MELNICK MISSES *MILLIKEN*

The Crucible of Desegregation: The Uncertain Search for Educational Equity. By R. Shep Melnick.* Chicago: University of Chicago, 2023. Pp. xiv + 310. $105.00 (Cloth), $35.00 (Paper).

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In *The Crucible of Desegregation: The Uncertain Search for Educational Equity*, R. Shep Melnick argues that the Supreme Court was unclear about its goals or intent when it required desegregation of American K-12 schools. He asserts this doctrinal confusion led to confusion and chaos among lower courts attempting to implement desegregation plans. Melnick also suggests that advocates of school integration were also unclear about what desegregation was intended to achieve. Thus, says Melnick, it is hard to evaluate whether the era desegregation and integration was a success.

But Melnick's argument omits important context. The problem with Supreme Court desegregation jurisprudence was not that it lacked a clear vision, but that it was caught between forces who wished to speed integration and forces who wished to slow or halt it. As the Supreme Court tilted toward the latter, it changed what desegregation meant. While the Court decisions that first stopped integration's forward progress and later dismantled integrations plan were unprincipled, their overarching aim was very clear. This created doctrinal confusion when the Court abruptly broke with its other precedents—including some that remained good law in other contexts—especially with the *Milliken v. Bradley* decision in 1974.[2]

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2. 418 U.S. 717 (1974).

The advocates for integration were also clear about what they wanted—metropolitan level school and housing integration. But the politicized Supreme Court decisions made this goal very hard to achieve, especially as a result of *Milliken*. Integration advocates were forced to work with a shrinking box of tools, occasionally leading to strange circumstances.

In supporting his argument that integration was not educationally effective, Melnick unfairly presents the existing evidence on the benefits of racial school integration. Finally, his criticism of school desegregation remedies mistakenly conflates true integration plans with fiscal remedies involving little integration.

I. THE SUPREME COURT CHANGED COURSE ON INTEGRATION

Contrary to Melnick, at particular points in time, the Supreme Court was mostly clear about what it was doing. There were three distinct stages of school desegregation decisions: 1) the expansion of school integration, 1954–74; 2) stopping forward progress on school integration in 1974; and 3) dismantling school integration remedies, 1990–present. We stand on the precipice of a fourth era in which the court may forbid voluntary integration. While in the second and third periods the Supreme Court changed course, ignoring or undermining its recent decisions, its intent at each stage was clear and clear results followed.

A. THE SUPREME COURT EXPANDS INTEGRATION 1954–1974

From 1954–74, the Supreme Court overturned the principle of "separate but equal" and the courts and Congress made huge if incomplete progress toward integrating the nation's schools. Most of the progress was in the South, where clear Jim Crow laws and large county-wide school districts facilitated remedial action.

Melnick is critical of *Brown II*, the Supreme Court's decision a year later on the implementation of *Brown*, that allowed lower courts to proceed "with all deliberate speed."[3] However, *Brown II* empowered trial courts to use their broad and flexible equity powers to shape remedies related to school administration, personnel, physical plant, transportation systems and, most

3. Brown v. Bd. of Education, 349 U.S. 294, 301 (1955).

notably, the power to consider remedies involving the "*revision of school districts and attendance areas into compact units*" and the "*revision of local laws and regulations*" in order to achieve "a system of determining admission to the public schools on a nonracial basis."[4] After the *Milliken* decision, the courts were foreclosed from using many of these powers.

Before the passage of the 1964 Civil Rights Act, the Courts tried but mostly failed to achieve meaningful desegregation plans. This era provided clear evidence that "freedom of choice" plans—in which existing enrollments were preserved but students could opt into another school—did not achieve integration. Few whites chose black schools, and most blacks were often intimidated from exercising the choice to go to white schools.

But contrary to Rosenberg, Klarman and other critics,[5] *Brown* was not evidence of judicial impotence. *Brown*, though slow to produce progress on integration, created the conditions for the civil rights movement. The Supreme Court did not immediately integrate schools but put in place a framework for new advocacy. And over time, the Court tightened its requirements for integration, eventually leading to the era of court-driven large-scale integration in the late 1960s.

Within two years, *Brown* helped facilitate the rise of Martin Luther King in Montgomery, Alabama. King, together with student activists, labor unions and a multiracial faith community, put their lives on the line to persuade the nation to implement *Brown*. Without *Brown*, there would have been no King, and no movement to persuade the Congress, after 100 years of animus and complacency, to give meaning to the Thirteenth, Fourteenth, and Fifteenth Amendments through the appropriate legislation of the 1964, 1965, and 1968 Civil Rights Acts.

The *Green* decision,[6] coming shortly after King's death, was also clear, as was Office of Civil Rights guidance issued in the 1960s. The goal of court-enforced integration was to eliminate segregation "root and branch."[7] *Green* held that the burden of integration could never fairly be placed on back of a single black

4. *Id* at 300–301 (emphasis added).

5. *See*, *e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE : CAN COURTS BRING ABOUT SOCIAL CHANGE? (3rd ed. 2023); *see also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 360 (2004).

6. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968).

7. *Id.* at 437–38.

child or that child's parent. The burden was on the discriminatory district. What did integration mean? First, it means there would be no all-white or all-black schools in an integrated district. To be effective integration had to be comprehensive: unless all white schools were incorporated, flight would undermine integration quickly. *Green* also required that courses and extracurricular offering, physical facilities and transportation be equal and that school faculties be integrated. Put simply, there could no longer be a "dual" school system, one for blacks and one for whites, but rather a "unitary system" was all school were "just schools" alike.[8]

Swann[9] is a muddled opinion in many ways, not least because newly appointed Chief Justice Burger was being intensively lobbied by the President himself during the Court's deliberation. Nevertheless, *Swann* upheld a very strong near-metropolitan integration remedy. It worked so well that, after the federal court withdrew its jurisdiction, the elected school board valiantly tried to keep it in place in the face of a hostile federal judge who had fought against the initial order as an aggrieved parent.

During this early period, integration substantially increased.

Social science and opinion polling consistently show the vast majority of black and Latino Americans do not want to attend segregated schools and do not want to live in segregated neighborhoods. Segregation in schools and housing is not caused primarily by individual racial choices, but by at least seven forms of well-documented illegal public and private discrimination: rampant mortgage lending discrimination to blacks and Latinos at all levels of income, steering by real estate agents, the placement of subsidized housing predominantly in economically segregated neighborhoods, exclusionary zoning, segregated boundary drawing, and biased treatment by sellers and rental agents. But Melnick, a political scientist, seems to fully accept the distinction between de facto and de jure discrimination, agreeing with the Supreme Court that the causes behind racial segregation in schools and housing are, as Justices Stewart said, "unknown and perhaps unknowable."[10]

As Douglas Massey and Nancy Denton describe the American melting pot, Italians, Jews, and the Irish, on arriving in

8. *Id.* at 441–42.
9. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
10. Milliken v. Bradley, 418 U.S. 717, 756 n.2 (1974) (Stewart, J., concurring).

America, for a time experienced the highest levels of isolation/segregation for white ethic groups in the later nineteenth and early twentieth century.[11] Yet this segregation was minor compared to the experience of blacks and more recently Latinos. Within a decade or two segregation for these white ethnic groups completely disappeared, and their residential and educational isolation was completely ended. To Melnick and the present majority on the Supreme Court, the goal of similarly eliminating the "isolation" of blacks and Latinos—to allow them like the Irish, Italians and Jews to move freely in American housing market and disappear in the mainstream of American educational and economic opportunity—is an absurd game of "racial balancing" improperly engrafted on the equal protection clause of the constitution, which according to Melnick, from its adoption has prohibited such "benign racial classifications."[12]

B. THE SUPREME COURT STOPS FORWARD PROGRESS ON INTEGRATION: THE *MILLIKEN* DECISION 1974

Melnick spends several chapters on the Supreme Court's desegregation decisions and doctrine. He is particularly fixated on the doctrinal inconsistencies of the early and later Dayton and Columbus cases. However, he spends little time on *Milliken v. Bradley*, the case most scholars believe is the court's most significant desegregation case after *Brown* itself. *Milliken,* by shielding the suburbs from desegregation remedies, made racial integration in large multi-district metropolitan areas—in other words, most of America—impossible. *Milliken* changed the course of American history.

In 1968, Richard Nixon promised to protect the suburbs by appointing judges and pledged to stop integration's forward progress.

After appointing Warren Burger, a tough-on-crime politico, Nixon's next two attempted appointments to the Supreme Court were southern segregationists. After *Brown*, Judge Clement Haynesworth upheld Virginia's massive resistance, which involved closing state public schools and creating in their place

11. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 32–33, 48–49 (1993).

12. *Cf.* Fisher v. Univ. Tex. Austin, 570 U.S. 297, 330 (2013) (Scalia, J., concurring) (on the required strict scrutiny of even "'benign' racial classifications").

private segregation academies.[13] Harold Carswell gave speeches endorsing white supremacy[14] and in 1956, two years before his appointment to the federal district court, helped privatize and segregate the public golf course where he golfed, which had been integrated under *Brown*.[15]

Reeling from these failed nominations, Nixon appointed Warren Burger's friend, Harry Blackmun, who after *Milliken* would move to support the principles of integration. In fact, many of the doctrinal changes in the *Pennick*[16] and *Brinkman*[17] cases criticized by Melnick involve Blackmun changing course on issues of desegregation after the implication of the *Milliken* decision became clear.

That Burger and Blackmun were part of the unanimous *Swann* decision enraged Nixon.[18] Nixon had directly lobbied Burger while the case was pending and "lit into him" on the question of busing.[19] After the case was decided, Nixon called Burger to the Oval for a recorded dressing down, telling him that busing just drives the public "up the damn wall."[20] Burger back-peddled, telling the president "[t]hat *Swann* case was thoroughly misrepresented by the press. . . . They wanted it to be just a busing decision. . . . It was the first time the court put limits on busing."[21]

After *Swann*, Nixon and his Attorney General John Mitchell (who was soon convicted of perjury, obstruction of justice and conspiracy and disbarred) agreed that no one would be appointed

13. *See* Griffin v. Bd. of Supervisors of Prince Edward Cty., 322 F.2d 332 (4th Cir. 1963).

14. Associated Press, *Carswell Disavows '48 Speech Backing White Supremacy*, N.Y. TIMES (Jan. 22, 1970), https://www.nytimes.com/1970/01/22/archives/carswell-disavows-48-speech-backing-white-supremacy-judge-disavows.html.

15. Fred Graham, *Carswell Denies He Tried To Balk Club's Integration*, N.Y. TIMES (Jan. 28, 1970), https://www.nytimes.com/1970/01/28/archives/carswell-denies-he-tried-to-balk-clubs-intergration-i-am-not-a.html.

16. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

17. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

18. David S. Tatel, *Judicial Methodology: School Desegregation and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1100 (2004).

19. Audio tape: Conversation between Richard Nixon, Harry Dent, John Mitchell and others, Oval Office of the White House, Washington, D.C. (April 21, 1971) (Nat'l Archives Nixon White House Tape Conversation 484–2).

20. Audio tape: Conversation between Richard Nixon and Warren Burger, Oval Office of the White House, Washington, D.C. (June 14, 1972) (Nat'l Archives Nixon White House Tape Conversation 733–10).

21. *Id.*; J. HARVIE WILKINSON, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL DESEGREGATION: 1954–1978, at 149 (1978).

to the Supreme Court unless that person made a clear commitment to oppose busing. On an audiotape in the Oval Office, Nixon told Mitchell:

> I want you to have a specific talk with whatever man we consider and I have to have an absolute commitment from him on busing and integration. I really have to. All right? Tell him that we totally respect his right to do otherwise, but if he believes otherwise, I will not appoint him to the court.[22]

Richard Nixon's next two appointments were Lewis Powell and William Rehnquist.

Of the two, Powell, more subtle and strategic, was not only central to stopping busing, but to reshaping the meaning of the Fourteenth Amendment to presumptively prohibit benign racial classification. Powell planted the seed of a constitutional revolution that would ultimately prohibit affirmative action, threaten voluntary integration, and dramatically limit the reach of the great civil rights acts. This effort was part of Powell's effective long-game strategy to move the nation and the court far to the right through the massive corporate funding of conservative think tanks. Groups like the Heritage Foundation, Cato and the Federalist Society reshaped Republican politics and likely moved the court further to the right that even Powell might have anticipated.[23]

In *Brown v. Board of Education*, Powell's law firm represented the Prince Edward County School District, which sought to maintain its segregated schools.[24] He had been the Chair of the Richmond School Board during *Brown* and until 1960. A

22. Audio tape: Conversation Between Richard Nixon and John Mitchell, Oval Office of the White House, Washington, D.C. (Sept. 18, 1971) (Nat'l Archives Nixon White House Tape Conversation 576-6).

23. Powell was the author of a profoundly influential memo written in August of 1971 to the U.S. Chamber of Commerce, entitled "Attack on the American Free Enterprise System, an anti-communist and anti-New Deal Blue-Print for conservative business interests to retake America," available at https://scholarlycommons.law.wlu.edu/powellmemo/. The memo called for corporate America to become more aggressive in molding society's thinking about business, government, politics, and law in the U.S., though the creation of conservative think tanks to legitimize a major constitutional restructuring. Powell advocated "constant surveillance" of textbook and television content, as well as a purge of left-wing elements Powell urged conservatives to undertake a sustained media-outreach program, including funding neoliberal scholars, publishing books, papers, popular magazines, and scholarly journals, and influencing public opinion.

24. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY (2001).

federal district court found unconstitutional racial discrimination on the part of the Richmond School Board when Lewis Powell was its Chair from 1952 to 1961; and on the part of the Virginia Board of Education, when he was Member from 1961 to 1969 and its President from 1968 to 1969. During his tenure as Chair in Richmond, the Board allowed the admission of only two of Richmond's 23,000 black children to white schools.[25] Powell had also filed a brief in *Swann* opposing the use of busing to achieve integration.

William Rehnquist, less subtle than Powell, was no less a single-minded opponent of school desegregation. As a law clerk to U.S. Supreme Court Justice Robert Jackson, he wrote a memorandum urging the affirmance of *Plessy v. Ferguson* in the *Brown* case.[26] Rehnquist had actively and publicly opposed ending discrimination in public accommodations in Phoenix, Arizona before and after the 1964 Civil Rights Act,[27] and had been cited repeatedly for harassing non-white citizens attempting to vote in Arizona.[28] As the head of the Office of Legal Counsel in Nixon's Justice Department, Rehnquist had drafted an anti-busing constitutional amendment.[29] In his first seventeen years on the Court, Justice Rehnquist never voted to uphold a desegregation order.[30] During the *Penick* case, Rehnquist's dissent describe civil rights goals as "integration *uber alles*."[31]

In 1974, the same day the Supreme Court unanimously (with Rehnquist not participating) ordered Nixon to release the White

25. JEFFRIES, *supra* note 24, at 140–141.

26. *See* Adam Liptak, *The Memo That Rehnquist Wrote and Had to Disown*, N.Y. TIMES, (Sept. 11, 2005), https://www.nytimes.com/2005/09/11/weekinreview/the-memo-that-rehnquist-wrote-and-had-to-disown.html; *see also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 605–09 (Special ed., 1994); JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST (2012); JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE APPOINTMENT THAT DEFINED THE SUPREME COURT 278–84 (2001). These three accounts provide persuasive evidence that the memo in question represented Rehnquist's own opinion, not Justice Jackson's, as Rehnquist claimed in his confirmation hearings.

27. Liptak, *supra* note 26.

28. DEAN, *supra* note 26.

29. JENKINS, *supra* note 26.

30. Sue Davis, *Justice Rehnquist's Equal Protection Clause: An Interim Analysis*, 63 U. NEB. L. REV. 288, 308 (1984).

31. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 513 (1979) (Rehnquist, J., dissenting).

House tapes[32]—and two weeks before Nixon resigned in disgrace—his Supreme Court issued *Milliken v. Bradley*.[33] *Milliken* created new law, in a manner that violated multiple streams of precedent, and ignored clear factual findings made by the District Court below—findings that satisfied its own new requirement to involve the suburbs in a remedy. While unprincipled, *Milliken's* meaning was totally clear. The suburbs were safe and whites could flee there and not have to attend school with poor blacks. After *Milliken*, any substantive effort to integrate American schools was over.

Melnick spends two chapters probing and parsing relatively minor cases for doctrinal inconsistencies. That Melnick barely discusses *Milliken* is a major and telling oversight. What he does say about the case is starkly inaccurate.

For example, Melnick writes:

1) "Chief Justice Burger's majority opinion stressed that 'the scope of the remedy is determined by the nature of the constitutional violation': the constitutional right of black children . . . 'is to attend a unitary school system *in that district*'" (p. 73).
2) "No one [in *Milliken*] claimed that Detroit's boundaries had been drawn in order to increase school segregation. Rather, the evidence at the trial focused on the way in which government action had contributed to residential segregation *within* Detroit, and the Detroit school district's failure to mitigate the consequences of that residential segregation" (p. 135).
3) "*Milliken v. Bradley* . . . rejected a lower court order consolidating the Detroit school district with fifty-three surrounding suburban districts and requiring the reassignment of students to eliminate majority-black schools" (p. 73).

But the context of *Milliken* is more complex than this, and more confused. *Milliken* signals the beginning of the Supreme Court's turn against integration, and that abrupt shift produces legal incoherency.

Contrary to Melnick's assertion, the remedial portion of Burger's opinion involving substantive rights and remedies had

32. United States v. Nixon, 418 U.S. 683 (1974).
33. Milliken v. Bradley, 418 U.S. 717 (1974).

only four votes. Justice Stewart's controlling opinion stated clearly it was not about the substantive equal protection rights of a black children, but rather a ruling about the limits that state rights placed of the remedial jurisdiction of a federal court. Stewart's test is as follows: "Before the boundaries of separate and autonomous school districts may be set aside by . . . *by imposing a cross-district remedy*, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district."[34] The remedy would also be available if the state had contributed to segregation by drawing or redrawing school district lines.[35]

Melnick is plain wrong when he writes that "no one claimed that Detroit's boundaries had been drawn to increase racial segregation" (p. 135). In *Milliken*, the trial court, upheld by a lengthy Sixth Circuit opinion, held that the Michigan Legislature, with the intent to segregate, had by statute repealed Detroit's gradual integration plan and *re-boundaried the Detroit school into eight legislative created sub-districts*, four black and four white, which would be more locally controlled and more segregated.[36] At the same time, the court noted that the legislature reduced bus transportation funds to the Detroit district, treating it differently from all other Michigan school districts. The state's illegal rebounding erased a gradual plan that was itself was found to be a constitutionally inadequate response to decades of egregious intentional racial gerrymandering and school site construction by the Detroit school district, actions in which the state of Michigan was fully complicit.

The district court found that the state of Michigan had not only drawn all the school districts but was actively forcing school district consolidation, over the opposition of local governments from across the state of Michigan. Between 1968 and 1972, the period of the *Milliken* litigation, the state consolidated more than 130 school districts. Twelve of these consolidations involved suburbs in the same county as Detroit. The state excluded Detroit from being part of any of these consolidations.[37] The *Milliken* trial

34. *Id*. at 744–45.

35. *Id.*

36. Act of July 7, 1970, 1970 Mich. Pub. Acts 48 (1970), Bradley v. Milliken 433 F.2d 897, 904–905 (6th Cir. 1970).

37. Bradley v. Milliken, 345 F. Supp. 914, 933 (E.D. Mich. 1972); Milliken v. Bradley, 484 F.2d 215, 247–48 (6th Cir. 1973).

court specifically found that racially diverse suburbs almost always segregated their schools, and the state was complicit in that segregation, too.[38]

The year before the trial court decided *Milliken*, the Pontiac School district within the Detroit metropolitan area—which included the suburban city of Pontiac and many of the suburban municipalities surrounding Pontiac—was found to be intentionally segregated and a city-suburban remedy already ordered.[39] Pontiac's city-suburban remedial area abutted—it bounded—the remedial area of the *Milliken* draft plan. In effect, the *Milliken* Detroit remedy was limited because it did not want to interfere with an already-established city-suburban remedy in the Detroit metropolitan area.

The trial court also found that the Ferndale district illegally carved out an all-black Carver elementary school district within its boundaries. Until 1960, all the black Carver/Ferndale students were bussed across district lines past closer white suburban and white Detroit schools, to attend all black schools in Detroit. After 1960, when the Carver district was annexed by the otherwise-white Oakdale suburban district, Oakdale formally continued sending its new black students to Detroit. Neither Ferndale, Oakdale, nor any of the other white districts close than Detroit, nor any white high schools in Detroit that were closer, would accept Carver's black students.[40] The trial court found that the transfer of these suburban black students could not have occurred unless specifically approved by the State Board of Education.[41] The trial court found that many educational services were provided on interdistrict and metropolitan basis and that hundreds of students commonly crossed district lines at attend school or receive educational services.[42] This evidence arguably met Stewart's test for an interdistrict remedy in *Milliken*.

More importantly, the district court made clear factual finding that the state had, by purposeful discrimination, caused

38. *Milliken*, 345 F. Supp. at 933 (the court found black children often remain isolated in predominantly black schools in the few suburban districts with any number of black students).

39. Davis v. Sch. Dist., 309 F. Supp. 734, 744–45 (E.D. Mich. 1970).

40. *Milliken*, 345. F. Supp. at 935, *Milliken*, 484 F.2d at 238; *see also* Milliken v. Bradley, 418 U.S. 717, 771 (1974) (White, J., dissenting); *id.* at 792 (Marshall, J., dissenting).

41. *Milliken*, 484. F.2d at 238.

42. *Milliken*, 345 F. Supp. at 935.

housing market segregation that created segregated schools, unambiguously meeting the requirement of the "housing segregation" component of Stewart's test. The trial court held that as "[t]he white population of the city declined and, in the suburbs grew; the black population in the city grew, and largely, was contained therein by force of public and private racial discrimination at all levels."[43] The Supreme Court ignored this finding. Both Powell and Rehnquists law clerks have drawn attention to this willful blindness.[44]

Melnick is just wrong again when he asserts the trial court in Milliken ordered the consolidation of 54 suburban districts. The trial court went out of its way to make clear it was not consolidating any districts. There is nothing in any of the opinions even proposing such a consolidation.

Contrary to Melnick's assertion, the trial judge in *Milliken* had not issued any order requiring the elimination of racial imbalance in the suburban districts. The trial court had only ordered the appointment of a panel of affected parties, including the plaintiffs, the Detroit school district, the suburban intervenors, and, of course, the state, to devise a plan that complied with the law as the Supreme Court had delineated it in *Green* and *Swann*.

Before the group could devise a *draft* plan, the Sixth Circuit vacated this planning order and the specifically vacated the judge's determination of the proper remedial area. The appeals court also forbid any further remedial planning before the legislature was given a chance to voluntarily respond to the court's finding of segregation. If the legislature did not respond, the Sixth Circuit required the trial court to hear from virtually every suburb who believed they were affected before he could issue any further remedial orders to plan for a plan. The only ruling that was left to review was the Sixth Circuit conclusion that any remedial order had to include some form of cooperation with the suburbs.

43. *Id.* at 932 (emphasis added).

44. Justice Powell's former law clerk, Judge (and former professor) J. Harvie Wilkinson, has written, "In failing to remand to district court for findings on past housing practices or even to explain their relevance, the Supreme Court failed to address the foremost cause of metropolitan segregation; precisely what *Milliken v. Bradley* purported to be about." *See* WILKINSON, *supra* note 21. James Ryan, Justice Rehnquist's former clerk, now President of the University of Virginia, calls the Court's failure to address the housing findings "willful blindness." JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: TWO SCHOOLS AND THE STORY OF EDUCATIONAL OPPORTUNITY IN AMERICA 102–03 (2010).

Before the legislature could prepare its response, before the trial court could hear from any suburb that had any opinion about the case, the Supreme Court granted *certiorari* and prohibited a suburban remedy that had not yet even been proposed in draft form.

Thus, rather than overruling a court order that had consolidated 54 suburb districts and ordered the integration of all the schools in this new district, as Melnick claims, the actual question before the court was whether intact suburban districts and the state of Michigan could be required to "cooperate" is some manner to protect the Fourteenth Amendment rights of black students. As Paul Dimond, a lawyer in the case, put it, the issue presented in *Milliken* is whether the Fourteenth Amendment could require an intact suburban district—in some cases a district that was sending their black children across district lines to black schools in Detroit—to admit one black child from Detroit to attend its schools to vindicate the rights of that black child to an education free of segregation.[45]

While Melnick seems to allow that *Milliken* ignored or overruled the court's recent decisions in *Swann*, *Keyes*,[46] and *Emporia*,[47] he fails to note that the *Milliken* also shattered a bedrock principle of federal and state black letter constitutional law: that local government, including school districts, were creatures of state law. As the Supreme Court held in *Hunter v. Pittsburgh*,[48] and as Justice Rehnquist himself wrote a few years after *Milliken*, school districts were "mere administrative conveniences."[49]

The Supreme Court had repeatedly and unambiguously held that local governments have no independent constitutional status or identity. On this point, before and after *Milliken*, there has been no ambiguity. Yet Melnick comfortably adopts the new constitutional status of suburban school boundaries and quotes

45. PAUL R. DIMOND, BEYOND BUSING, REFLECTION ON URBAN SEGREGATION, THE COURTS, AND EQUAL OPPORTUNITY 403 (2005).

46. Keyes v. Sch. Dist. No. 1, 396 U.S. 1215 (1969).

47. Wright v. City of Emporia, 407 U.S. 451 (1972).

48. Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907) ("The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.").

49. Holt v. City Club of Tuscaloosa, 439 U.S. 60 (1978).

the principle repeatedly. He never mentions the major doctrinal conflict represented by *Hunter* and its progeny, even though the conflict occupies most of the pages of the *Milliken* opinion itself.[50]

The state-creature doctrine was bolstered by the fact that the Michigan constitution gave the state a duty to provide universal education. Pursuant to this duty the lower courts and dissents noted that the state drew suburban school district boundaries, and in fact had been constantly revising and redrawing and consolidating suburban districts in the same urban county as Detroit, while excluding Detroit from the consolidations, and did so during the entire period of the *Milliken* litigation.

The state funded at least one third of the budgets of the schools in the court's remedial area. In eleven of the districts, state aid was more than half of the budgets; in eight more, it exceeded 40 percent.[51] Without such funding, many of these districts—perhaps all these districts—would not exist in their present form. In addition, the state had to approve and provide bonding support for every one of hundreds of new suburban school buildings that directly and foreseeably facilitated white flight to segregated suburban school districts.[52] Like the suburban districts that would not exist had the state not drawn and financed them, a large share of the new buildings, filled with white children whose parents did not want them to go to school with black children, would never have been built without state approval and money.

If the Supreme Court's decisions in *Green, Swann*, and *Keyes* were not sufficient in establishing intent in terms of school construction decisions, Michigan law independently required that the state and all the suburban district "must consider the factor of racial balance . . . in making decisions about selection of new school sites. . . ."[53]

In the same way the construction policies of the Detroit school district provided evidence of intentional segregation in Detroit's schools, the state approval and bonding of white flight schools in the suburbs was evidence of intentional discrimination,

50. Running through Melnick's narrative is the political impossibility of *Milliken* coming out any other way. If he believes this, he should just write a book about politics and avoid all the ersatz constitutionalism. If he purports to be a constitutional scholar, one cannot discuss *Milliken* in any serious legal way without dealing with *Hunter*.

51. Milliken v. Bradley, 484 F.2d 215, 248 (6th Cir. 1973).

52. Bradley v. Milliken, 338 F. Supp. 582, 593 (E.D. Mich. 1971).

53. *Milliken*, 484 F.2d at 235.

using reasoning from the *Keyes* decision, decided only one year earlier by the Supreme Court. The evidence of segregative behavior by the state, by the Detroit school district, and by the Pontiac, Ferndale and Oakdale suburban districts also clearly provided evidence of pervasive segregative behavior in the Detroit suburbs.

Further supporting the state creature doctrine, the courts below found the state pervasively regulated all aspects of school curriculum in Detroit's suburban school districts, including the subject matter taught, the length of classes, the books used in class, and even the credentialing and hiring and salary of every single superintendent, principal, teacher, and janitor employed in every suburban district. The trial court noted that the state often withheld funds to districts that did not comply with the letter of state educational requirements. The records show the state's willingness to withhold funds even for trivial deviations.

While Melnick spends pages exploring doctrinal inconsistencies in the Dayton and Columbus school cases, he never attempts to square Stewart's limits on the remedial jurisdiction of a federal court in *Milliken* with the Supreme Court's remedy redrawing Alabama's state senate districts in *Reynolds v. Sims*.[54]

In *Reynolds*, the Alabama legislature redistricted its lower house to comply with *Westbury v. Sanders*'s "one person, one vote" principle. But it apportioned the state senate to be representative of the counties, which it argued were the fundamental local government units for schools and urban governance in Alabama. In this effort, Alabama noted a structural parallel to the federal constitution, with House of Representative being apportioned by population and the Senate by state.

In deciding *Reynolds*, the Supreme Court agreed, seemingly in line with *Milliken*, that the goal of providing local government with a seat at the table in state government was both valid and rational. It also declared that the state senate district districts were not drawn with discriminatory purpose, which is more than could be said in *Milliken*. Nevertheless, in *Reynolds* that Court found the counties, as creatures of the state law, did not have sufficient constitutional status to limit—in any respect—the remedial jurisdiction of a federal court fulfilling its duty to protect the

54. 377 U.S. 533 (1964).

fundamental right to vote.[55] How, we might ask Melnick, could the Supreme Court utterly erase state-drawn political boundaries designed to protect rational local control interests, while simultaneously holding that the constitutional status of local school suburban school districts prevents a federal court from modifying boundaries in order to vindicate a child's rights?

Nor does Melnick address the salience of the Southeastern Michigan Council of Governments (SEMCOG) to the remedy, which was clearly addressed by the courts and Justice Marshall's dissent. This opinion repeatedly noted that the federal government in 1962 had required the state of Michigan, in cooperation with all the local units of government in metropolitan Detroit—including the cities, counties and school districts—to create a new metropolitan level of local government to decide where federal and state limited access highways were to be built.[56] Neither the state itself, nor any city or county, could make highway planning decisions that SEMCOG did not first approve.

In 1967, the state of Michigan named this new federally required local government SEMCOG (the Southern Michigan Council of Governments) and gave it the power to plan and approve all the limited access highways and undertake all regional planning activities in the Detroit metropolitan area. Detroit, Pontiac, all of Detroit's suburbs, and suburban school districts were all eligible SEMCOG members. Similarly, the trial court noted that Michigan had created a regional agency, Detroit Water and Sewerage Department (DWSD), to provide all the major sewer infrastructure for the Detroit metropolitan area. Every urban scholar knows that such roads and sewers are the necessary skeleton of all new suburban cities. The statutes creating SEMCOG and DWSD, giving them the power to profoundly, if not completely, shape the future development of the Detroit region and its suburbs, had already recognized and declared, as a matter of law, the interdependency of all the units of government in the Detroit metropolitan area.

55. In *Reynolds*, the Court held that "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Id*. at 575.

56. Bradley v. Milliken, 345 F. Supp. 914, 935 (E.D. Mich. 1972); *see also* Milliken v. Bradley, 418 U.S. 717, 804 (1974) (Marshall, J., dissenting).

If the new white flight school districts could not exist without state operating and infrastructure, neither could the new white flight cities exist without the federal and state highways and sewers, infrastructure paid for in part by the taxpayers in Detroit. If the Congress could force the state to create, over state and local opposition, a new level of local government with the power to shape the future urban form of Detroit suburban development, why, we might ask Melnick, could not a federal court require separate intact school districts—created, financed, and controlled by the state in most ways—to cooperate by accepting one black child to attend school within their constantly changing state-created boundaries?

C. THE SUPREME COURT DISMANTLES INTEGRATION PLANS, 1990–PRESENT

In the early 1990s, the court again changed school desegregation law, this time to dismantle court-ordered desegregation plans. Before this date, once a constitutional violation was found, the law required school districts to eliminate the vestiges of segregation root and branch, per *Green*. In *Board of Education of Oklahoma v. Dowell* and *Freeman v. Pitts*, the Court decided that, after a number of years (ten or so) of court supervision, even if the districts had never complied with the requirement of *Green*, their constitutional violation could be erased.[57] Under *Dowell* and *Pitts*, this duty was abruptly preempted by a new higher duty to return the districts as rapidly as possible to local control. Suddenly, all sorts of practices prohibited by *Swann* and the Dayton and Columbus cases were legal. All that was necessary was a brief hearing where a judge determined that the districts had tried their best. What school districts' "best efforts" meant was unclear. On the other hand, the presumption of time-limited court supervision was clear.

While these decisions overruled recent precedent almost without mentioning that precedent, their intention, their message and effect, were clear. After the 1990s, schools that had been integrated under court order became segregated again.

57. Bd. of Educ. v. Dowell, 498 U.S. 237 (1991); Freeman v. Pitts, 503 U.S. 467 (1992).

III. THE ADVOCATES FOR INTEGRATION WERE ALSO CLEAR ABOUT WHAT THEY WANTED—METROPOLITAN LEVEL SCHOOL AND HOUSING INTEGRATION

Based on his view that the Supreme Court's integration jurisprudence was confusing, Melnick asserts that the advocates of integration did not know what they wanted. In response, one need only read the district court opinions in the Richmond and Detroit case to realize that everyone involved understood that city-only desegregation would be at best temporary and perhaps even increase the already high levels of white flight every diverse American central city was already experiencing with or without busing plans.[58] In Richmond and Detroit, plaintiffs clearly stated their goal of metropolitan-wide integration. That this goal was hard to achieve in law did not diminish its clarity. These goals should not be confused with those of other advocates who sought fiscal-adequacy remedies or other forms of education reform.

In a 1975 study, the famous educational researcher James Coleman found that single-district school desegregation plans increased white flight, but he did not find the same loss in countywide districts—in fact, Coleman himself noted that metropolitan-wide desegregation plans experienced little, if any, white flight.[59]

Melnick criticizes the failures of city-only desegregation cases, like the one in Boston,[60] but fails to note that they were forced to operate under the severe constraints of *Milliken*. Rather than create a stable plan that included affluent white neighborhoods and strong suburban schools, Judge Garrity could only mix downwardly mobile urban whites and poor blacks with the boundaries of a collapsing dysfunctional urban district. Whenever two poor or downwardly mobile distinct racial groups are suddenly brought together—whether under court order or simply due to immigration that places poor blacks and Latinos in the same schools—the results are most often highly contentious. When the poor students are mixed into stable middle-class

58. Bradley v. Sch. Bd. of Richmond, 317 F. Supp. 555 (E.D. Va. 1970); Bradley v. Milliken, 338 F. Supp 582 (E.D. Mich. 1971).

59. JAMES D. COLEMAN, SARA D. KELLY & JOHN A. MORE, TRENDS IN SCHOOL SEGREGATION, 1968–73, AT 64 (1975) [hereinafter COLEMAN ET AL., TRENDS]. For a discussion of the impact of this study, *see* Gary Orfield, *Research, Politics and the Anti-Busing Debate*, 42 L. & CONTEMP. PROBS. 41 (1978).

60. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974).

schools with strong resources, things are more likely to work smoothly. The fierce white resistance in Boston was fueled by the resentment of Boston's poor whites that more affluent whites in the suburbs were protected by *Milliken*.

The key to a successful stable integration program is improving schools for not only poor black or Latinos but also for working class whites. The good metropolitan plans did this. Sadly, Melnick spends no time on these plans that worked, such as the 16 near-metropolitan-level desegregation initiatives that generally were stable, successful, and experienced much less white backlash.

Mathew Lassiter's story of the successful integration of Charlotte-Mecklenburg represents a successful metropolitan plan that not only lifted the boat of blacks, but also provided better schools, curriculum, and facility for most working-class whites in the larger metropolitan area.[61] Melnick's highly critical narrative about Charlotte derives, like his review of the benefits of integration, from the account of the expert witness used to dismantle Charlotte's integration plan, David Armor. Melnick ignores strong academic work by Davison Douglas and Roslyn Mickelson, and others, whose book-length treatments paint a brighter picture of success and directly challenge the expert witness assessments upon which Melnick relies.[62]

By 1992, it was clear that metropolitan areas that implemented large-scale mandatory geographic plans, like Indianapolis, Indiana; Broward, Florida; Hillsboro, Ohio; Clark County, Nevada; Nashville, Tennessee; and Duval, Florida, had the least white flight of any large racially diverse U.S. school districts.[63] From 1968 to 1988, three of the top six large U.S school districts (and more than half of the top twenty) with the most stable white enrollment had operated mandatory metropolitan-level busing since the early 1970s; the others either were white and growing fast or almost all non-white.[64] On the other hand, from

61. Matthew D. Lassiter, *"Socioeconomic Integration" in the Suburbs*, in THE NEW SUBURBAN HISTORY 120 (Kevin M. Kruse and Thomas J. Sugrue, eds., 2006).

62. *See*, *e.g.*, DAVISON M. DOUGLAS, READING, WRITING, & RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS (1995); YESTERDAY, TODAY, AND TOMORROW: SCHOOL DESEGREGATION AND RESEGREGATION IN CHARLOTTE (Roslyn Arlin Mickelson, Stephen Samuel Smith & Amy Hawn Nelson eds., 2015).

63. GARY ORFIELD & FRANKLIN MONFORT, STATUS OF SCHOOL DESEGREGATION: THE NEXT GENERATION, 22 (1992).

64. GARY ORFIELD & FRANKLIN MONFORT, NAT'L SCH. BD. ASS'N., RACIAL

1968 to 1988, the largest decline in white enrollment in large U.S. school districts occurred in districts with no desegregation plans.[65]

By the 1990s, regional integration plans in Raleigh-Wake County and Charlotte-Mecklenburg (desegregated by *Swann*) actually began to experience a growing proportion of white students or "reverse white flight."[66] Wake County had integrated voluntarily and without a court order and Charlotte was released from its court order in the early 1990s. In both areas, pro-metropolitan integration forces won significant victories in elections in 1995 against neighborhood-school proponents, and voters decided to keep metropolitan desegregation plan and opposed efforts to return to neighborhood schools.[67]

The availability of near-metropolitan options in these areas increased the chances that the resulting integration would be long-lasting. The inclusion of most of white suburbia in the plans meant that all schools in large areas, though integrated, would be majority white and middle-class. This decreased the chances that white flight would undermine integration efforts. Essentially, whites had nowhere to flee except private schools—a prohibitively expensive option for most middle-class households. In the end, it is important to note that none of the plans were fully metropolitan and thus, as suburban growth occurred out their jurisdiction, they become less effective.

Analysis of the regional plans also indicated that they were associated with more integrated neighborhoods and that integrated neighborhoods were much more likely to be stably integrated than integrated neighborhoods without metropolitan integration plans.

CHANGE AND DESEGREGATION IN LARGE SCHOOL DISTRICTS: TRENDS THROUGH THE 1986–1987 SCHOOL YEAR, 9–10 (1988).

65. *See* ORFIELD, ET AL., *supra* note 63.

66. Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825 (1996).

67. Gary Orfield, *Metropolitan School Desegregation: Impacts on a Metropolitan Society*, *in* PURSUIT OF A DREAM DEFERRED 133 (John A. Powell, Gavin Kearney & Vina Kay eds., 2001).

III. MELNICK UNFAIRLY PRESENTS THE EXISTING EVIDENCE ON THE BENEFITS OF RACIAL SCHOOL INTEGRATION.

Melnik argues that there is mixed evidence on the benefits of racial integration in schools. He concentrates mostly on studies concerning student test scores. He fails to include the evidence about network benefits, like increased graduation rates, post-secondary attendance, later life earnings and improved interracial understanding, where the benefits of integration are very well established.

To support his position that there is growing doubt about the benefits of integration, Melnick summarizes the finding of a scholarly amicus brief collecting the evidence on integration in the case of *Parents Involved in Community Schools v. Seattle School District No. 1*.[68] Melnick summarizes the brief "as declaring racially desegregated schools are not an educational or social panacea . . . and creating racially balanced schools is not enough."

Melnick's summary of these briefs, like his summary of *Milliken*, bears little relationship to the underlying documents. In *Parents Involved*, the briefs attesting to the benefits of integration ("pro-integration briefs") were submitted by the (1) American Educational Research Association (AERA), (2) the American Psychological Association (APA), and (3) 553 Social Scientists. Briefs disputing the benefits of integration ("anti-integration briefs") were filed by (1) Drs. David Armor, Abigail and Stephen Thernstrom, and (2) Dr. John Murphy, Christine Rossell, and Herbert Walberg. The AERA and APA briefs presented a consensus statement on behalf of thousands of tenured professors and credentialed researchers in the two academic fields best situated to evaluate integration's effects. In addition, the 553 Social Scientists brief was a statement of the nation's most cited scholars in these areas. On the other side were six experts—only two whom had published significant peer-reviewed studies on the topic. Melnick's summary of the evidence before the court much more closely tracks the briefs of the expert witnesses opposed to desegregation.

68. Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

A. THE BENEFITS OF INTEGRATION

The pro-integration briefs cited scholarly evidence on the benefits of school integration. The evidence documented the benefits of integrated schools, including higher test scores, better high school graduation rates, more years of education and higher incomes. Contrary to Melnick's characterization, the research highlighted in these brief shows that integrated schools boost academic achievement (defined as test scores, years of schooling and degree attainment, and expectations), improve opportunities for students of color, and generate valuable social and economic benefits, including better jobs with better benefits and greater ease living and working in diverse environments in the future. Integrated schools also enhance the cultural competence of white students and prepare them for a more diverse workplace and society.

Attending racially integrated schools and classrooms improves the academic achievement of minority students (measured by test scores).[69] Since the research also shows that integrated schools do not lower test scores for white students, racially integrated schools are one of the very few strategies demonstrated to ease one of the most difficult public policy problems of our time—the racial achievement gap. Other academic benefits for minority students include completing more years of education, and specifically much higher graduation rates and much higher post-secondary and college attendance rates. Long-term economic benefits include a tendency to choose more lucrative occupations, i.e., good jobs with benefits, in which minorities are historically underrepresented.[70]

69. Roslyn Arlin Mickelson, *Segregation and the SAT*, 67 OHIO ST. L.J. 157 (2006) [hereinafter Mickelson, *Segregation*]; Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513 (2003); Kathryn Borman et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 AM. ED. RES. J. 605 (2004); Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TEACHERS COLLEGE REC. 1999 (2005); Geoffrey D. Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TEACHERS COLLEGE REC. 1201 (2010).

70. Michael A. Boozer et al., *Race and School Quality Since* Brown v. Board of Education, 1992 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 269 (1992); R. L. CRAIN & J. STRAUSS, SCHOOL DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT (Center for Social Organization of Schools, 1985); Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, *in* DIVERSITY

Integrated schools also generate long-term social benefits for students. Students who experience interracial contact in integrated school settings are more likely to live, work, and attend college in more integrated settings.[71] Integrated classrooms improve the stability of interracial friendships and increase the likelihood of interracial friendships as adults.[72] Both white and non-white students tend to have higher educational aspirations if they have cross-race friendships.[73] Interracial contact in desegregated settings decreases racial prejudice among students and facilitates more positive interracial relations.[74] Students who attend integrated schools report an increased sense of civic engagement compared to their segregated peers.[75]

B. INTEGRATION AND THE ACHIEVEMENT GAP

During the period when school integration was improving, the racial achievement gap began systematically to narrow. The relation of integration and achievement is the most striking for black students. Since the Supreme Court has weakened its integration jurisprudence and allowed significant resegregation, the narrowing has stopped and begun to increase. While

CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99 (Gary Orfield & Michael Kurlaender eds., 2001); Orley Ashenfelter, William J. Collins & Albert Yoon, *Evaluating the Role of* Brown vs. Board of Education *in School Equalization, Desegregation, and the Income of African Americans*, 8(2) AM. L. & ECON. REV. 213 (2006); Jomills H. Braddock & James M. McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43(1) J. SOC. ISSUES 5 (1987); Goodwin Liu & William Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791 (2005).

71. Jomills H. Braddock, Robert L. Crain, & James M. McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66(4) PHI DELTA KAPPAN 259 (1984).

72. RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 31(2001); Maureen T. Hallinan & Richard A. Williams, *The Stability of Students' Interracial Friendships*, 52 AM. SOC. REV. 653 (1987).

73. Maureen T. Hallinan & Richard A. Williams, *Students' Characteristics and the Peer Influence Process*, 63 SOC. OF EDUC. 122 (1990).

74. Jennifer Jellison Holme, Amy Stuart Wells & Anita Tijerina Revilla, *Learning Through Experience: What Graduates Gained by Attending Desegregated High Schools*, 38 EQUITY & EXCELLENCE EDUC. 14 (2005); Melanie Killen & Clark McKown, *How Integrative Approaches to Intergroup Attitudes Advance the Field*, 26 J. APPLIED DEV. PSYCH. 616 (2005); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH. 751 (2006).

75. Michal Kurlaender & John T. Yun, *Fifty Years After Brown: New Evidence of the Impact of School Racial Composition on Student Outcomes*, 6 INT'L J. EDUC. POL'Y RES. & PRAC. 51 (2005).

correlation does not establish causation, many scholars believe there is striking evidence that these patterns are related.[76]

To support their arguments that integration did not produce benefits that constituted a compelling government purpose, Armor and Thernstrom's brief presented a review of the social science literature and concluded that desegregated schools did not improve academic or social outcomes for students. The brief of Murphy, Rossell, and Walberg argued the narrower point that forced integration did not improve outcomes for students. Melnick's summary of the questionable benefits of integration (pp. 54–57, 202–06) very closely tracks the arguments of the four dissenters and, like the dissenters, does not respond to most of the claims of benefits noted by the far larger group of academics and their briefs.

The National Academy of Education (NAE), a non-partisan organization dedicated to fostering public understanding of education and educational research, convened a panel of scholars to analyze both sets of briefs.[77] A second panel of social psychologists also evaluated the briefs.[78] Both panels strongly agreed that the preponderance of the social science evidence strongly indicates positive relationships among school racial diversity, academic achievement, and intergroup relations and the finding of the pro-integration briefs.[79]

Since the *Parents Involved* decision in 2007, a sweeping mega-data study of the American South by University of California economist Rucker Johnson compared the life course trajectories of black students who went to integrated schools with student who attended segregated schools. Johnson found that "[s]chool desegregation and the accompanied increases in school quality resulted in significant improvements in adult attainments

76. Eric A. Hanushek, *Black-White Achievement Differences and Governmental Interventions*, 91 AM. ECON. REV. 24 (2001); Ronald Ferguson & Jal Mehta, *An Unfinished Journey: the Legacy of* Brown *and the Narrowing of the Achievements Gap*, 85 PHI DELTA KAPPAN 656 (2004); Jaekyung Lee, *Multiple Facets of Inequality in Racial and Ethnic Achievement Gaps*, 79 PEABODY J. EDUC. 51 (2004); Douglas N. Harris & Carolyn D. Herrington, *Accountability, Standards, and the Growing Achievement Gap: Lessons from the Past Half-Century*, 112 AM. J. EDUC. 209 (2006).

77. NAT'L ACAD. OF ED., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES (Robert L. Linn & Kevin G. Welner eds., 2007); Mickelson, *Segregation*, *supra* note 69.

78. Mickelson, *Segregation*, *supra* note 69.

79. NAT'L ACAD. OF ED., *supra* note 77.

for blacks."[80] For blacks, school desegregation significantly increased educational and occupational attainment, as well as college quality and adult earnings, reduced the probability of incarceration, and improved adult health status; desegregation had no effects on whites across each of these outcomes.

Melnick argues (pp. 54–57) that the strength of Johnson's findings is called into question by subsequent research by Anstreicher, et al., which has a far larger national data set.[81] This study basically confirms Johnson's findings in the South, but does not find the same benefits of integrated schools in the north. Yet the Northeast and Midwest have by far the most fragmented structure of suburban school districts in the county. This fragmentation is associated with the highest levels of metropolitan segregation of schools, far higher than in the South. Johnson notes that his level of analysis was the school district and neighborhood group. Anstreicher, et al., used the county unit for all their analysis. Johnson noted that when in prior work he had disaggregated spending data to the county, as opposed to the school district and neighborhood level, he found it no longer had any detectable effects.[82]

IV. MELNICK CONFLATES *MILLIKEN II* AND ADEQUACY REMEDIES, WHICH ARE PRIMARILY FISCAL REMEDIES INVOLVING LITTLE INTEGRATION, WITH EFFECTIVE INTEGRATION PLANS

After *Milliken*, federal courts, faced with massive evidence of state and local racial discrimination that created segregated and unequal schools, were unable to respond with effective desegregation remedies. The only available alternative was increased state spending to try to equalize opportunities in racial segregated schools. Under *Milliken II*, federal courts, and state supreme courts in parallel state adequacy cases, ordered states governments to increase spending levels for central cities schools far above spending levels in academically successful suburban

80. Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments* (Nat'l Bureau Econ. Rsch.,Working Paper No.16664, 2015).

81. Garrett Anstreicher, Jason Fletcher, & Owen Thompson, *The Long-Run Impacts of Court-Ordered Desegregation* (Nat'l Bureau Econ. Rsch.,Working Paper No. 2022, Apr. 2022).

82. Johnson, *supra* note 80.

districts.[83] This spending built new facilities, increased teachers' pay, created smaller classes, and provided additional social services to students from poor homes. Most of these efforts honestly attempted to implement virtually all possible place-based reforms.

The Atlanta Compromise, described by Derrick Bell as an alternative to the numbers game of integration proposed by dogmatic civil rights lawyers, involved massive new state spending provided to a heavily black Atlanta school district.[84] With this spending came truly serious efforts to implement the most far-reaching sorts of place-based, non-integration reforms that the education reform community could come up, reforms guided and administered by black experts, including Harvard's Alonzo Crim.[85]

What happened in response in Atlanta is what happened in most *Milliken II* and state adequacy cases. When faced with a future of segregated schools, whatever remnants of the white middle class left, followed by a rapid movement of the black middle-class to the suburbs.[86] No level of spending, no type of place-based reform could change the fact that neither middle-class group wanted to attend high-poverty, segregated schools.

As the middle class of all races left and as the school district became poorer, test scores, with a powerful correlation to school poverty rates, plummeted—as, of course, did all the life opportunity outcomes associated with economically diverse schools.[87] Under pressure to show results from the high spending and reforms, the administrators cheated on test results.[88]

Bad scores, cheating, the absence of a threat of metropolitan integration, and the *Dowell* and *Pitts* decision that washed away evidence of historical discrimination, allowed the Georgia legislature to end state remedial money. The same story happened in Detroit, Kansas City, and Saint Louis.[89] Massive *Milliken II*

83. Milliken v. Bradley, 433 U.S. 267 (1977).

84. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 485–88 (1976).

85. GARY ORFIELD & CAROLE ASHKINAZE, THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY 103–51 (1991).

86. *Id*. at 110–15.

87. *Id.* at 118–28.

88. *Id.*

89. James E. Ryan, *Schools, Race and Money*, 109 YALE. L.J 249 (1999); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 (1999).

remedies began with a Detroit public school population of 250,000 students.[90] By 2015, the extra money was long gone and there were only 30,000 children left in a Detroit public school system that had been annihilated by segregation.[91] Ironically, most of the successful suburban intervenors had themselves resegregated. They had thought they were protecting themselves, but they were allowing an enormous wave of concentrated poverty and segregation to build in Detroit, that would eventually sweep past the city boundaries to destroy vast swathes of older suburban school districts. Had they cooperated, it is likely they and Detroit would be in far stronger shape today.

What we have learned from the *Milliken II* cases reaffirms the basic finding that James Coleman made in the 1970s.[92] While Coleman found that racial integration improved the life chances of poor minorities, he found no strong correlation between spending and results, either test results or, more importantly, life-outcome results. *Milliken II* and the adequacy cases, show that money—even truly massive expenditures of money—does not move the needle on test scores or, more importantly, on the life-opportunity measure like graduation, post-secondary education, later life earnings, comfort living and working a diverse society, or keeping young men out of jail. It is very hard to find any clear benefits related to separate-but-more-than-equal spending, anything like the clear benefits of racial integration, although these types of separate-but-more-than-equal spending continue to be the reform most often proposed by Democrats to respond to racial inequalities.

V. CONCLUSION

School integration is not a panacea. It does not by itself equal the racial playing field of education. Yet there is a strong academic consensus—akin to the consensus about climate change—that integration dramatically improves live outcomes for poor minority children like graduation rates, post-secondary education, the possibility of good jobs, and the ability to live and work in a diverse society. *Milliken II* and adequacy spending remedies—separate-but-more-than-equal

90. *Id.*

91. Myron Orfield, Milliken*,* Meredith*, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 453–54 (2015).

92. *See* COLEMAN, ET AL., TRENDS, *supra* note 59.

spending remedies—don't seem to have major positive or negative effects.

Finally, the evidence is now become clear that school choice-based reforms proposed in the 1990s, such as charter schools, open enrollment, and vouchers, have accelerated racial segregation and, when student characteristics are held constant, perform same or more often less well than public schools with similar demographics. While doing no better for kids, these so-called reforms dramatically weaken the financial and educational stability of already fragile central city public schools.

In the end, what does Melnick propose as an alternative to integration—perhaps to the most effective education reform ever implemented in the United States for poor children? He proposes nothing. That is beyond the scope of his project.