

THE CIVIL RIGHTS ACT OF 1964 AND SCHOOL DESEGREGATION: A DOUBLE-EDGED SWORD?

KATY J. HARRIGER†

In *Parents Involved in Community Schools v. Seattle School District No. 1*, a closely divided Supreme Court (5–4) struck down the voluntary efforts of Seattle, Washington, and Jefferson County, Kentucky, school districts to keep their schools integrated through the use of race as a factor in school assignment decisions.¹ Notable in the plurality² and dissenting opinions³ was sharp disagreement about the meaning of the *Brown v. Board of Education* decision with respect to racial consideration in school assignment.

This heated disagreement about *Brown*'s meaning is in sharp contrast to the unanimity that prevailed on the Court for the first twenty years after the *Brown* decision. In this paper, I explore the roots of the Court's divide over what *Brown* means and consider the crucial role that the Civil Rights Act of 1964 played in contributing to this contest over the decision's meaning. I explore the interplay between the Court and national politics in explaining the legal change described above. The Civil Rights Act of 1964 occurred at a critical juncture in this evolution of legal meaning. As the title of this paper implies, there are two different stories that can be told about the importance of the Act to the evolution of desegregation policy—one which cuts in favor of advancing integration, and the other which cuts in favor of limiting the meaning of *Brown* to simply the absence of laws that segregate.

In the first story, the Act gave the Court, as well as integration-minded politicians and federal bureaucrats, the sword they needed to slay the beast of massive resistance and delay in the

† Professor, Department of Politics and International Affairs, Wake Forest University

1. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).
2. *Id.* at 708–98.
3. *Id.* at 798–868.

school districts that had characterized the first decade after *Brown*. The significance of the *Brown* decision would have been substantially reduced had it not been for the Civil Rights Act of 1964. The Act put the legislative and executive branches behind the power of the Court,⁴ which emboldened the Court to end “all deliberate speed”⁵ and to support integrationist remedies that finally created real desegregation. Rather than being what Justice Breyer called the Court’s “finest hour,”⁶ *Brown* might be remembered instead as a clear example of its weakest hour, but for the Civil Rights Act of 1964.⁷

In the second story, the Act provided a sword for alternately inclined politicians, bureaucrats, and eventually judges, to slay the beast of race conscious remedies to accomplish integration. The legislative battle to pass the Civil Rights Act—and particularly the power of southern members of Congress—led to compromises in language and the extent of federal power under the Act that would have long-term and far-reaching consequences for the enforcement of the *Brown* decision in schools.⁸ This edge of the sword lay in wait for a changed national political climate and would eventually allow the Roberts Court to find voluntary efforts to keep schools integrated unconstitutional,⁹ an outcome difficult to imagine in the first several decades after *Brown* was decided.

I begin by outlining the division of the Court in *Parents Involved*, contrasting the views about the meaning of *Brown* reflected in the justices’ various opinions. I then explore how the meaning of *Brown* changed by looking both inside and outside the Court over four decades. I discuss three waves of political reaction that help explain the way in which *Brown*’s meaning shifted both inside and outside the Court, culminating in the *Parents Involved* decision. The first wave, beginning immediately after the *Brown* decision and ending with the passage of the Civil Rights Act of

4. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 70–71 (2d ed. 2008).

5. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

6. *Parents Involved*, 551 U.S. at 867.

7. *But see* ROSENBERG, *supra* note 4, at 42–57 (arguing that *Brown II* should be seen as evidence of the Court’s weakness).

8. See CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT (Bloomebury Press 2014).

9. See, e.g., *Parents Involved*, 551 U.S. at 701.

1964, was characterized by the “massive resistance” effort in the South.¹⁰ During this period, proponents and opponents alike saw integration and desegregation as the meaning of *Brown*. The second and perhaps most seminal change lasted from about 1964 to the mid-1970s and was characterized by the passage of the Civil Rights Act, rapid increase in the amount of integration in schools, and white flight and white backlash manifested in the political arena. This period culminated in a presidential election campaign in 1968 in which the Republican candidate, Richard Nixon, promised to restore “law and order” and appoint judges who would be “strict constructionists” in their interpretation of the Constitution.¹¹ The “Southern Strategy” of the Republican Party was to take advantage of the white fear of and hostility toward integration to break the Democrats’ long hold on the South.¹² But the Strategy was also to do so in a way that differed substantially from “massive resistance.” It instead used race-neutral language to limit the reach of *Brown* and opposed remedies for segregation, like busing and racial balancing.¹³ The third wave, in what we might consider a time of consolidation of these changes, occurred during the 1980s and 1990s. This era was influenced by the election of Ronald Reagan and the rise of a conservative legal community that sought to challenge, through litigation and the appointment of judges who shared their legal philosophy, the civil rights orthodoxy that had emerged from the fundamental changes wrought by the civil rights movement.¹⁴ Here, the language of Justice Harlan’s famous dissent in *Plessy v. Ferguson*¹⁵—the “colorblind” Constitution—was embraced and adopted as the frame for launching a new vision of civil rights, both by

10. Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South*, in *POLITICS AND SOCIETY IN TWENTIETH-CENTURY AMERICA* 3 (William Chafe et al. eds., 2006).

11. KEVIN J. MCMAHON, *NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* 2, 147 (Univ. of Chi. Press 2011).

12. THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS* 12–13 (W.W. Norton & Co. 1991); Lassiter, *supra* note 10, at 226.

13. MCMAHON, *supra* note 11, *passim*.

14. *Id.* at 251–52.

15. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

conservative legal scholars and by Republican appointees to the Court.¹⁶

There is not space in this paper to explore all of these developments in depth. Here, I focus on the middle period and offer a few specific examples from each era to illustrate how *Brown* was understood in each period and the role that the Civil Rights Act played in the second and third periods.

I. THE DISAGREEMENT IN *PARENTS INVOLVED*

The justices' disagreement in *Parents Involved* varied along a number of dimensions, including: (1) which precedent following *Brown* best clarified its meaning and was most applicable to the cases before the Court; (2) whether *Brown* required integration or only the end of legal segregation; (3) how to understand the distinction between de jure and de facto segregation; and (4) whether there is a difference between racial criteria being used for inclusion rather than exclusion.¹⁷ First, I examine the disagreement over what integration and desegregation mean and, to a lesser extent, the debate that first became a proxy for that distinction—the difference between de jure and de facto segregation. These interrelated disputes were also part of the debate during the passage of the Civil Rights Act.

Justice Roberts was thirty-eight pages into his opinion, and well into his critique of Justice Breyer's dissent, before he turned his attention to *Brown*.¹⁸ Linking *Brown* to a line of precedent addressing affirmative action programs from the past several decades, he wrote:

All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of*

16. See CLINT BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY 110–11 (1990) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–06 (1989) and *id.* at 527–28 (Scalia, J., concurring)).

17. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732, 742, 746–47, 749 (2007).

18. *Id.* at 746.

Education, we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. . . . The next Term, we accordingly stated that “full compliance” with *Brown I* required school districts “to achieve a system of determining admission to the public schools on a nonracial basis.”¹⁹

Justice Roberts recognized that both parties were debating who “is more faithful to the heritage of *Brown*” and contended that the plaintiffs’ desire in *Brown* was quite clear from the record.²⁰ He insisted that the desire was not for integrated public schools but instead for the stigma of state required segregation to be removed.²¹ He concluded:

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” is to stop assigning students on a racial basis. The way to stop

19. *Id.* at 746–47 (citations omitted) (citing *Brown I*, 347 U.S. at 493–94) (quoting *Brown II*, 349 U.S. at 300–01).

20. *Id.* at 747.

21. *Id.*

discrimination on the basis of race is to stop discriminating on the basis of race.²²

In his concurrence, Justice Thomas argued for a “colorblind interpretation” of the Constitution and that segregation is a legal term for state-imposed separation of the races.²³ Racial imbalance caused by legal, private decisions related to housing is not unconstitutional and is therefore not subject to remedies imposed by state actors.²⁴ Very early in his opinion he dismisses in a footnote the dissenters’ references to integration.²⁵ He notes that they refer to integration “repeatedly and reverently” but argues that “outside of the context of remediation for past de jure segregation, ‘integration’ is simply racial balancing,” which the law does not require or permit.²⁶ Thomas argued that the dissenters’ real problem is that they reject the notion of a “colorblind” Constitution upon which his definition of desegregation and his interpretation of *Brown* rest.²⁷

In contrast to the various majority opinions that rely almost exclusively on the race decisions of the last few decades, permitting virtually no consideration of race by state actors,²⁸ the dissents by Justice Stevens and Justice Breyer started with a claim about the meaning of *Brown* and then moved forward from the 1954 decision while relying on the unanimous decisions by the Court in the decades immediately following the decision.²⁹ Stevens called Roberts to task for his use of precedent and argued that the only justification that the Chief Justice could offer for refusing to recognize the difference between using race to include students versus using it to exclude them “is the citation of a few recent opinions—none of which even approached unanimity—grandly proclaiming that all racial classifications must be analyzed under

22. *Id.* at 747–48 (citation omitted) (quoting *Brown II*, 349 U.S. at 300–01).

23. *Id.* at 748–49.

24. *Id.* at 750.

25. *Id.* at 750 n.2.

26. *Id.*

27. *Id.* at 772.

28. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

29. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Alexander v. Holmes Cty. Bd. of Educ. (Alexander II)*, 396 U.S. 19 (1969); *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430 (1968); *Cooper v. Aaron*, 358 U.S. 1 (1958).

‘strict scrutiny.’”³⁰ Stevens argued that this “rigid adherence to tiers of scrutiny obscures *Brown*’s clear message.”³¹ Pointing to a 1968 decision from the Warren Court allowing busing in Boston, he noted that the Court had permitted the use of race in a school assignment situation where there had been no finding of de jure segregation.³² He concluded:

The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.³³

Justice Breyer (joined by Stevens, Souter, and Ginsburg) argued that the school board assignment plans in question in this case resembled plans in districts across the country representing “local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education*, long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake.”³⁴ Breyer noted that past Courts had approved plans “no less race conscious” than the ones before the Court and that it had been “understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.”³⁵

Breyer contended that the plurality “distorts precedent,”³⁶ resulting in an opinion that “undermines *Brown*’s promise of integrated primary and secondary education that local communities have sought to make a reality.”³⁷ He cited the *Swann v. Charlotte-Mecklenburg*³⁸ decision, noting a passage in the opinion written by Chief Justice Burger which recognized “the broad

30. *Parents Involved*, 551 U.S. at 800.

31. *Id.* at 800–01.

32. *Id.* at 803 (citing *Sch. Comm. of Bos. v. Bd. of Educ.*, 227 N.E.2d 729 (Mass. 1967)).

33. *Id.*

34. *Id.* (citation omitted).

35. *Id.*

36. *Id.*

37. *Id.* at 803–04.

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

discretionary powers of school authorities”³⁹ to formulate educational policy and stated that they “might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.”⁴⁰

Providing some support to Stevens’s claim that no one on the Court in 1975 would have agreed with the majority, Breyer also relied on an opinion in chambers from Justice Rehnquist in 1978, rejecting a request to stop a busing plan from going into effect in Los Angeles.⁴¹ He contends that Rehnquist recognized that this view from *Swann* was “settled law”⁴² when he wrote: “While I have the gravest doubts that [a state supreme court] was *required* by the United States Constitution to take the [desegregation] action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.”⁴³

The history going forward from *Brown*, said Breyer, is one where:

[D]ifferent districts—some acting under court decree, some acting in order to avoid threatened lawsuits, some seeking to comply with federal administrative orders, some acting purely voluntarily, some acting after federal courts had dissolved earlier orders—adopted, modified, and experimented with hosts of different kinds of plans, including race-conscious plans, all with a similar objective: greater racial integration of public schools.⁴⁴

Breyer’s conclusion also demonstrates the way in which he conflates the concepts of desegregation and integration. He returns to *Brown*, challenging the plurality’s interpretation of what the decision means:

39. *Id.* at 16.

40. *Parents Involved*, 551 U.S. at 823 (citing *Swann*, 402 U.S. at 16).

41. *Bustop, Inc. v. Bd. of Educ. of L.A.*, 439 U.S. 1380 (1978).

42. *Parents Involved*, 551 U.S. at 824.

43. *Id.* (quoting *Bustop*, 439 U.S. at 1383).

44. *Id.* at 805.

In this Court's finest hour, *Brown v. Board of Education* challenged this history [of racial segregation] and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.⁴⁵

Noting the initial resistance to *Brown* and the extent to which attitudes about race have changed since the decision, he placed the plans of Seattle and Louisville in the context of that change:

Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty.⁴⁶

The various opinions in *Parents Involved* demonstrate that the Roberts Court was sharply divided over the meaning of *Brown v. Board of Education* as a matter of law. While everyone on the Court agreed that state actors may not use the law to separate children by race, the disagreement was intense over whether that was *all* that it meant.⁴⁷ Should the decision be understood largely

45. *Id.* at 867–68.

46. *Id.* at 868.

47. *See id.* at 864–65.

as a historical artifact of a particular time in U.S. history when such laws existed, or did it stand for some larger and more enduring principle about the importance of integrated public education in a modern pluralistic democracy? The argument that *Brown's* goal was only the removal of legally required separation fits best with the historical artifact characterization; the argument for integration fits better with the other. Consideration of *Brown's* meaning both inside and outside of the Court during the first decade after it was decided demonstrates that, at least initially, both the supporters and most of the opponents of the decision believed that integration and desegregation were synonymous.

II. THE MEANING OF *BROWN*: 1954–1964

A. *Integration, Desegregation, and Court Interpretation*

The deliberations of the Vinson and Warren Court in the *Brown* cases have been well documented elsewhere,⁴⁸ but on the question of integration versus desegregation, some of that ground is worth revisiting. Notes from the conferences on these cases support the notion that all of the justices, regardless of their level of enthusiasm for the decision, believed that integrated schools would be the outcome of striking down the segregation laws.⁴⁹ For some, it was the reason to support the decision; for others, it was the reason they hesitated. Assignment to schools on a “non-racial” basis was presumptively the equivalent of integration. This was the reason several of the justices predicted the level of resistance in the Deep South. They recognized that legal segregation was tied up with deeply held white fears of race-mixing and that this fear would lead to vigorous, even violent, resistance to destruction of their way of life brought about by integrated schools.

Chief Justice Vinson believed that the Court had to take into account the likely backlash and the possibility that some states would close their public schools rather than integrate them.⁵⁰

48. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (Alfred A. Knopp ed., 1975); MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936–1961* (Oxford Univ. Press 1994); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 *GEO. L.J.* 1 (1979).

49. See Conf. Notes of Mr. Justice Clark on the Segregation Cases (Dec. 13, 1952), in Hutchinson, *supra* note 48, at 91–92.

50. See *id.* at 91.

Justice Reed argued that “negroes have not been assimilated”⁵¹ and that “there is a reasonable body of opinion that segregation is beneficial to both [races].”⁵² He believed that segregation was constitutional and that it existed to protect against “the mixing of races.”⁵³ Justice Jackson, who resisted joining the majority for some time, clearly saw integration as the result of a holding for the plaintiffs. Consider, he said, a district that had a “pretty good school” for whites and a “pretty poor one” for African-Americans. To desegregate, “you either have to build a new school or you have got to move some white people into the poor school, which would cause a rumpus, or you have to center them all in the good school.” The “rumpus,” of course, would be caused by white people.⁵⁴

Unanimity in *Brown* was attained largely by agreeing that the remedy announced in *Brown II* would recognize the differences among school districts and the likely degree of difficulty in bringing about integrated schools.⁵⁵ Justice Clark was insistent that because “violence will follow in the south,”⁵⁶ the remedy had to be “carefully worked out.”⁵⁷ He would have preferred for Congress, rather than the Court, to outlaw segregation, but he believed that it had not because “people couldn’t vote to integrate here and return home to the south.”⁵⁸ The brief filed by the U.S. Government regarding remedy also reflected the belief that integration was the outcome of the *Brown* ruling.⁵⁹ It contained a section designated “Obstacles to Integration” that discussed various administrative difficulties in merging school systems.⁶⁰

One of the first lower court interpretations of *Brown I* and *II* demonstrated that the price paid for unanimity of the Court was sufficient ambiguity. The decisions allowed for interpretations that

51. *See id.* at 92.

52. *See id.*

53. TUSHNET, *supra* note 48, at 211.

54. *Id.* at 209.

55. *See* Hutchinson, *supra* note 48, at 56.

56. TUSHNET, *supra* note 48, at 210.

57. *Id.*

58. *Id.*

59. Supplemental Brief for the United States on Reargument, *Brown I*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10).

60. *Id.* at 170–78.

substantially limited the reach of the opinion. When the South Carolina case that had been part of the *Brown* decision⁶¹ was remanded to the district court for implementation, Judge John Parker interpreted *Brown* in a manner that “set a standard for evasiveness by school districts throughout the South.”⁶² In an opinion foreshadowing the position that the plurality would take in *Parents Involved*, Parker said that *Brown* simply meant that “a state may not deny to any person on account of race the right to attend any school that it maintains.”⁶³ He went on to argue that:

[If] the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people the freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such discrimination as occurs as the result of voluntary action.⁶⁴

It took many years and many cases for the Court to reject the “freedom of choice” plans that some systems adopted with the encouragement of this reading of *Brown*.⁶⁵ Rather than “outright defiance,” this approach allowed school districts to create an appearance of compliance without creating any measurable desegregation of the schools.⁶⁶

61. *Briggs v. Elliot*, 103 F. Supp. 920 (E.D.S.C. 1952), *rev'd*, 349 U.S. 294.

62. KLUGER, *supra* note 48, at 751; *see Briggs v. Elliot*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (“The Constitution does not require integration. It merely forbids discrimination.”).

63. *Briggs*, 132 F. Supp. at 777.

64. *Id.*

65. *See, e.g., Green v. Cty. Sch. Bd.*, 391 U.S. 430, 440 (1968) (holding that “in desegregating a dual system a plan utilizing ‘freedom of choice’ is not an end in itself”); *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 233–34 (1964) (responding to a failing freedom of choice plan in Prince County, Virginia, the Court held more was necessary to assure the “petitioners that their constitutional rights will no longer be denied to them”).

66. KLUGER, *supra* note 48, at 752.

B. Integration, Desegregation, and Interpretation Outside the Court

These internal arguments on the Court played out within a broader political climate. It seems clear that in the decade after *Brown* was decided, both supporters and opponents of the decision believed that the outcome required was racially integrated schools.⁶⁷ Both sides assumed that the absence of legally mandated separation would, by definition, result in integration. Despite the claims of Justices Roberts and Thomas to the contrary,⁶⁸ the NAACP's position unabashedly favored integration and assumed it would be the outcome of the decision.⁶⁹ As the NAACP awaited the *Brown* decision, it prepared two press releases—one in case it lost and one in case it won.⁷⁰ If the NAACP lost, it pledged to “continue to press our fight for integration and equality until it is won.”⁷¹ After the decision was announced, one account of the celebratory dinner said that the NAACP staffers at the party “began saying the NAACP's work was done and it was just a matter of time before all of the nation's schools were integrated.”⁷² Thurgood Marshall, the lead attorney in the cases, expressed from the beginning and throughout his career the belief that *Brown* was about the creation of racially integrated schools.⁷³ Juan Williams's biography of Marshall argues that Marshall held an “unyielding integrationist worldview”⁷⁴ and that this worldview “had few critics in the NAACP or the black press”⁷⁵ at the time *Brown* was decided. Unlike his replacement on the Court, Justice Clarence Thomas, Marshall believed that the obvious outcome of a “color-blind” approach to the Constitution

67. See ROSENBERG, *supra* note 4, at 42–46.

68. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (signaling his hesitations with integration saying, “[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race”); Neil A. Lewis, *Justice Secures His Place as a Critic of Integration*, N.Y. TIMES, July 9, 2007, at A15.

69. See JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 229 (1998).

70. TUSHNET, *supra* note 48, at 216.

71. *Id.*

72. WILLIAMS, *supra* note 69, at 229.

73. *Id.* at 232.

74. *Id.*

75. *Id.*

would be integration.⁷⁶ In a speech before the NAACP in June 1954, he predicted that this result in the schools could be accomplished in a year.⁷⁷

If *Brown* only required the removal of laws requiring separation, but not actual integration, there would be little reason for the level of resistance that ensued. Despite the aforementioned interpretation by Judge Johnson in *Briggs*, local and state politicians and white citizens throughout the South believed it meant something much more. Herman Talmadge, the Governor of Georgia, vowed that “there will never be mixed schools while I am governor” and warned that school integration would be “a step toward national suicide.”⁷⁸ A Mississippi judge, Tom P. Brady, who was called by some the “intellectual leader” of the Citizens’ Council movement, published a broadside against the decision entitled “Black Monday: Segregation or Amalgamation . . . America Has Its Choice.”⁷⁹ In the essay, Brady encourages resistance to the decision, noting the inability of the Court to enforce its decisions.⁸⁰ As the title implies by its use of the word “amalgamation,” the threat of race-mixing that would occur as a result of *Brown* is one of the themes of the essay. Brady asserted that if the Court had even “a working knowledge of anthropology, ethnology, biology, social evolution, and the science of society as well as the Constitution and the decisions thereunder,” it would know that the race-mixing required by *Brown* would be a disaster.⁸¹

Perhaps most famously, nineteen Senators and seventy-seven House members from eleven states in the South introduced “The Southern Manifesto” in Congress on March 12, 1956.⁸² This document decried the Court’s “abuse of judicial power” and insisted that the Court’s decision in *Brown* violated a number of

76. Compare WILLIAMS, *supra* note 69, at 232, with Lewis, *supra* note 68, at A15.

77. WILLIAMS, *supra* note 69, at 232.

78. *Id.* at 230.

79. THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE, 1954–1990, at 83 (Clayborne Carson et al. eds., 1991) [hereinafter EYES ON THE PRIZE].

80. TOM P. BRADY, BLACK MONDAY: SEGREGATION OR AMALGAMATION . . . AMERICA HAS ITS CHOICE 44–45 (Ass’n of Citizens’ Council ed., 1955) (on file with Special Collections at Z. Smith Reynolds Library of Wake Forest Univ.), reprinted in EYES ON THE PRIZE, *supra* note 79, at 89.

81. *Id.* at 84.

82. The Southern Manifesto, 102 CONG. REC. S4459–60 (daily ed. Mar. 6, 1956) (statement of Sen. George).

important constitutional principles, including checks and balances, states' rights, and local control of the schools.⁸³ Recognizing and applauding the massive resistance that had already begun, the Manifesto commended "the motives of those States which have declared the intention to resist forced integration by any lawful means."⁸⁴ While never referring explicitly to the fear of race-mixing, it justified racial separation by states that had "substantial racial differences among [their] people"⁸⁵ as a long-established and judicially supported practice that:

became a part of the life of the people of many of the States and confirmed their habits, customs, traditions, and way of life. It is founded on elemental humanity and commonsense, for parents should not be deprived by Government of the right to direct the lives and education of their own children.⁸⁶

In 1957, during Senate debate over an Eisenhower-supported civil rights bill, Senator Richard Russell (D-Georgia) raised the issue of race-mixing in his opposition to a section that would allow the Department of Justice to file suits in civil rights cases.⁸⁷ "The bill is cunningly designed," argued Russell, "to vest in the Attorney General unprecedented power to bring to bear the whole might of the Federal Government, including the armed forces if necessary, to force a commingling of white and Negro children in the State-supported schools of the South."⁸⁸

This fear of racial mixing was given as a justification for the violent reaction to the token integration efforts in Little Rock, Arkansas, in 1957. For example, in a roundtable discussion among white and black students on NBC, one of the white students said the violence was justified "because the South has always been against racial mixing and . . . they will fight this thing to the

83. *Id.* at 4460.

84. *Id.*

85. *Id.*

86. *Id.*

87. 103 CONG. REC. S10771-78 (daily ed. July 2, 1957) (statement of Sen. Russell).

88. *Id.* at 10771.

end.”⁸⁹ He went on to argue that “we knew before this ever started that someday we were going to have to integrate the schools.”⁹⁰ The level of violent reaction to the *Brown* decision by its opponents and the adoption of the strategy of “massive resistance” can only be explained by the belief that desegregation meant integration.⁹¹

The violent, racist, and law-breaking reaction to *Brown*, and the Civil Rights Movement more broadly, created public sympathy for the black children seeking to integrate the schools and for the cause of legal equality. Laws requiring legal separation in higher education and in various publicly funded facilities fell steadily over the decade following the decision.⁹² Some Republicans recognized the political opportunity in the disgruntled South as early as the mid-1950s, but the Republican Party was hurt initially by President Eisenhower’s use of federal troops in Little Rock.⁹³ In 1961, however, Barry Goldwater spoke to Southern Republicans about the potential electoral benefits of targeting Southern white voters: “We’re not going to get the Negro vote as a bloc in 1964 and 1968, . . . so we ought to go hunting where the ducks are.”⁹⁴ This strategy showed that it had some legs in the 1962 and 1964 state and local elections, but the electoral thumping that Goldwater took in 1964 suggested that openly segregationist rhetoric would not work with a national audience.⁹⁵

Compliance with *Brown* in the first decade after the decision was dismal. In 1963, less than 1% of black students in

89. A ROUNDTABLE DISCUSSION (1957), reprinted in *EYES ON THE PRIZE*, *supra* note 79, at 104.

90. *Id.* at 104–05.

91. *EYES ON THE PRIZE*, *supra* note 79, at 62.

92. See, e.g., *New Orleans v. Barthe*, 376 U.S. 189 (1964) (per curiam); *Johnson v. Va.*, 373 U.S. 61 (1963) (per curiam); *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *New Orleans Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (per curiam); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam); *Fla. ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413 (1956) (per curiam); *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (per curiam); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam); *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (per curiam).

93. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 110–11 (1994).

94. PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 262 (Univ. of Chi. Press 1999).

95. *Id.* at 262–67, 275–76; RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 64 (Scribner ed., 2008).

southern states were in desegregated schools.⁹⁶ The Court's decision in *Brown II* to make school districts and federal district courts the decision makers of first instance, the subsequent lack of guidance from the high Court to district courts, and the political connections that federal district court judges had to their communities meant that the lower level judges' willingness to press for meaningful desegregation varied widely and tended toward allowing delay and only token efforts to desegregate.⁹⁷

III. CONTESTING THE MEANING OF *BROWN*: 1964–1974 AND THE CIVIL RIGHTS ACT

Unquestionably, the Civil Rights Act of 1964 profoundly shaped the way in which the *Brown* decision was implemented during the second decade of its existence. In the first version of our story about the Act and school desegregation, it is easy to make the case that the Act was an unmitigated success. “The first year of enforcement of the 1964 law,” wrote Gary Orfield, “showed that administrative agencies had been able to reach many more school districts and create much more desegregation in one year than had all the lawyers and federal courts of the previous decade.”⁹⁸ Orfield contended that most important to this success was the combination of Title IV,⁹⁹ prohibiting discrimination in public education, and Title VI¹⁰⁰ prohibiting discrimination in any program that receives federal funds.¹⁰¹ Title VI was made all the more meaningful one year later when the Elementary and Secondary Education Act of 1965 was passed, providing significant new federal funds for public education and operating on a formula that promised a large infusion of money to poor southern school districts.¹⁰² “The interaction of these two laws,” said

96. Gary Orfield, *The 1964 Civil Rights Act and American Education*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 89, 100 (Bernard Grofman ed., 2000).

97. J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1971); Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 37 J. POL. 917, 917–936 (1975).

98. Orfield, *supra* note 96, at 101.

99. Public Education, 42 U.S.C. § 2000c et seq. (2013).

100. Federally Assisted Programs, 42 U.S.C. § 2000d et seq. (2013).

101. Orfield, *supra* note 96, at 92–93, 124–25.

102. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 6301 (2012)); KLUGER, *supra* note 48, at 759–

Orfield, “confirmed the worst fears of southern leaders and prompted revolutionary change in southern schools.”¹⁰³ During this decade, a complicated dialogue between school districts, federal district and circuit court judges, the Office of Education in the Department of Health, Education, and Welfare (“HEW”), and later, the Office of Civil Rights in that same department led gradually to a set of guidelines for desegregation that were constitutionalized by lower federal courts and then the Supreme Court.¹⁰⁴

A. Passage and Implementation of the Civil Rights Act of 1964

When we examine the debate over the Civil Rights Act and the way in which it shaped the language of the Act, we begin to see how the Act presented a “double-edged sword” for school desegregation. On the one hand, tying access to federal funds to compliance with *Brown* had immediate and positive effects in moving recalcitrant school districts toward meaningful integration. On the other hand, the bargaining and negotiation necessary to get the Act passed led to compromises that would have significant long-term effects on the ability to keep schools integrated.

The First Story: On the tenth anniversary of *Brown*, as Congress considered the Civil Rights Act, only 1.17% of “black schoolchildren in the eleven states of the Confederacy were attending public school with white classmates.”¹⁰⁵ Most of this small percentage of students were in just four southern states.¹⁰⁶ In seven of the southern states, the numbers were far below 1%.¹⁰⁷ In Alabama, only twenty-one black students attended school with white children; in South Carolina, only nine did so; in Mississippi, not a single school had been desegregated.¹⁰⁸ This lack of progress on school desegregation, along with increased political activism by

60; GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 45, 77 (1969).

103. ORFIELD, *supra* note 102, at 4.

104. *Id.* at 337–41.

105. KLUGER, *supra* note 48, at 758.

106. Orfield, *supra* note 96, at 100.

107. *Id.*

108. *Id.*

civil rights advocates, motivated members of Congress and President John F. Kennedy to push for a new civil rights bill that would put executive power behind the Court's decisions banning segregated schools and other public accommodations.¹⁰⁹ When Kennedy submitted his proposed bill to Congress on June 19, 1963, he cited the importance of achieving "a more orderly and consistent compliance with the Supreme Court's school and college desegregation decisions"¹¹⁰ and noted that there were children who entered segregated elementary schools in 1954 that "will enter segregated high schools this year, having suffered a loss which can never be regained."¹¹¹

Kennedy's proposed bill would allow the Attorney General to initiate lawsuits to force school districts to desegregate.¹¹² The President stated that it was "unfair and unrealistic" to have parents and private individuals bear the burden of litigation of this sort.¹¹³ "Too often," he said, "those entitled to bring suit on behalf of their children lack the economic means for instituting and maintaining such cases or the ability to withstand the personal, physical, and economic harassment which sometimes descends upon those who do institute them."¹¹⁴ He also proposed that a program be developed for providing assistance "to those school districts in all parts of the country which, voluntarily or as the result of litigation, are engaged in the process of meeting the educational problems flowing from desegregation and racial imbalance."¹¹⁵ He included in this group school districts that had their state funds withdrawn because they had moved forward on desegregation, thus putting themselves in conflict with state segregation policies.¹¹⁶

While there were changes made to Kennedy's bill that would have implications for the other story to be told about the

109. KLUGER, *supra* note 48, at 754–57.

110. 109 CONG. REC. H11176 (daily ed. June 19, 1963), *reprinted in* 1 DESEGREGATION OF PUBLIC SCHOOLS LEGISLATIVE HISTORY OF TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-1 (1967).

111. *Id.*

112. *Id.* at LRS-2.

113. *Id.*

114. *Id.*

115. *Id.* at LRS-3.

116. *Id.*

Act, the essence of his proposals were adopted in the 1964 Act.¹¹⁷ It is undoubtedly the case that the decision to allow the Attorney General to pursue cases against school districts, to require the withholding of federal funds from recipients that discriminated, and to provide assistance and guidance to school districts trying to desegregate had a huge impact on the desegregation process.¹¹⁸ I focus here on the role of the Office of Education in HEW in carrying out its guidance responsibilities and its enforcement of Title VI.

After passage of the Act in the summer of 1964, the number of black children attending school with white children in the South had doubled by the fall,¹¹⁹ though doubling 1% is not a huge accomplishment. Nonetheless, this change suggests that the debate about the Act itself had the positive effect of making school districts realize that they had to do something and encouraging already impatient federal district court judges to put more pressure on school districts under court order.¹²⁰ In April 1965, the first HEW guidelines to school districts were issued stating what was required in order to continue to obtain federal funds.¹²¹ While fairly general, they did require that school districts be able to demonstrate a good faith effort at beginning the process of desegregation and they required, at a minimum, freedom of choice plans and the end of gerrymandering of attendance zones.¹²² That fall, 6% of black children in the South went to schools with white children, which—though still small—was a dramatic increase from where it had been.¹²³

Because of the Civil Rights Act, there were now two “enforcers” of *Brown*. While the coordination between district courts and HEW was not without its difficulties, in the end, the executive branch and judicial branch working together finally brought about substantial integration of the public schools of the

117. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 246–49 (1964).

118. Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968–1974*, 32 AKRON L. REV. 471, 503–04 (1999).

119. Orfield, *supra* note 96, at 100.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 101.

South.¹²⁴ One of the difficulties that developed between the courts and HEW involved the question of whether the agency's guidelines could require more than any federal district court had required.¹²⁵ While some in Congress certainly believed that the agency could do this, the general legislative history suggests that other members of Congress and the Department of Justice believed that "the bill . . . would require acceptance of court orders," even if those orders required less than what HEW thought was required.¹²⁶ What began to happen, however, is that once HEW issued guidelines, some district courts began to adopt them as minimum requirements.¹²⁷ School districts that sought to avoid HEW regulations by refusing federal aid then became the target of Department of Justice suits authorized under the Act.¹²⁸

The Department announced in June 1965 that it would "launch . . . a massive attack" on these school systems.¹²⁹ However, court proceedings are slow by nature, and even two years later, there were fifty-five school districts still not eligible for federal aid.¹³⁰ Through a gradual process, these tensions between court orders and regulations were resolved.¹³¹ Emboldened by many district courts' acceptance of guidelines and school districts' complaints that they had insufficient guidance, and encouraged by civil rights activists and the Johnson administration, HEW issued even stronger guidelines in 1966 that rejected token integration and "freedom of choice" plans that had produced no meaningful integration and requiring restructuring of systems across the board, including teacher placement and transportation.¹³²

The combination of HEW guidelines, court decisions, the threat of losing federal funds, and the availability of funds to aid communities trying to desegregate all combined to instigate significant desegregation of the schools. In 1964, the percentage

124. *Id.* at 103.

125. *Id.* at 102.

126. Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 323 (1967).

127. *Id.* at 328.

128. *Id.* at 330.

129. *Id.*

130. *Id.* at 329–30.

131. *Id.* at 364–65.

132. ORFIELD, *supra* note 102, at 229.

of black children in the South in majority white schools was 2.3%.¹³³ By 1967, it was 13.9%.¹³⁴ And despite the political backlash that began in the 1970s, by 1988 that percentage had grown to 43.5%.¹³⁵

The Second Story: If, on the one hand, the Civil Rights Act of 1964 was the spur that finally led to *Brown* meaning something more than token desegregation, a case can also be made that compromises made in adoption of the Act lay the groundwork for the move to the “colorblind” Constitution of *Parents Involved*. In this story, the sword of the Act was used for limiting or “taming”¹³⁶ *Brown*.

A close consideration of the legislative history of the Act, as well as changes in the larger political climate, help explain how the legal consensus about what *Brown* meant began to break down, and the terms “integration” and “desegregation” came to mean different things.¹³⁷ The passage of the bill epitomizes the complexities, and sometimes absurdities, of the legislative process and the necessity of bargaining and compromise. It was an historic legislative achievement for which many activists and politicians deserve credit.¹³⁸ But as Otto von Bismarck reminds us in his analogy to sausage making, it is not always a pretty process.¹³⁹

Two forces were at work in shaping the Act’s language in order to draw a distinction between integration and desegregation. The first force was a group of Southern segregationists who realized that the climate was such that they were not going to be able to stop the Civil Rights Act from passing, as they had been able to in the past.¹⁴⁰ The argument that *Brown* did not require integration, but only the absence of laws that segregate, had been around since a lower federal court judge had

133. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1598 (2003).

134. *Id.*

135. *Id.*

136. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

137. *Id.* at 949; RISEN, *supra* note 8, at 91.

138. RISEN, *supra* note 8, at 2; see TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964, at 6 (Henry Holt & Co. eds., 2014); see also THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION vii (Robert D. Loevy ed., 1997).

139. Robert Pear, *If Only Laws Were Like Sausages*, N.Y. TIMES, Dec. 5, 2010, at WK3.

140. RISEN, *supra* note 8, at 150.

asserted this in 1955.¹⁴¹ Southerners in Congress picked up this argument and insisted that once state laws requiring segregation were gone no further action was required and any remaining separation was simply a matter of choice by both races.¹⁴² Rather than pursuing their earlier arguments in favor of segregation by law, they focused their arguments on contending that the bill “was an invasion of property rights, states’ rights, and a dangerous power grab by the federal government.”¹⁴³ The second force involved members of Congress from Northern, Western, and Midwestern states who recognized that many of their cities practiced a form of de facto segregation.¹⁴⁴ They feared that their own constituents would be angry if their neighborhood school systems and segregated housing patterns were made illegal.¹⁴⁵

How did this shape the bill writing and passage? I will focus on just one example: the debate over language in Title IV about the authority of the federal government actors to address discrimination, which led to legislative choices that would have a profound impact when new administrations arrived with less commitment than the Johnson administration had to civil rights enforcement. In particular, debates about the meaning of “racial imbalance” and “desegregation” became important.

The original proposal involving the responsibilities that HEW would have for providing technical assistance in preparing, adopting, and implementing desegregation plans included the phrase “or other plans designed to deal with problems arising from racial imbalance” in public school systems.¹⁴⁶ The term “racial imbalance” was used in several places when referring to the kind of help the department could offer.¹⁴⁷ These references to

141. *Briggs v. Elliot*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

142. Linda McClain, *The Civil Rights Act of 1964 and “Legislating Morality”: On Conscience, Prejudice, and Whether “Stateways” Can Change “Folkways,”* 95 B.U. L. REV. 891, 913–14 (2015).

143. RISEN, *supra* note 8, at 79.

144. *Id.* at 206–07.

145. *Id.* at 91.

146. *Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States: Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1514 (1963) (statement of Rep. Cramer).

147. See 42 U.S.C. § 2000c-2 (2012), reprinted in 1 DESEGREGATION OF PUBLIC SCHOOLS: LEGISLATIVE HISTORY TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-5, 6 (1967).

racial imbalance were removed in committee.¹⁴⁸ The legislative history of Title IV, written after passage of the Act, says that this phrase drew more attention than almost any other, and by the time the bill emerged from the House committee, it was gone.¹⁴⁹ Various reasons were given for the change: it was not adequately defined and “could lead to forcible disruption of neighborhood patterns, might entail inordinate financial and human cost and create more friction than it could possibly resolve.”¹⁵⁰

Another dispute was about how “desegregation” was defined. When the bill left the House committee, desegregation was defined as “the assignment of students to public schools and within such schools without regard to their race, color, religion, sex, or national origin.”¹⁵¹ When the House voted on the bill, two amendments were added.¹⁵² The first stated that desegregation “shall not mean the assignment of students to public schools in order to overcome racial imbalance.”¹⁵³ The justification for this was that even though racial imbalance had been removed from the language of the section, its proponents wanted to make clear that there was no authority to remedy de facto segregation.¹⁵⁴

In the Senate, the same issues existed. The Senate made the language even stronger, saying that:

[N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students

148. H.R. REP. NO. 88-914, pt. 2, at 21–22 (1963), *reprinted in* 1 DESEGREGATION OF PUBLIC SCHOOLS: LEGISLATIVE HISTORY TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-10 (1967).

149. *Civil Right Hearings Before the H. Comm. on the Judiciary*, 88th Cong. 67–68 (1963), *reprinted in* DESEGREGATION OF PUBLIC SCHOOLS: LEGISLATIVE HISTORY TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-9 (1967).

150. H.R. REP. NO. 88-914, *supra* note 148, at LRS-10.

151. *See* 42 U.S.C. § 2000c(b) (2012), *reprinted in* 1 DESEGREGATION OF PUBLIC SCHOOLS: LEGISLATIVE HISTORY TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-20 (1967).

152. *See* 110 CONG. REC. 2250–2301 (1964), *reprinted in* 1 DESEGREGATION OF PUBLIC SCHOOLS: LEGISLATIVE HISTORY TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-16 (1967).

153. 42 U.S.C. § 2000c(b) (2012), *supra* note 151, at LRS-16.

154. 110 CONG. REC. 12683 (1964), *reprinted in* 1 DESEGREGATION OF PUBLIC SCHOOLS: LEGISLATIVE HISTORY TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-16 (1967).

from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standard[.].¹⁵⁵

The Senate also added that “nothing in this title shall prohibit classifications and assignment for reasons other than race, color, religion, or national origin.”¹⁵⁶ Hubert Humphrey, the Democratic leader of the effort to get the bill through the Senate, explained on the floor that this meant classification of students along “bona fide neighborhood school lines” or for reasons having to do with academic ability, for example, would not be prohibited.¹⁵⁷ This provision would have a significant impact on allowing much of the non-Southern segregation to go unaddressed and, in the case of the latter provision, contributing to a substantial amount of segregation within otherwise desegregated schools through the use of tracking and standardized testing.¹⁵⁸

IV. RETURN TO THE SUPREME COURT: INTEGRATION OR DESEGREGATION?

In the years following adoption of the Civil Rights Act, these provisions of the Act would become a source of litigation as school districts continued to resist the pressure coming from HEW and the federal district courts to move beyond token integration. As discussed earlier, the interaction between HEW and these courts gradually led to a ratification of the guidelines, a development that Gary Orfield said “moved the courts toward the momentous conclusion that the *Brown* decision required

155. See 42 U.S.C. § 2000c-6(a) (2012), reprinted in 1 DESEGREGATION OF PUBLIC SCHOOLS: LEGISLATIVE HISTORY TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-18 (1967).

156. See 42 U.S.C. § 2000c-9 (2012), reprinted in 1 DESEGREGATION OF PUBLIC SCHOOLS: LEGISLATIVE HISTORY TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-19 (1967).

157. 110 CONG. REC. S12714 (daily ed., June 4, 1964), reprinted in 1 DESEGREGATION OF PUBLIC SCHOOLS: LEGISLATIVE HISTORY TITLE IV OF THE CIVIL RIGHTS ACT OF 1964, at LRS-19 (1967).

158. R. SCOTT BAKER, PARADOXES OF DESEGREGATION: AFRICAN AMERICAN STRUGGLES FOR EDUCATIONAL EQUITY IN CHARLESTON, SOUTH CAROLINA 1926–1972, at 158 (Univ. of S.C. Press 2006).

uprooting the entire structure of southern education.”¹⁵⁹ A particularly important decision in this development was a decision in the Fifth Circuit that had a ripple effect with other federal courts overseeing school desegregation.¹⁶⁰ In *U.S. v. Jefferson County Board of Education*, Judge John Minor Wisdom ruled that the Civil Rights Act now required the federal courts to consider both the Act and the HEW guidelines authorized by the Act.¹⁶¹ He said that *Brown* “requires public school systems to integrate students, faculties, facilities, and activities”¹⁶² and stated that the only school desegregation plan that meets constitutional standards is one that works to accomplish this integration.¹⁶³ He established the HEW guidelines as the minimum acceptable standards for a desegregation plan.¹⁶⁴ This was too much for some systems to take, for they had convinced themselves that the 1965 guidelines, which had permitted freedom of choice plans, were all that was required under either the Civil Rights Act or the Constitution.¹⁶⁵ Decisions like this made it inevitable that the Supreme Court would have to reenter the fray in order to resolve the question of what impact the Civil Rights Act had on the meaning of *Brown*.

After having largely stayed out of the battles happening at lower levels of the federal court system except for the most extreme cases of resistance,¹⁶⁶ it was clear that the Supreme Court would be called upon to decide what *Brown* actually meant. Was desegregation simply the absence of laws that required separation, or was something more required? The Court’s answer was clear—

159. Orfield, *supra* note 96, at 104.

160. *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff’d per curiam*, 380 F.2d 385, 390 (5th Cir. 1967) (per curiam); *see, e.g.*, *Caulfield v. Bd. of Educ.*, 632 F.2d 999, 1005 (2d Cir. 1980) (holding that HEW had jurisdiction to investigate the employment practices of the board because the employment practices had a discriminatory impact on students); *Ala. NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346, 349 (M.D. Ala. 1967) (per curiam) (striking down an Alabama statute because it interfered with HEW guidelines for desegregating schools and was unconstitutional and invalid under the Supremacy Clause).

161. *Jefferson Cty. Bd. of Educ.*, 372 F.2d at 847.

162. *Id.* at 846.

163. *Id.* at 847.

164. *Id.*

165. *Id.* at 878.

166. *See, e.g.*, *Griffin v. Cty. Sch. Bd.*, 337 U.S. 218 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958).

much more was required to dismantle the legacy of separated systems.¹⁶⁷

Once drawn into the dispute about what was required, the Court maintained its unanimity and its insistence that school districts could no longer delay the implementation of *Brown*, nor could they accomplish the demands of *Brown* by simply removing the requirement of separated schools.¹⁶⁸ Behind the scenes, however, the memoranda being circulated among the justices demonstrate that the commitment to unanimity was being frayed by the disagreement about how much authority federal district courts had to impose remedies on the school districts, what measure of racial balance was required for a school district to be considered “unitary,” and to what extent a line could be drawn between de jure and de facto segregation.¹⁶⁹ The unanimity was finally lost when Nixon’s appointees to the Court changed the makeup sufficiently to limit the reach of *Brown*.

Three cases from this time reveal the roots of the breakdown of unanimity on what *Brown* required and the way in which they intersected with the Civil Rights Act and its enforcement: *Green v. County School Board of New Kent County*,¹⁷⁰ *Alexander v. Holmes County Board of Education*,¹⁷¹ and *Swann v. Charlotte-Mecklenburg*.¹⁷² In each, the Court unanimously required school districts in the South to stop delaying implementation of *Brown* and to take affirmative actions to integrate the schools.¹⁷³ But looming on the horizon and clearly already in the minds of the justices were the questions that would be raised about Northern and Western segregation, de facto rather than de jure segregation, and how the election of Richard Nixon would affect the Court.

Green was the last major desegregation decision made under Chief Justice Earl Warren.¹⁷⁴ At issue was the “freedom of

167. *Griffin*, 377 U.S. at 231–34.

168. *Id.* at 233–34.

169. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 64–65 (Oxford Univ. Press 2006).

170. *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968).

171. *Alexander II*, 396 U.S. 19 (1969).

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

173. *Id.* at 31–32; *Alexander II*, 396 U.S. at 20–21; *Green*, 391 U.S. at 442.

174. *CREATING CONSTITUTIONAL CHANGE: CLASHES OVER POWER AND LIBERTY IN THE SUPREME COURT* 296 (Gregg Ivers & Kevin T. McGuire eds., 2004).

choice” plan that had been adopted in New Kent County, Virginia, after earlier statewide efforts to resist *Brown* had been found to be unconstitutional.¹⁷⁵ The rural county had only two schools: each a combined elementary and high school with one designated for blacks and one for whites.¹⁷⁶ The policy allowed students to apply to attend the other school, but no white student had done that and only a few black students had.¹⁷⁷ There was no racial segregation in housing in the county, which meant black students rode buses that passed the white school and white students passed by the black school, even though the closer school would have been the one designated for the other race for some students.¹⁷⁸ In a unanimous opinion, the Court struck down this assignment plan, arguing that the county was still maintaining a “dual” system that *Brown I and II* prohibited.¹⁷⁹ The Court distanced itself from the way in which *Brown II* had initially been interpreted, arguing that:

It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the “white” schools.¹⁸⁰

Justice Brennan wrote, “Under *Brown II*, that immediate goal was only the first step. The transition to a unitary, non-racial system of public education was and is the ultimate end to be brought about.”¹⁸¹

Brennan wrote that the effectiveness of the “freedom of choice” plan must be measured against that goal of a “unitary” system; in that measurement, the plan failed.¹⁸² Noting New Kent

175. *Green*, 391 U.S. at 431–32.

176. *Id.* at 432.

177. *Id.* at 433.

178. *Id.* at 432.

179. *Id.* at 431.

180. *Id.* at 435–36.

181. *Id.* at 436.

182. *Id.* at 437.

County's claim that the Fourteenth Amendment did not require "compulsory integration,"¹⁸³ Brennan said that the argument "ignores the thrust of *Brown II*,"¹⁸⁴ which he said "was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution."¹⁸⁵ *Brown II* must be read as imposing on school districts "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."¹⁸⁶ The county had adopted its plan a full eleven years after *Brown II*, and Brennan described it as the "deliberate perpetuation of the unconstitutional dual system."¹⁸⁷ "Such delays," he wrote, "are no longer tolerable."¹⁸⁸ The burden was now on the school system "to come forward with a plan that promises realistically to work, and promises realistically to work *now*."¹⁸⁹

The Court's patience with delay had run out, and its belief that *Brown II* had been used to justify that delay led to its insistence in *Green* that minimalism in compliance must stop. The elimination of discrimination "root and branch" took the Court well beyond the narrower notion that all that was required was that the state stop *requiring* separation.¹⁹⁰ Backed now by the Civil Rights Act, which the Court cited in its opinion,¹⁹¹ the members of the Warren Court imagined that the long struggle to implement *Brown* was ending. In a note written to Brennan upon the circulation of his opinion to the other justices, Chief Justice Warren wrote, "Please join me in your opinion in this case. When this opinion is handed down, the traffic light will have changed from *Brown* to *Green*. Amen!"¹⁹²

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 437–38.

187. *Id.* at 438.

188. *Id.*

189. *Id.* at 439.

190. *Id.* at 437–38.

191. *Id.* at 433 n.2 (noting that the county had adopted its "choice" plan after passage of the Civil Rights Act and the first HEW guidelines suggested that such plans could be acceptable).

192. Letter from Justice Warren to Justice Brennan (May 22, 1968) (on file with the Library of Congress, William J. Brennan Papers, Box 1:174, Folder 6).

By 1969 when *Alexander v. Holmes County*¹⁹³ came to the Court, Justice Earl Warren had retired¹⁹⁴ and President Richard Nixon, elected in 1968, had successfully appointed Warren Burger as Chief Justice.¹⁹⁵ *Alexander* involved a dispute over how quickly a number of school districts in Mississippi would be required to implement HEW's desegregation plans.¹⁹⁶ The Court of Appeals for the Fifth Circuit had asked HEW to submit such plans in the summer of 1969.¹⁹⁷ In what was interpreted as Richard Nixon's first move to reward the South for its support in his election, the Justice Department and HEW asked for a delay in implementing the plans, which would have the effect of putting off for yet another school year desegregation of the schools in Mississippi.¹⁹⁸ The Fifth Circuit granted the delay.¹⁹⁹ The NAACP appealed the delay to Justice Hugo Black, who was the supervisory justice for the Fifth Circuit.²⁰⁰ The Solicitor General asked Black to approve the delay.²⁰¹ Black agreed, very reluctantly, to the delay,²⁰² but urged the NAACP to challenge the delay before the entire Supreme Court, which it did.²⁰³ In the end, the Court issued a short per curiam opinion stating that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."²⁰⁴ The Court vacated the Fifth Circuit decision permitting delay and directed the appeals

193. *Alexander II*, 396 U.S. 19 (1969).

194. See MERVIN I. UROFSKY, *THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY* 286 (2001).

195. *Id.*

196. *Alexander II*, 396 U.S. at 20.

197. *United States v. Hinds Cty. Sch. Bd.*, 417 F.2d 852, 858 (5th Cir. 1969).

198. See Patric J. Doherty, Note, *Integration Now: A Study of Alexander v. Holmes County Board of Education*, 45 NOTRE DAME L. REV. 489, 503 (1970).

199. *United States v. Hinds Cty. Sch. Bd.*, 423 F.2d 1264, 1267-68 (5th Cir. 1969) (per curiam); see also J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, 119 (Oxford Univ. Press 1979).

200. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 36 (Simon & Schuster ed., 1979).

201. *Alexander v. Holmes Cty. Bd. of Educ. (Alexander I)*, 396 U.S. 1218, 1218-19, 1221 (1969).

202. *Id.* at 1222.

203. *Id.*

204. *Alexander II*, 396 U.S. at 20.

court to enter an “order, effective immediately” that the schools in those districts be operated on a unitary basis.²⁰⁵

Oral arguments in the case reveal the roots of the divide in interpreting *Brown* that we see again in *Parents Involved* thirty years later. The NAACP emphasized the consequences of delay and the effect of that delay on integration efforts.²⁰⁶ “Segregation forever”²⁰⁷ used to be the motto, but now, the lawyer suggested, it was “litigation forever.”²⁰⁸ The NAACP argued any acceptance by the Court of further delay “will be exploited”²⁰⁹ by the school boards and “[a] fixed time deadline . . . is vastly preferable to reiteration of principles about desegregating and as soon as possible which will result in further litigation.”²¹⁰

The Attorney General for Mississippi raised the question of fairness, arguing that only Southern states were being forced to comply with *Brown* while children continued to be segregated in the North.²¹¹ Citing proof from HEW files, he argued:

We no longer have the issue of segregated schools, but de facto, just as those in other parts of the nations just as their schools are. How much longer can it be fairly said that Chicago with 610 schools can have 208 all Negro students; 184 all-white schools and 228 schools with no Negro teachers.²¹²

He concluded by contending that to require the desegregation plans would be to impose upon the children of Mississippi “a discriminatory application of a constitutional standard, that is not applied universally in this country.”²¹³ A second attorney finished the argument for Mississippi, accusing the NAACP of arguing for integration rather than desegregation

205. *Id.* at 19.

206. Brief for Petitioner at 18, *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19 (1969) (No. 69-632).

207. Oral Argument, *Alexander v. Holmes Cty. Bd. of Educ.* 496 U.S. 19 (1969), http://www.oyez.org/cases/1960-1969/1969/1969_632?sort=ideology.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

and contending that this was not how *Brown I and II* should be understood.²¹⁴

Internal memoranda demonstrate that Chief Justice Burger was initially supportive of the Nixon administration's request for delay and that it was Justice Black's threat of dissent that led to the final resolution of the case.²¹⁵ According to an unsigned memo from one of Brennan's clerks, there were at least three different versions of an order circulating among the justices, varying in the degree to which they were willing to impose a deadline on the implementation of the HEW plans and in the amount of detail describing the history of the litigation and the positions of the parties.²¹⁶ The clerk recommended to Brennan that they opt for brevity in the order and an early timeline for the Court of Appeals to order implementation.²¹⁷ The clerk also recommended against accepting Potter Stewart's seven pages of history of the litigation.²¹⁸ The clerk wrote:

A full description of the proceedings below buries the force of this Court's decision in a mass of verbiage. It suggests the facts are complicated and that the applicability of the law to them poses a difficult question. Expression of sympathy for the Court of Appeal's in Stewart's proposal suggests that the Government's request for delay was something other than clearly unwarranted.²¹⁹

As to the matter of whether the memo should lay out the position of the two parties, the clerk recommended against doing that: "Apparently only the Chief Justice [Burger] is interested in stating the positions of the parties and in doing so in a way to minimize the difference between them. Black and Harlan are affirmatively opposed to such a statement."²²⁰

214. *Id.*

215. Memorandum from clerk to Justice Brennan (on file at the Library of Congress, William J. Brennan Papers, Box 1:220, Folder 2).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

The suspicion that Chief Justice Burger's support for delay was based on sympathy to the government's position is revealed on a short handwritten note at the top of a memo from the Chief Justice circulated in October 1969 as the Court struggled toward unanimity in the case.²²¹ Brennan had been anticipating a short memo on the question of where "end of all delib. Speed [sic]"²²² would be placed in the opinion: "WJB [Brennan] thought there would be simply a revised version of that. Instead, this circulation persuaded WJB that the CJ [Burger] was trying to save Nixon."²²³ Justice Marshall circulated a memo the same day arguing that the Court should set particular dates for compliance and that they should be within a month of the announcement of their decision.²²⁴ A handwritten note at the top of that memo reads, "[c]irculated early Monday morning before the Conference attempt at compromise."²²⁵ In the end, the compromise produced a short per curiam opinion declaring the end to "all deliberate speed"²²⁶ and requesting the Court of Appeals to order implementation of the plans.²²⁷

Swann v. Charlotte Mecklenburg required considerably more compromise before the Court was able to issue its unanimous decision in 1971 supporting a plan that would require busing and numerical quotas to achieve racial balance in the county's schools.²²⁸ Here, the disagreement on the Court about what the Civil Rights Act required with regard to de jure and de facto segregation and what authority the district court had to fashion a remedy threatened to divide the court.²²⁹ In fact, the county school board relied in its argument on the aforementioned language of the Act forbidding busing for the purposes of remedying racial imbalance.²³⁰ This de jure and de facto

221. Memorandum from Chief Justice Burger (Oct. 27, 1969) (on file at the Library of Congress, William J. Brennan Papers, Box 1:220, Folder 2).

222. *Id.*

223. *Id.*

224. Memorandum from Justice Marshall (Oct. 27, 1969) (on file at the Library of Congress, William J. Brennan Papers, Box 1:220, Folder 2).

225. *Id.*

226. *Alexander II*, 396 U.S. at 20.

227. *Id.*

228. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25, 30 (1971).

229. See Draft Opinions from Brennan, Douglas, Harlan & Marshall (Dec. 1970–Mar. 1971) (on file at the Library of Congress, William J. Brennan Papers, Box 1:243, Folder 1).

230. Brief of Respondents at 61, *Swann*, 402 U.S. 1 (No. 70-281).

distinction was a proxy for the integration and desegregation divide that was brewing. For justices for whom integration was the perceived goal of *Brown*, the de jure and de facto distinction was largely arbitrary, ignoring the long history of the segregation and the way in which it had become embedded in living arrangements. But for the justices who, in the face of political backlash, were ready to limit the Court's role in remedying this past discrimination, the key to doing so appeared to be the drawing of this line.

The first draft of the opinion circulated by Burger in December of 1970 was sympathetic to the school board and appeared to overrule the district court's support for a more comprehensive desegregation plan (that included busing and racial balancing) than the one the school district wanted to implement (that relied more on "freedom of choice" assignment).²³¹ Along with a first draft of the opinion, Burger sent a memo that suggested division on the Court and the importance of trying to accomplish unanimity.²³² He wrote:

I am sure it is not necessary to emphasize the importance of our attempting to reach an accommodation and a common position, and I would urge that we consult or exchange views by memorandum, or both. Separate opinions, expressing divergent views or conclusions will, I hope, be deferred until we have exhausted all other efforts to reach a common view. I am sure we must all agree that the problems of remedy are at least as difficult and important as the great Constitutional principle of *Brown*.²³³

A draft of that opinion contained in Brennan's papers is marked up with a number of "NO"s written next to parts of the

231. First Draft of Opinion in *Swann* by Chief Justice Burger (Dec. 8, 1970) (on file with the Library of Congress Manuscript Division, William J. Brennan Papers, Box 1:243, Folder 4).

232. Memorandum from Chief Justice Burger to the Other Justices regarding his First Draft of *Swann* (Dec. 1970) (on file with the Library of Congress Manuscript Division, William J. Brennan Papers, Box 1:243, Folder 4).

233. *Id.*

opinion.²³⁴ Brennan objected particularly to Burger's claim that the questions in this case are novel by writing next to that statement that the Courts "have gone a long way" in answering the questions.²³⁵ Attached to the draft is a memo where Brennan takes issue with many of Burger's arguments.²³⁶ Burger made the distinction between de jure and de facto segregation and suggests that much of the segregation remaining in the school district is of the latter sort and cannot be remedied by measures that rely on racial balancing.²³⁷ Brennan wrote:

A *de jure* segregated system is one whose policies have stigmatized and still stigmatize one race. In each of these cases, despite the repeal of segregation laws and the discontinuance of the practice of gerrymandering school districts so as to create racial separation, the remaining racial separation continues to bear the stigma which was attached to it by the original unconstitutional state action. In that circumstance the school board has an affirmative duty to do whatever is necessary to eliminate that stigma. And it must eliminate the stigma at once.²³⁸

Brennan went on to argue that "the mere repeal of segregation laws is not enough if it leaves the situation of racial separation substantially the same as it was before. The only way to remove the stigma of racial separation is to achieve substantial integration."²³⁹ Brennan supported using numerical "rules of

234. First Draft of Opinion in *Swann* by Chief Justice Burger (Dec. 8, 1970) (on file with the Library of Congress Manuscript Division, William J. Brennan Papers, Box 1:243, Folder 1).

235. *Id.*

236. Memorandum from Justice Brennan to the Other Justices regarding Chief Justice Burger's First Draft of Opinion in *Swann* (Dec. 1970) (on file with the Library of Congress Manuscript Division, William J. Brennan Papers, Box 1:243, Folder 1).

237. First Draft of Opinion in *Swann* by Chief Justice Burger (Dec. 8, 1970) (on file with the Library of Congress Manuscript Division, William J. Brennan Papers, Box 1:243, Folder 4).

238. Memorandum from Justice Brennan to the Other Justices regarding Chief Justice Burger's First Draft of Opinion in *Swann* (Dec. 8, 1970) (on file with the Library of Congress Manuscript Division, William J. Brennan Papers, Box 1:243, Folder 1).

239. *Id.*

thumb”²⁴⁰ for considering whether sufficient integration has been achieved and suggested that “a school system will be considered presumptively unitary if 70% of the Negro pupils attend integrated schools.”²⁴¹ He concluded by summarizing his position:

The Constitution requires not merely desegregation but integration. Disestablishment therefore requires a racial mix in every unit. This applied to faculty, non-faculty employees and students. Racial balance in the sense of a mix in the precise proportions of black and white in the system is not a requirement but should be a goal.²⁴²

Justice Douglas was also unhappy with the first draft.²⁴³ Several days after its circulation, he wrote to Justice Burger criticizing the Chief Justice’s negative characterization of the district court’s remedies as “racial balancing”²⁴⁴ and his suggestion that the imbalances caused by residential segregation were “irrelevant.”²⁴⁵ He suggested that the limits Justice Burger would impose on busing would limit the integration required.²⁴⁶ In January 1971, he circulated a “dissenting in part” opinion disagreeing with Justice Burger’s opinion because he thought it unnecessary to spend so much time distinguishing between the two kinds of segregation.²⁴⁷ Given the long history in North Carolina of *de jure* segregation, Douglas saw:

[N]o occasion in this case to discuss the various forms of *de jure* segregation that have existed in most, if not all, States . . . North Carolina also had

240. *Id.*

241. *Id.*

242. *Id.*

243. *See* Letter from Justice Douglas to Chief Justice Burger (Dec. 10, 1970) (on file with the Library of Congress Manuscript Division, William J. Brennan Papers, Box 1:243, Folder 5).

244. *Id.*

245. *Id.*

246. *Id.*

247. Dissenting in Part Opinion from Justice Douglas (Jan. 13, 1971) (on file with the Library of Congress Manuscripts Division, William J. Brennan Papers, Box 1:243, Folder 1).

restrictive covenants, state zoning laws discriminating against the Blacks, and state urban renewal projects that had the same end. Whether the latter type of *de jure* segregation by themselves and apart from the dual school system is relevant to a school board's task working under the aegis of a federal court is before the Court in [another case].²⁴⁸

Justice Douglas also argued that the questions before the Court were not new and could be resolved on the basis of the *Green* decision.²⁴⁹

Several months later Justice Douglas circulated a second memo, this time calling it a "separate opinion," rather than a dissent.²⁵⁰ Again, he argued that *Green* was sufficient to resolve the case and stated his dislike for "the very limited view of *de jure* segregation" in the main opinion.²⁵¹ He wrote:

Segregation is not *de facto* simply because it is not the result of perceptible discriminatory acts by the *school* board. Housing patterns built by restrictive covenants, racial zoning, and other state sanctioned practices certainly constitute *de jure* segregation. And this segregation is no less legally imposed because the overt state practices have been discontinued.²⁵²

"Even if school boards cannot be held responsible for these housing patterns," argued Justice Douglas:

[I]t does not follow that children should be made to suffer the disadvantages of a segregated education because it is "caused" by one arm of the state rather than another. Nor is it any answer to say

248. *Id.*

249. *Id.*

250. Memorandum from Justice Douglas (Mar. 19, 1971) (on file with the Library of Congress Manuscripts Division, William J. Brennan Papers, Box 1:243).

251. *Id.*

252. *Id.*

that the burden on the school board is too great and unfair. The burden is upon the State to provide equal educational opportunity, undiminished by racial segregation.²⁵³

Further demonstrating the breakdown of consensus on the Court, the Chief Justice wrote back to Justice Brennan in March 1971, saying that after review of Justice Brennan's memo:

it becomes clear that I will not be able to accept all of [his suggestions]. Some are just the difference between the way in which two people express the same ideas but others seem to go beyond what at least five are prepared to accept. I can and will accept most of the "tonal" changes and the abstention from the suggestion of a holding on what is *de jure* and what is *de facto* segregation. . . .²⁵⁴

Justice Stewart also intended to circulate a "dissenting in part" opinion in February 1971.²⁵⁵ He did send the memo to Justice Brennan with a handwritten note saying that he had intended to circulate it before he learned of later developments and thought Justice Brennan should have a copy to read in confidence.²⁵⁶ In the opinion, Justice Stewart rejects the school board's interpretation of *Brown* as requiring "color-blindness" in administration of the public school system and therefore forbidding taking race into account.²⁵⁷ Calling the reasoning "fallacious,"²⁵⁸ Justice Stewart argued that:

253. *Id.*

254. Letter from Chief Justice Burger to Justice Brennan (Mar. 19, 1971) (on file with the Library of Congress Manuscripts Division, William J. Brennan Papers, Box 1:243, Folder 3).

255. Letter from Justice Stewart to Justice Brennan (Feb. 1971) (on file with the Library of Congress Manuscripts Division, William J. Brennan Papers, Box 1:243, Folder 3).

256. *Id.*

257. Memorandum from Justice Stewart (Feb. 19, 1971) (on file with the Library of Congress Manuscripts Division, William J. Brennan Papers, Box 1:243, Folder 3).

258. *Id.* (citation omitted).

Brown clearly extends to any effort, direct or indirect, whether initiated or only connived in by state officials, to maintain or reestablish the pattern of segregation by other means But racial discrimination in the society at large, combined with the play of social and economic forces, often creates divisions within the community and marked differences in the educational needs of children. A policy of deliberate “blindness” to these social realities is not required by the Constitution.²⁵⁹

Also in March 1971, Justice Black circulated a part concurring and part dissenting opinion, suggesting that he could not support an opinion that gave too much discretion to the District Court in fashioning remedies.²⁶⁰ In it, he argued that the Court could resolve the case by reaffirming *Brown*, *Green*, and *Alexander* but going no further.²⁶¹ “I believe that federal courts can constitutionally do no more than halt discriminatory practices,” he wrote.²⁶² In addition, he argued that one-race schools can constitutionally exist and that the courts cannot use racial balance as a guideline.²⁶³ Black expressed his strong disagreement “with any implication that may be found in the Court’s opinion that federal courts may order school boards to transport students across cities to balance schools racially or to eliminate one-race schools which have resulted from private residential patterns rather than school board imposed segregation.”²⁶⁴ In order to gain a unanimous Court, the opinion was changed to emphasize the legitimacy of the remedies fashioned by the district court based on the argument that the discrimination here was clearly *de jure*.²⁶⁵ In interpreting Title IV of the Civil Rights Act of 1964, the Court said:

259. *Id.*

260. Draft Opinion from Justice Black (Mar. 25, 1971) (on file with the Library of Congress Manuscripts Division, William J. Brennan Papers, Box 1:243, Folder 5).

261. *Id.*

262. *Id.* at 2.

263. *Id.*

264. *Id.* at 3.

265. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called “de facto segregation,” where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities. In short, there is nothing in the Act that provides us material assistance in answering the question of remedy for state-imposed segregation in violation of *Brown I*. The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”²⁶⁶

The Court left for another day the question of how to define de facto segregation and its implications for school integration. The decision, however, was far reaching in its impact as it legitimized busing to accomplish desegregation, at least for those school systems with a history of de jure segregation. It also suggested that race conscious assignment plans for the purpose of integrating schools were available to school districts even if they were not under court order to desegregate.²⁶⁷

Three years later, in *Milliken v. Bradley*,²⁶⁸ the long period of unanimity in school desegregation cases was broken. Splitting five to four in rejecting a district court plan for inter-district busing to remedy the segregation in the Detroit school system, the Court drew the line between de jure and de facto segregation, thus limiting the court ordered remedies available for segregated school systems outside of the South.²⁶⁹ However, left unanswered until 2007 in *Parents Involved* was what school districts could do *voluntarily* if they believed that the principle established in *Brown*

266. *Id.* at 17–18 (quoting U.S. CONST. amend. XIV, § 1).

267. *Id.* at 27–30.

268. *Milliken v. Bradley*, 418 U.S. 717, 720 (1974).

269. *Id.* at 718.

was that equality in public education required racially integrated schools.²⁷⁰

V. THE BROADER POLITICAL CONTEXT

The year 1966 was a turning point for the Civil Rights Movement, and the “long, hot, summer”²⁷¹ of race riots in cities across the country began to shift the political dynamic in ways that favored the Republican Party—particularly Richard Nixon’s rhetoric of “law and order.”²⁷² The 1965 Watts riot had signaled the beginning of this process, but the much wider sense of disorder in 1966 provided the political opportunity for the Party to tap into widespread white fear about disorder and belief that blacks wanted too much too fast.²⁷³ “And so,” wrote Rick Perlstein, “on the first anniversary of the riots in Watts, twenty-one months after the 1964 Johnson landslide, Goldwaterism became official House Republican policy on civil rights,”²⁷⁴ when Gerald Ford, then House Minority Leader, led an effort to defeat a fair housing provision in a civil rights bill.²⁷⁵ Noting the Party’s long commitment to civil rights, Ford blamed the fair housing provisions for inciting riots and insisted that “respect for law and order is basic to the achievement of common goals within our nation.”²⁷⁶

Richard Nixon’s more race-neutral rhetoric about school desegregation and civil rights, as a candidate and as president, helped lay the groundwork for giving *Brown* a substantially narrower interpretation than the one that had prevailed between *Brown* and *Green*.²⁷⁷ He accomplished this both through his own speeches and policy positions²⁷⁸ and through the appointment of

270. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746–48 (2007) (holding that school districts could not voluntarily assign students to schools on a racial basis in order to keep their student bodies diverse); *Brown II*, 349 U.S. at 300–01 (holding that courts have authority to force school districts to integrate to achieve a system of admissions to public schools on a nonracial basis).

271. PERLSTEIN, *supra* note 95, at 125.

272. *Id.* at 125–27.

273. *See id.* at 120–27.

274. *Id.* at 125.

275. *Id.*

276. *Id.* (citation omitted).

277. *See* MCMAHON, *supra* note 11, at 90–109.

278. *See id.* at 90–109.

Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist to the U.S. Supreme Court.²⁷⁹ During the 1968 campaign, Nixon reminded audiences that he had supported *Brown*, as well as the Civil Rights Act and Voting Rights Act,²⁸⁰ but would then change the subject and focus on the problem of “mob rule”²⁸¹ and the importance of “a new concept of states’ rights.”²⁸² He strongly opposed forced busing for the purposes of “racial balancing” and rejected the idea that integration was necessary for quality education.²⁸³ The dispute in the Charlotte-Mecklenburg school system, which would ultimately end in the *Swann* decision, was in full swing during 1968, and Nixon campaigned there by promising to put an end to forced busing for integration if elected.²⁸⁴

Shortly after becoming president, Nixon had to deal with the *Alexander* case discussed earlier.²⁸⁵ With *Green* handed down in the middle of the 1968 election year, the Warren Court demonstrated its impatience with the South’s continued resistance to *Brown*, rejected “freedom of choice” plans as facades that perpetuated dual school systems, and declared the end of “all deliberate speed” in favor of “integration now.”²⁸⁶ Under Lyndon B. Johnson, HEW had begun to pressure the states, including Mississippi, to finally begin integrating its schools, and the Fifth Circuit ordered the state to follow the HEW plans.²⁸⁷ After Nixon’s election, Mississippi state officials pressured the new administration to support their request for delays and to resist

279. THOMAS R. HENSLEY ET AL., *THE REHNQUIST COURT: JUSTICES, RULING, AND LEGACY* 8 (ABC-CLIO, Inc. 2006).

280. PERLSTEIN, *supra* note 95, at 148.

281. *Id.*

282. *Id.*

283. Gerard Peters & John T. Woolley, *Richard Nixon’s Statement About Desegregation of Elementary and Secondary Schools*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/u/ws/?pid=2923> (last visited Sept. 18, 2015).

284. DAVISON M. DOUGLAS, *READING, WRITING, AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS* 153 (Univ. of N.C. Press 1995).

285. *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 70 (Melvin I. Urofsky ed., 2001).

286. DEAN J. KOTLOWSKI, *NIXON’S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY* 24 (Harvard Univ. Press 2002).

287. Charles L. Zeldon, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968–1974*, 32 AKRON L. REV. 471, 483 (1999).

federal plans to defund segregated southern schools.²⁸⁸ What followed was a “measured federal retreat on school desegregation”²⁸⁹ led by Secretary of HEW Robert Finch, who urged “full compliance” with the Johnson administration guidelines but offered time for delay to majority black school districts or areas that did not have adequate facilities to accomplish desegregation, both of which applied to Mississippi.²⁹⁰ When the Court rejected the delay in the *Alexander* decision, one of Nixon’s aides consoled him by noting that: “The Supreme Court is being blamed.”²⁹¹

Nixon followed the *Alexander* decision by firing Assistant HEW Secretary, Leon Panetta, for too enthusiastically enforcing school desegregation rules.²⁹² In a speech on February 16, 1970, he promised federal assistance to school districts attempting to comply with the decision and laid out the following principles to guide that assistance: (1) desegregation plans should involve minimum possible disruption—whether busing or otherwise—of the educational routines of children; (2) to the extent possible, the neighborhood school concept should be the rule; and (3) within the framework of the law, school desegregation problems should be dealt with uniformly throughout the land.²⁹³

On its face, the speech appeared to encourage compliance with the law. But embedded in the speech were signals to the South of support by the president: the call for uniformity across the land—a sore spot for the South made manifest in the oral arguments in *Alexander*—and the call for limits on busing, putting children’s interests first, and maintaining neighborhood schools.²⁹⁴ As opposition to busing grew and spread across the country, it was no longer the miscegenation rhetoric that dominated opposition but instead the concerns for children, the desire for freedom of choice, and the rejection of the idea that

288. Lawrence J. McAndrews, *The Politics of Principle: Richard Nixon and School Desegregation*, 83 J. OF NEGRO HIST. 187, 189 (1998).

289. *Id.*

290. *Id.*

291. *Id.*

292. Interview by Timothy J. Natfali & Scott Spitzer with Leon Panetta, Asst. Sec’y, Dept. of Health, Educ., and Welfare, in Yorba Linda, Cal., at 12–13 (May 23, 2007), <http://www.nixonlibrary.gov/virtuallibrary/documents/histories/panetta-2007-05-23.pdf>.

293. Peters & Woolley, *supra* note 283.

294. *Id.*

learning was advanced by “forcing” children of different races to sit together.²⁹⁵

Nixon walked the fine line between supporting *Brown* and rejecting busing by making the case that the goal of *Brown* was not integration, but simply the end of legal separation.²⁹⁶ A speech in late March 1970 was characterized, and criticized, in a *Time Magazine* editorial as a message of “desegregation yes; integration no.”²⁹⁷ In the speech, Nixon drew a line between de jure and de facto segregation and argued that only the former required action by public officials.²⁹⁸ He emphasized the importance of letting local officials make decisions, embraced the idea of neighborhood schools, and said that “transportation of pupils beyond normal geographical school zones for the purpose of achieving racial balance will not be required.”²⁹⁹ When the concerns of parents resisting busing plans in Charlotte were brought to the White House, Attorney General Mitchell assured them that the administration’s position in the *Swann* case was “that the Fourteenth Amendment does not require racial integration as a matter of law.”³⁰⁰

On the eve of his landslide re-election victory in 1972, Nixon expressed a view about school desegregation that reflected the ambiguity of his position and the increasingly widespread belief in the population at large.³⁰¹ “There may be some doubt as to the validity of the *Brown* philosophy that integrating education will pull up the blacks and not pull down the whites,” he wrote, “but there is no doubt . . . that education requiring excessive transportation for students is definitely inferior.”³⁰² This view reflected the transition that was occurring and was a harbinger of the next stage in the transformation of *Brown*’s meaning. On the one hand, it acknowledged that the goal of *Brown* was integration,

295. See Zeldon, *supra* note 287.

296. See *Civil Rights: Desegregation Yes, Integration No*, TIME MAG., Apr. 6, 1970, at 13, <http://content.time.com/time/magazine/article/0,9171,943947,00.html> [hereinafter *Desegregation Yes*].

297. *Id.*

298. *Id.*

299. *Id.*

300. LAWRENCE J. MCANDREWS, *THE ERA OF EDUCATION: THE PRESIDENTS AND THE SCHOOLS, 1965–2001*, at 65 (Univ. of Ill. Press 2006).

301. *Id.* at 72.

302. *Id.*

but on the other, it offered a challenge to the legitimacy of that goal, not on the grounds of anti-race mixing, but instead on the grounds of what constituted a quality education. This view foreshadowed the development of the “color-blind” legal philosophy that conservative thinkers would begin to develop during the Reagan and Bush administrations and that would find its way to the Supreme Court in *Parents Involved*.

VI. GOING “BLIND”: 1970s–1990s

In the third stage of the transformation of the meaning of *Brown*, reflection by both white and black scholars on the long struggle to implement the 1954 decision led to reconsideration of their positions on integration in education. In 1978, the Rand Corporation issued a study on “white flight” to the suburbs that called into question the ability to accomplish integration of the schools through busing.³⁰³ The study concluded that desegregation “can cause accelerated white flight, particularly in larger school districts with substantial minority enrollments (over twenty percent or so) and in districts with accessible white suburbs.”³⁰⁴ The effect was the largest in systems where mandatory reassignment through the use of busing was used³⁰⁵ and “especially when white students are reassigned to formerly minority schools.”³⁰⁶ The study’s authors noted that “court-ordered mandatory plans, rather than desegregation per se, have been the primary causes of accelerated white flight.”³⁰⁷ As an alternative, the authors cited approvingly the idea of voluntary desegregation plans encouraged by state and federal support dollars.³⁰⁸ They noted that such efforts in Berkeley and San Diego have “not led to the intense controversy observed in mandatory busing cases,”³⁰⁹ could eliminate “the inevitable social costs of programs which are forced upon an unwilling and protesting

303. See DAVID J. ARMOR & DONNA SCHWARZBACH, *White Flight, Demographic Transition, and the Future of School Desegregation*, in THE RAND PAPER SERIES (Rand Corp. 1978).

304. *Id.* at 40.

305. *Id.*

306. *Id.*

307. *Id.* at 41.

308. *Id.* at 46.

309. *Id.*

public,”³¹⁰ and might reduce “the erosion of confidence in public education.”³¹¹ This study represented one kind of re-examination of the meaning of *Brown*; one that focused on the practical effects of the Court’s decisions and argued that busing was creating more problems that it was solving. But its call for voluntary integration plans suggests a commitment to the *ideal* of *Brown*, if not to the *methods* the Court had embraced for achieving that ideal.

Among conservative legal scholars, however, there was a more direct attack on the very constitutional basis for the Court’s decisions. Within just a few years after the *Swann* decision, efforts to use race in school assignment plans for the purposes of integration were being equated with discrimination based on race. University of Texas law professor Lino Graglia argued in his 1976 book *Disaster by Decree* that “while the *Brown* decision could be understood and justified . . . as simply the prohibition of all racial discrimination by government officials, compulsory integration meant that the use of racial discrimination by government officials was not only permitted but, for the first time in our history, constitutionally required.”³¹² Ronald Reagan later nominated Graglia for a seat on the Fifth Circuit Court of Appeals, but the Senate did not approve the nomination because of the response of the civil rights community pointing to his attacks on school desegregation policy.³¹³

Stephen Teles chronicled the way in which conservative lawyers modeled the NAACP in developing legal defense funds and litigation strategies to transform the law in a conservative direction in the decades following Nixon’s presidency.³¹⁴ While early efforts focused more on economic and property rights, the effort broadened to propose challenges to the civil rights orthodoxy of the 1960s and 1970s and to emphasize development of a broad constitutional vision that embraced states’ rights, originalism in interpretation of the Constitution, and the selection of federal judges who would uphold these principles in their

310. *Id.* at 47.

311. *Id.*

312. LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 15 (Cornell Univ. Press 1976).

313. SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 326 (Yale Univ. Press 1997).

314. *See* STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR THE CONTROL OF THE LAW* (Princeton Univ. Press 2008).

decision making.³¹⁵ For example, the Center for Applied Jurisprudence of the Pacific Research Institute for Public Policy, a conservative think tank in California, “assembled three task forces of intellectuals and lawyers”³¹⁶ to examine various issues of concern and to “combine substantive legal and policy arguments with strategic judgments about how to organize a legal campaign.”³¹⁷ One task force focused on economic liberty and civil rights, and the book that resulted from its work is identified by Teles as “the most important book to emerge from the project.”³¹⁸ The book was published in 1990 and authored by Clint Bolick, who had worked with Clarence Thomas at the EEOC during the Reagan administration.³¹⁹

The Bolick argument is representative of a theme that developed in this period, and one we see reflected in the Roberts and Thomas opinions in *Parents Involved*, of laying claim to being the true heirs of Justice Harlan’s *Plessy* dissent, *Brown*, and Martin Luther King’s civil rights vision.³²⁰ Rather than directly challenging these visions and defending segregation (the position in the first wave), or narrowly and legalistically defining a middle path that draws the line between de jure and de facto segregation (the position of the second wave), this approach embraces a constitutional vision of “color-blindness” that permits no consideration of race by government officials.³²¹ Bolick takes on the “contemporary civil rights establishment”³²² for abandoning “the principles that produced the civil rights movement’s greatest victories [and for] . . . grow[ing] complacent, elitist, patronizing, and increasingly detached from the needs of its claimed constituency, demanding as a civil rights litmus test fidelity to a failed agenda of racial quotas, busing, and set-asides.”³²³ Later, Bolick identifies Justice Harlan’s *Plessy* dissent as providing the

315. *See id.* at 58–89.

316. *Id.* at 83.

317. *Id.* at 84.

318. *Id.* at 85.

319. *Id.*

320. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743, 772 (2007); BOLICK, *supra* note 16, at 100–05 (discussing the *Plessy* dissent, *Brown*, and Martin Luther King, Jr. as the basis of the views set forth in the book).

321. BOLICK, *supra* note 16, at 100.

322. *Id.* at 3.

323. *Id.*

guiding principle for how the Equal Protection Clause of the Fourteenth Amendment must be understood.³²⁴ He notes that Thurgood Marshall relied on this notion in his oral arguments to the Court in *Brown*, but that the Court failed to recognize it in its *Brown* decision:

Conventional wisdom holds that *Brown* overturned *Plessy*; in a technical sense, that is true. What *Brown* did not do is explicitly to repudiate the rationale underlying *Plessy*, namely that racial classifications are permissible if they are “reasonable.” Also *Brown* did not embrace the dissenting opinion of Justice Harlan. The closest the Court came to vindicating the core principle of the equal protection clause was to declare that education, “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” But rather than striking down the law as committing on its face an obvious violation of that principle, it conducted what amounted to a “reasonableness” inquiry into the importance of education and the effects of school segregation on blacks to support its conclusion that “[s]eparate educational facilities are inherently unequal.”³²⁵

As a consequence, Bolick argues, the Court “retained a framework for rationalizing invidious discrimination that continues to rear its ugly head to this day.”³²⁶ He points to the Court’s decisions about remedies after *Brown* as evidence of this problem.³²⁷ “Instead of vindicating the equal right of every individual to pursue educational opportunities,” contends Bolick, “the Court made paramount the perceived right of groups to attain racial balance. Within ten years after *Brown*, the transition from the goal of equality of opportunity to forced equality in result was complete.”³²⁸

324. *Id.* at 100.

325. *Id.* at 103.

326. *Id.* at 104.

327. *See id.* at 106–13 (discussing the “Progeny of *Plessy*”).

328. *Id.* at 104.

The Federalist Society also grew out of this conservative legal movement and members of this group became important actors in the Reagan Administration's Justice Department and were short-listed and selected as federal court nominees because of their commitment to this new constitutional vision.³²⁹ Civil rights enforcement generally was affected by this new approach to civil rights, and it clearly had an impact on the school desegregation process.³³⁰ The new head of the Department of Justice's Civil Rights Division, William Bradford Reynolds, made clear his dislike for busing to achieve integration.³³¹ In testimony before Congress in 1981, he stated that the Justice Department was "not going to compel children who 'don't choose' to have an integrated education to have one."³³² He also said that "involuntary busing"³³³ was an "experiment"³³⁴ that had failed to advance educational equality and signaled that the Department would now focus its efforts only on "intentionally segregative acts of school officials."³³⁵ Reynolds was true to his word, and during the Reagan Administration, the executive branch sided consistently with school districts seeking to be removed from court orders and to avoid remedial actions and pursued no new cases against districts.³³⁶ Reagan also appointed to the Court two of the members of the *Parents Involved* majority (Kennedy and Scalia) and the other three members of that majority worked for his administration: Roberts and Alito, both in the Department of Justice, and Thomas, in both the Civil Rights Division of the Department of Education and the EEOC.³³⁷

During this time, even scholars with more sympathy for the integrationist vision of *Brown* began calling into question the consequences of the Court's decisions for education, particularly for the education of minority children. For example, in 1980, law

329. TELES, *supra* note 314, at 141–42.

330. See, e.g., NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 34–44 (Urban Inst. Press 1988).

331. *Id.* at 34.

332. *Id.* at 35.

333. *Id.* at 34.

334. *Id.*

335. *Id.* at 35.

336. See *id.* at 34–44.

337. *Biographies of Current Justices of the Supreme Court*, SUPREME CT. OF U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 13, 2015).

professor Derrick Bell edited a collection of essays that offered “new perspectives on school desegregation.”³³⁸ In his introduction, he noted that what drove the NAACP’s effort to dismantle segregation was an “integration ideology . . . born out of the fervor of those who espoused an end to discrimination by race, and who believed that this end could be obtained only when blacks were so thoroughly interspersed in the society, skin color would be as irrelevant as hair color.”³³⁹ He noted that the vigorous attack on integration by those who would maintain racial segregation had made it difficult to criticize the integration ideology without appearing “to give aid and comfort” to racist segregationists.³⁴⁰ But, he suggested, this lack of “positive criticism”³⁴¹ has had damaging consequences, particularly in the area of school desegregation:

If the integration ideology can be compared to a religion, school desegregation is the twentieth-century equivalent of the Christian Crusades. Issues that were once clear are now hopelessly confused, and goals that seemed reasonable have become unattainable. Neither group alliances that seemed permanent nor judicial support that was once so dependable have survived the clatter of conflicting interests. Worst of all, most black and other nonwhite children remain in schools that are mainly separate and predictably unequal.³⁴²

The essays in the book, to varying degrees, critique the Court’s and civil rights establishment’s focus on the integration message of *Brown* and its progeny and instead insist that the strategy going forward must be a focus on the equal educational opportunity message of *Brown*.³⁴³ The book is both an acknowledgment that the goal of *Brown* was integration (a view

338. DERRICK BELL, SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION (Derrick Bell ed., 1980).

339. *Id.* at vii.

340. *Id.* at viii.

341. *Id.*

342. *Id.*

343. *Id.* at x.

rejected by the conservative scholars) and a recognition that the politics of school integration had become so poisonous that reformist energies were best focused on ensuring that poor children in racially isolated schools would be provided with equal educational opportunities.³⁴⁴ At the conclusion of his introduction, Bell acknowledged that a goal of the book is to encourage reconsideration of *Brown*.³⁴⁵ “Even at this late hour,” he wrote, “we may move school desegregation policies toward alternative visions of what *Brown* and its promise might still mean for those who need it most.”³⁴⁶

Disillusionment with the implementation of desegregation was also increasingly prevalent in the African-American community beyond the academy. Parents felt that their children bore the brunt of the disruption and displacement caused by a desegregation effort that, when it finally happened, usually meant closing formerly all-black schools and moving those students to formerly all-white schools.³⁴⁷ There is no more telling example of this phenomena and its impact on the law than the challenge to the Jefferson County, Kentucky, school assignment plan that was at issue in *Parents Involved*. The Jefferson County case was brought by a black mother who was upset by the inability of her son to attend a school close to home because of the school system’s efforts to keep the schools within the district racially balanced.³⁴⁸ The threat to close down the undersubscribed high school that was an important anchor institution in the black community of Louisville added to the dissatisfaction.³⁴⁹

344. *Id.* at ix.

345. *Id.* at x.

346. *Id.*

347. See Amy Stuart Wells et al., *The Space Between School Desegregation Court Orders and Outcomes: The Struggle to Challenge White Privilege*, 90 VA. L. REV. 1721, 1730–31 (2004) (“Usually the historically black or Latino public schools were closed once districts were forced . . . to desegregate their schools,” which data shows “dealt a blow to these communities’ pride and dignity.”).

348. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dis. No. 1*, 551 U.S. 701, 717 (2007).

349. See SARAH GARLAND, *DIVIDED WE FAIL: THE STORY OF AN AFRICAN AMERICAN COMMUNITY THAT ENDED THE ERA OF SCHOOL DESEGREGATION* xii (Beacon Press 2013) (detailing the increasing dissatisfaction with the Louisville plan in the African American community).

VII. CONCLUSION

As we mark the fiftieth Anniversary of the Civil Rights Act, what are we to make of the two stories told here about the Act's impact on school desegregation and the changing meaning of *Brown*? Certainly, as a political scientist, it confirms for me the notion that the law is rarely fixed—not by courts, not by legislatures, and not by executives and bureaucrats. Despite the fact that *Brown* has become almost universally accepted as legitimate,³⁵⁰ the sharp division on both the Court in 2007 in *Parents Involved*³⁵¹ and in the larger political realm about its meaning suggests that a decision's iconic status may only come when different camps attach different meanings to the case to make it legally palatable. What both proponents and opponents of the decision thought it meant in 1954—integration of the races—is no longer what many people of both races think it means today. The Civil Rights Act played a role in that transformation.

Brown's meaning emerged out of the intersection of legal principles and the political forces of the day. Those political forces were not just at the national level, but also at the state and local level; federalism in the United States will always make it difficult to consolidate victories at the national level.³⁵² Great principles once established in the law can be very difficult to eliminate because the forces of inertia are great in politics. But the very same words can be embraced, strengthened, and vigorously enforced, or eroded, narrowed, and undermined by intentional action or neglect. It ultimately depends upon not just what politicians, lawyers, and judges decide to do, but also on the everyday acts of people in their communities.

White resistance to the legal change proposed by *Brown* and its progeny reflects what Philip Klinkner and Rogers Smith

350. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLES AND POLITICS IN CONSTITUTIONAL LAW 73–74 (Oxford Univ. Press 2009) (providing *Brown v. Board of Education* as an example of a decision that is “simply too well entrenched to be subject to any serious possibility of challenge”).

351. See Craig R. Heeren, “*Together at the Table of Brotherhood*”: Voluntary Student Assignment Plans and the Supreme Court, 24 HARV. BLACKLETTER L.J. 133, 141 (2008) (describing the Court in *Parents Involved* as “fractured and deeply divided”).

352. See Bryan Adamson, *A Thousand Humiliations: What Brown Could Not Do*, 9 SCHOLAR 187, 209–11 (2007) (discussing the unlikely prospects of future school desegregation now that it is largely controlled by state legislatures).

called “the unsteady march” for racial equality in the United States.³⁵³ A constitutional commitment to broad principles of universal rights has periodically worked to promote greater equality when marginalized groups successfully mobilized and appealed to these principles in making their case for change. The first decade following *Brown*, culminating in the Civil Rights Act, exemplifies this possibility. But Klinkner and Smith noted that change that disrupts the comfort level of even sympathetic whites has regularly led to backlashes that contribute to the unsteadiness of the march toward equality.³⁵⁴ Their description of this process and its basis in the “longstanding racial ordering” of American society seems to particularly resonate with the story of *Brown’s* evolving meaning.³⁵⁵ We hear it in the resistance, both violent and subtle, to integrating public schools, and it is echoed in white parents’ angst about their children’s schooling and their willingness to let some black children attend their schools, but their unwillingness to send their children to formerly and predominantly black schools. Klinkner and Smith also noted:

This favored status has meant that whites are commonly accepted as the “normal” and norm-setting, and hence really the most prestigious, members of American society. People who have grown up within arrangements in which their group regularly receives special social esteem as well as more material benefits, arrangements that seem so familiar as to be virtually natural, are always likely to find changes to those arrangements disquieting. Predictably, they will look for reasons to confine and condemn them. Our fellow white Americans, we firmly believe, are not people any more inherently prone to racism, selfishness, or evil than any other group in this or any other society. Their attachments to familiar ways are perfectly normal and human . . . [b]ut in American society, whites happen to be the group who have historically had the upper hand; and so many of their

353. See KLINKNER & SMITH, *supra* note 94, at 317.

354. *Id.* at 93.

355. *Id.* at 7.

understandable attachments to the status quo, often accompanied by genuine good will towards others, nonetheless have always worked against overcoming real and severe injustices.³⁵⁶

The legal change represented by *Parents Involved*, a change that calls into question even the *voluntary* decision by school districts to try to keep their schools integrated (a position encouraged in the aforementioned 1978 Rand Report as a solution to the backlash against forced busing)³⁵⁷ must be understood within the context of the broader political environment. White suburban “backlash” against busing, white resentment toward affirmative action, and black weariness with the battle manifested in electoral politics during the last decades of the twentieth century and found its way into the Court’s deliberations, arguments, and decisions.³⁵⁸

The story of the Civil Rights Act and school desegregation is not over. Justice Kennedy voted with the majority in *Parents Involved* against the two school systems because he thought that their racial categories were not narrowly tailored.³⁵⁹ However, he refused to accept the plurality’s color-blind version of *Brown*, calling it “an aspiration [that] . . . must command our assent,”³⁶⁰ but “[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle.”³⁶¹ He accepted that diversity could be a compelling interest of school boards and that race consciousness rather than racial classifications were acceptable.³⁶² School boards, moreover, need not ignore de facto re-segregation in schooling, particularly when it isolates poor minority children in sub-standard schools.³⁶³

356. *Id.*

357. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dis. No. 1*, 551 U.S. 701, 709–11 (2007); see ARMOR & SCHWARZBACH, *supra* note 303, at 46–47.

358. See Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111–12 (2004) (criticizing the Court for withdrawing from desegregation efforts despite clear evidence that desegregation was politically dangerous due to its unpopularity among voters in some areas).

359. *Parents Involved*, 551 U.S. at 784, 787 (Kennedy, J., concurring).

360. *Id.* at 788.

361. *Id.*

362. *Id.* at 788–89.

363. *Id.*

What remains to be seen is whether school boards will take advantage of the opening that Justice Kennedy has left to work to keep their schools integrated. Whether school boards will do that now depends upon whether the communities they serve care about it. Sixty years after *Brown* and fifty years after the passage of the Civil Rights Act, whether *Brown* means that our public schools will be the place where diverse student bodies learn to live together in a pluralistic democracy, or whether it means only that the state may not forbid minority children from attending white schools depends much less on courts, legislators, or presidents, and much more on the people themselves.