Interest Balancing and Other Limits to Judicially Managed Equal Educational Opportunity

Neal Devins
William & Mary Law School, nedevi@wm.edu
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by Neal Devins

Forty years after Brown v. Board of Education,1 the quest for equal educational opportunity remains elusive. Conservatives and liberals alike both complain bitterly about court-imposed solutions to racial isolation. For conservatives, judicial intervention in the name of equality is counter-productive. Jeremy Rabkin, for example, speaks of courts, "working with the whimsical imagery of the 1960s," making it "impossible for [inner city] neighborhoods to cope with the daily assault on their basic security."2 In sharp contrast, the battle cry from the left attacks the courts for being too weak-kneed. Gary Orfield, for example, reported in 1993 that the growing resegregation of African-American students is attributable to "the development of case law permitting both the abandonment of desegregation plans and return to segregated neighborhood schools."3

Erwin Chemerinsky's lament is decidedly (and decisively) of the lefty variety. Claiming that "equal educational opportunity only had a chance
of occurring if the Supreme Court had ruled that inequities in funding schools are unconstitutional and if it had permitted interdistrict remedies including both city and suburban schools," Chemerinsky "argue[s] that one factor contributing to the failed promise of equal schooling was the decisions of the Burger Court in the 1970s." The consequence of this supposed judicial abdication is that "American schools are socially segregated and grossly unequal." Erwin Chemerinsky is certainly correct in concluding that equal educational opportunity remains an elusive goal. Nonetheless, his proof of judicial irresponsibility is wanting. While the courts and elected government could have done more, the differences between the Warren Court and the "Republican dominated" Burger and Rehnquist Courts are less extreme than Chemerinsky imagines. The judiciary, including the exalted Warren Court, has always engaged in interest balancing in sorting out both the violation and remedy components of school desegregation litigation. Furthermore, interest balancing is not only inevitable, it is healthy. Courts cannot be crusaders without their decisions becoming stagnant and their credibility diminished. Instead, courts necessarily function within a political environment—they affect and are affected by public policy. "[I]n the realm of race and schooling," as David Kirp puts it, "[p]olitics and law . . . each reshapes the other." I. INTEREST BALANCING AND EQUAL EDUCATIONAL OPPORTUNITY A. The Warren Court

Today, it seems inconceivable that in Brown the Court’s basic declaration of racial equality tested the limits of judicial authority. When Brown was decided, however, segregation was so ingrained in the South that the outlawing of dual school systems promised social turmoil and massive resistance. These deep feelings were not lost either on the Court or on the Department of Justice. In an effort to temper Southern hostility, Chief Justice Earl Warren sought to craft a unanimous opinion of limited reach and the Justice Department recommended that the Court not specify a remedy in the case.

Chief Justice Warren’s participation in Brown and the corresponding drive towards unanimity were serendipitous. The Supreme Court was

5. Id. at 999.
set to decide *Brown* in its 1952 term with Chief Justice Vinson at the Court’s helm. After briefs were filed (including an important brief filed by the Justice Department in the last month of the Truman Administration, which argued that racial segregation undermined America’s stature as leader of the free world), and oral arguments were heard, the Court redocketed *Brown* so that it could also decide the constitutionality of segregated education in the “federal city,” Washington, D.C. At this time, the Justices were sharply divided—their December 1952 conference suggested a 5-4 opinion (to uphold!) segregated education. As Justice William O. Douglas wrote in his autobiography:

> It was clear that if a decision had been reached in the 1952 Term, we would have had five saying that separate but equal schools were constitutional, that separate but unequal schools were not constitutional, and that the remedy was to give the states time to make the two systems of schools equal.  

In 1953, however, Vinson died and Warren became Chief Justice—an occurrence prompting Associate Justice Felix Frankfurter to exclaim: “[T]his is the first solid piece of evidence I’ve ever had that there really is a God.” With Warren now at the helm, the Court, although still sharply divided, was able to unanimously agree upon a brief declaration that “separate educational facilities are inherently unequal.” After another year, in which the public had time to contemplate a desegregated country, the Court issued *Brown II*, declaring that desegregation must proceed with “all deliberate speed.”

The Court’s bifurcation of its merits and remedies holdings, as well as the absence of judgmental rhetoric in its segregation decision, reveals that the Justices sought to improve the acceptability of their decision in *Brown I* by speaking in a single moderate voice. Indeed, as Sidney Ulmer’s account of internal Court deliberations in the writing of *Brown* reveals, compromises were made by all nine Justices in order to ensure unanimity.

*Brown* was a masterstroke for the Court and its architect, Earl Warren. Inheriting a sharply divided Court on the precipice of upholding segregated education, the new Chief Justice crafted a

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11. Id. at 301.
unanimous opinion that is universally applauded. Robert Bork, for example, describes *Brown* as “the defining event of modern American constitutional law” and “the greatest moral triumph constitutional law had ever produced.”¹³

*Brown* is testament not just to the reaches, but also the limits of judicial action. By taking into account potential resistance to its decision, the Court in *Brown* engaged in the type of interest balancing that has set political parameters on judicial intervention in equal educational opportunity. Noting that “some achievable remedial effectiveness may be sacrificed because of other social interests” and that “a limited remedy [may be chosen] when a more effective one is too costly to other interests,”¹⁴ the Court recognized that victim’s rights must be balanced against a broad spectrum of competing policy concerns. Specifically, aside from victim’s rights, the Court in *Brown* valued local control of public school systems and judicial restraint. Consequently, in addition to taking southern resistance into account as a factor in crafting a remedy that would best serve plaintiffs’ interests,¹⁵ the Warren Court slowed down the pace of school desegregation for other reasons.

This conclusion is subject to criticism, for the Court’s failure in *Brown I* to specify a remedy or condemn segregation as immoral are easily explainable as the desire to avoid “the costs that a remedy imposes . . . when such costs actually interfere with the remedy’s effectiveness . . . .”¹⁶ *Brown II*, however, does not lend itself to such an interpretation. Rather than require southern systems to take concrete steps to dismantle dual systems, the Court recognized in *Brown II* that “varied local school problems” were best solved by “[s]chool authorities,” that district court judges were best suited to examine “local conditions,” and that delays associated with “problems related to administration” were to be expected.¹⁷ The inevitable result of this “remedial” order was inaction. As J. Harvie Wilkinson put it, “[T]he South was audibly relieved by *Brown II*, a victory of sorts snatched from the defeat of only a year ago [in *Brown*].”¹⁸ Indeed, Southern newspapers heralded the

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14. Paul Gewirtz, Remedies and Resistance, 92 YALE L.J. 585, 599 (1983). Gewirtz’s article was especially helpful to me in thinking through this part of the essay.
15. Gewirtz describes this type of calculation as “rights maximizing.” See id. at 589-93. Erwin Chemerinsky depicts Warren-era judicially imposed limits on school desegregation remedies as being “rights maximizing.” See Chemerinsky, supra note 4, at 1000.
17. 349 U.S. at 299-300.
remedial order, especially since the Court entrusted the implementation of its decision to "[o]ur local judges [who] know the local situation ..." These local judges did not disappoint segregationists, sometimes because they too opposed Brown and sometimes because they were hesitant to fight entrenched local institutions.20

Brown II's failure cannot be excused as the best possible remedy in the face of southern resistance. The Court's emphasis on local conditions invited tokenism and delay and southern school officials and judges acted in kind. The Supreme Court, then, did not seek to provide the type of leadership against which one can measure changes in black-white student contact. Moreover, in the decade following Brown, the Court's only foray into school desegregation is best understood as the Warren Court's defense of its institutional self-interest. Pressed in the Little Rock case by Arkansas Governor Orval Forbears' efforts to block school desegregation, the Court aggressively defended its turf, proclaiming itself "supreme in the exposition of the law of the Constitution ..."21 Although a more vigorous role in school cases may have immersed the Court in a thicket that may have otherwise jeopardized its social reform objectives in criminal law and elsewhere, it is indisputable that the Warren Court ducked the school desegregation issue for a decade. In 1964, the Warren Court finally recognized that "[t]he time for mere 'deliberate speed' has run out"22 and, in the 1968 Green v. County School Board23 decision, returned to school desegregation in earnest, demanding that school boards "come forward with a plan that promises realistically to work, and promises realistically to work now."

The Warren Court's intransigence on school desegregation spanned most of its sixteen-year life. Remarkably, one decade after Brown, only two percent of black children attended biracial schools in the eleven southern states.25 In the 1965-66 school year, however, the percentage of black children in biracial schools rose to six percent.26 The turning

24. Id. at 439.
26. See id.
point here was not hyped up judicial enforcement; instead, the principal impetus to meaningful school desegregation was rooted in elected branch action.

One explanation for this transformation is Congress’ encouragement of judicial intervention through its 1964 Civil Rights Act authorization of Department of Justice participation in school desegregation litigation. Over objections that “[t]his proposal would convert the Department of Justice into the legal arm of the NAACP, CORE, SNCC, and similar unofficial groups,” Congress recognized that federal action was needed to alter the snail-like pace of Southern desegregation. More significant, the implementation of the Elementary and Secondary Education Act of 1965, coupled with the issuance and enforcement of guidelines for Title VI of the Civil Rights Act of 1964, marked a shift in federal power over state education systems. Rather than playing a minimalist role in helping schools better educate their students, the federal government became a major player in pushing schools to provide equal educational opportunity to black children. With Title VI’s demand that federal grant recipients be nondiscriminatory, Congress became willing to pump billions of dollars of aid for the compensatory education of educationally deprived children. These billions of dollars were sufficient incentive for many school systems to comply with the Office for Civil Rights’ nondiscrimination standards.

It was against this backdrop of increasing federal involvement in school desegregation that the Warren Court stepped up its own involvement. This parallelism should come as no surprise. With Congress and the White House both making equal educational opportunity a national priority and envisioning an increasing judicial role, concerns of local control and judicial restraint no longer impeded judicial action. Court intervention, instead, was consistent with judicial respect for the priorities set by co-equal branches of the federal government.

B. The Burger and Rehnquist Courts

The Warren Court’s school desegregation legacy, then, is one of visionary leadership and a good dose of caution. Against this backdrop, Erwin Chemerinsky goes too far in his attack of the Burger Court for deviating from Warren Court decisionmaking. This, of course, is not to say that proponents of a vigorous judicial role in equal educational

31. See generally Devins & Stedman, supra note 25, at 1246-51.
opportunity should not be critical of the Burger Court. The Court's refusal in *Milliken I*, to include suburban counties in Detroit's school desegregation plan, despite the Court's recognition that the state of Michigan was partly responsible for illegal segregation in Detroit schools, explicitly placed the interest of local control ahead of equal educational opportunity. Likewise, local control triumphed when the Court formally embraced in *Austin v. United States* what was implicit in *Keyes v. Denver*, namely, that a school system may favor neighborhood schools irrespective of ethnically segregated residential patterns which makes racial isolation "the foreseeable and inevitable result of such an assignment policy."

Finally, the Burger Court removed school finance from judicial scrutiny, holding in *San Antonio Independent School District v. Rodriguez*, that a state need not equalize gross differences in per-pupil expenditures among school districts. "The effect of *Rodriguez,*" as Erwin Chemerinsky aptly put it, "was to institutionalize unequivalences in school funding." In the Court's eye, however, court-imposed school finance reform "is likely to lead to higher taxation and lower educational expenditures." In reaching the conclusion that property poor students are best served by judicial abdication, the Court emphasized "the wisdom of the traditional limitations on this Court's function"—a value that plays no role in Erwin Chemerinsky's competing calculus.

The Burger Court's recognition of values outside of equal educational opportunity, as the Warren Court experience suggests, is inevitable. This is especially so since four members of the Burger Court (William Rehnquist, Lewis Powell, Harry Blackmun, and Warren Burger himself) were appointed by a president, Richard Nixon, who campaigned against judicial activism and for states' rights as part of his "Southern Strategy." Correspondingly, by 1969, unlike the final stages of the Warren

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34. 429 U.S. 990 (1976).
38. *Id.*
40. 411 U.S. at 57.
41. *Id.* at 58.
Court where "the President, congressional leadership, and the public all recognized that protection of the rights of black Americans was the fundamental [social and educational] issue," both the executive and legislative branches were increasingly found opposing the federal courts in school desegregation questions. Mounting concern over the extension of desegregation to districts outside the South, and heightened opposition to the use of mandatory reassignments ("busing"), led to increased efforts by both branches to curb federal action in school desegregation. Without the support of the coequal branches of government, judicial intervention was likely to face increasing local resistance. Concerns of the judiciary's self-interest in having its orders enforced as well as the respect owed a coequal branch, warranted a diminished judicial role and, with it, increased attention to judicial restraint concerns.

What then seems remarkable about the Burger Court is its willingness to enter the school desegregation fray at all. In several instances, however, the Burger Court did just that, approving fairly broad constructs for defining both the scope of the violation and the sweep of the remedy. In 1971 the Court in, Swann v. Charlotte-Mecklenburg Board of Education, recognized the use of black-white pupil ratios and mandatory student reassignments as "starting point[s] in the process of shaping a remedy ..." Although rejecting year-to-year adjustments and recognizing that changing demographics might result in racial isolation outside of the courts' equitable authority the Court in Swann embraced busing as a remedy, and its use of black-white ratios assumed—for purposes of crafting the initial remedy—that the world is naturally integrated. That is, absent segregation the world would be racially balanced. For the Burger Court, to eliminate all vestiges of an unconstitutional dual school system, desegregation remedies might have to be "administratively awkward, inconvenient, and even bizarre ...." Interest balancing played only a minor role in Swann. While acknowledging concerns of the health of children from overly long bus trips, the Court emphasized that the competing value of desegregation will almost always win out. More significant, Swann eschewed local control, judicial restraint, institutional self-interest in crafting a clearly workable remedy, and respect for legislative and executive branch preferences in favor of massive far reaching judicial intervention.

43. Orfield, supra note 20, at 39.
44. See Fisher & Devins, supra note 42, at 264-67.
46. Id. at 25.
47. Id. at 28.
Swann was not an anomaly. The Burger Court, in varying degrees, embraced the naturally integrated model in Keyes v. Denver, Dayton v. Brinkman II, and Columbus Board of Education v. Penick. The Court in Keyes held that purposeful segregation in a significant portion of a school district justified a system-wide remedy unless the district can "satisfy the almost impossible burden of demonstrating that [it] would have been segregated regardless of its conduct." Dayton II and Columbus extended the Keyes presumption from focusing on the location of segregation (segregation in one part of a system implying segregation in other parts of the system) to inquiring about the time of segregation (segregation at one time implying segregation at other times). After Dayton II and Columbus, past constitutional violations could serve as a basis for relief, even though a plaintiff failed to show any current impact from that past discrimination.

In Dayton II, Columbus, Keyes and Swann, the Court envisioned a broad judicial role in school desegregation. While a finding of purposeful discrimination is a necessary trigger to judicial intervention, the Burger Court did not endeavor to foreclose judicial intervention in school cases. That the Burger Court did not go as far as some would like hardly bespeaks abdication. Indeed, in another context (employment discrimination lawsuits), the Burger Court followed the lead of Keyes' liberal critics—going well beyond statutory language to allow challenges to employment practices that disproportionately impact civil rights claimants.

Another (and final) measure of the Burger Court's acquiescence to significant judicial involvement can be seen in its refusal to resolve early 1980's challenges by school systems (and the Reagan Justice Department) to continuing judicial supervision of school systems subject to longstanding desegregation orders. In Estes v. Metropolitan Branch of NAACP, for example, the Burger Court refused to review the Fifth Circuit's decision to overturn a district court order that had substituted, in the Dallas system, educational remedies and neighborhood schools for


50. Dayton II, 443 U.S. at 534; Columbus, 443 U.S. at 457 (1979).


52. 444 U.S. 437 (1980).
systemwide busing predicated on black-white student population ratios. Similarly, the Court refused to review the Sixth Circuit’s decision in Kelly v. Metropolitan County Board holding that modifications in Nashville’s desegregation plan must reflect current black-white student population ratios, even if such an approach cannot effectively desegregate the schools and is educationally unsound. While too much should not be read into certiorari denials, the Burger Court’s refusal to reenter the desegregation fray suggests an acceptance—if not endorsement—of continuing judicial supervision of once segregated school systems. Specifically, rather than consider alternatives to mandatory assignments and other intrusive remedies or specify standards defining the termination of judicial authority in this area, the Burger Court put those decisions off for another day.

With the Rehnquist Court, that day has arrived. In Board of Education v. Dowell and Freeman v. Pitts, the Rehnquist Court has made clear that federal courts should be willing to terminate desegregation orders, placing increasing emphasis on local control and judicial restraint and, correspondingly, deemphasizing victims’ rights concerns. In Dowell, pointing to “[c]onsiderations based on the allocation of powers within our federal system” and extolling the virtues of local control in “allow[ing] citizens to participate in decisionmaking, and allow[ing] innovation so that school programs can fit local needs,” the Supreme Court approved Oklahoma City’s decision to abandon mandatory transportation for students in grades K-4. Pointing to an earlier judicial determination that Oklahoma City schools were racially unitary, not dual, the Dowell court found it unnecessary to determine whether the lifting of the desegregation decree required a showing of “grievous wrong.” Freeman likewise emphasized limits in the courts’ remedial authority and 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.” Upholding district court authority to relinquish jurisdiction over student assignments, despite

53. Id. at 438.
55. 687 F.2d at 817.
59. 498 U.S. at 248.
60. Id. at 247.
61. Id. at 1445.
62. Id. at 1446.
the system’s failure to fully comply with other features of the original school desegregation order, the decision in Freeman relieved Dekalb County of any obligation to address racial isolation caused by changing demographics. As a result, Dekalb could make use of neighborhood school assignments, despite the fact that fifty percent of black students attended schools that were over ninety percent black.63

VICTIMS RIGHTS did not figure prominently in the majority’s calculations in either Dowell or Freeman. Unlike Justice Marshall, who emphasized in his Dowell dissent that “the persistence of racially identifiable schools perpetuates the message of racial inferiority associated with segregation,”64 the Court in Dowell and Freeman welcomed a diminishing judicial role to advance the competing values of local control and judicial restraint.

For Erwin Chemerinsky, these cases “reflect the Supreme Court simply giving up—declaring victory and getting the federal courts out of the business.”65 That conclusion is not without support but too much should not be read into these court rulings.

To begin with, Dowell and Freeman are subject to narrow interpretation. In Dowell plaintiffs acquiesced to a preexisting unitariness finding. Freeman, although technically a unanimous opinion, may prove to be a vulnerable precedent. Four members of the Court called for a searching judicial inquiry in which the school system bears the burden to “prove that its own policies did not contribute”66 to either demographic changes or racial imbalance in the schools. With Ruth Bader Ginsburg (rather than Byron White) casting the decisive vote in future cases, a fifth justice will likely subscribe to this approach.67

Dowell and Freeman, moreover, neither require nor encourage district court judges to terminate school desegregation injunctions. Instead, like Brown II, these Rehnquist Court rulings empower district court judges to take local circumstances into account in sorting out whether a school system has satisfied its desegregation obligations. Along the same lines, the Rehnquist Court did not interfere with intrusive district court orders

63. Id. at 1445.
64. 498 U.S. at 263 (Marshall, J., dissenting).
66. 112 S. Ct. at 1457 (concurring opinion of O’Connor, Blackmun, and Stevens). Justice Souter’s separate concurrence likewise argued for a more scrutinizing judicial role. See 112 S. Ct. at 1454-55.
67. This analysis assumes that Justice Harry Blackmun’s replacement, Stephen Breyer, will adopt Blackmun’s scrutinizing approach to school cases.
requiring, in Yonkers, the building of state-subsidized housing and imposing, in Kansas City, a state-wide tax levy.

_Dowell_ and _Freeman_ also appear less draconian when placed in their social and political context. With the 1980 election of Ronald Reagan, the White House proposed and Congress endorsed “new federalism” in education programs that eliminated targeted funds for minority school children subject to school desegregation remedies and put in their stead block grant programs that allowed local school systems to purchase computers and the like. Under the block grant program, as compared to mid-sixties reform efforts, there is little or no federal leverage on school district’s desegregation practices. Furthermore, rather than discounting local control and encouraging judicial intervention, the block grants initiatives envisioned greater local control and a reduced judicial role.

Combusting with “New Federalism” initiatives, legislative riders as well as Reagan and Bush Justice Department arguments have emphasized local autonomy and attacked mandatory reassignments. Indeed, Reagan Civil Rights Division head Brad Reynolds not only refused to invoke the _Keyes_ presumption but also attacked busing as “diluting the essential [national] consensus that racial discrimination is wrong and should not be tolerated in any form.” The Bush Justice Department, while more moderate in tone, nonetheless argued in _Freeman_ that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools.” In addition to Congressional and White House opposition to intrusive judicial remedies, opinion polls suggest that busing is disfavored by the minority community. Rather than expansive judicial intervention, minority interests typically favor magnet school programs and other education-related expenditures. Given the absence of support for mandatory assignments and other intrusive remedies, it is little wonder that the courts themselves would tire of continuing judicial supervision of school systems.

70. _Id._
71. _See generally_ Devins & Stedman, _supra_ note 25, at 1245-57.
72. _Speech by William Bradford Reynolds, Assistant Attorney General for Civil Rights before the Delaware Bar Association, February 1982, at 9._
73. _Brief for the United States as Amicus Curiae, 8, Freeman v. Pitts, 112 S. Ct. 1430 (1992) (No. 89-1290)._ 
The fact that the Rehnquist Court was influenced by these concerns is as inevitable as the Warren and Burger Court's recognition of social and political factors in its equal educational opportunity jurisprudence. Whether the election of Bill Clinton will affect this dynamic remains to be seen. As of August 1994, the Clinton administration has left school desegregation and school finance alone. Congress also remains disinterested in these matters. Without any push for a greater federal judicial presence, the Court is likely to do little in this area. For Erwin Chemerinsky, that is ducking the issue by declaring victory. I, however, would place a less sinister spin on the evolution of the Court's role in this area. The Court sought to advance equal educational opportunity in fits and starts, sometimes—as in *Brown I, Swann, and Keyes*—moving aggressively and other times—as in *Brown II, Rodriguez, Miliken, and Freeman*—eschewing an activist role. In the end, the Court settled on a doctrine that roughly matched social and political conditions. Without question, the Court would have played a more aggressive role had the electorate placed other individuals in the Congress, the White House, and—through the appointments and confirmation process—on the bench. But to expect the Court to rise above its surroundings is unrealistic. Justice Cardozo reminded us that the “great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”

II. THE COURT IN PERSPECTIVE

Similarities and differences in the decisionmaking styles of the Warren, Burger, and Rehnquist Courts tell but a small part of the story of the Supreme Court's role in equal educational opportunity litigation. The issue is not simply whether interest balancing is inevitable. Questions remain regarding the appropriateness of interest balancing in school cases and the possibility that a more activist judiciary would have eradicated inequality on the basis of race and wealth. Erwin Chemerinsky, while never proclaiming that vigorous judicial intervention will solve all our schools' ills, embraces interventionist judicial strategies as both appropriate and successful. “Strongly believ[ing] that there was a meaningful opportunity for judicial action to make *Brown's* promise a reality,” Chemerinsky concludes “that this opportunity was lost because the cases were decided by the Burger Court and not its predecessor.”

76. Indeed, Chemerinsky recognizes that “[p]erhaps no judicial decisions could have really made a major difference in light of the lack of a strong public commitment to equal schooling.” Chemerinsky, supra note 4, at 1000.
77. Id. at 1001.
There are two weaknesses in this argument (neither of which, incidentally, Erwin Chemerinsky disputes). First, interest balancing seems especially appropriate in school cases. It is impossible to know what the world would look like absent segregation and judges, therefore, must engage in quite a bit of speculation both in identifying actionable segregation and specifying appropriate remedial relief. Second, political constraints set real limits on the reach of judicial reform. Although courts are extraordinarily influential, judicial action cannot reorder society.

A. The World Absent Segregation

One central inquiry underlies all race discrimination cases, namely, what would the world look like in the absence of illegal discrimination? If the world were naturally integrated, statistical imbalance would serve as proof of discrimination. Moreover, in such a world, expansive race-conscious remedies should be used to ensure "natural" racial balance. If the world, absent illegal discrimination, were racially imbalanced, however, reliance on such statistical measures would be inappropriate. In such a world, proof of discrimination must hinge on evidence that suggests that existence of some discriminatory animus. Correlative to this, judicial remedies in a racially imbalanced world should seek only to redress the consequences of proven discrimination.

The choice of which model should predominate is ultimately one of values. Support for each model can be found in court decisions, social science research, and partisan politics. This makes it impossible the attainment of a consensus on which model should predominate. Furthermore, supporters of each model offer persuasive evidence on why the other model should not be embraced. Proponents of "natural" racial balance hinge their argument on the inability of proofs of discriminatory intent to combat race-influenced decisionmaking. Pointing to psychological theories that explain submerged racism as well as the fact that "there are mental processes of which we have no awareness that affect our actions and the ideas of which we are aware," numerical proofs of discrimination are deemed necessary.

It is, however, naive to suggest that discrimination is the sole cause of racial imbalance. Voluntary and involuntary forces contribute to such separation. Housing studies suggest that "there is no reason to believe that the level of residential segregation observed between [blacks and whites] purely and simply reflects the totality of only one group's

demands.” Furthermore, at least sometimes, urban white America has sought a constructive voluntary solution to racial separation.

Faced with such conflicting evidence, courts must look to other factors in defining both the wrong and the remedy in school cases. Victims’ rights is one of these values and the one embraced by Erwin Chemerinsky. While there is nothing inherently wrong in giving great weight to victims’ rights concerns, it is nonetheless appropriate for judges to consider judicial restraint, institutional self-interest, respect owed a co-equal branch, local control, and the like. That the Supreme Court has placed less emphasis on victims rights’ then is entirely appropriate.

B. The Limits of Judicial Reform

There is no doubt about the judiciary’s profound impact in school cases. Put simply, courts affect behavior. When court orders result in new budgeting processes (Boston), the imposition of a state-wide tax levy (Kansas City), the building of state-subsidized housing (Yonkers), and the freezing of U.S. Department of Education accounts (Chicago), change occurs. Furthermore, parents do send their children to private schools or move to other school systems in response to school desegregation orders, although there is typically some increase in minority-nonminority contact in the public schools.

Erwin Chemerinsky overestimates, however, what courts can accomplish on their own. In some instances, Chemerinsky is correct. Judges or court-appointed special masters can work with community leaders to forge successful desegregation plans. In those cases, courts play an affirmative instrumental role.

80. See generally Kirp, supra note 6 (describing efforts by some predominantly white communities to address perceived black needs).
81. See Chemerinsky, supra note 4.
82. See Erwin Chemerinsky, The Constitution and Private Schools, in PUBLIC VALUES, PUBLIC SCHOOLS 274, 280 (Neal E. Devins ed., 1969) (state action doctrine studies in light of flight to private schools); F. WELCH & A. LIGHT, NEW EVIDENCE ON SCHOOL DESSEGREGATION (U.S. Commission on Civil Rights 1987) (exposure of minorities to white students increased in 74 of 125 districts studies, although court order prompted decline in the percentage of white students).
On other occasions, court orders provide little more than pyrrhic victory for civil rights litigants. When a school system prefers resistance to compliance, court action is not likely to succeed. For example, a recent study concluded that school systems can subvert school desegregation orders by delaying the remedy, devoting fewer resources to predominately black schools, and aiding white flight and the erosion of the city's tax base. Whether successful compromises outnumber political debacles is an open question. It is clear that courts can facilitate success stories, but only when school systems are willing players.

Chemerinsky, moreover, does not take into account the ability of Congress and the White House to stem the tide of judicial reform. Immediately after *Swann*, President Nixon delivered a national address on the evils of busing and proposed legislation making busing a remedy of “last resort” for school segregation, to be implemented “only under strict limitations.” Congress refused to limit court remedial authority, but numerous restrictions on federal financial support of mandatory busing and federal advocacy of busing have been enacted since 1972.

Recent social science findings speak to the limits of judicial intervention in both school desegregation and school finance. In school desegregation, despite Reagan administration attacks on the *Keyes* presumption and mandatory reassignments, “black students became more integrated from 1980 to 1988.” Moreover, although the Rehnquist Court did not signal the possible demise of school desegregation remedies until 1991, “the proportion of black students in schools with more than half minority students rose from 1986 to 1991.” In school finance, the limits of judicial intervention are made apparent by “social science findings showing a lack of correspondence between dollars spent and student achievement.”

86. See Fisher & Devins, supra note 42, at 267-69.
87. Orfield, supra note 2, at 7.
88. Id.
This evidence does not refute Erwin Chemerinsky’s claim that the courts could have accomplished more in school disputes. A more activist judiciary certainly would have had a more profound impact. At the same time, these findings also suggest, as Alexander Bickel put it, that “[o]nly a reordering of the environment”\textsuperscript{90} will result in racially balanced public schools. The fact that courts cannot accomplish such a task comes as no surprise. The story of school finance and school desegregation reveals that the judiciary is only a piece in a much larger mosaic.

III. CONCLUSION

Technically, this essay is a reply to Erwin Chemerinsky’s \textit{Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity}. Considering the bleak message portrayed by Chemerinsky about the tragedy of gross inequality in our schools and the unlikelihood of either the judiciary or elected government to respond to that inequality, it would be nice if this “reply” could offer solid evidence suggesting Chemerinsky’s description of our schools is in error. Unfortunately, while things may not be quite as bad as Chemerinsky makes them out to be, gross inequality does exist and it is unlikely to be corrected.

The courts are a contributing player to this state of affairs. Nonetheless, the courts are hardly the principal player. Without the support of community leaders and government officials, there are real limits on what we should expect of courts. The judiciary, while possessing significant power, cannot unilaterally manage social reform. Furthermore, interest balancing is certainly appropriate here and, more importantly, suggests that the courts should not seek to reshape our world. None of this is very satisfying but it seems a more realistic appraisal than that offered by Erwin Chemerinsky.

\textsuperscript{90} \textsc{Alexander Bickel, The Supreme Court and the Idea of Progress} 132 (1978).