HOPE, *supra* note 36.

38. BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 229–56 (2014).

39. *Adams v. Richardson*, 351 F. Supp. 636, 642 (D.D.C. 1973), *aff’d*, 480 F.2d 1159 (D.C. Cir. 1973).

40. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 439–41 (1968).

41. *Swann I*, 402 U.S. 1, 31 (1971).

42. *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972).

43. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 197–98 (1974).

44. See *infra* Part I.C.

45. *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294, 298–99 (1955).

46. *Id.* at 301.

achieve “a system of determining admission to the public schools on a non-racial basis.”<sup>47</sup>

Some school districts, particularly in the Border States between the Deep South and North (such as Louisville, Kentucky), accepted token integration on a gradual basis.<sup>48</sup> Yet in the Deep South, school integration faced “massive resistance,” symbolized by Arkansas’s Governor Orval Faubus calling up his state’s National Guard to stop school integration in Little Rock.<sup>49</sup> The Supreme Court ordered state officials to withdraw the guard and to integrate Little Rock’s schools, declaring them bound by *Brown*.<sup>50</sup> When Virginia closed its public schools and funded private “segregation academies,” the Court ordered the schools to reopen and obey *Brown*.<sup>51</sup>

Martin Luther King, Jr. and a growing number of civil rights organizations made observance of their constitutional rights, as recognized by *Brown*, a central goal.<sup>52</sup> These groups used nonviolent protest to “creatively confront” massive resistance. The ugly responses directed at citizens seeking enforcement of their constitutional rights galvanized broad public support for congressional action. Title VI itself evolved from a series of amendments offered by Harlem’s Congressmen Adam Clayton Powell to federal education aid bills in the late 1950s to withhold funds to districts defying *Brown*.<sup>53</sup>

Title VI provided powerful incentive to abide by *Brown*. What *Brown* required, however, was not yet clear.<sup>54</sup> Some Southern states and school districts repealed segregation mandates and adopted “freedom of choice plans.”<sup>55</sup> Yet, racial intimidation and discrimination kept black and white students in separate schools. The segregated North, with no such mandates, argued it complied with the law.

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47. *Id.* at 300–01.

48. See KLARMAN, *supra* note 36; GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 1–47* (1969) [hereinafter ORFIELD, RECONSTRUCTION].

49. See generally NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* (1999).

50. *Cooper v. Aaron*, 358 U.S. 1, 19–20 (1958).

51. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 233–34 (1964).

52. See generally sources cited *supra* note 34.

53. ORFIELD, RECONSTRUCTION, *supra* note 48, at 24–26.

54. For a very narrow reading of *Brown* and criticism of the proposed 1964 Civil Rights Act, see Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964). For a broad reading of *Brown* and of the 1964 Civil Rights Act, see Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concept*, 78 HARV. L. REV. 564 (1965).

55. J. HARVIE WILKINSON, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1964–1978*, at 108–18 (1978).

Backlash to civil rights laws, fueled by urban rioting in black ghettos, led to a strong showing by civil rights opponents in the 1966 congressional elections. Most notable was the election of Ronald Reagan, a prominent, non-Southern national opponent of the civil rights movement, in the wake of the Watts rioting.<sup>56</sup> Congressional progress on school integration waned.<sup>57</sup> When the Department of Health, Education, and Welfare (HEW) attempted to provide content to Title VI rules with requirements that went beyond “freedom of choice” plans, it met resistance from both southern and northern white urban members of Congress.<sup>58</sup>

As Congress lost momentum, the Supreme Court, in *Green v. County School Board*,<sup>59</sup> breathed new life into the HEW regulations and profoundly strengthened the desegregation rules being developed under Title VI. *Green* involved a small rural district, New Kent County, Virginia, with only two K–12 schools, one white and one black.<sup>60</sup> The school district adopted a “freedom of choice” plan. No white student chose the black school, and facing white intimidation, only fifteen percent of black students enrolled in the white school.<sup>61</sup>

*Green* declared that freedom of choice plans improperly placed responsibility for remedying segregation on its victims, rather than on the discriminatory school district. Because of this, the Court held that local schools districts bore a heavy burden in justifying their use over more effective remedies like busing.

The Court reasoned that when segregation created an unconstitutional “dual” school system, the Court’s remedial goal must be a “unitary non-racial system” that eliminates segregation “root and branch,”<sup>62</sup> creating a district “without a ‘white’ school and a ‘Negro’ school, but just schools.”<sup>63</sup>

*Green* held that good-faith efforts were not enough and that courts had the duty to craft remedies that eliminate the effects of segregation.<sup>64</sup> This required not only actually integrating students, but also creating substantial equality throughout the system in faculty, staff, transportation, extracurricular activities, and facilities. The school board was required to come forward with a plan that

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56. RICH PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 70–96 (2008).

57. ORFIELD, *RECONSTRUCTION*, *supra* note 48.

58. *See* ORFIELD, *RECONSTRUCTION*, *supra* note 48, at 328–48; WILKINSON, *supra* note 55, at 116–18.

59. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 441–42 (1968).

60. *Id.* at 432.

61. *Id.* at 441.

62. *Id.* at 438.

63. *Id.* at 442.

64. *Id.* at 438 n.4.

“promises realistically to work now.”<sup>65</sup> *Green* concluded that courts would maintain jurisdiction until all state-imposed segregation is “completely removed.”<sup>66</sup>

The *Green* factors—integration and equality in faculty, staff, transportation, extracurricular activities, and facilities, standards much stronger than anything yet proposed—were incorporated into the new regulations implementing Title VI.<sup>67</sup> With *Green*, the last school decision of the Warren Court (and during the presidency of Lyndon Johnson), the mantle of school desegregation leadership had returned to the Supreme Court.

## B. The Complexity of School Desegregation in Large Metropolitan Areas

### 1. The Historical Pattern of Residential and Educational Segregation

Bringing *Green*'s doctrinal revolution to large metropolitan areas, particularly the governmentally fragmented North, vastly increased the factual, legal, and political complexity of the Court's work.<sup>68</sup> Large metropolitan areas had growing racial ghettos, surrounded by a growing halo of unstably racially integrated areas, which were themselves in turn surrounded by a growing ring of exclusively white residential neighborhoods.<sup>69</sup> White flight along the edge of the expanding ghettos was already enormous.<sup>70</sup> These demographic patterns did not respect the boundaries of separate cities and school districts. Devising remedies that considered these dynamic patterns, in a politically fragmented governmental context, was the central challenge that courts would face.

#### a. The Emergence and Growth of Racial Ghettos

Before 1900, urban blacks were no more segregated than other newly arriving ethnic groups.<sup>71</sup> As black numbers swelled after 1900, whites used violence to confine blacks to segregated neighborhoods.<sup>72</sup> Explicit legal tools to promote

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65. *Id.* at 439.

66. *Id.*

67. ORFIELD, RECONSTRUCTION, *supra* note 48, at 341.

68. In *Swann*, the Court noted, “Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.” *Swann I*, 402 U.S. 1, 14 (1971).

69. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

70. *Id.* at 45.

71. *Id.* at 22.

72. *Id.* at 28. That black workers, excluded by racist labor unions, were often strikebreakers did not improve relations with threatened white industrial workers.

segregation supplemented controlled violence.<sup>73</sup> When racial zoning was struck down,<sup>74</sup> homeowner's associations and racial covenants that forbade the sale of homes in white neighborhoods to blacks effectively replaced it.<sup>75</sup> From 1900 to 1970, as segregation disappeared for all European ethnic groups, it steadily intensified for blacks.<sup>76</sup> Whites in enormous numbers took advantage of Federal Housing Administration and Veteran's Administration (FHA/VA) loans and better housing in affordable mass-produced suburbs. Because federal law prohibited the use of FHA/VA loans in racially integrated neighborhoods, blacks were forbidden to follow whites to the suburbs. Between 1950 and 1970, as white flight to the suburbs reached its highest levels, the percentage of blacks more than doubled in most cities.

In the mid-1960s, in the face of unprecedented urban ghettoization, industrial restructuring that hit urban blacks hardest, and new civil rights laws that created rising expectations but little immediate relief, a new wave of riots broke out across the county in urban black ghettos. Following the Watts and Cleveland riots of 1966, sixty riots occurred simultaneously in as many cities during July and August of 1967.<sup>77</sup> The riots deepened a growing white backlash to civil rights reforms.

A bipartisan presidential commission was created to investigate the riots and frame appropriate policy responses. The Kerner Commission Report<sup>78</sup> found that their fundamental cause was racial segregation and ghettoization and called for the passage of a comprehensive and enforceable open housing law that had been stalled in Congress.<sup>79</sup> The Report, and Martin Luther King Jr.'s assassination, provided the final impetus for passage of the 1968 Fair Housing Act<sup>80</sup> in April 1968.

In May, the Supreme Court in *Green* returned from a decade-long absence and demanded action. Ten days later, the Supreme Court revived the power of the Civil Rights Act of 1866 by outlawing the private discrimination not included

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73. *Id.* at 33–34.

74. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

75. *MASSEY & DENTON*, *supra* note 69, at 36–37.

76. *Id.* at 36–37, 84.

77. *Id.* at 58.

78. *See* REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS (1968) [hereinafter *THE KERNER COMMISSION REPORT*]. The report was created by a bipartisan commission appointed by Lyndon Johnson in 1967 to investigate the causes of the 1967 riots and provide recommendation for government action. CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 41 (2005).

79. *THE KERNER COMMISSION REPORT*, *supra* note 78, at 481.

80. Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*

in the Federal Fair Housing Act. In *Jones v. Alfred H. Mayer Company*<sup>81</sup> Justice Potter Stewart wrote for the Court: “Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”<sup>82</sup>

### b. Governmental Fragmentation and Stratification

In the urban industrial Northeast and Midwest, it was easy for residents to create small suburban municipalities. Urban and town legal structures had followed immigrants from urban England to the new world,<sup>83</sup> and legal reforms in corporation law streamlined municipal incorporation. The township divisions created by the Northwest Ordinance of 1787<sup>84</sup> further facilitated fragmentation. Thus, between 1850 and 1910, there was a continuous proliferation of new municipalities in the growing metropolitan areas of these states.<sup>85</sup> In the less-urban South and yet-unsettled West, rural county legal structures followed emigrants from rural England that suited these agricultural economies.<sup>86</sup>

From 1850 to 1910, America’s large industrial cities vastly expanded through annexation of or consolidation with the cities closest to the urban center, while at the same time new cities and towns continued to emerge at the metropolitan periphery. As the physical size, population, and political power of America’s largest industrial cities immensely increased, they pioneered water works, effective sewage treatment, streetcars, the nation’s best school systems, libraries, and other amenities. During this period, annexation was the only way for suburban residents to acquire these services.<sup>87</sup> The period of city growth through an-

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81. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–43 (1968).

82. *Id.*

83. DAVID HACKETT FISCHER, *ALBION’S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 181–90 (1989).

84. The primary effect of the ordinance was the creation of the Northwest Territory, the first organized territory of the United States, from lands south of the Great Lakes, north and west of the Ohio River, and east of the Mississippi River. Part of the ordinance divided the territory into townships and dedicated land in them to support public education. These townships often became and remained local governments in newly admitted states. *See, e.g.*, Jonathan Hughes, *The Great Land Ordinances: Colonial America’s Thumbprint on History*, in *ESSAYS ON THE ECONOMY OF THE OLD NORTHWEST* 8 (David C. Klingaman & Richard K. Vedder eds., 1987).

85. JON C. TEAFORD, *CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850–1970*, at 5–31 (1979).

86. FISHER, *supra* note, at 389–418.

87. TEAFORD, *supra* note 85, at 32–63.

nexation and consolidation came to an end around 1910, just as urban black migration surged and white hostility increased. By this time, new legal forms of special-district government, particularly regional water and sewer districts, were created to provide desired services to suburbs without annexation.<sup>88</sup>

School districts in early metropolitan America, particularly in the North, were often organized around the township in which land was dedicated to support universal education. Large cities, which later became independent local governments, first organized the nation's best, most professionally run schools in the late nineteenth century. Access to these urban schools was considered one of the great benefits of annexation. As suburbia grew, rural township schools consolidated into the forerunners of today's suburban school districts. The most privileged areas with strong local tax bases formed their own exclusive well-funded educational enclaves, excluding the less desirable parts of suburbia. The rapid and inequitable consolidation of suburban districts continued into the 1970s.

In twenty-one largely white northern and western states following the Civil War, Jim Crow school segregation was either never practiced or banned by statute or court decision.<sup>89</sup> In these states, school segregation increased in the face of large black migration both because of residential segregation and school-district-level discrimination. In some school districts, legal prohibitions on school segregation were ignored and students were assigned to segregated schools.<sup>90</sup>

In addition, widespread discriminatory practices emerged throughout the North, including racially gerrymandered attendance boundaries, optional attendance zones that allowed whites to avoid racially diverse schools, and school construction and expansion decisions made in locations that prevented student integration from occurring.<sup>91</sup>

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88. See generally DONALD AXELROD, *SHADOW GOVERNMENT: THE HIDDEN WORLD OF PUBLIC AUTHORITIES—AND HOW THEY CONTROL OVER \$1 TRILLION OF YOUR MONEY* (1992); DAVID RUSK, *BALTIMORE UNBOUND: A STRATEGY FOR REGIONAL RENEWAL* (1995); DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993); GREGORY WEIHER, *THE FRACTURE METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* (1991); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 72–89 (1990); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002).

89. DAVISON DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954*, at 84–85 (2005).

90. *Id.* Kansas, New Mexico, and Arizona soon allowed permissive segregation by local ordinance. In 1912, Arizona reversed itself and mandated segregation.

91. Davison DOUGLAS, *supra* note, at 123–66.



## C. Richard Nixon, the Court, and Desegregation: 1968 to 1971

### 1. Nixon and the Southern Strategy

In 1968, Earl Warren resigned from the Supreme Court hoping that Lyndon Johnson, and not Richard Nixon, would appoint his successor.<sup>92</sup> Johnson planned to elevate Justice Fortas, a committed civil-rights-era liberal, to become Chief and appoint another pro-civil rights justice to fill Fortas's associate justice slot.<sup>93</sup> In so doing, Johnson would likely have strengthened the Court's commitment to integration and civil rights. Fortas's confirmation was slowed in the Senate, and in 1969, after facing ethics charges, he left the Court in disgrace.<sup>94</sup> This left Johnson's successor, Richard Nixon, two vacancies on the Court to fill upon taking office. Within a few years, Nixon would have two more slots to fill.

Positioning himself between the massive resistance stance of George Wallace and the liberal civil rights reputation of Hubert Humphrey, Richard Nixon, before now a pro-civil rights Republican, skillfully rode Middle America's backlash to civil rights laws, urban riots, crime, social permissiveness, and the Vietnam War into the White House. Nixon maintained "[t]he court was right on *Brown* and wrong on *Green*"<sup>95</sup> and adopted a position on school integration close to the freedom of choice plans the Court had recently rejected. Nixon's electoral strategy centered on appealing to suburban whites threatened by urban riots, crime, student protests, and racial integration strategies. He believed that, by promising and delivering a Supreme Court that would shield whites from forced integration, he could help create a national political realignment and a permanent Republican ascendancy.<sup>96</sup>

Upon assuming office, Nixon turned his administration increasingly away from civil rights enforcement lawsuits and executive enforcement of the 1964 Civil Right Act provisions. When Nixon's HEW and Justice Department stopped enforcing fund cut-offs to segregated districts, a federal district court de-

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92. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 9–10 (1979).

93. LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 319–29 (1990).

94. *Id.* at 329–55.

95. WILLIAM SAFIRE, *BEFORE THE FALL: AN INSIDE VIEW OF THE PRE-WATERGATE WHITE HOUSE* 232 (1975).

96. See KEVIN J. MCMAHON, *NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* (2011); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 79–113 (2012).

clared this action illegal and ordered the administration to follow the law.<sup>97</sup> Congressional opposition to school integration continued to grow among previously supportive northern Democrats and moderate Republicans, particularly in the Midwest and Northeast, where residential segregation was very high.<sup>98</sup>

Nixon set out to produce a strict constructionist majority on the Supreme Court that would limit or eliminate busing to achieve integration. After the appointment of Chief Justice Warren Burger, Nixon attempted to appoint two southern federal judges with conservative records on civil rights. Clement Haynesworth had upheld both Virginia's effort to close schools to avoid court ordered integration and the freedom-of-choice plans that were stuck down in *Green*.<sup>99</sup> Harold Carswell, as a candidate for the state legislature, had declared his unwavering support for white supremacy.<sup>100</sup> The Senate rejected both nominees. Thereafter, Harry Blackmun, a close friend of the Chief Justice who had a moderate civil rights record, was appointed. By the late 1970s, Justice Blackmun would join the Court's liberals in school desegregation cases.<sup>101</sup>

## 2. *Swann v. Charlotte-Mecklenburg Board of Education*

*Swann*,<sup>102</sup> the first school case to arise from a large metropolitan area with an expanding urban racial ghetto, was the Court's most important desegregation decision, involving at least four significant doctrinal clarifications of *Brown*.<sup>103</sup> Because the Charlotte-Mecklenburg area was served by a single large county school system, *Swann* was, in effect, the Court's first and only metropolitan-wide desegregation decision.<sup>104</sup> Charlotte-Mecklenburg, no longer Jim Crow segregated, operated a freedom-of-choice plan approved by the federal courts before

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97. *Adams v. Richardson*, 351 F. Supp. 636 (D.D.C. 1972), *aff'd per curiam*, 480 F.2d 1159 (D.C. Cir. 1973).

98. See GARY ORFIELD, *MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY* (1978) [hereinafter ORFIELD, *MUST WE BUS?*].

99. David S. Tatel, *Judicial Methodology, Southern School Desegregation and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1097 (2004).

100. *Id.* at 1098.

101. See PAUL DIMOND, *BEYOND BUSING: REFLECTIONS ON URBAN SEGREGATION, THE COURTS & EQUAL OPPORTUNITY* 403 (2005).

102. *Swann I*, 402 U.S. 1 (1971).

103. See generally Owen M. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 699–703 (1971); Tatel, *supra* note 99, at 1087–88; see also ACKERMAN, *supra* note 38, at 252–56.

104. Charlotte-Mecklenburg schools and neighborhoods were stably integrated for twenty-five years. See MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 119–223 (2006).

*Green*, which left many schools highly segregated.<sup>105</sup> Thus, in many ways the issues before the Court were much like those it would face in segregated northern metropolitan areas.

First, *Swann* held that because housing and school segregation are deeply interrelated, neighborhood school assignments based on geographic proximity did not satisfy the board's duty to desegregate. The Court reasoned that past discrimination, such as building or adding capacity to schools that foreseeably increased system-wide school segregation, was not only school-level discrimination, but was also an important cause of metropolitan-wide housing segregation. The Court concluded that the interplay of housing and school segregation must be considered in shaping a school desegregation remedy.<sup>106</sup>

Second, *Swann* held that when a school assignment plan allowed some schools to be all or predominantly one race, a district with a history of discrimination bore the burden of proving that such segregation was not the result of past or present discrimination.<sup>107</sup> To satisfy this heavy burden, the school district must show that its past discriminatory conduct involving the racial designation of schools, siting, and determination of school size is "not a link in the causal chain" causing segregation.<sup>108</sup> The Court further noted, "independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown."<sup>109</sup>

Third, the Court declared that the district must do everything possible to actually eliminate segregated patterns of enrollment. Good-faith effort was not enough, and plans had to be evaluated on their effectiveness in eliminating segregation.<sup>110</sup> *Swann* declared that "[o]nce a right and a violation has been shown, the scope of the district court's equitable powers to remedy the wrong is broad, for breadth and flexibility are inherent in equitable remedies."<sup>111</sup> "The task," the Court continued, "is to correct, by balancing of the individual and collective interests, the condition that offends the constitution."<sup>112</sup>

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105. See *Swann v. Charlotte-Mecklenburg Bd. of Educ. (Swann II)*, 243 F. Supp. 667 (W.D.N.C. 1965), *aff'd*, 369 F.2d 29 (4th Cir. 1966).

106. *Swann I*, 402 U.S. 1, 20–21 (1971).

107. *Id.* at 25–26.

108. Fiss, *supra* note 103, at 701.

109. *Swann I*, 402 U.S. at 18.

110. *Id.* at 25.

111. *Id.* at 15.

112. *Id.* at 16.

The Court sanctioned judicial redrawing of school boundaries, mandatory school busing, and “root and branch” measures that would racially integrate all the schools and equalize all the other *Green* factors (e.g., facilities, faculty, transportation, and extracurricular activities) across a large metropolitan area. Further, when de jure segregation<sup>113</sup> was present, a district was prohibited from any construction or facility expansion activity that would have the effect of increasing racial segregation in the schools.

*Swann* noted that if proof of illegal housing discrimination by another level of government was made in a school case, a housing remedy could also be considered.<sup>114</sup> But absent proof of housing discrimination by other levels of government, the Court limited remedies in school desegregation cases to education facilities, stating that “one vehicle could contain and carry only a limited amount of baggage.”<sup>115</sup> Nevertheless, the Court noted that the interplay of school segregation and metropolitan housing segregation must be considered in the school-based remedy. The Court declined to reach the question of whether government housing discrimination alone by other levels of government would support a school desegregation order in the absence of school district discrimination.<sup>116</sup>

Fourth, the Court validated the use of race in student assignments when the goal was integration rather than segregation. The Court stated that while a locally elected school board could use quotas to prescribe precise racial balance in local schools, a court could not undertake such precise racial balancing.<sup>117</sup> A court could, however, use a rough target or a 29–71 ratio—as distinguished from prohibited racial balancing—as a “flexible starting point” to integrate schools.<sup>118</sup>

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113. De jure segregation is literally “segregation by law” and refers to either Jim Crow officially required segregation or segregation that is the result of intentional discrimination by a state or local government. De facto segregation is segregation that exists without established proof of such discrimination.

114. *Swann I*, 402 U.S. at 21.

115. *Id.* at 22.

116. *Id.* at 23.

117. *Id.* at 16. The Court’s statement in *Swann* concerning the power of an elected school board may be limited by Justice Kennedy’s controlling concurrence in which he states his agreement “in many respects” with Part III-A of Justice Roberts’s plurality opinion. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 791 (2007) (Kennedy, J., concurring).

118. *Swann I*, 402 U.S. at 23–25.

### 3. Strict Construction and Integration: Justices Rehnquist and Powell, and the Supreme Court From 1971 to 1974

*Swann* and *Green* dramatically expanded the meaning of *Brown* and the Civil Rights Act<sup>119</sup> in the face of a hostile executive and divided Congress.<sup>120</sup> President Nixon was upset by the role his first Supreme Court appointees played in *Swann*.<sup>121</sup> Nixon had lobbied Burger while the case was pending and “lit into him” on the question of busing.<sup>122</sup> After the case was decided, Nixon met with Burger, telling him that the Warren Court had caused the public to lose confidence. Nixon went on, saying: “They see the Negro problem[,]. . .and then there’s busing. That just drives them up the damn wall.”<sup>123</sup> Burger back-peddled, telling the President “[t]hat *Swann* case was thoroughly misrepresented by the press. . . . They wanted it to be just a busing decision. . . . It was the first time the Court put limits on busing.”<sup>124</sup> Four months after *Swann*, the Chief Justice, in a very unorthodox move, used a stay application in the Winston-Salem school desegregation case to reframe *Swann* in a more conservative light, emphasizing that it did not require racial balance or long bus rides.<sup>125</sup> The Chief Justice mailed copies of this “advice” to federal judges throughout the country marked: “For the personal attention of the Judge.”<sup>126</sup>

*Swann* would be the Court’s last unanimous school desegregation decision. Thereafter, Nixon made clear to Attorney General John Mitchell, who was in charge of the Supreme Court appointment process, that no one would be appointed to the Supreme Court unless that person made a clear commitment to oppose busing. On an audiotape in the Oval Office, Nixon told Mitchell:

I want you to have a specific talk with whatever man we consider and I have to have an absolute commitment from him on busing and integration. I really have to. All right? Tell him that we totally respect his

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119. Civil Rights Acts of 1964, 42 U.S.C. § 2000d *et seq.*

120. See Wilkson, 131-192; This development would seem to contradict Rosenberg’s “Hollow Hope” thesis. See ROSENBERG, THE HOLLOW HOPE, *supra* note 36, at 39-57 (noting that courts were too weak to accomplish important social reforms like school desegregation).

121. Tatel, *supra* note 99, at 1100.

122. *Id.* (quoting Audio tape: Conversation between Richard Nixon, Harry Dent, John Mitchell and others, Oval Office of the White House, Washington, D.C. (Apr. 21, 1971) (Nat’l Archives Nixon White House Tape Conversation 484-2)).

123. *Id.* at 1101 (quoting Audio tape: Conversation between Richard Nixon and Warren Burger, Oval Office of the White House, Washington, D.C. (June 14, 1972) (Nat’l Archives Nixon White House Tape Conversation 733-10)).

124. *Id.*

125. See WILKINSON, *supra* note, at 55.

126. *Id.*

right to do otherwise, but if he believes otherwise, I will not appoint him to the court.<sup>127</sup>

Richard Nixon's next two appointments were Lewis Powell and William Rehnquist.

The Nixon tapes suggest that the president and his Attorney General John Mitchell exacted explicit promises from Rehnquist and Powell that they would oppose busing.<sup>128</sup> Nixon had good reason to believe both men would use their power to limit court ordered integration.

In *Brown v. Board of Education*, Powell's law firm represented the Prince Edward County School District, which sought to maintain its segregated schools.<sup>129</sup> He had been the chair of the Richmond, Virginia, school board during *Brown* and until 1960. While Powell personally opposed Virginia's massive resistance effort to close the public schools, his opposition was a silent one.<sup>130</sup> A federal district court found unconstitutional racial discrimination on the part of the Richmond School Board when Lewis Powell was its chair from 1952 to 1961, and on the part of the Virginia Board of Education, when he was member from 1961 to 1969 and its president from 1968 to 1969. During his tenure as chair in Richmond, the board allowed the admission of only two of Richmond's 23,000 black children to white schools.<sup>131</sup> Powell also led the board to take a number of unconstitutional actions. For example, he championed the creation of all-black schools both by transferring all of the whites out of schools that blacks would attend, and by building new all-white schools in white neighborhoods to avoid integration.<sup>132</sup> Finally, Powell had filed a brief in the *Swann* case opposing the use of busing to achieve integration.

William Rehnquist, as a law clerk to U.S. Supreme Court Justice Robert Jackson, wrote a memorandum urging the affirmance of *Plessy v. Ferguson*<sup>133</sup> in the *Brown* case, which he asserted was rightly decided,<sup>134</sup> and actively and publi-

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127. Tatel, *supra* note 99, at 1098–99 (quoting Audio tape: Conversation Between Richard Nixon and John Mitchell, Oval Office of the White House, Washington, D.C. (Sept. 18, 1971) (Nat'l Archives Nixon White House Tape Conversation 576-6)).

128. *See id.*

129. JOHN C. JEFFRIES JR., LOUIS F. POWELL: A BIOGRAPHY 149–50 (2001).

130. Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1875–78 (1995).

131. JEFFRIES, *supra* note 129, at 141.

132. *Id.* at 141–42.

133. 163 U.S. 537 (1896).

134. JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE APPOINTMENT THAT REDEFINED THE SUPREME COURT 278–284 (2001); JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST PASSIM (2012); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 605–09 (Special ed. 1994). These three accounts

cally opposed ending discrimination in public accommodations in Phoenix, Arizona.<sup>135</sup> He also had been repeatedly accused of harassing nonwhite citizens attempting to vote in Arizona.<sup>136</sup> As the head of the Office of Legal Counsel in Nixon's Justice Department, Rehnquist proposed rewriting parts of the Constitution's Bill of Rights or dramatically limiting the incorporation of the Bill of Rights to the states through the Fourteenth Amendment.<sup>137</sup> In his first seventeen years on the Court, Justice Rehnquist never voted to uphold a desegregation order.<sup>138</sup>

#### 4. *Wright v. City of Emporia*

In *Wright v. City of Emporia*,<sup>139</sup> the Court held that school district boundaries between city and suburban schools—even if drawn without discriminatory intent—could not limit the scope or effectiveness of a school desegregation remedy if respecting these boundaries could increase white flight from one of the local school districts.

Emporia was an independent city in the Greenville County, Virginia. While its children historically attended the Greenville County school district, it had the right under state law to form and operate its own school district at any time. There was no evidence that the boundaries of Emporia were drawn in a racially discriminatory manner. The Greenville County schools operated under a freedom-of-choice plan and had remained racially segregated. After *Green*, a federal court ordered a more extensive desegregation plan. At this point, Emporia announced its intention to operate a separate school district as provided by state law.<sup>140</sup>

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provide persuasive evidence that the memo in question represented Rehnquist's own opinion, not Justice Jackson's, as Rehnquist claimed in his confirmation hearings. See Mark Tushnet & Katyz Lezin, *What really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1911, n.190 (1991); Laura K. Rey, *A Law Clerk and His Justice*, *What William Rehnquist did not Learn From Robert Jackson*, 26 IND.L.REV. 554–59 (1991).

135. JENKINS, *supra* note 133, at 69–70.

136. DEAN, *supra* note 133, at 270–73; JENKINS, *supra* note 133, at 69–70.

137. Memorandum to John W. Dean III, Associate Deputy Attorney General, From William Rehnquist, Assistant Attorney General, Office of Legal Counsel, Summary of Memorandum Re: Constitutional Decisions Relation to Criminal Law, April 1, 1969 with attached Memorandum Re: "Commision to Evalulate Recent Constitutional Decisions in [the] Field of Criminal Law," White House Special Files, Dean: Box 44; Crime and Rights of the Accused, National Archives and Records Administration; see also DEAN, *supra* note 133, at 267–270, 310 n.14; JENKINS, *supra* note 133, at 80–81; MCMAHON, *supra* note 96, at 190–91.

138. Sue Davis, *Justice Rehnquist's Equal Protection Clause: An Interim Analysis*, 63 NEB. L. REV. 288, 308 (1984).

139. 407 U.S. 451 (1972).

140. *Id.* at 453–63.

Whereas the Greenville County system was 34 percent white and 66 percent black, the separate district of Emporia would be 48 percent white and 52 percent black. Without Emporia's students, Greenville County schools would be 72 percent black and 28 percent white.<sup>141</sup> The district court enjoined Emporia's action stating that it would frustrate its plan to end the dual school district in Greenville County.<sup>142</sup> It found that part of Emporia's motivation, but not all or even the predominant motivation, involved race.<sup>143</sup> In reversing, the court of appeal judged that Emporia's motivation was not discriminatory and that absent proof that Emporia exercised its preexisting rights in a discriminatory manner, a court could not enjoin the formation of separate school districts.<sup>144</sup>

On appeal, Justice Stewart, writing for a sharply divided Supreme Court, reversed the holding that Emporia's intent was irrelevant. He wrote "[t]he measure of any desegregation plan was its effectiveness.' Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a school system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect."<sup>145</sup>

The Court found that if Emporia were allowed to withdraw, Greenville County schools would increase from 66 to 72 percent black, and that this could lead to greater white flight from that system.<sup>146</sup> Thus, even though Emporia would by itself be a majority black system, would be desegregated under *Green*, and would refuse to accept white transfer students from the county, its nondiscriminatory exercise of its preexisting right to operate an independent school district based on boundaries that had been drawn in a race neutral manner was impermissible if it might increase white flight from Greenville County schools.

##### 5. *Keyes v. School District No. 1*

*Keyes v. School District No. 1*<sup>147</sup> represents the high water mark of pro-integrative action by the federal government. *Keyes* established that in northern, non-Jim Crow states, past covert—as opposed to formally sanctioned—discrimination in a relatively small part of a school district created a hard-to-

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141. *Id.* at 464.

142. *Id.* at 458.

143. *Wright v. Cnty. Sch. Bd. of Greenville Cnty.*, 309 F.Supp. 671, 680 (E.D.Va.1970).

144. *Wright v. Council of Emporia*, 442 F.2d 570, 574 (4th Cir. 1971).

145. *Wright*, 407 U.S. at 462 (internal citations omitted) (quoting *Davis v. Sch. Comm'rs of Mobile Cnty.*, 402 U.S. 33, 37 (1971)).

146. *Id.* at 464.

147. 413 U.S. 189 (1973).



counter evidentiary presumption that the entire district was de jure segregated and must be desegregated root and branch.<sup>148</sup>

Justice Powell, in his first desegregation opinion, proposed eliminating the de facto/de jure distinction, in exchange for remedies that were largely voluntary and involved little or no busing. Justice Brennan preferred to build a majority that would preserve the distinction and require broad root and branch remedies.

Under *Keyes*, if a judge found that one or more of the following past actions were undertaken with intent to discriminate,<sup>149</sup> the district would be segregated by law.

The actions included: (1) the drawing or alteration of attendance zones that had racially segregative effects; (2) the location of new school construction or expansion of existing schools that increased segregation, or the failure to relieve overcrowding at segregated sites in ways that could increase integration;<sup>150</sup> (3) hiring, promotion, or faculty placement decisions with racially disparate impacts;<sup>151</sup> (4) perpetuation or exacerbation of district segregation by strict adherence to a neighborhood school policy,<sup>152</sup> and (5) transfer policies that systematically increase racial segregation in a district's schools.<sup>153</sup>

The Court declared even more boldly than *Swann* that school segregation and housing segregation were deeply intertwined and that school-level discrimination “may have profound reciprocal effects on the racial composition of neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.”<sup>154</sup>

*Keyes* next held that past covert discrimination, as opposed to officially sanctioned Jim Crow discrimination, found in a “substantial part” of a diverse school district, would create a presumption of intentional segregation throughout the

148. *Freeman v. Pitts*, 503 U.S. 467, 504–07 (1992) (Scalia, J., concurring); Owen M. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3, 22–26 (1974); cf. ACKERMAN, *supra* note 38, at 271–78 (asserting a highly critical analysis of *Keyes* doctrinal developments).

149. In *Columbus Board of Education v. Penick*, 443 U.S. 449, 464–65 (1979), the Court held that if school authorities took an official action where a disparate racial impact was foreseeable—including but not limited to the *Keyes* actions—such evidence could support a finding of intentional discrimination. *Dayton v. Brinkman* further suggests segregated faculty decisions alone might not be sufficient to support root and branch desegregation. *Dayton v. Brinkman (Dayton II)*, 443 U.S. 526 (1979).

150. *See Keyes*, 413 U.S. at 201–02; *id.* at 234–35 (Powell, J., concurring).

151. *See id.* at 209 (majority opinion); *id.* at 235 (Powell, J., concurring).

152. *See id.* at 212 (majority opinion); *id.* at 235 (Powell, J., concurring).

153. *See id.* at 235 (Powell, J., concurring). The failure to adhere to a district's approved integration plan is also a factor that may result in a finding of intentional segregation. *See* ORFIELD, *MUST WE BUS?*, *supra* note 98, at 20 tbl.1-1.

154. *Keyes*, 413 U.S. at 202.

district requiring root and branch remedies.<sup>155</sup> While the term “substantial” might suggest a pervasive practice, the conduct at issue in *Keyes* involved the Denver neighborhoods of Park Hill, which had only 5 to 10 percent of all students and schools and 38 percent of Denver’s black students.<sup>156</sup>

The Court used two evidentiary theories to support this presumption.<sup>157</sup> Under the “spread theory,” the Court declared that discrimination in even a small area infected adjacent schools and schools throughout the district.<sup>158</sup> If one school was made black by a discriminatory act, the Court reasoned, another school would be made whiter even though the white students may have been assigned based on neutral geography. The Court’s language bears repeating:

First, *it is obvious* that the practice of concentrating Negroes in certain schools by structuring attendance zones or designing ‘feeder’ schools on the basis of race has the reciprocal effect of keeping other nearby schools predominant white. Similarly, the practice of building a school—such as Barrett Elementary School in this case—to a certain size and in a certain location ‘with conscious knowledge that it would be a segregated school has a substantial effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students and the assignment of faculty and staff, on a racially identifiable basis, have the effect of earmarking schools according to their racial composition . . .’<sup>159</sup>

The *Keyes* presumption of district-wide discrimination based on the spread theory could be rebutted only if the district could prove that the portion of the district where discrimination was practiced was a “separate, identifiable and unrelated unit.”<sup>160</sup> In this light, the Court held that the separation of neighborhoods created by a six-lane highway was insufficient to establish such a distinction.<sup>161</sup>

If the spread theory could be overcome, which was unlikely, the Court used “the repetition theory” to find that if a school district was found to have discriminated in one part of the school district, it would be assumed that segregation in other parts of the school district were similarly discriminatory. In order to rebut

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155. *Id.* at 200, 213–14.

156. *See id.* at 199 n.10 (noting that from 1968 to 1969 Park Hills schools served 963 students out of the District’s total of 8,766 students, or approximately 9 percent).

157. Fiss, *supra* note 148, at 22–26.

158. *Id.* at 22–34.

159. *Keyes*, 413 U.S. at 201–02 (emphasis added).

160. *Id.* at 205.

161. *Id.*

the repetition presumption, the district must prove that the segregation at issue was in “no way the result of the separate past acts of discrimination.”<sup>162</sup>

Because such conduct was virtually always present in segregated systems, most *Keyes* claims were successful.<sup>163</sup> Because judicial discretion was still involved, however, judges confronting similar factual patterns came to different conclusions that were upheld by reviewing courts.<sup>164</sup>

## II. THE WATERSHED OF RACIAL INTEGRATION IN AMERICA'S SCHOOLS: *MILLIKEN V. BRADLEY* (1974)

### A. Metropolitan Remedies and the Constitution

As desegregation litigation moved to the highly fragmented urban North, it was immediately apparent that effective remedies must be metropolitan or at least interdistrict. By 1973, many of the nation's largest cities had already lost huge percentages of white citizens to suburbanization and white students were a minority in the schools. Since single-district remedies were likely to be impossible or very short-lived, and likely to make segregation worse on a metropolitan scale, they represented a further injury, not a remedy. As larger-scale plans, like the one in Charlotte-Mecklenburg, were created, evidence mounted that countywide or more nearly metropolitan plans were far less vulnerable to white flight, and in some cases, actually reduced or even stopped the existing white flight.<sup>165</sup>

The legal theory for more comprehensive interdistrict or metropolitan desegregation was straightforward. The Equal Protection Clause of the Fourteenth Amendment was directed at the states, not at local governments. Moreover, local governments, such as school districts, are creatures of the state and have no independent sovereignty or constitutional status. Upon this foundation, the result-oriented framework developed by *Green*, *Swann*, *Wright*, and *Keyes* provided strong support for interdistrict remedies. These cases held that once a violation is found, federal courts would evaluate school desegregation decrees in their effectiveness in eliminating the vestiges of segregation. Federal courts had not merely the power but the duty to “craft remedies that eliminate the effects of discrimina-

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162. *Id.* at 211, 213–14.

163. See ORFIELD, MUST WE BUS?, *supra* note 98, at 19, 24; Mark Tushnet, *A Clerk's Eye View of Keyes v. School District No. 1*, 90 DENV. U. L. REV. 1139, 1147 (2013) [hereinafter Tushnet, *Clerk's Eye*].

164. See Margaret H. Marshall, Comment, *The Standard of Intent: Two Recent Michigan Decisions*, 4 J.L. & EDUC. 227, 233–41 (1975) (discussing how very similar factual situations lead to different results in the Kalamazoo and Grand Rapids desegregation cases, which were both upheld by the Sixth Circuit).

165. LASSITER, *supra* note 104, at 212–13.

tion.” *Wright* had declared that white flight was an important consideration in shaping a remedy, and even if local district boundaries had been drawn with neutral intent, they could not be used to limit the effectiveness of a desegregation remedy. Finally, *Keyes*, through both its spread and repetition presumptions, provided strong support. The spread theory would support the holding that once the state had committed discrimination in one district to cause segregation, it would necessarily cause discrimination in the other districts. The repetition theory would support the presumption that discriminatory conduct proved in one district would be presumed in the segregated patterns within or among other districts. The reapportionment cases, by holding that state-drawn boundaries, even if created without intent to discriminate, had to be reshaped to vindicate important individual constitutional rights, also provided support.

### 1. The Constitutional Status of Local Government Boundaries

The Constitution is silent on questions of local government. Yet to lawyers practicing in the field of state and local government law, there is no clearer black-letter principle than that all local governments are mere administrative conveniences of the state and have no independent identity or constitutional status that makes them separate or in any way autonomous from state authority.<sup>166</sup> In the mid-nineteenth century, a minority of courts, led by Judge Thomas Cooley of Michigan (also a treatise writer) asserted that “local governments existed as manifestations of unwritten or customary constitutional values that would be respected by any conscientious legislature.”<sup>167</sup> Judge John Dillon of Iowa (another treatise writer) represented the clear majority view that that no such limitation on state power vis-à-vis local government existed.<sup>168</sup> By the early twentieth century, Dillon’s view had thoroughly prevailed in the courts of the United States, including in Michigan.<sup>169</sup>

For example, in *Hunter v. Pittsburgh*,<sup>170</sup> Pittsburgh annexed the neighboring city of Allegheny under a state law allowing annexation if a majority of citizens in the proposed combined entity voted in favor. The measure carried, with Pitts-

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166. For an overview of the role of cities as mere administrative entities of the state, see Gerald E. Frug, *The City as Legal Concept*, 93 HARV. L. REV. 1057, 1009–1119 (1980).

167. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW 221 (1983) (citing *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 97–98 (1871) (Cooley, J., concurring)).

168. See *City of Clinton v. Cedar Rapids & Mo. R.R.*, 24 Iowa 455, 475 (1868).

169. See GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 45–50 (1999); HARTOG, *supra* note 167, at 125, 220–235; David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999).

170. 207 U.S. 161 (1907).

burgh citizens in favor and Allegheny's voters in strong opposition.<sup>171</sup> Allegheny sued, arguing that this annexation would cause its citizens' taxes to rise without their consent, violated the Contract Clause, and deprived individuals of their property without due process of law.<sup>172</sup>

The Supreme Court, citing Judge Dillon, rejected Allegheny's claims in sweeping terms:

The State . . . at its pleasure may modify or withdraw all [local government] powers, may take without compensation [local government] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.<sup>173</sup>

In *City of Trenton v. State of New Jersey*,<sup>174</sup> New Jersey granted a private company a franchise to take water from the Delaware River without limit or cost. The company sold the franchise to Trenton and thereafter, New Jersey imposed a fee. The U.S. Supreme Court held that, even if the private company had a due process claim against New Jersey, the municipality had no such claim.<sup>175</sup> "[I]n the absence of state constitutional provisions safeguarding it to them," the Court held, "municipalities have no inherent right of self-government which is beyond the legislative control of the state."<sup>176</sup>

In *Gomillion v. Lightfoot*,<sup>177</sup> the Supreme Court held that the broad state powers to define municipal boundaries were limited by the Fifteenth Amendment, which forbids a state drawing such boundaries in a manner that intentionally deprives a citizen of the right to vote on the basis of race.<sup>178</sup> *Gomillion's* holding was then applied in the Fourteenth Amendment context to local school district boundaries that had been drawn without intent to frustrate the right of a student to attend a unitary nondiscriminatory school.<sup>179</sup>

The reapportionment cases went even further giving federal courts the power to redraw state-created boundaries that served to frustrate the vindication of individual rights, even though such boundaries were not drawn with intent to

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171. *Id.* at 167.

172. *Id.* at 168–69.

173. *Id.* at 178–79.

174. *City of Trenton v. State of N.J.*, 262 U.S. 182 (1923).

175. *Id.* at 191.

176. *Id.* at 187; *see also* *Williams v. Mayor and City Council of Balt.*, 289 U.S. 36 (1933).

177. 364 U.S. 339 (1960).

178. *Id.* at 345.

179. *United States v. Scotland Neck City*, 407 U.S. 484 (1972).

limit individual rights and served a rational purpose of giving local governments a voice in state legislative matters.

For example, in Alabama, the county was the basic unit of local government, and the state constitution guaranteed each county at least one representative and one senator. Remaining available seats were allocated to each county roughly on the basis of population. Because counties were unequal in population, citizens of more populous counties argued that Alabama's apportionment scheme, by diluting their vote, violated the Equal Protection Clause.<sup>180</sup>

In *Reynolds v. Sims*,<sup>181</sup> the Supreme Court noted that it was a rational and legitimate goal to ensure "some voice to some political subdivisions, as political subdivisions" and that the Alabama apportionment scheme was consistent with a "republican form of government."<sup>182</sup> The Court recognized that "[l]ocal government entities are frequently charged with various responsibilities incident to the operation of state government," that "much of the legislature's activity involves the enactment of so-called local legislation directed only to the concerns of particular political subdivisions" and finally, that "the state may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering."<sup>183</sup> Finally, the boundaries had been drawn sixty years before with no intent to deprive anyone of the right to vote.<sup>184</sup>

The Court observed that the right to vote is fundamental and personal right, however, "[e]specially since . . . [it] is preservative of other basic civil and political rights."<sup>185</sup> The right to vote "touches a sensitive and important area of human rights," and "involves one of the basic civil rights of man."<sup>186</sup> Thus any alleged infringement on this right must be "carefully and meticulously scrutinized."<sup>187</sup>

Ultimately, the Court rejected both Alabama's existing state constitutional apportionment scheme and a compromise proposal that one house would be apportioned on the basis of population and the other apportioned to ensure representation of local governments—the so-called "federal analogy."<sup>188</sup> Rejecting the federal analogy, the Court noted that the "original 13 states surrendered some of

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180. *Gomillion*, 364 U.S. at 341.

181. 377 U.S. 533 (1964).

182. *Id.* at 580–82.

183. *Id.*

184. *Id.* at 569–70.

185. *Id.* at 562.

186. *Id.* at 561.

187. *Id.*

188. *Id.* at 572–73.

their sovereignty in agreeing to join together . . . to form a more perfect union.”<sup>189</sup> These sovereign states, the Court held, were totally different from local governments that were mere administrative conveniences of the state.

Specifically, the Court stated:

Political subdivisions of states—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather they have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist in the carrying out of state governmental functions. . . . [T]he relationship of the states to the federal government could hardly be let less analogous.<sup>190</sup>

Thus, even though Alabama’s compromise constitutional apportionment plan to ensure local government representation in one house was a rational compromise between federal and state authority, it violated the Equal Protection Clause because it would have submerged the equal-population principle in “at least one house of a state legislature.”<sup>191</sup> The boundaries of both houses, even though they had been drawn sixty years earlier with no intent to limit the right to vote, had to yield.

In the face of all this legal authority stood the stupendous de facto political power of separate governments and their officials, and the suburban voters who had moved to these communities in part to avoid interaction with and responsibility for poor black students. Regardless of the history of racial violence, racial covenants, the Fair Housing Act (FHA), blockbusting, steering, mortgage lending, or anything else, white homebuyers had worked and saved, stretching themselves to their financial limits to afford their one-sixth acre of paradise and safety far removed from growing turmoil of the city.

Opponents to metropolitan desegregation sought to meld this immense political power into local government law. In so doing, they brought in Phillip Kurland, a professor at the University of Chicago Law School. Kurland argued that principles of federalism required evidence of violation by those who relied on the boundaries before they could be overcome by the remedial power of a federal court. While Kurland acknowledged that boundaries drawn with clear intent to discriminate could be redrawn, courts did not have the same power to redraw boundaries that were innocently drawn.<sup>192</sup>

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189. *Id.* at 574.

190. *Id.* at 575.

191. *Id.* at 574–75.

192. JAMES E. RYAN, FIVE MILES AWAY A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 88 (2010).

## 2. *San Antonio v. Rodriguez*

*Brown*'s prohibition on segregated education had been based on the importance of public education to effective citizenship and success in life.<sup>193</sup> The Court declared: "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>194</sup>

In *San Antonio v. Rodriguez*,<sup>195</sup> low-income Mexican plaintiffs from a low-property-wealth school district challenged Texas's school finance formula, which allowed sharp disparity in spending and tax effort between property poor and property rich districts. Justice Powell, writing for a 5–4 majority, found that despite *Brown*, there was no right to education in the Constitution's text, nor was wealth a suspect class for purposes of the Equal Protection Clause. Echoing Kurland's themes, Justice Powell embedded in the decision the concept of sacred tradition of local control over education, which weighed against finding a federal constitution role, writing, "[i]n an era that has witnessed a consistent trend toward centralization of the function of government. . . . The persistence of attachment to government at the lowest level where education is concerned reflects the depth of the commitment of its supporters."<sup>196</sup>

## 3. *Bradley v. Richmond*

In Richmond, Virginia in 1971, a federal district court ordered the consolidation of Richmond and two surrounding suburban countywide districts in the metropolitan areas. The 189-page opinion reasoned that a strategy relying on Richmond-only busing would be futile and would simply stimulate faster white flight to the county schools.<sup>197</sup>

The district court found that school segregation was caused by both public and private educational and housing discrimination.<sup>198</sup> The court noted the history of restrictive covenants, FHA loan discrimination, restrictive zoning, and refusal to accept government-supported low-income housing.<sup>199</sup> In addition to state-action discrimination in housing, the court also found discrimination in the

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193. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493–95 (1954).

194. *Id.* at 493.

195. 411 U.S. 1 (1973).

196. *Id.* at 49.

197. *Bradley v. Sch. Bd. of Richmond*, 338 F. Supp. 67, 183–85 (E.D. Vir. 1972).

198. *Id.* at 73–74.

199. *Id.* at 74.



school authorities' failure to combat the clear pattern of housing discrimination.<sup>200</sup>

The Fourth Circuit Court of Appeals reversed, using Kurland's argument, holding that the federal courts could not order county consolidation without proof that the state had drawn the boundaries with a segregative purpose or that the surrounding counties had intentionally discriminated in a way that caused school segregation in Richmond.<sup>201</sup> Constitutional violations within Richmond, which were upheld, were not enough. A second level of constitutional violations was required. While the Fourth Circuit affirmed the findings of government housing discrimination, it declared that the district court had not established that government housing discrimination had a meaningful impact on the segregation of the school system in Richmond.<sup>202</sup> The Fourth Circuit declared: "We think that the root causes of the concentration of blacks in the inner cities of America are simply not known and that the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the city of Richmond."<sup>203</sup>

The arguments of the district court and Fourth Circuit were like ships passing in the night. The district court described racial segregation as a dynamic ongoing process involving both schools and neighborhoods. Existing and potential white flight had to be taken into account in the remedy. Otherwise, the remedy could be worthless or even make the injury more severe. The Fourth Circuit viewed segregation as a static educational event and concluded that courts only bore the responsibility to remedy it at one moment in time. Existing dynamic racial trends or potential negative consequences of a more limited remedy were not important or even cognizable.

On appeal, the Supreme Court, divided 4–4, affirmed the Fourth Circuit by a tie. Justice Powell, a member of the Richmond school board from 1951 to 1961, and of the Virginia State Board of Education from 1961 to 1969, entities responsible for the constitutional violations found by the courts below, recused himself.<sup>204</sup>

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200. *Id.* at 93–94.

201. *Bradley v. Sch. Bd. of Richmond*, 462 F.2d 1058, 1064–65 (4th Cir. 1972).

202. *Id.* at 1065.

203. *Id.* at 1066.

204. *Sch. Bd. of Richmond v. State Bd. of Educ.*, 412 U.S. 92 (1973) (*per curiam*).

## B. The Political Challenge of Metropolitan Detroit

In 1950, metropolitan Detroit was the fifth-largest U.S. metropolitan area with three million residents, roughly six times as big as Charlotte-Mecklenburg and five times bigger than the city of Denver.<sup>205</sup> Where the previous cases involved a single school district, *Milliken* involved a potential eighty-five separate school districts and over 400 municipalities with land-use-planning powers.<sup>206</sup>

There was probably no worse place logistically or politically in the United States to attempt to implement an interdistrict school desegregation remedy than Detroit. Having experienced four significant race riots before *Milliken*, Detroit had an unusually vicious history of segregation and violence between white and black working-class neighborhoods.<sup>207</sup> The center of automobile manufacturing, Detroit grew explosively in the early twentieth century, as both white and black industrial workers moved to the expanding city. Blacks, initially excluded from unions, were often strikebreakers. Antagonism and severe segregation, enforced by violence, followed. Physical walls were erected between white and black neighborhoods.<sup>208</sup> In the late 1940s, at the high point of the labor movement in an overwhelmingly Democratic city, Detroit elected its first Republican mayor in a generation primarily based his promise to oppose Democratic plans for housing desegregation.<sup>209</sup>

Like much of the Midwest, in the late-nineteenth and early-twentieth centuries, the metropolitan area rapidly municipalized. Suburban school districts were in the process of rapid consolidation up until *Milliken* was decided. After World War II, with the assistance of its regional planning agency Southeastern Michigan Council of Governments (SEMCOG), the region built a huge array of radial and circumferential highways.<sup>210</sup> As restrictive covenants became unenforceable, whites began a rapid retreat to the suburbs. In

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205. RUSK, *supra* note 88, at 20.

206. *Milliken I*, 418 U.S. 717, 752–53 (1974).

207. This history is brilliantly chronicled in THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996) [hereinafter SUGRUE, *ORIGINS*]; see also THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008) [hereinafter SUGRUE, *FORGOTTEN STRUGGLE*].

208. SUGRUE, *ORIGINS*, *supra* note 207, at 63–64.

209. *Id.* at 82–86 (noting that labor leaders were stunned by the Republican victory on the housing issue).

210. Gary A. Benjamin, *SEMCOG's Business as Usual: A Failed Model*, 13 J.L. SOC'Y 155, 174–75 (2011); David Riddle, *Race and Reaction in Warren Michigan, 1971 to 1974: Bradley v. Milliken and the Cross District Busing Controversy*, 26 MICH. HIST. REV. 1, 47 (2000).

the 1960s, Detroit's already massive ghetto exploded in the nation's most deadly and destructive race riots.<sup>211</sup>

Michigan's Governor George Romney, a moderate, pro-civil rights Republican, was deeply affected by the riots and supported the findings of the Kerner Commission. As Nixon's newly appointed Secretary for Housing and Urban Development, Romney introduced legislation to tie federal highway, sewer, and housing funds to the new requirements of the Fair Housing Act.<sup>212</sup> Communities that failed to conform would not receive priority for federal spending programs. As he attempted to implement this program in the Macomb County suburb of Warren, Michigan, he was greeted by fierce public protest.<sup>213</sup> Nixon and his highest aides stopped Romney's efforts and he was marginalized within the administration. Ironically, the Warren protest against Romney's open housing plan helped set the stage for later protests in response to *Milliken v. Bradley*.

### C. *Milliken* in the Lower Courts

On April 7, 1970, after years of protest from the black community concerning educational segregation, the Detroit Board of Education voted 4–2 to adopt a gradual, partial integration plan.<sup>214</sup> Protest in the white community was fierce, and the Citizens Committee for a Better Education (CCBE), a group of white parents, was formed to recall the four board members supporting the plan.<sup>215</sup> On July 7, the Michigan Legislature repealed the integration plan by statute and further re-boundaried Detroit into eight subdistricts, four black and four white, which could be more locally controlled and possibly even more segregated.<sup>216</sup> The legislature had already reduced bus transportation funds to the Detroit district, treating it differently from all other Michigan school districts. On August 4, in a racially polarized vote, all four board members who had voted for the integration plan were recalled.<sup>217</sup>

On August 18, 1970, the NAACP sued, seeking to overturn the legislative act and establish an integrated unitary school district. The trial judge, Stephen Roth, a conservative former attorney general of Michigan, who came from a

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211. Benjamin, *supra* note 210, at 165–169.

212. CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 80–84 (2005).

213. *Id.* at 91–94.

214. JOYCE A. BAUGH, THE DETROIT SCHOOL BUSING CASE: *MILLIKEN V. BRADLEY* AND CONTROVERSY OF DESEGREGATION 80 (2011).

215. Riddle, *supra* note 210, at 11.

216. Act of July 7, 1970, 1970 Mich. Pub. Acts 48 (1970); BAUGH, *supra* note 214, at 83.

217. William R. Grant, *Evolution of Desegregation in Detroit*, 21 WAYNE L. REV. 851, 858 (1975).

white ethnic neighborhood of racially segregated Flint, Michigan, was initially very unsympathetic to the plaintiff's claims.<sup>218</sup> The district court allowed the intervention of CCBE, dismissed the governor and the attorney general as parties, and denied plaintiff's request for a preliminary injunction.<sup>219</sup> Roth was quickly overruled by the Sixth Circuit, which found the legislative act unconstitutional, reinstated the governor and attorney general, and ordered an expedited trial on plaintiff's claims of de jure segregation.<sup>220</sup>

Plaintiffs, basing their case on *Swann*, attempted to prove (1) intentional residential housing segregation and (2) educational segregation caused by local, state, and federal action. After a forty-one day trial, the district court found unlawful housing and educational segregation on the part of the school district, the state, and the federal government.<sup>221</sup>

The court heard ten days of testimony on housing segregation. Professor Karl Tauber, among other experts, detailed the effects of race riots, violence at the edge of the ghetto, racial bombings, racially restrictive covenants, steering, mortgage lending discrimination, state and federal housing policy, and other forms of discrimination.<sup>222</sup> Large maps were set up in the courtroom illustrating the expansion of a rigidly segregated black ghetto from 1940 to 1970.<sup>223</sup>

In response to this testimony, the skeptical trial judge's views had been transformed.<sup>224</sup> Roth held that "[g]overnmental actions and inactions at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and maintain the pattern of residential segregation throughout the Detroit metropolitan area."<sup>225</sup> The court held that Detroit's "substantial, pervasive, and . . . long standing" residential segregation was the result of "past and present practices" of racial discrimination.<sup>226</sup> "On the record" the court concluded emphatically "there can be no other finding."<sup>227</sup>

The court found there had been massive white flight in the previous decades. It noted that the city had gone from 9 percent black in 1940 to 44 percent

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218. DIMOND, *supra* note 101, at 31–32; Tushnet, *Clerk's Eye*, *supra* note 163, at 1147.

219. *Bradley v. Milliken*, 433 F.2d 897, 901 (6th Cir. 1970).

220. *Id.* at 904–05.

221. *Bradley v. Milliken (Milliken IV)*, 338 F. Supp. 582, 584–85 (E.D. Mich. 1971).

222. *Id.* at 585–87.

223. DIMOND, *supra* note 101, at 42–56.

224. See DIMOND, *supra* note 101, at 72–73; Tushnet, *Clerk's Eye*, *supra* note 163, at 1147.

225. *Milliken IV*, 338 F. Supp. at 587. The court noted that, while racially restricted covenants and the Federal Housing Administration and Veteran's Administration (FHA/VA) loan discrimination had ended, both had a continuing and present effect on segregation. *Id.*

226. *Id.*

227. *Id.* at 587.

in 1970, that the school population had gone from 45 percent black in 1961 to 72 percent black in 1972, and that the schools would be 80 percent black in 1980 and all black soon thereafter.<sup>228</sup> The court relied on Karl Tauber's testimony detailing the ghetto's segregated expansion over the past thirty years and the loss of white residents and white school-age children along the ghetto's periphery as it expanded.<sup>229</sup> The court noted: "As the white population of the city declined and in the suburbs grew; the black population in the city grew, and largely, was contained by the force of public and private discrimination at all levels."<sup>230</sup>

Citing *Swann*, and laying the basis for use of the *Keyes* spread theory, the court held that the state school authority's construction policies were in part responsible for residential segregation across Detroit's metropolitan area. From 1950 to 1968, the state, which until 1962 approved all school sites (and retained control over all school construction plans), added 13,900 classrooms capable of serving over 400,000 students in districts in the tri-county area with less than 2 percent black students.<sup>231</sup> The court found that this had a substantial effect on the racial composition of Detroit's neighborhoods and its schools.<sup>232</sup> "It is obvious that the white families who left the city schools would not be as likely to leave in the absence of . . . white schools, to attract or at least serve their children."<sup>233</sup>

In terms of educational segregation, the court found the Detroit board committed several *Keyes* violations.<sup>234</sup> Detroit had: (1) created and maintained optional attendance zones in neighborhoods undergoing racial transition; (2) bused blacks past white schools that were closer to their homes that had available space; (3) created and altered attendance zones and maintained and altered grade structures in a manner that caused segregation; (4) drew north-south boundaries despite knowledge that east-west boundaries would be integrative; and (5) promulgated a construction policy, supervised and subsidized by the state, that deepened racial segregation.<sup>235</sup> Of fourteen new schools, eleven opened 90 percent black and one less than 10 percent. In all these situations, the court found discrimination on the part of the school district because segregation was the reasonably foreseeable outcome of its actions.<sup>236</sup> The court also held that school

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228. *Id.* at 585–86.

229. *Id.* at 585–87; *Bradley v. Milliken (Milliken V)*, 345 F. Supp. 914, 932 (E.D. Mich. 1972).

230. *Milliken V*, 345 F. Supp. at 932.

231. *Id.*

232. *Id.* at 933.

233. *Id.*

234. *Milliken IV*, 338 F.Supp. at 587–89.

235. *Id.*

236. *Id.*

authorities violated their affirmative obligation to adopt pupil-assignment practices that compensated for the effects of residential racial segregation.<sup>237</sup>

The court found further state and suburban interdistrict education violations. First, a suburban district with a small residential population of black children contracted with Detroit to educate its black children, and black children in the suburban Carver school district were assigned to black schools in the inner-city because no white suburban district (or white school in the city of Detroit) would take the children.<sup>238</sup> Second, laying the basis for the use of the *Keyes* repetition presumption, the court noted that the few racially diverse suburban school districts were also highly segregated and that the Department of Housing Education and Welfare had cut off funds for one of these districts.<sup>239</sup>

After the finding of intentional segregation in September 1971, the court ordered Detroit to submit a Detroit-only plan and ordered the state defendants to submit a metro plan. CCBE had previously filed a motion to join eighty-five “white segregated” suburban districts in Wayne, Oakland, and Macomb counties in order to secure a metropolitan-level remedy.<sup>240</sup> All defendants and plaintiffs opposed the motion, and the court deferred its ruling. On March 15, 1972, the court permitted the intervention of a suburban white citizens group from Macomb County and from the potentially affected suburban school districts.<sup>241</sup> Intervention was allowed only in terms of the remedy, not to reargue the findings of intentional segregation by the state of Michigan.

On March 28, 1972, the district court held that the city-only plans would not accomplish desegregation and would accelerate white flight,<sup>242</sup> that the state plans did not constitute a good-faith effort, and that a metropolitan-level remedy would be required. On June 14, the court designated fifty-three Detroit suburban districts as the desegregation area and appointed a panel to prepare and submit a plan using *Swann*'s rough proportionality target as a starting point. The plan was to be based on fifteen city suburban clusters and would involve 503,000 students, including Detroit's 276,000 students.<sup>243</sup> Defendants immediately appealed these rulings.

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237. *Id.* at 593.

238. *Milliken V*, 345 F. Supp. at 940 n.23.

239. *Id.*

240. BAUGH, *supra* note 214, at 99–100, 116; DIMOND, *supra* note 101, at 54–55; William R. Grant, *The Detroit School Case: An Historical Overview*, 21 WAYNE L. REV. 851 (1974–75); Riddle, *supra* note 210, at 13–14.

241. William Saxon represented forty school districts. Gross Point, Southfield, and Royal Oak retained separate counsel.

242. *Milliken III*, 484 F.2d 215, 218 (6th Cir. 1973).

243. *Milliken V*, 345 F. Supp. at 914.

In support of metropolitan relief, the court noted there were already inter-district school programs in which students were bused across district lines for purposes other than racial integration, and that “local units of government in the Metropolitan area had voluntarily joined together to created several regional organizations to provide better solutions to problems confronting them, such the Southeastern Michigan Council of Governments (SEMCOG) for highways and regional planning, a metropolitan sewerage system, a regional transit agency and the Detroit metropolitan water system.”<sup>244</sup> Quoting the Census Bureau, the court noted that “in many respects—patterns of economic life, work, play, population, planning, transportation, health, and services—the tri-county area constitutes a rough series of interrelated communities.”<sup>245</sup>

Relying on both *Hunter*<sup>246</sup> and *Reynolds*,<sup>247</sup> the court held that school district boundaries were only an administrative convenience that offered no barrier to the remedy.<sup>248</sup> The court noted that the state had sole power to draw and alter local school district boundaries, and that local school districts were pervasively regulated by the state and were financially dependent on state aid to operate.<sup>249</sup> Moreover, as the court pointed out, it did not intend to consolidate school districts, but only to require cooperation among them.

In addition to *Hunter*, the court noted that each of Michigan’s four constitutions required the state establish, financially support, and supervise the public schools.<sup>250</sup> The Michigan Supreme Court had repeatedly held that “[e]ducation in Michigan belongs to the state. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over the legislature.”<sup>251</sup> The U.S. Supreme Court itself had held that “[s]chool districts are not separate and distinct sovereign entities under Michigan law” but rather are “auxiliaries of the state,’ subject to its absolute power.”<sup>252</sup>

Particularly relevant to *Milliken* was the fact that the State of Michigan had always both created local school districts and totally controlled the alteration of their boundaries. The state had wide-ranging powers to consolidate and merge

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244. *Id.* at 935.

245. *Id.* at 935.

246. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

247. *Reynolds v. Sims*, 377 U.S. 533 (1964).

248. *Milliken V*, 345 F.Supp. at 940.

249. *Id.* at 928–29.

250. *Milliken III*, 484 F.2d at 246.

251. *Bird v. Bd. of Educ.*, 118 N.W. 606, 609 (1908) (internal citations omitted). The opinions of the U.S. Supreme Court and lower federal courts in the *Milliken* case have literally dozens of citations to Michigan cases that establish this principle.

252. *Attorney ex rel. Kies v. Lowrey*, 92 N.W. 289 (1902), *aff'd*, 199 U.S. 233 (1905).

school districts and to transfer property from one school district to another, without the consent of the districts themselves or of the local citizenry.<sup>253</sup> Local school districts could not consolidate with other districts, annex territory, or divide or attach other parts of other districts without explicit state approval.<sup>254</sup>

In the years preceding the *Milliken* decision, Michigan witnessed an accelerated program of school district consolidations, mergers and annexations, many of which were state imposed. In 1912, Michigan had 7362 local school districts—by 1964, only 1438 remained. Between 1968 and 1972, the four years before *Milliken* was decided, Michigan eliminated 130 local school districts.<sup>255</sup> More than a dozen of the recent consolidations were in suburban Wayne County, which was the home county of Detroit and Oakland, and included in the court's planning.<sup>256</sup>

Second, the state pervasively regulated and controlled almost all aspects, large and small, of local school operations. Michigan law gave the state Superintendent of Public Instruction the authority to do all things “necessary to promote the welfare of public schools and public educational institutions and provide proper educational facilities for the youth of the state.”<sup>257</sup> No public school could operate and no teacher could teach unless accredited by the state.<sup>258</sup> The state controlled the number of days in the school year and the number of hours in the school day.<sup>259</sup> The state had broad control over the local school curriculum. For example, state law required the teaching of civics, health, physical education, and driver's education, and required school districts to follow detailed state requirements when teaching sex education. The state controlled the selection of textbooks, set rules for student conduct, and reviewed all local school suspension and expulsion decisions.<sup>260</sup> Finally, the state could remove local school board members from office for neglect of their duties.<sup>261</sup> The state supervised, and until 1962 totally controlled, all school site selection.<sup>262</sup> Schools could not be remodeled or expanded without state approval.<sup>263</sup> The construction of schools was done

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253. See, e.g., *Sch. Dist. of Lansing v. State Bd. of Educ.*, 116 N.W.2d 868 (1962); *Imlay Twp. Dist. v. State Bd. of Educ.*, 102 N.W.2d 720 (1960); *Attorney ex rel. Kies v. Lowrey*, 92 N.W. 289 (1902), *aff'd*, 199 U.S. 233 (1905).

254. *Milliken III*, 484 F.2d at 249.

255. *Id.* at 247.

256. *Id.* at 247–48.

257. *Milliken IV*, 338 F. Supp. 582, 594 (E.D. Mich. 1971).

258. *Milliken III*, 484 F.2d at 248.

259. *Id.* at 248.

260. *Id.* at 248; *Milliken IV*, 338 F. Supp. at 593.

261. *Milliken I*, 418 U.S. at 796 (Marshall, J., dissenting).

262. *Milliken IV*, 338 F. Supp. at 593.

263. *Id.* at 593.



through municipal bonds approved by several state agencies and by state bonds.<sup>264</sup> The state had authority over transportation routes and the disbursement of transportation funds.<sup>265</sup>

Third, in 1972, Michigan suburban districts were highly dependent on state aid to operate and many, if not most, suburban districts could not exist without this aid. Michigan contributed 34 percent of the operating budgets of the fifty-four districts included in the proposed metropolitan plan of integration.<sup>266</sup> In eleven of the suburban districts, the state contribution was above 50 percent and in eight districts it was above 40 percent.<sup>267</sup> Moreover, the state often withheld aid for failure to follow state education requirements,<sup>268</sup> which gave it “enormous leverage upon any local school district.”<sup>269</sup>

On May 16, the day after he was shot in a Maryland suburban parking lot, George Wallace won the Michigan Democratic presidential primary.<sup>270</sup> Campaigning against the Detroit and Pontiac busing cases, he received 66 percent of the vote in Macomb County, a working-class suburban area just north of Detroit, beating all of the other Democratic candidates combined. Voters in working-class suburbs like Macomb would become known as “Nixiecrats” or “Nixon Democrats” (later as “Reagan Democrats”).<sup>271</sup> In the 1980s and 1990s, centrist Democratic strategists argued that the antagonism surrounding busing, housing integration, and affirmative action had shifted such working-class whites to the Republicans and prevented Democrats from winning the presidency.<sup>272</sup> President Clinton’s pollsters and strategists were particularly obsessed with Macomb County, Michigan voters—a significant part of the political strategy behind Clinton’s welfare reform initiatives was to win back this sort of voter.<sup>273</sup>

In June, Congress passed, and President Nixon signed, a bill authored by Michigan Representative Broomfield to stop any busing order until all appeals

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264. *Id.*

265. *Id.*

266. *Milliken III*, 484 F.2d 215, 248 (6th Cir. 1973).

267. *Id.*

268. *Id.*

269. *Id.* at 249.

270. *Democratic Party Presidential Primaries 1972*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Democratic\\_Party\\_presidential\\_primaries,\\_1972](http://en.wikipedia.org/wiki/Democratic_Party_presidential_primaries,_1972) (last visited Nov. 11, 2014).

271. See KEVIN J. MCMAHON, *NIXON’S COURT: HIS CHALLENGE TO POLITICAL LIBERALISM AND ITS CONSEQUENCES* 11 (2011); see also E.J. DIONNE, *THEY ONLY LOOK DEAD: WHY PROGRESSIVE WILL DOMINATE THE NEXT POLITICAL ERA* (1997); MARY D. EDSALL & THOMAS BYRNE EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 28, 181–82 (1992); STANLEY B. GREENBERG, *MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY* 25–26 (1995).

272. See DIONNE, *supra* note 271; GREENBERG, *supra* note 271, at 220–27.

273. EDSALL & EDSALL, *supra* note 271; GREENBERG, *supra* note 271.

were completed. On July 11, 1972, the district court ordered Detroit to purchase or lease 295 buses.<sup>274</sup> On June 12, 1973, an en banc panel of the Sixth Circuit affirmed both Judge Roth's (and an earlier panel's) finding of segregation and the finding that a Detroit-only remedy would be inadequate. The court noted that a Detroit-only remedy would perpetuate segregation rather than provide a remedy.<sup>275</sup> The court upheld the district court's decision solely on the basis of the conduct by the Detroit school district and the state.<sup>276</sup> The court did not overturn the findings on housing discrimination, but chose not to rely on them.<sup>277</sup> Next, the court distinguished *Bradley v. Richmond*<sup>278</sup> in that the court below was not proposing a government consolidation but rather that the fifty-three districts cooperate.<sup>279</sup> Finally, the Sixth Circuit vacated all the other portions of the trial court's order and required it to hear from every suburb from which relief might be granted and from the state legislature before proceeding any further with an integration plan.<sup>280</sup> State and suburban defendants filed a petition for certiorari that was quickly granted by the Supreme Court.<sup>281</sup>

Demonstrations in Detroit suburbs increased in their intensity as mass meetings condemned Judge Roth and his decision.<sup>282</sup> He received multiple death threats, was placed under the protection of the police, suffered three massive heart attacks and died before the case was heard before the Supreme Court.<sup>283</sup>

In the wake of *Swann*, and the lower court decisions in Richmond and Detroit, public opinion moved sharply against busing. Congressional opponents of busing proposed a series of increasingly threatening amendments to education bills that would limit the power of the federal courts to integrate schools.<sup>284</sup> Democratic congressional leaders nullified these efforts by skillful legislative maneuvering, although their victories frequently were extremely narrow.<sup>285</sup> President Nixon briefly proposed a constitutional amendment to restrict the power of the federal courts to order school integration, but it never gained significant sup-

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274. *Milliken III*, 484 F.2d 215, 218 (6th Cir. 1973).

275. *Id.*

276. *Id.* at 242.

277. *Id.*; *Milliken I*, 418 U.S. 717, 728 n.7 (1974).

278. *Bradley v. Sch. Bd. of the City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973).

279. *Milliken III*, 484 F.2d at 251.

280. *Id.* at 251–52.

281. *Milliken v. Bradley*, 414 U.S. 1038 (1973) (granting certiorari).

282. Riddle, *supra* note 210, at 18–20.

283. BAUGH, *supra* note 8, at 133, 164; Charrie Sharlow, *Michigan Lawyers in History: Stephen J. Roth*, MICH. B.J., October 2012, at 44, 45.

284. Gary Orfield, *Congress, The President and Anti-Busing Legislation, 1966–1974*, 4 J.L. & EDUC. 81, 90–91 (1975).

285. *Id.*

port among his own party leaders and was never seriously pursued.<sup>286</sup> Nixon then won a massive reelection and carried Michigan and its suburbs by large margins. On the same day the Supreme Court unanimously ordered President Nixon to release the Watergate tapes,<sup>287</sup> and two weeks before Nixon resigned the presidency, the Supreme Court would issue its opinion in *Milliken*.

#### D. *Milliken* in the Supreme Court

A bitterly divided Supreme Court upheld the finding of local and state discrimination in Detroit, but reversed as to the interdistrict remedy. A cryptic concurrence by Justice Potter Stewart controlled the 5–4 decision. The appeal was interlocutory. No governmental consolidation had ever been proposed. No interdistrict plan could be devised until all affected school districts and interest groups and the Michigan Legislature could be fully heard and could participate in the plan’s formation.<sup>288</sup> There had been no settlement discussions.

Had the Court not intervened at this point, the outcome was still far from certain. Judge Roth had died and would be replaced by a judge less likely to require an extensive remedy. The state legislature might have responded to the Court’s decision with its own remedy, as the Delaware legislature did in the Wilmington school case,<sup>289</sup> and state legislatures often did in school finance cases<sup>290</sup> and in exclusionary zoning cases.<sup>291</sup> The case might have settled.

The *Milliken* majority, however, dishonestly treated the case as if a wild liberal judge had consolidated the districts and ordered a sweeping desegregation plan without the involvement of the affected school districts. The Court’s opinion then proceeded to ignore a century of black-letter local government law and created a murky constitutional status for local government boundaries based on an undefined “tradition” of local control over education.

While the State of Michigan could abolish, reshape, or change the local districts in any way at whim and without limitation, after *Milliken*, a federal court could not require the suburban districts to cooperate in any way with the Detroit school district or its students to reduce segregation unless it could show the dis-

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286. *Id.* at 102–04.

287. *United States v. Nixon*, 418 U.S. 683 (1974).

288. *Milliken III*, 484 F.2d 215, 258 (6th Cir. 1973).

289. DIMOND, *supra* note 101, at 334.

290. Myron Orfield, *The Region and Taxation: School Finance, Cities, and the Hope for Regional Reform*, 55 BUFF. L. REV. 91, 110–11 (2008).

291. *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 67 N.J. 151 (1975); *see also* CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 87–117 (1996); DAVID L. KIR, JOHN P. DWYER & LARRY ROSENTHAL, *RACE, HOUSING AND THE SOUTH OF SUBURBIA* (1997).

strict or state committed certain acts. A court could require cooperation only if the suburban district had intentionally committed a constitutional violation that caused segregation in Detroit, or if the state had intentionally drawn the school district boundaries to create segregation between the city and suburbs, or committed an act of housing discrimination that caused the innerdistrict segregation. Justice Burger wrote:

[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of public schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.<sup>292</sup>

Justice Burger's opinion never made clear what tradition of local autonomy "essential both to the maintenance of community concern and . . . [school] quality" the court was defending.<sup>293</sup> It cited the "local control" language from *San Antonio v. Rodriguez*,<sup>294</sup> a state school finance case decided by the Supreme Court the previous term, but *Rodriguez* did not involve any explicitly protected constitutional rights.<sup>295</sup> More importantly, the Michigan courts, as noted by the lower federal courts, had clearly held that there was no legal local educational autonomy and thus the tradition was state control over education.<sup>296</sup> Pursuant to this constitutional authority, Michigan created a tradition by which school districts were financially dependent upon the state and constantly forced to conform their conduct to state policy in every fundamental area of operation. By tradition, local school districts did not control curriculum, the days or even hours they met, or the books they used to teach. The state set the rules for student conduct and reviewed all suspension and expulsions. Local school districts could only hire

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292. *Milliken I*, 418 U.S. 717, 741–42 (1974). Justice Stewart wrote:

The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction. . . . The opinion of the Court convincingly demonstrates that traditions of local control of schools, together with the difficulty of a judicially supervised restructuring of local administration of schools, render improper and inequitable such an inter-district response to a constitutional violation found to have occurred only within a single district.

*Id.* at 753–755 (Stewart, J., concurring) (citation omitted).

293. 418 U.S. at 741–42 (Burger, J.); 418 U.S. at 755 (Stewart, J., concurring) (“[T]he opinion of the court convincingly demonstrates the tradition of local control.”).

294. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

295. *Id.* at 33–35; *Rodriguez* held there was not federal protected right to education and that wealth was not a suspect class and therefore strict scrutiny was not available.

296. *Milliken III*, 484 F.2d 215, 239–40 (6th Cir. 1973).

teachers certified by the state. They could not teach in a school unaccredited by the state. Local districts could not build or remodel a school—or even choose the location of a school—without state approval. The state had authority over the bus routes. Tradition allowed the state to confiscate and redistribute local school property and remove locally elected school board members without redress. There was no tradition whatsoever that local school districts had any power over their local boundaries. They could not alter these boundaries or make any decision to merge without state approval. By tradition, they could be and often were merged or abolished by the state at whim and often over local opposition.

Was the Court asserting that a local district or its citizens had a traditional right to refuse to allow students from outside the district to be schooled in the area? Or did a school district or its citizens have a traditional right to educate all students living within its boundaries who wanted to be educated there? Had any of the parties, or the Supreme Court itself, asserted these extra-legal traditions, it would be hard to square them with the reality that Detroit had to open its doors to suburban-resident black students whom their home school districts refused to educate.

In Michigan, white school districts and white schools traditionally did not have to accept black children and white children traditionally could avoid racially integrated schools. Perhaps this was the tradition of local control over education the Court sought to defend?

Based on this elusive tradition, Justice Stewart's concurrence reshaped "the appropriate exercise of federal equity jurisdiction."<sup>297</sup> *Swann* declared these powers were "broad," "flexible," and designed to "correct the condition that offends the constitution"—that the remedial efforts would be judged by their actual effectiveness in eliminating "all the vestiges of state-imposed segregation."<sup>298</sup> Stewart, without saying so, altered the holdings of these cases. After *Milliken*, these powers were "proportional" and "determined by the nature and extent of the constitutional violation."

Justice Burger had written that "[b]efore the boundaries of separate and autonomous school districts can be set aside by . . . by imposing a cross district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district,"<sup>299</sup> Justice Stewart added that where it was shown that state had contributed to segregation by (1) "drawing or redrawing school district lines;" or (2) "by purposeful-

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297. *Milliken I*, 418 U.S. 717, 753 (1974).

298. *Swann I*, 402 U.S. 1, 15–16 (1971).

299. 418 U.S. at 744–45.

ly racially discriminatory use of state housing or zoning laws” that an interdistrict remedy would be “proper” or “even necessary.”<sup>300</sup>

Under *Milliken*, innocent suburban school districts could not be punished by requiring the admission of Detroit’s black students. Thus, an appropriate proportional remedy could not provide black students access to integrated schools as *Green*, *Swann*, *Wright*, and *Keyes* had required. It could only restore them to the position they would be in if Detroit and the state had not committed the violation in Detroit. Under *Milliken* they had the right to attend partially integrated schools that very rapidly would become segregated.

In *Wright v. City of Emporia*, the Court had prevented the city of Emporia from exercising its right to secede from the Greenville County Public Schools District in Virginia. It had forbidden this even though the state had drawn the boundaries of Emporia without intent to discriminate and even though Emporia and the new Greenville County district would both be majority non-white and racially integrated. The sole reason the Court had prevented Emporia’s secession was that it could have worsened white flight from the Greenville county schools.

In 1973, Detroit schools were 75 percent black and the suburbs were 85 percent white. White flight out of the Detroit had been enormous for decades and the court below found that whether there was busing or not, Detroit would soon be an all-black school district. Justice White and Marshall cited *Wright* for the proposition that white flight should be considered in framing the scope of a remedy. First, they argued that the without the suburbs involved, all of the schools in desegregated Detroit would be overwhelming black and this reality would accelerate the already enormous white flight from Detroit. Such a remedy, they argued would not effectively desegregate Detroit’s schools.

Justice Stewart, the author of *Wright*, was silent. Chief Justice Burger responded that *Wright* stood for the opposite position. He argued that taking into account the racial ratio of black to white students in Detroit and the ratio in an adjoining districts in an effort to prevent white flight and implement a stable integration plan would require prohibited racial balancing. His reading of *Wright* misrepresents the Court’s holding, which he had himself described in careful detail in dissent.<sup>301</sup> His new version of *Wright* is hard to understand, but seems to be based on the following syllogism: *Wright* upheld a remedy in the Greenville County Public Schools District where two-thirds of the students were black and one-third white. Burger asserts that the “optimal desegregation plan would have resulted in [each of] the schools’ being 66 percent Negro and

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300. 418 US at 755.

301. *Wright v. City of Emporia*, 407 U.S. 451, 471–83 (1972) (Burger, J., dissenting).

34 percent white.”<sup>302</sup> Since it was apparently obvious to Burger that such a ratio would cause white flight, *Wright* therefore did not consider white flight an important remedial consideration. Burger made no mention of the fact that Emporia was not allowed to form a separate district because the difference in the racial ratio between Emporia and the county districts would cause white flight.

Moreover, Justice Burger had no idea what racial ratio the district court would require in Emporia. In cases with demographics like Greenville County, courts seldom ordered such “optimal balance” across all the schools of a district because it would intensify white flight.<sup>303</sup> Had the flight out of Greenville County to private schools occurred, over which the law and court had far less power, it would have raised a substantively different issue than the flight from one public school district to another. Justice Burger next asserted that a remedy designed to lessen the effect of white flight required a targeted racial composition for individual schools that was prohibited racial balancing. Burger’s opinion in *Swann*, defined “racial balancing” as a rigid racial quota for every school that matched the racial composition of the district as a whole. In contrast, Burger had approved the use of a flexible racial ratio of 29:71 as a “starting point.” This flexible ratio is what both the district court and parties below had suggested.

On remand, the district court in *Milliken* ordered a less than root and branch Detroit-only desegregation plan based on the finding that such a remedy would intensify the already rapid white flight in Detroit, which the Court in a opinion by Burger would affirm.<sup>304</sup> The Court’s majority conceded that white flight was a relevant consideration to limit a court-ordered remedy, but not to expand it. Justice Powell would later write:

[An objectionable desegregation plan] accelerates the exodus to the suburbs of families able to move. The children of families remaining in the area affected by the court’s decree are denied the opportunity to be a part of an ethnically diverse student body. . . . The general quality of the schools also tends to decline when substantial elements of the community abandon them. The effects of resegregation can be even broader reaching beyond the quality of education in the inner city to the life of the entire community. When the more economically advantaged citizens leave the city, the tax base shrinks and all the city services suffer. And the students who live beyond the reach of the court decree lose the benefits of attending ethnically di-

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302. *Milliken I*, 418 U.S. at 747 n.22.

303. *See id.* *See generally* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

304. The Supreme Court, again in an opinion by Justice Burger, affirmed this ruling. *See Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 271–73 (1977).

verse schools, an experience that prepares a child for citizenship in our pluralistic society.<sup>305</sup>

Further, in response to an objection that a Los Angeles-only desegregation plan (a school desegregation case not otherwise discussed in this Article) would increase white flight, Justice Rehnquist flippantly noted that he was troubled by the claim that it was necessary to consider white flight in shaping a remedy, since “it put white students much in the position of text books, visual aids, and the like—an element that every good school should have.”<sup>306</sup>

In *Keyes*, the Court held that when a local school district committed an act of segregation in a portion of the school district, it created a presumption that the entire district was illegally segregated and subject to a root and branch remedy. The *Keyes* spread assumption declared that even when a violation involved a portion of the district where only 5 to 10 percent of the students attended school, it presumptively infected the entire district, even schools miles away, in which the boundaries were seemingly set based on neutral neighborhoods criteria. The repetition presumption similarly declared when illegal segregation was found in a small part of the district, other segregation, wherever it existed in the district, would be presumed to be the product of discrimination. While the court reaffirmed both of these *Keyes* presumptions in its treatment of conduct within the city of Detroit, it never explained why these evidentiary presumptions applied to the actions of a local school district, but not to the actions of a state government exercising its legal authority across a metropolitan area.

*Keyes* used the discriminatory building of one small school intended for black students to create a system wide presumption of segregation throughout the Denver school district. In *Milliken*, however, the Court found the discriminatory construction of schools throughout Detroit and the state-sponsored suburban construction of schools for 400,000 white students too insignificant to trigger a region-wide presumption of discrimination on the part of the state. *Keyes* used a small number of racially discriminatory transfers to create a presumption of system-wide segregation in Denver. In *Milliken*, state approval or acquiescence in an enormous number of such transfers—both within Detroit and between Detroit and its white suburbs—did not create a similar presumption of metropolitan segregation on the part of the State of Michigan.

In *Keyes*, the Court found the intentional segregation in the Park Hill neighborhood of Denver, where only 5 to 10 percent of the children attended schools, created a presumption that the segregation in all other parts of the city

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305. *Estes v. Metro. Branches of the Dallas NAACP*, 444 U.S. 437, 450–52 (1980).

306. *Bd. of Educ. of L.A. v. Super. Ct. (Crawford)*, 448 U.S. 1343 (1980).



was intentional. In *Milliken*, the Court's finding of intentional segregation within Detroit, where over half the region's students attended school, created no similar presumption that the segregated pattern of enrollment in diverse suburban school districts was also intentional, even though the Department of Health, Education and Welfare had made a finding of intentional discrimination in these suburban school districts.

Most grievous perhaps was the Court ignoring ten days of expert testimony and explicit findings of housing discrimination by the district court. Justice Burger ducked the issue, arguing that the court of appeals had based its affirmation on the conduct of the schools and the state alone.<sup>307</sup> Ironically, Justice Stewart's controlling opinion stated that "[w]ere it to be shown, for example, that state officials had contributed to the separation of the races by . . . purposefully racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or a restructuring of district lines might well be appropriate."<sup>308</sup>

In response, Justice Stewart deals with the findings of housing discrimination below in a footnote, where he notes cryptically that the causes of residential segregation are "unknown and unknowable":

It is this essential fact of a predominantly Negro school population in Detroit caused by unknown and perhaps unknowable factors such as immigration, birth rates, economic changes, or cumulative acts of private racial fears that accounts for the growing core of Negro schools a core that has grown to include virtually the entire city. . . . No record has been made in this case showing that the racial composition of the Detroit public schools or the residential pattern within Detroit and in the surrounding areas were in any significant measure caused by government activity and it follows that the situation my dissenting Brothers express concern cannot serve as the predicate for the remedy adopted by the District Court and approved by the Court of Appeals.<sup>309</sup>

A few years earlier, Justice Stewart seemed less unsure about the causes of residential segregation in the United States, writing that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin . . . [it is a] relic of slavery."<sup>310</sup>

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307. *Milliken I*, 418 U.S. at 728 n.7.

308. *Id.* at 755

309. *Milliken I*, 418 U.S. at 756 n.2.

310. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–43 (1968). Woodward and Armstrong report that Justice Stewart believed the city-suburban busing was simply too far outside the mainstream of public opinion and, like the school prayer decisions, would hurt the Court's reputation with the

It could be argued that Justice Stewart's use of the word "significant" allowed him in a footnote to finesse the district court's explicit findings of housing discrimination based on ten days of expert testimony. However, both liberal and conservative scholars have condemned the Court's "willful" refusal to deal with the finding of housing discrimination below. Justice Powell's former law clerk, Judge (and former Professor) J. Harvie Wilkinson, has written that "[i]n failing to remand to district court for findings on past housing practices or even to explain their relevance, the Supreme Court failed to address the foremost cause of metropolitan segregation: precisely what *Milliken v. Bradley* purported to be about."<sup>311</sup> James Ryan, Justice Rehnquist's former clerk, now Dean of the Harvard Graduate School of Education, calls the Court's failure to address the housing findings below "willful blindness."<sup>312</sup> It is particularly ironic that a concurrence, which would place state action in housing segregation in the center of future school cases, ignored a detailed finding of such evidence in the case before it.

Supreme Court practice permits the party prevailing in the lower court to urge any ground in support of the judgment, including those rejected or ignored below.<sup>313</sup> Had the Supreme Court felt that the alternative ground of housing discrimination had not been appropriately developed in the lower courts, it should have sent it back for full consideration. Solicitor General Robert Bork had urged such an approach in both his brief and in oral argument.<sup>314</sup> The Court's own rules do not allow it to ignore such a critical issue altogether. When asked why his team did not try to reassert the finding of state housing discrimination on remand, plaintiff's counsel Paul Dimond stated: "We had the clearest findings that could possibly be made on the record to satisfy the court's standard. It was clear to us that no matter we could have proved, and no matter how much time and money we spent, this Court had foreclosed any metropolitan relief in Detroit, period."<sup>315</sup>

The actual question before the *Milliken* Court was whether intact local school districts and the state could be required to cooperate to protect the Fourteenth Amendment rights of black schoolchildren. As plaintiff's counsel Paul

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general public. "Stewart told his clerks that he had ridden the bus on the Charlotte and Denver cases, but Richmond was different. 'It is where I get off,' he said." BOB WOODWARD AND SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 267 (1979).

311. WILKINSON, *supra* note 55, at 223–24.

312. RYAN, *supra* note 191, at 102–03; *see also* Norman Amaker, *Milliken v. Bradley: The Meaning of the Constitution in School Desegregation Cases*, 2 *HAST. CONST. L.Q.* 349, 367 (1975); William L. Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of Milliken v. Bradley*, 21 *WAYNE L. REV.* 751, 760–69 (1975).

313. DIMOND, *supra* note 101, at 111.

314. *Id.*

315. Telephone Interview with Paul R. Dimond (Sept. 9, 2013).

Dimond recounted, the issue could be reduced to the question, “Could one black child have the right to cross the street to go to an integrated school in another school district?”<sup>316</sup> As noted, the *Milliken* Court dishonestly conflated a cross-district remedy that required the participation of intact suburban districts with an order consolidating these districts and completely eliminating their separate identity. Yet, even had the lower court gone this far, the record showed that local school districts in Michigan never in the state’s history had any authority to draw or alter their boundaries in any respect. The only tradition that existed was that the state, and the state alone, exercised this authority exclusively.

In *Reynolds v. Sims*,<sup>317</sup> the Court found that the objective of the Alabama Constitution and statutes to apportion legislative districts to local governments was valid and rational. Local control was an important goal that deserved legislative representation. But when the apportionment resulted in the dilution of some citizens’ voting power and denied them equal protection of the law, it was unconstitutional. In *Reynolds*, the Court held that normally sacrosanct state-drawn boundaries, even rationally drawn decades before any alleged violation, and even if drawn without intent to discriminate, could not stand if they denied individual rights guaranteed by the Equal Protection Clause.

In *Milliken*, Michigan had denied the equal protection rights of black children to attend schools free of racial discrimination. Like the individual right to an undiluted vote in *Reynolds*, the Court declared that such an education is “required in the performance of our most basic responsibilities,” and “the very foundation of good citizenship” and “success in life.”<sup>318</sup>

In *Reynolds*, the rational and important—but not constitutionally protected—interest in local government control had to yield to the constitutionally protected right to vote. It is hard to see how the rational and important, but not constitutionally protected, local control of school districts—which in Michigan never actually involved the power to create or amend local boundaries—would not similarly have to accommodate the rights of students to attend schools free from racial segregation prohibited by the Fourteenth Amendment. If state boundaries could be redrawn to protect individual voting rights in spite of rational and legitimate local government interests in legislative representation, why could school districts simply be required to cooperate with each other to protect the rights of black children to attend nonracially segregated schools?

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316. See DIMOND, *supra* note 101, at 403.

317. 377 U.S. 533 (1964).

318. *Brown I*, 347 U.S. at 493.

The *Milliken* Court could have fairly reached this conclusion by overruling *Green*, *Swann*, *Keyes*, and *Wright*. Instead, the Court chose to distort the holdings of those recently decided cases. Local government scholars today see *Milliken* as a politically motivated, doctrinally indefensible part of the Burger Court's effort to bolster the power of local governments to resist constitutional civil rights challenges,<sup>319</sup> or as an alternative vision of localism which focuses on the locality as a real polity, not just an arm of the state as traditional black letter doctrine describes it—"Our Localism" as Richard Briffault calls it.<sup>320</sup> Yet even among these cases—which fail to expand protected classes, require proof of intentional discrimination to establish violations, or limit standing—*Milliken* stands out as the only case in which both a state constitutional violation of the Fourteenth Amendment was actually established and the constitutional sovereignty of a local government limited the remedial power of a federal court.

Attesting to *Milliken's* doctrinal expediency,<sup>321</sup> three years later in *Holt Civic Club v. City of Tuscaloosa*,<sup>322</sup> the Court held that residents living in an unincorporated area outside the city limits of Tuscaloosa had no right to vote in Tuscaloosa elections, even though Tuscaloosa could tax, arrest, fine, and impose penal sanctions on them for violation of municipal ordinances.<sup>323</sup> The Court held that Tuscaloosa had a valid interest in regulating conduct outside its borders that affected its own citizens and its governmental operations.<sup>324</sup> Justice Rehnquist noted, "Given this country's history of popular sovereignty, appellants' claimed right to vote . . . is not without some logical appeal."<sup>325</sup> Sounding eerily like Judge Roth, Rehnquist continued:

319. See Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83 (1986).

320. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990). Both Briffault and Williams, *supra* note 319, point to the following cases: *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976); *James v. Valtierra*, 402 U.S. 137 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974); and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

321. One could argue that in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), *Milliken's* local control doctrine prevailed. See David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 550–51 (1999). Yet it is hard to know how much of this case (and others like *Romer v. Evans*, 517 U.S. 620 (1996) or *Papasan v. Allain*, 478 U.S. 265 (1986)) remain in light of *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

322. 439 U.S. 60 (1978).

323. *Id.* at 69.

324. *Id.*

325. *Id.* at 70.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. . . . The boundary at which conflicting interests balance cannot be determined by any particular formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.<sup>326</sup>

Citing *Hunter*<sup>327</sup> and *Reynolds*,<sup>328</sup> the Court held that citizen control over local government authority, even when such authority involved penal sanctions, did not embody an “Austinian notion of sovereignty.”<sup>329</sup> On the contrary, Rehnquist wrote that local governments were “administrative conveniences” or mere “techniques” of the state government.<sup>330</sup>

Within a few years of *Milliken*, beginning with the Nation at Risk Report in 1983, the same political movement that extolled local control to shield white suburbs from integration embarked on a massive federal effort to wrest that same local control not only from local school boards, but also from states themselves. The No Child Left Behind Act<sup>331</sup> would impose a federally driven set of education standards and mandates that would profoundly limit local educational decision-making in every city and suburban public school district in the United States.<sup>332</sup>

### III. LOUISVILLE-JEFFERSON COUNTY’S METROPOLITAN REMEDY

In 1956, the Louisville Board of Education adopted a modified freedom-of-choice plan for a school district that was 26 percent black and 74 percent white.<sup>333</sup> Louisville was surrounded by suburban Jefferson county, whose schools were virtually all white.

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326. *Id.*

327. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

328. *Reynolds v. Sims*, 377 U.S. 533 (1964).

329. *Holt*, 439 U.S. at 69–70.

330. *Id.* at 72.

331. See No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002).

332. See Michael Apple, *Ideological Success, Educational Failure? On the Politics of No Child Left Behind*, 58 J. TCHR. EDUC. 108 (2007); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004).

333. *Newburg I*, 489 F.2d 925, 929 (6th Cir. 1973).

In 1971, after *Swann*, civil rights plaintiffs sued the Louisville and Jefferson County School Districts seeking an interdistrict remedy.<sup>334</sup> If requested by the city, Kentucky state law allowed the merger of a city within a surrounding county without the consent of the county school board.<sup>335</sup>

In 1972, Louisville had 45,750 students: 22,367 (47 percent) were white and 22,933 (48 percent) were black.<sup>336</sup> In addition there were 10,000 mostly white students who resided in a portion of Louisville located in the Jefferson County School District. In the Louisville School District, more than 80 percent of the schools were racially identifiable.<sup>337</sup> Jefferson County had 96,000 students, with 4 percent being black. Three of its schools had 56 percent of all black elementary students.<sup>338</sup> Jefferson County sent its black high school students to Central High School in Louisville, and Louisville allowed some of its white students to transfer from integrated areas in Louisville to all-white schools in the county.

The trial court found that both districts were unitary and dismissed the cases.<sup>339</sup> On appeal, the Sixth Circuit consolidated the cases, and on December 28, 1973, one month after the Supreme Court granted certiorari in *Milliken*, the Sixth Circuit reversed the trial court. The Sixth Circuit found that both Louisville and Jefferson County were de jure segregated and cited *Bradley v. Richmond* for the proposition that state-drawn boundaries imposed no barrier to a county-wide, interdistrict remedy.<sup>340</sup> Chief Judge Harry Phillips, who authored the en banc opinion in *Milliken*, was on the panel. The defendants filed a petition for certiorari. On July 25, 1974, the day that *Milliken v. Bradley* was decided, the Supreme Court vacated the panel decision and remanded it for rehearing in light of *Milliken*.<sup>341</sup>

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334. *Id.* The Kentucky chapter of the ACLU and Louisville Legal Aid Society, in *Newburg v. Jefferson County Board of Education*, brought suit against Jefferson County to desegregate its schools. In 1972, the ACLU and the Louisville chapter of the NAACP, in *Haycraft v. Louisville Board of Education*, brought suits against Louisville and Jefferson County. These two actions were dismissed in the district court and consolidated on appeal into *Newburg I*, 489 F.2d 925 (6th Cir. 1973).

335. *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson Cnty. (Newburg II)*, 510 F.2d 1358, 1360 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975) (citing KY. REV. STAT. ANN. § 160.041). Louisville had already requested such a consolidation because of general fiscal and enrollment decline. It also feared that a Louisville-only remedy would accelerate the already occurring white flight. See Olatunde C.A. Johnson, *Integration, Reconstructed*, 1 DUKE F. L. & SOC. CHANGE 19, 27 (2009).

336. *Newburg I*, 489 F.2d at 929.

337. *Id.* at 930.

338. *Id.* at 928.

339. *Id.*

340. *Id.* at 931–32.

341. *Bd. of Educ. of Louisville v. Haycraft; Bd. of Educ. of Jefferson Cnty. v. Newberg*, 418 U.S. 918 (1974).

On December 11, 1974, the same panel affirmed its previous decision, per curiam, distinguishing its holding from *Milliken* for six reasons.<sup>342</sup> First, it found there was evidence in Newburg that the outlying school districts had committed acts of de jure segregation that was not present in *Milliken*.<sup>343</sup> Second, an inter-district remedy between Louisville and at most two suburban districts (compared to fifty-three districts in Detroit) would be less likely to “alter the structure of public education” in Kentucky, or even Jefferson County.<sup>344</sup> In this light, Kentucky had further established the county, as opposed to the local school district in Michigan, as the basic educational unit of the state and had expressly referred to school districts as “artificially drawn school district lines.”<sup>345</sup> Fourth, a Kentucky statute authorized the reconsolidation of school districts within a single county, even without the consent of the county school board, making the remedy administration process more manageable than in *Milliken*.<sup>346</sup> Fifth, both Jefferson and Louisville, which educated almost all the students in metropolitan Louisville, had a history of disregarding district lines to maintain continued segregation, whereas in *Milliken* only two of fifty-two districts has done so.<sup>347</sup> Finally, the court noted that the school district boundaries of the Louisville district were not coterminous with the city boundaries. With almost 10,000 white students living in the city but attending the Jefferson County schools, the process of disestablishing a dual school district was more difficult.<sup>348</sup>

The smaller number of districts and the orderly Kentucky process of dissolving the central city school into its larger county—and the willingness of the State Board of Education to do this—made Louisville an easier case for a court to administer than Detroit. Nevertheless, Michigan also had a formal process and a long history of consolidating school districts without their consent and had done so repeatedly in recent years in the inner suburbs of Detroit. Further, Michigan law afforded no greater constitutional identity to local school districts than Kentucky and arguably controlled local school finances and operation of local schools more. While a larger percentage of Louisville suburban districts (one of the two districts with most of the region’s students) had engaged in cross-boundary transfers to racially segregated schools, the actual number of schools and students participating in such transfers in both states was very similar. Finally, the fact that

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342. *Newburg II*, 510 F.2d 1358, 1359, 1361 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

343. *Id.* at 1359.

344. *Id.* at 1360.

345. *Id.*

346. *Id.* See KY. REV. STAT. ANN. § 160.041 (LexisNexis 2009), available at <http://www.lrc.ky.gov/KRS/160-00/041.PDF>.

347. *Newburg II*, 510 F.2d at 1360.

348. *Id.* at 1361.

the school district was not coterminous with Louisville seems of little importance in terms of distinguishing the *Milliken* holding, except insofar as it supports a finding of some sort of state-sanctioned gerrymandering.<sup>349</sup>

The court reinstated the original 1973 ruling establishing an interdistrict desegregation plan, with a few minor modifications.<sup>350</sup> On February 28, 1975, the Kentucky Board of Education ordered the merger of the districts effective April 1, 1975.<sup>351</sup> Defendant's second petition for certiorari was denied on April 21, 1975.<sup>352</sup> On July 17, 1975, the newly formed district appeared for a third time before the Sixth Circuit,<sup>353</sup> and the court issued a writ of mandamus ordering the formulation of a desegregation plan for the new Jefferson County Public Schools (JCPS).<sup>354</sup> This order was appealed, and the Supreme Court denied certiorari for the third time.<sup>355</sup>

The new plan utilized mandatory busing for black students and took effect beginning in the 1975–76 school year.<sup>356</sup> The order's requirements reflected a newly enlarged school district student population of about 135,000, approximately 20 percent of which were black. The order required the school board to create and maintain schools with student populations that ranged, for elementary schools, between 12 percent and 40 percent black, and for secondary schools (with one exception), between 12 percent and 35 percent black. The plan's initial busing requirements were extensive, involving the busing of 23,000 students.

The plan was met with violent opposition.<sup>357</sup> The local Ku Klux Klan and angry whites demonstrated, and over one thousand National Guard troops were deployed to maintain the safety of students.<sup>358</sup> This plan was challenged and upheld in August 1976.<sup>359</sup>

After an initial period of white flight, enrollment increased and stabilized. Black students thereafter experienced strong academic gains. The reading level of

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349. Chief Judge Peck of the Sixth Circuit, who was on the panel in both cases, may have understood that the panel was raising distinctions that were not as substantial as it claimed.

350. *Newburg II*, 510 F.2d at 1361.

351. KY. REV. STAT. ANN. § 160.041(1) (LexisNexis 2009).

352. Bd. of Educ. of Jefferson Cnty. v. Newburg, 421 U.S. 931 (1975) (denying cert.); Bd. of Educ. of Louisville v. Haycraft, 421 U.S. 931 (1975) (denying cert.).

353. *Newburg Area Council, Inc. v. Gordon (Newburg III)*, 521 F.2d 578 (6th Cir. 1975).

354. *Id.* at 580.

355. Bd. of Educ. of Jefferson Cnty. v. Newburg Area Council, Inc., 429 U.S. 1074 (1977).

356. *Newburg III*, 521 F.2d at 582.

357. See Scott Cummings & Michael Price, *Race Relations and Public Policy in Louisville: Historical Development of an Urban Underclass*, 27 J. BLACK STUD. 615 (1997); Johnson, *supra* note 335; Genevieve Siegel-Hawley, *City Lines, County Lines, Color Lines: The Relationship Between School and Housing Segregation in Four Southern Metro Areas*, 115 TCHRS. C. REC. 1 (2013).

358. Johnson, *supra* note 335, at 27–28.

359. *Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976).



black second graders from 1975 to 1977 improved from the 25th to the 34th percentile, black third graders rose from the 30th to the 40th percentile, and black fifth graders from the 25th to the 36th percentile.<sup>360</sup>

#### IV. THE DISMANTLING OF INTEGRATION IN AMERICAN SCHOOLS: THE SUPREME COURT FROM 1990 TO 2007

Racial integration in America's schools, most notably in the South, improved substantially from 1964 to 1974. After *Milliken*,<sup>361</sup> that improvement stopped. The gains in integration remained stable until the early 1990s, when the Supreme Court in *Dowell*<sup>362</sup> and *Freeman*<sup>363</sup> (collectively the Resegregation Cases) allowed federal courts to dissolve remedial court orders before unitary status had been fully achieved. *Green*<sup>364</sup> and *Swann*<sup>365</sup> held that school districts bore the burden of proving that single-race schools were not vestiges of discrimination and that courts would maintain jurisdiction until the effects of segregation had been fully remedied.<sup>366</sup> *Dowell*—without saying so—overruled these principles and replaced the imperative to remedy past segregation with the need to return districts as rapidly as possible to local control.<sup>367</sup> Half of the school districts under court order have been released so far, with more than twice as many districts released during the 2000s than the previous decade.<sup>368</sup> Resegregation occurred fastest in districts that had the most effective plans.<sup>369</sup>

Racial integration's growth and then later the resegregation of U.S. schools closely tracked changes in school integration law: in 1964 (the passage of Title VI),<sup>370</sup> from 1968 to 1971 (*Green* and *Swann*), 1974 (*Milliken*), and 1990 (*Dowell* and *Freeman*). In the South and border states, it was easy to establish that a Jim

360. See Robert A. Sedler, *The Profound Impact of Milliken v. Bradley*, 33 WAYNE L. REV. 1693, 1718–1719 (1987) (citing KENTUCKY COMMISSION OF CIVIL RIGHTS REPORT, SCHOOL & HOUSING DESEGREGATION ARE WORKING TOGETHER IN JEFFERSON COUNTY 1973–1983); TRACY W. KMEYER, FROM BROWN TO MEREDITH; THE LONG STRUGGLE FOR SCHOOL DESEGREGATION IN LOUISVILLE, KENTUCKY, 1954–2007, 174–79 (2013); Johnson, *supra* note 335, at 28.

361. *Milliken I*, 418 U.S. 717, 752–53 (1974).

362. Bd. of Educ. of Okla. City v. *Dowell*, 498 U.S. 237 (1991).

363. *Freeman*, 503 U.S. 467 (1992).

364. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968).

365. *Swann I*, 402 U.S. 1 (1971).

366. Tatel, *supra* note 99, at 1106.

367. *Id.* at 1105–15.

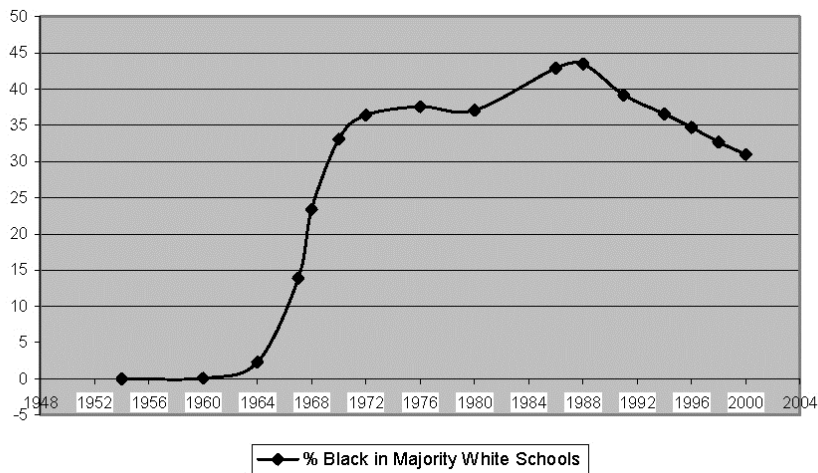
368. Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876, 878 (2012).

369. *Id.* at 879.

370. 42 U.S.C. § 2000d.

Crow system was discriminatory; the prevalence of large, countywide school districts, which included most of suburbia, made rapid and relatively stable racial integration common. Because of the greater difficulty of establishing de jure segregation and governmental fragmentation that, after *Milliken*, made single district desegregation futile, the Northeast and Midwest made relatively small progress integrating their schools.<sup>371</sup> In the West, the part of the country with the smallest black and largest Latino populations, black-white segregation has declined; Latino segregation has grown rapidly, however, and is the most intense segregation in the United States.

FIGURE 1. Change in Black Integration in the South (1954-2000)<sup>372</sup>



371. GARY ORFIELD & CHUNGMEI LEE, UCLA, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 33 (2007).  
 372. *Southern Education Reporting Service*, in REED SARRATT, THE ORDEAL OF DESEGREGATION 362 (1966); HEW Press Release, May 27, 1968; OCR data tapes; 1992-93, 1994-95, 1996-97, 1998-99, 2000-01 NCES Common Core of Data.

FIGURE 2. Percentage of White Students in Schools Attended by the Average Black Student (1968-2000)<sup>373</sup>



In the South, the percentage of blacks in majority white schools rose from roughly 2 percent in 1964 to roughly 36 percent in 1972, reaching a high of almost 44 percent in 1988.<sup>374</sup> In 2005, after *Dowell* and *Freeman*, only 27 percent of blacks remained in majority white schools.<sup>375</sup> Between 1968 and 1988, the percentage of Southern blacks in schools over 90 percent nonwhite declined from 78 percent to 24 percent. In 2005, it had climbed back to 32 percent.<sup>376</sup>

In the Northeast from 1968 to 1980, the percentage of blacks in majority white schools declined from 33 percent to 20 percent, where it remains today.<sup>377</sup> The percentage of blacks in schools more than 90 percent nonwhite has steadily grown throughout the period from 43 percent to 51 percent.<sup>378</sup>

In the Midwest from 1968 to 1980, the percentage of blacks in majority white schools increased from 23 percent to 30 percent, where it remains today.<sup>379</sup> The Midwest had 58 percent of blacks in intensely segregated schools in 1968; that number went down to 42 percent in 1988, but has returned to 46 percent in 2005.<sup>380</sup>

373. U.S. Department of Education Office for Civil Rights; Orfield, Monfort & Aaron, Status of School Desegregation; 1968-86, 1988-89, 1991-92, 1996-97, 1998-99, 2000-01 NCES Common Core of Data.

374. ORFIELD & LEE, *supra* note 371, at 23.

375. *Id.*

376. *Id.* at 33.

377. *Id.* at 28.

378. *Id.* at 33.

379. *Id.* at 28.

380. *Id.* at 33.

The western United States has the smallest black population. From 1968 to 2005, the percentage of blacks in majority white schools declined from 28 percent to 23 percent,<sup>381</sup> and the percentage of blacks in intensely segregated schools declined from 51 percent to 29 percent.<sup>382</sup>

Latino students are also being segregated. *Keyes*, which recognized discrimination against Latino students under *Brown*, occurred only a year before *Milliken*. Because proactive desegregation jurisprudence ended with *Milliken*, most Supreme Court decisions concern black-white segregation. As the Latino school population has grown rapidly, Latino segregation has increased everywhere, but particularly in the West where the Latino population is largest. Between 1968 and 2005, the percentage of Latinos in majority white schools in the Western United States declined from 58 percent to 18 percent.<sup>383</sup> In the West, from 1968 to 2005, the percentage of Latinos in schools more than 90 percent nonwhite increased from 12 percent to 41 percent.<sup>384</sup>

In the South, where the Latino population is the second largest, between 1968 and 2005, the percentage of Latinos in majority white schools declined from 30 percent to 22 percent,<sup>385</sup> and the percentage of Latinos in intensely segregated schools increased from 34 percent to 40 percent.<sup>386</sup> In the Northeast, between 1968 and 2005, the percentage of Latinos in majority white schools has been roughly 25 percent throughout the period,<sup>387</sup> and the percentage in intensely segregated schools is approximately 45 percent.<sup>388</sup> In the Midwest, the percentage of Latinos in majority white schools declined from 68 percent to 43 percent from 1968 to 2005,<sup>389</sup> and the percentage of Latinos in schools more than 90 percent nonwhite schools increased from 7 to 26 percent.<sup>390</sup>

## V. JUDGING *BROWN* AND INTEGRATION

*Brown*<sup>391</sup> held that the “in the field of public education, the doctrine of separate but equal has no place. Separate education facilities are inherently une-

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381. *Id.* at 28.

382. *Id.* at 33.

383. *Id.* at 34.

384. *Id.* at 35–36.

385. *Id.* at 34.

386. *Id.* at 35.

387. *Id.* at 34.

388. *Id.* at 35.

389. *Id.* at 34.

390. *Id.* at 35.

391. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1965).

qual.”<sup>392</sup> The decision was based on the importance of public education to effective citizenship and success in life, and the clear—and, in the Court’s view, irreparable—harms of educational segregation, particularly when that segregation carried the sanction of law.<sup>393</sup>

The benefits of integration are well documented. Recently, in *Parents Involved v. Seattle School District No. 1*,<sup>394</sup> the Court was presented with clear empirical evidence of the benefits of racial integration in schools. The American Educational Research Association (AERA), the American Psychological Association (APA),<sup>395</sup> and a group of 553 social scientists submitted briefs that attested to the benefits of integration (pro-integration briefs). In contrast, Drs. David Armor, Abigail and Stephen Thernstrom, John Murphy, Christine Rossell, and Herbert Walberg filed briefs disputing the benefits of integration (anti-integration briefs).<sup>396</sup> The AERA and APA briefs presented a consensus statement on behalf of thousands of tenured professors and credentialed researchers in the two academic fields best situated to evaluate integration’s effects. In addition, the 553 scholars’ brief was a statement of the nation’s most accomplished scholars on this subject.<sup>397</sup> Disputing the benefits of integration were six experts, only two of whom had published significant peer-reviewed studies on the topic.<sup>398</sup>

### A. The Benefits of Integration

The pro-integration briefs cited scholarly evidence on the benefits of school integration. Extensive research literature documents that racial and economic segregation hurts children and the potential positive effects of creating more integrated schools are broad and long-lasting. The research shows that integrated schools boost academic achievement (defined in terms of test scores, attainment (years in school and number of degrees), and expectations), improve opportunities for students of color, and generate valuable social and economic benefits (better jobs with better benefits, greater ease of living, and diverse future work

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392. *Id.* at 495.

393. *Id.* at 493–95.

394. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1*, 551 U.S. 701 (2007).

395. Brief of the American Educ. Research Ass’n as Amicus Curiae Supporting Respondents, Parent’s Involved and Meredith, 127 S. Ct. 1278 No. 05-908, 05915); Brief for the American Psychological Association and the Washington State Psychological Association as amicus supporting respondents; Brief for 553 Social Scientists as Amicus Curiae.

396. Brief of Dr. John Murphy, Christine Rosell and Hebert Walberg as Amicus Curiae supporting Petitioners, Parents Involved and Meredith; Brief for Dr. David Armor, Abigail Thernstrom & Stephen Thernstrom as Amicus Curiae supporting Petitioners.

397. Mickelson *passim*, Frankenberg and Garces.

398. *Id.*

environments). Integrated schools also enhance the cultural competence of white students and prepare them for a more diverse workplace and society.

Attending racially integrated schools and classrooms improves the academic achievement of minority students (measured by test scores).<sup>399</sup> Since the research also shows that integrated schools do not lower test scores for white students, racially integrated schools are one of the very few strategies demonstrated to ease one of the most difficult public policy problems of our time—the racial achievement gap. Other academic benefits for minority students include completing more years of education and higher college attendance rates. Long-term economic benefits include a tendency to choose more lucrative occupations in which minorities are historically underrepresented.<sup>400</sup>

Integrated schools also generate long-term social benefits for students. Students who experience interracial contact in integrated school settings are more likely to live, work, and attend college in more integrated settings.<sup>401</sup> Integrated classrooms improve the stability of interracial friendships and increase the likelihood of interracial friendships as adults.<sup>402</sup> Both white and nonwhite students

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399. Geoffrey D. Borman & N. Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data* (paper presented at the annual meeting of the American Educational Research Association, in San Francisco, California, 2006); Kathryn M. Borman et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 AM. EDUC. RES. J. 605, 605 (2004); Roslyn Arlin Mickelson, *Segregation and the SAT*, 67 OHIO ST. L.J. 157, 157 (2006) [hereinafter Mickelson, *Segregation*]; Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C.L.REV. 1513, 1513 (2003) [hereinafter Mickelson II]; Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TCHR. C. REC. 1999, 1999 (2005).
400. Orley Ashenfelter, William J. Collins & Albert Yoon, *Evaluating the Role of Brown v. Board of Education in School Equalization, Desegregation, and the Income of African Americans*, 8 AM. L. & ECON. REV. 213, 213–48 (2006); Michael A. Boozer et al., *Race and School Quality Since Brown v. Board of Education*, 1992 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 269–338; Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, J. SOC. ISSUES, Spring 1987, at 5–39; ROBERT L. CRAIN & JACK STRAUSS, *SCHOOL DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT* 3–40 (Center for Social Organization of Schools, 1985); Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L.REV. 791 (2005); Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 99, 100 (Gary Orfield & Michael Kurlaender eds., 2001).
401. Jomills Henry Braddock II, Robert L. Crain & James M. McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259, 259–64 (1984).
402. RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 31 (2001); Maureen T. Hallinan & Richard A. Williams, *The Stability of Students' Interracial Friendships*, 52 AM. SOC. REV. 653, 653–64 (1987).

tend to have higher educational aspirations if they have cross-race friendships.<sup>403</sup> Interracial contact in desegregated settings decreases racial prejudice among students and facilitates more positive interracial relations.<sup>404</sup> Students who attend integrated schools report an increased sense of civic engagement compared to their segregated peers.<sup>405</sup>

## B. Integration and the Achievement Gap

During the period when school integration was improving, the racial achievement gap began to systematically narrow. The relation of integration and achievement is the most striking for black students. Since the Resegregation Cases,<sup>406</sup> the narrowing has stopped and began to increase. While correlation does not establish causation, many scholars believe there is striking evidence that these patterns are causally related.<sup>407</sup> The figures below illustrate these trends with National Assessment of Educational Progress (NAEP) math and reading scores since 1975.<sup>408</sup>

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403. Maureen T. Hallinan & Richard A. Williams, *Students' Characteristics and the Peer Influence Process*, 63 SOC. OF EDUC. 122, 122–32 (1990).
404. Jennifer Jellison Holme, Amy Stuart Wells & Anita Tijerina Revilla, *Learning Through Experience: What Graduates Gained by Attending Desegregated High Schools*, 38 EQUITY & EXCELLENCE IN EDUC. 14, 14–24 (2005); Melanie Killen & Clark McKown, *How Integrative Approaches to Intergroup Attitudes Advance the Field*, 26 J. APPLIED DEV. PSYCH. 616, 616–22 (2005); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 751–83 (2006).
405. Michal Kurlaender & John T. Yun, *Fifty Years After Brown: New Evidence of the Impact of School Racial Composition on Student Outcomes*, 6 INT'L J. EDUC. POL'Y RES. & PRAC. 51, 51–78 (2005).
406. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 1–52 (1996).
407. See, e.g., Ronald F. Ferguson & Jal Mehta, *An Unfinished Journey: The Legacy of Brown and the Narrowing of the Achievements Gap*, 85 PHI DELTA KAPPAN 656, 656 (2004); Eric A. Hanushek, *Black-White Achievement Differences and Governmental Interventions*, 91 AM. ECON. REV. 24, 25–26 (2001); Jaekyung Lee, *Multiple Facets of Inequality in Racial and Ethnic Achievement Gaps*, PEABODY J. EDUC. 51, 51 (2004); Douglas N. Harris & Carolyn D. Herrington, *Accountability, Standards, and the Growing Achievement Gap: Lessons from the Past Half-Century*, 112 AM. J. EDUC. 209, 209 (2006).
408. Data for these figures was collected from the NAEP Data Explorer long-term trend web tool. *National Assessment of Educational Progress Data Explorer*, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/nationsreportcard/ltrdata> (last visited Dec. 12, 2014).

FIGURE 3. Black-White Achievement Gap on NAEP Math Tests

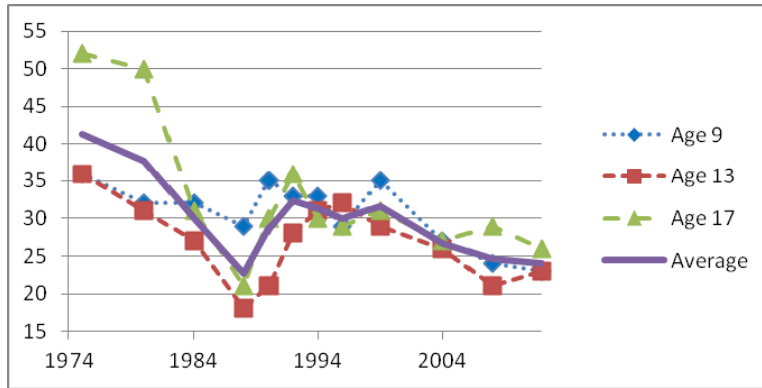
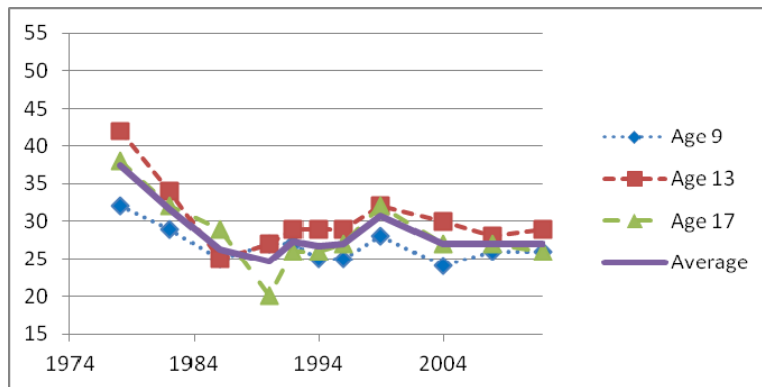


FIGURE 4. Black-White Achievement Gap on NAEP Reading Tests



To support their arguments that integration did not produce benefits that constituted a compelling government purpose, Armor and Thernstrom’s brief presented a review of the social science literature and concluded that desegregated schools did not improve academic, long-term, or social outcomes for students. The brief of Murphy, Rossell, and Walberg argued the narrower point that forced integration did not improve outcomes for students.

As the Court was considering the cases, the National Academy of Education (NAE), a nonpartisan organization dedicated to fostering public understanding of education and educational research, convened a panel of scholars to analyze both sets of briefs.<sup>409</sup> A second panel of social psychologists also evaluat-

409. Mickelson, *Twenty-First Century Social Science*, 69 OHIO ST. L.J 1173, 1179; NATIONAL ACADEMY OF EDUCATION, RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO



ed the briefs.<sup>410</sup> Both panels strongly agreed that the preponderance of the social science evidence strongly indicated positive relationships among school racial diversity, academic achievement, intergroup relations, and the finding of the pro-integration briefs.<sup>411</sup>

## VI. THE PERSISTENCE OF PUBLIC AND PRIVATE RACIAL DISCRIMINATION IN HOUSING AND SCHOOLS

In the earlier *Milliken*<sup>412</sup> case, Justice Stewart asserted that the causes of residential segregation are “unknowable.”<sup>413</sup> Since that time, members of the Supreme Court have indulged themselves in an increasingly vivid fantasy that segregated schools are caused by residential segregation alone and that residential segregation is either based on neutral demographic shifts caused by the incompatible preferences of racial groups or solely by private discrimination that cannot support an integrative remedy.<sup>414</sup>

Contrary to Justice Stewart’s footnote, the governmental and private discriminatory causes of segregation and resegregation in schools and neighborhoods were well known at the time of *Milliken*, and remain so today. While courts no longer enforce racial covenants and the Federal Housing Administration and the Veterans Administration (VA) have changed, pervasive illegal government and private discrimination in housing and education remain as present in 2014 as they were in 1974.<sup>415</sup>

Discriminatory local school attendance practices and policies can violate federal law, are common, and there is little oversight over them.<sup>416</sup> Recent na-

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SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 1–54 (Robert L. Linn & Kevin G. Welner eds., 2007); Mickelson, *Segregation*, *supra* note 399.

410. Mickelson, *Twenty-First Century Social Science*, 69 OHIO ST. L.J. at 1180.

411. NATIONAL ACADEMY OF EDUCATION, *supra* note 409.

412. *Milliken I*, 418 U.S. 717 (1974).

413. *Id.* at 756 n.2 (Stewart, J., concurring).

414. See *Freeman v. Pitts*, 503 U.S. 467, 493–97 (1992) (Kennedy, J.); *id.* at 502–04 (Scalia, J., concurring); *Missouri v. Jenkins*, 515 U.S. 70, 94 (1995) (Rehnquist, J.); *id.* at 114–16 (Thomas, J., concurring); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 736 (2007) (Roberts, J.); *id.* at 750–54 (Thomas, J., concurring).

415. Myron Orfield & Thomas F. Luce, *America’s Racially Diverse Suburbs: Opportunities and Challenges*, 23 HOUSING POL’Y DEBATE 395, 395–430 (2013) [hereinafter Orfield & Luce, *Challenges*].

416. See MYRON ORFIELD & THOMAS F. LUCE JR., REGION: PLANNING THE FUTURE OF THE TWIN CITIES 133–34 (2010), for a description of the use of a discontinuous boundary in a Twin Cities school district that served this purpose. See also Baris Gumus-Dawes, Myron Orfield & Thomas Luce, *East Versus West in Minneapolis Suburbs*, in THE RESEGREGATION OF SUBURBAN SCHOOLS: A HIDDEN CRISIS IN AMERICAN EDUCATION 113–38 (Erica Frankenberg & Gary Orfield eds., 2012) [hereinafter RESEGREGATION]; Elizabeth DeBray & Ain Grooms, *High Civic Capacity, Low Demand for Integration: Rapid Demographic Transition in Suburban Atlanta*, in

tional research found that local school boundaries created schools that were considerably more segregated than their neighborhoods. Had their boundaries more clearly reflected school capacity and neighborhood proximity, American schools would be 14 to 15 percent less segregated.<sup>417</sup>

The Equal Protection Clause,<sup>418</sup> Title VI,<sup>419</sup> and the Fair Housing Act<sup>420</sup> forbid building a disproportionate share of low-income housing in poor-and-segregated or integrated-but-re-segregating neighborhoods, particularly when it is possible to build that same housing in low-poverty, high-opportunity white or stably integrated neighborhoods.<sup>421</sup> Numerous recent studies demonstrate that federal, state, and local governments continue to build a disproportionate share of subsidized, low-income housing in poor and predominantly minority neighborhoods or neighborhoods in the process of resegregation.<sup>422</sup>

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RESEGREGATION 163–84; Margaret C. Hobday, Geneva Finn & Myron Orfield, *A Missed Opportunity: Minnesota's Failed Experiment with Choice-Based Integration*, 35 WM. MITCHELL L. REV. 936, 936 (2009); Jennifer Jellison Holme, Anjale Welton & Sarah Diem, *Pursuing "Separate but Equal" in Suburban San Antonio: A Case Study of a Southern Independent School District*, in RESEGREGATION 45–67; Myron Orfield, *Regional Strategies for Racial Integration of Schools and Housing Post Parents Involved*, 29 LAW & INEQ. 149, 149 (2011) [hereinafter Orfield, *Regional Strategies*]; Salvatore Saporito & Deenesh Sohoni, *Coloring Outside the Lines: Racial Segregation in Public Schools and Their Attendance Boundaries*, 79 SOC. EDUC. 81, 81–105 (2006); Genevieve Siegel-Hawley, *Educational Gerrymandering? Race and Attendance Boundaries in a Demographically Changing Suburb*, 83 HARVARD EDUC. REV. 580, 580 (2013); Deenesh Sohoni & Salvatore Saporito, *Mapping School Segregation: Using GIS to Explore Racial Segregation Between Schools and Their Corresponding Attendance Areas*, 115 AM. J. EDUC. 569, 569–600 (2009); Kathryn Wiley, Barbara Shircliffe & Jennifer Morley, *Conflicting Mandates Amid Suburban Change: Educational Opportunity in a Post Desegregation Florida County-wide District*, in RESEGREGATION 139–61.

417. See Meredith Paige Richards, *The Gerrymandering of School Attendance Zones and the Segregation of Public Schools: A Geospatial Analysis*, 51 AM. EDUC. RES. J. 1119 (2014); see also Paul A. Jargowsky, *Changes in Segregation by Race and Class: The Implications for Schools*, in ANNETTE LAREAU & KIMBERLY GOYETTE, CHOOSING HOMES, CHOOSING SCHOOLS (forthcoming).

418. U.S. CONST. amend. XIV § 1.

419. Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

420. Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*

421. *Hills v. Gatreaux*, 425 U.S. 284 (1976); *Shannon v. U.S. Dep't of Hous. & Urb. Dev.*, 436 F.2d 809 (3d Cir. 1970); *Gatreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736, 737–38 (N.D. Ill. 1969), *aff'd*, 503 F.2d 930 (7th Cir. 1974); 24 C.F.R. §§ 941.202, 880.205; FED. REG. NO. 139, at 43741–42 (2013); see also Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1747 (2005).

422. CASEY J. DAWKINS, ASSISTED HOUSING RESEARCH CADRE REPORT FOR THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, EXPLORING THE SPATIAL DISTRIBUTION OF LOW INCOME HOUSING TAX CREDIT PROPERTIES 1–39 (2011), available at [http://www.huduser.org/publications/pdf/Dawkins\\_ExploringLIHT\\_AssistedHousingRCR04.pdf](http://www.huduser.org/publications/pdf/Dawkins_ExploringLIHT_AssistedHousingRCR04.pdf); see also Orfield & Luce, *supra* note 415.

While exclusionary zoning is a violation of the Fair Housing Act if it is intentionally discriminatory or has a racially disparate impact,<sup>423</sup> and has been declared unconstitutional in several states<sup>424</sup> and is prohibited in others by legislation,<sup>425</sup> it remains very common in predominantly white suburbs and intensifies both racial and social segregation.<sup>426</sup>

Racial steering occurs when “housing providers direct prospective homebuyers interested in equivalent property to different areas according to their race.”<sup>427</sup> Recent studies document that significant levels of steering still occur in metropolitan housing markets and are likely increasing.<sup>428</sup> Similarly, research shows that private lenders continue to deny mortgages to potential minority homebuyers at disproportionate rates.<sup>429</sup>

## A. The Pattern of Residential Segregation Since *Milliken*

### 1. Concentrated Poverty

From 1970 to 1990, in the wake of *Milliken*, the already large, distressed ghettos and barrios in large American cities more than doubled in size and population. The number of high-poverty census tracts doubled from 1177 to 2776.<sup>430</sup> The number of persons living in high-poverty areas increased from 4.1 million to

423. *Huntington Branch NAACP v. Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam); 24 C.F.R. §100.70(D)(5) (2013); 78 FED. REG. NO. 32, at 11460-01 (2013).

424. *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991); *Township of Williston v. Chesterdale Farms, Inc.*, 341 A.2d 466 (Pa. 1977); *Berenson v. Town of Newcastle*, 341 N.E.2d 236 (N.Y. 1975).

425. Oregon, New Jersey, California, Twin Cities, Montgomery County.

426. Douglas S. Massey & Jonathan Rothwell, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 6 URB. AFF. REV. 779, 779 (2009); Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning on Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1123 (2010).

427. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 94 (1979).

428. NAT'L FAIR HOUSING ALLIANCE, *UNEQUAL OPPORTUNITY—PERPETUATING HOUSING DISCRIMINATION IN AMERICA* (2006) [hereinafter NATIONAL FAIR HOUSING ALLIANCE I]; George Galster, *Racial Steering by Real Estate Agents: Mechanisms and Motives*, 19 REV. OF BLACK POL. ECON. 39, 39 (1990); George Galster, *Racial Steering in Urban Housing Markets: A Review of the Audit Evidence*, 18 REV. OF BLACK POL. ECON. 105, 105 (1990); Margery Austin Turner et al., *Discrimination in Metropolitan Housing Markets: National Results from Phase I of HDS 2000* (U. of Conn., Working Paper, 2002); see also NAT'L FAIR HOUS. ALLIANCE, *THE CRISIS OF HOUSING SEGREGATION* (2007) [hereinafter NAT'L FAIR HOUSING ALLIANCE II].

429. STEPHEN L. ROSS & JOHN YINGER, *THE COLOR OF CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY, AND FAIR-LENDING ENFORCEMENT* (2002); William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 102 (Xavier de Souza Briggs ed., 2005).

430. PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 29–58 (1997).

8 million. The number of African Americans living in high poverty ghettos climbed from 2.4 million to 4.2 million, and the number of Latinos in barrios increased from 729,000 to 2 million.<sup>431</sup> The largest growth during this period was in the rust belt states of the Midwest: Illinois, Indiana, Michigan, Ohio, and Wisconsin. During this time, when the poverty level of families was relatively constant, the chance that a poor black child would live in a high-poverty neighborhood increased from one in four to one in three.<sup>432</sup>

Large distressed neighborhoods shrank during the economic boom of the 1990s,<sup>433</sup> but neighborhoods of concentrated poverty returned to 1990s levels by the 2010 census. In 2009, blacks represented 45 percent; Latinos, 34 percent; and whites, 17 percent of ghetto and barrio residents.<sup>434</sup> These ratios were the same in 1980.<sup>435</sup> During the 2000s, most of the growth of concentrated poverty was in the Midwest and the urban South. In the 2000s, the growth of extremely distressed neighborhoods firmly moved into the suburbs, like suburban Warren outside Detroit. From 2000 to 2010, the population in extreme poverty tracts grew twice as fast as the suburbs as in the central cities. By 2010, 20 percent of extreme poverty neighborhoods were in the suburbs.<sup>436</sup>

## 2. Dissimilarity and Isolation

Today, black-white residential neighborhood segregation remains intense and most of the glacially-paced improvement has come in areas with the smallest percentage of blacks. In the metropolitan areas where blacks form the largest percentage of population, particularly in the Northeast and Midwest (where local government is highly fragmented), segregation remains virtually unchanged

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431. *Id.*

432. See Paul A. Jargowsky, *Stunning Progress, Hidden Problems: The Dramatic Decline of Concentrated Poverty in the 1990s*, in REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000 (Allan Berube, Bruce Katz & Robert Land eds., 2005); PAUL A. JARGOWSKY, THE CENTURY FOUNDATION & RUTGERS CENTER FOR URB. RES. & EDUC., CONCENTRATION OF POVERTY IN THE NEW MILLENNIUM: CHANGES IN THE PREVALENCE, COMPOSITION, AND LOCATION OF HIGH POVERTY NEIGHBORHOODS (2013), available at <http://tcf.org/bookstore/detail/concentration-of-poverty-in-the-new-millennium>; ELIZABETH KNEEBONE ET AL., METROPOLITAN POL'Y PROGRAM AT BROOKINGS, THE RE-EMERGENCE OF CONCENTRATED POVERTY: METROPOLITAN TRENDS IN THE 2000S (2011).

433. Jargowsky, *supra* note 432, at 138.

434. *Id.* at 144; KNEEBONE ET AL., *supra* note 432.

435. Jargowsky, *supra* note 432.

436. KNEEBONE ET AL., *supra* note 432, at 9–10.

from the 1970s, when it was at apartheid levels.<sup>437</sup> For Latinos, America's largest and fastest growing nonwhite community, residential segregation is both high and ominously constant. In areas like California and Texas, where Latinos form a large part of the population, segregation between whites and Latinos is now greater than black-white segregation.<sup>438</sup>

### 3. Resegregation Spreading to the Suburbs

Richard Nixon believed that he could create a perpetual Republican majority by appointing judges who would keep poor nonwhites within central cities and protect swing suburban voters from racial and economic integration.<sup>439</sup> Today the same forces of discrimination, segregation, white flight, and resegregation that tore central cities' neighborhoods apart in Nixon's time are doing the same things in the suburbs he pledged to protect. In 2010, more than half of blacks, Latinos, and Asian residents of America's fifty largest regions lived in the suburbs.<sup>440</sup> Sixty-five percent of nonwhites at or above the regional median income and three-quarters of nonwhites married with children lived in the suburbs in 2010. Diverse suburban neighborhoods now outnumber those in the central cities by more than two to one.<sup>441</sup> Forty-four percent of suburban residents in the fifty largest U.S. metropolitan areas live in racially integrated communities, which are defined as places between 20 and 60 percent nonwhite.<sup>442</sup>

Middle-income minority families in the suburbs, as they did in central cities in the 1920s, often live at the periphery of higher poverty, nonwhite areas in neighborhoods of relatively less poverty, safer streets, and better schools. As these middle-income, nonwhite families seek neighborhoods of greater opportunity, their housing choices are less likely to be constrained by violence, but continue to be very constrained compared to whites of similar income, credit history, and education.<sup>443</sup>

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437. JOHN R. LOGAN & BRIAN J. STULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 7-10 (2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

438. *Id.* at 6-15.

439. KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES (2011).

440. Figures from supporting documents for Myron Orfield & Tom Luce, *America's Racially Diverse Suburbs: Opportunities and Challenges*, INST. ON METROPOLITAN OPPORTUNITY (July 20, 2012), <http://www.law.umn.edu/metro/resources/maps-by-city/detroit-mi.html>.

441. *Id.* The terms "integrated" and "racially diverse" will both be used to describe municipalities and neighborhoods with nonwhite population shares between 20 and 60 percent.

442. *Id.*

443. See Margery Austin Turner & Stephen Ross, *How Residential Discrimination Effects the Search for Housing*, in THE GEOGRAPHY OF OPPORTUNITY 81, 81-100 (Xavier Briggs ed., 2005);

Middle-income nonwhites have more residential choice than low-income nonwhites, but less than comparable or even lower income white households. They are seriously affected by steering and mortgage-lending discrimination, and discrimination by white sellers and renting agents. Because middle-income minority families often become the first to integrate white suburban neighborhoods, the local elementary schools often become diverse long before the balance of the neighborhood does. After a beachhead of diversity is established, minority families seeking better schools are steered toward these newly diverse schools, while white families are steered away from them.<sup>444</sup> Often, real estate agents tell minority families that the racially integrated schools are excellent or very good, while at the same time telling white families of similar education and credit history that the same schools are inadequate.<sup>445</sup> As local schools become diverse, certain triggering events like the need to close a school because of student population loss or open a new school because of increased student population can trigger schools to redraw their boundaries, in which the classic *Keyes*-type<sup>446</sup> discrimination occurs in the suburbs. Unless a local school district has very strong political leaders or administrators who care about civil rights, most, if not all, of these types of discrimination will occur. The intense emotional pressure of white parents to get into the highest-scoring (almost always the whitest) school and to avoid a lower-scoring (almost always more diverse) one becomes politically hard to counter, and unless there is a very intentional and organized counterforce, *Keyes* gerrymandering will occur. These illegal acts of educational discrimination will in turn increase the steering of whites away from the most diverse school attendance areas and increase the speed of neighborhood resegregation.

In the early twenty-first century, racial change happens less tempestuously than it did in the early twentieth century, and at the initial stages, is defined as nonreplacement rather than flight. Americans are highly mobile and move about every sixth year on average. For a neighborhood to remain racially stable, buyers with the same racial characteristics must replace sellers. When steering occurs, white buyers fail to replace white sellers, in effect withdrawing from the local housing market. When white buyers withdraw, there is not a demand segment to replace them. The black middle class is not large enough or concerted enough (it does not all share the same racial preferences) to make up the slack. As whites

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MARGERY AUSTIN TURNER ET AL., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 (2013).

444. NATIONAL FAIR HOUSING ALLIANCE I, *supra* note 428; NATIONAL FAIR HOUSING ALLIANCE II, *supra* note 428.

445. NATIONAL FAIR HOUSING ALLIANCE II, *supra* note 428.

446. *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

withdraw, prices fall and poorer minority families move in behind middle-income nonwhites and the segregated core of the region grows. The suburban neighborhood resegregates as its urban counterpart did a generation before.

This pattern of white nonreplacement/flight from integrated schools is a constant background pattern in metropolitan America. If proximate whiter districts surround a racially diverse district, the problem of white flight described above intensifies. All this is true whether there is a school desegregation plan or not. Yet a local desegregation effort in a racially diverse district surrounded by whiter districts, particularly if accompanied by serious public resistance, can increase white nonreplacement/flight even more and be counterproductive. Older first-ring suburbs have far less power to stably integrate their schools than even central cities did. While they must do the best they can to integrate their schools in order to keep their neighborhoods integrated, they must finely calibrate their responses to account for the white nonreplacement/flight that any action may exacerbate. Moreover, it is likely that the discriminatory housing market and the creation of new white schools at the periphery will undermine even their best efforts over time.

In the large metro areas, time-series maps of integrated neighborhoods from 1920-1960 to the present reveal a decades-long expanding ring of racial integration emanating outward, ahead of similarly expanding nonwhite core areas. Each decade, the ring of integration moves farther outward into inner and (sometimes) middle suburbs, and the expanding core of nonwhite segregated areas grows to include larger portions of the central city and/or large parts of older suburbs, overtaking neighborhoods that were once integrated.<sup>447</sup> Integrated areas, in turn, are surrounded by an expanding, largely white peripheral ring at the edge of metropolitan settlement. This is nothing new, but recent rings cover a vastly larger physical area of the larger metropolis than in the past.

Integrated suburbs, like integrated neighborhoods, face serious challenges to their prosperity and stability. Integrated communities have a hard time staying integrated for extended periods. “Neighborhoods that were more than 23 percent nonwhite in 1980 were more likely to be predominately nonwhite by 2005 than to remain integrated.”<sup>448</sup> Illegal discrimination, in the form of steering by

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447. Maps of nineteen metropolitan areas are produced and available by request from the Institute on Metropolitan Opportunity (IMO). The areas include Atlanta, Chicago, Dayton, Denver, Detroit, Greensboro, Indianapolis, Las Vegas, Los Angeles, Louisville, Memphis, Minneapolis, Nashville, Pensacola, Portland (OR), Raleigh, Richmond, Seattle and Wilmington (DE). The maps were produced by IMO from data provided by Minnesota Population Center. *National Historical Geographic Information System: Version 2.0.*, UNIVERSITY OF MINNESOTA (2011), available at <http://www.nhgis.org> (last visited Dec. 12, 2014).

448. Orfield & Luce, *Challenges*, *supra* note 415, at 396.

real estate agents, mortgage lending and insurance discrimination,<sup>449</sup> subsidized housing placement, and racial gerrymandering of school attendance boundaries is causing rapid racial change and economic decline.

Almost all diverse communities are in the midst of racial transition.<sup>450</sup> Integrated suburbs show the most rapid racial change (relative to their individual metropolitan areas) of all of the community types. The nonwhite share of the population in a typical diverse suburb increased from 65 percent of the regional average in 2000 to 78 percent in 2010.<sup>451</sup> Data for municipalities and census tracts clearly show the vulnerability of integrated neighborhoods to racial transition. In just ten years, 160 of the 1107 communities (16 percent) classified as diverse in 2000 made the transition to predominantly nonwhite. A similar percentage of predominantly white municipalities made the transition to diverse.<sup>452</sup>

By 2010, 17 percent of suburbanites (and 12 percent of metropolitan area residents) lived in predominantly nonwhite suburbs, communities that were once integrated but are now more troubled and have fewer prospects for renewal than their central cities.<sup>453</sup> By 2010, nonwhite suburbs had higher nonwhite population shares than central cities. Nonwhite suburbs have lower local tax resources than central cities. Moreover, local tax resources are virtually always declining, most often in the face of growing local poverty and aging buildings and infrastructure. As suburbs become ever more deeply segregated, their property taxes increase or remain stable in the face of declining local services and increasing local need for services. They compete with newer white suburban schools and communities with growing tax bases, better services, and little real need for the range of government services required by the less fortunate. Mobilizing the nonwhite suburbs and the diverse suburbs politically to remain integrated and

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449. In part because there is no equivalent to Home Mortgage Disclosure Act (HMDA) data for insurance, far less is known about insurance than mortgage lending. See Gregory D. Squires & Sally O'Connor, *The Unavailability of Information on Insurance Unavailability: Insurance Redlining and the Absence of Geocoded Disclosure Data*, 12 HOUSING POL'Y DEB. 347, 347 (2001).

450. Orfield & Luce, *Challenges*, *supra* note 415, at 395.

451. The relative nonwhite shares were calculated in both years based on how communities were classified in 2010. The cited change therefore represents growing nonwhite shares during the decade in communities classified as diverse at the end of the period.

452. Table 1 does not show exurbs. Since exurbs are defined by urbanization rate in 2000 in both years—2010 urbanization data are not yet available—none made the transition to another classification during the period.

453. Figures from supporting documents for Myron Orfield & Tom Luce, *America's Racially Diverse Suburbs: Opportunities and Challenges*, INST. ON METROPOLITAN OPPORTUNITY (July 20, 2012), <http://www.law.umn.edu/metro/resources/maps-by-city/detroit-mi.html>.



avoid resegregation will be central to any policy program to integrate America's large metropolitan areas.<sup>454</sup>

## VII. THE METROPOLITAN PLANS AND WHITE FLIGHT

Despite *Milliken*,<sup>455</sup> near metropolitan-level integration plans were implemented in fifteen metropolitan areas in the 1970s and 1980s.<sup>456</sup> The majority of these plans occurred in the Border States and the Southeast. These areas had the advantage of a less fragmented local government structure. In most cases, it was possible to use relatively large, countywide school districts encompassing all or most of the relevant housing market as the vehicle for integration efforts.

While hardly a liberal bastion historically, this part of the country proved to be more racially progressive than either the Deep South or the highly fragmented and segregated North.<sup>457</sup> Practical political, business, and religious leaders in several Border States sought to avoid the trauma of a drawn out racial struggle by designing sustainable integration plans.<sup>458</sup>

### A. *Milliken*, White Flight, and School Desegregation

In *Missouri v. Jenkins*,<sup>459</sup> Justice Rehnquist asserted—without any authority—that white flight “may result from desegregation, not de jure segregation.”<sup>460</sup> In a 1975 study, the famous educational researcher James Coleman had found that single-district school desegregation plans increased white flight, but he did not find the same loss in countywide districts—in fact, Coleman himself noted that metropolitan-wide desegregation plans resulted in little, if any, white flight.<sup>461</sup>

Coleman's white flight report set off a bevy of academic studies. These studies repeatedly emphasized that white flight from urban centers was a back-

454. Orfield & Luce, *Challenges*, *supra* note 415.

455. *Milliken I*, 418 U.S. 717 (1974).

456. The included metropolitan areas were Charlotte, North Carolina; Daytona Beach, Florida; Greensboro, North Carolina; Indianapolis, Indiana; Lakeland, Florida; Las Vegas, Nevada; Louisville, Kentucky; Nashville, Tennessee; Orlando, Florida; Pensacola, Florida; Wilmington, Delaware; Raleigh, North Carolina; Durham, North Carolina; Sarasota, Florida; Tampa, Florida; St. Petersburg, Florida; and West Palm Beach, Florida.

457. See LASSITER, *supra* note 104.

458. *See id.*

459. 515 U.S. 70 (1995).

460. *Id.* at 95.

461. JAMES S. COLEMAN, SARA D. KELLY & JOHN A. MORE, TRENDS IN SCHOOL SEGREGATION 1968–73, at 64 (1975) [hereinafter COLEMAN, TRENDS]. For a discussion of the impact of this study, see Gary Orfield, *Research, Politics and the Antibusing Debate*, 42 L. & CONTEMP. PROBS. 141, 141 (1978).

ground constant in all diverse cities, and that this flight was related not only to race in schools and neighborhoods, but to the following factors as well: growing poverty; crime; fiscal inequality, which caused taxes to rise in the face of declining services; low local spending on schools and other local services desired by the middle class; new home types and inexpensive financing; and desire for more space. These scholars noted that every racially diverse American city had white flight, whether it had a school desegregation plan or not.<sup>462</sup> In the end, most scholars had trouble assigning much of the flight to the separable influence of forced integration.<sup>463</sup> Some scholars found much smaller losses in countywide districts where whites would have to move greater distances to avoid integration, and both found that the degree of white flight was highly related to the availability of nearby very white suburban school enclaves. The easier it was for whites to move to nearby all-white districts, the greater the level of flight. In areas where the white suburban school districts were relatively far away or where the suburbs were racially diverse, white flight declined sharply.<sup>464</sup>

By the time Rehnquist made his claim that white flight was caused by desegregation and not by de jure segregation in *Jenkins*, its utter falsity had been established by hard factual evidence. By 1992, it was clear that metropolitan areas that implemented large-scale mandatory geographic plans like Indianapolis, Indiana; Broward, Florida; Hillsboro, Ohio; Clark County, Nevada; Nashville, Tennessee; and Duval, Florida, which had the least white flight of any large racially diverse U.S. school districts.<sup>465</sup> On one hand, from 1968 to 1988, three of the top six large U.S. school districts with the most stable white enrollment (and more than half of the top twenty) had operated mandatory metropolitan-level busing since the early 1970s; the others either were white and growing fast or almost all nonwhite.<sup>466</sup> On the other hand, from 1968 to 1988, the largest decline

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462. Reynolds Farley, Toni Richards & Clarence Wurdock, *School Desegregation and White Flight*, 53 SOC. EDUC. 123, 123 (1980); William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 AM. SOC. R. 425, 425 (1979); Christine H. Rossell, *School Desegregation and White Flight*, 90 POL. SCI. Q. 675, 675 (1975); Gary Orfield et al., Center for Nat'l Pol'y Rev., *Symposium on School Desegregation and White Flight* (1975).

463. COLEMAN, TRENDS, *supra* note 461.

464. Farley, *supra* note 462, at 130; COLEMAN, TRENDS, *supra* note 461, at tbl.14.

465. GARY ORFIELD & FRANKLIN MONFORT, COUNCIL OF URBAN BOARDS OF EDUCATION, STATUS OF SCHOOL DESEGREGATION: THE NEXT GENERATION 22 (1992), available at <http://files.eric.ed.gov/fulltext/ED415291.pdf>.

466. See GARY ORFIELD & FRANKLIN MONFORT, NAT'L SCH. BD. ASSOC., RACIAL CHANGE AND DESEGREGATION IN LARGE SCHOOL DISTRICTS: TRENDS THROUGH THE 1986-1987 SCHOOL YEAR 9-10 (1988).

in white enrollment in large U.S. school districts occurred in districts with no desegregation plans.<sup>467</sup>

By the 1990s, regional integration plans in Raleigh-Wake County and Charlotte-Mecklenburg (desegregated by *Swann*)<sup>468</sup> actually began to experience a growing proportion of white students or “reverse white flight.”<sup>469</sup> Wake County had integrated voluntarily and without a court order and Charlotte was released from its court order in the early 1990s. In both areas, pro-metropolitan integration forces won significant victories in elections in 1995 against neighborhood-school proponents, and voters decided to keep metropolitan desegregation plans and opposed efforts to return to neighborhood schools.<sup>470</sup>

### B. Metropolitan School Integration, Increased Housing Integration, and the Stability of Housing Integration

Forty years of history and data demonstrate that integrated neighborhoods in regions with large scale, close to metropolitan-wide school-integration plans were much more stable than those in metropolitan areas without such plans.<sup>471</sup> Eleven of the fifteen plans occurred in regions where there was a large central county school district that encompassed a large part of the metropolitan area. In these areas, once an act of intentional segregation was found, the court could order what was effectively a near metropolitan plan without the limits of the *Milliken*<sup>472</sup> requirements. In three cases, courts found *Milliken*<sup>473</sup> violations and ordered city-suburban school desegregation.<sup>474</sup> Finally, in Wake County, North Carolina, progressive leaders used the threat of court action to create a metropolitan integration plan without any court action.<sup>475</sup>

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467. ORFIELD & MONFORT, *supra* note 465, at 22.

468. *Swann I*, 402 U.S. 1 (1971).

469. Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825 (1996).

470. Gary Orfield, *Metropolitan School Desegregation: Impacts on a Metropolitan Society*, in PURSUIT OF A DREAM DEFERRED 121, 133–34 (John A. Powell, Gavin Kearney & Vina Kay eds., 2001).

471. Orfield & Luce, *Challenges*, *supra* note 415, at 395; MYRON ORFIELD & THOMAS LUCE, MINORITY SUBURBANIZATION AND RACIAL CHANGE 1–11 (2005), available at [http://www.irpumn.org/uls/resources/projects/MinoritySubn\\_050605wMAPS.pdf](http://www.irpumn.org/uls/resources/projects/MinoritySubn_050605wMAPS.pdf) [hereinafter ORFIELD & LUCE, SUBURBANIZATION].

472. See Orfield & Luce, *Challenges*, *supra* note 415.

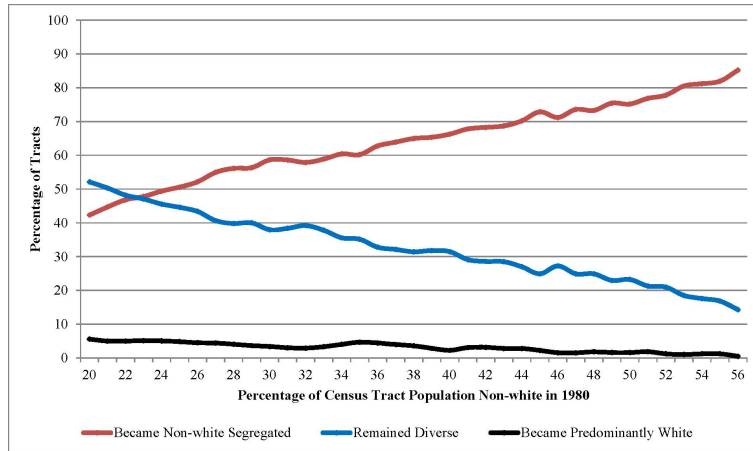
473. See *id.*

474. *United States v. Bd. of Sch. Comm'rs of Indianapolis*, 637 F.2d 1101 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980); *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson Cnty.*, 510 F.2d 1358 (6th Cir. 1975), *cert. denied*, 421 U.S. 931 (1975); *Evans v. Buchanan*, 379 F. Supp. 1218 (D. Del. 1974), *aff'd*, 423 U.S. 963 (1975).

475. See Letter from Dep't of Educ., Office for Civil Rights, to William R. McNeal, Superintendent Wake Cnty. Sch. (Aug. 29, 2003).

The availability of near-metropolitan options in these areas increased the chances that the resulting integration would be long lasting. The inclusion of most of white suburbia in the plans meant that all schools in large areas, though integrated, would be majority white and middle class. This decreased the chances that white flight would undermine integration efforts. Essentially, whites had nowhere to flee except private schools—a prohibitively expensive option for most middle class households. In the end, it is important to note that none of the plans were fully metropolitan and thus, as suburban growth occurred out of their jurisdiction, they become less effective.

**CHART 1. The Status in 2005-09 of Diverse Neighborhoods From the Fifty Largest Metropolitan Areas in 1980**



**CHART 2. The Status in 2005-09 of Diverse Neighborhoods From the Fifteen Metropolitan Areas With Regional School Integration Strategies in 1980**

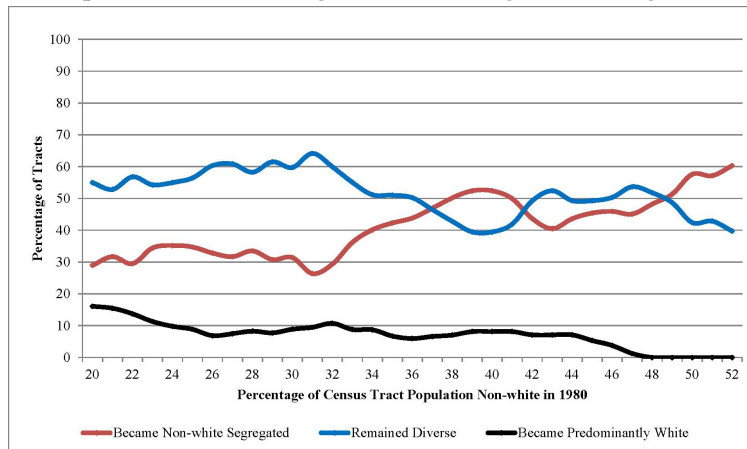


Chart 1 shows that in areas without metropolitan school integration, census tracts that were more than 23 percent nonwhite in 1980 were more likely to become majority nonwhite than remain integrated. In these areas, neighborhoods that were between 30 percent and 60 percent nonwhite had very little chance of remaining integrated. For example, neighborhoods that were 50 percent nonwhite had an 85 percent chance of becoming 60 percent nonwhite by 2009.

Chart 2 shows the same relationship—the likelihood that a neighborhood would remain integrated between 1980 and from 2005 to 2009, or resegregate, as a function of its racial composition in 1980—for the fifteen metropolitan areas that had large-scale school integration plans. In contrast with the results for metropolitan areas with no such plans, integrated neighborhoods in regions with metropolitan (or nearly metropolitan-scale) school-integration plans were much more stable. Neighborhoods between 20 percent and 33 percent nonwhite were much more likely (between 55 percent and 65 percent likely) to remain integrated than to resegregate. And neighborhoods between 33 percent and 50 percent nonwhite had a roughly 50 percent chance of remaining stably integrated over twenty-five years.<sup>476</sup>

The most commonly cited example of a large-scale desegregation plan still in existence illustrates these results very well. Raleigh (Wake County), North Carolina, which implemented metropolitan-level desegregation of its schools in the 1970s, not only has schools that rank among the nation's most integrated, but its neighborhoods are also among the least segregated.<sup>477</sup> It has also been one of the fastest-growing metropolitan areas in the country.

In areas with metropolitan-level integration, residential integration increased faster and there was much less evidence of housing discrimination by real estate agents than in areas without such integration. Instead of steering families to certain neighborhoods based on schools, agents were more likely to say that all neighborhoods had good schools.<sup>478</sup> Newspaper advertisements for sales or rentals were also less likely to list schools in a discriminatory manner.<sup>479</sup>

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476. Orfield & Luce, *Challenges*, *supra* note 415.

477. See William H. Frey, Brookings Institution & University of Michigan Social Science Data Analysis Network, *Black-White Segregation Indices for Metro Areas*, <http://www.psc.isr.umich.edu/dis/census/segregation2010.html> (last visited Nov. 2, 2014) (analyzing 1990, 2000, and 2010 Census Decennial Census tract data); Black-White Segregation Dissimilarity index calculated by Institute on Metropolitan Opportunity of 2009 National Center for Education Statistics data.

478. DIANA PEARCE, *BREAKING DOWN BARRIERS: NEW EVIDENCE ON THE IMPACT OF METROPOLITAN DESEGREGATION ON HOUSING PATTERNS* (1980); JOHN YINGER, *CLOSED DOORS OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* (1995).

479. Diana M. Pearce, *Deciphering the Dynamics of Segregation: The Role of Schools in the Housing Choice Process*, 13 *URB. REV.* 85, 88 (1981).

A recent study of Louisville-Jefferson County, Kentucky; Richmond-Henrico County, Virginia; Charlotte-Mecklenburg County, North Carolina; and Chattanooga-Hamilton County, Tennessee, found a strong relationship between the existence of an effective metropolitan school integration plan and improvements in residential integration. Louisville had a metropolitan plan from 1970 to 2010. Charlotte had one between 1970 and 2000. Richmond tried and failed to establish a metropolitan plan in 1970, and Chattanooga adopted one in the later 1990s. The metropolitan areas with city suburban plans experienced much faster declines in housing segregation.

From 1990 to 2000 in Louisville and Charlotte, housing segregation fell by ten points on the dissimilarity index compared to a five-point decline in Richmond and an eight-point decline in Chattanooga, which began an integration plan in 1997. From 2000 to 2010, when Charlotte was released from its 1999 plans, its dissimilarity fell by 5 percent, while it fell an additional 13 percentage points in Louisville which kept its plan. In Chattanooga, which began a plan in 1997, dissimilarity fell by 11 points from 2000 to 2010. Richmond continued to have the slowest decline in segregation.<sup>480</sup>

## VIII. FORBIDDING RACIAL INTEGRATION IN AMERICA'S SCHOOLS: THE SUPREME COURT (2007 TO PRESENT)

### A. Striking Down the Integration Plan of an Elected Local Government

After the Resegregation Cases, a third stage of the doctrinal evolution on school integration began to take root. Courts began to limit the authority of elected school boards to integrate their school districts, absent *de jure* segregation. In the 1990s, as the Supreme Court pushed the federal courts to dissolve decrees, and lower federal courts used the *Regents of the University of California v. Bakke*,<sup>481</sup> *City of Richmond v. J.A. Croson Co.*,<sup>482</sup> and *Adarand Constructors, Inc. v. Peña*<sup>483</sup> decisions (in which the Supreme Court had sharply limited affirmative action) to begin invalidating the efforts of locally elected school boards to integrate schools if (1) there was no proof of intentional discrimination, or (2) the federal courts, using *Dowell*,<sup>484</sup> *Freeman*,<sup>485</sup> and *Jenkins*,<sup>486</sup> had declared that the

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480. Siegel-Hawley, *supra* note 357.

481. 438 U.S. 265 (1978).

482. 488 U.S. 469 (1989).

483. 515 U.S. 200 (1995).

484. Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991).

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

486. Missouri v. Jenkins, 515 U.S. 70 (1995).

original violation had been cured during the period of court supervision (even as segregation remained).<sup>487</sup>

Because the consensus-elected boards developed for integration programs were fragile, trying to reformulate controversial local reforms and school boundary changes, the most sensitive and difficult of local issues, only to have these plans struck down by a hostile federal judge, became a politically unsustainable task.

The *Grutter v. Bollinger*<sup>488</sup> decision in 2003 upheld affirmative action in higher education and gave new life to local boards that wanted to integrate. *Grutter*<sup>489</sup> was used as authority to uphold integration plans created by locally elected school boards in Boston,<sup>490</sup> Seattle,<sup>491</sup> Louisville,<sup>492</sup> and other places,<sup>493</sup> and the number of districts taking actions to integrate schools increased for the first time since the 1980s.

#### B. *Meredith v. Jefferson County Public School: Louisville-Jefferson County*

School integration advocates hoped that the after courts ordered integration, local elected officials would see its benefits and would be persuaded that it was a valuable policy to pursue independently. This happened in Louisville-Jefferson County, Kentucky. There, an elected school board, after it had been released from court supervision, won repeated reelection by promising to keep the schools integrated on a metropolitan basis. In *Meredith v. Jefferson County*,<sup>494</sup> the companion case to *Parents Involved*,<sup>495</sup> the Supreme Court struck this plan down.

In 1984, 1991, and 1995, Jefferson County Public Schools (JCPS), in response to community input, revised their desegregation plan, each time creating more flexibility, reducing the number of children bused, and gradually replacing mandatory busing with a greater use of incentive-based magnet schools and controlled choice.<sup>496</sup> The plan became popular among students and their parents. In 2000, following the example of their school districts, the city of Louisville

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487. See *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999); *Equal Open Enrollment Ass'n v. Bd. of Educ.*, 937 F. Supp. 700 (N.D. Ohio 1996).

488. 539 U.S. 306 (2003).

489. See *id.*

490. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005).

491. *Parents Involved v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005).

492. *McFarland v. Jefferson Cnty. Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005).

493. See, e.g., *Doe v. Lower Merion School District*, 665 F.3d 524 (3d Cir. 2011); *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 90 Cal. Rptr. 3d 789 (Cal. Ct. App. 2009).

494. *Meredith v. Jefferson Cnty. Bd. of Educ.*, 549 U.S. 1017 (2006).

495. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

496. *Id.* at 816–18.

merged with Jefferson County, creating the Louisville-Jefferson Metropolitan Government.<sup>497</sup>

Notwithstanding the general popularity of the plan, in 1999, several parents who did not receive their first choice school (which often, ironically, was an integrated magnet rather than a whiter neighborhood school) sued, challenging the plan's use of racial guidelines at one of the district's most popular magnet schools and asking the court to dissolve the desegregation order. JCPS opposed dissolution, arguing that "the old dual system" had left a "demographic imbalance" that "prevent[ed] dissolution."<sup>498</sup> The district court declared the district unitary<sup>499</sup> and the use of race-based "targets" at popular magnet schools unconstitutional.

After being released from court supervision, Jefferson County continued to implement its plan as modified to reflect the court's magnet school determination. JCPS attempted to keep all schools between 15 percent and 50 percent nonwhite, arguing this was not a racial quota, but rather, a flexible starting point permissible under *Swann*.<sup>500</sup> At the elementary level, each elementary school student was given a "resides" school that they would attend if they enrolled by the prescribed deadline. They were also assigned to a geographic cluster to facilitate integration. If they did not want to go to their resides school, or a magnet school that they could apply to at any time, they could submit a list of preferences to go to other schools in their cluster. They would receive an assignment thereafter based on their preference, if space was available and if the assignment would not contribute to racial imbalance.<sup>501</sup> After assignment, students would be permitted to transfer to schools outside of their clusters, again if space was available and it did not contribute to racial imbalance. Middle and high school students were designated a single resides school and assigned to that school unless it was at the extremes of the racial guidelines. They could also apply to a magnet school or program, or, at the high school level, take advantage of an open enrollment plan that allowed ninth grade students to apply for admission to any non-magnet high school. JCPS estimated that the use of the racial guidelines accounted for only 3 percent of assignments.<sup>502</sup>

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497. *Louisville/Jefferson County Merger*, LOUISVILLEKY.GOV, <http://www.louisvilleky.gov/yourgovernment/merger.htm> (last visited Sept. 23, 2014).

498. *Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 363 (W.D. Ky. 2000).

499. *Id.* at 382.

500. *McFarland v. Jefferson Cnty. Pub. Sch.*, 330 F. Supp. 2d 834, 856–57 (W.D. Ky. 2004).

501. *Parents Involved*, 551 U.S. at 716–17.

502. "Elementary school students are assigned to their first- or second-choice school 95% of the time, and transfers, which account for roughly 5% of assignments, are only denied 35% of the time—and presumably an even smaller percentage are denied on the basis of the racial guidelines, given that other factors may lead to a denial." *Parents Involved*, 551 U.S. at 734.



In 2003, several new families who did not receive their first choices challenged the school desegregation policy, again as an improper use of race. The district court upheld the plan, but required modification to the use of race in its assignment plans to its “traditional” magnet schools, a subset of nine schools that emphasized basic skills in a highly structured environment, with school uniforms and special disciplinary policies.<sup>503</sup> The court of appeals affirmed,<sup>504</sup> but a solitary parent who was still unhappy filed a petition for certiorari, which was granted in June 2006.<sup>505</sup>

Crystal Meredith, a single white mother with one son, moved to Jefferson County in 2002. She applied for her son’s resides school four months after the deadline and a month after the school year had already begun.<sup>506</sup> His resides school was only a mile from his new home, but it had no available space. Meredith applied for no second choice and Jefferson County assigned him to another elementary school in his cluster, Young Elementary.<sup>507</sup> This school was ten miles from home. Meredith thereafter sought admission to a whiter school, Bloom Elementary, in a different cluster, which was only a mile from home.<sup>508</sup> Space was available at Bloom, but her son’s transfer was denied because it “would have an adverse effect on desegregation compliance” of Young Elementary.<sup>509</sup> Meredith had an unlimited right to apply for other transfers, but did not do so and attended Young for the first grade.<sup>510</sup> The next year Meredith’s son was admitted to Bloom Elementary, but she asserted continued standing on the basis of damages for the denial during the first grade year and the possibility that her son might be subject to additional discrimination based on his race when he applied to middle school.<sup>511</sup>

Eighty percent of the students in JCPS disagreed with Crystal Meredith and wanted to keep the integration as it was or strengthen it.<sup>512</sup> Students reported strong teacher support for their aspirations to attend college.<sup>513</sup> JCPS students

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503. *McFarland*, 330 F. Supp. 2d at 864.

504. *McFarland v. Jefferson Cnty. Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005).

505. *Meredith v. Jefferson Cnty. Bd. of Educ.*, 547 U.S. 1178 (2006).

506. *Parents Involved*, 551 U.S. at 717.

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

513. Eighty-nine percent of students said they were encouraged by their teachers to go to college, with 58 percent of black students and 63 percent of white students reporting they received strong encouragement. GARY ORFIELD & ERICA FRANKENBERG, *THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES*, UCLA, EXPERIENCING INTEGRATION IN

associated positive gains with racial diversity within their classrooms. Sixty-four percent of whites and 68 percent of blacks said they were “very comfortable” when “discussing controversial issues related to race,” and even higher proportions felt comfortable “working with students from different racial and ethnic backgrounds on group projects.”<sup>514</sup> In terms of the their future, huge majorities of students felt very well prepared to work and live in diverse settings, an increasingly important educational outcome in the nations rapidly diversifying society.”

More than 90 percent of JCPS parents disagreed with Crystal Meredith, believing that diverse schools have important educational benefits for their children. A substantial percentage of parents also believed the decades of integrated schools improved the greater Louisville community. Eighty-nine percent of parents thought that the school district’s guidelines could “ensure that students learn with students from different races and economic backgrounds.”<sup>515</sup>

Louisville’s business community also disagreed with Crystal Meredith. An amicus brief of the Louisville Area Chamber of Commerce urged the Court to sustain the JCPS metro plan because of its broad beneficial effects on regional economic growth.<sup>516</sup> The Chamber told the Court that the plan had helped Louisville overcome poor race relations that had hurt the economy, thereby helping transform Louisville into a thriving economy and corporate headquarters location.<sup>517</sup>

The Chamber explained “the importance of racial diversity” and “healthy race relations for fostering economic growth.”<sup>518</sup> The brief asserted that that because of the plan, JCPS students “were better prepared for the future racially diverse work environment”<sup>519</sup> and that “[s]uccess in business often depends on how well a company can deal with diverse customers and business partners.”<sup>520</sup> Additionally, the brief noted, “[h]uman resource management is critical in business administration, and a company’s mishandling of race and alleged discrimination in the workplace can result in significant reputation damage, low employee morale, and exposure to legal liability.”<sup>521</sup> It concluded that “schools can be a crucial

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LOUISVILLE: HOW PARENTS AND STUDENTS SEE THE GAINS AND CHALLENGES 2 (2011) [hereinafter ORFIELD & FRANKENBERG, LOUISVILLE].

514. *Id.*

515. *Id.* at 2–3.

516. Brief Amici Curiae of the Louisville Area Chamber of Commerce, Inc. (D/B/A Greater Louisville Inc.) and Louisville Mayor Jerry E. Abramson in Support of Respondents, *Meredith v. Jefferson Cnty. Bd. of Educ.*, 547 U.S. 1178 (2006).

517. *Id.*; see also TURNER ET AL., *supra* note 428.

518. ORFIELD & FRANKENBERG, LOUISVILLE, *supra* note 513, at 3.

519. *Id.* at 9.

520. *Id.*

521. *Id.*

venue in which to inculcate values of racial diversity early on when students are still learning how to interact appropriately with their peers.” Schools are sometimes the only such opportunity, because “[b]y the time a student enters the workforce, it may be too late to eliminate prejudicial attitudes and stereotypes.”<sup>522</sup> The Chamber’s brief concluded by quoting *Milliken* and asking the Court to respect local control and to defer to the decisions about integration made by locally elected officials.<sup>523</sup>

A deeply divided Supreme Court struck down Jefferson County’s plan.<sup>524</sup> On the one hand, Justice Roberts’s opinion, joined by Justices Alito, Thomas, and Scalia, would essentially forbid locally elected school districts from taking any action to integrate schools, absent a de jure violation.<sup>525</sup> On the other hand, Justice Breyer, writing for Justices Stevens, Ginsburg, and Souter would give local districts a largely free hand to decide how to integrate.<sup>526</sup> The controlling concurrence by Justice Kennedy found that, while the plans before the court were impermissible affirmative action, there remained a compelling governmental interest in achieving diversity and it avoiding racial isolation.<sup>527</sup> His opinion outlined more limited strategies, supported by the four pro-integration justices (who would have gone further), which allowed locally elected districts significant discretion to integrate schools without invoking strict scrutiny.<sup>528</sup>

Justice Kennedy wrote that when making individualized student decisions about admission to selective or magnet schools, race can be used as one of many factors for admission, but not the sole factor.<sup>529</sup> He held that school districts have much greater discretion (or can use race alone) when they are undertaking racially proactive strategies that do not subject students to individual racial classification. Specifically, the Court approved “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”<sup>530</sup> “These mechanisms,” wrote Kennedy, “are race conscious but do not

522. *Id.* at 10.

523. *Id.* at 12–19.

524. *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

525. *Id.* at 708–48.

526. *Id.* at 803–76 (Breyer, J., dissenting).

527. *Id.* at 797–98 (Kennedy, J., concurring).

528. *Id.* Justice Kennedy recently signaled the continuing viability of his *Parents Involved* concurrence in *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013), and *Shuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

529. *Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring).

530. *Id.* at 788–89.

lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”<sup>531</sup>

The Supreme Court thus dismantled Louisville’s plan over the opposition of the students, their parents, and the local business community, all of whom believed that it was important to the success of the metropolitan area. The locally elected school district has recently reformulated its plan to fit under the terms of Justice Kennedy’s concurrence. However, there is clear uncertainty whether this new plan, which will undoubtedly be challenged, will survive the next test and whether elected local officials will be allowed to sustain successful metropolitan integration.

#### IX. THE LESSON OF *MILLIKEN* AND *MEREDITH*: DETROIT AND LOUISVILLE FROM 1974 TO 2013

While Detroit’s proposed integration district had three times as many students as Louisville’s in 1972, both contained 20 percent black and 80 percent white students in 1972.<sup>532</sup> Both regions had equally segregated schools and neighborhoods and black ghettos that were proportionately the same size.

In 2010 Detroit had the third most racially segregated schools among the nation’s fifty largest regions. Louisville was the eleventh most racially integrated and had been the seventh most integrated in 1990 before the process of accommodating white parents and suburban growth began to limit the plan’s effectiveness in the most recent decade.<sup>533</sup> In 2000, the average black Detroit student went to a school with less than 2 percent white students. In Louisville, the average black student went to a school that was half white.<sup>534</sup>

The following charts compare the results of academic tests administered to Detroit and Louisville students.

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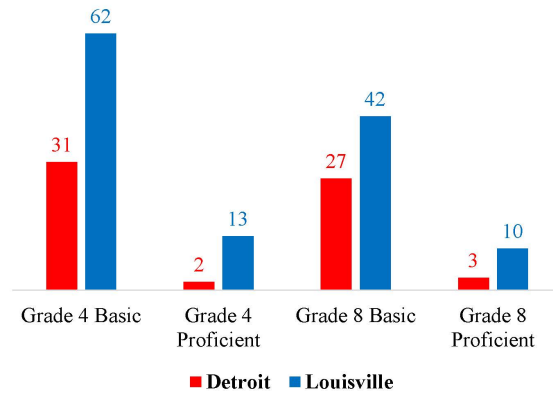
531. *Id.* at 789.

532. *Milliken V*, 345 F. Supp. 914, 925 (E.D. Mich. 1972); *see also Newburg III*, 521 F.2d 578, 581 (6th Cir. 1975).

533. Black-White Segregation Dissimilarity index calculated by Institute on Metropolitan Opportunity of 2009 National Center for Education Statistics data.

534. Percentages calculated by Institute on Metropolitan Opportunity of 2000 National Center for Education Statistics data.

**FIGURE 5. Math Test: Percentage at or Above Basic and Proficient Levels for Black Students in Detroit and Louisville in 2011**



**FIGURE 6. Reading Test: Percentage at or Above Basic and Proficient Levels for Black Students in Detroit and Louisville in 2011**

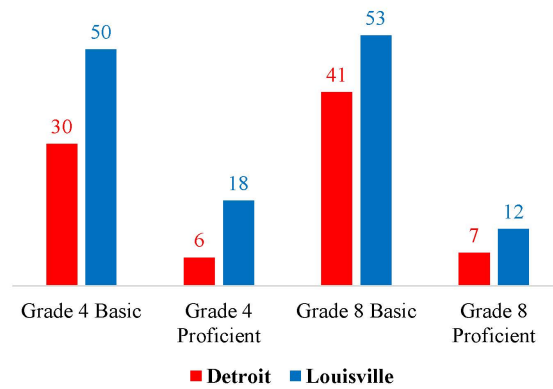
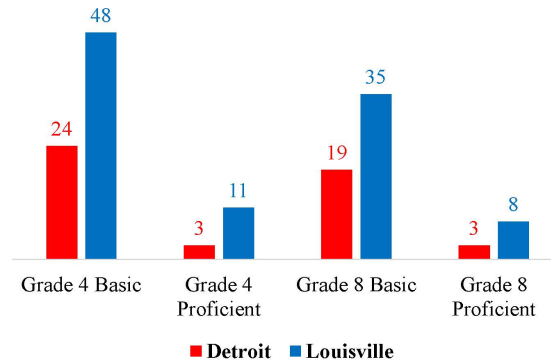


FIGURE 7. Science Test: Percentage at or Above Basic and Proficient Levels for Black Students in Detroit and Louisville in 2009



In 2011, Louisville students were twice as likely across the board to achieve basic or proficient level on the National Assessment of Education Progress. Seventy-five percent of Louisville's black fourth graders had achieved the basic or proficient level in math, compared to 33 percent in Detroit. In terms of reading, 68 percent of Louisville's black fourth graders had achieved the basic or proficient level, while only 36 percent of Detroit's had. In science, 59 percent of Louisville's black fourth graders had achieved the basic or proficient level, compared to only 25 percent of Detroit's black fourth graders.<sup>535</sup>

Fifty-two percent of Louisville's eighth-grade black students had achieved a basic or proficient level in reading compared to 25 percent of Detroit's black eighth graders. In math, 65 percent of Louisville's eighth-grade black students were basic or proficient, compared to 48 percent in Detroit. In science, 43 percent of Louisville's black eighth graders had achieved basic or proficient levels compared to 21 percent in Detroit.<sup>536</sup>

Detroit's schools reached a peak enrollment of 300,000 in 1966, when it was half white and half black. By January 2013, the school population fell to 49,900, with 90 percent black students.<sup>537</sup> In 1974, the combined population of the Louisville and Jefferson County schools had been less than half the population of the

535. See *District Summary Table for Detroit, NAEP District Profiles*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/nationsreportcard/districts> (last visited July 25, 2014); *District Summary Table for Jefferson County (KY), NAEP District Profiles*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/nationsreportcard/districts> (last visited July 25, 2014).

536. See *id.*

537. *Detroit Public Schools*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Detroit\\_Public\\_Schools](http://en.wikipedia.org/wiki/Detroit_Public_Schools) (last visited July 25, 2014).

Detroit city schools. In 2013, JCPS had twice as many students as Detroit. From 2000 to 2009, Louisville-Jefferson County's student population grew from 95,000 to 99,217. Its white population was 52 percent, and 56 percent of its student's qualified for free or reduced-cost lunch.<sup>538</sup>

From 1940 to 1970, both Detroit and Louisville's neighborhoods grew steadily more racially segregated and their black ghettos expanded proportionately.<sup>539</sup> After *Milliken*, Detroit's neighborhoods continued to grow even more segregated, while Louisville's gradually became much more racially integrated. In 1980, both regions had a dissimilarity score of approximately seventy to eighty. By 2010, Detroit's dissimilarity score of 79.6 was the highest of the nation's hundred largest metropolitan areas; by contrast, Louisville's score of 56.2 was the forty-eighth highest.<sup>540</sup>

By 2010, 69 percent of Detroit's blacks lived in neighborhoods more than 75 percent black (five points lower than in 1970) and 80 percent lived in neighborhoods more than 50 percent black (nine points lower). In Louisville, in 2010, only 37 percent of blacks lived in neighborhoods more than 75 percent black (twenty-seven point lower than in 1970) and 52 percent lived in neighborhoods that were more than 50 percent black (thirteen points lower). From 1970 to 2010, Detroit's black ghetto (overwhelmingly poor tracts with more than 75 percent black population) grew 558 percent in area, from twenty square miles in 1960, to 129 square miles in 2010. In contrast, Louisville's ghetto grew 289 percent, from four square miles to fifteen square miles. Most of the growth in Louisville's ghetto came in the last decade, as the suburbs' growth outside the plan began to challenge its effectiveness.

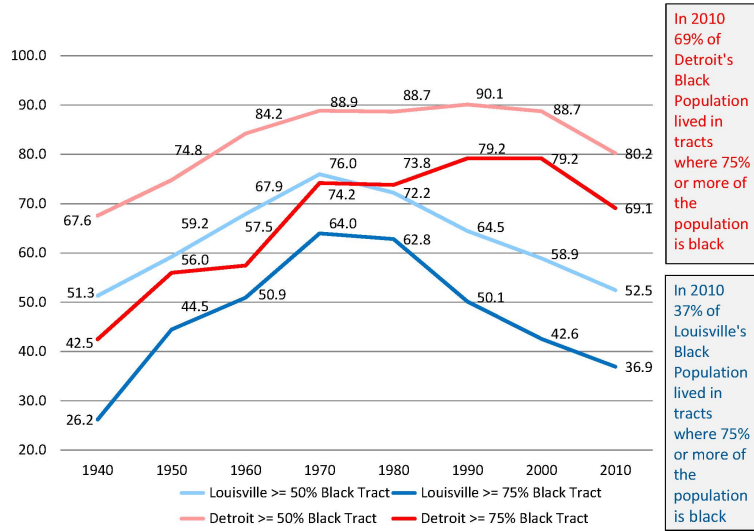
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538. Figures calculated by Institute on Metropolitan Opportunity of 2009. NATIONAL CENTER FOR EDUCATION STATISTICS DATA, <http://nces.ed.gov/ccd/elsi/> (last visited Dec. 12, 2014).

539. Data on Detroit and Louisville metropolitan areas were calculated by the Institute on Metropolitan Opportunity (IMO). The data analyzed by IMO are from data provided by Minnesota Population Center. *National Historical Geographic Information System: Version 2.0*, UNIVERSITY OF MINNESOTA, <http://www.nhgis.org> (last visited Nov. 2, 2014). For this analysis only the historical (core) parts of Detroit and Louisville metros were assessed, including portions of Wayne, Macomb and Oakland Counties in Detroit and (Louisville) Jefferson County in Louisville.

540. Dissimilarity scores are provided by the American Communities Project at Brown University. *Residential Segregation Data, US2010 Project*, BROWN UNIVERSITY, <http://www.s4.brown.edu/us2010/SegSorting/Default.aspx> (last visited Dec. 12, 2014).

**FIGURE 8. Share of Total Black Population in Census Tracts That Are Predominantly Black in Detroit and Louisville Areas (1940-2010)**



In 2010, Detroit had twenty-eight jobs per hundred residents, while Louisville had sixty-one jobs per hundred residents. During the 1990s, Louisville had the seventeenth-fastest job growth among the nation’s top fifty metropolitan areas. Detroit’s employment growth was ranked twenty-seventh. From 2000 to 2008, Louisville grew 5 percent in employment, ranking thirty-ninth among the fifty largest regions, while Detroit lost 6 percent of its jobs, ranking forty-seventh.<sup>541</sup>

In the last decade, Detroit lost 25 percent of its population, while Louisville’s consolidated city grew by 7 percent.<sup>542</sup> From 1970 to the present, Detroit’s metropolitan population did not grow at all, while Louisville’s grew over 20 percent.

In 2008 Detroit’s tax base was 28 percent of the regional average. Louisville’s was 122 percent of the regional average, or six times higher in comparison to its region than Detroit’s.<sup>543</sup> In 2012 Detroit’s bond rating was CC and Caa2 by

541. Figures from supporting documents for Myron Orfield & Tom Luce, *America’s Racially Diverse Suburbs: Opportunities and Challenges*, INST. ON METROPOLITAN OPPORTUNITY (July 20, 2012), <http://www.law.umn.edu/metro/resources/maps-by-city/detroit-mi.html>.

542. *Id.*

543. *Id.*



S&P and Moody's, respectively, or junk status. In 2010, Louisville's bond rating was an Aa2, or high quality.

#### A. The Decline of Detroit and the Loss of Local Control Over Schools and City Government

*Milliken's*<sup>544</sup> central principle stated that “[n]o single tradition in public education is more deeply rooted than local control over the operation of public schools; local autonomy has long been thought essential both to the maintenance of community concern and support from public schools and to the quality of the education process.”<sup>545</sup> But the *Milliken* Court, by protecting suburban local power to keep out black students, made local self-government in Detroit and Michigan's other predominantly black cities impossible.

After *Milliken*, there have been seven substantial school governance reorganizations in Detroit. None made any difference in Detroit's decline.<sup>546</sup> In 1976, the state decided to decentralize control to the neighborhoods. When that did not help, power was recentralized in the mayor and State of Michigan in 1981. In 1999, as the schools neared financial bankruptcy, a state reform board took over. After nothing improved, the schools were returned to a traditionally elected school board in 2006.<sup>547</sup> Two years later, operating in a deep deficit, an Emergency Financial Manager was appointed in 2008. In 2011, the state created a new Educational Achievement Plan placing the thirty-nine lowest scoring schools directly under state control.<sup>548</sup>

In *Milliken*, the Supreme Court had in effect told whites that it was safe to flee and that it would protect them. Consequently, white flight accelerated. Each decade, demographers thought Detroit had reached the bottom, but Detroit's decline accelerated again in the 2000s, as the charter school system and open enrollment rapidly began to siphon off students. From 2003 to 2010, the number of students attending charter schools grew from 27,503 to 45,036.<sup>549</sup> During that same time, open enrollment grew from 7770 to 12,929.<sup>550</sup> By 2010, Detroit only educated 60 percent of resident students; charter school enrollment

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544. *Milliken I*, 418 U.S. 717 (1974).

545. *Id.* at 741–42.

546. Peter J. Hammer, *The Fate of the Detroit Public Schools: Governance, Finance and Competition*, 13 J.L. SOC'Y 111 (2011).

547. *Id.* at 132.

548. *Id.* at 133.

549. *Id.* at 142.

550. *Id.*

will surpass public school enrollment this year.<sup>551</sup> There is no evidence, however, that charters are any better than the public schools.<sup>552</sup> Since 2004, Detroit has closed one hundred schools.<sup>553</sup> In 2004, it employed 18,747 teachers—by 2012, only 8551 teachers remained.<sup>554</sup>

The State of Michigan and the U.S. Supreme Court stranded Detroit's black students on a fiscal ice floe that was melting. Each year, as Detroit's needs grew more, and as its citizens became more isolated and troubled, local government resources declined. As Detroit's black ghetto grew to encompass most of the city, causing its businesses to leave and housing to be abandoned, its already weak tax base collapsed. The city's population has declined from 1.8 million to 700,000. After *Milliken*, Detroit lost 80 percent of its manufacturing establishments and 78 percent of its retail establishments. The number of jobs declined from 735,104 to 346,545 in 2012.<sup>555</sup>

From 1975 to 1990, the state heavily subsidized both the Detroit schools and the city government. But in the mid-1990s, support began to disappear when results continued to decline and the state government experienced a tax revolt and a damaging recession. From 2009 to 2012, state school aid to Detroit had fallen over one third, from \$553 million to \$363 million.<sup>556</sup>

Coleman Young, Detroit's first black mayor, went to great lengths to keep jobs in the city, often diverting funds for the poor or to repair infrastructure to provide subsidies to stimulate the creation of jobs.<sup>557</sup> For example, the famous Poletown case involved one of the nation's most politically difficult and extraordinary uses of eminent domain: Detroit took a large residential neighborhood to

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551. *Id.*

552. Joy Resmovits, *Charter School Growth In Michigan Brings Cautionary Tale On Quality*, HUFFINGTON POST, Jan. 17, 2013, available at [http://www.huffingtonpost.com/2013/01/17/charter-school-quality\\_n\\_2490931.html](http://www.huffingtonpost.com/2013/01/17/charter-school-quality_n_2490931.html) (last visited Dec. 12, 2014); Michael Winerip, *For Detroit Schools, Mixed Picture on Reforms*, N.Y. TIMES, Mar. 14, 2011, available at [http://www.nytimes.com/2011/03/14/education/14winerip.html?\\_r=1&cmc=eta1&pagewanted=print](http://www.nytimes.com/2011/03/14/education/14winerip.html?_r=1&cmc=eta1&pagewanted=print).

553. Hammer, *supra* note 546, at 138.

554. *Id.*

555. Opinion Regarding Eligibility at 19, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Dec. 5, 2013). There is no doubt that the global recession of 2008 hit Detroit extremely hard, in part because of its great dependence on manufacturing and the automobile industry in particular. On the other hand, many of the other segregated central cities of the Midwest and Northeast experience similar, if not quite as extreme, trends. Michigan recently enacted a tax limitation provision, and a state-wide tax cut, and dramatic declines in Michigan aids to poor black schools districts also played a role in Detroit's dire situation.

556. Hammer, *supra* note 546, at 138.

557. Daniel Clement, *The Spatial Injustice of Crisis-Driven Neoliberal Urban Restructuring in Detroit*, UNIV. OF MIAMI SCHOLARLY REPOSITORY 45-46 (2003).

lure General Motors to locate a manufacturing facility there.<sup>558</sup> Yet, no matter what the city did, people, jobs, and resources left faster than they could be recruited, created, or obtained.

During the post-*Milliken* period, as Detroit lost its middle class of all races, high-quality candidates were hard to recruit. In the face of hopelessness, voter turnout declined and city officials were increasingly chosen from a pool of poorly qualified candidates by a political machine and approved by a tiny percentage of a destitute, poorly informed electorate. With little competition or oversight, corruption in Detroit, as in many segregated empty cities, flourished. State and local funds, provided as an alternative to integration, were often improvidently and sometimes corruptly used. One recent Detroit mayor is in prison, as are many of its former leading elected officials and many officials from inner-ring poor suburbs.<sup>559</sup> In addition, its elected officials poorly managed Detroit. The recent Detroit bankruptcy decision outlines one terrible business decision after another, such as the city investing in extremely risky interest rate swaps, in which the city lost millions.<sup>560</sup>

In 2008, the state appointed an Emergency Manager to take over Detroit's bankrupt school system from the only elected school board it had had since *Milliken*, a board that served for fewer than two of the intervening forty-five years. The board sued successfully in attempt to maintain control over academics and curricular decision-making.<sup>561</sup> After it won in state court, however, the legislature stripped all control from the locally elected board by statute.<sup>562</sup>

558. *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

559. See Kate Abbey-Lambertz, *Detroit Corruption Rooted Out As Felony Bribery Charges Filed Against Seven Building Inspectors*, HUFFINGTON POST (Aug. 29, 2013, 12:45 PM), [http://www.huffingtonpost.com/2013/08/29/detroit-corruption\\_n\\_3837180.html](http://www.huffingtonpost.com/2013/08/29/detroit-corruption_n_3837180.html); Alan Burdziak, *Former River Rouge School Official Gets Five Years in Prison*, THE DETROIT NEWS HERALD (May 23, 2013), <http://www.thenewsherald.com/articles/2013/05/23/news/doc519e312484c58209389241.txt>; *Detroit Corruption*, MICH. PUB. RADIO (compilation of recent stories on official corruption), <http://michiganradio.org/term/detroit-corruption>; *Ex-Wayne County official David Edward gets prison for bribery*, DETROIT FREE PRESS (Sept. 27, 2013, 2:49 PM), <http://www.freep.com/article/20130927/NEWS02/309270092>; Charlie LeDuff, *From Then Until Now: A Look at Detroit's Corrupt Political Past*, MY FOX DETROIT, (Oct. 10, 2013, 4:10 AM), <http://www.myfoxdetroit.com/story/23652333/from-then-until-now-a-look-at-detroits-80-year-corruption>; Steven Yaccino, *Kwame M. Kilpatrick, Former Detroit Mayor, Sentenced to 28 Years in Corruption Case*, N.Y. TIMES, Oct. 11, 2013, at A12, *available at* [http://www.nytimes.com/2013/10/11/us/former-detroit-mayor-kwame-kilpatrick-sentencing.html?\\_r=0](http://www.nytimes.com/2013/10/11/us/former-detroit-mayor-kwame-kilpatrick-sentencing.html?_r=0).

560. Opinion Regarding Eligibility, *supra* note 555, at 13.

561. Opinion in Support of Ruling Issuing Injunctive Relief and Nunc Pro Tunc Order and Order Scheduling Settlement Conference Requiring Attendance of All Parties and Production of Plans and Budgets, *Scott v. Bobb*, Case No. 09-020160-AW (Wayne Cnty. Cir. Ct. May 5, 2010).

562. Hammer, *supra* note 546, at 133.

As the financial takeover of Detroit loomed, Michigan voters repealed, by referendum, the state's takeover statute.<sup>563</sup> Within six weeks, however, the Michigan legislature reinstated the act, with minor changes, over voter objections, and on March 14, 2013, Michigan took over Detroit's city government from its elected officials.<sup>564</sup> Detroit was now added to the list of predominantly black cities—Flint, Pontiac, Saginaw, Benton Harbor, suburban Ecorse, River Rouge, Inskster, Allen Park, and Royal Oak—that were under direct state control. With the Detroit takeover, over 50 percent of Michigan's black citizens now lived in cities where local control was removed by state.<sup>565</sup>

The takeovers of Detroit and its school system were different than previous state takeovers of troubled cities. In the past, such takeovers had been consensual and were accompanied by significant state bailout funds. Michigan's recent takeovers of black cities and school districts were hostile, local voters were totally stripped of control over the objections of their elected officials, and the state provided no resources to help.<sup>566</sup>

On March 27, 2013, elected officials and residents of Detroit and several other cities that were taken over brought suit alleging that the Emergency Manager Law, PA 436,<sup>567</sup> violates their rights under the U.S. Constitution and the Voting Rights Act.<sup>568</sup> On May 13, 2013, the Detroit NAACP filed suit in federal court claiming that the administration of the Michigan takeover statute discriminated against Michigan's black citizens.<sup>569</sup> Because 50 percent of Michigan's black citizens resided in cities (and school districts) that were taken over, and predominantly white cities with similar financial troubles were not taken over, the NAACP argued that Michigan's administration of the takeover statute amounted

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563. Steven Yaccino, *Michigan Voters Repeal a Financial Law*, N.Y. TIMES, Nov. 8, 2012, at A.13, available at <http://www.nytimes.com/2012/11/08/us/michigan-voters-kill-emergency-managers-for-city-finales.html>.

564. Opinion Regarding Eligibility, *supra* note 555, at 31.

565. The cities include Benton Harbor, Flint, Pontiac, Ecorse, Inskster, River Rouge, Royal Oak, Hamtramck, and Allen Park. The school districts include Ecorse, East Detroit, Pontiac, Muskegon Heights, Highland Park, and Detroit. *Emergency Manager Info.*, DEPT OF TREASURY, available at [http://www.michigan.gov/treasury/0,1607,7-121-1751\\_51556-201116\\_00.html](http://www.michigan.gov/treasury/0,1607,7-121-1751_51556-201116_00.html); see also Ryan Holeywell, *Emergency Financial Managers: Michigan's Unwelcome Savior*, GOVERNING (May 2012), <http://www.governing.com/topics/mgmt/gov-emergency-financial-managers-michigan-municipalities-unwelcome-savior.html>.

566. Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 586–92 (2012).

567. Local Financial Stability and Choice Act, MICH. COMP. LAWS § 141.1541 *et seq.* (2012).

568. Complaint for Declaratory & Injunctive Relief, Phillips v. Snyder, No. 2:13-cv-11370-GCS-RSW (E.D. Mich. Mar. 27, 2013).

569. Khalil AlHajal, *NAACP Lawsuit Claims Emergency Manager Law Violates Voting Rights of Half Michigan's African Americans*, MLIVE (May 13, 2013), available at [http://www.mlive.com/news/detroit/index.ssf/2013/05/naacp\\_lawsuit\\_claims\\_emergency.html](http://www.mlive.com/news/detroit/index.ssf/2013/05/naacp_lawsuit_claims_emergency.html).

to disparate impact discrimination that diluted the voting rights of its black citizens.<sup>570</sup> Detroit filed for bankruptcy on July 25, 2013, and the NAACP case was stayed pending the completion of the bankruptcy proceeding, even though the elected officials were allowed to proceed if they agreed not to seek removal of the emergency manager in the Detroit bankruptcy.<sup>571</sup>

On December 6, 2013, the bankruptcy court declared, *inter alia*, that PA 436 did not violate the constitutional right to referendum or the home rule provisions of the Michigan Constitution. Moreover, it held that the emergency manager had authority to file for bankruptcy even though he was not an elected official.<sup>572</sup> Citing Michigan case law, Judge Rhodes concluded that “[m]unicipal corporations have no inherent power. They are created by the state and derive their power from the state and . . . the [l]egislature may modify their corporate charters at will.”<sup>573</sup>

#### B. The Tide Turns on *Milliken’s* Suburban Interveners

In 1972, forty-one of Detroit’s suburban districts intervened to stop racial integration within the city schools.<sup>574</sup> As these communities helped contain black school children in Detroit, the social problems there grew worse and the city and its school district collapsed. These communities today face a wave of migrants from neighborhoods far more troubled than they were in 1972, a wave that will grow as Detroit continues to depopulate. As a consequence, from 1990 to 2011, the intervener communities’ schools went from roughly 6 percent to 20 percent nonwhite, with most of the change coming in the last decade.

By 2011, suburban Southfield’s schools were 92 percent black, as were Oak Park’s. Harper Woods’s schools were 85 percent nonwhite, Ferndale’s 77 percent, Hazel Park’s 43 percent, and Lincoln Park’s 41 percent. East Detroit and Highland Park school districts have been taken over by emergency managers (as have the cities of Royal Oak and Allen Park).<sup>575</sup> Even Warren’s schools, where Judge Roth was burned in effigy by a mob waving confederate flags and where George Wallace received 66 percent of the vote, were 25 per-

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570. *Detroit NAACP v. Snyder*, No. 13-12098 (E.D. Mich. May 13, 2013); David Sands, *Detroit NAACP Lawsuit Filing Says Michigan Emergency Manager Law Threatens Voting Rights*, HUFFPOST DETROIT (May 14, 2013, 9:39 AM), [http://www.huffingtonpost.com/2013/05/13/detroit-naacp-lawsuit-emergency-manager\\_n\\_3266358.html](http://www.huffingtonpost.com/2013/05/13/detroit-naacp-lawsuit-emergency-manager_n_3266358.html).

571. *In re City of Detroit*, Mich., 501 B.R. 702 (Bankr. E.D. Mich. 2013).

572. *In re City of Detroit*, No. 13-53846 at 81–94 (Bank. E.D. Mich. Dec. 5, 2013).

573. *Id.* at 90–91.

574. BAUGH, *supra* note 214, at 122.

575. Percentages calculated by Institute on Metropolitan Opportunity of 2011 State of Michigan, Center for Educational Performance and Information Data.

cent nonwhite, half poor, and in rapid decline.<sup>576</sup> Until the most recent census, Detroit's suburbs were some of the whitest in the nation. That is now changing fast. In 2000, Detroit had five predominantly nonwhite suburbs. In 2010 it had four more. In 2000, Detroit had ten racially diverse suburbs (between 20 and 60 percent nonwhite). In 2010, there were twenty-six racially diverse suburban communities. The region's population living in diverse suburbs went from 3 percent to 23 percent. Yet as racial integration was temporary in Detroit neighborhoods, so it appears to be in its suburbs. Half of the suburbs that were racially diverse in 2000 had become predominantly nonwhite in 2010, and most of the integrated suburbs in 2010 were in the process of resegregation. From 2000 to 2010, Harper Woods went from 15 percent to 51 percent nonwhite, Eastpoint from 9 percent to 36 percent, Royal Oak from 77 percent to 99 percent, and Redford from 13 percent to 35 percent.<sup>577</sup>

Once white enclaves, the diverse suburbs now had below average and declining tax bases. Among the interveners, Allen Park and Royal Oak have, like Detroit, been taken over and several other interveners face this same possibility. At the same time, newer white suburbs continue to grow at Detroit's sprawling periphery. These predominantly white suburbs have tax bases that are 120 percent of regional average, lower taxes, better services, and all-white schools to attract white flight from the intervener suburbs.

The racism these intervener communities practiced against Detroit has ultimately returned great harm to them. Had they agreed to cooperate with Detroit, today they would be stably integrated and more prosperous communities, perhaps in a region that was growing, rather than the resegregating suburbs in a declining metropolitan area.

## CONCLUSION

The histories of *Milliken*<sup>578</sup> and *Meredith*<sup>579</sup> raise important "what might have been" questions. *Milliken*<sup>580</sup> was decided by a 5–4 vote, with four of the five deciding votes provided by Richard Nixon appointees. These justices had been screened by the administration to be strict constructionists in the area of school busing. Nixon defeated Hubert H. Humphrey, once one of the nation's greatest

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576. *Id.*

577. Figures from supporting documents for Myron Orfield & Tom Luce, *America's Racially Diverse Suburbs: Opportunities and Challenges*, INST. ON METROPOLITAN OPPORTUNITY (July 20, 2012), <http://www.law.umn.edu/metro/resources/maps-by-city/detroit-mi.html>.

578. *Milliken I*, 418 U.S. 717 (1974).

579. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

580. *Milliken I*, 418 U.S. at 717.

champions of racial integration, in one of the closest presidential elections in U.S. history. Undoubtedly, Humphrey was hurt by the backlash to liberal civil rights policy, but he was also hurt by increased crime in ghetto neighborhoods, urban riots, the disorderly nature of the Chicago Democratic Convention, the weak support of Lyndon Johnson, and his too-late turn against Johnson's Vietnam policies.<sup>581</sup>

Justice Fortas, and Johnson's other appointments, would likely have decided *Milliken* differently. Moreover, it is unlikely that Humphrey would have screened federal judges to stop integration. *Milliken* cut doctrinally against a century of basic local government law. This law was clear that local governments were creatures of state law, mere administrative conveniences of their states, with no independent constitutional status apart from the states to limit the remedial jurisdiction of a federal court. Desegregation remedies were to be judged by their effectiveness in achieving actual desegregation and white flight was an important consideration in framing an appropriate remedy.

Some have argued that *Milliken* was a prudent "switch in time" necessary to avoid a constitutional crisis and a constitutional amendment limiting the power of the federal courts.<sup>582</sup> Yet this is far from clear, as the Senate had held firm in the face of a concerted attack on the courts and a constitutional amendment had not gained political momentum.<sup>583</sup> It would have likely depended on the district court's remedial action in Detroit. Had it been able to implement a successful plan, like Charlotte's, Louisville's, or Wake's, it is possible that a constitutional crisis would have been averted.

Had *Milliken* been decided more consistently with historical local government law and the Court's four most recent desegregation decisions, and had it not ignored the clear factual findings of housing discrimination and that single district remedies would increase white flight, U.S. schools would be more integrated and our racial achievement gaps would almost certainly be narrower. In addition, metropolitan neighborhoods would be both more integrated and more racially stable. Race relations and the housing markets of many central cities and fully developed suburbs of America would be stronger. This stability would have encouraged urban and older suburban redevelopment rather than the decline and blight that almost always occur when neighborhoods resegregate and become

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581. LEWIS CHESTER, GODFREY HODGSON & BRUCE PAGE, AN AMERICAN MELODRAMA: THE PRESIDENTIAL CAMPAIGN OF 1968 (1969); THEODORE H. WHITE, THE MAKING OF THE PRESIDENT, 1968 (1969).

582. BRUCE ACKERMAN, WE THE PEOPLE, VOL. 3: THE CIVIL RIGHTS REVOLUTION 257–87 (2014).

583. Gary Orfield, *Congress, the President and the Anti-Busing Legislation 1966–1974*, 4 J.L. & ED. 81 (1975).

majority nonwhite. American prosperity might have been greater and more fully shared. And American democracy might have been more vibrant and hopeful.

Richard Nixon resigned a disgraced president because of the cover-up of political burglaries. His ethical lapses disillusioned a generation of Americans. Yet, an arguably even greater disservice was his appointment of justices who, in the service of a divisive political vision, distorted the law and ignored clear factual findings in order to stop the rapid progress toward equality that had begun under *Brown*<sup>584</sup> and Title VI of the Civil Rights Act of 1964.<sup>585</sup>

Should Justice Kennedy be replaced with someone more like Chief Justice Roberts, the Supreme Court would likely sustain a pattern of racial apartheid more severe and unyielding than it allowed under *Plessy v. Ferguson*.<sup>586</sup> For all its perfidy, *Plessy* did not forbid integration; it simply did not require it. Moreover, *Plessy* was decided in an America where the suburbs were nascent and whites and nonwhites by and large still shared the same local governments and local tax base. Today in most parts of metropolitan America, affluent whites and poor blacks live in different jurisdictions, with predominantly white school districts endowed with far more local tax resources. Because the Court in *San Antonio v. Rodriguez*<sup>587</sup> declared the federal courts were powerless to equalize state school finance,<sup>588</sup> nonwhites will not only be stranded in segregated cities and school districts but in jurisdictions, unless the state has chosen to intervene, without the local tax resources to either exercise meaningful “local control” or to be “separate but equal.”<sup>589</sup>

The next Supreme Court decision on school desegregation will be another version of *Meredith*. Will the Supreme Court look at the evidence and allow locally elected officials the discretion to create stable integration plans that improve student achievement and help integrate neighborhoods? Or will it continue to limit the authority of elected officials to integrate schools, forcing local, state, and federal governments to helplessly watch now-integrated neighborhoods resegregate? There is a clear scholarly consensus that integration is beneficial to individuals and communities, and that segregation destroys the lives of individuals and prospects of neighborhoods. Segregation hurts regions, the American economy, and the cohesiveness and fairness of American democracy. It is hard to accept

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584. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

585. Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

586. 163 U.S. 537 (1896).

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

588. State courts are not equally powerless, however. Twenty-five state supreme courts have declared their school finance systems unconstitutional under state constitutions. See Orfield, *The Region and Taxation*, *supra* note 290.

589. See *Brown*, 347 U.S. at 483.



that a court-imposed return to the school segregation levels of the past can be consistent with equal protection under the law in the twenty-first century.

The urban and metropolitan history of Detroit and Louisville demonstrate the clear benefits of regional cooperation on issues of educational segregation and the terrible harms that arise in its absence. There is no region in the United States that would have chosen Detroit's fate over Louisville's if it had the chance. While this Article has been about the lost opportunity represented by *Milliken*, it is important to remember that nothing until *Meredith* could have stopped the elected officials in the State of Michigan from solving the problems of segregation themselves had they wanted to. Going forward, given the position of our federal courts on race, this realization is central. Until different judges occupy our courts, electoral politics are the principle route for reform. Today, America's regions have the chance to decide to be more like Louisville than Detroit. But in order to do so, political understandings, and then the law, must evolve.

In 2010, 80 percent of our nation lived in the 235 metropolitan areas with more than 50,000 people. Last year, for the first time, a majority of the children born in the United States were not white.<sup>590</sup> By 2043, there will be no racial majority in the population at large.<sup>591</sup> There is profound inequality between the races, in education attainment, income, and health: a gap that, after improving, is now growing wider. Much of this inequality is rooted in racial and social segregation that is caused by continuing public and private discrimination. Divergent perceptions of the causes and consequences of our racial inequality have always polarized our politics and sense of common citizenship.

While they do not yet perceive it, stably integrated metropolitan schools and neighborhoods, which will prevent expanding ghettos from sweeping into America's suburbs, are in the clear and immediate self-interest of the majority of metropolitan voters. The lessons of Detroit and Louisville should be used to persuade elected officials and their voters of this fact. Elected officials must use their power to enforce and improve the law to end racial segregation, a goal that can now be seen more clearly to be in the long-term self-interest of all Americans.

Perhaps someday the Supreme Court will again require racial fairness from elected governments, rather than forbid it. *Milliken* is an unprincipled decision and should someday be corrected. In the meanwhile, it can be rendered less oppressive by building metropolitan political coalitions between cities and older di-

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590. *American Schools: The New White Minority*, ECONOMIST, Aug. 23, 2014, available at <http://www.economist.com/news/united-states/21613277-new-white-minority>.

591. United States Census Bureau, *U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now*, <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html> (last visited Oct. 4, 2014).

verse suburbs to legislatively reform local government law in a manner that can reduce the nation's profound residential and educational segregation.

These reforms involve efforts to integrate residential housing patterns through civil rights enforcement, pro-integrative government housing construction policy, and the elimination of exclusionary zoning practices. Also, the efforts that encourage stronger civil rights enforcement against rampant illegal educational discrimination, greater pro-integrative school choice measures that actually allow nonwhites to choose integrated and high performing schools, and strong magnet schools in central cities that can draw whites back in will help to integrate residential housing patterns. Some regions in the country have adopted strong fair housing programs that work.<sup>592</sup> Other regions, as we have seen, have implemented effective and politically sustainable regional school integration plans. No one has yet done both together. Most regions have done nothing.<sup>593</sup>

The United States is a multiracial nation of vast metropolitan areas, each with dozens or hundreds of local governments. But with few exceptions, it has no metropolitan level governments, systems of law, or jurisprudence. American local government law was created in the nineteenth century for comparatively small industrial cities without suburbs and isolated rural towns. It must now evolve to suit the metropolitan reality of hundreds of competing, yet interdependent, jurisdictions sharing a common conurbation—of hundreds of conurbations, dozens of times larger and more complex in countless respects than could be imagined in 1868 when Judge Dillon sat on the Iowa Supreme Court.<sup>594</sup>

It is necessary to legislatively change the structure of local government in metropolitan America through consolidation, or two-tiered regional governance, or stronger legal requirements for interlocal government cooperation on regional problems such as segregation, local government finance and taxation, infrastructure (particularly transportation), and environmental protection.<sup>595</sup> The jurispru-

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592. Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L.J.* 877 (2006).

593. MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* (2002) [hereinafter ORFIELD, *METROPOLITICS*]; MYRON ORFIELD & THOMAS F. LUCE JR., *REGION: PLANNING THE FUTURE OF THE TWIN CITIES* (2010); Orfield & Luce, *supra* note 415; Orfield, *supra* note 592; Orfield, *supra* note 421; Orfield, *supra* note 421; Orfield, *supra* note 290.

594. *City of Clinton v. Cedar Rapids & Mo. R.R. Co.*, 24 Iowa 455 (1868).

595. ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994); MYRON ORFIELD, *METOPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1998); ORFIELD, *METROPOLITICS*, *supra* note 593; DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *STAN. L. REV.* 1115 (1996); Gerald E. Frug, *Beyond Regional Government*, 115 *HARV. L. REV.* 1763 (2002).

dence of state fundamental rights and equal protection strongly established in state school finance litigation<sup>596</sup> and of regional general welfare (and the constitutional interdependence of local governments within a metropolitan area) as embodied in the *Mount Laurel* doctrine<sup>597</sup> must further evolve to suit the reality of twenty-first century metropolitan America.<sup>598</sup>

In moving forward, the challenge is to create a system of politics and local government law that preserves the true virtues of Alexis De Tocqueville's small local governments, while at the same time gaining the real benefits of James Madison's large, diverse, and interdependent republic. In a sense, these reforms must move America from the metropolitan Articles of Confederation that exists in voluntary regional councils of government, transportation planning, and air quality management authorities, toward a more perfect metropolitan union that strikes a better balance between local government independence and interdependence.

If America can learn the lessons of Detroit and Louisville, perhaps it can resume the legislative and judicial strengthening of civil rights that *Milliken* and the politics of that era ended. Should this occur, and if presidents appoint and the Senate confirms judges and justices who are not politically and ideologically pre-committed to opposing any governmental effort for racial integration—judges and justices with respect for the law and a fair and open mind on questions of race—even *Milliken* itself might be workable. Perhaps then the Supreme Court will return sufficient local political control to metropolitan areas to allow all their citizens, cities, and school districts to prosper in the twenty-first century.

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596. Orfield, *The Region and Taxation*, *supra* note 290.

597. The New Jersey Supreme Court has held under its state constitution that every municipal government has a duty to provide for its regional fair share of affordable housing. *See* S. Burlington Cnty. NAACP v. Township of Mount Laurel, 336 A.2d 390 (1983); S. Burlington Cnty. NAACP v. Township of Mount Laurel, 336 A.2d 713 (1975).

598. *See* STEVEN G. KOPELMAN & DWIGHT MERRIAM, *Regional General Welfare: The End of a Trend?*, in SW. LEGAL FOUND., INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN §§ 2.01–2.03 (1985); Robert H. Freilich, *Separate But Unequaled: The Need for Inter-district Relief Based on State Law*, 24 URB. LAW. 637 (1992); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183 (1997).