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## THE END OF BUSING?

Davison M. Douglas\*

DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION*. By Gary Orfield, Susan E. Eaton, and the Harvard Project on School Desegregation. New York: The New Press. 1996. Pp. xxiii, 424. \$30.

Forty years after the Supreme Court's decision in *Brown v. Board of Education*,<sup>1</sup> America's schools are becoming increasingly racially segregated. Since the late 1980s, segregation levels have increased such that urban schools are now more racially imbalanced than they were prior to the Supreme Court's 1971 *Swann v. Charlotte-Mecklenburg Board of Education*<sup>2</sup> decision, which legitimated the use of busing to integrate city school districts beset with significant residential segregation.<sup>3</sup> Moreover, the gap between Black and White achievement levels, which narrowed from the early 1970s until the late 1980s, has increased during the early 1990s.<sup>4</sup>

Yet, despite this trend toward greater school segregation, public discourse about America's schools no longer focuses on preserving racial mixing. Increasingly, discussion of school desegregation — among academicians, politicians, and judges — has been dominated by its critics. Although most Americans still say they favor desegregated schools (pp. 109-10), school desegregation — particularly busing — increasingly has been blamed for many of this country's education woes, and school choice has emerged as the new watchword in American education.

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\* Professor of Law, William and Mary Law School. A.B. 1978, Princeton; J.D. 1983, Ph.D. (History) 1992, Yale. — Ed. I would like to thank Neal Devins and Russell Pearce for their helpful comments on an earlier draft of this essay, and Catherine Rogers for her research assistance. I would also like to thank the Spencer Foundation and the National Academy of Education for their financial support. All shortcomings, of course, are my own.

1. 347 U.S. 483 (1954).

2. 402 U.S. 1 (1971).

3. The proportion of Black students in schools with more than half minority students began to rise in 1986; by 1991, it had reached a level higher than that existing prior to the 1971 *Swann* decision, which opened the door to urban school desegregation. P. 54. At the same time, the percentage of Black students in intensely segregated schools, as measured by those with a minority population of over ninety percent, also increased. Pp. 54-55. In addition, Latino students "have remained in an unbroken pattern of increasing [school] segregation dating to the time national data was first collected in the late 1960s." P. 53.

4. See JAY R. CAMPBELL ET AL., U.S. DEPT. OF JUSTICE, REPORT IN BRIEF: NAEP 1994 TRENDS IN ACADEMIC PROGRESS 8-9 (1996).

Recent books by political scientists such as David Armor<sup>5</sup> and Christine Rossell<sup>6</sup> sharply question the educational benefits of mandatory desegregation plans, such as busing, and promote instead the use of voluntary desegregation devices, such as magnet schools, which emphasize parental choice. During the past ten years, dozens of school districts have persuaded courts, weary from decades of school supervision, to allow them to abandon busing plans in favor of neighborhood schools and magnet schools, notwithstanding the resegregative effects of those decisions.<sup>7</sup> Even in the African-American community, where support for racially mixed schools traditionally has been strongest, more and more leaders question the wisdom of pursuing racial balance at the expense of strong Black schools.<sup>8</sup> Indeed, much of the support for a return to the neighborhood school has come from African Ameri-

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5. See DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995).

6. See CHRISTINE H. ROSSELL, *THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING* (1990).

7. See, e.g., *Freeman v. Pitts*, 503 U.S. 467 (1992) (DeKalb County, Georgia); *United States v. Overton*, 834 F.2d 1179 (5th Cir. 1987) (Austin, Texas); *Arthur v. Nyquist*, 904 F. Supp. 112 (W.D.N.Y. 1995) (Buffalo, N.Y.); *Keyes v. Congress of Hispanic Educators*, 902 F. Supp. 1274 (D. Colo. 1995); *Coalition to Save Our Children v. State Bd. of Educ.*, 901 F. Supp. 784 (D. Del. 1995) (Wilmington, Del.); *Dowell v. Board of Educ.*, 606 F. Supp. 1548 (W.D. Okla. 1985), *revd.*, 890 F.2d 1483 (10th Cir. 1989), *revd.*, 498 U.S. 237 (1991) (Oklahoma City); *Riddick v. School Bd.*, 627 F. Supp. 814 (E.D. Va. 1984), *affd.*, 784 F.2d 521 (4th Cir. 1986) (Norfolk, Virginia).

8. Within academia, Derrick Bell, a former NAACP attorney engaged in school desegregation litigation, has long questioned the civil rights community's single-minded quest for racially balanced schools. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 112-13 (1987) (arguing, via Bell's fictional character Geneva Crenshaw, that: "[R]ather than beat our heads against the wall seeking pupil-desegregation orders the courts were unwilling to enter or enforce, we could have organized parents and communities to ensure effective implementation for the equal-funding and equal-representation mandates."); Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Derrick Bell et al., *Racial Reflections*, 37 UCLA L. REV. 1037 (1990); see also Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992) (criticizing the Court's emphasis on racial mixing); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1403 (1993) (urging "the maintenance and operation of separate institutions that allow African-Americans to join together").

United States Supreme Court Justice Clarence Thomas has also questioned the emphasis on racial balance. See *Missouri v. Jenkins*, 115 S. Ct. 2038, 2062 (1995) (Thomas, J., concurring) ("[T]he theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development . . . not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority.").

Much of the contemporary debate concerning the desirability of full racial assimilation has intellectual antecedents in the northern Black community of the pre-Brown era. See Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677 (1997).



cans. School desegregation no longer dominates the agenda of the civil rights community.<sup>9</sup>

Gary Orfield,<sup>10</sup> long one of this country's most relentless supporters of school integration, Susan Eaton,<sup>11</sup> and the Harvard Project on School Desegregation<sup>12</sup> challenge this emerging orthodoxy in their new book *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*. They worry that the increase in racial isolation poses great risks for America's urban minority children and urge jurists and educators to keep "their eyes on the prize of *Brown* rather than [turn] . . . again down the blind alley of *Plessy*" (p. 112). According to Orfield and Eaton,<sup>13</sup> the current trend toward greater racial separation in the public schools bears striking and disturbing similarities to the movement toward segregation in this country at the end of the nineteenth century. Noting that Black schools worsened relative to White schools following the Supreme Court's decision in *Plessy v. Ferguson*,<sup>14</sup> the authors fear that the present increase in racial isolation could lead to similar results:

The nation today is experiencing the quiet consolidation of a system of segregation and inequality. Much the same thing happened after

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9. As Chris Hansen, special litigation counsel for the American Civil Liberties Union and twenty-year veteran of school desegregation litigation, noted in 1993: "Unlike the past, there are few lawyers today in national or local civil rights organizations who devote substantial time to school desegregation work." Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863, 868 n.28 (1993).

10. In addition to testifying in a number of school-desegregation cases and serving as special master in the San Francisco school desegregation case, Orfield is director of the Harvard Project on School Desegregation and a professor of education and social policy at Harvard University. He has written many books and articles dealing with school desegregation. See, e.g., GARY ORFIELD, *MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY* (1978) [hereinafter ORFIELD, *MUST WE BUS?*]; GARY ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980* (1983); GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* (1969); GARY ORFIELD, *TOWARD A STRATEGY FOR URBAN INTEGRATION: LESSONS IN SCHOOL AND HOUSING POLICY FROM TWELVE CITIES* (1981); GARY ORFIELD & CAROLE ASHKINAZE, *THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY* (1991); Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397 (1995); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825 (1996); Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759 (1993).

11. Susan Eaton, a graduate student in the Harvard School of Education and former assistant editor of the *Harvard Education Letter*, is assistant director of the Harvard Project on School Desegregation.

12. The Harvard Project on School Desegregation grew out of a graduate seminar held at Harvard University conducted by Gary Orfield and consisting of Harvard students from the university's law, government, and education schools. As part of the seminar, the students conducted research in various cities that formed the basis for the book's case studies. The book's overview and concluding chapters are written by Orfield; the case studies are largely written by Eaton and the other students.

13. This review essay refers to "Orfield and Eaton" since they are the primary authors of the book, even though the book is coauthored in part by a collection of Harvard students.

14. 163 U.S. 537 (1896) overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954).



*Plessy*. Generations passed as segregation was consolidated and built into the fabric of our developing metropolitan areas. Rigid segregation was followed by dramatic increases in the inequality of resources; there are signs of the same trend now. As we face resegregation and inequality, it is urgent to seek policies that lead back toward the vision of *Brown*. [p. 345]

Orfield and Eaton place the blame for this increasing racial isolation in large part on the Supreme Court. They argue that the Court has retreated from its earlier insistence on the elimination, or at least substantial reduction, in racial isolation in urban schools. Part I of this review essay considers the Court's school desegregation jurisprudence and concludes that the Court's decisions on interdistrict remedies and unitariness have indeed impeded urban desegregation.

Yet Orfield and Eaton do more than merely review the Supreme Court's evolving school-desegregation jurisprudence. Relying in part on several case studies of school desegregation plans around the country,<sup>15</sup> they argue that racial isolation in urban schools harms minority children and that alternative measures such as voluntary magnet schools will not, in the long run, produce the same educational and social benefits as would mandatory pupil-assignment plans such as busing (pp. 64-71, 277-80). They also argue that despite growing support in the African-American community for strong, albeit separate, minority schools, minority children will invariably fare less well in racially isolated schools. Part II of this review essay considers Orfield and Eaton's empirical claims regarding the effects of racial isolation on minority children and concludes that the exact effect of school desegregation is more difficult to assess than Orfield and Eaton suggest. It also concludes that though racial mixing is difficult to achieve in many inner-city school districts, racially isolated urban schools are particularly vulnerable to insufficient public support.

Ultimately, this is not a book about legal doctrine; rather, it is a book about education policy. During the four decades since *Brown*, the debate about school desegregation has been waged primarily in the federal courts. As the Supreme Court continues its slow retreat from this area of law, the locus of debate over school desegregation has shifted to state legislatures, state courts, and local school boards, where policy arguments about the educational and social benefits of pupil mixing have assumed increasingly greater

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15. The authors examine in detail school desegregation in Austin, pp. 166-73, Charlotte, pp. 179-206, Detroit, pp. 148-56, Kansas City, pp. 241-63, Montgomery County (Maryland), pp. 207-39, Little Rock, pp. 156-61, Norfolk, pp. 115-42, and Prince George's County (Maryland), pp. 162-66, 265-89.

relevance.<sup>16</sup> In this new arena, the concerns that Orfield and Eaton raise will play an even larger role in reshaping American urban education.

# I. THE EVOLUTION OF SCHOOL-DESEGREGATION JURISPRUDENCE AND ITS EFFECT ON URBAN SCHOOLS

Orfield and Eaton blame the Supreme Court for both the failure of *Brown* to achieve greater pupil mixing and the recent increases in racial isolation.<sup>17</sup> Indeed, two important doctrinal developments in school-desegregation jurisprudence during the past quarter century have contributed to greater segregation in urban schools: (1) the Court's reluctance to allow interdistrict remedies, which effectively foreclosed much northern urban desegregation; and (2) the Court's increasing inclination to find that the effects of past intentional segregation have been eliminated and thus to excuse school districts from ongoing desegregation obligations. In the book's title, Orfield and Eaton characterize these doctrinal developments, which undoubtedly have had a significant impact on the increase in racial isolation in urban schools, as a "[q]uiet [r]eversal of *Brown v. Board of Education*."

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16. State legislatures, state courts, and local school boards continue to debate the issue of school desegregation, even as the federal courts are increasingly withdrawing their jurisdiction from school desegregation disputes. For example, many state legislatures are considering or have enacted proposals, including private school vouchers, that permit greater school choice for parents. The state legislatures in Connecticut, Massachusetts, and New Jersey each have enacted legislation in the last few years that encourages desegregation. See ARMOR, *supra* note 5, at 60-61. The Connecticut legislature is currently considering legislation that would link state funding for education with desegregation goals. See *Several Testify on Desegregation Legislation*, HARTFORD COURANT, Mar. 14, 1997, at 1B. A number of school boards in recent years have adopted voluntary desegregation plans. See ARMOR, *supra* note 5, at 61, 115.

School desegregation litigation under state laws and constitutions has also increased in recent years, with the Connecticut Supreme Court's 1996 decision in *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996), being the most dramatic example of the use of state law to secure desegregation. Similarly, state court litigation to equalize school funding between rich and poor school districts, with potential benefits for minority urban districts, has been carried out in a number of states in recent years. See, e.g., *Abbott ex rel. Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (finding New Jersey's public school financing system violates New Jersey Constitution); *DeRolph v. State of Ohio*, 677 N.E.2d 733 (Ohio 1997) (finding Ohio's public school financing system violates Ohio Constitution), *clarified per curiam*, Nos. 95-2066, 95-9638, 1997 WL 205136 (Ohio Apr. 25, 1997). See generally Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); Julie K. Underwood, *School Finance Litigation: Legal Theories, Judicial Activism, and Social Neglect*, 20 J. EDUC. FIN. 143 (1994).

17. Pp. 1-22. Orfield and Eaton also blame the Reagan Administration's desegregation policies for recent increases in racial isolation. Pp. 16-19.



### A. *The Restriction on Interdistrict Remedies*

Following enactment of Title VI of the Civil Rights Act of 1964,<sup>18</sup> large numbers of southern school districts eliminated race-conscious pupil assignments in the face of threatened funding cut-offs.<sup>19</sup> As a result of vigorous enforcement of Title VI by the Department of Health, Education, and Welfare, the percentage of Black children attending desegregated schools in the South increased tenfold, from two to twenty percent, between 1964 and 1968.<sup>20</sup> Yet these early efforts barely affected southern cities with substantial residential segregation. In 1971, the Supreme Court addressed the issue of urban school desegregation in its landmark *Swann*<sup>21</sup> decision. The Court legitimated the reassignment of children to schools outside of their immediate neighborhoods in order to overcome residential segregation. In the wake of *Swann*, urban school districts, particularly in the South, dramatically increased the use of school busing.<sup>22</sup> Two years later, in *Keyes v. School District No. 1*,<sup>23</sup> the Supreme Court extended school-desegregation obligations to northern and western states by holding that school districts in states with no recent history of de jure segregation were nonetheless obligated to desegregate if the districts themselves had engaged in any type of discriminatory behavior.

The *Keyes* decision, coupled with *Swann*, appeared to open the door to desegregation efforts in urban school districts throughout the nation. But many northern urban school districts encountered desegregation hurdles that southern districts, such as the Charlotte district at issue in *Swann*, did not encounter. Whereas many southern urban school districts cover an entire metropolitan area, encompassing inner-city areas along with suburban and even rural areas, in the North, self-contained inner-city, majority-Black school dis-

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18. Pub. L. No. 88-352, tit. VI, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d (1994)).

19. Title VI of the Civil Rights Act of 1964 provided that no recipient of federal funds could discriminate on the basis of race. As a result, the Office of Education of the Department of Health, Education, and Welfare (HEW) began an extensive effort to compel southern school districts to end their segregative practices in exchange for the continued receipt of federal funds. The level of school desegregation in the South dramatically increased in the late 1960s in response to HEW pressure. See generally ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION*, *supra* note 10; James R. Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967).

20. See DAVISON M. DOUGLAS, *READING, WRITING, AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS* 125-26 (1995).

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

22. By the following school year, more than forty judges had entered new school-desegregation decrees requiring the elimination of majority Black schools through the use of busing. See ORFIELD, *MUST WE BUS?*, *supra* note 10, at 25.

23. 413 U.S. 189 (1973).



tricts are much more common.<sup>24</sup> As a result, many northern urban school districts could not be desegregated without transporting students across school district lines.

In 1972, a federal district court judge in Detroit ordered a metropolitan-area-wide desegregation remedy, encompassing fifty-three suburban school districts, in order to desegregate the Detroit schools.<sup>25</sup> In a decision that would prove extremely significant for urban desegregation, the Supreme Court in 1974 ruled five to four in *Milliken v. Bradley*<sup>26</sup> that the district court had erred in requiring an interdistrict school remedy without a showing that the school district lines had been constructed with an intent to preserve segregation or that the state or suburban school districts had taken other action that contributed to the interdistrict segregation.<sup>27</sup>

Although a few courts did order interdistrict desegregation remedies after *Milliken* — most notably in Wilmington, Delaware,<sup>28</sup> and Indianapolis<sup>29</sup> — and a few suburban school districts agreed to participate in voluntary interdistrict transfer programs — as in Cincinnati, Milwaukee, and St. Louis<sup>30</sup> — most plaintiffs could not satisfy the *Milliken* standards for an interdistrict remedy.<sup>31</sup> As a result, meaningful desegregation became impossible in many of America's cities, particularly those outside the South.

*Milliken* has had enormous consequences for racial isolation. More than eighty percent of the nation's minority students live in metropolitan areas, which, in most instances, are divided into majority-Black inner-city school districts and majority-White suburban

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24. In the meantime, urban school systems throughout the country were losing large numbers of White students to suburban school districts. During the late 1960s and early 1970s, virtually every major city in the United States experienced a decline in the percentage of school-age children who were White, in some instances by over 30%. By 1973, 53% of the students in the nation's 49 largest school districts were non-White, an increase from 44% just two years earlier. These population shifts were particularly dramatic in the older industrial cities of New England and the Mid-Atlantic, where the White population declined by 10% and the Black population increased by 45% during the 1960s. See ORFIELD, *MUST WE BUS?*, *supra* note 10, at 50-51, 54, 70-71.

25. See *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972). That same year, a federal district court judge in Richmond, Virginia, also ordered a metropolitan-area desegregation remedy that encompassed both a center-city school district as well as suburban school districts. See *Bradley v. School Bd.*, 338 F. Supp. 67 (E.D. Va. 1972).

26. 418 U.S. 717 (1974).

27. See 418 U.S. at 744-45. One year earlier, in 1973, the Supreme Court had divided four to four in *School Bd. v. State Bd. of Educ.*, 412 U.S. 92 (1973), a case considering the legitimacy of an interdistrict remedy in metropolitan Richmond, Virginia. Justice Powell recused himself in that case, causing the deadlock, because of his prior membership on the Richmond School Board.

28. See *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975).

29. See *United States v. Board of Commrs.*, 456 F. Supp. 183 (S.D. Ind. 1978).

30. ARMOR, *supra* note 5, at 125.

31. For example, efforts to secure an interdistrict remedy in both the Atlanta and Kansas City metropolitan areas failed. See *id.* at 124-25.

school districts (p. 292). In the nation's largest cities, fifteen of every sixteen Black and Latino students are in schools where most of the students are non-White.<sup>32</sup> The four states with the most extreme school segregation — Illinois, Michigan, New York, and New Jersey — each contain large metropolitan areas where majority-Black urban school districts are cut off from neighboring majority-White suburban school districts (p. 59). No court decision has influenced patterns of racial isolation in America's schools more than *Milliken*.

*B. Unitariness Decisions: Ending Court-Mandated Desegregation*

A second aspect of school-desegregation jurisprudence that has contributed to the resegregation of urban schools has been the willingness of courts to find that school districts have eliminated the effects of past intentional segregation and thus are entitled to relief from further desegregation obligations. During the past decade, numerous federal courts have allowed school districts to abandon mandatory pupil-assignment plans, such as busing, in favor of neighborhood schools or voluntary magnet schools, on the ground that these school districts have achieved "unitary" status.<sup>33</sup> As a result, a number of urban school districts, particularly in the South, have abandoned busing plans, with a corresponding increase in racial isolation.

The Supreme Court, in *Green v. County School Board*,<sup>34</sup> imposed on school boards that had previously operated a dual school system "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."<sup>35</sup> Three years later, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court suggested that once such racial discrimination has been eliminated, "further intervention by a district court should not be necessary" unless the school district takes action to resegregate its schools.<sup>36</sup>

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32. P. 61. In 1986, the 25 largest central-city school systems contained 30% of the country's Latino school population, 27% of the African-American population, and 3% of Whites. P. 61.

33. See *supra* note 7.

34. 391 U.S. 430 (1968).

35. 391 U.S. at 437-38. Such school boards, the Court concluded, "must be required to formulate a new plan . . . which promise[s] realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442. The Court specified six parts of a school district that must be free from racial discrimination before the mandate of *Brown* is met: school attendance patterns, faculty, staff, transportation, extracurricular activities, and facilities. See 391 U.S. at 435. These *Green* factors became the means by which a court could assess whether a school district had eliminated the effects of racial discrimination and hence achieved unitary status.

36. See 402 U.S. 1, 31-32 (1971). In 1976, the Court again addressed the unitariness issue by holding that the City of Pasadena school board was not obliged to engage in annual readjustments of school attendance zones to counteract shifting demographic patterns when those



But the Court left unresolved at least one critical issue: When has racial discrimination in a school district "been eliminated root and branch," thereby ending the need for judicial supervision?

During the 1980s, a number of school districts sought to abandon busing plans and return to using neighborhood schools. Supported by the Reagan Justice Department (pp. 17-18), several of these districts received judicial approval to abandon court-ordered busing plans, notwithstanding the fact that conversion to neighborhood schools would increase racial isolation.<sup>37</sup> These school districts argued that the racial isolation caused by the end of busing was not due to intentional segregation, but rather was due to residential segregation, caused by countless private decisions for which the school districts were not responsible.

The Supreme Court initially stayed out of the debate over how to determine when a school district has eliminated the effects of past racial discrimination,<sup>38</sup> but finally addressed it in two decisions in the early 1990s. In *Board of Education v. Dowell*,<sup>39</sup> the Court held that a school district achieved unitary status if it had engaged in good-faith compliance with earlier desegregation decrees and had eliminated the vestiges of past discrimination to the extent practicable. The Court further indicated that once a school district achieved unitary status, it was free to return to a pupil-assignment plan that exacerbated racial imbalance so long as the district was motivated by legitimate educational concerns rather than an intent to segregate. In *Freeman v. Pitts*,<sup>40</sup> the Court determined that a school system could achieve unitary status with respect to part, but not all, of its operations, thus allowing lower courts to withdraw their supervision of schools districts in piecemeal fashion.

When a school district achieves unitary status and wins permission to return to neighborhood schools, school segregation typically increases as a result of residential segregation. The crucial issue in the wake of *Dowell* and *Pitts* is whether segregated neighborhoods — which result in segregated neighborhood schools — are due to past racial discrimination, in which case the return to neighborhood schools would be impermissible, or are due to neutral factors such as private choice in residence. Although in earlier years the

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changing patterns were "not attributed to any segregative actions" on the part of the school district. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976).

37. See *supra* note 7 and accompanying text.

38. In *Freeman v. Pitts*, 503 U.S. 467 (1992), Justice Scalia acknowledged the limited guidance that the Supreme Court had previously given in resolving this issue: "We have never sought to describe how one identifies a condition as the effluent of a [prior] violation, or how a 'vestige' or a 'remnant' of past discrimination is to be recognized." 503 U.S. at 502 (Scalia, J., concurring).

39. 498 U.S. 237 (1991).

40. 503 U.S. 467 (1992).



Supreme Court recognized the connection between past discrimination and residential segregation,<sup>41</sup> the current Supreme Court has emphasized the extraordinary difficulty of sorting out the causes of existing residential segregation, thereby opening the way to unitariness determinations.<sup>42</sup> As a result, the number of school districts gaining unitary status and abandoning busing plans in favor of racially isolated neighborhood schools is likely to increase during the next few years.

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41. In its 1971 *Swann* decision, the Court noted:

The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. . . . It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district may consider this in fashioning a remedy.

*Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971). Similarly, two years later in *Keyes*, the Court noted that:

[T]he use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools. We recognized this in *Swann* . . . .

*Keyes v. School Dist. No. 1*, 413 U.S. 189, 202 (1973).

42. For example, the Court affirmed district court findings in *Freeman* that residential segregation in Oklahoma City and Atlanta could not be linked to prior school segregation. See 503 U.S. at 494-96. As Justice Scalia noted in a concurring opinion in *Freeman*, "[r]acially imbalanced schools are . . . the product of a blend of public and private actions, and any assessment that they would not be segregated, or would not be *as* segregated, in the absence of a particular one of those factors is guesswork." 503 U.S. at 503 (Scalia, J., concurring).

Yet Orfield, long interested in the connection between housing segregation and school segregation, argues that though "there is no way to prove scientifically just how much of contemporary [residential] segregation" is due to past unlawful discrimination, p. 298, much social science evidence suggests a connection between past discrimination and current residential segregation, pp. 318-19. The courts, however, appear increasingly reluctant to accept such a correlation. Many scholars and even members of the Supreme Court have argued that segregation should be unlawful regardless of its connection to official discrimination because of the harm it causes minority children. See, e.g., 1 U.S. COMM. ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 193 (1967) ("The conclusion drawn by the U.S. Supreme Court about the impact upon children of segregation compelled by law . . . applies to segregation not compelled by law."); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 939 (1989) (asserting that the intent standard of *Washington v. Davis*, 426 U.S. 229 (1976), constitutes a "taming" of *Brown*). But a majority of the Court has consistently maintained the position that segregation not linked to intentional discrimination does not offend the Constitution. See, e.g., *Freeman*, 503 U.S. at 493 (holding that school districts have no obligation to desegregate "when the [racial] imbalance is attributable neither to the prior *de jure* system nor to a later violation by the school district but rather to independent demographic forces"); *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) ("The Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more."); *Washington v. Davis*, 426 U.S. at 240 (holding that the presence of "both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause").

C. *The Political Context of the Court's School-Desegregation Jurisprudence*

Orfield and Eaton argue the Supreme Court's school-desegregation jurisprudence that has contributed to the increase in racial isolation does not reflect public sentiment: These decisions "are often viewed as if they were responses to public opinion turning against desegregation or to civil rights policies failing. But the courts were actually leading, not following, public opinions."<sup>43</sup> Orfield and Eaton rely on public opinion surveys that indicate that the vast majority of Americans favor school desegregation (p. 340). Although support for pupil mixing is strong, support for mandatory desegregation remedies, such as busing, is much less extensive.<sup>44</sup> In following a more conservative path in its recent school-desegregation jurisprudence, the Court has not necessarily subverted popular attitudes about busing. Rather, the Court has thrown the issue of the desirability of busing back to school boards and legislatures and their constituents to resolve for themselves.

For forty years, the Supreme Court's school-desegregation decisions have been influenced by political context. Beginning with the two *Brown* decisions, the Court has been particularly sensitive to the political impact of its school-desegregation pronouncements. Certainly the Court's weak enforcement decision in the second *Brown* case<sup>45</sup> must be seen in part as responsive to southern antagonism to the first decision.<sup>46</sup> Similarly, the Court's decision in

43. P. 340. Orfield and Eaton also complain that the Supreme Court's recent decisions eviscerating desegregation requirements have "received little mass-media attention." P. 340. Yet the Supreme Court's school desegregation decisions continue to receive extensive coverage in both the popular and academic press. For example, each of the Court's two most recent school desegregation decisions received front-page coverage in the *Washington Post*, followed by a major editorial. See Joan Biskupic, *Desegregation Remedies Rejected: Justices Say Solutions Must Address Specific Discrimination*, WASH. POST, June 13, 1995, at A1 (news article discussing *Missouri v. Jenkins*); Juan Williams, *The Court's Other Bombshell: Schools, Not Voting Rights, Was the Key Racial Ruling*, WASH. POST, July 2, 1995, at C1 (editorial describing the importance of *Missouri v. Jenkins*); Ruth Marcus, *Court Cuts Federal Desegregation Role: Schools' Anti-Bias Obligations Eased*, WASH. POST, Apr. 1, 1992, at A1 (news article discussing *Freeman v. Pitts*); Nat Hentoff, *Back to Separate but Equal*, WASH. POST, Apr. 11, 1992, at A25 (editorial discussing the impact of *Freeman v. Pitts*). Several law reviews have published symposia dealing with school desegregation during the past four years. See, e.g., Symposium, *Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall*, 61 FORDHAM L. REV. 1 (1992); Symposium, *Desegregation Law: The Changing Vision of Equality in Education*, 42 EMORY L.J. 747 (1993); Forum, *In Pursuit of a Dream Deferred: Linking Housing and Education*, 80 MINN. L. REV. 743 (1996); Symposium, *Race, Education, and the Constitution: The Legacy of Brown v. Board of Education*, 20 HASTINGS CONST. L.Q. 521 (1993).

44. See pp. 109-10; ARMOR, *supra* note 5, at 195-203. But Orfield and Eaton correctly note that those parents who have had a direct experience with school busing are likely to have a favorable opinion of school desegregation. P. 22.

45. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

46. See J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978* (1979).



*Cooper v. Aaron*,<sup>47</sup> signed in dramatic and unprecedented fashion by all nine justices,<sup>48</sup> was issued in the context of widespread southern rejection of the legitimacy of the Court's first *Brown* decision.<sup>49</sup> The Court's decision in *Alexander v. Holmes County Board of Education*,<sup>50</sup> which demanded extraordinary urgency in implementation of school desegregation decrees, was influenced by the Nixon administration's antagonism to school desegregation and particularly its desire to delay implementation of southern desegregation plans.<sup>51</sup>

The Court's decision to which Orfield and Eaton direct most of their attention — *Milliken* — cannot be understood apart from the politics of the day. The politics of school busing changed dramatically after *Swann* legitimized the use of busing as a desegregation remedy in 1971. In the wake of that decision, efforts in Congress to limit busing remedies by both legislation and constitutional amendment intensified. These antibusing efforts, particularly outside the South, escalated in 1972 when the district court ordered the metropolitan Detroit desegregation plan into effect.<sup>52</sup> It was in this ex-

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47. 358 U.S. 1 (1958).

48. Prior to *Cooper*, all nine Justices had never jointly signed one of the Court's opinions. Dennis Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 82 (1979).

49. The Court in *Cooper* underscored that *Brown* "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes." 358 U.S. at 17.

50. 396 U.S. 19 (1969) (per curiam).

51. In *Alexander*, the United States Court of Appeals for the Fifth Circuit had allowed, at the urging of the Nixon Justice Department, a postponement of the desegregation of 30 Mississippi school districts from August until December 1969. The Department of Health, Education, and Welfare (HEW) had already prepared desegregation plans for the school districts which it described as "educationally and administratively sound," but HEW Secretary Robert Finch took the extraordinary step of asking the Fifth Circuit to ignore those plans and grant a delay.

HEW's action marked the first time that the federal government had ever attempted to delay implementation of a school desegregation order. The delaying action created a crisis in the Justice Department; as a result, the Solicitor General refused to defend the government's position before the Supreme Court and several attorneys resigned in protest. Hearing the case in expedited fashion and undoubtedly irritated by the Nixon Administration's recalcitrance, the Supreme Court held that the lower court should have denied all motions for additional time and ordered every affected school district to "begin immediately to operate as unitary school systems." *Alexander*, 396 U.S. at 20. The *Alexander* case would have a significant impact on the pace of desegregation litigation. See DOUGLAS, *supra* note 20, at 163-64; ORFIELD, *MUST WE BUS?*, *supra* note 10, at 327-28.

As a further example of the Court's sensitivity to the political culture, Justice William Brennan sent a memorandum to Chief Justice Warren Burger during the Court's deliberations in the *Swann* case noting that recent newspaper surveys had indicated a lessening of opposition to school desegregation and that he wanted to make sure that the Court's opinion did not contain any language that would give comfort to those still seeking to resist pupil mixing. See Memorandum from William Brennan to Warren Burger (Mar. 8, 1971) (on file with the Hugo Black Papers, Box 436, Library of Congress, Washington, D.C.).

52. See *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972). This decision, along with a similar decision in Richmond, see *Bradley v. School Bd.*, 338 F. Supp. 67 (E.D. Va. 1972), raised the specter of widespread busing in major cities throughout the country.



plosive political environment that the Supreme Court rendered its *Milliken* decision. Some observers aptly have interpreted the decision as an indication that the Court would not risk its institutional prestige on the busing issue until the political climate had changed.<sup>53</sup>

The Court's unitariness decisions also show the influence of the political and social context in which they were rendered. The *Dowell* and *Freeman* decisions made it considerably easier for school boards to jettison busing plans in favor of neighborhood schools. These decisions came at a time of growing support among both African Americans and Whites for a return to neighborhood schools. In both the *Dowell* and *Freeman* cases, the district courts emphasized their perception of Black opposition to school busing in permitting the return to neighborhood schools.<sup>54</sup> Moreover, frustration with the protracted nature of desegregation litigation and ongoing judicial supervision of local school districts, with some cases in their third or fourth decade, undoubtedly influenced these recent decisions.<sup>55</sup>

Orfield and Eaton oversimplify when they label the Supreme Court as out of touch with American sentiment on school busing. Although support for busing has increased over the past twenty-five years (pp. 109-10), a large percentage of Americans still favor a return to neighborhood schools, which is precisely what the Court's recent decisions allow.<sup>56</sup>

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The extension of school busing to the North transformed the politics of school busing. The Michigan delegation to Congress emerged during the spring of 1972 as leaders in the fight for congressional antibusing legislation, spurred by George Wallace's surprising victory in the Michigan Democratic presidential primary in May 1972. Throughout 1972 and 1973, Congress debated both proposed legislation and a constitutional amendment banning the use of busing for school desegregation purposes. See ORFIELD, *MUST WE BUS?*, *supra* note 10, at 247-60.

53. See, e.g., Nathaniel R. Jones, *An Anti-Black Strategy and the Supreme Court*, 4 J.L. & EDUC. 203, 203 (1975) (arguing *Milliken* must be "viewed in light of the political climate created by the . . . [Nixon] administration"); Charles Lawrence, "One More River to Cross" — *Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 49, 57 (Derrick Bell ed., 1980) (calling *Milliken* a "politically motivated decision to keep black children out of Detroit's suburbs").

54. See Hansen, *supra* note 9, at 871 n.34.

55. In *Dowell*, the Court commented: "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." Board of Educ. v. Dowell, 498 U.S. 237, 247 (1991). Similarly, in *Freeman*, the Court explained 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." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992). As Justice Scalia noted in *Freeman*: "At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools." 503 U.S. at 506 (Scalia, J., concurring).

56. See ARMOR, *supra* note 5, at 195-203.

The Supreme Court is unlikely to reverse its decisions on interdistrict remedies or unitariness. Indeed, in the next few years, lower courts are likely to find that many more school districts have achieved unitary status. As a result, the locus of the school-desegregation debate will increasingly shift to the political sphere, as school boards and state legislatures grapple with the issue whether to continue desegregation efforts despite the end of a constitutional mandate to do so.<sup>57</sup> Hence, the more momentous discussion in Orfield and Eaton's book is their claim that curtailing busing remedies has negative educational and social implications.

## II. THE RESEGREGATION OF URBAN SCHOOLS: SHOULD WE CARE?

Orfield and Eaton do not focus primarily on adverse court decisions but on why we should care about the resegregative effect of those decisions. The central thesis of their book is that this dismantling of desegregation has profound negative consequences for urban minority schoolchildren. Beneath the book's dramatic rhetoric about a return to *Plessy* and abandonment of *Brown* lies a fundamental claim: racial isolation intensifies educational and social detriment for disadvantaged minority children.

Orfield and Eaton are not the first social scientists to consider the educational and social implications of racial isolation. Social scientists have studied the effects of school integration for more than three decades, with conflicting conclusions. Orfield and Eaton thus must address two questions with which social scientists have long struggled: What are the actual costs and benefits of racial mixing, and how effective are desegregation alternatives, such as voluntary magnet schools, in comparison to busing, in bringing about equal educational opportunity for minority students?

### A. *The Costs and Benefits of Mandatory Desegregation Remedies*

#### 1. *The Benefits of Racial Mixing*

Central to Orfield and Eaton's argument is their view that pupil mixing confers tangible educational and social benefits on minority children. This claim has formed the policy, if not the legal, basis for much past school-desegregation activity; the question of its validity

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57. One potential troubling effect of a unitariness finding, not discussed by Orfield and Eaton, is that a unitary school district may be prohibited thereafter from considering race in its decisionmaking, such as in the assignment of students or teachers, even if the purpose is to promote desegregation. See, e.g., *Equal Open Enrollment Assn. v. Board of Educ.*, 937 F. Supp. 700 (N.D. Ohio 1996) (granting preliminary injunction blocking Akron school district's policy of restricting transfers of White students because the policy was "substantially likely" to be unconstitutional).



will be central to future policy debates on the issue of school busing.

It is difficult to assess the data on the social and educational effects of racial mixing. Both opponents and supporters of mandatory desegregation plans agree that since the early 1970s, Black students have attained higher educational achievement levels, particularly in younger grades, while White students' achievement levels have remained relatively constant.<sup>58</sup> The disagreement arises in attempting to identify the reasons for this increase in Black achievement. While Orfield and Eaton attribute the achievement gains to racial mixing, other social scientists, such as David Armor, contend that the increases are more a function of the improving socioeconomic condition of African Americans and of compensatory education programs targeted at minority students.<sup>59</sup>

It is unfortunate that Orfield and Eaton do not respond more directly to Armor's 1995 book, *Forced Justice: School Desegregation and the Law*,<sup>60</sup> in which he explores in considerable detail the social science research concerning the costs and benefits of racial mixing in the schools. Armor analyzes several of the most important studies of the effects of racial mixing on educational and social achievement and concludes that the evidence does not definitively establish a positive correlation between racial mixing and achievement gains. Because this conclusion is at odds with that of Orfield and Eaton, their book would have been greatly strengthened by a more direct engagement with Armor's analysis.

Orfield and Eaton are persuasive when they identify the poor educational outcomes in many urban minority schools, but they are less convincing when they argue that these outcomes are a function of racial isolation as opposed to other social or economic factors. Certainly the pervasive racial and economic isolation in urban America and the poor educational outcomes that accompany such isolation raise deeply troubling issues of significant social concern. But whether the best way to improve urban educational outcomes is to increase racial mixing remains an open question after considering Orfield and Eaton's book alongside Armor's.

Despite almost twenty-five years of study of the educational and social effects of school desegregation, the precise impact of racial

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58. See ARMOR, *supra* note 5, at 91-98. Two of the more frequently cited studies are Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis*, 88 AM. J. SOC. 839 (1983), which found a positive correlation in younger grades between racial mixing and Black achievement levels, and a 1984 study by the National Institute of Education, which showed a modest average increase in Black reading levels as a result of desegregation. See ARMOR, *supra* note 5, at 86-91.

59. See ARMOR, *supra* note 5, at 92-98.

60. *Id.*



mixing on Black and White children remains cloudy. Armor is probably correct when he notes that "there is still no definitive study of the relationship between school desegregation and educational achievement, and no group of studies has generated consensus among social scientists who have conducted reviews of the research literature."<sup>61</sup> Additional studies examining the long-term effects of racial mixing are particularly needed.<sup>62</sup> Yet school desegregation research — particularly that which seeks to identify long-term effects — is expensive to conduct, and foundation and government support for such research has greatly diminished. Indeed, the federal government has sponsored very little school desegregation research since the early 1980s (pp. 341, 352-53). But the stakes are enormous: the future of another generation of inner-city children who are falling yet further behind and contributing to the ever-growing gap between rich and poor in America.<sup>63</sup>

## 2. *The Detriment of Mandatory Desegregation Remedies: Fears of White Flight*

A central attack on mandatory desegregation remedies, such as busing, is the claim that they contribute to White flight from urban school systems. Indeed, much of the conversation about the negative effects of busing has focused on its tendency to cause White families to flee to private schools or neighboring suburban school districts, thereby further undermining support for urban schools. It is precisely because of this fear of White flight that so many educational reformers oppose busing in favor of neighborhood schools or voluntary desegregation plans such as magnet schools.

As Orfield and Eaton concede, America's cities have undergone significant White flight during the past thirty years, coinciding with many school-desegregation orders (pp. 314-16). But they argue

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61. *Id.* at 76.

62. Much school desegregation research attempted to measure the effects of racial mixing over a short period of time. Moreover, many studies examined the educational effects of pupil mixing during the first few years of desegregation, missing later gains following initial periods of instability. *See id.* Fewer studies have attempted to assess the long-term effects of racial mixing, although one important such study found some positive educational and social benefits from a desegregation plan in Hartford, Connecticut. *See* ROBERT L. CRAIN ET AL., FINDING NICHES: DESEGREGATED STUDENTS SIXTEEN YEARS LATER (1989); *see also* studies gathered in ARMOR, *supra* note 5, at 108.

A further difficulty in conducting research into the effects of school desegregation is the manipulation of test data. As Orfield and Eaton suggest, certain tests such as the California Achievement Test, showed artificial achievement gains during the 1980s because the test relied upon a 1977 baseline and hence showed student achievement against a 1977 norm as opposed to a contemporary norm. Furthermore, some school districts, such as Oklahoma City, affected test results by testing a smaller percentage of students, eliminating the least successful students. Pp. 280-81, 338.

63. *See generally* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY (1995) (describing the growing gap between rich and poor in America).

that this decline in the White urban population has less to do with school desegregation than with concerns about urban decay, lower birthrates among non-Hispanic Whites, and the settlement of non-White immigrants in cities. Indeed, many cities with no school busing orders have also experienced sharp declines in the percentage of non-Hispanic Whites during the past thirty years.<sup>64</sup>

Undoubtedly school desegregation decrees have contributed to White flight from urban school districts, although Orfield and Eaton are correct in noting that much White flight took place for reasons unrelated to pupil assignments. But regardless of the reasons for this flight, it has left most major urban school districts with a majority non-White population, rendering efforts at substantial intradistrict racial mixing impossible in many instances. Because the Supreme Court has refused to remove the barriers to interdistrict desegregation remedies erected in *Milliken*, and in fact recently limited efforts to make voluntary interdistrict transfers more attractive in its *Missouri v. Jenkins*<sup>65</sup> decision, efforts to achieve greater racial mixing in many urban school districts will be increasingly difficult. Because of this reality, more and more educational strategists have begun to pursue methods of garnering additional resources for urban schools, such as tax reform, as a way of improving educational outcomes for inner-city schoolchildren.<sup>66</sup>

### 3. *African-American Attitudes Toward Mandatory Desegregation Remedies*

The debate over the value of mandatory desegregation remedies is complicated by the fact that the African-American community is increasingly divided about the value of racial mixing, with many African Americans arguing that Black children do not require contact with White children in order to experience educational gains. Indeed, a number of African Americans have supported efforts to abandon busing plans in favor of neighborhood schools,<sup>67</sup> even though this would result in greater racial separation.

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64. Pp. 93-96. Moreover, the return to neighborhood schools has not stopped the declining White population in urban areas. White enrollment declines have continued in school districts that have always had neighborhood schools as well as in cities, such as Norfolk, that have recently abandoned busing plans in favor of neighborhood schools. P. 113.

65. 115 S. Ct. 2083 (1995) (disapproving district court's efforts to make Kansas City school district "a magnet district [designed] to attract nonminority students from outside [Kansas City]").

66. See, e.g., Enrich, *supra* note 16, at 110-15.

67. See *supra* note 8. As Orfield himself notes, ending mandatory desegregation plans has been endorsed by the Black mayors of several major cities, including Cleveland, Denver, and Minneapolis. P. 343; see also Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV. 613, 643-45 (1995); Steven A. Holmes, *Look Who's Saying Separate Is Equal*, N.Y. TIMES, Oct. 1, 1995, § 4 (Magazine), at 1.



The African-American community has long struggled with the issue of school integration. During the nineteenth century, many African-American leaders favored separate schools because of fears of mistreatment of their children in integrated schools, the refusal of school boards to hire Black teachers to teach White children, and the loss of community cohesiveness.<sup>68</sup> Even though most northern states abolished segregated schools by statute during the late nineteenth century, those statutes went unenforced in many northern communities, and the African-American community bitterly divided about the wisdom of demanding integrated schools.<sup>69</sup> For example, W.E.B. DuBois, a longtime proponent of racial mixing, eventually editorialized against school integration because of the harm to Black students in mixed schools.<sup>70</sup>

This conflict continues today. Much of the controversy in the African-American community about the importance of pupil mixing focuses on the harm of racial isolation. Some critics of segregation have characterized its harm as the stigma of subordination that flows from a government-mandated policy of keeping African-American children apart from White children.<sup>71</sup> Others, such as Orfield and Eaton, go further and argue that racial segregation, regardless of whether the government mandates it, harms minority children by isolating them from the economic and social benefits that Whites enjoy. Yet many African Americans bristle at the no-

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68. See Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, 793-99 (1993) (discussing history of African-American attitudes toward school desegregation); Douglas, *supra* note 8, at 697-701, 712-19 (discussing northern African-American community's attitudes toward school segregation during pre-Brown era).

69. For example, Wendell Dabney, a Black newspaper editor and local NAACP leader in Cincinnati in the early twentieth century, complained about Black support for segregated schools: "Separate schools could neither be established nor maintained under the law, were it not for the solicitation of many colored people who, through selfishness, ignorance or cowardice, submit to such conditions as the easiest method of getting colored teachers appointed." WENDELL P. DABNEY, CINCINNATI'S COLORED CITIZENS: HISTORICAL, SOCIOLOGICAL AND BIOGRAPHICAL 149 (1926). As the NAACP launched its celebrated campaign against southern school segregation, it waged a second campaign against northern segregation. Many northern Blacks favored segregation, and the NAACP attempted to alter these attitudes. Thurgood Marshall complained to Walter White in 1945, for example, that the "biggest problem in Dayton [Ohio] is not a legal problem but is a problem of educating the Negro community to be in a frame of mind to fight segregated schools. The majority of the Negroes in Dayton are in favor of segregated schools and if this were not so, it would have been impossible to establish them." Memorandum from Thurgood Marshall to Walter White, Executive Secretary, NAACP (Nov. 6, 1945) (on file with NAACP Papers, Box II-B-146, Library of Congress, Washington, D.C.).

70. See W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935) (reluctantly endorsing school segregation to avoid mistreatment of Black children); see also W.E.B. DuBois, *Postscript*, 41 CRISIS 85 (1934) (noting mistreatment of Black children in northern mixed schools); W.E.B. DuBois, *The Tragedy of "Jim Crow"*, 26 CRISIS 169, 170-71 (1923) (same).

71. See generally JENNIFER L. HOCHSCHILD, *THIRTY YEARS AFTER BROWN* 17-28 (1985) (describing differing views of the harm of segregation articulated in *Brown*).

tion that blacks require contact with Whites in order to prosper. As Professor Kevin Brown has noted:

If one begins with an assumption of equality of physical facilities and other tangible factors, then it becomes apparent that the intangible difference between the white schools and the black schools is the absence of whites in the latter. The valuable "intangibles" lacking in the black schools, therefore, were attributes which must have been endemic only to white teachers and students.<sup>72</sup>

To Brown and others, this view of the harm of segregation is premised upon the notion that African Americans are innately deficient.<sup>73</sup> Hence, many African-American leaders argue that the problem with racial separation is not isolation from Whites, but rather the denial of equal facilities and support.

Orfield and Eaton respond that African-American schools, historically underfunded, are in danger of remaining so as schools become more segregated. They argue that when a school takes on an identity as a minority school, it risks losing public support.<sup>74</sup> Moreover, minority schools tend to have a higher percentage of disadvantaged children<sup>75</sup> compared with White schools. Hence, they require greater resources to cope with the array of concerns that disproportionately affect their students: health problems, developmental disabilities, hunger, violence, family disruption, and lower parent education and participation (p. 83). Orfield and Eaton worry that:

When discrimination is officially declared to have fully been rectified and the policies for resegregation are accepted by courts and community leaders as educationally sound, the blame for the pervasive ine-

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72. Brown, *supra* note 68, at 811; see also Brown, *supra* note 8, at 54-60.

73. See Brown, *supra* note 68, at 805. Furthermore, this conceptualization of segregation's harm identifies harm only to Blacks, not Whites, again suggesting that "desegregation becomes necessary precisely because African-Americans are not the equals of Caucasians." *Id.* at 816. As a result, according to Brown, "[a]t the same time that the country was dismantling de jure segregation and its concomitant message of African-American inferiority, it was also constructing a policy of integration which carried its own message of African-American inferiority." *Id.* at 817.

Malcolm X made a similar claim more than thirty years ago: "So, what the integrationists, in my opinion, are saying, when they say that whites and blacks must go to school together, is that the whites are so much superior that just their presence in a black classroom balances it out. I can't go along with that." Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 764 (quoting MALCOLM X, BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS AND A LETTER 17 (George Breitman ed., 1970)); see also Louis M. Seidman, Brown and Miranda, 80 CAL. L. REV. 673, 712-13 (1992) ("Symbolically, the assertion that black facilities were inherently unequal, that they could not be made equal regardless of the resources devoted to them, and that it did not matter how well students performed in them, implied that the mere nonexposure to whites deprived blacks of their rights.").

74. For example, after the Kansas City school district became majority non-White in the early 1970s, the voters of Kansas City turned down a long series of school bond referenda aimed at improving the financial status of the city's schools. P. 244.

75. In 1991, schools with more than 90% Black or Latino populations were 14 times more likely than White schools to have a majority of poor children. P. 83.



qualities that remain tends to be shifted to minority families and communities, the teachers, and the educational leaders. When discrimination is declared cured, the system can no longer be blamed. . . . The predictable failure of inner-city segregated schools then feeds cynicism and generates attacks on the entire system of public education. The failure often reinforces white stereotypes about what critics describe as the inferior culture of minority families, reinforcing growing suburban resistance to providing state resources to heavily minority urban school systems. Increasingly, state governments are moving from aiding urban schools toward seizing control of them and districts that they define as "educationally bankrupt," which usually have large majorities of segregated nonwhite students.<sup>76</sup>

Orfield and Eaton recognize that minority schools often receive supplemental monies, such as Chapter One funding, but worry that these funds will be lost in future budget cutting (pp. 162-63, 177).

Orfield and Eaton further argue that racial isolation harms Black schoolchildren by denying them access to students of a higher socioeconomic background: "A recently modish dig at integrationists says: 'Black kids don't need white kids to learn.' But that phrase misses the effective property of desegregation" (p. xv). The authors also observe that:

*Brown's* judgment that segregated schools are inherently unequal remains correct, not because something magic happens to minority students when they sit next to whites but because segregation cuts students off from critical paths to success in American society. . . .

. . . .

Research shows that desegregation opens richer opportunity networks for minority children, but without any loss for whites. Part of the benefit for minority students comes from learning how to function in white middle-class settings, since most of the society's best opportunities are in these settings. In contrast to the critics' assumptions, the theory is not one of white racial superiority but a theory about the opportunity networks that historic discrimination has attached to white middle-class schools and about the advantages that come from breaking into those mobility networks. . . .

. . . .

. . . Desegregation aims to create connections with new opportunities that will change a student's life chances not only through academic achievement but through better access to jobs, higher education, and roles in community leadership. [pp. 331, 344, 346]

Orfield and Eaton recognize — as they must — that there are excellent urban minority schools. But they argue that for every successful urban minority school, many others fail. Moreover, these

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76. Pp. 332-33; cf. *Boston Schools Scrap Racial Quotas; Reverse Bias Suit From White Girl Triggers Action*, FLA. TODAY, Nov. 16, 1996, at 5A (noting Boston school board's recent dismantling of a two-decade-old policy of giving preference for minority students at the school district's elite public schools, such as the Boston Latin School).

successes have become increasingly difficult to replicate because of the flight of middle-class Black families to suburban schools, which contributes further to the socioeconomic isolation of urban minority students (p. 84).

Although it is tempting to agree with those critics who claim that racial mixing is irrelevant to African-American educational progress, Orfield and Eaton convincingly argue that such views contribute to the notion that urban minority children are responsible for their own educational failure. Minority schools historically have been undersupported in this country, and urban areas undoubtedly will be further stretched financially as social welfare burdens shift from the federal government to the states. In the long run, the isolation of urban minority children from their middle-class peers may well undermine support for their schooling, with severe educational and social consequences.

#### B. *Alternatives to Busing: Voluntary Desegregation Plans*

In recent years, interest in voluntary desegregation plans, such as magnet schools, has increased significantly. Proponents of voluntary plans argue that they minimize White flight, achieve in the long run about the same degree of racial balance as do busing plans, enjoy greater public support, and bear the potential of greater educational achievement.<sup>77</sup>

Many districts developed magnet schools as part of a broader program for enhancing minority schools pursuant to the Supreme Court's 1977 decision in *Milliken v. Bradley*<sup>78</sup> (*Milliken II*). After the Court rejected a multidistrict desegregation remedy for the Detroit schools in 1974, the district court fashioned a new decree that provided for considerably greater expenditure of monies to improve the Detroit schools. The Court, having foreclosed integration of schools in Detroit with its earlier *Milliken* decision, affirmed the district court's decree, thereby offering some compensation to those Detroit schoolchildren denied a desegregation remedy. In so doing, the Court ratified a second paradigm of school-desegregation remedies: improving schools in segregated areas so as to achieve better educational outcomes and to attract White students on a voluntary basis in order to integrate those schools.

The data on magnet schools do suggest some educational benefits as well as some reduction in White flight, although as magnet school supporter David Armor concedes, "relatively few studies compare the effectiveness of alternative plans in general and

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77. See, e.g., ARMOR, *supra* note 5, at 180-82; ROSSELL, *supra* note 6, at 41-110.

78. 433 U.S. 267 (1977).



mandatory versus voluntary plans in particular.”<sup>79</sup> Certainly additional study of the comparative educational benefits of voluntary desegregation plans versus mandatory desegregation plans is needed.

Orfield and Eaton devote much attention to the issue of voluntary magnet schools, as such schools have emerged as the dominant alternative desegregation paradigm to the busing plans that the authors endorse. One of the more interesting case studies that Orfield and Eaton present involves Prince George’s County, Maryland. In the late 1980s, politicians from Ronald Reagan to Edward Kennedy praised the Prince George’s County magnet schools “as a model of educational excellence” (p. 265) and an example of how well-financed minority schools can both achieve positive educational outcomes and attract White students. Orfield and Eaton, however, question whether the Prince George’s schools actually achieved the educational gains claimed. Although the county’s standardized test scores rose after it established magnet schools, the school district could not replicate those increases once it stopped using the California Achievement Test in 1989.<sup>80</sup> Orfield and Eaton acknowledge the political appeal of magnet schools but argue that their popularity is based on misperceptions of their educational successes.<sup>81</sup>

Finally, Orfield and Eaton worry whether magnet schools can sustain their gains if they lose their special resources (p. 349). Financial pressures on urban school districts will invariably continue. Once again, Orfield and Eaton conclude that for pragmatic reasons, Black children are best served by mandatory desegregation plans that reduce racial isolation. If minority children attend schools with White children, the chances of continued strong support for those schools are considerably higher.

### CONCLUSION

In 1954, the Supreme Court forced the issue of school integration into the national consciousness with its decision in *Brown*. Now, more than forty years later, the Court appears poised to exit

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79. ARMOR, *supra* note 5, at 181. For an extensive treatment of the effectiveness of magnet schools, see ROSSELL, *supra* note 6.

80. See pp. 280-82. As noted *supra* note 62, the California Achievement Test over-reported educational gains during the 1980s because it compared the educational levels of Prince George’s students to a 1977 national norm as opposed to a more contemporary national norm. School districts throughout the country that abandoned the California Achievement Test in the late 1980s showed declines in educational achievement levels.

81. Examining data from St. Louis, Orfield and Eaton conclude that Black students who remained in inner-city neighborhood schools with greater funding did not do as well as those who attended magnet schools or left the city in a voluntary desegregation program to attend predominantly White middle-class suburban schools. Pp. 89-90.

the school desegregation arena altogether. In the wake of the Court's retreat, America's urban schools are becoming increasingly racially segregated. Whether this trend continues depends less on federal judges than upon state legislatures, state courts, and local school boards. As these groups consider the future of urban education, one question remains central: how important is it to retain integrated schools?

What is unmistakable is that in many of America's cities, disadvantaged minority students are languishing in schools beset with extensive racial and socioeconomic isolation. For Orfield and Eaton, the answer to the troubled state of urban education is the retention of a commitment to racial integration through school busing plans. Without such a commitment, another generation of urban schoolchildren will fall further behind their suburban counterparts as White support for inner-city schools declines and these children are blamed for their own educational failures.

Yet in many urban school districts, demographics have rendered racial mixing extremely difficult to achieve, while questions remain whether the efforts required to secure the limited pupil mixing that is possible in such settings are worth the trouble. Although interdistrict assignment plans offer the opportunity of greater racial mixing, such plans, no longer required by the federal courts, are likely to confront substantial political opposition.

But even if racial mixing is an elusive goal in many cities, Orfield and Eaton have performed a valuable service in keeping the question of the fate of urban schoolchildren before us. As more and more White Americans embrace the view that the harm of past racial segregation and discrimination has been eliminated, the future of inner-city minority schools is threatened. Urban schools require greater resources than their suburban counterparts because of the greater socioeconomic problems that their children bring to the classroom, and yet often have fewer resources with which to work due to financial inequities. And as racial isolation increases, Orfield and Eaton are correct in claiming that the political will — particularly on a statewide basis — to offer additional support for these schools will in many instances decline.

The era of widespread school busing appears to be ebbing. But as America returns to racially isolated urban schools, Orfield and Eaton remind us that the problem of urban education is far from solved.