

THE UNFINISHED BUSINESS OF *BROWN* AND SCHOOL INTEGRATION

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I. INTRODUCTION

Racism, oppression, and segregation: all wounds from which the United States of America continues to feel the pain. Progress slowly began with the abolishment of slavery at the end of the Civil War. Thereafter, Reconstruction led to the Thirteenth Amendment, which eliminated slavery; the Fourteenth Amendment, which protects against the deprivation of “life, liberty, or property, without due process of law;” and the Fifteenth Amendment, which barred racial discrimination with respect to voting.¹ Slaves were freed and protected under the Constitution, but blatant racism, deriving from the preceding two and a half centuries of forced servitude, still remained.² In *Plessy v. Ferguson*, the Supreme Court affirmed racial segregation “by reasoning that racial equality [provided under the Fourteenth Amendment] did not require ‘an enforced commingling of the two races.’”³ The Court further concluded that, “[t]he object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law, but . . . it could not have intended to abolish distinctions based upon color[.]”⁴ In his dissenting opinion in *Plessy*, Justice Harlan accurately anticipated that the Court’s decision would contribute to and, in some cases, further the enactment of Jim Crow laws.⁵ The Jim Crow laws—cemented in notions of racial inferiority—prohibited Blacks from entering or utilizing the same public facilities as

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¹ See U.S. CONST. amends. XIII, XIV, XV.

² Melvin I. Urofsky, *The Supreme Court and Civil Rights Since 1940: Opportunities and Limitations*, 4 BARRY L. REV. 39, 40 (2003) (“As Gideon Welles, Lincoln’s Secretary of the Navy, put it: ‘Thank God slavery is abolished, but the Negro is not, and never can be the equal of the White. He is an inferior race and must always remain so.’”).

³ Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2176 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

⁴ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

⁵ *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

their white counterparts.⁶

During the 1950s and 1960s, commonly termed the “Civil Rights Era,” Black Americans made many strides.⁷ In 1954, after decades of *Plessy* precedent, which held that “separate but equal” was constitutional, the Court effectively overruled *Plessy* by finding “that in the field of public education the doctrine of ‘separate but equal’ has no place.”⁸ In 1955, after simply finding a violation of equal protection but providing no remedy,⁹ in *Brown II*, the Court ordered the Black plaintiffs’ admission to public schools “on a racially nondiscriminatory basis with all deliberate speed.”¹⁰ Collectively, *Brown I* and *II* are remembered for “chang[ing] the civil rights landscape in America forever by ending segregation in public school systems,”¹¹ but the opinions’ legacy is far removed from reality. The effects of *Brown* were not instantaneous¹² and, still, many of the conditions *Brown* sought to remove are unchanged. The district courts’ new and exclusive responsibility to order decrees pursuant to *Brown*, coupled with the Court’s broad language, which demanded public schools to desegregate “with all deliberate speed,”¹³ eventually proved that *Brown* had little bite.¹⁴ Despite the misconceived belief that *Brown* ended public school segregation in the United States, in 1964—a decade after *Brown I*—ninety-eight percent of Black children in the South were still attending segregated schools.¹⁵

In addition to the *Brown* holding, the Civil Rights Era resulted in Congress passing the Civil Rights Act of 1964 (“the Civil Rights Act,” or “the Act”), which entitles “all persons . . . to the full equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, . . . without discrimination or segregation on the ground of race, color, religion, or national origin.”¹⁶

⁶ Pamela W. Carter, *A Historic Overview of Brown v. Board of Education*, 51 LA. B.J. 410, 412 (2004).

⁷ Wendy Tolson Ross, *The Negro National Anthem Controversy*, 16 TEX. WESLEYAN L. REV. 561, 569 (2010).

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) [hereinafter “*Brown I*”].

⁹ *Id.* (“[B]ecause of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these [class action] cases presents problems of considerable complexity.”).

¹⁰ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) [hereinafter “*Brown II*”].

¹¹ *Law Day 2004*, 52 LA. B.J. 150, 154 (2004).

¹² Sarah Pruitt, *Brown v. Board of Education: The First Step in the Desegregation of America’s Schools*, HISTORY (May 16, 2018), <https://www.history.com/news/brown-v-board-of-education-the-first-step-in-the-desegregation-of-americas-schools>.

¹³ See generally *Brown I*, 347 U.S. at 495.

¹⁴ Pruitt, *supra* note 12.

¹⁵ *Id.*

¹⁶ 42 U.S.C.A. § 2000a(a) (WestLaw 2018).

The Civil Rights Act enabled the Attorney General to initiate suits against¹⁷ and enabled the government to withhold federal funds from¹⁸ schools who refused to integrate. By 1966, the Johnson administration had withheld federal funding from thirty-two school districts; by the end of the administration, in 1969, the government had terminated funding to more than one-hundred twenty school districts.¹⁹ Within five years of the enactment of the Civil Rights Act, nearly one-third of Black children in the South attended integrated schools.²⁰ By 1973, the figure reached ninety-percent.²¹ Nonetheless, the Department of Justice's enforcement of the district courts' desegregation orders has lost momentum since the end of the Civil Rights Era.

Although the Civil Rights Act showed substantial and promising progress in its ability to enforce the Court's holding in *Brown*, there are still hundreds of outstanding court orders for school districts to desegregate public schools.²² Furthermore, the federal government's inaction following the issuance of these court orders has hindered progress; school districts largely ignore²³ court orders or, once the court order is lifted, re-implement standards that are facially neutral yet discriminatory in effect.²⁴ Meanwhile, the recordkeeping of court orders is in disarray.²⁵

Based on the aforementioned, this Comment argues that the federal government must provide concrete plans for school districts ordered to desegregate, enforce compliance through the use of Title VI federal fund termination and strict deadlines, and ensure there is no re-segregation once court orders are lifted. To this day, the country's reluctance deprives students of color across the country the opportunity of an equal education, as "the number of segregated schools, [*i.e.* schools where less than forty percent of students are white,] approximately doubled between 1996 and

¹⁷ See 42 U.S.C.A. § 2000c-6 (WestLaw 2018) (specifically relating to deprivation of equal access to public education).

¹⁸ See Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. 2000d et. seq. (WestLaw 2018).

¹⁹ Ian Millhiser, 'Brown v. Board of Education' *Didn't End Segregation, Big Government Did*, NATION (May 14, 2014), <https://www.thenation.com/article/brown-v-board-education-didnt-end-segregation-big-government-did/>.

²⁰ *Id.*

²¹ *Id.*

²² See Yue Qiu & Nikole Hannah-Jones, *A National Survey of School Desegregation Orders*, PROPUBLICA (Dec. 23, 2014), <https://projects.propublica.org/graphics/desegregation-orders>.

²³ See *id.*

²⁴ *Id.*

²⁵ Nikole Hannah-Jones, *Lack of Order: The Erosion of a Once-Great Force for Integration*, PROPUBLICA (May 1, 2014), <https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration>.

2016.”²⁶

Specifically, Part II of this Comment will examine the United States’ continuing problem of segregation within its public schools. Part III will then examine the manner in which the Court has curtailed and limited district courts’ discretion to pursue desegregation in public schools since the Civil Rights Era. Part IV illustrates the methods school districts use to comply with court orders while maintaining segregated schools. And Part V will propose how the Department of Justice and the judiciary can be most effective in ensuring each student has an equal educational opportunity.

II. THE PROGRESS, STAGNATION, AND RETREAT OF CIVIL RIGHTS ERA COURT ORDERS

Although the progress towards integration had a slow start following *Brown* and began to show promising effects after the implementation of the Civil Rights Act, the scope and enforcement of court orders to desegregate public schools has decreased throughout recent decades. This section will illustrate the change in *Brown*’s effect since the Court’s “landmark” decision.

A. *Traffic Light Changes “from Brown to Green”*

In establishing a method for school integration, the Court in *Brown II* held that “the [present] cases are remanded to the District Courts to take proceedings and enter such orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to this case.”²⁷ Following *Brown II*, the federal courts possessed broad power to implement court orders in pursuit of effective and timely school desegregation. For instance, federal judges “issued hundreds of court orders that set out specific plans and timetables to ensure the elimination of racial segregation.”²⁸ The Civil Rights Act authorized the Department of Justice to: (1) enforce the district court orders by authorizing federal agencies to collect data to document desegregation efforts, which provided evidence against school districts that failed to comply with *Brown* and subsequent court orders;²⁹ (2) bring suit on behalf

²⁶ Will Stancil, *School Segregation is Not a Myth*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614/>.

²⁷ *Brown II*, 349 U.S. 294, 301 (1955).

²⁸ Nikole Hannah-Jones, *School Districts Still Face Fights—and Confusion—on Integration*, ATLANTIC (May 2, 2014), <https://www.theatlantic.com/education/archive/2014/05/lack-of-order-the-erosion-of-a-once-great-force-for-integration/361563/>.

²⁹ Frank Brown, *The First Serious Implementation of Brown: The 1964 Civil Rights Act and Beyond*, 73 J. NEGRO EDUC. 182, 182 (2004).

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of Black plaintiffs in segregated school districts;³⁰ and (3) terminate federal funding for school districts that failed to comply with *Brown*'s mandates.³¹

The Elementary and Secondary Education Act of 1965 (ESEA)³² also incentivized public school districts to integrate. The ESEA provided funds to every school district but was designed to provide additional funds to districts with higher percentages of economically-disadvantaged students.³³ While the ESEA facially confronted issues of educational inequality, the legislation was also in response to the Civil Rights movement “by improving aid to black children, many of whom were also economically disadvantaged, without actually being race conscious.”³⁴ Although *Brown* and Civil Rights Era legislation began the process of desegregation, the Supreme Court played a significant role in broadening—and then limiting—the courts’ and the Department of Justice’s ability to enforce *Brown*.

The judicial and legislative efforts to desegregate schools were met with massive resistance, most evidently in the South. Scholars at this time believed, “[t]he South would [have] happily depend[ed] on ‘all deliberate speed’ and the wide discretion given [to] sympathetic district judges,” because the South believed that if desegregation efforts were delayed long enough, “the interest of the country would fade, just as it did after Reconstruction.”³⁵ In Virginia, Senator Harry Byrd described *Brown* as “the most serious blow that has yet been struck against the rights of the states in a matter vitally affecting their authority and welfare.”³⁶ Senator Byrd called for “Massive Resistance,” “a collection of laws passed in response to the *Brown* decision that . . . tried to forestall and prevent school integration.”³⁷ For example, Virginia passed a law to eliminate state funding for—or even shut down—integrated public schools.³⁸ In 1968, the

³⁰ *Id.*

³¹ Hannah-Jones, *supra* note 28.

³² The “ESEA has been reauthorized eight times since 1965, most recently in December of 2015 when lawmakers revamped No Child Left Behind [to Every Student Succeeds Act] Despite the changes, its central goal remains: improving the educational opportunities and outcomes for children from lower-income families.” *The ABC’s of ESEA, ESSA, and No Child Left Behind*, EDUCATIONPOST, <http://educationpost.org/the-abcs-of-esea-essa-and-no-child-left-behind/> (last visited Feb. 9, 2020).

³³ Erica Frankenberg & Kendra Taylor, *ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation*, 1 RUSSELL SAGE FOUND. J. SOC. SCI., 32, 36 (2015).

³⁴ *Id.*

³⁵ JACK BASS, UNLIKELY HEROES 213 (1981).

³⁶ *The Southern Manifesto and “Massive Resistance” to Brown*, NAACP LEGAL DEF. AND EDUC. FUND, INC., <https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown/> (last visited Feb. 9, 2020).

³⁷ *Id.*

³⁸ *Id.*

Supreme Court expanded *Brown*'s holding to a rural Virginia town that was affected by Senator Byrd's Massive Resistance.

In *Green*, the Court charged "[s]chool boards . . . with the affirmative duty to take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch."³⁹ The Court analyzed a rural Virginia school district where half the population was Black.⁴⁰ The school system had only two schools—one white school and one Black school—that each served the entire county.⁴¹ In order to desegregate and remain eligible for federal funds, the segregated school district implemented a "freedom-of-choice" plan, allowing students to choose which of the two schools they wished to attend.⁴² The Court determined that the "plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system," because in three years under the plan, zero white children had chosen the formerly designated Black school and eighty-five percent of Black children remained in an entirely Black school.⁴³ Thus, the Court ordered the school board "to formulate a new plan and . . . realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."⁴⁴

The Court's ruling in *Green* produced a framework to guide courts when analyzing whether a given school district had successfully desegregated and therefore established "unitary status."⁴⁵ These later cases would use the "*Green* factors"⁴⁶ in not only looking at the racial composition of the student body but at "every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities."⁴⁷ The *Green* court clarified that there is no hardline rule to achieve unitary status; instead the school district must consider the present circumstances and the available options on a case-by-case basis.⁴⁸ And the district court retained

³⁹ *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 437–38 (1968) (emphasis added).

⁴⁰ *Green*, 391 U.S. at 432.

⁴¹ *Id.*

⁴² *Id.* at 433–34.

⁴³ *Id.* at 441.

⁴⁴ *Id.* at 442. By 1970, the county schools were integrated; the county received a one-year delay to the termination of federal funds and divided the two schools—formerly white and Black—by grade. Jody Allen & Brian J. Daugherty, *Charles Green et al. v. County School Board of New Kent County, Virginia*, ENCYCLOPEDIA VIRGINIA (Mar. 13, 2009), https://www.encyclopediavirginia.org/Green_Charles_C_et_al_v_County_School_Board_of_New_Kent_County_Virginia#start_entry.

⁴⁵ See generally *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430 (1968).

⁴⁶ See, e.g., Bradley W. Joondeph, *Killing Brown Softly: The Subtle Undermining of Effective Desegregation in Freeman v. Pitts*, 46 STAN. L. REV. 147, 159 (1993).

⁴⁷ *Green*, 391 U.S. at 435.

⁴⁸ *Id.* at 439.

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jurisdiction until the segregation was evaluated in practice and clearly shown to be completely removed.⁴⁹ At that point, the school district achieves unitary status.⁵⁰

Thus, in the years immediately following *Brown*, “all deliberate speed” proved to mean “little more than ‘a soft euphemism for delay.’”⁵¹ But, Justices Warren and Brennan anticipated the impact of *Green*: “[w]hen the [*Green*] opinion was about to be announced, Chief Justice Warren sent Brennan a note, ‘When this opinion is handed down, the traffic light will have changed from *Brown* to *Green*. Amen!’”⁵²

As anticipated, the Court’s position became more assertive in demanding desegregation of school districts under district court orders. In *Alexander v. Holmes County Board of Education*, the Court determined “a standard of allowing ‘all deliberate speed’ is no longer constitutionally permissible.”⁵³ The Court held that the Fifth Circuit should have denied all motions that requested a deadline extension for Mississippi schools to comply with a desegregation order.⁵⁴ The Mississippi schools maintained segregated conditions.⁵⁵ Instead, the Court demanded every Mississippi school district involved in the matter to terminate segregated “school systems at once and to operate now and hereafter only unitary schools . . . effective immediately.”⁵⁶

Following *Alexander*, the Court in *Swann v. Charlotte-Mecklenburg Board of Education* persisted, granting courts the discretion to desegregate school districts by a “frank—and sometimes drastic—gerrymandering of school districts and attendance zones.”⁵⁷ Although the Court admitted that some court orders may put “awkward, inconvenient, and even bizarre” burdens on school districts, it maintained that burdens cannot be avoided when attempting to fix a system that has “been deliberately constructed and maintained to enforce racial segregation.”⁵⁸ In addition, the Court opened the door to a large scale busing system—to combat residential segregation and achieve unitary status—so long as the time and distance of travel was

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Jim Chen, *With All Deliberate Speed: Brown II and Desegregations Children*, 24 L. & EQUITY: J. THEORY & PRAC., 1, 3–4 (2006).

⁵² MARK TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991* 69 (1997).

⁵³ *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19, 20 (1969).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 20–21 (granting the Court of Appeals jurisdiction over the matter “to insure prompt and faithful compliance with its order”).

⁵⁷ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 27 (1971).

⁵⁸ *Id.* at 28.

not so great as to impinge on the educational process.⁵⁹

District court orders aimed at the desegregation of school districts even reached states beyond those formerly governed by Jim Crow laws. For example, in *Keyes v. School District Number 1*, the Court considered a school system in Denver, Colorado, that had never “mandated or permitted racial segregation in public education”⁶⁰ but which operated segregated school districts by intentional state action.⁶¹ The Court posited that the Denver School Board exemplified a clear purpose to segregate Black students. The school board’s intent was shown not only by the fact that nearly forty percent of the total Black student population attended a small selection of schools in Denver but also by the fact that teachers were assigned to schools based on minority status.⁶² The Court held that once state-imposed segregation is found within a school system, the portion of the school district that is segregated is not viewed in isolation; rather, the school district assumes an affirmative duty to desegregate the school system in its entirety.⁶³

The judiciary also ensured the executive branch played its part in implementing an integrated U.S. public-school system. When enforcement seemed stagnant, the Court compelled the Department of Health, Education and Welfare (HEW) to enforce the *Brown* holding through Title VI of the Civil Rights Act.⁶⁴ In *Adams v. Richardson*, HEW had determined there were hundreds of school districts across seventeen states that were receiving federal funds and yet operated segregated school districts.⁶⁵ Although HEW requested the states to submit desegregation plans within one-hundred twenty days, half of the states submitted unacceptable plans, while the other half entirely ignored HEW’s request.⁶⁶ Despite these inadequate responses, HEW went years without instituting any enforcement proceedings against such states⁶⁷ and simply claimed that negotiations with the states were ongoing.⁶⁸ The D.C. Circuit Court held that HEW is required to monitor school districts under desegregation orders to the extent resources are available, particularly where there is evidence of significant

⁵⁹ *Id.* at 29–31. *Cf.* *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (later narrowing this holding as to purposeful attempts to desegregate school districts).

⁶⁰ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 191 (1973).

⁶¹ *Id.* at 198.

⁶² *Id.* at 199–200.

⁶³ *Id.* at 200.

⁶⁴ *See Adams v. Richardson*, 351 F. Supp. 636, 537 (D.D.C. 1972).

⁶⁵ *See generally id.*

⁶⁶ *Id.* at 637–38.

⁶⁷ *Adams v. Richardson*, 480 F.2d 1159, 1164 (Fed. Cir. 1973).

⁶⁸ *Id.*

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noncompliance.⁶⁹

After *Adams*, all three branches of government began a collective effort to maintain momentum regarding school desegregation.⁷⁰ The percent of Black students in schools that were formerly ninety-percent to one-hundred percent minority (hereinafter “intensely segregated schools”) was nearly cut in half. From 1968 to 1969—the year of *Green*—sixty-four percent of Black students attended such schools. From 1972 to 1973—the year of *Keyes*—schools further integrated, and this statistic decreased to thirty-eight percent.⁷¹ In 1988, school integration reached an all-time high.⁷²

Although further integration was still possible in 1988, advancements halted—and even retreated—as the Court limited the scope of integration efforts.⁷³

B. *Retrenchment – Lost Momentum and Backtrack*

Following *Brown*, the Civil Rights Act, and the aforementioned cases, integration efforts significantly lost momentum. The number of Black students in intensely segregated schools, — which in 1988 was under six percent, an all-time low—had more than tripled to slightly above eighteen percent by 2013.⁷⁴

Shortly before 1974, a district court ordered public school systems in Detroit to look beyond school district lines and develop a metropolitan plan to integrate fifty-three suburban school districts with Detroit, largely due to the fact that racial balance was not achievable in Detroit’s district.⁷⁵ This order followed the district court’s findings that (1) Detroit’s school district

⁶⁹ *Id.* at 1165.

⁷⁰ See Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 737 (2010) (describing the impact of *Adams*, “[i]n just a few short years, primarily under the leadership of the Johnson administration, the combine efforts of HEW and the Civil Rights Division of the DOJ transformed public education in the South.”).

⁷¹ GARY ORFIELD, THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968, (Dec. 1993), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/the-growth-of-segregation-in-american-schools-changing-patterns-of-separation-and-poverty-since-1968/orfield_schley-et-al_growth-of-seg.pdf.

⁷² Jason M. Breslow, *The Return of School Segregation in Eight Charts*, PBS FRONTLINE (July 15, 2014), <https://www.pbs.org/wgbh/frontline/article/the-return-of-school-segregation-in-eight-charts/>.

⁷³ See Greg Toppo, *GAO Study: Segregation Worsening in U.S. Schools*, USA TODAY (May 17, 2016), <https://www.usatoday.com/story/news/2016/05/17/gao-study-segregation-worsening-us-schools/84508438/>.

⁷⁴ Gary Orfield, et al., *Brown at 62: School Segregation by Race, Poverty and State*, CIVIL RIGHTS PROJECT UCLA 1, 3 (2016).

⁷⁵ *Milliken v. Bradley*, 418 U.S. 717, 724–27 (1974).

transported Black students to predominantly Black schools, notwithstanding the fact that white schools with greater availability were geographically closer; (2) the Board had never transported white children to predominantly Black schools, despite almost twenty-three thousand vacant seats in predominantly Black schools; (3) north-south school district lines were drawn to support racial segregation even though a line east-to-west would produce significantly greater desegregation;⁷⁶ and (4) out of fourteen schools that opened in 1970–71, eleven opened as intensely segregated schools.⁷⁷ Nonetheless, the Court in *Milliken v. Bradley* narrowed its position on school integration, holding that the dismantling of a segregated school district “does not require any particular racial balance.”⁷⁸ The *Milliken* Court also rejected the inter-district court order because “school district lines may not be casually ignored or treated as a mere administrative convenience,” and “local control over the operation of schools” is a deeply rooted tradition.⁷⁹ In so doing, the Court deemed district courts’ desegregation orders may not exceed the boundaries of a single school district.⁸⁰ The Court’s holding limited district court discretion to issue only single, intra-district desegregation orders—even in cases where neighboring districts were also in violation.

In the 2018–19 school year, Detroit Public Schools Community District enrolled 50,176 students, of which 97.30% were among the minority.⁸¹ In comparison, during the 2018–19 school year, Grosse Pointe Public Schools—also involved in *Milliken*—enrolled 7,652 students, of which only 22.05% were minority.⁸² Beyond racial composition, Detroit School District and Grosse Pointe Public Schools are the two neighboring school districts with the greatest income disparity in the United States as of 2016.⁸³

⁷⁶ To see the racial divide in Detroit as of a 2010 census, see Meredith Bennett-Smith, *Incredibly Detailed Map Shows Race, Segregation Across America in Beautiful Color*, HUFFINGTON POST (Aug. 27, 2013), https://www.huffingtonpost.com/2013/08/27/map-segregation-america-race_n_3824693.html.

⁷⁷ *Milliken*, 418 U.S. at 725–26.

⁷⁸ *Id.* at 718.

⁷⁹ *Id.* at 719.

⁸⁰ *Id.* at 741.

⁸¹ *Racial Census Report by School Districts 2017 – 2018*, MICHIGAN DEP’T OF EDUC. (Mar. 8, 2018), https://www.michigan.gov/documents/mde/RacialCensus0506_204440_7.pdf.

⁸² *Id.*

⁸³ Cory Turner, *The 50 Most Segregating School Borders in America*, NATIONAL PUBLIC RADIO (Aug. 23, 2016), <https://www.npr.org/sections/ed/2016/08/23/490513305/the-50-most-segregating-school-borders-in-america>. Detroit City School District students have a poverty rate of 49%, median property value of \$45,100, and median household income of \$26,087. *Id.* Students of Grosse Pointe Public Schools have a poverty rate of 7%, median property value of \$220,100, and median household income of \$90,542. *Id.*

In further retreating from initial progress, the *Dowell* Court clarified the role of court orders and the standard for achieving unitary status.⁸⁴ In 1972, the Oklahoma City Board was ordered to implement a desegregation plan.⁸⁵ In 1977, the district court determined the district had achieved unitary status and terminated the court order.⁸⁶ After the Tenth Circuit reversed the district court's finding of unitary status, the Supreme Court—far removed from *Green*, where the Court held a district court maintains jurisdiction until segregation is “completely removed”⁸⁷—directed the district court to consider whether the school district “had complied in good faith” since the court order was imposed and “whether the vestiges of past discrimination had been eliminated to *the extent practicable*.”⁸⁸ The Court stated that court orders “are not intended to operate in perpetuity.”⁸⁹ Once the school district shows “the vestiges of past discrimination had been eliminated to the extent practicable,” the district is entitled to have the court order terminated.⁹⁰

In a dissenting opinion, Justice Marshall feared that the Court had lost sight of “the unique harm associated with a system of racially identifiable schools.”⁹¹ Justice Marshall (largely relying on *Green*) claimed, “school districts are required to ‘make every effort to achieve *the greatest possible degree of actual desegregation*’ . . . [with a] focus on ‘achieving and preserving an integrated school system,’” and, with this opinion, the majority allowed for districts, like Oklahoma City, to re-segregate once the court order was terminated.⁹² On remand, under the Court's direction, the school district was released from its court order and returned to local control.⁹³ The School Board subsequently eliminated several programs that were originally instituted to comply with the court order and returned to neighborhood schools, which “quickly began to mirror the city's racially [divided] housing pattern.”⁹⁴

⁸⁴ See Board of Ed. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1992).

⁸⁵ Dowell v. Board of Education of the Oklahoma City Public Schools, 606 F. Supp. 1548, 1550 (W.D. Okla. 1985).

⁸⁶ *Id.* at 1551.

⁸⁷ See generally *Green*, 391 U.S. 430.

⁸⁸ *Dowell*, 498 U.S. at 249–50 (emphasis added).

⁸⁹ *Id.* at 248.

⁹⁰ *Id.* at 250.

⁹¹ *Id.* at 257 (Marshall, J., dissenting).

⁹² *Id.* at 259 (emphasis in original).

⁹³ See *Dowell*, 778 F. Supp. at 1144.

⁹⁴ Linda Greenhouse, *High Court Agrees to Rule on When Supervision of School Desegregation Should End*, NY TIMES (Mar. 27, 1990), <https://www.nytimes.com/1990/03/27/us/high-court-agrees-to-rule-on-when-supervision-of-school-desegregation-should-end.html> (“After years of busing and other remedial measures, dozens of school districts around the country have achieved ‘unitary’ status, although relatively few have sought an end to

Furthermore, in *Freeman*, the Court granted federal courts authority to “relinquish supervision and control of school districts in incremental stages.”⁹⁵ The Court held once the district court has determined that a school district has shown good faith compliance with a court order and that vestiges of past discrimination have been eliminated to the extent practicable in a single facet—such as racial composition of faculty—the court would return control of that aspect back to the school board⁹⁶ rather than considering the totality of the *Green* factors like decades of precedent following *Brown*.⁹⁷ Additionally, the Court established that a district court does not need to order any remedies “where racial imbalance is not traceable, in a proximate way, to constitutional violations.”⁹⁸ Such a standard, however, can be problematic.⁹⁹

In an attempt to create racially integrated schools, school districts began to implement racial quotas or mathematical ratios used to assign students to schools.¹⁰⁰ The *Belk* Court held that such racial quotas are inappropriate and are prohibited as a means to obtain desegregation of a school district.¹⁰¹ The Court noted mathematical ratios, on the other hand, are permissible starting points.¹⁰² But in 2007, the *Parents Involved* Court determined race may not be the sole factor considered in assigning students to schools even when using a mathematical ratio because, as Chief Justice Roberts clarified, “[t]he way to stop discrimination on the basis of race”—as in *Brown*—“is to stop discriminating on the basis of race.”¹⁰³ Justice Kennedy—the deciding justice in *Parents Involved*—declared adopting

busing orders.”). One quarter of Oklahoma City’s elementary schools were almost entirely one-race; forty percent of Black elementary school children attended schools that were nearly all Black. *Id.*

⁹⁵ *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).

⁹⁶ *Id.* at 491–92.

⁹⁷ Frank H. Stubbs III, *Freeman v. Pitts: Rethinking of Public School Desegregation*, 27 RICH. L. REV. 399, 410 (1993) (“Such a mechanical approach [in *Freeman*] reduces a court’s assessment of the *Green* indicia to quantifying unitary status and fails to consider the true intent of *Brown I.*”).

⁹⁸ *Freeman*, 503 U.S. at 491.

⁹⁹ “If . . . we require the plaintiffs to establish [racial imbalance] is at least in part the vestige of an older *de jure* system—the plaintiffs will almost always lose. Conversely, if we . . . require the school authorities to establish the negative . . . the plaintiffs will almost always win.” *Freeman*, 503 U.S. at 503. (Scalia, J., concurring). See also Stubbs III, *supra* note 97, at 409–10.

¹⁰⁰ See *Belk v. Charlotte-Mecklenburg Bd. of Ed.*, 269 F.3d 305, 342 (4th Cir. 2001).

¹⁰¹ *Id.*

¹⁰² *Id.* at 315.

¹⁰³ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702–704, 748 (2007). One school district considered: (1) placement of siblings; (2) distance from schools; and (3) race in assigning students. *Id.* at 793. (Kennedy, J., concurring). The Court considered *Grutter* and *Gratz*, two affirmative action cases that establish a standard for the role of race in college admissions. *Id.* at 792–93.

policies that consider racial composition to encourage a diverse student body is permissible,¹⁰⁴ but sided with the majority because the school district could have achieved racial diversity through other means.¹⁰⁵

As court oversight of desegregation orders has continued to wane, scholars, journalists, and civil-rights advocates began to believe that *Brown's* desegregation attempts are regressing, especially as school segregation has started to resurface.¹⁰⁶ In 1972, when courts ordered strict and prompt desegregation efforts, twenty-five percent of southern Black students attended intensely segregated schools. In districts released from court orders between 1990 and 2011, the statistic worsened, as fifty-three “percent of black students . . . attend these schools.”¹⁰⁷ Since 1988, the number of Black students in intensely segregated schools has increased in every region of the United States.¹⁰⁸ Today, approximately seventy-three percent of Black students attend schools that are mainly attended by minority students.¹⁰⁹ After positive strides towards desegregation in America’s public schools, district courts’ limited power to order integration has allowed school districts throughout the country to maintain segregated school systems.

III. COMPLIANCE AND RETREAT, OR AVOIDANCE, EITHER WAY WORKS

Over the last several decades, the Supreme Court has restricted the district courts’ breadth of power to issue court orders that meaningfully integrate school districts and in doing so, the Department of Justice is left to supervise a wider array of school districts than its resources allow. This section will explain a variety of ways that school districts maintain segregated schools while complying with, or all together avoiding, desegregation orders, including (1) segregation academies; (2) neighborhood schools; and (3) secession.

¹⁰⁴ *Id.* at 788.

¹⁰⁵ *Id.* at 790.

¹⁰⁶ Stancil, *supra* note 26.

¹⁰⁷ Nikole Hannah-Jones, *Segregation Now...*, THE ATLANTIC (May 2014), <https://www.theatlantic.com/magazine/archive/2014/05/segregation-now/359813/>.

¹⁰⁸ Gary Orfield & Erica Frankenberg, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, THE CIVIL RIGHTS PROJECT, 1, 18, (May 15, 2014), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>. From 1988 to 2011, the percentage changed from 24.0% to 34.2% in the South; 35.5% to 41.0% on the Border; 48% to 51.4% in the Northeast; 41.8% to 43.2% in the Midwest and 28.6% to 34.4% in the West. *Id.*

¹⁰⁹ *Public Education Funding Inequity*, U.S. COMMISSION ON CIVIL RIGHTS, at 13, (Jan. 2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>.

A. Segregation Academies

Following *Brown*, as federal courts ordered school districts to desegregate, enrollment at private academies substantially increased. For many, these institutions served as an attractive alternative to attending integrated schools.¹¹⁰ Many private academies were formed after *Green*, specifically, as white parents “refused to enroll their children in genuinely integrated schools.”¹¹¹ These private schools became known as “segregation academies,”¹¹² and although enrollment in such schools had increased significantly throughout the country, no region had experienced more of an uptick than the South—where private school enrollment “increased from roughly 25,000 students in the 196[0s] to about 535,000 by 1972.”¹¹³ Naturally, the enrollment rates in public schools decreased and as a result, public schools received less funding. Also, academies received a greater share of local, nonmonetary resources such as equipment, teachers, administrators, and even buildings.¹¹⁴ “It is thus evident that the segregation academies are a key element in a new dual system of schools—one, white and ‘private’; the other, disproportionately black and ‘public.’”¹¹⁵ “The academies clearly threaten to frustrate the national goal of banishing racial segregation from the classroom.”¹¹⁶

1. Mississippi’s Indianola School District

Mississippi has more than thirty-five segregation academies, Indianola Academy in Indianola, Mississippi, is particularly noticeable.¹¹⁷ Before *Brown*, Indianola operated a dual school system—each racially-divided, residential neighborhood hosted its respective school, separated by a railroad track.¹¹⁸ In April 1969, a federal court order compelled Indianola to “establish a unitary system which achieves substantial desegregation. . . . At the very least, this means that this school board has an obligation to see

¹¹⁰ *A History of Private Schools & Race in the American South*, SOUTHERN EDUCATION FOUNDATION, <https://www.southerneducation.org/publications/historyofprivateschools> (last visited Feb. 9, 2020).

¹¹¹ Notes, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1441 (1973).

¹¹² *A History of Private Schools & Race in the American South*, SOUTHERN EDUCATION FOUNDATION, <https://www.southerneducation.org/publications/historyofprivateschools/> (last visited Feb. 9, 2020).

¹¹³ Notes, *supra* note 111, at 1441.

¹¹⁴ *Id.* at 1452–53.

¹¹⁵ *Id.* at 1453.

¹¹⁶ *Id.*

¹¹⁷ Sarah Carr, *In Southern Towns, ‘Segregation Academies’ Are Still Going Strong*, ATLANTIC (Dec. 13, 2012), <https://www.theatlantic.com/national/archive/2012/12/in-southern-towns-segregation-academies-are-still-going-strong/266207/>.

¹¹⁸ *Id.*

that schools in its district [no longer remain segregated].”¹¹⁹ The court was unconvinced “that the white residents of Indianola or any city wherever located would choose the destruction of their school system over its compliance with constitutional mandates.”¹²⁰

The court’s conviction led it astray. Less than one year later, in January 1970, Indianola intended to comply with the court order by establishing the previously “Black” Gentry High School as the integrated school following the 1969–70 holiday break.¹²¹ Nonetheless, not a single white student returned to public schools following the break. Rather, they began to attend Indianola Academy, which was not large enough at the time to accommodate all of the new students. Thus, white students attended a sort of “satellite campus,” also known as the town’s first Baptist Church.¹²² Indianola Academy did not have a school building to accommodate all of its students until three years later, when the construction of its building was complete.¹²³ Even after the court order of April 1969 demanding desegregation, Indianola schools remained segregated.

In the 2009–10 school year, Indianola Academy enrolled 434 white students and two Black students, despite the fact that more than eighty percent of the town’s population was Black.¹²⁴ Currently, the school gives \$6,500 in minority scholarships each school year, which is slightly more than annual tuition for a single student at the school.¹²⁵ Despite its history and apparent purpose, Indianola Academy received \$56,000 in federal funds through Title programs that flow through public school districts.¹²⁶ Meanwhile, Gentry High School is “made up of several worn buildings” in which students—ninety-eight percent who are Black—must walk outside from class to class.¹²⁷ This struggling public high school is also plagued by outdated drainage and sewage systems that do not coincide with its outdoor

¹¹⁹ United States v. Indianola Mun. Separate Sch. Dist., 410 F.2d 626, 629 (5th Cir. 1969).

¹²⁰ *Id.* at 631.

¹²¹ Carr, *supra* note 117.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* See *Indianola Academy Handbook 2018-2019*, Indianola Academy (2018), <http://indianolaacademy.org/wp-content/uploads/2018/08/IA-Handbook.pdf> (Notice of Nondiscriminatory Policy: “Indianola Academy admits students of any race, color, . . . national or ethnic origin to all the rights privileges, programs, and activities generally accorded or made available to students at the school. It does not discriminate [based on] race, . . . color, . . . national or ethnic origin in administration of its educational policies, admission policies, . . . athletic or other school administered programs.”).

¹²⁵ Carr, *supra* note 117.

¹²⁶ *Id.*

¹²⁷ *Id.*

“hallways,” which tend to flood when it rains.¹²⁸

Indianola School District has remained segregated despite the district court’s order—outstanding for more than fifty years—to desegregate. And in 2014, the district court terminated the court order concluding that Indianola¹²⁹ had fulfilled its obligation of ensuring the district no longer remains all-Black or all-white with “only an infinitesimal fraction of Negro students.”¹³⁰ Regardless, the district court explained how the case has been on its “docket for close to fifty years, and it is simply not accurate to state that a lawsuit of this nature is necessarily a continuing force for good.”¹³¹ The court clarified that the ineffectiveness and expenses associated with desegregation court orders take away resources from the respective students, and that “some desegregation lawsuits may, over decades, devolve into entities which generate reports and attorneys’ fees but which have little, if any, practical impact upon the lives of students.”¹³² Although the original plaintiff in *Carter* raised an argument regarding the funding deficiencies caused by “white flight,”¹³³ the district court dismissed the point because there was “no indication of what the instant lawsuit might do to combat what are largely societal issues affecting the . . . region as a whole.”¹³⁴ In sum, the court stated that the order “had outlived the useful purpose which it previously served,” and “fulfilled its affirmative desegregation obligations.”¹³⁵

The white residents of Indianola did not choose to destruct *their* school system over desegregation, instead the residents chose to create a new *private* school system—Indianola Academy—and allow Indianola’s *public* school system to destruct. The opening of segregation academies has allowed for continued segregated education and less funding for public schools, yet the court still found that Indianola complied with its order compelling integration. This cannot be the type of public school

¹²⁸ *Id.*

¹²⁹ The Indianola School District was consolidated with the neighboring Drew School District and the Sunflower County School District after the State of Mississippi took over control of the school district due to insufficient funding and an inability to meet payroll. *Carter v. Sunflower Cty. Sch. Dist.*, No. 4:67-cv-00031, 2014 U.S. Dist. LEXIS 123291, at *1 (N.D. Miss. Sept. 3, 2014).

¹³⁰ *Id.* at *1–2, *13; *United States v. Indianola Mun. Separate Sch. Dist.*, 410 F.2d 626, 629 (5th Cir. 1969).

¹³¹ *Carter*, 2014 U.S. Dist. LEXIS 123291 at *9.

¹³² *Id.* at *9.

¹³³ White flight is defined as “the departure of whites from places (such as urban neighborhoods or schools) increasingly or predominantly populated by minorities.” *White Flight*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/white%20flight> (last visited Feb. 9, 2020).

¹³⁴ *Carter*, 2014 U.S. Dist. LEXIS 123291 at *7.

¹³⁵ *Id.* at *11, *13.

“integration” that the Court envisioned in *Brown*.

2. Mississippi’s Cleveland School District

Even when the district court does not timidly dismiss the lingering court order on its docket as it did in Indianola, and instead compels the desegregation of its schools, segregation still endures. In 1969—the same year the district court gave an order to the Indianola School District—the court also ordered Cleveland, Mississippi, to desegregate its public schools. Instead of integrating schools, however, the school district established attendance zones around each of the town’s segregated neighborhoods.¹³⁶ The schools were no longer technically “Black schools” and “white schools,” but neighborhood schools—using residential segregation to maintain segregation within the schools. Two decades later, the Justice Department persisted and, in response, the school district introduced a magnet program in an effort to attract white students to historically Black schools.¹³⁷ The school district also permitted “students to transfer to schools where they would be in the racial minority.”¹³⁸ While many Black students transferred to the historically white Cleveland High School, white students did not transfer to the historically Black East Side High School.¹³⁹ As a result, although Cleveland High became largely integrated, in the 2015–16 school year, East Side High remained *entirely* Black.¹⁴⁰

The Department of Justice demanded that the district court order the schools to consolidate.¹⁴¹ The attorney for the government argued, “[i]n a 3,700 student district that is thirty percent white . . . there shouldn’t be schools that are 99 percent black.”¹⁴² On remand, after the federal appellate court overturned the initial order declaring Cleveland schools did not have to consolidate, the district court ordered a plan that would “consolidate . . . ninth through twelfth grades students into a single comprehensive high school” and do the same for middle school aged

¹³⁶ Wesley Lowery & Emma Brown, ‘Don’t Force Us to Give Up Our School’: A Mississippi Town is Being Told to Integrate, WASH. POST (May 27, 2016), https://www.washingtonpost.com/local/education/in-a-segregated-city-forced-integration-of-schools-is-a-complex-subject/2016/05/27/a295131e-212e-11e6-aa84-42391ba52c91_story.html?utm_term=.9e4854c41950.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* Despite the apparent lack of attraction to attend the “Black school,” East Side High achieved stronger test scores in 2013–14 and a better state rating than Cleveland High. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *Cowan v. United States*, No. 265-cv-00031, 2017 U.S. Dist. LEXIS 31316, at *2 (N.D. Miss. Mar. 6, 2017).

¹⁴² Lowery & Brown, *supra* note 136136.

children.¹⁴³ A similar plan was established for Cleveland elementary schools.¹⁴⁴

Although the court's role was different in Cleveland than it was in Indianola, the effect proved to be largely the same. Since the summer of 2014, when the appellate court overturned the district court's order and integration was certain, the student population in Cleveland's public school district has decreased by more than 300 students.¹⁴⁵ Before the court order, in August 2016, there were 973 white students enrolled in the Cleveland School District; however, following the court order to integrate schools, there are 135 fewer white students in the district.¹⁴⁶ "A breakdown of the drop in enrollment in the Cleveland School District shows the majority of students who left went to private schools."¹⁴⁷ Where exactly? Of the students who transferred out of the school district, the majority of white students transferred to local segregation academies.¹⁴⁸

For the students who remain in the Cleveland School District, white students now represent about one-quarter of the student body.¹⁴⁹ In total, including students who have transferred into Cleveland High School since the integration, the school district had lost one-hundred students in its first year.¹⁵⁰ As a result, the school district has a \$500,000 shortfall in budget for the 2018–19 academic year and must consider laying off administration, faculty, and staff.¹⁵¹

Although the Department of Justice successfully persisted in its challenge against Cleveland public schools, segregated public education persists. Indianola and Cleveland School Districts remain segregated. And these two towns are only two illustrations of the large presence of segregation academies allowing segregated education to continue without

¹⁴³ *Cowan*, 2017 U.S. Dist. LEXIS 31316 at *2.

¹⁴⁴ *See id.* at *5–6.

¹⁴⁵ Kelsey Davis, *Cleveland School District Considers Layoffs as Enrollment Declines*, MISSISSIPPI TODAY (Feb. 12, 2018), <https://mississippitoday.org/2018/02/12/cleveland-school-district-faces-budget-shortfall-amid-enrollment-decline/>.

¹⁴⁶ Kelsey Davis, *Cleveland School District Enrollment Dips with Consolidation*, MISSISSIPPI TODAY (Aug. 23, 2017), <https://mississippitoday.org/2017/08/23/cleveland-school-district-enrollment-dips-with-consolidation/>.

¹⁴⁷ Kelsey Davis, *Cleveland School District Releases Breakdown of Enrollment Numbers*, MISSISSIPPI TODAY (Sept. 12, 2017), <https://mississippitoday.org/2017/09/12/cleveland-school-district-releases-breakdown-enrollment-numbers/>.

¹⁴⁸ *Id.* ("North Sunflower Academy – 10 students; Washington School – 2 students; Indianola Academy – 3 students; Mississippi School of Math and Science – 8 students; Presbyterian Day School – 3 students.").

¹⁴⁹ Davis, *supra* note 146.

¹⁵⁰ Davis, *supra* note 145.

¹⁵¹ *Id.* ("The school district receives about \$5,200 per student from Mississippi Department of Education, The enrollment decline will lead to a nearly \$500,000 deficit for academic year 2018-19.").

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government interference. Additionally, segregation academies cause public schools to lose students, which deprives the school districts of funds that are needed in order to operate the school buildings and provide necessary resources. Notwithstanding the negative consequences, segregation academies continue to receive federal funds through the public school system. Although both the Cleveland and Indianola School Districts have complied with their court orders and achieved “desegregation” in the eyes of the court, is this the type of integration the Court in *Brown* intended? This Comment insists it is not.

B. *Neighborhood Schools*

Despite courts’ desegregation orders reaching beyond the Southern region, the Court’s curtailment on enforcement—seen specifically in *Milliken*, where the Court prohibited transportation systems as a method of desegregating schools—opened the door for neighborhood schools to be a method of segregation in the *de facto* segregated North.¹⁵² “*Milliken* is often portrayed as a heroic effort to break Northern school segregation in [areas that are] largely segregated by neighborhoods and suburban schools [resulting from] race-based real estate, . . . and housing development practices.”¹⁵³ But *Milliken* failed in this regard.

Since the Court restricted methods such as busing and multi-district desegregation plans from desegregation orders, *de facto* segregation has been largely unenforced. In 2011, the northeast region had the highest number of Black students attending intensely segregated schools at 51.4%.¹⁵⁴ The northeast is also the only region in which such segregation has increased since the 1960s.¹⁵⁵ Specifically, the State of New York has the most Black students in intensely segregated schools at 64.6%; New Jersey is fifth in this category at 48.5%.¹⁵⁶

In 1959, school districts in Queens, New York, began busing minority students to white areas in an effort to desegregate public schools.¹⁵⁷ In response, white families began protesting not necessarily for segregated education, but for an end to busing programs, while also seeking enhanced

¹⁵² John Mogk, *Busing Failed Then, Would Fail Now*, DETRIOT FREE PRESS, (July 25, 2015), <https://www.freep.com/story/opinion/contributors/2015/07/24/desegregation-detroit-schools/30645637/>.

¹⁵³ *Id.*

¹⁵⁴ Orfield & Frankenberg, *supra* note 108, at 18.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Rebecca Klein, *The South Isn’t the Reason Schools are Still Segregated*, *New York Is*, HUFFINGTON POST (Apr. 1, 2016), https://www.huffingtonpost.com/entry/new-york-school-desegregation_us_56fc7cebe4b0a06d5804bdf0.

support for neighborhood schools.¹⁵⁸ Such protests gained large amounts of attention and New York legislators helping to draft the Civil Rights Act, “essentially blocked the federal government from having a role in pursuing school desegregation cases in the north.”¹⁵⁹

In New Jersey, one of the country’s most diverse states,¹⁶⁰ the inability to establish multi-district desegregation plans or busing programs has resulted in school districts and cities with high concentrations of minorities and a lack of parity among neighboring districts.¹⁶¹ “In urban areas like Paterson, Newark, and Union, minorities make up at least 90 percent of district enrollment” but neighboring school districts have large racial disparities.¹⁶² In Paterson, for example, “67 percent of students are Hispanic and 22 percent are black. Wayne, which borders Paterson to the west, is 11 percent Hispanic and 1 percent black . . . Newark is 48 percent Hispanic and 42 percent black. Glen Ridge, about 10 miles away, is 6 percent Hispanic and 4 percent black.”¹⁶³

Even if preventing the federal government from enforcing desegregation orders in the North was not the legislator’s intent, the Court’s stance—that integration efforts cannot exceed the school district’s boundary lines—has allowed northern segregation—masked as pro-neighborhood schools and anti-busing stances—to prosper beyond the reach of desegregation orders in northern areas like New York City and New Jersey.

C. *Secession as a Way to Stay Segregated*

Similar to the resistance exuded by local communities following *Brown*, “more than 70 communities have tried to secede” from their respective school districts since 2000, and more than fifty have done so successfully.¹⁶⁴ Typically, white, wealthier school districts attempt to splinter off from larger more diverse districts.¹⁶⁵ Secessions do not only

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See Hannan Adely & Dave Sheingold, *How Segregated are New Jersey’s Schools and What Can be Done About It?*, NORTHJERSEY.COM (July 13, 2018), <https://www.northjersey.com/story/news/2018/07/13/how-segregated-new-jerseys-schools-and-what-can-be-done/702719002/>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Valerie Strauss, *Back to the Future: A New School District Secession Movement is Gaining Steam*, WASH. POST (May 2, 2018), https://www.washingtonpost.com/news/answer-sheet/wp/2018/05/02/back-to-the-future-a-new-school-district-secession-movement-is-gaining-steam/?utm_term=.0b2938d81e93.

¹⁶⁵ *Id.*

occur in the South but throughout the entire country.¹⁶⁶ Such secessions can be accomplished after achieving unitary status and the subsequent termination of desegregation orders.

1. Memphis-Shelby County School Integration & Prompt Secession

In August 2013, Tennessee school districts integrated Memphis City Schools and neighboring Shelby County Schools, producing “the largest city-suburban school district merger in recent U.S. history.”¹⁶⁷ The Memphis area districts, which include Memphis and six suburban towns, were previously under separate desegregation orders.¹⁶⁸ In 2012, Memphis had a 63% Black population, while Germantown—a close suburban neighborhood—had a Black population of 4.5%.¹⁶⁹ The other neighboring suburbs also involved in the school integration had demographics comparable to Germantown.¹⁷⁰ In response to the integration, six suburban towns filed referendums to create six new, independent school districts.¹⁷¹ One year after the integration of Memphis schools and its suburbs, six new school systems were opened in Memphis suburbs, separate from Memphis’s large minority population.¹⁷² After the secession, Memphis’s new, “integrated” school district was overwhelmingly Black, at 78.4%, and all of the new, seceded, suburban districts enrolled white students at 62% or higher.¹⁷³

2. Gardendale

In 1965, the district court ordered Jefferson County, Alabama, to integrate its public schools.¹⁷⁴ The areas of Jefferson County with a higher white population seceded, which resulted in the district’s demographics

¹⁶⁶ *Fractured: The Breakdown of America’s School Districts*, EDBUILD, <https://edbuild.org/content/fractured#intro> (last visited Feb. 9, 2020).

¹⁶⁷ Genevieve Siegel-Hawley et al., *The Disintegration of Memphis-Shelby County, Tennessee: School District Secession and Local Control in the 21st Century*, 55 AM. EDUC. RES. J., 651, 652 (2018). The integration was a result of Memphis School Board voting to relinquish its charter in an attempt to stop Shelby County School District from being granted special school district status, which would have drawn a hard line removing Memphis from any tax benefit. *Id.*

¹⁶⁸ *Id.* at 665.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Strauss, *supra* note 164.

¹⁷² *Id.*

¹⁷³ Siegel-Hawley, *supra* note 167, at 668.

¹⁷⁴ Will Stancil, *Is School Desegregation Coming to an End?*, ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/education/archive/2018/02/a-bittersweet-victory-for-school-desegregation/554396/>.

changing from seventy-five percent white in 2000 to around forty percent white in 2018.¹⁷⁵ In a more recent attempt of secession, the suburb of Gardendale, with an eighty-three percent white population, attempted to secede from the diverse Jefferson County School District.¹⁷⁶ The district court judge originally approved Gardendale's secession,¹⁷⁷ even though she believed elements of the secession campaign were "deplorable," and motivated by a desire to discriminate.¹⁷⁸ The judge reasoned that, alternatively, if she barred Gardendale's secession, Jefferson County would be more integrated and soon achieve unitary status.¹⁷⁹ If she did that, however, the desegregation order would soon be terminated, and without the school district under court order, the secession could then occur without interference.¹⁸⁰ Gardendale would be able to secede without judicial supervision.¹⁸¹ But because the judge ruled to allow Gardendale to secede, a new desegregation order would be placed on the newly seceded school district because of its desire to self-segregate and the new court order could remain in effect for "the indefinite future."¹⁸²

Nevertheless, the Eleventh Circuit held on appeal that Gardendale's secession was not permitted because the secession would interfere with Jefferson County's outstanding desegregation order.¹⁸³ In correcting the district court judge, the Eleventh Circuit stated, "the district court had no basis to speculate about the possibility that Jefferson County might or might not obtain a determination of unitary status."¹⁸⁴ The appellate court further clarified, stating that the court does "not suggest that the Gardendale Board of Education is 'forever [a] vassal[] of the [C]ounty [B]oard.'" ¹⁸⁵ Although Gardendale must cease efforts to create a new school system now, the possibility of secession remains open once the desegregation order is inevitably terminated.

Proponents of secession, like Memphis and Gardendale, stress the importance of keeping tax dollars with local children, rather than sharing funds with children all over the county. Also, they focus on the need to

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *Stout v. Jefferson Cnty. Bd. of Educ.*, 250 F. Supp. 3d 1092, 1181 (N.D. Ala. 2017).

¹⁷⁸ Stancil, *supra* note 174.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Stancil, *supra* note 174. See also *Stout*, 250 F. Supp. 3d at 1166.

¹⁸³ *Stout v. Jefferson Cty. Bd. of Ed.*, 882 F.3d 988, 1013 (11th Cir. 2018).

¹⁸⁴ *Id.* at 1015.

¹⁸⁵ *Id.* at 1016 (quoting *Stout v. Jefferson Cty. Bd. of Ed.*, 466 F.2d 1213, 1215 (5th Cir. 1972)).

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retain local, rather than county-wide, control of schools.¹⁸⁶ But the white and typically more wealthy areas that often seek secession are, in effect, seeking a more segregated forum to educate their children. And it is the court's lack of power to order desegregation under *Brown* and its progeny that makes secession possible.

IV. CONFUSION, NEGLECT, INACTION

As of 2014, more than three hundred court orders remained outstanding, as many school districts are yet to establish a unitary system.¹⁸⁷ In fact, school districts under court order often do not even know the order exists since they date back to the 1960s and 1970s.¹⁸⁸ As a result, the courts and the Justice Department have lost track of whether individual court orders remain operative and necessary.¹⁸⁹ Even the Department of Education (DOE) has struggled in this regard, shown by their unexplainable yet drastic year-to-year changes in statistics.¹⁹⁰ What was once a powerful system that guided the nation towards racially integrated public education now finds itself in considerable and inexcusable disarray.¹⁹¹

A. *School Districts Not Held Accountable for Failed or Lack of Integration Efforts*

Across the country, segregated school districts continue to operate without interference. Employees transition out of the school district and new employees assume control, yet many of these same school districts were considered segregated following *Brown* and still remain under the court's jurisdiction.¹⁹²

Thirty years ago, the school district in Hollandale, Mississippi, submitted required documentation to the court, which detailed the district's statistics regarding integration efforts. Since then, however, no action has taken place since the submission.¹⁹³ In 2014, the attorney for Hollandale school district stated that he did not know if the desegregation order was still in effect when, in fact, it was.¹⁹⁴ School district attorneys in

¹⁸⁶ Stancil, *supra* note 26.

¹⁸⁷ Nikole Hannah-Jones, *Hundreds of School Districts Have Been Ignoring Desegregation Orders for Decades*, PAC. STANDARD (May 2, 2014), <https://psmag.com/education/hundreds-school-districts-ignoring-desegregation-orders-decades-80589>.

¹⁸⁸ *See id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Hannah-Jones, *supra* note 187.

¹⁹⁴ *Id.*

Mississippi are not alone when it comes to their naivety of public records. An attorney for the Washington, Georgia school district publicly shared that the district fulfilled its obligations under several desegregation orders as of 2000.¹⁹⁵ The Justice Department records, however, later showed that while some court orders had been lifted, others still remained in effect.¹⁹⁶ In Yancey County, North Carolina, the superintendent of schools “asserted that a court order had never been imposed on its schools;” but to the contrary, archives show the county has been under court order since 1960.¹⁹⁷ This type of ignorance amongst school representatives who are accountable for knowing such information illustrates the lack of attention and enforcement regarding outstanding desegregation orders.

B. Courts’ and the Justice Department’s Failure to Enforce Outstanding Court Orders

In Warren County, North Carolina, a school board attorney was aware that the district may remain under court order and contacted the local federal court to inquire about its status; however, the court told the attorney his question could not be answered because the records were shipped to federal archives.¹⁹⁸ The frustration in the “attempts to simply determine the status of any ongoing federal oversight” has deterred that county from any further action.¹⁹⁹ Another desegregation order sat idle for thirty years in Louisiana, when a federal judge was clearing his docket of older cases—much like the judge determining unitary status in Indianola, finding the lapse in time sufficient, despite any change in racial disparity in the school district—as a rationale to terminate a desegregation order.²⁰⁰ The judge determined the court order was terminated in 1976.²⁰¹

C. Department of Education

The DOE releases the current status of desegregation orders in a biennial report, entitled “the Civil Rights Data Collection.”²⁰² That said,

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (“[T]he district’s lawyer, Donny Laws, said the district was placed under court order but that, ‘I can safely tell you [ProPublica’s inquiry is] the first time it’s been mentioned in Yancey County in 45 to 50 years.’”).

¹⁹⁸ *Id.*

¹⁹⁹ Hannah-Jones, *supra* note 187.

²⁰⁰ *See supra* Sec. III, A, 1.

²⁰¹ Hannah-Jones, *supra* note 187. The Justice Department has since insisted that the order is operative and necessary and due to the insistence, the order remains active and is waiting for an appellate court ruling. *Id.*

²⁰² CIVIL RIGHTS DATA COLLECTION, <https://ocrdata.ed.gov/Home> (last visited Feb. 26, 2020) (follow “Data Analysis Tools” or “School & District Search” and search for the status of a desegregation order).

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there are unexplainable and drastic changes in data regarding outstanding court orders in each of the last three publications.²⁰³ The three most recent Civil Rights Data Collection reports came to three eye-opening determinations: (1) in 2011–12, more than 1,200 districts reported being subject to a desegregation order; (2) in 2013–14, 171 districts reported being subject to a desegregation order; and (3) in 2015–16, 334 districts reported being subject to such.²⁰⁴ Although the DOE altered the definition of Civil Rights Data Collection, a former “lawyer in the educational opportunities section of the civil rights division of the U.S. Department of Justice,” stated she is unsure how the change in definition could account for such drastic changes, and there has been no surge in the number of districts submitting to desegregation plans.²⁰⁵ All in all, the only justification for such data, which shows an 85% decrease followed by a nearly 100% increase in outstanding desegregation orders, seems to be a lack of attention and due diligence.

V. RECOMMENDATION

The Supreme Court has repeatedly stressed the importance of education. “[E]ducation is perhaps the most important function of state and local governments,”²⁰⁶ and the Court has recognized that education is of importance to our democratic society.²⁰⁷ The Court has also held that a diverse student body constitutes a compelling state interest.²⁰⁸ Additionally, the Court followed these values in enforcing desegregation orders immediately after *Brown*, most evidently in *Green* and *Swann*. But the progress established after the Civil Rights Era has largely been lost. The most recent Supreme Court decisions have curtailed the district courts’ ability to effectively enforce desegregation orders and the Justice Department has failed to show the same persistence as it did following the Civil Rights Era. As a result, students across America are deprived of an equal opportunity to learn, grow, influence, lead, and become the most productive citizens.

First, in *Keyes*, the Court held that a showing of clear purpose to segregate Black students within a school district allows a district court to place the entire school district under desegregation order; however, when a

²⁰³ Andrew Ujifusa & Alex Harwin, *There are Wild Swings in School Desegregation Data. The Feds Can’t Explain Why*, EDUC. WK. (May 2, 2018), <https://www.edweek.org/ew/articles/2018/05/02/there-are-wild-swings-in-school-desegregation>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *See Brown I*, 347 U.S. at 493.

²⁰⁷ *Id.*

²⁰⁸ *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003). *See also Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

private academy is formed specifically to promote segregation, or a previously formed academy acts as a tool to further segregation, not only do these academies remain untouched but the academies continue to receive federal funds.²⁰⁹ At the very least, the Justice Department must be able to threaten the discontinuance of federal funds after a finding of intentional segregation regardless of whether the institution is public or private. If public schools are to be deprived of federal funds under Title VI after a showing of intentional segregation, Title VI should apply to *and be enforced* against private academies.

Second, in contrast to the Court's holding in *Milliken* and supported by the Court's holding in *Swann*, district courts must be able to issue court orders that reach beyond a school district's boundaries. The Court has stressed the importance of a diverse student body and the negative impact of segregated education on a growing child, but never before has the Court indicated the significance of current school district boundaries. So, if the Court limits district court desegregation plans to intra-district, the Court is effectively determining that under specific circumstances, the school district boundaries are of greater significance than achieving the greatest possible means of desegregated education.

If necessary, the district court should be able to gerrymander school zones and provide reasonable transportation to areas in order to achieve a desegregated school system, regardless of whether the desegregation plan is inter-district or race is the sole factor in making determinations. Any other method of desegregation significantly limits the available options to desegregate in highly concentrated, single-race residential areas, like Detroit in *Milliken*, or burdens the good-intentioned school district attempting to achieve desegregation by forcing that school district to establish a different system of student assignment that is racially neutral but achieves the same means, like in *Parents Involved*. Desegregation may be accomplished to the greatest extent practicable, not by limiting the district courts' discretion in enforcing desegregation orders, but by allowing broad discretion, like the Court pre-*Milliken*, to achieve the desegregated system that *Brown* intended by all means possible.

Such broad discretion, and the ability to reach beyond school district lines, would disincentivize a town's effort to secede from a larger district because rather than arbitrary school district lines, the school district lines may be drawn for the sole purpose of achieving desegregation. If not previously gerrymandered, the school district lines could be altered at the court's discretion.

Lastly, desegregation orders must provide specific, measurable aims

²⁰⁹ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 207–209 (1973).

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and a strict deadline before withdrawing federal funds. The Court illustrated such an assertion in *Alexander*, where the appellate court disavowed an extension for compliance and demanded desegregation at once, effective immediately. Specific aims and a strict deadline deter the school district from implementing measures that seem to integrate but maintain segregated schools in practice. The Justice Department can then easily identify—against the measurable aims—school districts that comply, or fail to comply, with a court order. This process also avoids the lingering court orders that the school districts, judiciary, and executive branch seem to lose after decades of existence. The Justice Department should monitor the progress of school districts recently relieved of desegregation orders to ensure districts are not re-segregated. The school districts should be required to file changes in student assignment policies and each school's year-to-year student demographics for a specific period of time following the termination of the desegregation order. This task is feasible considering the relatively low volume of three-hundred outstanding desegregation orders nationwide.

These recommendations allow the Court to convey the importance and value of education and diversity and the Justice Department can continue to guide public education towards the desegregation that *Brown* aspired to, and the Civil Rights Era sought to achieve.

VI. CONCLUSION

Brown sought to achieve desegregation throughout schools in the United States. More than sixty years later, however, desegregation is far from a reality and has actually regressed since 1988. Such regression is attributable to the Court's continued restraint on the district courts' ability to enforce desegregation orders and the Justice Department's lack of enforcement of those orders. To achieve desegregation in America's schools, the Court must return to its strict enforcement of desegregation that created substantial progress in the decades following the Civil Rights Era and bring intentional segregation via private academies within its enforcement because those academies receive federal funds. Segregation attempts come in all shapes and sizes, affecting education throughout the United States.

As the *Brown* Court stated, "segregated public schools are not 'equal' and cannot be made 'equal[.]'"²¹⁰ The time has come to implement broad measures to combat these elusive tactics and ensure that every student, regardless of race, has an equal educational opportunity.

²¹⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).