THE SEGREGATION AND RESEGREGATION OF AMERICAN PUBLIC EDUCATION: THE COURTS' ROLE

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Schools in the South and throughout the country are resegregating. Why is this occurring, and why were desegregation efforts limited in their success? This Essay argues that the Supreme Court is largely to blame. In a series of decisions in the 1970s, the Court ensured separate and unequal schools by preventing interdistrict remedies, refusing to find that inequities in school funding are unconstitutional, and making it difficult to prove a constitutional violation in northern de facto segregated school systems. In a series of decisions in the 1990s, the Court ordered an end to effective desegregation orders. Lower federal courts have followed these rulings and, in many areas, have ended remedies despite the likelihood that resegregation will follow. As Brown v. Board of Education *nears its fiftieth anniversary, American public schools are increasingly separate and unequal. The institution that provided the impetus for desegregation and offered so much hope—the courts—is responsible for this failure.*

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INTRODUCTION

A half century of efforts to end school desegregation have largely failed. Gary Orfield's powerful recent study, *Schools More Separate: Consequences of a Decade of Resegregation*,[1] carefully documents that, during the 1990s, America's public schools have become substantially more segregated. In the South, for example, he shows that "[f]rom 1988 to 1998, most of the progress of the previous two decades in increasing integration in the region was lost. The South is still more integrated than it was before the civil rights revolution, but it is moving backward at an accelerating rate."[2]

The statistics presented in his study are stark. For example, the percentage of African-American students attending majority white schools has steadily decreased since 1986. In 1954, at the time of *Brown v. Board of Education*,[3] only 0.001% of African-American students in the South attended majority white schools.[4] In 1964, a decade after *Brown*, this number increased to just 2.3%.[5] From 1964 to 1988, there was significant progress: 13.9% in 1967; 23.4% in 1968; 37.6% in 1976; 42.9% in 1986; and 43.5% in 1988.[6] But since 1988, the percentage of African-American students attending majority white schools has declined. By 1991, the percentage of African-American students attending majority white schools in the South had decreased to 39.2% and over the course of the 1990s this number dropped: 36.6% in 1994; 34.7% in 1996; and 32.7% in 1998.[7]

Professor Orfield's study shows that, nationally, the percentage of African-American students attending majority African-American schools and schools where over 90% of the students are African-American also has increased in the last fifteen years. In 1986, 62.9% of African-American students attended schools that were 50% to 100% comprised of minority students; by 1998–1999, this percentage had increased to 70.2%.[8] The same pattern exists in North Carolina. Between 1993 and 2000, the number of African-American students attending schools with minority enrollments of 80% or more

1. Gary Orfield, The Civil Rights Project, Harvard University, *Schools More Separate: Consequences of a Decade of Resegregation* (2001), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (on file with the North Carolina Law Review).

2. *Id.* at 2.

3. 347 U.S. 483 (1954).

4. Orfield, *supra* note 1, at 29.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 31.

doubled.[9] Furthermore, in the Charlotte-Mecklenburg School District, fewer than 60% of the schools meet the standard definition of "diverse"; this number is down from 85% in the 1980s.[10]

Quite significantly, Professor Orfield's study shows that the same pattern of resegregation is true for Latino students.[11] The historic focus for desegregation efforts has been to integrate African-American and white students. The burgeoning Latino population requires that desegregation focus on this racial minority too.[12] The percentage of Latino students attending schools where the majority of students are of minority races, or almost exclusively of minority races, increased steadily over the 1990s.[13] Professor Orfield notes that "[Latinos] have been more segregated than blacks now for a number of years, not only by race and ethnicity but also by poverty."[14]

The simple and tragic reality is that American schools are separate and unequal. As Professor Orfield documents, to a very large degree, education in the United States is racially segregated.[15] By any measure, predominately minority schools are not equal in their resources or their quality. Wealthy suburban school districts are almost exclusively white; poor inner city schools are often exclusively comprised of African-American and Hispanic students. The year 2004 will be the fiftieth anniversary of *Brown v. Board of Education*, and American schools will mark that occasion with increasing racial segregation and gross inequality.

There are many causes for the failure of school desegregation. None of the recent Presidents—neither Reagan, nor either Bush, nor

9. Susan Ebbs, *Separate and Unequal, Again*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 18, 2001, at 1A.

10. *Id.*

11. *See* Orfield, *supra* note 1, at 31.

12. The focus of desegregation in the South has traditionally been on whites and African Americans because they were the concern of the litigation of the civil rights movement. At the time, the states did not have a significant Latino population. Now, however, the growth in the Latino population requires that this group be considered as well in evaluating desegregation efforts. *See* Elizabeth M. Grieco & Rachel C. Cassidy, U.S. CENSUS BUREAU, "Overview of Race and Hispanic Origin," Census 2000 Brief, at 3 tbl.1, March 2001, http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf (on file with the North Carolina Law Review) (illustrating that Latinos are the largest minority group in the United States); *see also* Orfield, *supra* note 1, at 17 tbl.1 (indicating that from 1968 to 1998, the Latino population enrolled in public schools has grown from 2 million to 6.9 million—a 245% growth in thirty years).

13. *See* Orfield, *supra* note 1, at 31.

14. *Id.* at 2.

15. *See id.* at 48. Professor Orfield explains that segregation by race relates to segregation by poverty and to many forms of educational inequality for African-American and Latino students. *Id.*

even Clinton—have done anything to advance desegregation. None have used the powerful resources of the federal government, including the dependence of every school district on federal funds, to further desegregation. "Benign neglect" would be a charitable way of describing the attitude of recent Presidents to the problem of segregated and unequal education; the issue has been neglected, but there has been nothing benign about this neglect. A serious social problem that affects millions of children has simply been ignored.

Nor has the federal government, or for that matter have state or local governments, acted to solve the problem of housing segregation. In a country deeply committed to the ideal of the neighborhood school, residential segregation often produces school segregation. But decades have passed since the enactment of the last law to deal with housing discrimination,[16] and efforts to enhance residential integration seem to have vanished.

There is not a simple explanation for the alarming trend toward resegregation. In this Essay, I argue that the courts must share the blame; courts could have done much more to bring about desegregation, and instead, the judiciary has created substantial obstacles to remedying the legacy of racial segregation in schools.[17] I do not want to minimize the failure of political will, but every branch and level of government is responsible for the failure to desegregate American public education. I contend that Supreme Court decisions over the last thirty years have substantially contributed to the resegregation that Professor Orfield and others document.[18]

Desegregation will not occur without judicial action; desegregation lacks sufficient national and local political support for elected officials to remedy the problem. Specifically, African Americans and Latinos lack adequate political power to achieve desegregation through the political process. This relative political powerlessness was true when *Brown* was decided and remains true today. The courts are indispensable to effective desegregation, and over the last thirty years the courts, especially the Supreme Court, have failed. As discussed below, court orders have been successful in many areas of the country to bring about desegregation.[19] Courts could have done more, but even merely continuing rather than ending

16. The last national housing law addressing discrimination, The Fair Housing Act, was enacted in 1968. Fair Housing Act of 1968, Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619, 3631 (2000)).

17. *See infra* Part III.

18. *See infra* Parts I, II.

19. *See infra* Parts I, II.

existing desegregation orders (as the Supreme Court has mandated)[20] would have limited resegregation of southern schools.

This Essay focuses on two major sets of Supreme Court decisions that have contributed to resegregation. Part I focuses on the Supreme Court's decisions of the 1970s, especially those decisions rejecting interdistrict solutions to segregation and inequality of funding.[21] Part II examines the Supreme Court's decisions of the 1990s, which ordered an end to desegregation efforts.[22] These cases, and lower court decisions following them, have substantially contributed to resegregation of public schools. Part III looks at why this judicial failure has occurred. Some commentators, such as Professor Gerald Rosenberg, argue that the failure to achieve desegregation reflects inherent limits on the power of the judiciary.[23] I strongly disagree. The judiciary's failure lies in its actions, not in inherent limits to its power. Had the Supreme Court decided key cases differently, the nature of public education today would be very different.[24] Although there are many causes for segregated schools, the overarching explanation for the Court's rulings is simple: Justices appointed by Republican presidents have undermined desegregation. Four Justices appointed by President Richard Nixon are largely to blame for the decisions of the 1970s; the cases were 5–4 decisions, with those four Justices helping to make up the majority.[25] Five Justices appointed by Presidents Ronald Reagan and George H.W. Bush are responsible for the decisions of the 1990s that have

20. *See infra* notes 135–65 and accompanying text.

21. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (limiting the power of the courts to impose interdistrict remedies for school segregation); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–58 (1973) (holding that inequities in school funding do not deny equal protection).

22. *See* Missouri v. Jenkins, 515 U.S. 70, 100–02 (1995) (holding that disparity in test scores between white and African-American students alone does not prove the lack of a unitary system or justify continuing desegregation orders); Freeman v. Pitts, 503 U.S. 467, 485–92 (1992) (clarifying that partial compliance with a desegregation order should end that part of the order, even if other parts of the order remain to be met); Bd. of Educ. v. Dowell, 498 U.S. 237, 246–49 (1991) (holding that once a public school system has achieved unitary status, desegregation orders should end, even if a resegregation of the public schools would result).

23. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that inherent limits on judicial power inhibit the courts' ability to bring about social change, such as achieving desegregation and equalizing educational opportunity).

24. *See infra* notes 180–84 and accompanying text.

25. The four Nixon appointees—Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist—were joined by Justice Potter Stewart to comprise the majority opinion. *See, e.g.*, *Milliken*, 418 U.S. at 720; *Rodriguez*, 411 U.S. at 2–3.

contributed substantially to resegregation of schools.[26] The resegregation of schools is largely a result of the Court's decisions, not of the inherent limits in the judicial process.

Thirty years ago, in a prophetic dissent in *Milliken v. Bradley*,[27] Justice Thurgood Marshall reminded the nation of what is at stake in the fight for desegregation:

> [W]e deal here with the right of all children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future. Our nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.[28]

I. THE DECISIONS OF THE 1970S: THE SUPREME COURT CONTRIBUTES TO THE RESEGREGATION OF AMERICAN PUBLIC EDUCATION

The 1970s were a particularly critical time in the battle to desegregate American schools. From *Plessy v. Ferguson*[29] in 1896 until *Brown* in 1954, government-mandated segregation existed in every southern state and many northern states. As mentioned above, in 1954 when *Brown* was decided, only 0.001% of African-American students in the South attended majority white schools.[30] After *Brown*, southern states used every imaginable technique to obstruct desegregation. Some school systems attempted to close public schools rather than desegregate.[31] Some school boards adopted so-called "freedom of choice" plans which allowed students to choose the school where they would enroll and resulted in continued segregation.[32] In some places, school systems outright disobeyed

26. Recent desegregation cases, such as *Missouri v. Jenkins*, 515 U.S. 70 (1995), have been 5–4 decisions, with the majority comprised of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. *See id.* at 72.

27. 418 U.S. 717 (1974).

28. *Id.* at 783 (Marshall, J., dissenting).

29. 163 U.S. 537 (1896).

30. *See* Orfield, *supra* note 1, at 29.

31. *See, e.g.*, Griffin v. County Sch. Bd., 377 U.S. 218, 229–32 (1964) (holding that the closing of public schools, combined with tuition grants and tax breaks to private segregated schools, violates the Constitution).

32. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968) (overturning New Kent County's "freedom of choice" plan as unconstitutional finding that it burdened students and parents with a responsibility which remained on the school board).

desegregation orders.[33] The phrase "massive resistance" appropriately describes what occurred during the decade after *Brown*. By 1964, in *Griffin v. County School Board*,[34] the Supreme Court had grown tired of the delay, lamenting that there had been far too little speed, and ordered that all vestiges of prior segregation be eliminated "quick[ly] and effective[ly]."[35]

The result of this massive resistance was that a decade after *Brown*, little desegregation had occurred. In the South, just 1.2% of African-American school children were attending schools with whites.[36] In South Carolina, Alabama, and Mississippi, not one African-American child attended a public school with a white child in the 1962–1963 school year.[37] In North Carolina, only one-fifth of one percent (or 0.2%) of the African-American students attended desegregated schools in 1961, and the figure did not rise above 1% until 1965.[38] Similarly, in Virginia in 1964, only 1.63% of African Americans were attending desegregated schools.[39]

But the persistent efforts at desegregation had an impact. One by one, the obstructionist techniques were defeated. Finally, by the mid-1960s, desegregation began to proceed. By 1968, the integration rate rose to 32% and by 1972–1973, 91.3% of southern schools were desegregated.[40]

Many factors explain the delay between *Brown* and any results in desegregation. Efforts to thwart *Brown* had to be defeated. The 1964 Civil Rights Act, in which Title VI tied federal funds to eliminating desegregation, played a crucial role.[41] But so did renewed attention by the Supreme Court to segregated schools. For a decade after *Brown*, the Court largely stayed out of the desegregation effort.[42] It was not until 1964 that the Court lamented that "[t]here has been entirely too much deliberation and not enough speed" in achieving desegregation.[43]

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33. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18–20 (1958) (demanding that states follow judicial orders of the Supreme Court).

34. 377 U.S. 218 (1964).

35. *Id.* at 232.

36. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 10.

41. *See* Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1034 (1992).

42. *Cooper v. Aaron*, 358 U.S. 1 (1958), is a notable exception, in which the Court insisted on state compliance with a federal court desegregation order. *Id.* at 5.

43. Griffin v. County Sch. Bd., 377 U.S. 218, 229 (1964).

Too few scholars have focused their attention on whether the Court could have done more in the decade after *Brown* to hasten desegregation. The conventional wisdom seems to be that the resistance was so great and the techniques of obstruction so varied as to require years of conquering opposition to achieve desegregation.[44] While this view is worthy of merit, it may be too generous to the Supreme Court. In *Brown*, the Court found that separate but equal is unconstitutional, but it did not order a remedy.[45] A year later, in *Brown II*,[46] the Court considered the issue of remedy, but did virtually nothing: the Court sent the case back to the lower courts to achieve desegregation "with all deliberate speed."[47] The Court did not even order the Topeka Board of Education to admit Linda Brown to a segregated school. Sixteen years later, the Court finally attempted to provide guidance to lower courts in structuring remedies to desegregate schools in *Swann v. Charlotte-Mecklenburg Board of Education*.[48] The Court approved techniques such as redrawing attending zones and busing students to achieve desegregation.[49] One must ask whether it would have made a difference had the Supreme Court in *Brown II*, or a case soon thereafter, imposed timetables and detailed remedies for desegregation.

Whether such Supreme Court efforts would have hastened desegregation remains unclear. But it is too easy to assume that they would have made little difference in the face of massive resistance. Had the Court dictated timetables, outlined remedies, and been more actively involved from 1954 to 1964, results might well have been different, at least in some places.

By the 1970s, as described above, the nation finally saw substantial progress towards desegregation. But three crucial problems emerged: white flight to suburbs threatened school integration efforts;[50] northern school systems, which had not enacted Jim Crow laws, required desegregation;[51] and pervasive inequalities

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44. *See generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, REVIEWING THE DECADE OF SCHOOL DESEGREGATION (1977) (describing resistance to desegregation); J. HARVIE WILKINSON, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954–1978 (1978) (describing southern resistance following *Brown*).

45. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495–96 (1954).

46. 349 U.S. 294 (1955) (*Brown II*).

47. *Id.* at 301.

48. 402 U.S. 1 (1971); *see infra* text accompanying notes 59–68.

49. *Swann*, 402 U.S. at 28, 30; *see infra* text accompanying notes 59–68.

50. *See infra* Part I.A.

51. *See infra* Part I.B.

existed in funding, especially between city and suburban schools.[52] The Court's handling of these issues was critical in achieving desegregation. In each instance, the Court, with four Nixon appointees in the majority, ruled against the civil rights plaintiffs and dramatically limited the effectiveness of efforts at desegregation and equal educational opportunity.[53]

A. White Flight

By the 1970s, a crucial problem had emerged: white flight to suburban areas.[54] White flight came about, in part, to avoid school desegregation and, in part, as a result of a larger demographic phenomenon, namely endangered successful desegregation.[55] White families moved to suburban areas to avoid being part of desegregation orders affecting cities. In virtually every urban area, the inner city was increasingly comprised of racial minorities. By contrast, the surrounding suburbs were almost exclusively white and what little minority population did reside in suburbs was concentrated in towns that were almost exclusively African-American.[56] School district lines parallel town borders, meaning that racial separation of cities and suburbs results in segregated school systems. For example, by 1980, whites constituted less than one-third of the students enrolled in the public schools in Baltimore, Dallas, Detroit, Houston, Los Angeles, Miami, Memphis, New York, and Philadelphia.[57]

Thus, by the 1970s, effective school desegregation required interdistrict remedies. The lack of white students in most major cities prevented desegregation. Likewise, intradistrict remedies could not desegregate suburban school districts because of the scarcity of minority students in the suburbs. As Professor Smedley explains:

> Regardless of the cause, the result of this movement [of whites to suburban areas] is that the remaining city public

52. *See infra* Part I.C.

53. *See infra* text accompanying notes 59–130.

54. A discussion of white flight including the context in which it occurred, how it occurred, the extent to which it occurred, and the reasons why it occurred are beyond scope of this Essay.

55. *See* Steven E. Asher, Note, *Interdistrict Remedies for Segregated Schools*, 79 COLUM. L. REV. 1168, 1173–74 (1979) (discussing white flight in many major cities and arguing that federal and state constitutional grounds justify interdistrict relief in a wide range of situations).

56. *See* Milliken v. Bradley, 418 U.S. 717, 785 (1974) (Marshall, J., dissenting) ("Negro children had been intentionally confined to an expanding core of virtually all negro schools immediately surrounded by a receding herd of all white schools.").

57. *See* T.A. Smedley, *Developments in the Cases of School Desegregation*, 26 VAND. L. REV. 405, 412 (1981).

> school population becomes predominately black. When this process has occurred, no amount of attendance zone revision, pairing and clustering of schools, and busing of students within the city school district could achieve substantially integrated student bodies in the schools, because there simply are not enough white students left in the city system.[58]

In *Swann*, the Supreme Court addressed the issue of the federal courts' power to impose remedies in school desegregation cases.[59] The Court held that district courts have broad authority in formulating remedies in desegregation cases.[60] The Court stated that mathematical ratios—such as comparisons of the race in particular schools with the overall race of the district—are a "useful starting point in shaping a remedy to correct past constitutional violations."[61] In using these ratios, the Court emphasized that not "every school in every community must always reflect the racial composition of the school system as a whole."[62] In fact, "some small number of one-race, or virtually one-race, schools within a district" may be unavoidable.[63] Such a result, however, always should receive close judicial review in a school system once segregated by law.[64]

The Court upheld the broad power of the district courts to take "affirmative action in the form of remedial altering of attendance zones ... to achieve truly nondiscriminatory assignments."[65] The Court also stated that courts could use busing as a remedy where needed,[66] and that bus transportation is an important "tool of school desegregation."[67] The Court found that busing students is a constitutionally acceptable remedy unless "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."[68] But *Swann* focused exclusively on remedies *within* a school district. The holding did not address interdistrict remedies. When a school system is comprised predominantly of minority students, there is a limit to how much desegregation can be achieved without an interdistrict remedy.

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58. *Id.*
59. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16–18 (1971).
60. *See id.* at 30.
61. *Id.* at 25.
62. *Id.* at 24.
63. *See id.* at 26.
64. *See id.* at 28.
65. *Id.*
66. *See id.* at 30.
67. *See id.*
68. *Id.* at 30–31.

In 1974, the Supreme Court started to take a different turn in its jurisprudence of granting broad powers to federal courts in desegregation cases. In *Milliken v. Bradley*,[69] the Court imposed a substantial limit on the courts' remedial powers in desegregation cases.[70] *Milliken* involved the Detroit-area schools and the reality that, like so many areas of the country, Detroit was a mostly African-American city surrounded by predominately white suburbs.[71] A federal district court imposed a multi-district remedy to end de jure segregation in one of the districts.[72] The Supreme Court ruled that this desegregation technique is impermissible:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.[73]

Thus, the Court concluded that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[74]

Milliken has a devastating effect on the ability to achieve desegregation in many areas. In a number of major cities, inner-city school systems are substantially African-American and are surrounded by almost all-white suburbs. Desegregation requires the ability to transfer students between the city and suburban schools. There simply are not enough white students in the city, or enough African-American students in the suburbs, to achieve desegregation without an interdistrict remedy. Yet, *Milliken* precludes an interdistrict remedy unless plaintiffs offer proof of an interdistrict violation.[75] In other words, a multidistrict remedy can only be formulated for those districts whose own policies fostered discrimination or if a state law caused the interdistrict segregation.

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69. 418 U.S. 717 (1974).
70. *Id.* at 752–53.
71. *Id.* at 725.
72. *Id.* at 732–34.
73. *Id.* at 744–45.
74. *Id.* at 745.
75. *Id.* at 744–45. *But see generally* Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976) (implementing metropolitan plan); United States v. Missouri, 363 F. Supp. 739 (E.D. Mo. 1973) (finding school district to be a remaining vestige of segregation), 388 F. Supp. 1058 (E.D. Mo.) (supplemental opinion), *aff'd in part, rev'd in part en banc*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

Otherwise, the remedy can include only those districts found to violate the Constitution. While such proof is often unavailable, plaintiffs in relatively rare cases have met *Milliken*'s requirements.[76]

I grew up in Chicago, an urban area in which the city is predominately minority, but surrounding suburbs are virtually all white. For example, on the west side of the city, the Austin neighborhood is almost entirely comprised of African Americans and Latinos. But just across the border between the city and its suburbs, Oak Park and especially River Forest are overwhelmingly white. An interdistrict remedy could help to desegregate both the Chicago public schools and the nearby suburban schools. Little would be required except redrawing attendance zones. But *Milliken* ensured that this kind of remedy would not happen.

The segregated pattern in major metropolitan areas—African Americans in the city and whites in the suburbs—did not occur by accident, but rather was the product of myriad government policies. Moreover, *Milliken* has the effect of encouraging white flight. Whites who wish to avoid desegregation can do so by moving to the suburbs. If *Milliken* had been decided differently, one of the incentives for such moves would be eliminated. The reality is that in many areas the *Milliken* holding makes desegregation impossible.

In an important paper for the *The Resegregation of Southern Schools* Conference,[77] Professor Charles Clotfelter quantifies the causes for segregation of public schools.[78] Professor Clotfelter's study dramatically proves the impact of *Milliken* in perpetuating segregation and preventing effective remedies.[79] According to Professor Clotfelter, private schools lead to only about 17% of segregation in the nation.[80] By far, the most important factor, accounting for segregation is racial disparities between public school

76. *See, e.g.*, United States v. Bd. of Sch. Comm'rs, 456 F. Supp. 183, 191–92 (S.D. Ind. 1978) (finding that housing discrimination warranted interdistrict desegregation), *aff'd in part and vacated in part*, 637 F.2d 1101 (7th Cir. 1980), *cert denied sub nom.* Metro. Sch. Dist. v. Buckley, 449 U.S. 838 (1980); *Evans*, 416 F. Supp. at 352–53 (approving interdistrict remedies when disparity in enrollment patterns are caused by government activity); *see also* Hills v. Gatreaux, 425 U.S. 284, 305–06 (1976) (allowing an interdistrict remedy for housing discrimination).

77. *The Resegregation of Southern Schools?: A Crucial Moment in the History (and the Future) of Public Schooling in America*, held at the University of North Carolina, Chapel Hill, August 29–30, 2002, and sponsored by the Civil Rights Project of Harvard University and The University of North Carolina School of Law.

78. *See* Charles T. Clotfelter, Private Schools, Segregation, and the Southern States 3–4 (Aug. 30, 2002) (unpublished manuscript, on file with the North Carolina Law Review).

79. *Id.* at 17–20.

80. *Id.* at 13, 32 tbl.5.

districts.[81] *Milliken* precludes courts, in most instances, from remedying this problem, and thus is significantly responsible for the segregation of schools in the United States today.

B. Proving Discrimination in Northern School Systems

Plaintiffs had no difficulty in proving discrimination in states that by law had required separation of the races in education. But in northern school systems, where segregated schools were not the product of state laws, the issue arose as to the requirements for proving an equal protection violation and to justify a federal court remedy. Northern school systems were generally segregated; the issue was what plaintiffs had to prove for courts to provide a remedy.

The Supreme Court addressed this issue in *Keyes v. School District No. 1, Denver, Colorado*.[82] *Keyes* involved the public schools of Denver, where substantial segregation existed, even though state law had never mandated the separation of the races.[83] The Court recognized that *Keyes* was not a case where schools were segregated by statute, but stated that,

> [n]evertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.[84]

Once a plaintiff proves the existence of segregative actions affecting a significant number of students, an equal protection violation is demonstrated and justifies a system-wide federal court remedy because "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions."[85]

Keyes held that absent laws requiring school segregation, plaintiffs must prove intentional segregative acts affecting a substantial part of the school system. The Court said that "a finding of intentionally segregative school board actions in a meaningful portion of a school system ... creates a presumption that other segregated schooling within the system is not adventitious."[86] Such

81. *Id.* at 8–14.
82. 413 U.S. 189 (1973).
83. *Id.* at 201.
84. *Id.*
85. *Id.* at 203.
86. *Id.* at 208.

proof places "the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions" on the defendant school systems.[87]

The Court therefore drew a distinction between de jure segregation that existed throughout the South, and de facto segregation that existed in the North. The latter constitutes a constitutional violation only if there is proof of discriminatory purpose. This approach is consistent with the Supreme Court cases holding that when laws are facially neutral, proof of a discriminatory impact is not sufficient to show an equal protection violation; proof of a discriminatory purpose must also exist.[88] But requiring proof of discriminatory purpose created a substantial obstacle to desegregation in northern school systems, where residential segregation—which was a product of myriad discriminatory policies—caused school segregation. The reality is that *Keyes* created an almost insurmountable obstacle to judicial remedies for desegregation in northern cities. The government was responsible for segregation in northern schools, but plaintiffs often found it impossible to prove the government's responsibility.

C. Inequality in School Funding

By the 1970s, substantial disparities existed in school funding. In 1972, education expert Christopher Jencks estimated that, on average, the government spent 15% to 20% more on each white student's education than on each African-American child's schooling.[89] This disparity existed throughout the country. For example, the Chicago public schools spent $5,265 for each student's education; but the Niles school system, just north of the city, spent $9,371 on each student's schooling.[90] The disparity also corresponded to race: in Chicago, 45.4% of the students were white and 39.1% were African-American; in Niles Township, the schools were 91.6%

87. *Id.*

88. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 297–99 (1987) (holding that proof of disparate impact is insufficient to establish a constitutional violation in administration of the death penalty); Washington v. Davis, 426 U.S. 229, 239–45 (1976) (holding that proof of discriminatory impact alone is not enough to prove a racial classification, there also must be proof of discriminatory purpose).

89. CHRISTOPHER JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY SCHOOLING IN AMERICA 28 (1972).

90. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 236 tbl.1 (1991).

white and 0.4% African-American.[91] Camden, New Jersey, spent $3,538 on each pupil; but Princeton, New Jersey, spent $7,725.[92]

There is a simple explanation for the disparities in school funding. In most states, education is substantially funded by local property taxes. Wealthier suburbs have significantly larger tax bases than poor inner cities. The result is that suburbs can tax at a lower rate and still have a great deal to spend on education. Cities must tax at a higher rate and nonetheless have less to spend on education.[93]

The Court had the opportunity to remedy this inequality in education in *San Antonio Independent School District v. Rodriguez*.[94] The Court, however, profoundly failed and concluded that the inequalities in funding did not deny equal protection.[95] *Rodriguez* involved a challenge to the Texas system of funding public schools largely through local property taxes.[96] Texas's financing system meant that poor areas had to tax at a high rate, but had little to spend on education; wealthier areas could tax at low rates, but still had much more to spend on education.[97] One poorer district, for example, spent $356 per pupil, while a wealthier district spent $594 per student.[98]

The plaintiffs challenged this system on two grounds: it violated equal protection as impermissible wealth discrimination and it denied children in the poorer districts the fundamental right to education.[99] The Court rejected the former argument by holding that poverty is not a suspect classification and thus discrimination against the poor need meet only rational basis review.[100] The Court explained that where wealth is involved, the Equal Protection Clause does not

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91. Roberta L. Steele, Note, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 620 n. 173 (1993).

92. KOZOL, *supra* note 90, at 236 tbl.2.

93. JOHN E. COONS, WILLIAM H. CLUNE III & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 45–51 (1970); Donna E. Shalala & Mary Frase Williams, *Political Perspectives on Efforts to Reform School Finance*, 4 POL'Y STUD. J. 367, 368 (1976).

94. 411 U.S. 1 (1973).

95. *Id.* at 55.

96. *Id.* at 10–11.

97. *Id.* at 27.

98. *Id.* at 12–13.

99. *Id.* at 17.

100. *Id.* at 28–29. The Court determined that the system of alleged discrimination and the class it defines did not have the "traditional indicia of suspectness." *Id.* at 28. In the Court's view, the class was not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *Id.*

require absolute equality or precisely equal advantages.[101] In thoroughly viewing the Texas system for funding schools, the Court determined that the system met the rational basis test.[102]

Moreover, the Court rejected the claim that education is a fundamental right:[103]

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[104]

Justice Powell, writing for the majority, then concluded that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[105] Although education obviously is inextricably linked to the exercise of constitutional rights such as freedom of speech and voting, the Court nonetheless decided that education, itself, is not a fundamental right:[106]

> [T]he logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.[107]

The Court also noted that the Texas government did not completely deny an education to students; the challenge was to

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101. *Id.* at 23–24 (citations omitted).

102. *Id.* 47–53. After analyzing the various aspects of the Texas plan, the Court determined that it was "not the result of hurried, ill-conceived legislation . . . [or] the product of purposeful discrimination against any group or class." *Id.* at 55. To the extent that the plan of school financing resulted in unequal expenditures between children who resided in different districts, the Court found that such disparities were not the product of a system that is so irrational as to be invidiously discriminatory. *Id.*

103. *Id.* at 33.

104. *Id.* at 33–34.

105. *Id.* at 35.

106. *See id.*

107. *Id.* at 37.

inequities in funding.[108] In concluding, the Court found that strict scrutiny was inappropriate because neither discrimination based on a suspect classification[109] nor infringement of a fundamental right occurred.[110] The Court found that the Texas system for funding schools met the rational basis test.

In *Kadrmas v. Dickinson Public Schools*,[111] the Court reaffirmed that education is not a fundamental right under the equal protection clause.[112] *Kadrmas* involved a challenge brought by a poor family against a North Dakota statute authorizing local school systems to charge a fee for the use of school buses.[113] The Court reiterated that poverty is not a suspect classification and that discrimination against the poor only must meet rational basis review.[114] The Court found that the law did not deny any child an education because the fee did not preclude the student from attending school.[115] Hence, the Court said that rational basis review was appropriate and concluded that the plaintiffs "failed to carry the 'heavy burden' of demonstrating the challenged statute is both arbitrary and irrational."[116]

These decisions are wrong—tragically wrong in holding that there is not a fundamental right to education. The Court should have recognized a fundamental right to education under the Constitution, as it has recognized other rights that are not enumerated, including the right to travel,[117] the right to marry,[118] the right to procreate,[119] the right to custody of one's children,[120] the right to control the upbringing of one's children,[121] and many others.[122] Education is essential for the exercise of constitutional rights, for economic

108. *Id.* at 39.
109. *Id.* at 28.
110. *Id.* at 37–39.
111. 487 U.S. 450 (1988).
112. *See id.* at 457–59.
113. *See id.* at 452.
114. *Id.* at 458.
115. *Id.* at 459–60.
116. *Id.* at 463 (quoting Hodel v. Indiana, 452 U.S. 314, 332 (1981)).
117. *See* Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969).
118. *See* Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971).
119. *See* Skinner v. Oklahoma, 316 U.S. 535, 541–43 (1942).
120. *See* Stanley v. Illinois, 405 U.S. 645, 650–51 (1972).
121. *See* Troxel v. Granville, 530 U.S. 57, 63–66 (2000).
122. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–80 (1990) (finding a fundamental right under the Due Process Clause to refuse unwanted medical treatment); Roe v. Wade, 410 U.S. 113, 153 (1973) ("Th[e] right of privacy . . . is broad enough to encompass a woman's decision . . . to terminate her pregnancy."); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding that the right to use contraceptives falls within a constitutionally protected zone of privacy).

opportunity, and, ultimately, for achieving equality. Chief Justice Warren eloquently expressed this view in *Brown*:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[123]

Almost three decades after *Brown*, in *Plyler v. Doe*,[124] Justice Brennan, again writing for the majority, recognized the vital importance of public education.[125] He explained that "public education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[126] Justice Brennan noted that both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark this distinction.[127] The Court thus concluded that education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.[128] Education is so basic to the exercise of other constitutional rights, and so basic for success in society, that the Court should have found a fundamental right to a quality education.

The combined effect of *Milliken* and *Rodriguez* cannot be overstated. *Milliken* helped to ensure racially separate schools and *Rodriguez* ensured that the schools would be unequal.[129] American

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123. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

124. 457 U.S. 202 (1982).

125. In *Plyler*, the Supreme Court declared unconstitutional a Texas law that provided a free public education for children of all citizens and all noncitizens lawfully in the United States and required children of undocumented aliens to pay for their public education. *Id.* at 229–30.

126. *Id.* at 221.

127. *Id.*

128. *Id.*

129. This is not to minimize the adverse effects of the other decisions, but *Milliken* and *Rodriguez* are crucial because the former ensured the separateness of American public education and the latter ensured their inequality. In theory, there still could have been

public education is characterized by wealthy white suburban schools spending a great deal on education surrounding much poorer African-American city schools that spend much less on education.[130]

II. THE DECISIONS OF THE 1990S: THE SUPREME COURT ENDS DESEGREGATION ORDERS

Professor Orfield, briefly but accurately, notes a cause for the resegregation of the 1990s: Supreme Court decisions ending successful desegregation orders.[131] In several cases, the Court concluded that school systems had achieved "unitary" status and thus that federal court desegregation efforts were to end.[132] These decisions resulted in the cessation of remedies, which had been effective, and ultimately resegregation resulted.[133] Many lower courts followed the lead of the Supreme Court and have likewise ended desegregation orders causing resegregation.[134]

In several recent cases, the Supreme Court has considered when a federal court desegregation order should end. In *Board of Education v. Dowell*,[135] the Court determined whether a desegregation order should continue when its termination would mean a resegregation of the public schools.[136] Oklahoma schools had been segregated under a state law mandating separation of the races.[137] It was not until 1972—seventeen years after *Brown*—that courts ordered desegregation.[138] A federal court order was successful in desegregating the Oklahoma City public schools.[139] Evidence indicated that ending the desegregation order would likely result in dramatic resegregation.[140] Nonetheless, the Supreme Court held that

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effective desegregation through actions of the federal or state governments. But such actions did not occur, and *Milliken* and *Rodriguez* meant that courts, the most likely agents for change, could not succeed in achieving desegregation.

130. *See generally* JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001) (discussing the combined impact of *Milliken* and *Rodriguez*).

131. Orfield, *supra* note 1, at 16.

132. *See infra* text accompanying notes 135–65.

133. *See supra* text accompanying note 7.

134. *See infra* text accompanying notes 166–77.

135. 498 U.S. 237 (1991).

136. *Id.* at 249–50.

137. *Id.* at 240.

138. *Id.* at 240–41.

139. *Id.* at 241.

140. *Id.* at 242. After the School Board was released from the continuing constitutional supervision of the federal court, it adopted the Student Reassignment Plan ("SRP"). Under the plan, which relied on neighborhood assignments for students in grades K–4, a student could transfer from a school where he or she was in the majority to a school where

once a "unitary" school system had been achieved, a federal court's desegregation order should end even if the action could lead to resegregation of the schools.[141]

The Court did not define "unitary system" with any specificity. The Court simply declared that the desegregation decree should end if the school board has "complied in good faith" and "the vestiges of past discrimination have been eliminated to the extent practicable."[142] In evaluating these two factors, the Court instructed the district court to look "not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.' "[143]

In *Freeman v. Pitts*,[144] the Supreme Court held that a federal court desegregation order should end when a district complies with the order, even if other desegregation orders for the same school system remain in place.[145] A federal district court ordered desegregation of various aspects of a school system in Georgia that previously had been segregated by law.[146] Part of the desegregation plan had been met; the school system had achieved desegregation in pupil assignment and in facilities.[147] Another aspect of the desegregation order, concerning assignment of teachers, however, had not yet been fulfilled.[148] The school system planned to construct a facility that likely would benefit whites more than African Americans.[149] Nonetheless, the Supreme Court held that the federal court could not review the discriminatory effects of the new construction because the part of the desegregation order concerning facilities had already been met.[150] The Court stated that once a portion of a desegregation order is met, the federal court should cease

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he or she would be in the minority. In 1985, it appeared that the SRP was a return to segregation. If the SRP was to continue, 11 of 64 schools would be greater than 90% African-American, 22 would be greater than 90% white plus other minorities, and 31 would be racially mixed. *Id.* In light of this evidence, the district court refused to reopen the case. *Id.*

141. *Id.* at 247–49.

142. *Id.* at 249–50.

143. *Id.* at 250 (quoting Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)).

144. 503 U.S. 467 (1992).

145. *Id.* at 490–91.

146. *Id.* at 471.

147. *Id.* at 480–81.

148. *See id.* at 481 (finding that a racial imbalance existed in the assignment of minority teachers and administrators).

149. *Id.* at 483.

150. *Id.* at 488.

its efforts as to that part and remain involved only as to those aspects of the plan that have not been achieved.[151]

Finally, in *Missouri v. Jenkins*,[152] the Court mandated an end to a school desegregation order for the Kansas City schools.[153] Missouri law once required the racial segregation of all public schools. It was not until 1977 that a federal district court ordered the desegregation of the Kansas City, Missouri, public schools.[154] The federal court's desegregation effort made a difference. In 1983, twenty-five schools in the district had an African-American enrollment of greater than 90% or more.[155] By 1993, no elementary-level student attended a school with an enrollment that was 90% or more African-American. At the middle school and high school levels, the percentage of students attending schools with an African-American enrollment of 90% or more declined from about 45% to 22%.

The Court, in an opinion authored by Chief Justice Rehnquist, ruled in favor of the state on every issue.[156] The Court's holding consisted of three parts. First, the Court ruled that the district court's order that attempted to attract nonminority students from outside the district was impermissible because the plaintiffs had not proved an interdistrict violation.[157] The social reality is that many city school systems are now primarily comprised of minority students, while surrounding suburban school districts are almost all white. Effective desegregation requires an interdistrict remedy.[158] Chief Justice Rehnquist, however, applied *Milliken v. Bradley* to conclude that the interdistrict remedy—incentives to attract students from outside the district into the Kansas City schools—was impermissible because there only was proof of an intradistrict violation.[159]

Second, the Court ruled that the district court lacked authority to order an increase in teacher salaries.[160] Although the district court believed that an across-the-board salary increase to attract teachers

151. *Id.* at 490–91.
152. 515 U.S. 70 (1995).
153. *Id.* at 103. Earlier in *Missouri v. Jenkins*, 495 U.S. 33 (1990), the Supreme Court ruled that a federal district court could order a local taxing body to increase taxes to pay for compliance with a desegregation order, although the federal court should not itself order an increase in the taxes.
154. *Jenkins*, 515 U.S. at 74.
155. *Id.* at 75.
156. *See id.* at 70–71.
157. *See id.* at 90, 92.
158. *See supra* notes 75–76 and accompanying text.
159. *See Jenkins*, 515 U.S. at 92–94, 97.
160. *Id.* at 100.

was essential for desegregation, the Supreme Court concluded that the increase was not necessary as a remedy.[161]

Finally, the Court ruled that the continued disparity in student test scores did not justify continuance of the federal court's desegregation order.[162] The Court concluded that the Constitution requires equal opportunity and not equal result and that, consequently, disparities between African-American and white students on standardized tests were not a sufficient basis for concluding that desegregation had not been achieved.[163] Disparity in test scores is not a basis for continued federal court involvement.[164] The Supreme Court held that once a district has complied with a desegregation order, the federal court effort should end.[165]

The three cases—*Dowell*, *Freeman*, and *Jenkins*—together have given a clear signal to lower courts: the time has come to end desegregation orders, even when the effect could be resegregation. Lower courts have followed this lead. Indeed, it is striking how many lower courts have ended desegregation orders in the last decade, even when provided with clear evidence that the result will be increased segregation of the public schools. For example, in *People Who Care v. Rockford Board of Education*,[166] the United States Court of Appeals for the Seventh Circuit reversed a federal district court decision that refused to end desegregation efforts for the Rockford, Illinois, public schools.[167] The court began its analysis by observing that the Supreme Court has called for " 'bend[ing] every effort to winding up school litigation and returning the operation of the schools to the local school authorities.' "[168] The Seventh Circuit noted the substantial disparity in achievement between white and minority students, but stated that although the Board "may have a moral duty [to help its failing minority students,] it has no federal constitutional duty."[169] This analysis is the same reasoning followed by other courts throughout the country in ending desegregation orders.[170]

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161. *See id.*
162. *See id.*
163. *See id.* at 101–02.
164. *See id.* at 102.
165. *See id.*
166. 246 F.3d 1073 (7th Cir. 2001).
167. *Id.* at 1078.
168. *Id.* at 1074 (quoting People Who Care v. Rockford Bd. of Educ., 153 F.3d 834, 835 (7th Cir. 1998)).
169. *Id.* at 1076 (citations omitted).
170. *See infra* text accompanying notes 171–77.

Similarly, the United States Court of Appeals for the Fourth Circuit has ended the desegregation remedy for the Charlotte-Mecklenburg schools, a decision that was upheld by the Supreme Court in *Swann*.[171] Although this was a historically segregated school system and desegregation had been successful, the court nonetheless ordered an end to desegregation efforts.[172] The United States Court of Appeals for the Eleventh Circuit ended the desegregation order for the Hillsborough County schools in Tampa, Florida.[173] The Eleventh Circuit concluded that the Hillsborough County schools had achieved unitary status.[174] Notwithstanding the Eleventh Circuit's conclusion, at thirteen Hillsborough Schools, Latino students outnumbered whites and African Americans combined.[175] The Eleventh Circuit stated that the segregation was the result of white flight and voluntary residential segregation and thus was not a basis for continued desegregation efforts.[176]

In addition to these decisions by federal courts of appeals, many district courts have ordered an end to desegregation efforts, including several in 2002.[177] In none of these cases did the courts give weight to the consequences of ending the desegregation orders in causing resegregation of the public schools.

The trend across the country of federal courts ending desegregation efforts means that resegregation will increase, potentially dramatically, in the next decade. Professor Orfield documents the resegregation that occurred during the 1990s.[178] Recent decisions indicate that this decade may see a much worse return to resegregation.

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171. Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 335 (4th Cir.) (en banc), *reconsideration denied en banc*, 274 F.3d 814 (4th Cir. 2001), *cert. denied*, 535 U.S. 986, *and cert. denied*, 535 U.S. 986 (2002).

172. *Id.* at 353.

173. NAACP v. Duval County Schs., 273 F.3d 960, 962 (11th Cir. 2001).

174. *Id.* at 976.

175. Marilyn Brown, *Beyond Black and White*, TAMPA TRIB., Feb. 10, 2000, at A1.

176. *NAACP*, 273 F.3d at 971–72.

177. *See, e.g.*, Berry v. Sch. Dist., 195 F. Supp. 2d 971, 999–1001 (W.D. Mich. 2002) (ending desegregation efforts for the Benton Harbor public schools); Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d 1359, 1368–69 (M.D. Ala. 2002) (ending desegregation order for the Butler County, Alabama public schools); Lee v. Opelika City Bd. of Educ., No. 70-T-853-E, 2002 U.S. Dist. LEXIS 2513, at *28–*29 (M.D. Ala. Feb. 13, 2002) (ending desegregation order for Opelika, Alabama schools); *see also* Davis v. Sch. Dist., 95 F. Supp. 2d 688, 698 (E.D. Mich. 2000) (ending desegregation order for the Pontiac, Michigan public schools).

178. *See supra* notes 7–15 and accompanying text.

III. WHY HAVE COURTS FAILED?

Scholars, such as Professor Gerald Rosenberg, see the failure to achieve desegregation as reflecting inherent limitations of courts.[179] I strongly disagree. Desegregation likely would have been more successful, and resegregation less likely to occur, if the Supreme Court had made different choices.

If the Court, from 1954 to 1971, had acted more aggressively in imposing timetables and outlining remedies, desegregation might have occurred more rapidly.[180] If the Court had decided *Milliken* differently[181]—not a fanciful possibility considering the case was a 5–4 decision—interdistrict remedies could have produced much more desegregation of American public education. If the Court had decided *Keyes* differently,[182] then courts could have fashioned desegregation remedies if there was proof of a discriminatory impact. Requiring a showing of discriminatory intent dramatically limited the ability of the federal courts to order desegregation of de facto segregated northern city school systems. If the Court had decided *Rodriguez* differently, there would have been more equality in school funding and educational opportunity.[183] If the decisions of the 1990s had been different,[184] successful desegregation orders in many cities still would have remained in place. Therefore, the dismal statistics about current segregation are less an indication of the inherent limits of the judiciary and more a reflection of the Supreme Court's choices.

What, then, explains the Court's choices? The answer is obvious: its decisions result from the conservative ideology of the majority of the Justices who sat on the Court when these cases were decided.

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179. *See* ROSENBERG, *supra* note 23, at chs. 2 & 3 (discussing the failure to achieve desegregation as reflecting limits on the powers of the judiciary to bring about social change).

180. *See supra* notes 42–49.

181. *See supra* notes 69–81 and accompanying text.

182. *See supra* notes 82–88 and accompanying text.

183. Indeed, a number of state supreme courts have found that inequalities in funding violate provisions of their state constitutions. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 957–58 (Cal. 1977) (holding that the California school financing system violated equal protection provisions of the California Constitution); Rose v. Council for Better Educ., 790 S.W.2d 186, 215–16 (Ky. 1989) (finding defendant's common school financing system unconstitutional); McDuffy v. Sec'y of Educ., 615 N.E.2d 516, 617 (Mass. 1993) (holding that the school financing system violated the state's constitution); Abbott v. Burke, 575 A.2d 359, 393–94 (N.J. 1990) (finding the Public School Education Act unconstitutional); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156–57 (Tenn. 1993) (declaring educational funding statutes unconstitutional); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397–98 (Tex. 1989) (finding the state school financing system in violation of state constitution).

184. *See supra* Part II.

Milliken and *Rodriguez* were both 5–4 decisions, and the majority included the four Nixon appointees who joined the Court in the few years before those rulings. If the Warren Court had decided the cases in 1968, six years before *Milliken* and five years before *Rodriguez*, the cases would have been resolved in favor of interdistrict remedies. If Hubert Humphrey had won the 1968 presidential election and appointed the successors to Justices Warren, Fortas, Black, and Harlan, the result would have been different in these cases.

Similarly, the decisions of the 1990s were the product of conservative, Republican Justices. In each of the cases, five Reagan and Bush appointees—Chief Justice Rehnquist (who was nominated by President Reagan to be Chief Justice), and Justices O'Connor, Scalia, Kennedy, and Thomas—constituted the majority in ordering an end to desegregation orders.

The cause for the judicial failure could not be clearer: conservative Justices have effectively sabotaged desegregation. In June 2002, Justice Clarence Thomas wrote a concurring opinion in *Zelman v. Simmons-Harris*,[185] in which the Supreme Court upheld the constitutionality of the use of vouchers in parochial schools.[186] Justice Thomas lamented the poor quality of education for African Americans in inner cities and urged voucher systems as a solution.[187] The irony, and indeed hypocrisy, of Justice Thomas's opinion is enormous. The rulings of his conservative Brethren have contributed significantly to the educational problems of racial minorities. Justice Thomas has never suggested that the Court reconsider any of the

185. 122 S. Ct. 2460 (2002).

186. *Id.* at 2480 (2002) (Thomas, J., concurring). The Supreme Court upheld the constitutionality of an Ohio law that allowed parents to use vouchers in the Cleveland city schools. *Id.* Approximately 96% of parents used their vouchers in parochial schools. *Id.* at 2466. In a 5–4 decision, the Court upheld this use as constitutional. *Id.* at 2480. The Court's division was identical to that in the 1990s decisions ordering an end to desegregation orders: the majority was comprised of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.* at 2462.

187. *Id.* at 2480 (Thomas, J., concurring). Indeed, Justice Thomas lamented the current condition of inner-city schools in very powerful language:

> Frederick Douglass once said that "[e]ducation ... means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown v. Board of Education*, that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," urban children have been forced into a system that continually fails them.

Id. (alteration in original) (citations omitted).

decisions discussed in this Essay. But he is very willing to allow vouchers, which would take money from the public schools and transfer it to private, especially parochial, institutions.

CONCLUSION

During the Viet Nam War, Senator George Aiken said that the United States should declare victory and withdraw from Viet Nam.[188] The Supreme Court seems intent on declaring victory over the problem of school segregation and withdrawing the judiciary from solving the problem. But as Professor Orfield demonstrates, the problem has gotten worse, not better.[189] The years ahead look even bleaker as courts end successful desegregation orders.[190]

People can devise rationalizations to make this desegregation failure seem acceptable: that courts could not really succeed; that desegregation does not matter; that parents of minority students do not really care about desegregation. But none of these rationalizations are true. *Brown v. Board of Education* stated the truth: separate schools can never be equal.[191] Tragically today, America has schools that are increasingly separate and unequal.

188. Albin Krebs, *George Aiken, Longtime Senator and G.O.P. Maverick, Dies at 92*, N.Y. TIMES, Nov. 20, 1984, at B10.

189. *See* Orfield, *supra* note 1, at 2. Professor Orfield's report, including statistics from the 2000 Census, illustrates that from 1988 to 1998 southern school segregation intensified. *Id.* at tbls.1, 3 & 6. This trend occurred during a time period where three Supreme Court decisions authorized a return to segregated neighborhood schools and limited the reach and duration of desegregation orders. *Id.* at 2. Orfield concludes that from 1988 to 1998, "most of the progress of the previous two decades in increasing integration in the [South] was lost," *id.* at 2, and provides numerous recommendations for a stable interracial education system. *Id.* at 48.

190. The issue of what could be done differently is beyond the scope of this Essay, except as it is implicit in the criticism of what the Supreme Court has done. A major national initiative for school desegregation is needed. This initiative could come through Congress as it could document extensive segregation and inequalities in the public schools and adopt a comprehensive statute mandating interdistrict remedies and equity in school funding. There would be constitutional challenges based on recent federalism decisions, yet remedying such inequalities is at the very core of Congress's powers under the Thirteenth and Fourteenth Amendments. Alternatively, the Supreme Court could reverse course and reconsider the decisions discussed in this Essay, which have contributed so much to the resegregation and inequalities in American public education. There is no indication whatsoever that these—or any actions—from Congress or the Supreme Court are likely in the foreseeable future.

191. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).