A SHORT-LIVED BENCHMARK: HOW THE SUPREME COURT DEBILITATED *BROWN V. BOARD OF EDUCATION* LONG BEFORE *PARENTS INVOLVED*

Genevieve M. Kelly[*]

INTRODUCTION

Almost sixty years after *Brown v. Board of Education*,[1] public schools still exist in which local school boards have identified either every student or almost every student at each grade level as black.[2] In one such school in Washington, D.C., roughly 25 percent of students score "proficient" on city math and reading tests.[3] Fewer than 50 percent graduate.[4] The school is only a few miles away from a suburban high school in an adjacent school district where a separate school board has identified the majority of the students as white.[5] In comparison, 95 percent of the students there score "proficient" on state reading tests and 93 percent on state math exams.[6]

Such incongruity is too common throughout the United States, where access to educational opportunities still corresponds too closely to skin color. Approximately 40 percent of high school freshmen identified as black drop out before graduation.[7] Students identified as white average higher reading and math scores than students identified as black at every grade

---

[*] Thank you to John and Jack Kelly, Jacinta and Dave McCarthy, Eileen and Ian Kelly, Lora Barnhart Driscoll, and Angela Miller for their great help with this Note. This Note is dedicated to the students working to fund their education at Cristo Rey Network high schools, many of whom commute over ninety minutes outside of their neighborhoods to attend schools with outstanding college acceptance rates.

1 347 U.S. 483 (1954), *supplemented by* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

2 *See, e.g.*, *District of Columbia Assessment and Accountability Data Reports: Ballou SHS Report Card*, DC OFF. ST. SUPERINTENDENT EDUC., http://nclb.osse.dc.gov/ (select "2010," "Report Card," "DCPS Schools," "Secondary Schools," and "Ballou SHS" from the drop-down menu) (last visited Feb. 22, 2012).

3 *Id.*

4 *Six Schools in Region Classified by Report as 'Dropout Factories,'* WASH. EXAMINER (Oct. 30, 2007, 2:00 AM), http://washingtonexaminer.com/local/2007/10/six-schools-region-classified-report-%E2%80%98dropout-factories%E2%80%99/82679. In 2007, only 49 percent of one D.C. high school's freshmen were expected to enroll in the school as seniors. *Id.*

5 *2010 Results for Adequate Yearly Progress*, ARLINGTON PUB. SCH. (Aug. 12, 2010), http://www.apsva.us/cms/lib2/VA01000586/Centricity/Shared/AYP%20FinalSR_2010only_revised.pdf.

6 *Id.*

7 U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, NO. 2010-341, PUBLIC SCHOOL GRADUATES AND DROPOUTS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2007-08, at 7 & 8 n.1 (2010), *available at* http://nces.ed.gov/pubs2010/2010341.pdf.

level in every state.[8] In addition, the black-white achievement gap cannot solely be explained by differences in average family income. When comparing the test scores of black and white students from similar economic backgrounds, the black-white achievement gap still exists between children in families of similar income levels.[9]

Professor Mark Tushnet associates racial inequities in American education with the Supreme Court eventually washing its hands of school desegregation.[10] In *The "We've Done Enough" Theory of School Desegregation*, Professor Tushnet states that in 1995, in *Missouri v. Jenkins*,[11] the Court opted not to extend *Brown* to a desegregation order that would have required a state to create magnet schools within its city borders to increase the racial balance in city schools by attracting white students from the suburbs.[12] According to Professor Tushnet, the Court made this decision because it had determined, as white America had, that *Brown* had gone far enough in providing relief to black students.[13] He argues that *Jenkins* permitted school districts to discontinue their racial balancing efforts by relying on an artificial bright-line distinction between de jure and de facto segregation.[14] He states that to distinguish the racially imbalanced schools that violate *Brown* from the racially imbalanced schools in *Jenkins*, the Court determined that once a school formerly segregated by law achieved racial balance, it became de jure desegregated, even if demographic changes resulting from the new student-assignment plan soon caused racial imbalance again.[15] Professor Tushnet argues that the Court accommodated its desired result in such cases by identifying the cause of such demographic changes as people's private option to choose schools with their feet, rather than as

---

8 U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, NO. 2009-455, ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, at iii (2009), *available at* http://nces.ed.gov/nationsreportcard/pdf/studies/2009455.pdf. Hawaii provides the only exception to this statement. *See id.* at iv. The seven point difference in test scores between black and white students in Hawaii was deemed statistically insignificant by the Department of Education. *Id.*

9 *Id.* at 10-11.

10 *See* Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 767 (1996).

11 515 U.S. 70 (1995).

12 Tushnet, s*upra* note 10, at 767-68.

13 *Id.* at 767-68, 771.

14 *See id.* at 777-78 (discussing the dissent's response to the Supreme Court's distinction of "white flight" caused by desegregation instead of segregation (internal quotation marks omitted)).

15 *See id.*; *see also* Missouri v. Jenkins, 515 U.S. 70, 102 (1995) ("Just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments so too will numerous external factors beyond the control of the KCMSD and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus." (citation omitted)).

the school district's original de jure segregation.[16] According to Professor Tushnet, the Supreme Court's comfortable reliance on the artificial bright-line distinction between de jure and de facto segregation demonstrated that the Court had grown disinterested in the desegregation docket.[17]

This Note argues that there is another explanation for what has appeared to be the Supreme Court's emerging disinterest in desegregation cases since the 1990s. It argues that the Court did not betray *Brown* by refusing to extend it in *Jenkins*, but rather that it inadvertently debilitated *Brown* by narrowing it in *Green v. County School Board*.[18] It argues that *Green*, a case known as the Court's first attempt to zealously enforce *Brown*, actually impaired it in the long term by limiting the types of remedies that lower courts could apply in desegregation orders and by diminishing the educational options available to students who lacked the financial wherewithal to vote with their feet. Rather than washing its hands of desegregation in *Jenkins*, the Court tied its hands in *Green*, establishing a trajectory for desegregation case law that led to both the controversy and outcome of *Jenkins*. The *Green* decision also brought about other desegregation cases that prohibited certain remedies for de facto segregation, including, most recently, *Parents Involved in Community Schools v. Seattle School District No. 1*.[19]

Part I of this Note provides a background of *Brown*'s and *Green*'s attempts to fully desegregate public schools. Part II describes how, despite the Court's best intentions, *Green* ignored three key elements of *Brown*, thereby limiting both educational opportunities and judicial remedies that could have addressed the desegregation problem, and then discusses cases that followed *Green*'s faulty reasoning. Part III proposes an alternative rationale the Court should have entertained in *Green* and suggests a solution the Court could have considered in *Parents Involved* to counter *Green*'s

---

16 *See* Tushnet, *supra* note 10, at 777-78; *Jenkins*, 515 U.S. at 96 (stating that segregation must have a causal link to the de jure violation being remedied and that school districts, since *Brown*, have only been required to remedy de jure segregation); *see also id.* at 117 (Thomas, J., concurring) ("District courts must not confuse the consequences of *de jure* segregation with the results of larger social forces or of private decisions.").

17 *Jenkins*, 515 U.S. at 164 (Souter, J., dissenting) ("[T]here is in fact no break in the chain of causation linking the effects of desegregation with those of segregation. There would be no desegregation orders and no remedial plans without prior unconstitutional segregation as the occasion for issuing and adopting them, and an adverse reaction to a desegregation order is traceable in fact to the segregation that is subject to the remedy."); *see also* Tushnet, *supra* note 10, at 777-78.

18 391 U.S. 430 (1968). The courts currently apply the same factors utilized in *Green* to determine whether a school district has fulfilled its obligation to desegregate. *See, e.g.*, Williams v. Kimbrough, No. 65-11329, 2010 WL 1790516, at *2 (W.D. La. May 3, 2010); United States v. Bd. of Educ., 663 F. Supp. 2d 649, 655 (N.D. Ill. 2009); United States v. Avoyelles Parish Sch. Bd., No. 1:65-cv-12721, 2009 WL 1505305, at *1 (W.D. La. May 28, 2009).

19 551 U.S. 701 (2007).

erosion of the *Brown* holding. Part IV suggests options for both courts and legislators to effectively address the achievement gap that still exists today.

I. LAYING THE GROUNDWORK: THE COURT'S EARLY SCHOOL DESEGREGATION JURISPRUDENCE

Beginning in the mid-1950s, the Court began to reverse its view that states could allow or require schools to maintain racially segregated facilities under certain conditions. This Part begins by reviewing the Court's seminal desegregation holding in *Brown*, which struck down the principle of "separate but equal" as it applies to public schools. The Part then illustrates how only a few years later, the Court limited the expansive *Brown* holding by forbidding school boards from instituting free-choice plans, which the Court considered insufficiently expeditious to achieve desegregation goals.

A. Brown*: The Foundation of Desegregation*

In *Brown v. Board of Education (Brown I)*, the plaintiffs challenged state laws in Kansas, Virginia, Delaware, and South Carolina that permitted or required local governments to maintain separate school facilities for black and white students.[20] The four school districts named in the class action suit attempted to defend the constitutionality of their school-assignment schemes under *Plessy v. Ferguson*'s[21] interpretation of the equal protection clause that permitted states to operate separate but equal facilities.[22] *Brown I* overturned *Plessy*, holding that race-based, public-school segregation deprives minority students of equal protection under the Fourteenth Amendment, even if the minority school's facilities are comparable to the white school that denied minority students admission.[23] The Court aimed not only to stop states from separating citizens along racial lines, but also to give minority students equal access to educational opportunities.[24]

In reaching its verdict, the Court did not rely on the geometric principle espoused by contract and property law that two places cannot be equal

---

20 *Brown I*, 347 U.S. 483, 486 n.1 (1954), *supplemented by Brown II*, 349 U.S. 294 (1955).

21 163 U.S. 537 (1896), *overruled by Brown I*, 347 U.S. 483.

22 *Brown I*, 347 U.S. at 488; *see also Plessy*, 163 U.S. at 544-45 (interpreting the Fourteenth Amendment as permitting separation of schools for white and colored children as a valid exercise of the states' police power).

23 *Brown I*, 347 U.S. at 495.

24 *See id.* at 493.

when they exist in different locations.[25] Instead, the Court stated that segregated schools are inherently unequal because segregation itself disrupts the hearts and minds of minority students in a way that must impact their prospects for academic success.[26] *Brown I* stated:

> The impact [of segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[27]

In reaching this conclusion, *Brown I* defined segregation as the "separat[ion of Negro children] from others of similar age and qualifications solely because of their race."[28] In doing so, *Brown I* did not limit its definition of segregation to either the government's active classification and assignment of students to schools by race or to the government's operation of racially imbalanced schools.[29] It left the term more general, potentially broadening the state actions the decision might impact.[30]

In outlawing the states' race-based separation of students, *Brown I* identified equal access to educational quality as the moral objective of its verdict.[31] States, according to the Court, have a duty not to "deprive the children of the minority group of equal educational opportunities."[32] Stating that a productive life depends on access to quality education,[33] *Brown I* questioned whether any child could "succeed in life" without educational opportunities.[34] Under *Brown I*, segregation is harmful because it generates a feeling of inferiority in minority children, which negatively impacts their

---

25 Property and contract law incorporate this idea into the principle that real property is inherently unique. *See generally In Re* Scott & Alvarez's Contract, [1895] 2 Ch. 603 (Eng.) (identifying specific performance as the appropriate remedy for enforcing a real estate contract).

26 *Brown I*, 347 U.S. at 494.

27 *Id.* (second and third alterations in original) (internal quotation marks omitted).

28 *Id.*

29 *See id.* at 493-94.

30 Chief Justice Warren may also have defined segregation generally in order to use language that was more inspirational than technical, perhaps garnering support for the decision from newspaper critics and from white Americans. For an argument that an interest in garnering such support influenced the Chief Justice's opinion, see Robert A. Prentice, *Supreme Court Rhetoric*, 25 ARIZ. L. REV. 85, 111-13 (1983).

31 *Brown I*, 347 U.S. at 495.

32 *Id.* at 493. For an argument that this principle in *Brown I* should include an affirmative duty to provide a satisfactory education in basic skills to students of all races, see Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 811-13 (1985).

33 *Brown I*, 347 U.S. at 493.

34 *Id.*

motivation to learn, thereby impairing their mental development.[35] In an attempt to fight this trend, *Brown I* mandated that states abolish segregated schools, reasoning that such schools cannot offer high-quality education to minority students.[36]

After reaching its seminal verdict, *Brown I* postponed ruling on relief for the plaintiffs,[37] perhaps because the Chief Justice did not want to risk losing a unanimous verdict over debate about what specific requirement the new ruling would impose on states.[38] Whether or not politics motivated the Court's decision not to immediately make a judgment on relief, the Court rationalized its postponement by stating, "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity."[39] As a result, *Brown I* concluded that the Supreme Court should not rush a desegregation decree.[40] Staying true to this principle, the Supreme Court refrained from ruling on the remedies until the next year, providing the parties and amici curiae time to brief the Court on specific questions regarding their recommendations for relief.[41] The Court instructed the parties to brief the question of whether "Negro children should forthwith be admitted to schools *of their choice*" or whether the Court should "permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions."[42]

After receiving briefs from the parties and amici answering this question, the Court in *Brown II* also declined to issue desegregation decrees specific to local school districts.[43] Whether politically motivated or not, the Court stayed true to the principle in *Brown I* that desegregation decrees involved matters of considerable complexity.[44] *Brown II* reserved the re-

---

35 *Id.* at 494. *Brown I*'s belief that public school assignments forcing students to be separated on the sole basis of race hurts educational quality should not be confused with a more frequently contested claim that minority students learn best when sharing a classroom with white students. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 761-64 (2007) (Thomas, J., concurring).

36 *See Brown I*, 347 U.S. at 494-95.

37 *Id.* at 495-96.

38 Professor Robert Prentice argues that this decision to postpone a verdict on the remedies was a political strategy. Prentice, *supra* note 30, at 112. According to Prentice, Chief Justice Warren postponed a verdict on the remedies because it would have been contentious, and Warren wanted to garner a unanimous decision in the momentous case. *Id.* Even if the Court's reluctance to decide the remedies was politically motivated, those political concerns may also reveal its appreciation for the complex and varied ways that desegregation decrees would affect the lives of students throughout the country.

39 *Brown I*, 347 U.S. at 495.

40 *Id.* at 495-96.

41 *Id.*

42 *Id.* at 495 n.13 (emphasis added).

43 *Brown II*, 349 U.S. 294, 299 (1955).

44 *Id.*

sponsibility of formulating specific desegregation orders for district courts, maintaining that "their proximity to local conditions" made lower courts best suited to rule on the particular remedies appropriate in each desegregation case consolidated under *Brown I*.[45]

B. Green*: An Attempt to Enforce* Brown*'s Mandate*

In *Green v. County School Board*, decided thirteen years after *Brown II*, plaintiffs filed suit alleging that a Virginia school district that had operated state-segregated schools violated *Brown* by assigning students to schools based on each family's choice.[46] The choice plan permitted each family to choose its child's school, assigning students who submitted no choice to the school they previously attended.[47] To prevent students' default choices from perpetuating racial imbalance, the plan also required first and eighth graders to "affirmatively choose a school."[48]

According to the plaintiffs, the county's voluntary school assignment plan violated *Brown*.[49] They argued that although the plan had been in effect for three years, no white students had enrolled in the school formerly designated for black students and only 15 percent of black students had enrolled in the school formerly designated for whites.[50]

The district court had permitted the county to operate its free choice scheme as long as the racial imbalance in its schools had not resulted from any pressures inhibiting students' truly free choice.[51] The plaintiffs had conceded that their annual choice of school was "unrestricted and unencumbered," so the Fourth Circuit affirmed the district court's ruling that the school choice plan was not discriminatory and did not violate *Brown*.[52] The Fourth Circuit held that "[i]f each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free."[53]

Judge Sobeloff concurred in the Fourth Circuit's opinion but he wanted the court to require each school district to periodically assess the effectiveness of its school-choice plan in achieving racial balance.[54] In addition, he would have preferred the court adopt the Fifth Circuit's approach to de-

---

45 *Id*.

46 Green v. Cnty. Sch. Bd., 391 U.S. 430, 431-34 (1968).

47 *Id*. at 434.

48 *Id*.

49 *See id.* at 431-32.

50 *Id*. at 441.

51 Green v. Cnty. Sch. Bd., 382 F.2d 338, 339 (4th Cir. 1967) (en banc) (per curiam) (citing Bowman v. Cnty. Sch. Bd., 382 F.2d 326, 327-28 (4th Cir. 1967)), *vacated by* 391 U.S. 430 (1968).

52 *Bowman*, 382 F.2d at 328.

53 *Id*. at 327.

54 *Id*. at 330-31 (Sobeloff, J., concurring).

segregation orders, which permitted free-choice plans that required students at every grade level to affirmatively choose a school and that assigned students who failed to designate a choice to the school closest to their homes.[55] Judge Sobeloff also suggested that the Fourth Circuit impose a duty on school boards to "unequivocally" demonstrate that it had actively protected black students from "harassment, intimidation, threats, hostile words or acts, and similar behavior" influencing their choice.[56]

The Supreme Court reversed the Fourth Circuit's approval of the free-choice plan, holding that it did not achieve the desegregation demanded by *Brown* quickly enough.[57] "The time for mere 'deliberate speed' has run out," the Court stated.[58] "[D]elays are no longer tolerable."[59] According to the Court, the small amount of racial mixing that resulted from the free-choice plan demonstrated that New Kent County had failed to effectively integrate its schools.[60] In lieu of the free-choice plan or the modifications Judge Sobeloff proposed, the Supreme Court ordered the county to pursue a different strategy that "promises realistically to work, and promises realistically to work *now*."[61] The Court even noted that a school board's decision to adopt a free-choice plan over a zoning plan could "indicate a lack of good faith."[62]

In making its determination, the Court effectively prohibited school boards from using free-choice plans to implement *Brown* because zoning plans will generally always be "speedier" than choice plans.[63] Also, because zoning—or some other form of forced school assignments—is the only alternative to free-choice plans, the Court effectively mandated that school districts under desegregation orders could only achieve racial balance through forced school assignments.

---

55 *Id.* at 331-32.

56 *Id.* at 334 (quoting United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 898 (5th Cir. 1966), *adopted by* 380 F.2d 385 (5th Cir. 1967) (en banc)) (second internal quotation marks omitted).

57 Green v. Cnty. Sch. Bd., 391 U.S. 430, 439-41 (1968). For a discussion detailing *Green*'s interest in effecting a swifter response to *Brown*, see Charles J. Russo et al., Brown v. Board of Education *at 40: A Legal History of Equal Educational Opportunities in American Public Education*, 63 J. NEGRO EDUC. 297, 302 (1994).

58 *Green*, 391 U.S. at 438 (quoting Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964)) (internal quotation marks omitted).

59 *Id.*

60 *Id.* at 441-42.

61 *Id.* at 439.

62 *Id.* The Court wrote:

> Where [a free-choice plan] offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, "freedom of choice" must be held unacceptable.

Id. at 440-41.

63 *Green*, 391 U.S. at 441-42.

II. *GREEN*'S UNINTENDED DEPARTURE FROM *BROWN*

At first blush, *Green* appears to speed up *Brown*'s desegregation goals, but a closer look reveals otherwise. This Part analyzes ways in which *Green*, though it intended to further *Brown*, actually impaired it in the long term by encouraging states to limit the number of educational options they provided to students with the most limited financial resources and by reducing the number of remedies lower courts could apply to desegregation cases. The Part explains that *Green* made this mistake by ignoring three aspects of the *Brown* opinion: (1) *Brown*'s broad definition of "segregation"; (2) its moral rationale for school desegregation; and (3) its preference for district-specific desegregation orders. This Part also traces the long-term negative impact that *Green*'s interpretation of *Brown* had on school policy, leading to both the controversies and outcomes of various landmark school desegregation cases that followed.

A. Green*'s Desertion of Three Principles of* Brown *Jurisprudence*

In trying to meet or even to surpass *Brown*'s commitment to desegregation, *Green* had much short-term success in increasing the racial balance of public schools.[64] However, *Green*'s interpretation of *Brown* established a trajectory for desegregation case law that actually prevented the Court from guaranteeing equal educational opportunities to many lower-income students, a disproportionate number of whom were racial minorities. *Green* disregarded three principles of *Brown* on the nature and process of desegregation. First, *Green* failed to account for the principle that segregation as defined in *Brown* is a broad term that refers to both the physical separation of students by color and the state's classification and assignment of students by race.[65] Second, it was silent on the moral rationale for desegregation—to increase the quality of education for minority students.[66] Third, *Green* ignored *Brown*'s acknowledgement that given the complexity of the desegregation process, district courts were in the best position to issue desegrega-

---

64 Various legal scholars have credited *Green* with being more effective than *Brown*—at least in the short term—at promptly bringing racial balance to public schools. *See, e.g.*, Stephen J. Caldas & Carl L. Bankston III, *A Re-Analysis of the Legal, Political, and Social Landscape of Desegregation from* Plessy v. Ferguson *to* Parents Involved in Community Schools v. Seattle School District No. 1, 2007 BYU EDUC. & L.J. 217, 229 (2007); Lia B. Epperson, *Resisting Retreat: The Struggle for Equity in Educational Opportunity in the Post-*Brown *Era*, 66 U. PITT. L. REV. 131, 140-41 (2004); Dennis D. Parker, *Are Reports of* Brown*'s Demise Exaggerated? Perspectives of a School Desegregation Litigator*, 49 N.Y.L. SCH. L. REV. 1069, 1073 (2005).

65 *See Brown I*, 347 U.S. 483, 494 (1954), *supplemented by Brown II*, 349 U.S. 294 (1955). *See generally Green*, 391 U.S. 430.

66 *Brown I*, 347 U.S. at 493. *See generally Green*, 391 U.S. 430.

tion decrees that responded to the unique circumstances facing each individual school district.[67]

Green first erred by interpreting *Brown*'s definition of segregation—"separat[ion of Negro children] from others of similar age and qualifications solely because of their race"[68]—too narrowly, as the geographic separation between black and white students in school facilities and programming.[69] According to *Green*, *Brown* targeted "[t]he pattern of separate 'white' and 'Negro' schools."[70] *Green* did not read *Brown* to prohibit states from singling out students solely on the basis of race when making school assignments.[71] In fact, it encouraged—and effectively required—New Kent County to base its school assignments on race to more immediately accomplish racial balance.[72] In limiting *Brown*'s definition of segregation to the *physical* separation of people of a different race, without accounting for the other effects of such segregation, *Green* downplayed the possible pitfalls of the government's use of racial classifications.[73]

Green also ignored *Brown*'s moral rationale for desegregation: the importance of providing all students with a high-quality education.[74] Under *Brown*, desegregation was about access to education itself, not just access to mixed-race facilities.[75] *Green* overlooked this distinction by taking aim at school districts' failure to mix the races in the same school building without addressing their failure to provide all students with a high-quality educa-

---

67 *Brown I*, 347 U.S. at 495-96; *see also Green*, 391 U.S. at 441-42 (not only striking down the specific free-choice plan New Kent County had implemented, but effectively dictating a new plan for the district court that would remove any aspect of parent choice from school assignments and institute zoning in its place).

68 *Brown I*, 347 U.S. at 494.

69 *See Green*, 391 U.S. at 435. *Green* determined that a school could satisfy *Brown* by achieving racial balance in the composition of its faculty and staff and in its transportation, extracurricular activities and facilities. *Id.*

70 *Id.*

71 *Id.* at 441.

72 *Id.* Before *Brown*, student school assignments in the North or South were rarely mandated by local governments. MEYER WEINBERG, RACE AND PLACE: A LEGAL HISTORY OF THE NEIGHBORHOOD SCHOOL 6 (1967). Although some judges have assumed the contrary, public school students, in large part, did not have a right to attend the school closest to their homes. *Id.* at 5-6.

73 Notwithstanding some school districts' attempts to use neighborhood assignment plans to retain racially separate schools (which *Green* did not condone), the government's use of racial classifications might perpetuate the prejudicial or race-conscious views of its citizens. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971) ("In the past, [neighborhood zoning] choices . . . have been used as a potent weapon for creating or maintaining a state-segregated school system."). In addition, Justice Thomas warns that permitting the government to use racial classifications might risk a return to the eras of *Dred Scott* and *Plessy*. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 781-82 (2007).(Thomas, J., concurring) ("Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive?").

74 *Brown I*, 347 U.S. 483, 493 (1954), *supplemented by Brown II*, 349 U.S. 294 (1955).

75 *See supra* notes 25-30 and accompanying text.

tion.[76] Nowhere in *Green* does the Court mention access to *quality* schools as a moral or legal rationale for its desegregation mandate.[77] Nor does it anticipate how its decision might impact school quality at all, either in the long or short term.[78]

Green's emphasis on geographically mandated school assignments required the Court to overlook educational quality as one aspect of desegregation efforts. Even as it favored zoning, *Green* disregarded basic economic principles that could have predicted how zoning would encourage affluent families to cluster around schools considered to be of higher quality, leaving low-income students—a disproportionate number of whom were minorities—with lower-quality options.[79] By focusing only on the racial balance of classrooms, *Green* either lost sight of the importance of providing minority students equal-quality education or falsely assumed that geographically mandated school assignments would naturally accomplish it. *Brown* assumed that successful desegregation would give minority students access to the school of their choice within their school district.[80] However, *Green* never considered how a free-choice plan is more likely in the long term to give students access to a high-quality education than geographically based assignments are.[81] *Green* saw free choice as a burden rather than as a long-term opportunity.[82] According to *Green*, "[r]ather than further the dismantling of the dual system, the [New Kent County] plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board."[83]

---

76 *Green*, 391 U.S. at 442.

77 *See generally id.*

78 *Id.* at 440-41.

79 The Supreme Court should have understood the possibility that geographically mandated school assignments would increase demand and price for housing zoned to what people considered the higher-quality schools. The Court applied much more sophisticated economic analysis to antitrust decisions as early as the 1930s. *See* Sugar Inst., Inc. v. United States, 297 U.S. 553, 594 (1936) (analyzing the elasticity of demand in the sugar market); *see also* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 380 (1956) (analyzing the "cross-elasticity of demand" in the cellophane market).

80 *See supra* note 42 and accompanying text.

81 *See, e.g.*, Dennis Epple & Richard Romano, *Neighborhood Schools, Choice, and the Distribution of Educational Benefits*, *in* THE ECONOMICS OF SCHOOL CHOICE 227, 234 (Caroline M. Hoxby ed., 2003) (predicting through economic models that a free-choice plan produces higher-quality schools than a student assignment plan based on neighborhood); *see also* Eric A. Hanushek & Steven G. Rivkin, *Does Public School Competition Affect Teacher Quality?*, *in* THE ECONOMICS OF SCHOOL CHOICE, *supra*, at 23, 24 (showing through empirical data how school choice promotes teacher quality in public schools); Rebecca Allen & Simon Burgess, *Evaluating the Provision of School Performance Information for School Choice* 4 (Ctr. for Mkt. & Pub. Org., Working Paper No. 10/241, 2010) (concluding that in England's free-choice system, "a child who attends the highest [*ex ante*] performing school within their choice set . . . will *ex post* do better than the average out-turn in their choice set twice as often as they will do worse than average").

82 *See Green*, 391 U.S. at 441-42.

83 *Id.* at 439.

In addition to ignoring *Brown*'s moral rationale for desegregation and narrowing *Brown*'s definition of segregation, *Green* also improperly declined to adopt *Brown*'s belief that district courts should fashion desegregation decrees because they are in the best position to address the unique complexities facing individual school districts.[84] The case occurred ten years after *Brown*'s instruction to desegregate schools with "all deliberate speed,"[85] but, according to *Green*, ten years was too long. In so concluding, however, *Green* discarded what could have been *Brown*'s patience with the difficulty of formulating and implementing effective desegregation orders.[86] The *Green* Court perceived New Kent County and possibly the lower courts as dawdling or dodging *Brown*.[87] *Green*'s assertion that "[t]he time for mere 'deliberate speed' has run out" was likely an attempt to make *Brown* more robust.[88] *Green*'s demand for immediacy, however, should not be mistaken as a demand for equality. Because forced school assignments can contribute significantly to white flight,[89] many school districts tasked with complying with *Green* could not achieve both immediate and lasting desegregation.[90] By requiring districts to adopt a plan that "promises realistically to work, and promises realistically to work *now*," the Court failed to consider that geographically mandated school assignments could not achieve both immediate and long-lasting racial balance in schools.[91]

B. Green*'s Impact on Subsequent Desegregation Efforts and Supreme Court Decisions*

1. The Transition from Zoning to Busing

Just three years after *Green*, the Supreme Court acknowledged the difficulty of achieving long-term racial balance through neighborhood school

---

84 *See id.* at 441-42.

85 *Id.* at 436, 438 (citing *Brown II*, 349 U.S. 294, 299-301 (1955)) (internal quotation marks omitted).

86 *See id.*

87 *See id.* at 438-39.

88 *Green*, 391 U.S. at 438 (quoting Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964)) (internal quotation marks omitted).

89 CHRISTINE H. ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING 194 (1990) (showing that the racial balancing of schools did not contribute to white flight to the suburbs as much as forced school assignments and forced busing did); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971) (establishing that the former policy of closing schools which appear likely to integrate "may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races").

90 *See, e.g.*, *Swann*, 402 U.S. at 31-32.

91 *Green*, 391 U.S. at 439.

assignments in *Swann v. Charlotte-Mecklenburg Board of Education*.[92] *Swann* considered a North Carolina school board's neighborhood zoning scheme that corresponded to segregated housing patterns, which plaintiffs urged had failed to desegregate its schools.[93] The district court issued a desegregation order requiring the school board to redraw its neighborhood school zones such that it would bus black students living in the city to suburban schools and white students living in the suburbs to schools inside the city.[94] On appeal, the school board challenged the district court's busing requirement as an unreasonable burden on both students and the board.[95] When the case reached the Supreme Court, the Court upheld the desegregation plan, citing *Green*'s holding that school boards are "clearly charged with the affirmative duty to take whatever steps might be necessary to . . . eliminate[] [racial discrimination] root and branch."[96]

To temper the burden that its forced-busing mandate placed on the school district, the *Swann* Court allowed that as soon as segregated school districts achieved significant levels of racial balance, they were no longer obligated to maintain it.[97] The Court stated, "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[98]

This aspect of the holding freed school districts from the obligation to continuously broaden or to otherwise redraw neighborhood school zones to counteract the voluntary neighborhood segregation (and corresponding school resegregation) that could follow each new round of neighborhood zoning. School districts had to achieve racial balance immediately, but they were not required to maintain it.[99] To some extent, this rule might have encouraged states to make less than a good-faith effort to pursue lasting racial balance. On one hand, *Swann* might have imposed a heavy financial burden on the school board to immediately achieve racial balance through busing. On the other hand, it relieved the school board of the burden to maintain such racial balance for any meaningful duration once it had momentarily reached that goal. Such a qualification seems to weaken the Court's assertion that its "objective today [is] to eliminate from the public schools all vestiges of state-imposed segregation."[100]

---

92 402 U.S. 1, 20-21 (1971).

93 *Id.* at 6-7.

94 *Id.* at 10.

95 *Id.*

96 *Id.* at 15 (quoting *Green*, 391 U.S. at 437-38).

97 *Id.* at 31-32.

98 *Swann*, 402 U.S. at 31-32.

99 *See supra* note 97 and accompanying text.

100 *Swann*, 402 U.S. at 15.

Swann's holding, while conflicted, follows naturally from *Green*. If a school board attempted to follow *Green*'s direction and established neighborhood school zones, but the zones failed to achieve racial balance, *Swann* permitted district courts to redraw noncontiguous school zones that both broadened and cut up the geographic area from which each school would obtain students.[101] In this way, *Swann* attempted to provide district courts with another tool to combat the resegregation that might follow geographically mandated school assignments.[102] *Swann*'s faithfulness to *Green*'s interpretation of *Brown*, however, prevented *Swann* from recommending a form of relief other than geographically mandated school assignments. *Swann* adopted *Green*'s narrow definition of "segregation" and its emphasis on access to school facilities over school quality.[103] As a result, *Swann* also embraced *Green*'s preference for geographically established school assignments for their "promise[] realistically to work . . . *now*," even if they do not work later.[104] *Swann*'s conflicted holding required school boards to eliminate all vestiges of de jure segregation "root and branch" even as it relieved them from the obligation to maintain racial balance once they initially achieved it.[105] This conflict in *Swann* likely resulted from the Court's understanding that the geographically mandated school assignments encouraged by *Green* were not likely to produce lasting racial balance.[106]

2. School Boards Need Not Pursue Students Indefinitely or Across Geographic Lines

Just as the neighborhood zones encouraged by *Green* could contribute to segregated housing patterns, *Swann*'s forced busing scheme could go still farther, encouraging white flight from the school district itself.[107] After conceding the point in *Swann* that geographically mandated school assignments may not provide a long-term solution to the problem of racially imbalanced schools, the Supreme Court reached an inevitable point: in the 1990s, it weakened *Swann*'s rule that all vestiges of past de jure segregation be elim-

---

101 *Id*. at 27-29.

102 *Id*. at 20-22.

103 *See id.*

104 *Id*. at 13 (second alteration in original) (quoting Green v. Cnty. Sch. Bd., 391 U.S. 430, 439 (1968)) (internal quotation marks omitted); *see also* Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215, 216-17 (2001) (demonstrating that white students in the Charlotte-Mecklenburg school district still retain privileged access to educational opportunities more than thirty years after *Swann*).

105 *Swann*, 402 U.S. at 15 (quoting *Green*, 391 U.S. at 437-38) (internal quotation marks omitted).

106 *See supra* note 97 and accompanying text.

107 *See* ROSSELL, *supra* note 89, at 194 ("[M]andatory [desegregation] plans experience more white enrollment decline than voluntary plans, not only in the implementation year but in subsequent years as well, and countywide plans have no advantage over citywide plans.").

inated by qualifying it with the phrase "to the extent practicable."[108] The two cases that employed this limiting language, *Board of Education v. Dowell*[109] and *Missouri v. Jenkins*, addressed the extent to which the Court required school districts to broaden school zones to yield racially balanced schools.[110]

In *Dowell*, the school district sought to discard the busing program it had applied to elementary schools in favor of a plan that assigned students to the schools closest to their neighborhoods.[111] The busing plan had previously contributed to a period of racial balance in the school district, and discontinuing the plan would have ensured that a "number of schools would return to being primarily one-race schools."[112] The Court faced the question of how long a school district had to maintain a forced busing system to achieve racial balance.[113] The Court permitted the Oklahoma City school board to discontinue its elementary school busing program, stating in its rationale that desegregation decrees "are not intended to operate in perpetuity."[114]

Similarly, in *Jenkins*, a school board's desegregation order required it to create an expensive urban magnet school intended to promote racial balance in city schools overall by attracting white students who lived in the suburbs outside of the city and school district lines to the magnet school.[115] The Court considered the scope of a state's obligation to extend the geographic boundaries of its school districts to address racial imbalance.[116] The Court struck down the school board's requirement to build a city magnet school.[117] The Court held that the "*inter*district goal [of the magnet school] is beyond the scope of the *intra*district violation [of de jure segregated city schools]."[118]

Although *Swann* held that the "pairing and grouping of noncontiguous school zones" would yield rapid results in schools that remained under desegregation orders,[119] *Dowell* and *Jenkins* concluded, respectively, that states need not pursue students past a reasonable point in time or past a reasonable geographic boundary.[120] The Court decided in both cases that the

---

108 *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 89 (1995) (quoting Freeman v. Pitts, 503 U.S. 467, 492 (1992)) (internal quotation marks omitted); Bd. of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991).

109 498 U.S. 237 (1991).

110 *See Jenkins*, 515 U.S. at 92; *see also Dowell*, 498 U.S. at 241-48.

111 *Dowell*, 498 U.S. at 241.

112 *Id.* at 244.

113 *Id.*

114 *Id.* at 248.

115 *Jenkins*, 515 U.S. at 92.

116 *Id.* at 92-94.

117 *Id.* at 92.

118 *Id.*

119 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971).

120 *See Jenkins*, 515 U.S. at 92-94; *see also* Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991).

school boards had done enough to remedy racial imbalance—but it was not necessarily responding, as Professor Tushnet suggests, to political pressures from white America.[121] Instead, the Court likely simply realized that requiring school districts to continually expand the outer limits of their school zones is not likely to accomplish racial balance.

3. No Race-Based Affirmative Action for Local School Districts

Ten years after *Jenkins*, the Supreme Court decided a case that has received some of the most negative criticism from desegregation advocates and affirmative action proponents since *Plessy*.[122] The case, *Parents Involved in Community Schools v. Seattle School District No. 1*, consolidated two desegregation cases, one involving secondary schools in Seattle[123] and another involving public schools of all grade levels in Louisville.[124] The Seattle school board had received complaints in the 1950s and 1960s that its schools lacked racial balance in part because neighborhood school zones corresponded to segregated housing patterns.[125] The school board responded by initiating a mandatory busing program in the 1970s, one similar to the plan approved in *Swann*.[126] The program compelled the busing of both white and black students to new schools created by the merger of previously distinct "white" and "black" neighborhood schools.[127]

Although the plan initially achieved high rates of racial balance in Seattle schools, the result did not last long, as *Swann* might have foretold.[128] Within ten years, so many white families had moved out of the city that Seattle's public-school population had decreased by half.[129] Realizing the effects of mandatory busing, the Seattle school board instead sought to in-

---

121 *See* Tushnet, *supra* note 10, at 768.

122 *See, e.g.*, Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of* Parents Involved, 69 OHIO ST. L.J. 1321, 1321 (2008) ("Never before [*Parents Involved*] had the United States Supreme Court pitted two civil rights victories against each other to produce a high-profile defeat for advocates of school integration.").

123 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1166 (9th Cir. 2005) (en banc), *rev'd*, 551 U.S. 701 (2007).

124 McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834, 838-39 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd sub nom.*, *Parents Involved*, 551 U.S. 701.

125 *Parents Involved*, 551 U.S. at 807-09 (Breyer, J., dissenting). Although the Seattle school board never operated schools that were segregated by law, and was therefore never bound by desegregation order, it received several legal challenges to the racial imbalance of its neighborhood schools several times from the 1960s through the 1970s. *Id.* at 807-10.

126 *Id.* at 809-10. The *Swann* plan employed the pairing and grouping of formerly all-white and all-black schools as well as the busing of both black and white students. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 9-10 (1971).

127 *Parents Involved*, 551 U.S. at 810 (Breyer, J., dissenting).

128 *Id.* at 811.

129 *Id.*

crease the diversity in its schools by creating a free-choice plan by which parents could apply to several of their preferred schools in their city.[130] In the event that a school received more applications than available seats, preference for admission went first to students with siblings in the same school, then to students whose race would increase the school's racial balance, and then to students who lived closest to the school.[131] The board chose to employ the "racial tiebreaker" to mitigate the effect of racially identifiable housing patterns on the racial balance of its schools.[132]

In Louisville, after the school district received its original desegregation order, school officials made several attempts to draw and redraw school zoning lines to achieve racial balance.[133] A district court later ruled that Louisville had met the requirements of eliminating state-sponsored segregation.[134] However, like Seattle's busing plan, Louisville's zoning scheme led to neighborhood resegregation, and the school board sought to remedy both effects by opening public magnet schools and by establishing district racial quotas.[135] These quotas required all non-magnet public schools to have a student body comprising at least 15 percent—but no more than 50 percent—of black students.[136] A white student's parent brought a complaint against the school board when it denied the child access to the parent's first-choice school, telling the parent that accepting the child would adversely affect desegregation compliance.[137] The parent and other Louisville plaintiffs complained that the quotas gave preferential treatment in admission to high-demand schools to black students.[138]

The Sixth and Ninth Circuits, respectively, found the Louisville and Seattle school boards' admissions policies constitutional and consistent with the jurisprudence of *Brown*.[139] The Supreme Court, however, reversed

---

130 *Id*. at 812.

131 *Id*. at 711-12 (majority opinion).

132 *Id*. at 712.

133 *Parents Involved*, 551 U.S. at 814-17 (Breyer, J., dissenting).

134 *See id.* at 818.

135 *Id.* at 816, 819; *see also* Christine Rossell, *The Desegregation Efficiency of Magnet Schools*, 38 URB. AFF. REV. 697, 723 (2003) ("Virtually all magnets begin as a desegregation strategy . . . .").

136 *Parents Involved*, 551 U.S. at 716 (majority opinion).

137 *Id*. at 717.

138 *Id.* at 716-17; *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971) ("An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. . . . [that permits the] optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority . . . ."). *But see id.* at 28 ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis.")

139 McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834, 836 (W.D. Ky. 2004) ("To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of *Brown*'s promise."), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd sub nom. Parents Involved*, 551 U.S. 701 (2007); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1179 (9th Cir. 2005) (en banc)

both circuits' decisions.[140] In a five-to-four decision, the Court held that the school districts were not constitutionally justified in using race as a factor in school assignments because such quotas failed to serve a compelling state interest.[141] The plurality opinion relied primarily on *Brown*'s requirement that school districts assign admission to schools on a "nonracial basis."[142] Reading *Brown*'s definition of segregation more broadly than *Green* did, the plurality found both the Seattle tiebreaker scheme and the Louisville racial quotas unconstitutional because both based school assignments on race.[143] The school boards' quotas had aimed for racial balance as an end in itself, rather than as a means to equalize educational benefits for all races.[144] In acknowledging this distinction, *Parents Involved*, unlike *Green*, preserved *Brown*'s appreciation of equal educational quality, not just racial blending for its own sake, as the critical moral rationale behind desegregation.

Critics of *Parents Involved*, including dissent author Justice Breyer, warned that the case was a major setback in efforts to desegregate American schools.[145] Justice Breyer argued that the decision would obstruct states' local efforts to combat the increasing resegregation in public schools that arose when parents simply moved rather than find themselves subject to mandatory busing or zoning rules they found unfavorable.[146] Another dissenter, Justice Stevens, found irony in the Court's use of *Brown* to prevent Louisville and Seattle from giving race-based preferences to historically disadvantaged minority students.[147]

Parents Involved may have had such a negative reception in part because the measures that Seattle and Louisville took to improve educational opportunities for disadvantaged minorities were so small compared to the obstacles minority students had faced in the past, yet the Court found them excessive. *Parents Involved* also seems unfair when considered in the entire history of desegregation cases heard by the Supreme Court. It took the Court fifty years—and significant prodding by the lower courts—to over-

---

("*Brown*'s statement that 'in the field of public education . . . [s]eparate educational facilities are inherently unequal' retains its validity today." (alterations in original) (quoting *Brown I*, 347 U.S. 483, 495 (1954))), *rev'd*, 551 U.S. 701 (2007).

140 *Parents Involved*, 551 U.S. at 720-21.

141 *Id.*

142 *Id.* at 747 (plurality opinion) (emphasis omitted) (quoting *Brown II*, 349 U.S. 294, 300-01 (1955)). Justice Kennedy did not join in the plurality decision—Parts III-B and IV of the opinion—that advocated a broader prohibition on the government's use of race for school assignments than Justice Kennedy supported in his concurring opinion. *Id.* at 782-98 (Kennedy, J., concurring).

143 *Id.* at 748 (plurality opinion).

144 *Id.* at 710 (majority opinion).

145 *Parents Involved*, 551 U.S. at 858-63 (Breyer, J., dissenting).

146 *Id.* at 803.

147 *Id.* at 799 (Stevens, J., dissenting).

turn *Plessy v. Ferguson*.[148] Even today, almost sixty years after *Brown*, hundreds of school districts still operate under their original desegregation orders.[149] The Supreme Court has been slow to respond to desegregation issues as they concern minority students, and the lingering problem demonstrates that its decisions' solutions have been inefficient. Within that context, *Parents Involved* may appear to some as offering disproportionate relief to white complainants who have generally had access to better public education than minority students have.

Despite the criticism of *Parents Involved*, however, the case has not likely had any significant practical impact on school diversification efforts in Seattle, Louisville, or anywhere else. After all, Seattle only used race as a tiebreaker after considering a list of other more determinative factors.[150] The race factor had affected school placement for very few students, black or white, since the student assignment process rarely necessitated its use.[151] If left in effect, the quota would not have leveled the playing field for minorities, nor would it have given black students a real advantage over white students in the grand scheme.[152] Indeed, Seattle school officials acknowledged that the tiebreaker scheme did little to improve racial balance in the school districts.[153] In addition, *Parents Involved* does not prevent Seattle, Louisville, or other districts from employing different factors for their school-choice plans, such as student socioeconomic status, that could more effectively improve racial balance.[154]

Perhaps more disheartening for desegregation advocates than the outcome of *Parents Involved* is the dilemma itself that the case presented to the Court. *Parents Involved* forced the Court to choose between allowing states to assign students based (at least in part) on skin color and forbidding states from offering even a small advantage in educational opportunity to a histor-

---

148 *See, e.g.*, Brown v. Bd. of Educ., 98 F. Supp. 797, 799 (D. Kan. 1951) ("On numerous occasions the Supreme Court has been asked to overrule the Plessy case. This the Supreme Court has refused to do, on the sole ground that a decision of the question was not necessary to a disposal of the controversy presented."), *rev'd*, *Brown II*, 349 U.S. 294 (1955).

149 U.S. COMM'N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 12 (Sept. 2007) ("As of May 2007, the United States remains a party to 266 suits in which school desegregation court orders are in effect.").

150 *Parents Involved*, 551 U.S. at 711-12 (majority opinion).

151 *Id.* at 727-28 (plurality opinion).

152 *Id.*

153 *Id.* at 733-34 (majority opinion).

154 *See* Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 65-70 (2009) (demonstrating how "socioeconomic status integration" achieves racial balance without drawing the strict scrutiny that threatens racial quotas); *see also* Heather Schwartz, *Housing Policy is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, CENTURY FOUND. 5 (2010), http://tcf.org/publications/pdfs/housing-policy-is-school-policy-pdf/Schwartz.pdf (showing that disadvantaged students perform better in economically diverse student bodies).

ically disadvantaged minority.[155] *Green* contributed to the unhappy dilemma faced by the Court in *Parents Involved* because it diluted the effect of *Brown*'s landmark holding and limited school districts' and courts' options for enforcing *Brown.* The Court should never have found itself in such a dilemma this long after *Brown. Brown*, after all, sought to eliminate both state-based racial classifications and race-based educational advantages in one pronouncement.[156] It offends both the spirit and letter of *Brown* that desegregation efforts after *Green* evolved in such a way that the *Parents Involved* Court could not prohibit both at the same time.

III. A WAY FORWARD: HOW COURTS AND LEGISLATURES CAN EFFECTIVELY ENFORCE *BROWN*

Previous Courts have lost their way in furthering *Brown*'s goal of equal access to education, but this trend must change in order to eliminate the educational opportunity racial divide that still exists today. This Part describes an alternative approach that the Court should have taken in *Green* and proposes ways that *Parents Involved* could have better mitigated *Green*'s long-term debilitating interpretation of *Brown*.

A. *How the* Green *Court Should Have Enforced* Brown

Green might have better influenced desegregation policy and case law if it had limited its holding to addressing the "unencumbered choice" element of New Kent County's school-choice plan rather than striking down school choice altogether. Although *Green* anticipated that geographically mandated school assignments place students of different races in the same classroom, it failed to acknowledge that those assignments also create new markets for exclusive neighborhood schools.[157] Families who can afford to do so cluster around higher-performing schools, separating the children of affluent, generally well-educated parents from children of lower-income, generally less-educated parents.[158] Since children's parents' educational background is a primary factor affecting student test scores,[159] forced geo-

---

155 *See Parents Involved*, 551 U.S. at 711-12, 715-17 (describing the details of the Seattle and Louisville student assignment plans).

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

157 *See generally* ROSSELL, *supra* note 89; *see also supra* note 81 and accompanying text.

158 *See generally* ROSSELL, *supra* note 89.

159 Increases in reading scores correspond directly to increases in parent education. NAT'L CTR. FOR EDUC. STAT., *Average Scores and Achievement-Level Results in Reading by Parental Education Level* (2005), http://nces.ed.gov/nationsreportcard/nies/nies_2005/l0141.asp (click on the "Parental Education" tab). In addition, children of college graduates are over three times more likely to score proficient in reading than children whose parents did not finish high school. *Id.*

graphic zoning prevents low-income students en masse from gaining access to high performance schools.[160]

Even worse, such zoning discourages wealthier residents with higher levels of education from working to improve school quality for all students, rather than just their own. Real estate in a high-quality school zone is worth much more than real estate zoned to low-quality schools—a "good" school district can add more than eleven times the value to a home than a "bad" school district can.[161] As a result, people who own real estate in a high-quality school zone can actually benefit when schools in other areas of their region perform poorly. This profit incentive discourages wealthy real-estate owners from supporting political initiatives that would improve educational quality for lower-income students.[162]

Green's method for achieving racial balance has failed in the long run because affluent families, historically often white, cluster around higher-quality schools.[163] Schools in districts that obeyed the order in *Green* became highly susceptible to resegregation after the districts drew their initial zones.[164] In response to this resegregation, the *Swann* Court allowed districts to continue to pursue forced school assignments and to base those assignments on race alone, rather than on neighborhood.[165] Even those efforts failed, however, as affluent families completely abandoned school districts that engaged in forced busing.[166] These efforts yielded districts

---

160 Varying access to school quality,

> is supported by housing prices that ascend across neighborhoods in the same order as school quality. If we introduce intradistrict choice across public schools and there are no costs of exercising this choice (e.g., if transportation costs are paid by the government), then schooling qualities will be equalized in equilibrium.

Epple & Romano, *supra* note 81, at 234; *see also Closing the Achievement Gap: We Just Need More 90210's!*, NAT'L COUNCIL ON TCHR. QUALITY (Oct. 29, 2010), http://www.nctq.org/p/tqb/viewStory.jsp?id=23509 (showing a high correlation between average family income and school quality).

161 *See* William T. Bogart & Brian A. Cromwell, *How Much Is a Good School District Worth?*, 50 NAT'L TAX J. 215, 231 (1997) (assessing the value added to homes by their location in high performing school districts).

162 *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2118-27 (2002) (arguing that misaligned economic incentives for families in wealthy neighborhoods create a political road block to school choice).

163 ROSSELL, *supra* note 89, at 194; *see also* J. Skelly Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 16 W. RES. L. REV. 478, 497 (1965) (stating that white flight follows the forced neighborhood school assignment method of desegregation).

164 ROSSELL, *supra* note 89, at 194.

165 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-32 (1971).

166 *The* Green *Decision of 1968*, VA. HIST. SOC'Y, http://www.vahistorical.org/civilrights/green.htm (last visited Feb. 17, 2012) ("Because of white flight to private academies and to the suburbs, racial balance could not be achieved in many city schools without extensive busing of students citywide or across city-county boundaries. This set the stage for a sharp white backlash against social engineering by the judiciary and a strengthening of conservative political opinion."); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 805-12 (2007) (Breyer, J., dissenting).

containing many fewer affluent families interested in sending their children to a public school.[167] Other districts abandoned their attempt at maintaining racial balance altogether after completing their first attempt to implement geographically mandated assignments.[168] *Green* succeeded in achieving immediate racial mixing in schools.[169] However, the integration was short-lived, and in the long run, it cost lower-income—and often "nonwhite"—students access to higher-quality public schools.[170]

Defenders of *Green* might argue that *Green* succeeded in stopping states from affirmatively designating one-race schools, even if the neighborhood school schemes encouraged private individuals to vote with their feet by moving to other school zones or districts. Defenders of *Green* might also claim that while neighborhood-school schemes can disadvantage lower-income students whose families cannot afford to move to a better district, such plans do not disadvantage those students on the sole basis of race. While both of those points are valid, they contravene the spirit and purpose of *Brown*. Forced school assignments not only tend to deny lower-income students initial access to higher-quality schools, they also limit students' opportunities to transfer schools to avoid bullying, gangs, or other forces that can seriously interfere with a child's schooling.[171] For students whose families lack the financial means to move to another school district, the only way to avoid such situations might be to stay home from school entirely.[172] Because financial success is closely linked to education level, and because the opportunity to "vote with one's feet" really means an opportunity to vote with one's checkbook, school districts' failure to provide lower-income students with effective school choice contributes to the racial achievement gap.

The Supreme Court in *Green* might have been right to suspect that New Kent County's free-choice plan betrayed the spirit of *Brown*. However, the *Green* plaintiffs conceded that under their school's plan, the choice was unencumbered and that students were in no way influenced in their

---

167 ROSSELL, *supra* note 89, at 65-70.

168 *See Parents Involved*, 551 U.S. at 804-05 (Breyer, J., dissenting).

169 David Rhinesmith, Note, *District Court Opinions as Evidence of Influence:* Green v. School Board *and the Supreme Court's Role in Local School Desegregation*, 96 VA. L. REV. 1137, 1157-58 (2010).

170 *See supra* notes 81 and 131, and accompanying text.

171 *See, e.g.*, Kylee Crews et al., *School Violence Is Not Going Away So Proactive Steps Are Needed*, 4 C. TEACHING METHODS & STYLES J. 25, 25 (2008) (demonstrating that school violence increases dropout rates).

172 While additional factors other than school choice likely contribute to this problem, the dropout rate is some states is forty to fifty percentage points higher for minority students than for white students. *High School Dropouts in America*, ALLIANCE FOR EXCELLENT EDUC. 1 (2009), http://www.all4ed.org/files/GraduationRates_FactSheet.pdf.

choice of school by the school board's acts or omissions.[173] Under those facts, the Supreme Court should have either affirmed the decision that the Fourth Circuit made in *Green* or adopted the ruling Judge Sobeloff proposed in his concurrence because New Kent County's free-choice plan offered white and black students an equal opportunity to attend the school of their choice.[174]

The Court based its decision on its belief that the plaintiffs' choice in schools was not actually free, despite the plaintiffs' admission that the school district had not encumbered their selections.[175] In support of its suspicions, the Court cited a report by the U.S. Commission on Civil Rights that indicated why some freedom-of-choice plans had failed to accomplish racial balance in schools.[176] This list included appalling circumstances black students faced in formerly all-white schools, such as the fear of retaliation from the white community, harassment, exclusion of black parents from official functions, and the imposition of new attendance fees.[177] The facts of *Green*, however, contained no evidence that New Kent County students felt any of these undue influences, so the Court was wrong to author its ruling as if the students did.

The Court likely wished to prevent placing students in the position of facing such harsh circumstances, as well as situations in which students felt significantly less undue influence—a noble goal. To accomplish this end, however, the Court should have focused its enforcement efforts on the school board's failure to provide an unencumbered choice instead of effectively prohibiting school-choice plans altogether. And if the Court thought that undue influence might be too difficult for a plaintiff to prove, it could have balanced that difficulty with more stringent penalties for districts and school officials who failed to offer truly free choice. The Court could have also expanded the list of acts constituting undue influence to include very broad sets of circumstances, such as school officials tolerating even a single occurrence of harassment that would reasonably discourage a student from attending a certain school. In addition, the Court could have given districts benchmarks for their free-choice plans that included both immediate and long-term requirements for racial balancing.[178]

Had the Court made a less sweeping pronouncement about school-choice plans, it could have permitted bona fide free-choice plans to create positive economic incentives and prevented the development of the nega-

---

173 Green v. Cnty. Sch. Bd., 382 F.2d 338, 339 (4th Cir. 1967) (en banc) (per curiam) (citing Bowman v. Cnty. Sch. Bd., 382 F.2d 326, 327-28 (4th Cir. 1967)), *vacated by* 391 U.S. 430 (1968).

174 *Brown I*, 347 U.S. 483, 495 n.13 (1954), *supplemented by Brown II*, 349 U.S. 294 (1955).

175 *See Green*, 391 U.S. at 440 n.5, 440-42.

176 *Id.* at 440 n.5.

177 *Id.*

178 *See, e.g.*, United States v. Choctaw Cnty. Bd. of Educ., 292 F. Supp. 701, 702, 704 (S.D. Ala. 1968) (requiring—among other things—that "[a] minimum of 10% of the Negro school population attend traditional white schools" in the following academic year).

tive incentives geographically mandated school assignments have created.[179] Schools could have attracted students away from their previous schools by offering a combination of specialized activities, advanced academic programs, or exceptionally qualified faculty members. These measures attract students of all races, so they would have encouraged voluntary racial balancing even as they improved school programming and facilities in every school, regardless of the average income level of its students.

In addition, employing a school-choice plan with positive incentives would not have required the state to classify or label students by race. States could have used demographic statistics to determine whether their choice plans were achieving racial balance, but those statistics would not require the states to rely on race to directly assign students to schools. Had *Green* not broadly discouraged free-choice plans, it would have stayed more faithful to *Brown*'s principle that segregation includes the state's race-based assignment of students and that desegregation would be accomplished when "Negro children [are] admitted to schools of their choice."[180]

B. *How* Parents Involved *Should Have Revived* Brown

Parents Involved attempted to modify *Green*'s faulty reading of the term "segregation," including within that term not only the forced separation of students in different school buildings by color, but also the government's classification of individual students by race.[181] The Seattle school district classified students as "white" or "nonwhite,"[182] while the Louisville school district classified them as "black" or "other."[183] In *Parents Involved*, the Court concluded that the evils—or at least unconstitutionality—of the government's racial classifications far exceeded the benefits of the slightly preferential treatment some minority students received in Louisville and Seattle public school assignments.[184] The plurality shunned the "race-based reasoning" that it thought unreasonably and detrimentally divided the nation into "racial blocs."[185]

In his concurring opinion, Justice Thomas wrote that racial discrimination is generally prohibited because it is irrelevant.[186] The Constitution is

---

179 *See* Ryan & Heise, *supra* note 162, at 2115; *see also* Michael J. Alves & Charles V. Willie, *Controlled Choice Assignments: A New and More Effective Approach to School Desegregation*, 19 URB. REV. 67, 75 (1987) (maintaining that school choice "frees the public schools from their hostage status to real estate" and promotes educational progress and effectiveness).

180 *Brown I*, 347 U.S. 483, 495 n.13 (1954), *supplemented by Brown II*, 349 U.S. 294 (1955).

181 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 710 (2007).

182 *Id.*

183 *Id.* (second internal quotation marks omitted).

184 *See id.* at 720-21.

185 *Id.* at 746.

186 *Id.* at 752 (Thomas, J., concurring).

color-blind, Thomas insisted.[187] Even when racial classifications are intended to benefit a disadvantaged group, they can later be used to harm the very group they attempted to protect:

> Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories. . . . Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow.[188]

The Court's and Justice Thomas's definitions of segregation in *Parents Involved* are closer to the broad concept of segregation *Brown* attacked than is *Green*'s definition. However, even the Court and Justice Thomas failed to embrace the full breadth of *Brown*'s definition. Although the *Parents Involved* Court identified the danger of state-imposed racial classifications, the Court also validated these terms—"black," "white," "Latino," etc.—by employing them in the language of its opinions.[189] If the Court wants to communicate that race is an arbitrary and potentially dangerous construct or that the Constitution is color-blind, it should itself avoid relying on racial classifications in crafting its opinions, especially when interpreting the Constitution.[190]

In addition to ending the Court's misplaced reliance on racial classifications in its constitutional law opinions, *Parents Involved* could have more effectively modified *Green* by explicitly validating the school-choice plans utilized by Louisville and Seattle. The plurality noted in dicta that both Seattle and Louisville had made great strides in diversifying their schools even before the districts used race as a factor in evaluating student preferences.[191] The Court missed its chance to remedy *Green*'s mistaken blanket condemnation of school-choice plans when it failed to explicitly connect Seattle and Louisville's successes to the districts' school-choice plans.[192] The *Parents Involved* Court's holding should have emphasized the value of school-choice programs over forced-assignment plans in promoting sustained diversity in schools. Doing so might have fueled the efforts of com-

---

187 *Parents Involved*, 551 U.S. at 780.

188 *Id.* at 780-82.

189 *See id.* at 712-13, 716, 724, 726-27 (plurality opinion). For example, where the Court mentions "black students," "white students," "Latino," "African American," "Native American," "Asian American" or "nonwhite" students, it should have revised its language to describe students *classified by the school district as* black, white, Latino, etc. *See id.* As Justice Kennedy asks in his concurring opinion, "Who exactly is white and who is nonwhite?" *Id.* at 797 (Kennedy, J., concurring).

190 *See generally* Robert Kurzban et al., *Can Race Be Erased? Coalitional Computation and Social Categorization*, 98 PROC. NAT'L ACAD. SCI. 15,387 (2001) (demonstrating that people notice race only to the extent that their language employs racial classifications).

191 *Parents Involved*, 551 U.S. at 728 (plurality opinion).

192 *See id.*

munity and school-district leaders who are committed to expanding educational options—not just simple racial integration—for historically disadvantaged groups.

Parents Involved also missed a valuable opportunity to prevent *Green*'s praise of geographically mandated school assignments from being the last word on court-preferred methods of desegregation. Justice Kennedy, discussing in his concurrence the methods by which school districts could legally increase racial diversity, noted several race-conscious methods school districts could employ that do not involve the classification of *individual* students by race.[193] Justice Kennedy mentioned redrawing school attendance zones, selecting appropriate sites for new schools, and allocating resources for special programming as some tactics school districts may properly employ to increase diversity.[194] However, both Justice Kennedy and the plurality failed to mention school-choice opportunities as an effective method for achieving long-lasting racial diversity.[195]

Had Justice Kennedy wished, he might have tried to prevent the plurality's strong language from potentially misguiding local policymakers, as he did in *Olmstead v. L.C.*[196] *Olmstead*, which commentators term the "*Brown* of disability law," requires states to deinstitutionalize persons with mental disabilities when community-based treatment can appropriately accommodate them.[197] Justice Kennedy concurred in *Olmstead* to express his concern that the majority's language might communicate a policy preference that too strongly encourages states to deinstitutionalize patients whose conditions might be addressed by community-based treatment but would in fact greatly benefit from institutional supervision.[198] He wrote, "if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition."[199]

Justice Kennedy should have offered a similar caveat in his *Parents Involved* concurrence because policymakers might interpret the plurality holding more broadly than intended. Justice Kennedy could have pointed out that despite its context within a history of desegregation case law encouraging geographically mandated school assignments, school boards should not interpret the *Parents Involved* decision as prohibiting school boards from employing free-choice plans as a tool to improve racial bal-

---

193 *Id.* at 789 (Kennedy, J., concurring).

194 *Id.*

195 *See id.* at 708-48 (plurality opinion); *id.* at 782-98 (Kennedy, J., concurring).

196 527 U.S. 581, 608-15 (1999) (Kennedy, J., concurring).

197 *Id.* at 607 (majority opinion); *see, e.g.*, Mary C. Cerreto, Olmstead*: The* Brown v. Board of Education *for Disability Rights: Promises, Limits, and Issues*, 3 LOY. J. PUB. INT. L. 47 (2001).

198 *Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring).

199 *Id.*

ance, at least in school districts not subject to a desegregation decree. Because Justice Kennedy and the plurality failed to take this opportunity, however, desegregation case law currently communicates a strong, albeit misguided, preference for forced-school assignments.

IV. ADDRESSING TODAY'S ACHIEVEMENT GAP

The trajectory that desegregation law has followed since *Green* has failed to achieve *Brown*'s intended results. *Parents Involved* and its warnings about the dangers of permitting states to use racial classifications may represent one example of the Supreme Court's attempt to revise some of *Green*'s interpretation of *Brown*. However, *Parents Involved* does nothing to warn against the inequities that inevitably result from forced-school assignments. This Part suggests ways that courts and legislators might try to better apply the principles of *Brown* to the lingering racial achievement gap.

Some lawmakers have made strides to correct the defects that *Green* left in public education. The No Child Left Behind Act[200] took some corrective efforts by entitling students to transfer from neighborhood schools that fail in educating their students three years in a row.[201] Certain city and state executives have continued the efforts by building charter schools or establishing other choice programs that promote competition and give low-income, historically disadvantaged students improved access to high-quality schools.[202] Given the misaligned economic incentives *Green* created, however, political solutions have come slowly. Real estate owners in high-performing school districts can create a political roadblock to advancing school-choice efforts.[203] And key special-interest groups, such as the National Education Association and the American Federation of Teachers, have opposed school choice, claiming that the detriments of long distances between students and their schools outweigh the educational benefits.[204] The

---

200 20 U.S.C. §§ 6301-7941 (2006).

201 20 U.S.C. § 7325.

202 As of 2010, four U.S. cities have enrolled one-third of their public school students in charter schools. Lisa Gartner, *D.C. Exodus to Charters Among Highest in U.S.*, WASH. EXAMINER (Nov. 1, 2010, 10:00 PM), http://washingtonexaminer.com/dc/2010/11/dc-exodus-charters-among-highest-us.

203 *See* Eric Brunner & Jon Sonstelie, *Homeowners, Property Values, and the Political Economy of the School Voucher*, 54 J. URB. ECON. 239, 254 (2003) (indicating that even fiscally conservative voters who would otherwise support free-market initiatives vote against school choice when they own property in high-quality school districts).

204 By referring to geographically mandated assignments as "neighborhood schools," proponents of the forced assignments, such as teachers' unions, have claimed a range of benefits to the system wholly disconnected from the mandatory nature of the school assignments, such as shorter commute time for students and a purported increase in parent involvement that follows. *See, e.g.*, *AFT Resolutions: Oppose the Unjustified Closure of Neighborhood Schools*, AM. FED'N. TCHRS. (2010), http://www.aft.org/about/resolution_detail.cfm?articleid=1562 (claiming that neighborhood schools are a valuable part of community life).

existing stalemate between school districts, courts, legislators, special-interest groups, and high-value real estate owners demands new approaches to addressing the racial achievement gap.

A. *A Legal Argument to Highlight Inequality*

Advocacy groups that have historically challenged school districts' failures to provide equal access to education should fight geographically based school assignments directly, even though these groups might have supported such forced assignments at the time of *Green*.[205] *Reynolds v. Sims*,[206] the 1964 voting-rights case addressing vote dilution in Alabama,[207] provides a rationale for such challenges.

In *Reynolds*, the Court addressed Alabama's failure to reapportion its electoral districts after demographic shifts over the years had increased the population of some voting districts, significantly diluting the votes of residents in those areas.[208] Although the state argued that federal courts lack the power to affirmatively reapportion seats in a state legislature, the Court noted that the U.S. Constitution protects qualified individuals' right to vote in both federal and state elections.[209] The Court ruled that only court-ordered reapportionment would give residents of these neighborhoods equal access to government.[210]

Although *Reynolds* has never been applied outside the context of voting rights disputes, its rationale applies to the achievement gap that geographically mandated school zones have all but guaranteed. According to *Reynolds*:

> [T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or

---

205 For a description of the NAACP's most recent legal action related to equal access to education, see Holly Atkins, *NAACP files lawsuit against Wake County Schools*, WAKE COUNTY SCH. EXAMINER (Sept. 25, 2010), http://www.examiner.com/schools-in-raleigh/naacp-files-lawsuit-against-wake-county-schools. The NAACP might do better to challenge the neighborhood assignment plan itself rather than the county's cancellation of the busing system.

206 377 U.S. 533 (1964).

207 Education expert Meyer Weinberg argued to the Office of Education in 1967 that forced school assignments, which adversely impact minority students, should be struck down as unconstitutional under *Reynolds v. Sims*. WEINBERG, *supra* note 72, at 80-84. However, since Mr. Weinberg made the argument, no one has brought suit under this rationale to challenge the constitutionality of geographically based school assignments directly.

208 *Reynolds*, 377 U.S. at 540.

209 *Id.* at 554.

210 *See id.* at 586-87.

> challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live.[211]

Advocates of equal access to education could argue that a school district's failure to provide equal education to students simply because they live in different neighborhoods is an unreasonable form of discrimination that violates the Fourteenth Amendment.[212] Like vote dilution, forced school assignments involve the government drawing lines that give some of its citizens unfairly disparate access to essential state-provided institutions. Minority students with no choice but to attend the school within their government-established geographic zone, like the disenfranchised voters in *Reynolds*, should be placed "in the same relation" to high-quality education "regardless of where they live." Because education—like the right to vote—constitutes a basic foundation of democracy, courts should be open to applying *Reynolds* to geographically forced school assignments.[213]

The fact pattern with the greatest chance of succeeding under *Reynolds* would involve a single school district that:

(1) Denies students any option of attending a school other than the one assigned to his or her residential zone;

(2) Contains schools of significantly varied quality (as measured by annual progress tests, college admission rates, or other factors);

(3) Dispenses tax revenue equally among schools so that the taxes paid by students in the lower-income school zone are placed in the same pool that funds schools in the wealthier school zones; and

(4) Has capacity in its higher-quality schools to serve at least some additional students without jeopardizing the quality of the education it provides to its current students.

Under these facts, it would be difficult for a school board to demonstrate a rational basis for excluding lower-income students from its higher-quality schools. A court might find that the school board would have an obligation to admit several students from the lower-income zone to the higher-quality school, even if it permits the school board to grant preference in admission to the students living closest to the school. Even if it is ultimately unsuccessful, a suit challenging the constitutionality of geographically based school assignments would highlight the problems with such a system and might encourage some school boards to increase opportunities for choice within their districts.

---

211 *Id.* at 565.

212 *See id.*

213 *See, e.g.*, *Brown I*, 347 U.S. 483, 493 (1954) ("[Education] is the very foundation of good citizenship.").

For their part, district courts continuing to rule on the large number of desegregation orders still in place should be mindful of the ways in which *Green* failed to promote long-term racial balance and prevented low-income students from accessing high-quality schools.[214] These courts should encourage school choice plans that have shown progress in building long-term voluntary racial balance as well as choice plans that give a tiebreaker preference to students with socioeconomic disadvantages.[215]

B. *Political Solutions to Fix the Achievement Gap*

In addition to challenging education-access inequality in court, advocates should also continue to pursue political solutions at the local level with their own school boards. Any successful campaign, however, will likely involve only small or incremental changes to neighborhood-zone schemes and will be initiated in a manner that does not significantly disrupt real-estate values for land-owners in wealthy school districts. The more drastic the change, the more likely such voters—and political contributors—are to quash it.

In choosing a realistic plan to equalize school quality, school boards must balance the political influence of its wealthier households with the needs of its lower-income households. They might do so by reserving some level of preference in school selection to families who live closest to each school. In that way, lower-income families would receive some increased access to higher-quality education programs, as space permits. Wealthier households would still retain some of the real-estate value that necessarily accompanies their homes' location in a higher-quality-school zone.

The degree of preference in school selection reserved for households living closest to a particular school would vary depending on how the school board balanced the interests of its wealthier denizens with those of its lower-income households. As school options expand, however, one would hope that greater competition for students would lead to increased quality in all the schools within a district, thus expanding the popularity of school choice throughout all district households and raising education quality for all students, regardless of race or socioeconomic status.[216]

---

214 *See Desegregation Orders in Louisiana: You Mean We Still Have Those?*, COWEN INST. FOR PUB. EDUC. INITIATIVES (Aug. 12, 2010), http://www.coweninstitute.com/public-blog/desegregation-orders-in-louisiana-you-mean-we-still-have-those (explaining that forty out of Louisiana's sixty-nine school districts, for example, are still under desegregation orders).

215 For a discussion of the benefits of this method as well as a legal justification for it, see Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1913-16 (1996).

216 *See supra* note 81 and accompanying text.

CONCLUSION

If the only injustice *Green* sought to remedy was the states' physical barring of students from school buildings on the sole basis of their race, then *Green* succeeded. But if *Green*, like *Brown*, actually intended to guarantee black and other minority students proportional access to *high-quality* public schools, it failed. *Green* erred when it disregarded key principles espoused by *Brown* and when it encouraged geographically mandated school assignments over truly free-choice plans that might have addressed educational quality as well as physical integration. In doing so, *Green* established a trajectory for desegregation case law that, in the long run, has helped prevent racial balance and equal access to education.

While *Parents Involved* recognized one of *Green*'s errors—the failure to view "segregation" in *Brown*'s far broader terms—it did nothing to amend *Green*'s other departures from *Brown* that necessarily follow from *Green*'s strong preference for geographically mandated schools. As a result, desegregation case law virtually mandates geographically based school assignments. This history is problematic because the influence of neighborhood-school quality on real-estate value discourages homeowners in wealthy neighborhoods from supporting political solutions that would expand school choice for lower-income families and, almost certainly, improve educational quality for their own children.

Only when students receive equal access to high-quality education will they receive equal access to schools under *Brown*. Advocates of equal access to high-quality education should seek to challenge geographically mandated school assignments with novel arguments that force courts to consider all of the effects of *Green* and forced school assignments. They might also consider advocating for political solutions that are implemented slowly and in a manner that real-estate owners in wealthy school districts will not view as stripping their homes of value. In the meantime, the courts should do their part by encouraging school-desegregation schemes that address not only *Brown*'s aim for physical integration, but also its more important goal of guaranteeing equal educational opportunity.