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A Second Redemption?


Bradley W. Joondeph

Introduction

The court-ordered desegregation of America's public schools is nearly over. In the last ten years, an increasing number of federal district courts have relinquished jurisdiction over formerly segregated school districts and returned control to local officials. Consequently, scores of school districts have

abandoned desegregation plans and returned to neighborhood attendance policies, resulting in a substantial degree of resegregation. This retreat has been fueled, at least in part, by three recent Supreme Court decisions—Board of Education v. Dowell, Freeman v. Pitts, and Missouri v. Jenkins. Although not altering any fundamental legal principles, the decisions evinced a clear hostility to the continuation of court-ordered desegregation remedies. In each opinion, the Court emphasized that the judicial supervision of formerly segregated school districts was intended to be temporary, and that federal district courts should return control over public schools to politically accountable local officials as soon as practicable. The Court also stressed that the permissible objectives of a desegregation plan are quite limited; desegregation remedies are legally justifiable only to the extent that they address conditions that are proximately traceable to the original constitutional violation, even if other racial inequalities or imbalances remain.

To many, the Court's recent decisions are premature and ill-conceived. Perhaps the most prominent critic has been Gary Orfield, director of the


7. See, e.g., Freeman, 503 U.S. at 491 (stating that "the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations").
8. See, e.g., ORFIELD ET AL., supra note 2; Richard Thompson Ford, Geography and Sovereignty: Jurisdictional Formation and Racial Segregation, 49 STAN. L. REV. 1365, 1386-
Harvard Project on School Desegregation. In his recent book, *Dismantling Desegregation*, Orfield, Susan Eaton, and several of their colleagues at the Harvard Project contend that the Court’s decisions over the past twenty-five years have betrayed the promise of *Brown v. Board of Education*.

This betrayal began with the Court’s 1974 decision in *Milliken v. Bradley* (Milliken I), in which the Court struck down a metropolitan-wide desegregation remedy in Detroit, and has continued through *Dowell, Freeman*, and *Jenkins*. Specifically, in ending or curtailing desegregation remedies, the Court has made no effort to ensure that the essential command of *Brown* – that the victims of past discrimination receive equal educational opportunities – has been fulfilled.

This abandonment of school desegregation, contends Orfield, is reminiscent of the period following Radical Reconstruction, when the federal government, in conjunction with several important Supreme Court decisions, abandoned the cause of civil rights to facilitate regional reconciliation and southern "home rule." Today, federal courts, fatigued by the perceived ineffectiveness and futility of their efforts, are withdrawing from the cause of racial equality in public education for the purposes of respecting the sovereignty and political accountability of state and local authorities, despite those authorities’ proven history of discrimination.

Orfield contends that, despite forty years of court-ordered desegregation, public education remains largely separate and unequal. American public schools are as segregated today as they were in 1972, when desegregation was just beginning in earnest. Moreover, minority students (specifically African American and Latino children) continue to lag well behind whites in every measure of academic achievement. Orfield therefore concludes that, contrary


9. See Douglas, *The End of Busing?*, supra note 2, at 1717 (describing Orfield as "one of the country’s most relentless supporters of school integration").

10. ORFIELD ET AL., supra note 2.


13. See ORFIELD ET AL., supra note 2, at 75-76.

14. Except where otherwise noted, I refer to Orfield as the author because he alone wrote the six chapters of *Dismantling Desegregation* that are the focus of this review essay. Orfield’s six chapters present the normative arguments condemning the Court’s recent decisions and supporting the continuation of court-ordered desegregation. The remaining chapters generally present case studies of the desegregation experience in various school districts. See id. at 115-289.

15. See infra text accompanying notes 117-40.
to the Court's recent decisions, federal courts should require the continuation or expansion of desegregation remedies in formerly segregated school districts.

_Dismantling Desegregation_ is probably the definitive expression of the traditional liberal defense of school desegregation, and it makes some salient points. First, a well developed body of research supports Orfield's basic premise that desegregation, at least under certain circumstances, has produced tangible educational benefits for minority children with no detriment to whites. Controlling for the relevant measurable variables, school desegregation appears to increase educational achievement for minority students and enhance their "life chances" as measured by a variety of social indicators.\(^{16}\)

Second, the Court's decisions over the last twenty-five years have clearly turned away from a more aggressive implementation of court-ordered desegregation remedies. _Milliken I_ was indeed a turning point in the Court's desegregation jurisprudence, substantially curtailing the usefulness of desegregation remedies in the metropolitan North. Moreover, _Dowell, Freeman, and Jenkins_ have indicated the Court's desire to expedite the conclusion of court-ordered desegregation altogether.\(^{17}\)

But Orfield's conclusion that the Court has "quietly reversed" _Brown_ and, therefore, his comparison of recent events to the period of southern Redemption are based on an unrealistic reading of _Brown_ and its progeny. Orfield understands _Brown_ as requiring not just the elimination of _de jure_ segregation and its effects, but the equalization of educational opportunities. He defines this guarantee not in formalistic terms but as having substantive content, such that white and minority students have "genuinely equal" chances for academic success. Consequently, he contends, federal courts should require formerly segregated school districts to ensure that objective measures of academic achievement are largely equal between white and minority students, so that race is no longer so strongly correlated with academic success.\(^{18}\)

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16. See _infra_ text accompanying notes 156-79.

17. See _infra_ text accompanying notes 195-221.

18. This conception of equal educational opportunity is substantially more expansive than the mere absence of formal barriers, or even the provision of equivalent educational inputs, such as per pupil expenditures, quality of teachers, physical facilities, and the like. It is significantly less egalitarian than the conception that each child's educational opportunity should operate completely independent of all morally irrelevant factors, including socioeconomic status. See David A. Strauss, _The Illusory Distinction Between Equality of Opportunity and Equality of Result_, 34 WM. & MARY L. REV. 171, 172-76 (1992). It is based on the belief that a social condition in which race has a strong predictive value in assessing a child's chances for educational attainment violates the principles of racial equality and racial justice, as those concepts are best understood. As discussed _infra_, I wholly agree with Orfield's conception of equal educational opportunity, but I am skeptical of courts' ability to move American society toward that objective.
Although this conception of educational equality may be a laudable policy goal, such an interpretation of Brown and its progeny is far broader than that ever embraced by the Court, even at the height of school desegregation's acceptance in the early 1970s. Nor is it realistic to have expected the federal judiciary, with its limited institutional capacities, to have given itself the role of enforcing such a guarantee. The disparities in educational experience between white and minority children are the result of myriad social and economic problems, such as income and wealth disparities, residential segregation, high rates of joblessness, crime and violence in predominantly minority communities, lack of access to health care, and the persistence of racism. In arguing that the Court has betrayed Brown's vision, Orfield exaggerates what Brown required—or ever could have required—as a remedy for school segregation.

More fundamentally, as we look toward the future, there are reasons to wonder whether the continuation of court-ordered desegregation is a helpful strategy for expanding the educational opportunities of minority children. First, as critics of the Court's recent decisions would readily acknowledge, the objectives attainable through desegregation litigation are dramatically underinclusive as a means for addressing racial disparities in public education. The permissible goals for court-ordered desegregation plans are narrowly circumscribed by existing constitutional doctrine, such that few initiatives which are likely to be helpful educationally are legally permissible. Second, desegregation litigation may foster an unhelpful and distorted conception of the problem of racial inequalities in public education. In particular, court-ordered desegregation may facilitate the belief that governmental efforts to improve educational opportunities for minority children should be compensatory in nature—a narrowly tailored remedy redressing a discrete wrong—rather than addressing the larger but more pertinent issue of systemic disadvantage. Finally, focusing on litigation may divert attention and resources from efforts to initiate change through the political process. Political initiatives generally are not constrained by the narrow dictates that restrict judicial remedies, and

19. By "systemic disadvantage," I mean the social condition in which a specific characteristic, such as race, correlates with disadvantage in a number of important aspects of well-being, such as income, wealth, housing, health care, political influence, and treatment by the criminal justice system. In the context of public education, it refers more specifically to those social and economic disadvantages that, directly and indirectly, operate to deprive the average minority student of an education similar in quality to that provided to the average white student and that deny minority students an equal opportunity to achieve academic success. My conception of systemic disadvantage derives largely from Cass R. Sunstein, The Anticaste Principle, 92 MICH. L. REV. 2410 (1994). Sunstein defines the term as a disadvantage "that operates along standard and predictable lines in multiple and important spheres of life and that applies in realms that relate to basic participation as a citizen in a democracy." Id. at 2429.

20. An important exception is that judicially ordered race-conscious state action is clearly permissible as a remedy for de jure segregation in the context of litigation, whereas, under the
they provide the only means for addressing the broader social problems that are the underlying causes of racial inequalities in education. Moreover, the mobilization of citizens for political action can produce a range of collateral benefits unavailable through litigation.

The point is not that continuing court-ordered desegregation is necessarily misguided or that courts are incapable of playing a constructive role in addressing these inequalities. But in advocating the continuation and extension of court-ordered desegregation, Orfield overlooks two important points. First, the continuation of desegregation litigation may have unintended, adverse consequences. Second, because of these possible effects, the question of whether continuing such litigation is a sound strategy for expanding the educational opportunities of minority children is a complicated empirical inquiry. The answer depends on, among other things, the educational benefits obtainable through judicial remedies in any particular case, the degree to which continuing such litigation decreases the likelihood of political mobilization, whether litigation can be used as leverage to produce political action, and the likelihood of success for redistributive political initiatives more generally. Ultimately, Orfield may be correct that court-ordered desegregation presently offers the best means to address the persistent racial inequalities in American education. But the issue is more complex and is plagued by more empirical uncertainties than proponents such as Orfield concede.

Part I of this review essay briefly traces the evolution of desegregation law from the Court's 1968 decision in *Green v. County School Board*, which established the remedial framework for desegregation cases that remains largely in place today, to the present. Part II explains the essential elements of Orfield's argument in *Dismantling Desegregation*, namely that (a) the Burger and Rehnquist Court's desegregation decisions have effectively overruled *Brown*, (b) this is especially troublesome in light of school desegregation's success as an educational policy, and (c) contrary to the Court's holdings, judicially enforced desegregation remedies should continue until the educational opportunities for white and minority children are genuinely equal. In Part III, I assess Orfield's argument on its own terms. Although *Dismantling Desegregation* offers several important insights into the present debate about school desegregation, its assertion that the Supreme Court has "quietly reversed" *Brown* is exaggerated. This contention is based on a conception of

Supreme Court's recent affirmative action and redistricting decisions, race-conscious programs adopted through the political process violate the Equal Protection Clause unless they are narrowly tailored to furthering a compelling governmental interest. See infra text accompanying notes 338-50.

A SECOND REDEMPTION?

Court-ordered desegregation remedies that is much broader than ever embraced by the Court and is inconsistent with the limited institutional competence of the judiciary. Finally, Part IV raises more fundamental questions about the future of court-ordered desegregation. Regardless of the impact of judicially enforced school desegregation over the past forty years, there are reasons to question whether the continuation of such litigation will produce meaningful benefits for minority children in the future. Indeed, it is worth considering whether continuing to pursue desegregation through the courts might, in the long run, actually frustrate efforts to achieve meaningful social change.

I. The Evolution of Court-Enforced Desegregation

The Supreme Court's 1971 decision in *Swann v. Charlotte-Mecklenburg Board of Education* was the high water mark for judicial endorsement of school desegregation in the United States. At issue in *Swann* was a plan to desegregate the school district that encompasses Charlotte, North Carolina, and its surrounding suburbs. The school district as a whole was 21% African American and 79% white, but two-thirds of the African American students were clustered in the city. Because assigning students to neighborhood schools would have left the district's schools racially imbalanced, the district court required the creation of gerrymandered and noncontiguous attendance zones, accompanied by the busing of students between city and suburban neighborhoods. The school district appealed, contending that these remedies were beyond the scope of the constitutional violation.

The Court in *Swann* upheld the district court's remedy, stating that the crucial question in assessing the constitutionality of a desegregation plan was its "effectiveness." This cemented the Court's commitment to a "corrective," as opposed to "prohibitory," approach to desegregation remedies, which it had initially articulated three years earlier in *Green v. County School Board*. In *Green*, a Virginia county school board had attempted to comply with *Brown* by adopting a "freedom of choice" plan, which permitted students to choose

25. Id. at 6-7.
26. A school is racially imbalanced if its racial composition diverges significantly from the racial composition of the school district as a whole. For example, some of the city schools in Charlotte would have been predominantly black, even though the school district as a whole was only 21% African American in composition.
28. Id. at 25.
either of the school district's two schools. Unsurprisingly, few blacks chose to attend the formerly all-white school, and no whites attended the all-black school. The Court in Green held that the "freedom of choice" plan, although facially neutral and free from discriminatory intent, was insufficient to discharge the school district's constitutional obligations. According to the Court, the school board's abandonment of a policy of deliberate segregation was merely a first step to complying with the requirements of Brown. Formerly segregated school districts were also charged "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

In upholding the district court's remedy of busing and gerrymandered attendance zones in Swann, the Court reaffirmed Green's corrective approach to desegregation remedies. Once a school district had been found liable for de jure segregation, it was obligated to take whatever steps necessary - even if "administratively awkward, inconvenient, and even bizarre" - to eliminate any ongoing effects, so-called "vestiges," of past discrimination. Moreover, Swann confirmed that any ongoing segregation (or other discriminatory "effect") that persisted in a formerly segregated school district was presumptively a vestige of past discrimination, which the school district was therefore obligated to eradicate. Thus, if a school district such as Charlotte-Mecklenburg (a) was presently de facto segregated, (b) had been de jure segregated in the past (as all school districts in the South had been), and (c) had not yet been found by a court to have discharged its obligations under Brown (that is, achieved "unitary status"), then the school district was presumptively obli-

32. Id. at 441.
33. Id.
34. Id. at 437.
35. Id. at 437-38.
38. For instance, in some cases courts have found that the school district's constitutional violation caused a system-wide reduction in student achievement. See Jenkins v. Missouri, 639 F. Supp. 19, 24 (W.D. Mo. 1985), aff'd as modified, 807 F.2d 657 (8th Cir. 1986), cert. denied, 484 U.S. 816 (1987). In these cases, this reduction in student achievement is presumptively related to the de jure violation until the school district achieves unitary status. See Jenkins v. Missouri, 122 F.3d 588, 593-95 (8th Cir. 1997).
39. See Swann, 402 U.S. at 26 ("The court should scrutinize [racially imbalanced] schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.").
40. "Unitary status" refers to the point at which a formerly segregated school district has eliminated all vestiges of the de jure system. The term originated in Green v. County School Board, 391 U.S. 430 (1968), in which the Court stated that formerly segregated systems were
gated to eliminate its present de facto segregation. A school district could relieve itself of this obligation only if it could disprove any causal connection between the existing de facto segregation and the school district's original constitutional violation. Unsurprisingly, it has been largely impossible for school districts to establish this negative.\footnote{See Freeman v. Pitts, 503 U.S. 467, 503 (1992) (Scalia, J., concurring) (stating that when school authorities must establish a negative, "plaintiffs will almost always win").} Thus, \textit{Green} and \textit{Swann} created an expansive framework for desegregation remedies; if plaintiffs could establish a de jure violation, the school district was practically required to integrate completely all facets of its operations, regardless of the administrative burdens or costs.

Within three years, however, the momentum favoring thoroughgoing school desegregation had waned considerably. In 1974, the Court's decision in \textit{Milliken I} substantially undermined the usefulness of school desegregation in northern metropolitan areas. In \textit{Milliken I}, the district court had found the Detroit school board and the State of Michigan liable for the de jure segregation of students within the Detroit school system.\footnote{Milliken v. Bradley, 418 U.S. 717, 727 (1974) [hereinafter \textit{Milliken I}].} But the district court faced a dilemma in crafting a remedy: Roughly 64\% of the students in the Detroit system were African American, and testimony at trial convincingly showed that, under a Detroit-only plan, that proportion would rise to almost 90\% because of "white flight" shortly after implementation.\footnote{Bradley v. Milliken, 338 F. Supp. 582, 586 (E.D. Mich. 1971), aff'd, 484 F.2d 215 (6th Cir. 1973), rev'd, 418 U.S. 717 (1974).} Heeding the command of \textit{Green} and \textit{Swann} that desegregation plans must "make every effort to achieve the greatest possible degree of actual desegregation,"\footnote{Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).} the district court required the participation of 53 predominantly white suburban school districts that surrounded Detroit, busing students between city neighborhoods and the suburbs.\footnote{\textit{Milliken I}, 418 U.S. at 733-34.}

The Supreme Court held that the district court's metropolitan-wide remedy was impermissible. The Court started with the premise that the scope of a desegregation plan must be defined, and therefore circumscribed, by the scope of the relevant constitutional violation.\footnote{\textit{Id.} at 744.} The Court also reasoned that "the 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."\footnote{\textit{Id.} at 741.} The integrity of these boundaries was essential to preserv-
ing local control of elementary and secondary public education, a "deeply rooted" national tradition that the Court deemed "essential both to the maintenance of community concern and support for public schools and to quality of the educational process."\textsuperscript{48} The Court therefore concluded that de jure segregation confined to a single school district could not justify a remedy that imposed obligations on other districts without "interdistrict segregation directly caused by the constitutional violation."\textsuperscript{49} In \textit{Milliken}, the district court had not found that the suburban school districts had intentionally discriminated or that the state had drawn its school district boundaries in a manner that fostered interdistrict segregation; the relevant constitutional violation had only caused segregation \textit{within} Detroit schools.\textsuperscript{50} Accordingly, the remedy could only seek to alleviate racial imbalances within the city school district.

The \textit{Milliken} case returned to the Supreme Court three years later (\textit{Milliken II}), whereupon the Court approved a remedy that could substitute for the actual integration of city and suburban students.\textsuperscript{51} On remand from \textit{Milliken I}, the district court had approved a modified desegregation plan that included several "educational components," such as programs for remedial education, career guidance and counseling, and co-curricular activities.\textsuperscript{52} The district court had found these programs necessary to eliminate the lingering effects of de jure segregation, even though the relevant constitutional violation had only involved pupil assignments.\textsuperscript{53} The Supreme Court upheld the district court's order, holding that "matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation."\textsuperscript{54} The Court reasoned that discriminatory student assignments can "manifest and breed other inequalities built into a dual system founded on racial discrimination."\textsuperscript{55} That is, "[c]hildren who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation."\textsuperscript{56} Thus, compensatory programs designed to remedy educational deficits traceable to past de jure segregation can be "appropriate remedies to treat the condition that offends the Constitution."\textsuperscript{57}

\textsuperscript{48} Id. at 741-42.  
\textsuperscript{49} Id. at 745.  
\textsuperscript{50} Id.  
\textsuperscript{51} \textit{Milliken} v. Bradley, 433 U.S. 267 (1977) [hereinafter \textit{Milliken II}].  
\textsuperscript{53} Id.  
\textsuperscript{54} \textit{Milliken II}, 433 U.S. at 283.  
\textsuperscript{55} Id.  
\textsuperscript{56} Id. at 287.  
\textsuperscript{57} Id. at 286 n.17.
Milliken II created a politically attractive alternative to mandatory integration as a remedy for past discrimination. In circumstances like Detroit’s, where the school district was predominantly minority, courts could provide inner-city students with a legal remedy for de jure segregation without provoking strident resistance from the suburbs. And so long as the state government was jointly responsible for the constitutional violations, the district court could require the state to provide most of the funding for the compensatory programs. This ensured both that the remedies would have sufficient funding and that the city school system—the entity charged with implementation—would actively support the remedy and become an advocate for its continuation.\footnote{For instance, in \textit{Missouri v. Jenkins}, 515 U.S. 70 (1995), the school district, though a nominal defendant, remained a "friendly adversary" of the plaintiffs throughout the litigation. See id. at 79.}

Aside from two rather insignificant 1979 decisions,\footnote{Those cases were \textit{Dayton Board of Education v. Brinkman}, 443 U.S. 526 (1979), and \textit{Columbus Board of Education v. Penick}, 443 U.S. 449 (1979).} the Court did not decide another school desegregation case until 1991. In \textit{Board of Education v. Dowell},\footnote{498 U.S. 237 (1991).} the Rehnquist Court’s first desegregation decision, the Court held that once a formerly segregated school district has achieved unitary status, it has completely fulfilled its constitutional obligations and may act as if it had never been found liable for de jure segregation.\footnote{\textit{Board of Educ. v. Dowell}, 498 U.S. 237, 250 (1991).} A unitary school system could therefore abandon its desegregation plan, even if doing so would resegregate its schools.\footnote{See Bradley W. Joondeph, \textit{Note, Killing Brown Softly: The Subtle Undermining of Effective Desegregation} in Freeman v. Pitts, 46 STAN. L. REV. 147, 164 (1993) (discussing unitary school systems’ freedom to implement policies that exacerbate existing racial imbalances).} Thus, the school district in \textit{Dowell} (Oklahoma City) could assign its elementary school students to neighborhood schools even though doing so resulted in 33 of the district’s 64 elementary schools having student populations that were at least 90% one-race.\footnote{\textit{Dowell}, 498 U.S. at 242.}

A year later, the Rehnquist Court handed down its second primary school desegregation decision. In \textit{Freeman v. Pitts},\footnote{503 U.S. 467 (1992).} the district court had found that the school system had achieved "partially unitary status," meaning that the school system had eliminated the vestiges of discrimination from some, but not all, aspects of its operations.\footnote{See Freeman v. Pitts, 503 U.S. 467, 474 (1992).} Accordingly, the court returned the unitary aspects of the system (student assignments, transportation, physical facilities, and extracurricular activities) to the control of local officials while retaining
supervision over the remaining areas (teacher and principal assignments, and quality of education). The Supreme Court upheld the district court's piece-meal withdrawal of judicial supervision, emphasizing that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." The Court stated that judicial supervision was always "intended as a 'temporary measure,'" and that "[a]lthough this temporary measure has lasted decades, the ultimate objective has not changed - to return school districts to the control of local authorities." A district court's partial withdrawal of supervision over a formerly segregated school district "can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities."

Most recently, the Court in Missouri v. Jenkins essentially ended the vast compensatory education programs designed to remedy the effects of past discrimination in Kansas City's schools. As in Milliken II, the district court had found that de jure segregation in the Kansas City, Missouri, School District (KCMSD) had caused "a system wide reduction in student achievement." The district court also found that the constitutional violations had caused white families to leave the school district, leaving the KCMSD more racially isolated than it would have been had the school district and the State of Missouri not engaged in racial discrimination. The district court therefore ordered a wide range of compensatory educational programs for the KCMSD with the dual goals of improving the quality of education and luring more white students to enroll voluntarily in the district. One such compensatory program mandated funding for increased teacher salaries intended to raise compensation to a level commensurate with surrounding school districts.

66. Id. at 484.
67. Id. at 490.
68. Id. at 489 (quoting Board of Educ. v. Dowell, 498 U.S. 237, 247 (1991)).
69. Id.
73. See Jenkins, 515 U.S. at 161 (Souter, J., dissenting) (citing district court finding that attributed white flight from district to past constitutional violations).
74. See Joondeph, supra note 8, at 620-22 (discussing court-ordered compensatory measures including hiring more librarians, reducing teaching loads, hiring guidance counselors, reducing class size, and implementing summer school and tutoring programs).
In 1994, the State of Missouri, which had funded roughly three-fourths of the $1.5 billion in compensatory programs for the KCMSD, challenged the continuation of teacher salary increases and moved for a finding of partially unitary status. The district court rejected the State's objections and ordered the continuation of salary relief. Although the court did not explicitly address the State's unitary status claim, it implicitly concluded that the school district had not yet achieved partially unitary status. The court reached this decision at least partly because the standardized test scores of KCMSD students remained well below national averages.

The Supreme Court reversed the district court on both grounds. First, the Court held that because the district court had justified the salary relief order in part because it would attract more white students into the district, the order was an impermissible interdistrict remedy under Milliken. The Court reasoned that, in seeking to enhance the KCMSD's "desegregative attractiveness," the district court had designed the order to have interdistrict effects. This remedy exceeded the scope of the relevant constitutional violation because it amounted to an interdistrict response to a purely intradistrict violation. "In effect, the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students." The Court also held that the district

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76. Exactly how much money has been spent on the KCMSD as part of the desegregation remedy is unclear. Estimates vary from $1.2 billion to $1.7 billion. See Dennis Farney, Fading Dream? Integration Is Falttering in Kansas City Schools as Priorities Change, WALL ST. J., Sept. 26, 1995, at A1 ($1.2 billion); Linda Greenhouse, Justices Say Making State Pay in Desegregation Case Was Error, N.Y. TIMES, June 13, 1995, at A1 ($1.5 billion); James S. Kunen, The End of Integration: A Four-Decade Effort Is Being Abandoned, as Exhausted Courts and Frustrated Blacks Dust Off the Concept of "Separate but Equal," TIME, Apr. 29, 1996, at 39, 41 ($1.7 billion).


79. See Jenkins, 11 F.3d at 760-61 (commenting, without discussion, on rejection of State's argument in June 17, 1992 order).

80. See id. at 761-62 (restating district court's finding that test scores in district still lagged behind national norms, although school district had made substantial improvement in academic achievement).


82. Id. at 94.

83. Id. at 91-92.

84. See id. at 92.

85. Id.
court's comparison of KCMSD students' standardized test scores to national norms was inappropriate in deciding whether the school district had achieved partially unitary status.\textsuperscript{86} The Court stated that student achievement is the result of many factors, several of which are "beyond the control of the KCMSD and the State."\textsuperscript{87} It reasoned that if "these external factors are not the result of segregation, they do not figure in the remedial calculus."\textsuperscript{88}

\textit{II. The Dismantling of Court-Ordered Desegregation}

In \textit{Dismantling Desegregation}, Orfield harshly condemns the Supreme Court's desegregation jurisprudence. In his view, \textit{Milliken I}, as well as the Rehnquist Court's three recent desegregation decisions, has ignored the fundamental lessons of \textit{Brown}—that racially separate educational facilities are inherently unequal and that states must provide the same educational opportunities to minority children that they provide to whites.\textsuperscript{89} The Court's recent decisions have not only blessed a return to segregated schools, but they have done so without any regard for whether the schools have truly equalized educational opportunities for white and black students.\textsuperscript{90} The decisions have made "desegregation orders short-lived and ineffectual, and [have] legitimated sending minority students back to inferior schools after a few years without any showing that the harmful effects were cured."\textsuperscript{91} Orfield contends that this return to segregation is reminiscent of the period in American history in which the Court formally endorsed the principle of "separate but equal."\textsuperscript{92} Much as the federal government abandoned its protection of newly freed slaves following the Civil War, and the Supreme Court gutted the guarantees of the Reconstruction Amendments and the Reconstruction-era civil rights legislation, federal courts presently are abdicating their responsibility under \textit{Brown} to guarantee racial equality in public education.\textsuperscript{93} As \textit{Dismantling Desegregation}'s subtitle asserts, this exaltation of the principles of federalism and local autonomy over the command of racial equality has amounted to nothing short of a "quiet reversal" of \textit{Brown}.

The starting point for \textit{Dismantling Desegregation}'s analysis is \textit{Milliken I}, which Orfield contends was a "turning point" in the history of school desegre-

\begin{itemize}
    \item[86.] See id. at 101.
    \item[87.] Id. at 102.
    \item[88.] Id.
    \item[89.] See ORFIELD ET AL., supra note 2, at 1.
    \item[90.] See id. at 75-76.
    \item[91.] Id. at 50.
    \item[92.] See id. at 30.
    \item[93.] See id. at 34.
\end{itemize}
A SECOND REDEMPTION?

According to Orfield, *Milliken I* rendered *Brown* almost meaningless for most of the metropolitan North. By prohibiting desegregation between city and suburban school districts, except in the rare instances in which plaintiffs could demonstrate significant interdistrict segregative effects, *Milliken I* guaranteed that desegregation would be limited and temporary in much of the North, and that "there would be no remedy for unconstitutional segregation in much of metropolitan America." Even if plaintiffs in city school systems could demonstrate that their school districts had engaged in unlawful discrimination, "poor minority children would be confined to segregated central city schools as the remaining whites and, later, many middle-class minority families fled to suburbs." And as the dissenting Justices in *Milliken I* had predicted, "Detroit and other cities like it...became even more segregated by both race and economic class once they tried to desegregate inside a black city." Orfield thus concludes that *Milliken I* "lock[ed] millions of minority schoolchildren into inferior, isolated schools." Much as *Milliken I* foreclosed the possibility of effective desegregation in most northern metropolitan areas, Orfield contends that the Rehnquist Court's trilogy of desegregation decisions has ended the chance for successful desegregation in the rest of the country. Orfield terms *Dowell, Freeman,*

94. *See id.* at 10.

95. *Id.* at 2.


98. *Id.* at 30.

99. *Id.*

100. *Id.*

101. *Id.* at 13.

102. *See id.* at 2-3 (interpreting *Dowell, Freeman,* and *Jenkins* as abandoning "the goal of rooting out the lingering damage of racial segregation and discrimination" to pursue "the twin goals of minimizing judicial involvement in education and restoring power to local and state governments, whatever the consequences").
and Jenkins "the resegregation decisions" because, not only have they signaled the abandonment of court-ordered desegregation, but they have also facilitated and even encouraged the resegregation of formerly segregated school districts. The Court's understanding of "unitary status" no longer envisions a "school system with equitable interracial schools," but instead represents "merely a method of getting out of racial integration."

For instance, the Court's holding in Dowell dictates that, after having achieved unitary status, a formerly segregated school district is no longer obligated to take affirmative steps to assure racial balance in the school system; the only constraint on a district's adoption of new policies is that they not have been motivated by intentional discrimination. Once declared unitary, formerly segregated school districts are free to adopt race-neutral policies that aggravate racial imbalances. Orfield sees this as sinister, as it permits school systems with a long history of racial prejudice to "knowingly re-create segregated schools with impunity." By closing its eyes to segregation that occurs after the conclusion of judicial supervision, the Rehnquist Court has ignored Brown's command that "[s]eparate educational facilities are inherently unequal," allowing school systems that have formally obeyed their desegregation plans to "send students back to neighborhood schools, even if those schools [are] segregated and inferior."

Most important, contends Orfield, the Court's decisions have permitted formerly segregated school districts to abandon their desegregation plans even when educational outcomes for black and white students remain substantially unequal. If Brown stated that separate schools were "inherently unequal," then "one might expect that a finding that desegregation requirements have been fulfilled would require proof of equality." That is, "it would be

103. See, e.g., id. at 28.
104. Id. at 19.
105. See Joondeph, supra note 62, at 163-64.
    A school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like, but it of course remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment.
107. See Joondeph, supra note 62, at 163-64.
108. ORFIELD ET AL., supra note 2, at 19.
110. ORFIELD ET AL., supra note 2, at 2.
111. Id.
112. Id. at 75.
reasonable to expect that education for minority students had become more equal to that of white students in the metropolitan area in terms of achievement test scores, graduation, college preparation, and other educational measures. But Dowell, Freeman, and Jenkins make clear that formerly segregated school districts are entitled to a finding of unitary status once they have eliminated those conditions proximately traceable to past discrimination, regardless of ongoing disparities in educational achievement. Unless continuing racial inequality in test scores, graduation rates, or other measures of achievement are proximately traceable to the district’s constitutional violation, attempting to ameliorate these disparities is beyond the scope of an appropriately tailored remedy. In short, "school districts do not need to show that education gains or opportunities are equal between minority and white children."

Orfield contends that this abandonment of desegregation by the federal courts parallels the events that followed the collapse of Radical Reconstruction, including the Supreme Court’s decision in Plessy v. Ferguson. "[W]e are moving back toward a rigid form of the tradition of separate and unequal education" in a manner similar to "the period in which the dream of abolitionists and the goals of the Civil War gave way to the reality of apartheid in the United States." In 1877, as part of an intricate compromise that resolved the disputed 1876 presidential election in favor of Rutherford B. Hayes, northern Republicans agreed to abolish the Freedman’s Bureau and to withdraw all remaining federal troops from the unredeemed southern states. This marked the formal collapse of Radical Reconstruction and the completion of southern Redemption. The federal government abandoned the role it had assumed during Reconstruction of protecting African Americans from discrimination in the states of the former Confederacy, instead pursuing a policy of regional reconciliation that would facilitate economic growth in both the North and

113. Id.
115. See Freeman, 503 U.S. at 496 (“The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the de jure violation being remedied.”).
116. ORFIELD ET AL., supra note 2, at 20.
117. 163 U.S. 537 (1896).
118. ORFIELD ET AL., supra note 2, at 26.
South.121 While the transformation was not immediate,122 southern states under pure "home rule" relegated blacks to a legally-enforced second-class status in, among others, the following ways: laws respecting vagrancy, petty theft, contract enforcement, and false pretenses, combined with criminal surety laws and the practices of convict labor and convict lease, coerced many blacks into labor in a manner similar to slavery;123 state-imposed segregation statutes mandated separate facilities for African Americans in virtually every sphere of public life;124 and legal devices, such as poll taxes, literacy tests, white primaries, and grandfather clauses, as well as extralegal, though tacitly approved, violence and intimidation, completely excluded blacks from participation in the political process.125 By the early 1900s, southern states had uniformly imposed a rigid racial caste system, essentially rendering the guarantees of the Reconstruction Amendments a dead letter.126

As students of constitutional history know well, the Supreme Court was an important accomplice to the subjugation of African Americans during this period.127 In a series of decisions, the Court eviscerated the protections of the Reconstruction Amendments and the civil rights legislation enacted thereunder.128 The Court’s decision in The Slaughter-House Cases129 largely gutted


124. See Woodward, supra note 122, at 67-109 (describing rise of segregation in South, as extending to separate Bibles for African American witnesses in court and separate elevators in office buildings); Klarman, supra note 123, at 889-90, 911-12.


127. See J. Harvie Wilkinson III, From Brown to Bakke 11-23 (1979) (documenting Court’s series of late nineteenth century decisions involving race and describing them as constituting "one of justice’s dark hours"); Woodward, supra note 122, at 70-71; McConnell, supra note 121, at 133-40.

128. See Kluger, supra note 119, at 83 ("By the close of the nineteenth century, ... the Supreme Court had nullified nearly every vestige of the federal protection that had been cast like a comforting cloak over the Negro upon his release from bondage."); McConnell, supra note 121, at 140 (noting that Plessy "marked the effective repeal of the Fourteenth Amendment").

129. 83 U.S. (16 Wall.) 36 (1873).
the Privileges and Immunities Clause, construing it to protect only those rights incident to national citizenship, such as the right to travel. The Court held that the clause offered no protection for the more important rights arising under state law, such as the right to property, to contract, to security of the person, or to essential guarantees in the criminal process. In *The Civil Rights Cases*, the Court struck down the public accommodations sections of the Civil Rights Act of 1875, a central legislative achievement of Reconstruction, on the ground that Congress lacked the power under the Thirteenth or Fourteenth Amendments to prohibit private discrimination. And in the notorious 1896 *Plessy* decision, the Court expressly condoned the growing practice of state-mandated racial segregation, though such mandatory racial separation "went beyond what even die-hard southern Democrats had been able to defend in 1875." Orfield argues that, in their recent desegregation decisions, the federal courts have similarly abdicated their responsibility to protect African Americans in communities with a long history of racial discrimination. As during Redemption, the Supreme Court has sacrificed the principle of racial equality on the altar of state and local sovereignty:

Both the 1896 *Plessy* decision and the 1990s' resegregation cases entrusted minority rights to local and state politics in the face of profound social and economic inequalities and racially polarized politics. After Reconstruction, courts affirmed state power even in the face of manifest plans to limit black opportunities. In the 1990s, power was turned back to local school districts

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131. See McConnell, supra note 121, at 133-34.

132. 109 U.S. 3 (1883).

133. The Civil Rights Cases, 109 U.S. 3 (1883); see Stone et al., supra note 130, at 510-11; McConnell, supra note 121, at 133.

134. McConnell, supra note 121, at 139. Other important Redemption-era decisions that eviscerated the promise of the Reconstruction amendments and legislation were *United States v. Reese*, 92 U.S. 214 (1875), which struck down provisions of the 1870 Enforcement Act as beyond Congress's power under the Fifteenth Amendment; *United States v. Cruikshank*, 92 U.S. 542 (1875), which overturned convictions under the same Act for three defendants' participation in the lynching of at least 60 African Americans in Grant Parish, Louisiana, because the Fourteenth Amendment did not give Congress the power to regulate purely private conduct; *United States v. Harris*, 106 U.S. 629 (1882), which struck down on the same grounds convictions under the Ku Klux Klan Act of 1871 for members of a lynching mob who had seized prisoners held by a state official; and *Williams v. Mississippi*, 170 U.S. 213 (1898), which upheld state practices that vested virtually unreviewable discretion in local officials to determine the qualification of individual voters.
in spite of the fact that almost every city and many states had strongly resisted desegregation and many were actively planning to resegregate.\textsuperscript{135}

In the same vein, Orfield characterizes the Court's recent desegregation decisions as creating a "new era of 'separate but equal.'\textsuperscript{136} The Rehnquist Court has not simply curtailed the availability or extensiveness of desegregation remedies but has actually "reversed" Brown.\textsuperscript{137} In Dowell, Freeman, and Jenkins, the "Court has, once again, authorized lower courts to send minority children to segregated schools."\textsuperscript{138} Indeed, the Rehnquist Court has "exhumed some of Plessy's basic assumptions . . . , authoriz[ing] lower courts to send minority children to segregated schools without any assurance that the schools will be genuinely equal."\textsuperscript{139} They have moved the country back toward "a rigid form of the tradition of separate and unequal education."\textsuperscript{140}

Orfield finds the Court's dismantling of Brown especially troubling because of school desegregation's remarkable success as an educational policy over the last forty years. The Rehnquist Court's decisions reflect a broader societal skepticism, wholly independent of its legal foundations, about the practical benefits of desegregation. For instance, in July 1997, the NAACP, the organization that spawned the Legal Defense and Education Fund that originally litigated Brown, debated whether school desegregation should remain one of its official objectives.\textsuperscript{141} Many scholars have recently questioned the value of desegregation, and some have insinuated that it has been counterproductive.\textsuperscript{142} Notably, this skepticism has become increasingly

\textsuperscript{135} \textbf{Orfield et al.,} supra note 2, at 34.

\textsuperscript{136} \textit{Id.} at 24; \textit{see id.} at 26 (suggesting that "we are moving back toward a rigid form of the tradition of separate and unequal education").

\textsuperscript{137} Indeed, the book's provocative subtitle is \textit{The Quiet Reversal of Brown v. Board of Education.}

\textsuperscript{138} \textbf{Orfield et al.,} supra note 2, at 29; \textit{see id.} at 2 ("[P]ublic decisions that re-create segregation, sometimes even more severe than before desegregation orders, are now deemed acceptable."); \textit{id.} at 24 ("[S]egregation has somehow come to be viewed as a type of school reform, something progressive and new.").

\textsuperscript{139} \textit{Id.} at 27; \textit{see id.} at 26 ("The arguments made a century ago when Plessy made 'separate but equal' the legal justification for segregation, and the assumptions of courts and political leaders at that time, bear a resemblance to those heard in the school desegregation debates today."); \textit{id.} at 33 (stating that Rehnquist Court's desegregation decisions "echo some of Plessy's basic themes and employ arguments paralleling some of those used to justify an end to Reconstruction-era civil rights law").

\textsuperscript{140} \textit{Id.} at 26.


\textsuperscript{142} \textit{See, e.g.,} DAVID ARMOR, \textit{FORCED JUSTICE} (1994); DERRICK BELL, \textit{AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE} 107-22 (1987) (discussing viability of desegregation strategies); ROY L. BROOKS, \textit{INTEGRATION OR SEPARATION? A STRATEGY FOR
prominent among African Americans, desegregation's supposed principal beneficiaries. In many school districts that have operated under mandatory desegregation plans, blacks have voiced a preference to return to neighborhood schools. Orfield laments these doubts, asserting that "integration's achievements are considerable." First, many studies of the impact of school desegregation have focused myopically on short-term increases in standardized test scores. Unsurprisingly, this research has tended to understate the actual effects of desegregation on students. Second, those studies that have taken a more long-term view have found significant improvements in achievement for minority students, particularly where desegregation began in early elementary school and placed students in schools with peers of higher socioeconomic status. Finally, "considerable evidence support[s] the argument that desegregation plugs students into a different network tied to greater lifelong opportunity," resulting in a greater likelihood of success in college, of working in integrated employment settings, and of living in integrated neighborhoods as adults. "In contrast to the critics' assumptions, the theory is not one of white racial superiority but a theory about the opportunity networks that historic discrimination has attached to white middle-class schools and about the advantages that come from breaking into those mobility networks."


145. See Orfield et al., supra note 2, at xviii (with Susan Eaton).

146. See id. at 104-05.

147. See id. at 105.

148. See id.

149. Id. at 106.

150. See id. at xviii, 342.

151. Id. at 344.
Because the educational opportunities available to white and minority children in America's public schools remain largely unequal, and because desegregation has proved efficacious in enhancing minority students' educational achievement and broader "life chances," Dismantling Desegregation concludes that court-ordered desegregation remedies should continue and expand. According to Orfield, our nation's experience proves that racial isolation is incapable of producing meaningful equality: "Seven decades of 'separate but equal' under Plessy were probably the best documented social policy experiment in American history," an experiment that proved that segregated schools will never "be equal so long as the rest of society is profoundly unequal." Thus, contrary to the Supreme Court's recent decisions, federal courts should require formerly de jure school districts to continue to implement desegregation remedies until the educational opportunities provided to white and minority students are "genuinely equal," such that racial disparities in test scores, graduation rates, and college attendance rates have largely dissipated. By permitting school districts to resegregate their students, the federal judiciary risks "making permanent the highly unequal structure of opportunity that confines millions of children to segregation and inadequate schools in declining parts of metropolitan America."

III. Assessing the Dismantling

Dismantling Desegregation makes important points about the practical effects of school desegregation and the Supreme Court's recent decisions. Although some disagreement remains on the question, a wide body of empirical research supports Orfield's basic premise that school desegregation, at least under certain circumstances, has produced substantial benefits for minority children. And the Court's desegregation decisions over the past twenty-five years, particularly Milliken I and the Rehnquist Court's trilogy, have clearly created a more restrictive framework for permissible court-ordered desegregation remedies. Nonetheless, Dismantling Desegregation's ultimate doctrinal conclusion—that these decisions have effectively overruled Brown—is greatly exaggerated. It is founded on an understanding of Brown that is not only much broader than that ever embraced by the Court, but also inconsistent with the limited institutional capacities of courts. Hence, the assertions that the Court has dismantled Brown, and that recent events have mirrored the period of southern Redemption, are based on a flawed conception

152. Id. at 50-51.
153. Id. at 361.
154. See id. at 20.
155. Id. at 50.
of what *Brown* requires, or ever realistically could have required, as a remedy for school segregation.

This Part assesses the central elements of Orfield's argument. Sections A and B concur with Orfield's contentions that school desegregation has been successful as an educational policy and that *Milliken I* and the Rehnquist Court's decisions have represented important turning points in the Court's desegregation jurisprudence that have restricted the breadth of permissible remedies. Section C, however, explains that Orfield's conclusions that the Court has "quietly reversed" *Brown*, and that recent events in this area have represented a second Redemption, are overstated.

A. The Instrumental Benefits of School Desegregation

*Dismantling Desegregation*’s basic premise—that school desegregation has produced tangible benefits for minority children—is well supported by empirical research. The period of widespread school desegregation in the United States, approximately from 1970 until 1990, corresponded with a dramatic increase in the level of academic achievement for African Americans relative to whites.\(^{156}\) In 1971, the difference between white and black thirteen-year-olds in average reading scores on the National Assessment of Educational Progress (NAEP) was 39 points (on a scale from 0 to 500), but by 1990 it had decreased to 18 points.\(^{157}\) Similarly, the gap in math scores between white and black seventeen-year-olds was 40 points in 1973, but had fallen to 21 points by 1990.\(^{158}\) Though less pronounced, test scores in every age group and for each subject tested demonstrated a similar pattern over roughly the same time period.\(^{159}\) Likewise, the gap between white and black high school and college graduation rates closed dramatically. In 1970, the high school dropout rate for African Americans was 43.9%, compared to 22.2% for whites.\(^{160}\) In 1988, the rate was 19.2% for African Americans and 13.4% for whites.\(^{161}\) In 1970, whites were 2.36 times as likely as blacks to graduate from college, whereas in 1988 they were only 1.91 times as likely.\(^{162}\)


\(^{158}\) See id.

\(^{159}\) See id.

\(^{160}\) See id., at 177 tbl. 5.7.

\(^{161}\) See id.

\(^{162}\) See id.
Of course, this correlation does not prove causation, but it does mean that substantial progress occurred simultaneous to the implementation of desegregation.

More specifically, those studies that have attempted to isolate the effects of desegregation have generally found that, controlling for such relevant variables as the student's socioeconomic background and preexisting ability, school desegregation produces a modest but statistically significant increase in achievement for minority children with no detriment to white children. The most comprehensive study of the subject, a meta-analysis conducted by Rita Mahard and Robert Crain of 93 separate studies, concluded that "desegregation has consistently positive effects for black students." Mahard and Crain divided the 93 studies into 323 samples of students and found that "[s]lightly over half of the samples showed an increase in achievement after desegregation, while the remainder were divided between samples that showed no change and samples that lost ground," and that those studies employing the strongest methodology were more likely to show positive results. They also found that "the age at which desegregation began made a very important difference," such that virtually every study of students desegregated in kindergarten or first grade showed significant positive effects. Their best estimate was that first grade desegregation would raise student achievement by one-third of a standard deviation. This constituted only a small difference in the first grade, but if a student "held on to this advantage throughout

163. See Armor, supra note 156, at 69-80 (contending that rise in black academic achievement is attributable to increase in African Americans' socioeconomic status and not to school desegregation).


165. Mahard & Crain, supra note 164, at 111.

166. Id. at 106.

167. See id. at 111.

168. Id. at 109.

169. See id. at 110-11.

170. See id. at 111.
school . . . he or she would be approximately one grade level higher than if he or she had been in a segregated school.\textsuperscript{171}

The majority of researchers who have studied the question have supported Mahard and Crain's basic conclusions.\textsuperscript{172} Most recently, in an amici brief filed in \textit{Freeman}, 52 social scientists attested to the findings that "desegregation is generally associated with moderate gains in the academic achievement of black children," and that these gains are "significant."\textsuperscript{173} Others have been more resolute than Mahard and Crain in their assessment of desegregation's benefits. For instance, James Liebman has written in his survey of the literature that "[w]ithout doubt, desegregation improves black academic achievement."\textsuperscript{174}

Empirical research has also demonstrated that desegregation improves African American students' "life chances" according to a variety of indicators of social well-being. Again holding constant the measurable relevant variables, school desegregation appears to reduce the rates of teenage pregnancy and delinquent behavior for African American children and to increase the likelihood that black students will attend college, attend a four-year college, receive solid grades, and graduate from college.\textsuperscript{175} African Americans who attended desegregated schools also seem to have higher average salaries as adults than do those who attended segregated schools.\textsuperscript{176} School desegregation can also instigate greater integration in other spheres of social interaction.\textsuperscript{177} Studies have shown that students who attend integrated primary or secondary schools are more likely to attend desegregated colleges, to work in integrated employment settings, to socialize with individuals of different races, to live in integrated neighborhoods, and to have children who attend

\textsuperscript{171} Id.
\textsuperscript{172} See supra note 164.
\textsuperscript{174} Liebman, supra note 164, at 1624.
\textsuperscript{175} See id. at 1625-26; see also Jomills Henry Braddock II & James M. McPartland, \textit{Assessing School Desegregation Effects: New Directions in Research, in RESEARCH IN SOCIOLOGY OF EDUCATION AND SOCIALIZATION} 259, 272 (Alan C. Kerckhoff & Ronald G. Corwin eds., 1982) (concluding that desegregation has positive effect on years of college attainment).
\textsuperscript{176} See Liebman, supra note 164, at 1626.
desegregated schools.178 Aside from purely normative or aesthetic reasons to prefer a society in which individuals of different races interact on a regular basis, interracial contact is instrumentally valuable in breaking down barriers to informal social networks and "opportunity structures" that have historically excluded racial minorities.179

B. A More Restrictive Framework for Desegregation Remedies

Dismantling Desegregation's analysis of how the Supreme Court's desegregation jurisprudence over the past twenty-five years has constrained the duration and extensiveness of judicial remedies is also instructive. The Court's decision in Milliken I clearly was an important turning point in the evolution of desegregation law. Most northern cities have evolved in a manner similar to Detroit: rings of relatively affluent, predominantly white municipalities and school districts surround a relatively poor, predominantly minority urban core.180 Even in cities that have retained a substantial number of affluent residents, the city school districts are nonetheless largely minority and largely poor, as middle- and upper-class parents have abandoned the public school system to enroll their children in private schools.181 Because Milliken I forbade interdistrict desegregation absent a showing of "a significant segregative effect in another district" – a very steep burden for plaintiffs – it undercut much of Brown's potential in the North.

Perhaps more important, Milliken I foreclosed the possibility that court-ordered desegregation would produce meaningful socioeconomic integration in the North. Dating back to the landmark Coleman Report182 published in

178. See Braddock, supra note 177, at 185; Braddock & McPartland, supra note 175, at 272; Braddock & McPartland, supra note 164, at 8-10, 63; Liebman, supra note 164, at 1627; powell, supra note 8, at 789-90; Wells & Crain, supra note 177, at 551.

179. See William Julius Wilson, When Work Disappears: The World of the New Urban Poor 63-66 (1996); powell, supra note 8, at 758.


181. For instance, in 1986 the 25 largest central city school systems in the United States contained 30% of the nation's Latino students, 27% of the African American students, and only 3% of the white students. See Gary Orfield, Metropolitan School Desegregation: Impacts on Metropolitan Society, 80 MINN.L.REV. 825, 842 (1996).

1966, empirical research on the determinants of educational achievement has found that the socioeconomic status (SES) of a student's peers exerts a significant influence on academic progress. When all else is held equal, lower SES students improve academically when placed in schools with higher SES students. Because the average African American or Latino public school student comes from a lower socioeconomic background than the average

183. See, e.g., JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 118-20, 125-29 (1990) (providing regression analysis demonstrating that school SES has statistically significant influence on student achievement); COLEMAN, supra note 182, at 21; MARTIN THRUPP, THE SCHOOL MIX EFFECT: HOW THE SOCIAL CLASS COMPOSITION OF SCHOOL INTAKES SHAPE SCHOOL PROCESSES AND STUDENT ACHIEVEMENT 22-25 (1997) (reviewing numerous studies demonstrating significant "school mix effect" correlating education achievement with socioeconomic status); MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 597 (3d ed. 1992) (noting that research has demonstrated that "[c]hildren of low socioeconomic status appeared to benefit significantly from exposure to more affluent and more highly motivated peers"); Anthony S. Bryk et al., High School Organization and Its Effects on Teachers and Students: An Interpretive Summary of the Research, in CHOICE AND CONTROL IN AMERICAN EDUCATION 135, 150 (William H. Clune & John F. Witte eds., 1990); Christopher S. Jencks, The Coleman Report and the Conventional Wisdom, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 69, 87-88 (Frederick Mosteller & Daniel P. Moynihan eds., 1972) (re-examining the EROS data used in Coleman Report and finding that "[p]oor black sixth graders in overwhelmingly middle-class schools were about 20 months ahead of poor black sixth graders in overwhelmingly lower-class schools," and that "[t]he differences for poor white sixth graders were similar"); Susan E. Mayer & Christopher Jencks, Growing Up in Poor Neighborhoods: How Much Does It Matter?, 243 SCIENCE 1441, 1442 (1989) (noting that "teenagers who live in high SES neighborhoods attain more schooling than teenagers from similar families who live in lower SES neighborhoods," that "[t]here is some evidence that attending school with high SES classmates raises children's test scores," and that "[a]tending high school with affluent classmates may also increase a student's chances of graduating"); Richard J. Murnane, Evidence, Analysis, and Unanswered Questions, 51 HARV. EDUC. REV. 483, 486 (1981) ("[O]ne of the most effective ways to improve children's cognitive skills is to put them in an environment with other children who want to acquire cognitive skills and whose families support such learning."); Martin E. Orland, Demographics of Disadvantage: Intensity of Childhood Poverty and Its Relationship to Educational Achievement, in ACCESS TO KNOWLEDGE: THE CONTINUING AGENDA FOR OUR NATION'S SCHOOLS 43, 46 (1994); James S. Liebman, Voice, Not Choice, 101 YALE L.J. 259, 267 (1991) (book review) (explaining that "a well-developed literature establishes that achievement levels depend not only on one's own and one's parents educational expectations, but also on the expectations of one's schoolmates and their parents").

184. See, e.g., COLEMAN, supra note 182, at 304 (finding that "an impressive percent of variance [in student achievement] is accounted for by student body characteristics" and that "the environment provided by the student body is asymmetric in its effects, [such] that it has its greatest effect on those from educationally deficient backgrounds"); Gary Orfield & David Thronson, Dismantling Desegregation: Uncertain Gains, Unexpected Costs, 42 EMORY L.J. 759, 783 (1993) (finding that low-income students in San Francisco who transferred to high achieving schools showed significant gains in achievement despite no increase in school funding or special programs at those schools, while students who stayed at predominantly low-income schools showed no increase in achievement despite millions of dollars in increased funding).
white student, an important potential benefit of racial desegregation is to place socioeconomically disadvantaged students in schools surrounded by relatively advantaged peers. Indeed, Mahard and Crain’s analysis found that desegregation plans encompassing entire metropolitan areas produced the greatest benefits to black students, indicating that desegregation is most effective when it "represents the most complete form of socioeconomic desegregation." By rejecting the district court’s interdistrict remedy, however, the Court limited most desegregation plans in the North to integrating those students who remained in urban public schools, a disproportionately poor group. Milliken therefore substantially restricted a crucial educational benefit that desegregation might offer.

This is not to say that a different outcome in Milliken I would have necessarily altered the ultimate course of school desegregation in the North. Political forces and private behavior might well have prevented metropolitan desegregation from ever occurring, regardless of the Court’s decision. In the early 1970s, a sizable majority of Americans opposed busing. The backlash in response to the district court’s order in Detroit was reminiscent of the South’s massive resistance to Brown: rabid demonstrators in Pontiac burned buses, and George Wallace prevailed in the 1972 Michigan Democratic primary. President Nixon made opposition to busing a centerpiece of his reelection campaign. On March 16, 1972, he addressed the country on

186. Mahard & Crain, supra note 164, at 118. In fact, Coleman concluded in Equality of Educational Opportunity that "[t]he higher achievement of all racial and ethnic groups in schools with greater proportions of white students is largely, perhaps wholly, related to effects associated with the student body’s educational background and aspirations." COLEMAN, supra note 182, at 307.
187. See GODFREY HODGSON, AMERICA IN OUR TIME 455 (1976) (stating that "the great majority, without any rabid racist opposition to busing, nevertheless didn’t like it and were prepared to consider most other alternatives"); KLUGER, supra note 119, at 765-66; WILKINSON, supra note 127, at 230 ("Antibusing atmospherics of the mid-1970s seemed no different than southern school openings of the late 1950s."). In response to mandatory desegregation plans in Boston and Seattle in the mid-1970s, the relatively progressive states of Massachusetts and Washington passed referenda that forbid busing for purposes of racial balance. See WILKINSON, supra note 127, at 248.
188. See HODGSON, supra note 187, at 454.
189. See PAUL R. DIMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION 86 (1985); WILKINSON, supra note 127, at 248. Bumper stickers throughout the Detroit area pilloried the district court judge who had issued the metropolitan-wide order, Judge Stephen J. Roth, with epithets such as "Roth is a four-letter word" and "Roth is a child molester." DIMOND, supra, at 76.
190. See HERBERT S. PARMET, RICHARD NIXON AND HIS AMERICA 594-97 (1990); Alexander M. Bickel, Busing: What’s To Be Done?, in THE NEW REPUBLIC READER: EIGHTY YEARS
national television to propose legislation placing a moratorium on court-ordered busing to achieve racial balance. At the Democratic convention that summer, party members vigorously debated whether to include an antibusing provision in its platform, with liberals Hubert Humphrey and Edmund Muskie proposing a compromise that called on Congress to forbid interdistrict busing until the Supreme Court issued a controlling decision. Congress considered an antibusing constitutional amendment in 1972, and it might well have adopted a similar measure in 1974 had the Court upheld the interdistrict plan in *Milliken*. At a minimum, such a decision would have prompted significantly higher enrollments at private schools in metropolitan areas under desegregation orders, undermining the actual achievement of racial and socioeconomic integration.

Even so, Orfield's contention that *Milliken I* was an important turning point still seems valid. In 1974, how extensive the project of school desegregation would ultimately become was uncertain. It is possible that political resistance in northern suburbs could have been overcome, or at least ameliorated, much as it ultimately was in the South. And while resistance might have created implementation problems, a different outcome would have at least placed the force of inertia in favor of metropolitan remedies. In short, *Milliken I* was a significant defeat for pro-desegregation forces.

Orfield is also correct to identify the Rehnquist Court's three desegregation decisions as another important shift in desegregation law. *Dowell, Freeman, and Jenkins* did not alter any of the basic doctrinal principles in the area;

OF OPINION AND DEBATE 400, 400 (Dorothy Wickenden ed., 1994); see also WILKINSON, supra note 127, at 217 ("[Nixon's] southern strategy dismissed the black vote; his domestic advisor had counseled 'benign neglect' of black problems.").

191. See Robert B. Semple Jr., *Nixon Asks for Bill Imposing Halt in New Busing Orders; Seeks Education Equality*, N.Y. TIMES, Mar. 17, 1972, at A1. In that address, Nixon clearly appealed to northern suburban voters who feared the implications of metropolitan desegregation:

    [Parents] want their children educated in their own neighborhoods. Many have invested their life savings in a home in a neighborhood they chose because it had good schools. They do not want their children bused across the city to an inferior school just to meet some social planner's concept of what is considered to be the correct racial balance or what is called progressive social policy.

*Transcript of Nixon's Statement on School Busing*, N.Y. TIMES, Mar. 17, 1972, at A22. Congress ultimately adopted a watered-down version of Nixon's proposal, which forbid the implementation of busing until the appeals process had been fully exhausted. See HODGSON, supra note 187, at 454; Peter Lisagor, *Nixon Rips College Bill but Signs It*, CHI. DAILYNEWS, Jun. 24-25, 1972, at 1.


193. See HODGSON, supra note 187, at 454.

194. See WILKINSON, supra note 127, at 227.
each addressed a relatively well-settled legal issue or resolved the case on rather narrow grounds. Nonetheless, the three decisions collectively reveal the Court's general discontent with the continuation of court-enforced desegregation remedies. Consistent with the Court's broader constitutional agenda, *Dowell, Freeman,* and *Jenkins* reveal the Court's intent to bring a quiet close to the era of school desegregation administered by federal district courts.195

There are four principal reasons for this conclusion. Most prominently, the outcome in each case expedited the withdrawal of judicial supervision over the respective school districts and hastened their return to local control. Of course, the outcomes themselves are insufficient to conclude that the Court has abandoned desegregation remedies. The particular circumstances of the cases could have necessitated decisions that curtailed further desegregation regardless of the Court's broader agenda. Nonetheless, the outcomes are an important starting point, particularly because, prior to *Dowell,* the Court had only issued three desegregation decisions in favor of school districts in the forty-one years since *Brown.*196

Second, ending court-enforced desegregation is wholly consistent with, and indeed complements, the Rehnquist Court's broader constitutional priorities. The prolonged supervision of school systems by federal courts for purposes of implementing desegregation remedies contravenes three of the Court's principal tenets. First, desegregation remedies, which are necessarily race-conscious,197 coexist uneasily with the Rehnquist Court's understanding of the Equal Protection Clause as requiring color-blind governmental action.198 In a series of affirmative action and redistricting decisions, the Court has emphasized that race-conscious state action is constitutionally permissible only in extremely rare circumstances,199 if at all.200 Second, the displacement

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198. *See* Jeffrey Rosen, *The Color-Blind Court,* 45 AM. U. L. REV. 791, 791 (1996) ("The ideal of a color-blind Constitution is close to securing five votes on the Supreme Court for the first time since it was considered and rejected during Reconstruction.").


200. *See* Adarand Constructors, 515 U.S. at 239 (Scalia, J., concurring) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in
A SECOND REDEMPTION?

of politically accountable state and local officials by federal courts in the administration and governance of public school systems violates traditional norms of federalism, norms that have resurfaced in importance under the Rehnquist Court. Perhaps the current Court’s defining theme has been its renewed emphasis on the constitutional limitations of federal power and the independent sovereignty of state governments. The Court has stated that these norms are particularly relevant in the context of public education, where "[s]tates historically have been sovereign." Finally, ongoing supervision of public school systems conflicts with the Rehnquist Court’s conception of the limited role and institutional competence of Article III courts. The Court has repeatedly emphasized the limited role of federal courts in our constitutional structure, and it has been particularly hostile to ongoing judicial involvement in the administration of government programs instigated by institutional

order to "make up" for past racial discrimination in the opposite direction."); id. at 240 (Thomas, J., concurring) ("I believe that there is a 'moral [and] constitutional equivalence' . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality." (citation omitted)).


203. United States v. Lopez, 514 U.S. 549, 564 (1995); see id. at 580 (Kennedy, J., concurring) (stating that "it is well established that education is a traditional concern of the States").
litigation. Hastening the end of judicially imposed desegregation remedies is therefore fully consistent with the Court's broader constitutional priorities.

The third reason that Dowell, Freeman, and Jenkins have signaled an important shift is that the Court's rhetorical emphasis in the opinions differed considerably from that of its earlier desegregation opinions. Until recently, the Court's desegregation decisions generally stressed the goal of ensuring that all vestiges of discrimination be removed from school systems that once were de jure segregated. For instance, the Court stated that school districts found liable for unlawful segregation must ensure the "all-out desegregation" of the system's schools, and that formerly de jure school districts may not "achiev[e] anything less than complete uprooting of the dual public school system." It underscored that a formerly segregated school district's "continuing 'affirmative duty to disestablish the dual system' is . . . beyond question." The Rehnquist Court's decisions, in contrast, have emphasized the importance of returning public school systems to the control of local, politically accountable officials as soon as practicable. In all three opinions, the Court began its analysis with the premise that "federal supervision of local school systems was intended as a temporary measure." It has stated that "local autonomy of school districts is a vital national tradition" that "allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs," and that "in the absence of judicial supervi-

204. See, e.g., Missouri v. Jenkins, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) ("The necessary restrictions on [federal courts'] jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills."). This strand of the Rehnquist Court's jurisprudence is perhaps best exemplified by its decisions involving the constitutional rights of prisoners, in which the Court has repeatedly emphasized that it generally is not the judiciary's place to stand in judgment of how prison administrators carry out their duties. See, e.g., Washington v. Harper, 494 U.S. 210, 227 (1990) (upholding state policy that permitted corrections officials to administer antipsychotic drugs to inmates against their will without prior hearings); O'Lone v. Estate of Shabazz, 482 U.S. 342, 351-52 (1987) (upholding prison regulations that prevented Muslim inmates from attending particular congregational service); Turner v. Safley, 482 U.S. 78, 81-82, 91-93 (1987) (upholding regulations that restricted correspondence between inmates at different institutions to that between family members and that concerning legal matters unless correspondence was in "best interests" of inmates).


209. Jenkins, 515 U.S. at 99; Freeman, 503 U.S. at 490.

sion, [schools] can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.\textsuperscript{211} Thus, "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."\textsuperscript{212}

These complementary points—that desegregation remedies were intended to be temporary and that local control over public education is a valuable tradition—are not new to desegregation cases. Indeed, the Court has expressed these ideas in one form or another throughout its desegregation jurisprudence since \textit{Brown}. The change has been in the prominence and emphasis that these themes have received in the Rehnquist Court's opinions. Instead of constituting two among several decisional factors, they appear in \textit{Dowell}, \textit{Freeman}, and \textit{Jenkins} to have become the Court's predominant concerns.

Finally, the Court's questionable reasoning suggests the existence of an important subtext to the opinions. In \textit{Freeman}, for instance, the Court claimed merely to make explicit the reasoning of its 1976 decision in \textit{Pasadena Board of Education v. Spangler}.\textsuperscript{213} But \textit{Freeman}'s conclusion that school districts could achieve unitary status in a piecemeal fashion, and that district courts could consequently withdraw their supervision incrementally, actually decided a moderately significant, unresolved issue in desegregation law.\textsuperscript{214} Moreover, it did so in a fashion that created the possibility that school districts would be released from judicial supervision without ever having eliminated the racial identifiability of their schools.\textsuperscript{215}

The Court's analysis in \textit{Jenkins} was more clearly suspect. In holding that the district court's salary relief order was impermissible under \textit{Milliken I}, the Court conceptualized the term "interdistrict remedy" quite expansively.\textsuperscript{216} Unlike the desegregation plan in \textit{Milliken I}, the remedy in \textit{Jenkins} only imposed affirmative obligations on the KCMSD. It was interdistrict only in the sense that it sought to attract white students attending private schools or surrounding suburban school districts to enroll voluntarily in the KCMSD. In holding that these indirect effects made the desegregation plan an "interdistrict remedy," the Court largely blurred the intradistrict and interdistrict distinction, as every desegregation plan has some impact beyond the school district's boundaries.\textsuperscript{217} Moreover, even conceding that the plan in \textit{Jenkins} constituted

\begin{itemize}
\item \textsuperscript{211} \textit{Freeman}, 503 U.S. at 490.
\item \textsuperscript{212} \textit{Id.}
\item \textsuperscript{213} 427 U.S. 424 (1976); see \textit{Freeman}, 503 U.S. at 489 ("Today we make explicit the rationale that was central in \textit{Spangler}.").
\item \textsuperscript{214} See Joondeph, \textit{supra} note 62, at 157.
\item \textsuperscript{215} See \textit{id.} at 166-67.
\item \textsuperscript{216} See Joondeph, \textit{supra} note 8, at 630-36.
\item \textsuperscript{217} See \textit{id.} at 630-35.
\end{itemize}
an interdistrict remedy, it was still justifiable under Milliken I so long as the "constitutional violation . . . produce[d] a significant segregative effect in another district."\(^\text{218}\) Although the district court in Jenkins found that no surrounding suburban districts had engaged in unlawful discrimination, it did find that de jure segregation in the KCMSD had caused white flight from Kansas City schools.\(^\text{219}\) That is, it concluded that the KCMSD’s intradistrict constitutional violation had resulted in incrementally more white families leaving the school system, leaving the KCMSD more racially isolated than it would have been absent the unlawful discrimination. Yet the Court still rejected the remedy, concluding that the district court’s white flight finding was "both inconsistent internally, and inconsistent with the typical supposition . . . that ‘white flight’ may result from desegregation, not de jure segregation."\(^\text{220}\) In essence, the Court overturned Kansas City’s longstanding desegregation program on the ground that the district court had erred nine years earlier in concluding that the KCMSD’s declining white enrollment was causally related to the school district’s past discrimination.\(^\text{221}\)

The outcomes in Dowell, Freeman, and Jenkins may not be necessarily wrong or unjustifiable, but the decisions have changed more than their explicit holdings would indicate. They unmistakably reveal the Court’s desire to see the judicial supervision of formerly segregated school districts end and control returned to politically accountable local officials as soon as practicable. Orfield therefore is entirely correct in identifying these decisions as another important shift in the Court’s approach to court-ordered desegregation that has curtailed the duration and extensiveness of permissible judicial remedies.


\(^{220}\) Id. at 95 (footnote omitted).

\(^{221}\) See Richard Thompson Ford, Geography and Sovereignty: Jurisdictional Formation and Racial Segregation, 49 Stan. L. Rev. 1365, 1387 (1997). Curiously, the Court’s opinion omitted several steps that one would have expected given its reasoning: (a) the Court never explicitly acknowledged that it was reversing the district court’s judgment on the basis of a factual finding; (b) the Court never articulated the appropriate "clearly erroneous" standard of review mandated by Rule 52(a) of the Federal Rules of Civil Procedure; (c) the Court ignored the "two court rule," which dictates that the Supreme Court should reverse a factual finding affirmed by a court of appeals only under "the most exceptional circumstances," Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980), when there is "a very obvious and exceptional showing of error," Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949), aff'd in part on reh'g, 339 U.S. 605 (1950); and (d) the Court did not seriously weigh the evidence relied on by the district court or explain why the district court’s conclusion regarding white flight was implausible. See Joondeph, supra note 8, at 640-53. Moreover, this factual finding had been reviewed and affirmed by the Eighth Circuit on three separate occasions, and the Supreme Court had previously denied certiorari on the question. See id. at 641-42 & n.243.
C. The Meaning of Brown and the Degree of Dismantling

The present doctrinal framework for desegregation remedies clearly is more restrictive than what appeared possible in the early 1970s. *Milliken I* substantially limited the geographic breadth of permissible desegregation plans, *Washington v. Davis* limited school districts' liability to instances of de jure segregation, and the Rehnquist Court's decisions have directed district courts to release formerly segregated school districts from judicial supervision as soon as practicable. But these developments do not constitute a "quiet reversal" of *Brown*. Such a contention is based on an understanding of *Brown* that is much broader than the Court's decisions permit. Indeed, Orfield's claim is founded on a conception of desegregation remedies that is more expansive than one could have ever realistically expected the judiciary to embrace.

To Orfield, *Brown* was not simply concerned with de jure segregation and its traceable effects. Rather, "*Brown*'s promise . . . was that government would protect minority students' rights to equal opportunity in education." Properly understood, *Brown* targeted the "highly unequal structure of opportunity" and "the roots of racial inequality" in American public education. Thus, the appropriate remedy for school segregation is not only the elimination of intentional desegregation and its vestiges, but also the production of schools in which opportunities are "genuinely equal" between minority and white children.

What is more, Orfield's conception of equal educational opportunity is substantive, not formalistic. Equal educational opportunity does not mean merely the absence of formal, state-imposed barriers to advancement. Nor is it necessarily satisfied by the provision of equal educational inputs. Rather, Orfield's conception of opportunity is inextricably intertwined with outcomes. Educational opportunities are unequal when millions of minority children are consigned to "[s]chools with large numbers of impoverished students tending to have much lower test scores, higher dropout rates, fewer students in demanding classes, less well-prepared teachers, and a low percentage of students who will eventually finish college." Thus, under *Brown*,

223. ORFIELD ET AL., supra note 2, at xix; see Liebman, supra note 164, at 1485-86 & n.123 (describing equal educational opportunity theory and citing commentators who have endorsed this understanding of *Brown*).
224. ORFIELD ET AL., supra note 2, at 50.
225. Id. at 4.
226. Id. at 75.
227. See supra note 18.
228. ORFIELD ET AL., supra note 2, at 53.
desegregation remedies should not end until the "education for minority students has become more equal to that of white students in the metropolitan area in terms of achievement test scores, graduation, college preparation, and other educational measures." Formerly segregated school districts should have to demonstrate "actual racial equality" with "a narrowing of academic gaps between the races."

But the Supreme Court has never embraced such a broad understanding of Brown or its consequent remedies. Concededly, the Court stated in Brown that public education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." To read this language as demanding actual equivalence in chances to achieve academic success, however, is to take it well out of context. For several years after the decision, the Court appeared to endorse the limited principle that the appropriate remedy for school segregation was purely prohibitory, requiring school districts to do no more than desist from intentionally discriminating on the basis of race, and this only with "all deliberate speed." In Brown II, for instance, the Court stated that the relief to which the plaintiffs were entitled was their "admission to public schools as soon as practicable on a nondiscriminatory basis" and that formerly de jure school districts were required "to achieve a system of determining admission to the public schools on a nonracial basis." Two years later, in Cooper v. Aaron, the Court equated "desegregation" with "the immediate general admission of Negro children, 

229. Id. at 75.
230. Id. at 4.
234. Id. at 300.
235. Id. at 300-01.
otherwise qualified as students for their appropriate classes, at particular schools." 237

In *Green* and *Swann*, the Court abandoned this prohibitory approach to desegregation remedies and adopted a broader, corrective framework. 238 The Court required formerly segregated school districts not only to end their discriminatory practices, but also to affirmatively eliminate any lingering effects of the de jure system. 239 Yet even during this expansion of *Brown*’s remedial reach, the Court clearly adhered to the principle that the objective of desegregation remedies was only to place the school system in the position that it would have occupied had it never been de jure segregated. In striking down New Kent County’s "freedom of choice" plan in *Green* because it failed to produce "effective" desegregation, the Court stated that *Brown* required "meaningful and immediate progress toward disestablishing state-imposed segregation" 240 and the "dismantling of the state-imposed dual system." 241 And in *Swann*, in which the Court articulated its broadest vision ever of desegregation remedies, the Court still underscored the premise that the objective in desegregation cases is only "to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." 242 In fact, *Swann* expressly declined to require the elimination of completely segregated schools from a formerly de jure segregated district; 243 so long as the segregation is not a product of the district’s past discrimination, "the existence of some small number of one-race, or virtually one-race, schools" is permissible. 244

More conspicuously, the Court in *Swann* took pains to deflate expectations concerning the breadth of *Brown*’s constitutional guarantee, explicitly acknowledging the limits of its institutional capacities. It cautioned that desegregation remedies were not meant to address the "myriad factors of human existence which can cause discrimination in a multitude of ways" 245

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238. See supra text accompanying notes 28-41.
239. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."); Green v. County Sch. Bd., 391 U.S. 430, 440 (1968) ("[S]chool officials have the continuing duty to take whatever action may be necessary to create a unitary, non-racial system." (quoting Bowman v. County Sch. Bd., 382 F.2d 326, 333 (4th Cir. 1967) (en banc) (Sobeloff, J., concurring))).
241. *Id.*
243. *Id.* at 25-26.
244. *Id.* at 26.
245. *Id.* at 22.
and "cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."246 Indeed, "[t]he elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities."247 Nowhere in either Green or Swann did the Court speak of Brown’s requirements in terms of educational outcomes.

As discussed earlier, the Court’s decisions subsequent to Swann have generally narrowed Brown’s remedial framework. In Milliken II, the Court expanded the range of permissible remedies to include compensatory educational programs. Even so, such remedies are only permissible where students’ educational deficits are proximately traceable to the de jure violation, and they must end once the effects of past discrimination have been eliminated. Indeed, it would be impermissible, even in a Milliken II case, for a district court to require a school district to equalize achievement for white and minority students.

Thus, at all points since Brown, the permissible objective of desegregation has not exceeded eliminating the constitutional violation of de jure segregation and its lingering effects.248 Remedial orders are limited "to restor[ing]..."
the victims of discriminatory conduct to the position they would have occu-

49 Unless racial imbalances or other educational inequalities are causally related to past discrimination by the school district, they present no constitutional concerns. Hence, Orfield's understanding of Brown as requiring the equalization of educational outcomes in formerly segregated school districts is not only at odds with the Court's precedent prior to Dowell, but it is inconsistent with any plausible reading of the Court's decisions since 1954.

Moreover, the notion that the Court nonetheless should have interpreted Brown as requiring greater equality of educational outcomes as a remedy for school segregation overestimates the institutional capacities of courts. Racial disparities in educational achievement are the product of a wide range of environmental factors. The greatest determinant of educational achievement, excluding preexisting ability, is the family background of the student.

of racial inequalities in realms such as test scores, graduation rates, or rates of college attend-


No. 1, 413 U.S. 189, 198 (1973).

Students from families with lower incomes, less wealth, and less educational attainment, measured by the quantity and quality of their parents’ and grandparents’ schooling, do worse on standard measures of educational achievement. The reasons for this influence are varied, but clearly, poor students suffer disproportionately from problems that inhibit their ability to learn, such as malnutrition, developmental disorders, and untreated health problems. Their families tend to move more frequently, preventing schools or teachers from either developing a close relationship with the student or tracking his development. And the educational background of a child’s parents appears to exert a strong influence on a student’s approach to school, the learning that takes place at home, and overall educational expectations.

The significant disparities in socioeconomic status between whites and racial minorities, particularly African Americans and Latinos, mean that the average black or Latino child begins at a substantial disadvantage relative to white children in the competition for academic success. The median incomes of African American and Latino households in 1995 were $22,393 and $22,860 respectively, compared to $35,766 for white households. The median net worth of white households in 1993 was $45,740, more than ten times greater than the median net worth of black households ($4418) and nine times greater than the figure for Latino households ($4656). While 26.4% of black families and 27.0% of Latino families fell below the poverty line in 1995, only 8.5% of white families did so. Most troublesome, a staggering

URB. EDUC. 328, 337-42 (1993) (contending that most researchers have overstated relationship between student SES and achievement).

252. See Meredith Phillips et al., Family Background, Parenting Practices, and the Black-White Test Score Gap, in THE BLACK-WHITE TEST SCORE GAP, supra note 156, at 103, 138 (concluding that index of family environment broader than traditional definition of socioeconomic status may explain up to two-thirds of gap in test scores between whites and African Americans); supra note 251.

253. See ORFIELD ET AL., supra note 2, at 54.

254. See id.

255. See CHUBB & MOE, supra note 183, at 106-08 & tbl. 4-4, 334 (correlating parental education with students’ academic performance); JENCKS, supra note 156, at 175-77 (documenting relationship between high school dropout rates and parents’ level of educational attainment); Liebman, supra note 183, at 266-68.


258. See STATISTICAL ABSTRACT, supra note 256, at 479 tbl. 745.
41.5% of black children and 39.3% of Latino children fell below the poverty line in 1995, compared to 15.5% of white children. Moreover, the average African American or Latino parent has accumulated substantially less formal education than the average white parent. As of 1996, 82.8% of whites twenty-five years and older had completed four years of high school, while only 74.3% of African Americans and 53.1% of Latinos had done so. Similarly, 24.3% of whites had finished four years of college, compared to 13.6% of blacks and 9.3% of Latinos. Tellingly, the United Nations reported in 1993 that, according to its Human Development Index, which is based on a combination of per capita income, educational attainment, and longevity, the United States ranked sixth in the world as a nation; white Americans by themselves ranked first; and African Americans by themselves ranked thirty-first.

As mentioned earlier, another important influence on academic achievement is the socioeconomic status of a student’s peers. Unsurprisingly, a concentration of poor students at a school has several deleterious effects on the quality and effectiveness of the educational experience. High poverty schools typically must devote a disproportionate share of their resources to items such as remedial instruction, instruction in English as a second language, emotional and developmental problems, security, and the supplementation of resources that students do not receive at home. Conversely, they are less likely to offer gifted or advanced placement programs. Teachers at high poverty schools report that the problems of drug use, teenage pregnancy, violence, possession of knives and handguns, and students’ lacking basic skills are either "serious" or "somewhat serious" at a significantly higher rate. Teachers are also more likely to report student misbehavior that interferes with instruction and less likely to report receiving significant support

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259. See id. at 475 tbl. 737.
260. See id. at 159 tbl. 243.
261. See id.
262. See Sunstein, supra note 19, at 2430 (citing UNITED NATIONS DEV. PROGRAMME, HUMAN DEV. REPORT 1993, at 18 & figs. 1.12-.13).
263. See supra note 183 and accompanying text.
265. See ORFIELD ET AL., supra note 2, at 331, 343.
266. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP’T OF EDUCATION, NCES 96-133, DIGEST OF EDUCATION STATISTICS 141 (1996) [hereinafter DIGEST OF EDUCATION STATISTICS].
267. See NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP’T OF EDUCATION, NCES 97-388, THE CONDITION OF EDUCATION 7 & tbl. 5 (1997) [hereinafter THE CONDITION OF EDUCATION] (showing that teachers in schools where 41% or more of students qualified for
Those students who are prepared to excel academically tend not to receive the same competition from their peers, and it is more difficult for the school to create a culture in which academic excellence is respected or valued. These burdens, in turn, make it more difficult to hire or to retain highly qualified faculty and staff. Fewer teachers in inner city schools have majored or minored in their subject of instruction, and a much higher percentage of teachers have either an emergency teaching credential or no credential at all. Such schools suffer from more teaching vacancies, higher rates of teacher turnover, and more frequent teacher absenteeism. Moreover, after making the appropriate adjustments for relative purchasing power, high poverty schools appear to receive below average funding for instruction. According to one study, school districts with 5% or fewer households living in poverty spent an average of $3514 per pupil in instructional expenditures in 1990, while school districts in which 50% or more of the households fell below the poverty line averaged $2479 per pupil.

reduced-price lunch were 2.2 times as likely to report level of student misbehavior that interferes with instruction as teachers in schools with 5% or fewer eligible for reduced-price lunch).

268. See id. at 8 & fig. 7 (showing that teachers in high poverty schools were more than three times as likely as teachers in low poverty schools (38% vs. 12%) to report that "lack of parent involvement was a serious problem").

269. See MASSEY & DENTON, supra note 180, at 168, 179 (discussing pressure on African American students to avoid "acting white" in academic arena). But see Philip J. Cook & Jens Ludwig, The Burden of "Acting White": Do Black Adolescents Disparage Academic Achievement?, in THE BLACK-WHITE TEST SCORE GAP, supra note 156, at 375, 392 (concluding that "group differences in peer attitudes [do not] account for the black-white gap in educational achievement," but that "disparities in the family backgrounds of blacks and whites do account for the modest differences in effort that we find between the average black and white students").

270. See THE CONDITION OF EDUCATION, supra note 267, at 180.


273. See id. <http://www.edweek.org/sreports/qc98/challenges/teach/te-c6.htm> (noting that 58% of urban eighth graders attend schools in which at least one teacher leaves during course of the academic year, compared to 27% of nonurban eighth graders).

274. See id. <http://www.edweek.org/sreports/qc98/challenges/teach/te-c3.htm> (noting that 12% of urban eighth graders attend schools in which school officials say absenteeism among teachers is problem, compared to 5% of nonurban eighth graders).

275. See NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, PROFILE OF CHILDREN IN U.S. SCHOOL DISTRICTS 4-37 (1996). But see JENCKS, supra note 156, at 9 ("Despite glaring economic inequalities between a few rich suburbs and nearby central
Due to the higher rates of poverty for African Americans and Latinos, as well as the residential segregation of metropolitan areas on the basis of race and class, African American and Latino children suffer disproportionately from these pathologies endemic to high poverty schools. Schools that are predominantly minority are 16.3 times as likely to have high concentrations of poor students than are schools that are predominantly white. Indeed, 87% of schools that are over 90% African American or Latino are predominantly poor, and only 3% of such schools have fewer than 25% of their students living in poverty. In America’s largest urban school systems, more than a third of African American students and almost half of Latino children attend schools in which more than half the students are poor. Relatedly, a substantially higher percentage of black than white children report that fellow students disrupted class in a manner that interfered with learning; 11.2% of African American children and 8.6% of Latino children report that they have been threatened or injured with a weapon at school, compared to 6.3% of white children; and black and Latino children report that they feel too unsafe to attend school at a rate nearly three times that of whites. It is unsurprising, then, that African American and Latino children

cities, the average black child and the average white child now live in school districts that spend almost exactly the same amount per pupil.

It is important to note that residential racial segregation in the United States is not simply a by-product of class segregation. See MASSEY & DENTON, supra note 180, at 125 (noting that poor African Americans are significantly more likely to live in neighborhoods of extreme poverty than are poor whites).


See ORFIELD ET AL., DEEPENING SEGREGATION, supra note 264.

See id.

See id.

See NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP’T OF EDUCATION, NCES 95-765, THE EDUCATIONAL PROGRESS OF BLACK STUDENTS 9 (1995) (noting that 76.3% of black students reported that other students often disrupt class and that 51.1% reported that these disruptions interfere with learning, compared to 69.9% and 36.7%, respectively, of white students).

See DIGEST OF EDUCATION STATISTICS, supra note 266, at 139 tbl. 145.

See id.
continue to lag well behind whites on virtually every measure of academic achievement.\textsuperscript{284}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|}
\hline
\textbf{READING} & \textbf{WHITE} & \textbf{BLACK} & \textbf{LATINO} \\
\hline
9-year-olds & 218 & 185 & 186 \\
13-year-olds & 265 & 234 & 235 \\
17-year-olds & 296 & 266 & 263 \\
\hline
\textbf{MATHEMATICS} & \textbf{WHITE} & \textbf{BLACK} & \textbf{LATINO} \\
\hline
9-year-olds & 237 & 212 & 210 \\
13-year-olds & 281 & 252 & 256 \\
17-year-olds & 312 & 286 & 291 \\
\hline
\textbf{HISTORY} & \textbf{WHITE} & \textbf{BLACK} & \textbf{LATINO} \\
\hline
4th graders & 215 & 177 & 180 \\
8th graders & 267 & 239 & 243 \\
12th graders & 292 & 265 & 267 \\
\hline
\textbf{WRITING} & \textbf{WHITE} & \textbf{BLACK} & \textbf{LATINO} \\
\hline
4th graders & 217 & 175 & 189 \\
8th graders & 279 & 258 & 265 \\
11th graders & 294 & 263 & 274 \\
\hline
\textbf{SCIENCE} & \textbf{WHITE} & \textbf{BLACK} & \textbf{LATINO} \\
\hline
9-year-olds & 240 & 201 & 201 \\
13-year-olds & 267 & 224 & 232 \\
17-year-olds & 306 & 257 & 261 \\
\hline
\textbf{GEOGRAPHY} & \textbf{WHITE} & \textbf{BLACK} & \textbf{LATINO} \\
\hline
4th graders & 218 & 168 & 183 \\
8th graders & 270 & 229 & 239 \\
12th graders & 291 & 258 & 268 \\
\hline
\end{tabular}
\caption{Average scores for white, black, and Latino students on the 1993-94 National Assessment of Academic Progress (NAEP) Tests.}
\end{table}

See \textit{Statistical Abstract}, supra note 256, at 178 tbl. 278.

As of 1988, black 17-year-old high school students were roughly half as likely as their white counterparts to read at an "adept" level (25.8\% vs. 46.3\%) and one-third as likely to read at an "advanced" level (1.9\% vs. 5.7\%). \textit{Jencks}, supra note 156, at 178 tbl. 5.9. Similarly, as of 1986, white 17-year-old high school students were roughly three times as likely to be capable of "moderately complex procedures and reasoning" in math (58.0\% vs. 21.7\%), and a remarkable 25 times as likely to be capable of "multi-step problem solving and algebra" (7.6\% vs. 0.3\%). See id. at 178 tbl. 5.10. (Given that the gap in scores between whites and blacks on the NAEP has actually increased since 1988, see \textit{Statistical Abstract}, supra note 256, at 178 tbl. 278, these disparities may be even greater today.) According to the College Entrance Examination Board, almost twice as many white students as African Americans ranked in the top 10\% of their class in 1995. See Adrian Wooldridge, \textit{A True Test}, \text{i}THE\text{NEW\ REPUBLIC}, June 15, 1998, at 18, 20. While 21\% of white high school students had "A" averages, only 8\% of black students did. See id. In 1997, the average score for white students on the verbal section of the SAT was 526, compared to 466 for Latino students and 434 for African American
Given the breadth and systemic nature of the causes of these racial disparities, the expectation that courts would interpret *Brown* as requiring formerly segregated school districts to produce substantial equality in educational achievement between white and minority students is fundamentally inconsistent with the limited institutional role of the judiciary in American government. Courts, lacking the flexibility, fact-finding abilities, or democratic legitimacy of the political branches, are ill-equipped to address the myriad social conditions that, in combination, deprive minority children of an equal chance at academic success.  

255. The Court’s recent decisions have made  

285. I do not mean here to leave the impression that all variance in academic achievement between minority students, particularly African Americans, and white students is attributable to differences in socioeconomic status, even broadly defined. Controlling for SES, white children still outperform black children academically according to a variety of traditional measures. See *Jencks*, *supra* note 156, at 138-40 (stating that controlling for parents’ years of education, occupation, income, and family structure, white children score substantially higher than African American children on standardized tests in vocabulary, reading comprehension, arithmetic reasoning, and computational skills); *id.* at 2 (noting that gap in test scores "shrinks only a little when black and white families have the same amount of schooling, the same income, and the same wealth"); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 978 (1997) ("Black middle-class children do worse in school than (seemingly) similarly situated white middle-class children — which means that middle class socioeconomic status is not as strong a predictor of educational success for blacks as it is for whites."). There are a variety of possible explanations for these disparities. Because of residen-
desegregation's remedial framework marginally more restrictive than was possible under a broader reading of *Green* and *Swann*, and perhaps these additional restrictions were unwarranted, even after accounting for courts' limited institutional capacities. But it is unrealistic to think that courts could have produced something dramatically different. A relatively limited vision of *Brown* was a predictable result of the institutional setting in which school desegregation has unfolded.

In short, Orfield's conclusion that the Court has "quietly reversed" *Brown* is hyperbole. It rests on an understanding of *Brown* that the Court never endorsed — indeed, an understanding that is unrealistic to think American courts could have ever seriously attempted to implement. The Court's recent decisions are better understood as a constriction of the remedial framework created by *Green* and *Swann*, limiting the breadth and duration of permissible desegregation remedies. As a result of *Milliken I* and the Rehnquist Court’s decisions, court-ordered desegregation plans are less ambitious and less extensive than they might have otherwise been. This may be unfortunate, but it is a less dramatic development than *Dismantling Desegregation* claims.

Likewise, Orfield's comparison of recent events to the collapse of Reconstruction is exaggerated. The Court's recent decisions have not encouraged, endorsed, or reinstated segregation. Instead, they likely reflect a pragmatic judgment that, after roughly thirty years of court-ordered desegregation, federal courts are no longer useful in remedying the effects of past de jure discrimination in public schools, and that school districts and their students would be better served if control over public education were in the hands of politically accountable local officials rather than federal courts. Perhaps these
conclusions are unjustified, and desegregation remedies should not be so restricted. But ending judicial supervision over formerly segregated school districts, which may aggravate de facto segregation, is quite different from Plessy's affirmation of Jim Crow. To equate the two is to ignore the fundamental distinction between government policies that are arguably indifferent to the goal of remediating systemic racial inequalities, and those that reflect a deliberate effort to subjugate a class of citizens on the basis of race. The Court's recent decisions might be described as callous, but unlike Plessy, they are not grounded in the ideology of white supremacy.

By constantly comparing the Court's apparent abandonment of court-enforced desegregation remedies to the collapse of Reconstruction, Orfield ahistorically implies that the periods share more than superficial similarities. To be sure, the Court's recent decisions reflect a desire to replace federal control with state and local sovereignty, even though racial injustice remains an entrenched reality of American society. To say that these decisions have constituted a second Redemption, however, greatly exaggerates their legal and political significance.

IV. Foundational Questions About the Continuation of Court-Enforced Desegregation

Aside from the impact of the Supreme Court's recent decisions, Dismantling Desegregation raises a more fundamental question about the future of school desegregation. Orfield's ultimate policy prescription is for district courts to continue and to expand desegregation remedies until educational opportunities for white and minority children are truly equal. In advocating such an indefinite extension of court-ordered desegregation, however, Orfield overlooks the ways in which such litigation might actually be detrimental to the cause of educational equality. Clearly, educational opportunities remain

288. Cf. Bickel, supra note 190, at 400-01 ("[T]here is a moral difference between what housing patterns do to schools, even where those patterns were encouraged by past government policies, and what a legally enforced system of rigid segregation does to schools."). But cf. Derrick A. Bell, Jr., California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster, 30 Loy. L.A. L. Rev. 1447, 1455 (1997) (contending that "the Court's racial rhetoric [closely] mirrors that of its late-nineteenth century predecessors" and that "Justice O'Connor's opinions in particular contain the 'see no evil' approach of the Court in the Civil Rights Cases").

289. A passage from Justice Harlan's dissent, historically hailed for its relative progressiveness, reveals the depth of the Plessy Court's commitment to racial superiority:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
substantially unequal in American public schools; race remains strongly correlated with academic achievement. And school desegregation, at least under certain circumstances, has helped mitigate these inequalities. But these empirical truths do not require the conclusion that investing scarce resources in court-enforced desegregation is a sound strategy for enhancing the educational opportunities of disadvantaged children.290

First, as Dismantling Desegregation aptly demonstrates, desegregation remedies are dramatically underinclusive as a means for mitigating racial inequalities in public education.291 More precisely, the objectives attainable through the continuation of such litigation are very limited compared to the enormity of the problem of current racial disparities in educational opportunity. This is partly due to the stage to which ongoing desegregation cases have advanced. Most school districts that remain under federal court supervision have been implementing desegregation remedies for more than twenty years and have substantially complied with their desegregation orders, even if they have not fully attained unitary status. Thus, the prospect for new findings of liability is largely nonexistent. The relevant question in most cases is whether desegregation remedies will remain in place for a few more years or instead will end immediately. Consequently, the benefits that might flow from the continuation of judicial supervision in these districts may be insubstantial relative to those that it has produced thus far.

More important, because the permissible goals of desegregation remedies are narrowly circumscribed by the doctrine created by the Supreme Court, they are capable of conferring only limited educational benefits on minority children292. Desegregation remedies are permissible only after a finding of a de jure violation, and they must be limited to remedying those present effects of discrimination that are proximately traceable to the constitutional violation. Moreover, in all but the rarest cases, desegregation plans can only embrace a single school district; thus, in most metropolitan areas, in which 90% of the nation’s minority students reside293 and in which well over half of the African American and Latino students attend a school that is majority nonwhite294, desegregation plans generally are limited to mixing students who are predominantly minority and largely poor. Finally, and most obviously, judicial remedies are incapable of addressing the root causes of racial inequalities in

291. See Orfield et al., supra note 2, at 345.
292. Indeed, this is precisely one of Orfield’s chief criticisms of the Supreme Court’s decisions.
293. See Orfield, supra note 181, at 826.
294. See id. at 841 tbl. 3.
educational opportunity, such as residential segregation, income and wealth disparities, or high rates of joblessness.

The limited utility in continuing court-ordered desegregation remedies would not, in itself, necessarily counsel their abandonment. If there were no costs in the continuation of this litigation, it would certainly produce some benefits and at least cause no harm. But investing resources in ongoing desegregation cases could have two important effects that actually undermine efforts to mitigate inequalities in educational opportunity. First, continuing to pursue desegregation through the courts may promote a distorted and counterproductive conception of the problem of racial inequality in public education. Second, litigation may divert attention and resources from initiatives pursued through the political process, which, in the long run, offers the only means for addressing the root causes of racial disadvantage in American schools. As a result, it is possible that the continued pursuit of desegregation through the courts could be counterproductive.

This is not to say that the continuation of court-enforced desegregation necessarily is mistaken. The political process may be unlikely to produce any serious efforts to address racial inequalities in education despite greater mobilization; court-ordered remedies might be providing significant educational benefits to minority students in a particular community; or the continuation of litigation might actually increase the likelihood of subsequent political action by providing leverage against the school district or the state government. In these circumstances, the continuation of court-ordered desegregation may remain a sensible means of expanding educational opportunities for minority children. Even so, proponents of judicially-mandated desegregation, such as Orfield, generally have failed to acknowledge that continuing to focus on the courts has some significant drawbacks, and that it is possible that these adverse consequences might actually exceed the benefits of court-ordered remedies.

A. The Perpetuation of the Compensatory Model

One potential adverse consequence from the continuation of court-enforced desegregation is that it may foster an unhelpful and distorted conception of racial inequality in public education. Due to courts' limited institutional capacities, they tend to create narrow conceptual models for addressing the issues that come before them, even when the issue, properly understood, is much broader than the model admits. These frameworks are better suited to courts' traditional role of resolving disputes between particular parties and meting out individualized justice. They place definable limits on the breadth of the relevant inquiry, and they translate the issues into concepts and terms familiar to courts.

School desegregation is an excellent example. While the social problems implicated by Brown are exceptionally broad, the Supreme Court has created a narrow doctrinal framework for desegregation cases largely modeled on the private law of torts. First, remedies are only available upon the finding of a discrete, actionable wrong by the school district—namely, intentional discrimination. Broader or more amorphous causes of racial inequalities cannot justify judicial intervention. Second, as in tort law, the remedies for de jure segregation are compensatory in nature, aiming to "make whole" the victims of discrimination. As the Court has stated frequently, the objective of every desegregation remedy must be to return the school district and its students to the position that they would have occupied absent the unlawful discrimination.

Clearly, the analogy to tort law is imperfect. Desegregation remedies have not provided compensation to the direct, individual victims of segregation, namely those students who attended school while the system was de jure segregated; rather, the victims who have been made whole are the school district's students as a group, whose composition of individuals is constantly changing. Nor have remedies for school segregation ever included money damages. Nonetheless, desegregation remedies are compensatory in the sense that their nominal objective, as in tort law, is to restore the status quo ante. Hence, the scope of the violation necessarily determines the scope of an appropriate remedy. Because the only permissible objective for desegregation remedies is to correct for the discrete de jure violation, they may only address those conditions proximately traceable to the constitutional wrong.

296. See James A. Henderson, Jr., Settlement Class Actions and the Limits of Adjudication, 80 CORNELL L. REV. 1014, 1017 (1995); powell, supra note 8, at 768; Cass R. Sunstein, Three Civil Rights Fallacies, 79 CAL. L. REV. 751, 762 (1991) (arguing that Court's approach has been "based on a narrow conception of compensation, linking public and private law").


298. See Missouri v. Jenkins, 515 U.S. 70, 87 (1995) (noting that "desegregation remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct") (quoting Milliken I, 418 U.S. 717, 746 (1974)); Milliken II, 433 U.S. 267, 280 (1977) (quoting same).

299. See Liebman, supra note 164, at 1501-17 (critiquing descriptive accuracy of corrective desegregation theory).

300. See id. at 1514.

301. See id. at 1508-09.

302. See Sunstein, supra note 296, at 763.

303. See Jenkins, 515 U.S. at 88 ("[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971))); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 478 (1979) (Stewart, J., concurring in part and dissenting in part) (stating that "the scope of the remedy is tied to the scope of the violation").

304. See Missouri v. Jenkins, 515 U.S. 70, 117 (1995) (Thomas, J., concurring) (stating that "[i]n order for a 'vestige' to supply the ground for an exercise of remedial authority, it must
The application of this model to school desegregation presents two important problems. First, it has caused courts and litigants to engage in a discourse of nonsense. Because the private law model is grounded in the concepts of compensation and correction, an issue in every desegregation case, and at virtually every stage of the litigation, is whether existing conditions causally are related to the school district's constitutional violation. Courts must assess whether the existing racial compositions of the various facets of a school district's operations, such as student assignments, faculty and staff assignments, transportation, and extracurricular activities, differ from what they would have been had the district never engaged in discrimination. But this question, particularly thirty years after the de jure violation, is unanswerable. Given the intervening demographic changes and myriad potential influences, it is impossible to ascertain what a school district would look like today had there never been de jure segregation. The inquiry itself is incoherent.

The problem is more acute in Milliken II cases, such as Jenkins, in which the identifiable injury from the de jure violation is a systemwide reduction in student achievement. The appropriate remedy in such cases is compensatory educational programs designed to enhance educational achievement in the district. According to the corrective model, these programs may only aim to eliminate the reduction in achievement attributable to the constitutional violation. As the Court held in Jenkins, it is impermissible to determine

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305. See Gewirtz, supra note 29, at 783-84.

306. See Freeman, 503 U.S. at 503 (Scalia, J., concurring) ("Racially imbalanced schools are... the product of a blend of public and private actions, and any assessment that they would not be segregated, or would not be as segregated, in the absence of a particular one of those factors is guesswork."); SUNSTEIN, supra note 295, at 331; see also Lisa E. Chang, Remedial Purpose and Affirmative Action: False Limits and Real Harms, 16 YALE L. & POL'Y REV. 59, 84 (1997) (declaring that return to status quo ante is impossible goal).

307. As Sunstein has written, an inquiry into the amount of racial integration that would have occurred in a world unaffected by racial segregation is likely to be empirically unanchored, indeed, chimerical. Social scientists, let alone judges, are simply not equipped to answer that question—not because they lack the appropriate tools, but because the question itself is of uncertain epistemological status.

Sunstein, supra note 296, at 763-64; cf. Liebman, supra note 164, at 1518-19 (stating that corrective model fails to respond adequately to problems related to school segregation "for the same reasons that private-law compensatory tort approaches fail to respond satisfactorily to mass toxic disasters," as "both situations cause the correctly critical prerequisites of an identifiable plaintiff and an identifiable defendant to elude proof").

308. See Jenkins, 515 U.S. at 101 ("The basic task of the District Court is to decide whether the reduction in achievement by minority students attributable to prior de jure segregation has
whether these programs have accomplished their objectives by reference to external benchmarks, such as national norms on standardized test scores.\textsuperscript{309} Rather, the district court somehow must determine whether present levels of student achievement remain below what they would have been had the school district never been segregated. Not only is such an inquiry beyond the competence of district courts, but it borders on the absurd.

The second and more practically significant problem with the compensatory model is that it may perpetuate a distorted and counterproductive conception of the broader problem that proponents of school desegregation seek to address. By focusing attention on the discrete act of de jure segregation and its present effects—and discarding all other issues as immaterial—the model defines the issue of educational inequality in dramatically underinclusive terms. The goal of government intervention in this area should be to alleviate the systemic racial disadvantages currently present in American education.\textsuperscript{310} That is, the objective should be to move towards a society in which race is not strongly correlated with academic achievement. Whether all traces of past de jure segregation have been eradicated, assuming we could ever know whether such traces continue to exist, is immaterial to the achievement of racial equality or racial justice, as those concepts are best understood.\textsuperscript{311} By focusing exclusively on intentional discrimination and its proximate effects, court-ordered desegregation may reinforce the conception common in the public discourse about race that victims can be "made whole" through specific remedies designed to compensate for discrete acts of past discrimination. It may promote the distorted notion that our collective obligation is to provide disadvantaged minority students with compensation for past discrimination, rather than to address the causes of systemic disadvantage.\textsuperscript{312}

Perpetuating this conception of the problem may, in turn, create the perception that once desegregation remedies have ended, the problem, how-

\textsuperscript{309} Id. at 100-02.

\textsuperscript{310} Analogously, and more broadly, Sunstein has argued that "[t]he Fourteenth Amendment is best conceived of as opposing" the caste-like features of American society, "a system that turned the highly visible and morally irrelevant characteristic of race into a systemic basis for second-class citizenship." Cass R. Sunstein, Public Deliberation, Affirmative Action, and the Supreme Court, 84 CAL. L. REV. 1179, 1190 (1996). See generally Sunstein, supra note 19.

\textsuperscript{311} See Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 968 (1993) ("For black people . . . the fact of racial oppression exists largely independent of the motives or intentions of its perpetrators."); Sunstein, supra note 296, at 771 (suggesting that it should not be "decisive whether a present disadvantage can be tightly connected to an intentionally discriminatory act by a public 'tortfeasor'" in determining whether collective action to address disadvantage is appropriate).

\textsuperscript{312} See generally Sunstein, supra note 19.
ever defined, has been solved. A declaration that a school system has achieved unitary status places the court's imprimatur on the conclusion that the school district is now free from the effects of past discrimination. Such an edict may carry the unfortunate implication that any remaining inequalities are not the appropriate target of governmental action but, instead, the intractable product of private choices beyond social control, or the fault of children, parents, educators, and administrators at the racially isolated schools. As Orfield acknowledges,

[w]hen discrimination is officially declared to have fully been rectified and the policies for resegregation are accepted by courts and community leaders as educationally sound, the blame for the pervasive inequalities that remain tends to be shifted to minority families and communities, the teachers, and the educational leaders. When discrimination is declared cured, the system can no longer be blamed.

Thus, not only might litigation distort the societal conception of the problem that desegregation seeks to address, it might also create false conceptions of what has been accomplished and what forces are responsible for remaining disparities. It may legitimate the racial inequalities that remain once litigation has ended and deflate claims that these inequalities raise constitutional concerns (even if those concerns are better addressed through political channels than the courts). The replacement of court-ordered remedies with programs adopted through the political process, whose existence would not depend on a court's determination of unitary status, would ameliorate this concern.

In short, extricating school desegregation from the courts could have an important beneficial effect on the public's conception of the problem of racial inequality in America's schools. Pursuing other avenues for change may shift

313. See Klarman, supra note 123, at 948 (noting that "when the Court purports to solve a constitutional problem, but the underlying grievance remains unredressed, it is plausible that the legitimacy of that grievance is diminished"); Louis Michael Seidman, Brown and Miranda, 80 CAL. L. REV. 673, 717 (1992) (arguing that, by effectively defining equality in terms of absence of legal separateness, Brown "served to . . . legitimate current arrangements," even though "many blacks remained poor and disempowered"); cf. Bell, supra note 288, at 1462 (contending that "victory in a social reform case leads to a passivity that undermines the action that gives life to a cause and meaning to a belief").

314. ORFIELD ET AL., supra note 2, at 332; see Douglas, Justifying Racial Reform, supra note 2, at 1183 (noting that when "notions of harm from the legacy of discrimination are jettisoned, African Americans are increasingly vulnerable to claims that poor social, educational, and economic outcomes are a function of their own moral failure and pathology").

315. It is important to bear in mind that only a subset of all social and legal practices that plausibly violate the Equal Protection Clause are susceptible to effective judicial remedies. Thus, courts may decline to create broad remedial frameworks for certain inequalities not because those inequalities do not raise legitimate constitutional concerns but because the judiciary would be an inappropriate institution for addressing the problem.
attention from the narrow objective of compensating the victims of past de jure segregation to the more pertinent goal of eliminating systemic racial disadvantage in public education.

**B. The Comparative Advantages of the Political Mobilization**

Another potential cost in continuing court-ordered desegregation is that it may divert attention and resources from political mobilization around the issue of racial inequality in public education.\(^{316}\) Granted, the prospects for serious political efforts to redress systemic racial disadvantage in American education in the near future appear less than outstanding. Several high-profile political initiatives have been distinctly hostile to redistributive efforts, particularly where they appear to bestow disproportionate benefits on racial minorities. The adoption by voters in California\(^ {317}\) and Washington\(^ {318}\) of ballot initiatives that prohibit affirmative action by the state or its political subdivisions and the recent federal welfare reform\(^ {319}\) are prominent examples. Congress has even rejected the Clinton Administration’s rather tame proposals to assist school districts in funding capital improvements to dilapidated public schools.\(^ {320}\)

Nonetheless, there are reasons to think that, in the long run, initiatives pursued through the political process might produce more meaningful gains for disadvantaged students than will ongoing desegregation litigation.\(^ {321}\) First, recent scholarship has demonstrated that courts may be largely ineffective as engines of social change. Gerald Rosenberg’s thoughtful study has called into question the utility of school desegregation litigation in particular.\(^ {322}\) According to Rosenberg’s accumulation of evidence, *Brown* had little or nothing to do with the actual desegregation of American public schools. Little desegre-

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317. CAL. CONST. art. I, § 31(a) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").


321. *See* Brett McDonnell, Comment, *Dynamic Statutory Interpretations and Sluggish Social Movements*, 85 CAL. L. REV. 919, 920 (1997) (using game theoretic models to contend that, in area of civil rights, "activists concentrating on short-run gains in court have lost broader social support in the long run").

Desegregation occurred in the ten years following *Brown*; as of 1964, more than 99.5% of African American students in the South, excluding Texas and Tennessee, still attended all-black schools. Desegregation did not begin in earnest until the 1965-66 school year, after Congress had enacted the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965 (ESEA). Title VI of the Civil Rights Act forbade racial discrimination by entities receiving federal funds, and the ESEA made billions of dollars available to public school districts. Using Title VI, the Department of Health, Education, and Welfare made the disbursement of ESEA funds contingent on school districts' abandonment of segregation. Gradually, this financial incentive, coupled with the Justice Department's active involvement in desegregation litigation under a separate provision of the Civil Rights Act, caused many school systems to abandon their de jure policies and desegregate their schools. By the 1972-73 school year, 91.3% of black students in the South were attending integrated schools.

These legislative and executive actions were in direct response to the political pressure created by the modern civil rights movement, which Rosenberg plausibly contends was largely unrelated to, and unaffected by, *Brown*. Other scholars, most notably Michael Klarman, also have questioned the impact of *Brown* on the desegregation of America's schools and

323. See id. at 50.
324. See id. at 42-54.
327. See Joondeph, supra note 8, at 605.
329. See Joondeph, supra note 8, at 605-06.
330. See ROSENBERG, supra note 322, at 50.
331. See id. at 107-69.
332. See Klarman, supra note 328, at 99-105; Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433, 440-50 (1994) (book review); cf. Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REv. 677, 744 (1997) (contending that "[t]he northern desegregation experience . . . suggests that the best strategy for securing racial reform is to utilize a variety of tactics — including but not limited to traditional litigation campaigns — to build political and cultural support for the reformist agenda" and that "litigation and even legislative strategies are not likely to translate into meaningful change unless they are reinforced by broader cultural support"). Klarman agrees with Rosenberg that *Brown* did not directly influence the civil rights movement or civil rights legislation, but contends that it did so indirectly by prompting a conservative shift in racial politics in the South. See Klarman, supra note 328, at 97-118. This shift led to dramatic confrontations between southern segregationists and civil rights demonstrators in places such as Little Rock, Ole Miss, Birmingham, and Selma.
more generally have challenged the assumption that courts can act in a genuinely countermajoritarian fashion to protect the interests of minority groups.\footnote{333}

The point here is not that the judiciary's involvement in school desegregation has been ineffectual. As other commentators have noted, Rosenberg's analysis fails to capture the indirect and intangible ways in which \textit{Brown} altered the landscape and discourse surrounding civil rights.\footnote{334} Even if the elected branches ultimately were responsible for desegregating America's schools, \textit{Brown}, by placing the weight of the Fourteenth Amendment behind the mandate to desegregate, altered the backdrop against which subsequent political events unfolded.\footnote{335} Thus, the contention that \textit{Brown} had no impact on school desegregation seems implausible. Moreover, courts, even if not strongly countermajoritarian, may nonetheless instigate changes that, at the margin, the political branches otherwise would have foregone.\footnote{336} Nonetheless,\footnote{333}

\textit{See id.} at 118-29. The broadcast of these confrontations on national television profoundly affected national public opinion about civil rights, which, in combination with other influences, led to the landmark civil rights legislation of the 1960s. \textit{See id.} at 141-49. Klarman asserts that the elimination of racial segregation produced by this legislation was, from a long-term perspective, inevitable, but that it occurred in the mid-1960s because of the southern backlash against \textit{Brown}. \textit{See id.} at 10-11.

\footnote{333}{\textit{See Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 VA. L. REV. 1, 6 (1996). Klarman contends that the Supreme Court has intervened to protect the interests of minorities only to impose the national consensus on an issue on a region that remains an outlier or, more rarely, to take sides on a genuinely divisive issue where popular opinion is roughly split, such as in \textit{Roe v. Wade}. \textit{See id.} at 16-17. Klarman does not assert that the Court has had no countermajoritarian function, but that its "capacity to protect minority rights is more limited than most justices or scholars allow." \textit{Id.} at 6.}}


\footnote{335}{\textit{See, e.g., Taylor Branch, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 124 (1988) (writing that \textit{Brown} "had brought fresh excitement to the NAACP" in Alabama just before Montgomery Bus Boycott); DAYBREAK OF FREEDOM: THE MONTGOMERY BUS BOYCOTT 57 (Stuart Burns ed., 1997) (noting that, four days after Court decided \textit{Brown}, "an English professor at Alabama State College in Montgomery wrote a letter to the mayor urging him to accept minor reforms to improve the treatment of black passengers on the city's segregated buses"); David J. Garrow, \textit{Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education, 80 VA. L. REV. 151 (1994) (contending that significant historical evidence reveals \textit{Brown}'s impact on civil rights movement and Montgomery Bus Boycott in particular).}}

\footnote{336}{\textit{See Michael Heise, Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine, 33 LAND & WATER}}
Rosenberg and Klarman present historically-grounded reasons to doubt the capacity of courts, at least without the active support of the elected branches, to produce substantial change in this area. 337

Second, efforts to improve educational opportunities for disadvantaged students through the political process enjoy the advantage of not being constrained by the narrow strictures of the Supreme Court’s desegregation doctrine. This advantage should be most apparent to those, such as Orfield, who are convinced that school desegregation remains a promising strategy for mitigating inequalities in educational opportunity. Desegregation plans adopted legislatively could embrace any school district, not just those found liable of de jure segregation; they could encompass entire metropolitan areas, cultivating socioeconomic integration; they could place a high priority on desegregating kindergarten and elementary school students, in which desegregation is most likely to produce meaningful academic gains; they could accommodate and account for the integration of students from a wide variety of racial and ethnic backgrounds, rather than only those groups for whom there is proof of past discrimination; and they could operate indefinitely, not just until the vestiges of de jure segregation have been eliminated. More generally, in approaching educational reform, the political branches could experiment, devising more creative and flexible programs informed by their greater fact-finding capacities, and they would not be moored to the limited objective of achieving greater racial balance. The school choice initiatives adopted in Cleveland and Milwaukee, which have permitted low-income inner-city students to enroll in private schools or surrounding public school districts, 338 and the urban residential academies that have started, or will soon start, in Trenton, Washington, D.C., Boston, and throughout Minnesota, 339 are two examples.

An important caveat is in order. According to the Supreme Court’s recent affirmative action and redistricting decisions, any educational reforms that explicitly classify students on the basis of race, or for which race is the predominant factor in defining the relevant class, are in substantial jeopardy of violating the Equal Protection Clause. In decisions such as Richmond v. J.A. Croson


337. See Bell, supra note 288, at 1462 ("In my experience, we who advocate social reform grant litigation a spotlight larger than anything judicial decisions can achieve — particularly in the long term.").


Co., Adarand Constructors, Inc. v. Pena, and Shaw v. Hunt, the Court has reiterated that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." Further, at least with respect to government contracts, the only state interest that is sufficiently compelling to justify explicit racial classifications is to remedy the present effects of past discrimination, and governmental actors "must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." Justice Powell's opinion in Regents of the University of California v. Bakke, which represented his view alone but announced the judgment for the Court, stated that racial diversity was a compelling state interest that justified using race as a "plus factor" in the student admissions process. But it is unclear whether this aspect of Bakke remains good law. The Fifth Circuit has rejected Bakke's diversity rationale, concluding that the Court's decisions in Croson and Adarand have foreclosed the possibility that diversity can be a compelling state interest. And the First Circuit recently struck down the Boston School Committee's use of race in selecting students for the city's three public examination schools (though the court reserved the question of whether diversity could ever be a compelling interest in the context of education). Thus, an explicitly race-based desegregation plan might be unconstitutional unless it is based on a specific finding that existing racial imbalances were attributable to past discrimination within that community, and it is narrowly tailored to remediating those present effects.

345. Id. at 504.
348. Hopwood v. Texas, 78 F.3d 932, 944-45 (5th Cir.) (striking down University of Texas's consideration of race in admitting students to law school as violation of Equal Protection Clause), cert. denied, 116 S. Ct. 2581 (1996).
350. But cf. Brown, supra note 197, at 1032-40 (arguing that mandatory desegregation plans adopted in absence of federal constitutional violation should be upheld as narrowly tailored to
Nonetheless, this "colorblind" interpretation of the Equal Protection Clause should not pose a significant barrier to education reforms intended to mitigate racial inequalities. Given the high degree of existing residential segregation, both in terms of race and socioeconomic status, programs that classify students on the basis of where they live, such as by neighborhood or school district, would successfully identify students who are racially isolated and socioeconomically disadvantaged without any explicit racial classification. For instance, a program that permitted students in the Kansas City, Missouri, school district to enroll in any one of the surrounding suburban districts would place many disadvantaged minority students in relatively affluent, predominantly white schools. So long as race is not the "predominant, overriding factor" in defining the class of students eligible to participate, the program would be subject only to rationality review and clearly would pass constitutional muster.\(^3\)

A more fundamental advantage of political mobilization over litigation is that the political process provides the only mechanism for directly addressing the root causes of racial inequalities in public education. Again, the reasons that race remains strongly correlated with academic achievement in American society are structural and systemic. They are interconnected with disparities in wealth and income, residential segregation on the basis of race and class, access to health care, susceptibility to crime and violence, and the prevalence of joblessness, drug dependency, teenage pregnancy, and single-parent families in predominantly minority communities. They are a product of the broader racial inequalities in American society — inequalities that courts, because of their limited institutional competence, are incapable of seriously addressing on their own. Although courts might play some role in instigating social change, only the political branches, with their broader powers, their flexibility and fact-finding capacities, and their democratic legitimacy, can tackle these problems directly.\(^3\)

compelling interest of enabling students to make informed choices about lives that they will lead and values of racial and ethnic toleration). For a thorough analysis of the Court's recent affirmative action decisions concluding that Bakke's diversity rationale remains good law, see generally Akhil Reed Amar & Neal Kumar Katyal, Bakke's Fate, 43 UCLA L. REV. 1745 (1996).

351. Cf. Miller v. Johnson, 515 U.S. 900, 910 (1995) (holding that state's use of race as "predominant, overriding factor" in drawing boundaries of voting district is subject to strict scrutiny); McCleskey v. Kemp, 481 U.S. 279, 298 (1987). The McCleskey court stated: "[D]iscriminatory purpose" ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. Id. (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (footnote and citation omitted)).

352. See Sunstein, supra note 19, at 2439-40; Sunstein, supra note 296, at 768-69, 771-72;
Finally, initiatives pursued through the political process can produce collateral benefits unavailable through litigation.\(^{353}\) As Cass Sunstein has noted, political action can cultivate "a kind of citizen mobilization that is a public and a private good, and can inculcate political commitments, broader understanding, feelings of citizenship, and dedication to the community."\(^{354}\) Participation in the political process as mobilized citizens can enhance individuals' sense of power and responsibility in shaping collective priorities. It can educate citizens, deepen personal commitments to the achievement of substantive objectives, and produce longer-lasting political support for specific policy goals.\(^{355}\)

The modern civil rights movement is a poignant example. Not only did the movement lead to tangible legislative action, including the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act, but it also cultivated a broad commitment to active participation in the political process. This mobilization of citizens shaped American politics for several years, spilling over into the antiwar, environmental, and women's rights movements. Notably, the leaders of the civil rights movement focused consciously on the political process and not the courts.\(^{356}\) For instance, Martin Luther King wrote that when litigation had been "the sole form of activity [in the movement], the ordinary Negro was involved as a passive spectator. His interests were stirred,
but his energies were unemployed." King believed that "a deeper involvement as a group in political life will bring [African Americans] more independence. Consciously and creatively developed, political power may well, in the days to come, be the most effective new tool of the Negro's liberation." To King, it was imperative that African Americans become intensive political activists. We must be guided in this direction because we need political strength more desperately than any other group in American society. Most of us are too poor to have adequate economic power, and many of us are too rejected by the culture to be part of any tradition of power. Necessity will draw us toward the power inherent in the creative use of politics.

The point is not that *Brown* was either insignificant or unsuccessful. Indeed, much evidence indicates that court-ordered desegregation has contributed to the substantial reduction in achievement gaps between white and minority children over the past forty years. But there are reasons to reexamine strategies that rely heavily on courts to produce meaningful social change. Although Orfield concedes that "[c]ourts are not ideal institutions for restructuring racial opportunity in schools," this only admits that, in an ideal world, the political branches would be preferable to the judiciary for implementing reform. This concession fails to acknowledge that the continuation of desegregation litigation could produce significant adverse consequences that, in some cases, might actually aggravate the problem of racial inequality in public schools. In short, when all systemic effects are considered, the wisdom of investing resources in the continuation of court-ordered desegregation remedies is an extremely complicated, and largely unanswered, empirical question.

**Conclusion**

Frustration with the apparent end of court-enforced desegregation is understandable. Despite forty-four years under *Brown*, significant disparities in educational opportunity between white and minority students persist. We

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360. See supra notes 156-74 and accompanying text.

361. ORFIELD ET AL., supra note 2, at 349.

362. I am indebted to Jim Ryan for clarifying this distinction.
know a great deal about a child's likelihood of academic success simply from knowing his race. The average test scores for African American and Latino students remain well below those for white students at every age and in every subject area. Blacks and Latinos are more likely than whites to drop out of high school, and they are substantially less likely to attend college, graduate from college, or attend graduate school.

The best understanding of racial inequality in American education is as a problem of systemic disadvantage. Disparities in wealth, income, and parents' educational backgrounds, residential segregation on the basis of race and class, inadequate access to health care, and disproportionate rates of crime, violence, and drug use in predominantly minority neighborhoods, as well as the persistence and historical impact of racism, combine to deprive minority children of an equal chance at academic success. Thus, eliminating the vestiges of official discrimination committed by formerly segregated school districts—the avowed goal of court-ordered desegregation remedies—is largely irrelevant. Indeed, the notions of compensation and correction, although supplying additional moral force to the case for racially redistributive measures, arguably are immaterial to the project of creating a society in which race is not correlated with academic achievement. The objective of governmental intervention should be to address the causes of systemic disadvantage, whatever their relation to past discrimination.

For these reasons, the continuation of court-ordered desegregation may not be a constructive means to expand educational opportunities for minority children. The doctrinal constraints on permissible desegregation remedies, as well as the late stage to which most desegregation cases have advanced, mean that the educational benefits available through judicial remedies are dramatically underinclusive relative to the breadth of the problem. More important, the continuation of litigation could have unfortunate, unintended consequences. First, the judicial framework for implementing desegregation remedies may foster an unduly narrow understanding of the problem of racial disparities in education, perpetuating the fundamental misconception that the issue is one of compensation for discrete wrongs in the past. Second, litigation may divert attention and resources from efforts to initiate change through the political process, which offers several advantages over courts as a mechanism for addressing the broad and systemic causes of educational inequalities.

While the present political climate may seem inhospitable to initiatives addressing these disparities, there are some grounds for optimism. In the last three years, California has invested billions of dollars to reduce class sizes to twenty students or fewer in kindergarten through third grade, and it has

363. See Funding for Class-Size Reduction Program, L.A. TIMES, Feb. 6, 1998, at B5. According to the California Department of Education, 90% of first and second grade students
undertaken significant "whole school change" reforms at high poverty schools that have already raised student achievement. In 1997, Illinois reformed its school financing scheme to increase its foundational aid to public school districts, providing an additional $485 million to the state's poorest systems. New York recently increased its state funding for primary education by $950 million, much of which is earmarked for programs that specifically benefit poor systems, such as universal prekindergarten classes and aid for teachers' salaries in poor urban districts. Maryland enacted legislation in 1997 to provide $254 million in additional funding for troubled inner-city schools in Baltimore. And several states recently have adopted open enrollment measures that allow students to attend public schools outside their home districts.

Perhaps the most salutary development is Missouri's adoption of a broad-ranging legislative plan that, contingent upon a settlement of the St. Louis case, would replace court-ordered desegregation remedies in Kansas City and St. Louis. The legislative program, enacted in May 1998, would offer and 70% of kindergarten and third grade students attend classes with 20 or fewer students. See id.

364. See Rene Sanchez, Cleaning House Helps Troubled Calif. Schools, WASH. POST, June 6, 1998, at A1 (describing reforms in San Francisco Unified School District, in which test scores at schools with most disadvantaged students have risen steadily over past five years). But cf: Kelly C. Rozmus, Education Reform and Education Quality: Is Reconstitution the Answer?, 1998 BYU EDUC. & L.J. 103, 138-40 (contending that results from San Francisco’s reforms have been mixed).


369. See Will Sentell, School Measure OK'd, Ending Divisive Campaign; But St. Louis Must Settle Lawsuit Before KC Gets $40 Million, KAN. CITY STAR, May 16, 1998, at A12; Virginia Young, Legislature OKs Bill that Could Close Desegregation Case, ST. LOUIS POST-DISPATCH, May 16, 1998, at 14. After the Supreme Court's decision in Jenkins, the KCMSD and the State of Missouri reached an agreement to end judicial remedies in Kansas City by 1999, and the Eighth Circuit affirmed the district court's approval of the settlement. See Jenkins v. Missouri, 122 F.3d 588, 600-05 (8th Cir. 1997); Lynn Horsley & Will Sentell, KC Board, State Agree to End Aid: Desegregation Payments Would Stop in 1999 If Judge Approves, KAN.
several benefits unavailable through the continuation of litigation. For instance, it would expand the resources of several predominantly minority, predominantly poor school districts that were not parties to the litigation but which suffer from problems similar to those in Kansas City and St. Louis.\textsuperscript{370} It would continue state funding for a voluntary interdistrict transfer plan in metropolitan St. Louis, which permits approximately 13,000 inner city students to enroll in more affluent suburban schools,\textsuperscript{371} and it would permanently adjust the state education funding formula to provide additional resources to districts that enroll higher proportions of students living in poverty.\textsuperscript{372} Most important, the legislation would effectively redefine the objective of these educational programs. Because the continuation of these programs would not be contingent on the persistence of vestiges of the de jure system, and the programs would embrace school districts not found liable for segregation, the purpose of the programs would no longer be compensatory. Rather, they are consciously forward-looking, seeking to address the problems that face the state’s disadvantaged students regardless of their cause. Although the legislation represents only a small step towards racial equality in Missouri’s schools, its several benefits could make it a model for the settlement of ongoing desegregation cases throughout the country. It represents a constructive use of the leverage of ongoing litigation to forge a more lasting political solution.

This is not to say that the continuation of court-ordered desegregation will necessarily be counterproductive or that efforts to produce change through the political process will necessarily be forthcoming or successful. Whether the continuation of desegregation litigation will improve educational opportunities for minority children in any particular community is an extremely complicated empirical question. Rather, the important lesson is that the shortcomings of court-ordered desegregation remedies present a basis for at least questioning the wisdom of court-centered strategies at this stage of the desegregation saga. More broadly, we should be mindful that the major redistributive initiatives of this century—the New Deal and the civil rights movement—almost exclusively were the product of political mobilization and deliberation. It seems likely that the same will be true of any truly effective efforts in the future to mitigate racial inequalities in America’s public schools.

\textsc{City Star}, May 23, 1996, at Al. The parties to the St. Louis desegregation litigation have been in negotiations to reach a settlement since 1996. See Tim Bryant, \textit{William Danforth Gets Key Desegregation Role: Ex-WU Chancellor to Seek Agreement}, \textsc{St. Louis Post-Dispatch}, Apr. 24, 1996, at B1.

\textsuperscript{370} See Young, \textit{supra} note 369, at 14.

\textsuperscript{371} See id.

\textsuperscript{372} See id.