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Milliken's Legacy in the 'eLearning Era'—Redefining Remedies to Address Amplified Academic Achievement Gaps in America's K-12 Public Schools

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Milliken's Legacy in the 'eLearning Era'— Redefining Remedies to Address Amplified Academic Achievement Gaps in America's K-12 Public Schools

Rebecca R. Rosenthal*

"As we reckon with our nation's past and work to dismantle racist institutions that have stood for far too long, let us not forget our children."
—Representative Andy Levin, Michigan's 9th District[1]

"Children came into the . . . system with the same capabilities and potentiality to learn. . . . [O]ne of the purposes of equity is to restore the children where they would have been, but for . . . segregation."
—Attorney George T. Roumell Jr. (the author's grandfather) (Oral Argument in *Milliken*)[2]

The Supreme Court's 1954 ruling in Brown v. Board of Education, holding racial segregation in America's public schools unconstitutional, is widely regarded as a landmark decision. Popular perception credits the case with transforming education for Black students, permitting them equal access to and integration within our nation's classrooms. But popular perception too often excludes consideration of a much lesser studied Supreme Court case: Milliken v. Bradley. In 1974, the Milliken Court effectively halted and reversed Brown's integration efforts by holding that if a school district line is drawn in any plan for nearly any reason, desegregation efforts do not have to cross over that line.[3] Legal scholars suggest that Milliken "entrenched the power of the school district border in desegregation efforts."[4] Where Brown took two steps forward, Milliken took ten steps back. Today, nearly fifty years later, Milliken's legacy has resulted in a system of splintered communities—a system in which public schools are dependent on an equally splintered funding system and in which nearly twenty-five million public school students do not attend integrated

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* J.D. 2021, University of Wisconsin Law School; B.A. 2017, University of Michigan. I dedicate the Article to my grandfather, George T. Roumell Jr., who argued *Milliken v. Bradley* in front of the United States Supreme Court in 1977 on behalf of the District Board of Education. I am grateful to Mckenna Kohlenberg for her education law and policy expertise and the feedback she offered on this piece, and to the *Journal*'s Editors for all of their hard work. Any errors are my own.

1 *WATCH: Levin Speaks Out Against Metro Detroit School Segregation*, ANDY LEVIN (Sep. 15, 2020), https://andylevin.house.gov/media/press-releases/watch-levin-speaks-out-against-metro-detroit-school-segregation.

2 Transcript of Oral Argument at 25, *Milliken v. Bradley*, 433 U.S. 267 (1977) (No. 76-447), located at https://www.supremecourt.gov/pdfs/transcripts/1976/76-447_03-22-1977.pdf.

3 *See generally* Elissa Nadworny, *This Supreme Court Case Made School District Lines A Tool for Segregation*, NPR (July 25, 2019), https://www.npr.org/2019/07/25/739493839/this-supreme-court-case-made-school-district-lines-a-tool-for-segregation.

4 Ailsa Chang & Jonaki Mehta, *Why U.S. Schools Are Still Segregated—And One Idea to Help Change That*, NPR (July 7, 2020, 6:58 PM), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/07/888469809/how-funding-model-preserves-racial-segregation-in-public-schools.

schools.[5] *Segregation in America's public schools is no new phenomenon. Yet this Article proffers a new understanding of segregation in our nation's public schools: segregation in the era of COVID-19—a time of online learning for America's K-12 public school students that this Article coins the "eLearning Era."*

The ongoing global pandemic has amplified and evolved the inequities in our country's public education system that Milliken codified and perpetuated. Today, as the majority of children across America are learning in remote settings for the first time in history, segregation in K-12 public education is not only more profound than ever before, but it also appears in an unprecedented manner. This Article identifies three specific areas of inequity in today's eLearning Era, particularly for students of color, students with disabilities, and students of lower socioeconomic status: (1) quality of education, (2) access to education, and (3) evaluation of educational outcomes. Analyzing how these inequities are rooted in Milliken and its progeny, this Article argues that we must mitigate this segregation by implementing innovative remedies. Looking to Milliken as a cautionary tale, this Article recommends that to remedy the pervasive inequities COVID-19 has amplified in our nation's public schools, we must focus on state-level solutions rather than seeking relief from the federal courts. Ultimately, this Article asserts that state legislatures are best suited to do this work, but the federal government must assist by creating new funding opportunities for state education systems as a direct response to COVID-19.

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[5] *Id.*

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INTRODUCTION

Today, between 15 and 16 million public school children in America live in a home either without internet access or without adequate technological devices for the online schooling that became the norm for so many as a result of COVID-19.[6] Consider, for example, two sisters who sit on a sidewalk in the parking lot of a Taco Bell in California where they use the restaurant chain's free WiFi to complete their online schoolwork.[7] Or across the country in the Bronx, New York, where a mother of two receives a call from Grant Avenue Elementary School, notifying her that if her children's online absences continue, the school will report her to child services.[8] Despite the fact that the United States Department of Education provided her two children with iPads, the devices are on the fritz, with long-outstanding repair requests.[9] As a result, her children share a single laptop, each missing classes when

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6 Michelle Fox, *Coronavirus Has Upended School Plans. It Will Also Worsen Racial and Economic Inequalities, Experts Warn*, CNBC (Aug. 12, 2020, 11:00 AM), https://www.cnbc.com/2020/08/12/impact-of-covid-19-on-schools-will-worsen-racial-inequity-experts-say.html.

7 N'dea Yancey-Bragg, *More Than $130k Raised for California Family After Girls Seen Using Taco Bell WiFi for School Work*, USA TODAY, https://www.usatoday.com/story/news/nation/2020/09/01/thousands-raised-girls-who-had-use-taco-bell-wifi-school/5680992002/ (last updated Sept. 4, 2020, 11:12 AM).

8 Noah Goldberg & Michael Elsen-Rooney, *NYC Families Unable to Have Kids Log into Online Classes Fear Being Reported to Child Services for Truancy*, N.Y. DAILY NEWS (Oct. 25, 2020), https://www.nydailynews.com/new-york/ny-homeless-mother-nyc-truancy-school-doe-shelter-wifi-remote-learning-20201026-jl55pntulfefjbfwt3etgxyfsm-story.html.

9 *Id.*

their schedules overlap.[10] Or consider the entire class of forty-five second grade students at Achievement Prep in Southeast Washington, D.C., 95% of whom are Black and 13% of whom are homeless, who *all* fell behind in their Fall 2020 reading assessments.[11] This is a stark contrast from March 2020, before Achievement Prep closed for in-person instruction due to COVID-19, when ninety percent of these same students hit their reading targets.[12] Devastating stories like these are only a few of the many currently transpiring around the country that illustrate the amplified inequities in K-12 public education during the "eLearning Era" (the term this Article uses to refer to online learning occurring during COVID-19)—inequities that disproportionately affect students of color, students with disabilities, and students of low socioeconomic status in particular.

Fifty years earlier in 1970, in a world before computers, the internet, and a global pandemic, Verda Bradley, the mother of Black second-grade student Ronald Bradley, faced some of the same issues aggrieved parents currently face in the age of COVID-19. Ronald attended Detroit's DeWitt Clinton Elementary where textbooks were out of date, and classes were held in trailers in the schoolyard because the school building was in disarray.[13] The Bradley family lived in working-class poverty in Detroit.[14] Believing that education would create a path to a brighter future for her two sons, Verda joined with other parents at the National Association for the Advancement of Colored People's (NAACP) Detroit offices to call for action.[15] Led by NAACP Counsel Nathaniel R. Jones, parents of students of color filed a lawsuit against the Detroit Board of Education and the Governor of Michigan at the time, William Milliken.[16] In the lawsuit,[17] which came to be known as *Milliken v. Bradley*,[18] plaintiffs argued that the State of Michigan actively increased racial segregation in Detroit's K-12 public schools by building new schools in white neighborhoods and drawing school district boundaries that relegated Black children to Detroit's urban center.[19]

What began as a local lawsuit to integrate the Motor City's public schools soon garnered national recognition. After two preliminary rounds in the District Court for the Eastern District of Michigan[20] and in front of the Sixth Circuit Court

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10 *Id.*

11 Perry Stein, *This Entire Second-Grade D.C. Class Fell Behind in Reading. Now What?*, WASH. POST (Dec. 1, 2020, 6:02 PM), https://www.washingtonpost.com/local/education/learning-to-read-on-zoom/2020/12/01/50718514-2b78-11eb-9b14-ad872157ebc9_story.html.

12 *Id.*

13 Samantha Meinke, *The Northern Battle for Desegregation*, 90 MICH. B.J. 20, 20 (2011).

14 *Id.*

15 *Id.*

16 Milliken v. Bradley, 418 U.S. 717, 720, 722 (1974); *see* Meinke, *supra* note 13, at 20–21.

17 Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970), *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974).

18 *Milliken*, 418 U.S. 717.

19 *See* Meinke, *supra* note 13, at 21.

20 Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974); Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972), *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974).

of Appeals,[21] the United States Supreme Court granted a writ of certiorari in *Milliken*.[22] On July 25, 1974, in a 5–4 decision written by Chief Justice Warren Burger, the Supreme Court reversed the findings of the lower courts.[23] The Court held that there was "no showing of significant violation"[24] in Detroit because desegregation did not require "any particular racial balance in each 'school, grade or classroom.'"[25] The Court contended that because Detroit school district lines were drawn as a result of "neutral legislation," these lines were not, in fact, drawn on the basis of race.[26] Moreover, the Court asserted that local school districts—not the state—retained control of school district lines.[27] Thus, the *Milliken* Court left the responsibility for remedying the segregation occurring in Detroit's public schools to that school system itself—wholly excluding any potential relief at the federal level.[28] Justice Thurgood Marshall strongly dissented to the majority's rationale and conclusions, arguing: "[u]nder such a plan, white and Negro students will not go to school together. Instead, Negro children will continue to attend all-Negro schools. The very evil that *Brown I* was aimed at will not be cured, but will be perpetuated for the future."[29]

Justice Marshall was right: in the five decades since the *Milliken* decision, segregation in Detroit public schools—like in K-12 public school districts around the country—only increased, and is now more pervasive than ever, especially in the wake of the COVID-19 pandemic. In fact, contemporary scholars and news outlets alike believe that *Milliken* is "the 'most historic school desegregation decision since *Brown v. Board of Education* [*Brown I*],'"[30] and one of the "most villainous" decisions decided by the Supreme Court, whose "legacy hangs over nearly every major school system in the country."[31] In 2019, predominantly white school districts received $23 billion more in funding than predominantly Black and Latinx school districts.[32] Further, in the past twenty-five years, the number of public K-12 schools

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[21] Bradley v. Milliken, 438 F.2d 945 (6th Cir. 1971), *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974); Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973), *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974).

[22] *Milliken*, 418 U.S. at 721; *see* Meinke, *supra* note 13, at 21.

[23] *Milliken*, 418 U.S. at 740–41, 745.

[24] *Id.* at 745.

[25] *Id.* 740–41.

[26] *Id.* at 748.

[27] *Id.* at 741–42; *see also* Linda Sheryl Greene, *The Battle for* Brown*,* 68 ARK. L. REV. 131, 135 (2015).

[28] James R. Freeswick, *Milliken v. Bradley*, 3 HOFSTRA L. REV. 487, 489 (1975); *see Milliken*, 418 U.S. at 741–42.

[29] *Milliken*, 418 U.S. at 802 (Marshall, J., dissenting).

[30] Freeswick, *supra* note 28, at 487.

[31] Daniel Hertz, *You've Probably Never Heard of One of the Worst Supreme Court Decision*s, WASH. POST (July 24, 2014), https://www.washingtonpost.com/posteverything/wp/2014/07/24/youve-probably-never-heard-of-one-of-the-worst-supreme-court-decisions/.

[32] Clare Lombardo, *Why White School Districts Have So Much More Money*, NPR (Feb. 26, 2019), https://www.npr.org/2019/02/26/696794821/why-white-school-districts-have-so-much-more-money.

comprised of 90 to 100% non-white students has more than tripled.[33] During the eLearning Era, in which Black and Latinx families are disproportionately impacted not only by the virus itself but also by its economic ramifications,[34] the Black-white divide in America's K-12 public schooling system will be further exacerbated when children ultimately return to classrooms for full-time, in-person instruction.

Milliken remains relevant to our understanding of education equality in the eLearning Era and beyond. Specifically, this Article suggests that *Milliken* functions as an important cautionary tale as we seek to address widening inequities and disparities for our nation's public school children. For students of color, students from low socioeconomic backgrounds, and students with disabilities in K-12 public schools across America, online learning in the wake of the COVID-19 pandemic exacerbated racialized academic achievement gaps by fostering new inequalities and deepening old ones. As a result, the eLearning Era presents new challenges to overcoming segregation in education. In proposing solutions to remedy the increased segregation that will stem from the eLearning Era, this Article explores education equality jurisprudence—specifically the Supreme Court's 1974 decision, *Milliken v. Bradley*. Using *Milliken* as a lens, this Article analyzes how an equitable public school education can be the vehicle by which we can best close racialized academic achievement gaps and address the increased school segregation this country faces in coming years. Specifically, this Article explores the roles that institutions like federal courts, school districts, and states themselves might play in fixing these problems—eventually positing that state legislatures should take control of the problem at a state-to-local level and, due to the economic ramifications of COVID-19, must also receive federal assistance to adequately fund their efforts.

This Article proceeds in three main parts. Part I examines education equality jurisprudence from the time of the *Civil Rights Cases* through *Parents Involved in Community Schools v. Seattle School District No. 1*, specifically highlighting the shortcomings of *Milliken v. Bradley*. In doing so, Part I looks at how the *Milliken* Court decided in favor of local autonomy rather than state responsibility[35] and thus problematically placed control over public education in the hands of local school districts instead of states themselves.[36] Considering the foundation laid by *Milliken*, Part I also explores how quality of education, issues of access, and learning evaluations, are strengthening existing racial divides in the eLearning Era. Next, Part II draws lessons from the past to shape decision-making in the school segregation space moving forward. Specifically, Part II analyzes which institutions are best suited to deal with contemporary challenges of segregation and discusses how federal litigation would engender a *Milliken* 2.0 due to the Supreme Court's

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33 Stefan Lallinger, *America's Segregated Schools: We Can't Live Together Until We Learn Together*, USA TODAY (June 23, 2020, 12:30 PM), https://www.usatoday.com/story/opinion/2020/06/23/why-segregation-still-plagues-americas-schools-and-how-fix-column/3234499001/.

34 *Id.*

35 Robert Allen Sedler, *Metropolitan Desegregation in the Wake of* Milliken*—On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U. L.Q. 535, 536 (1975).

36 *See id.*

new conservative majority. It also considers the three states with the widest racialized academic achievement gaps—California, New York, and Michigan[37]—to emphasize why school districts themselves are not the answer to solving the problems of the eLearning Era. Finally, Part II concludes by reviewing current and proposed federally funded state initiatives, to underscore how the federal government can, and should, step in to support states in eradicating the effects of the disparate education occurring during COVID-19.

I. EDUCATION INEQUITIES ARE ENDEMIC, BUT WHAT ABOUT IN A PANDEMIC?

For students of color, students from low socioeconomic backgrounds, and students with disabilities in K-12 public schools across America, online learning in the wake of COVID-19 widened already existing racialized academic achievement gaps.[38] Further, where education inequities were already endemic in pre-COVID-19 America, these inequities have only been amplified in the eLearning Era.[39] Today, in the contemporary and ongoing eLearning Era, we face a new form of segregation in America's public schools—segregation so widespread that we must reimagine strategies for mitigating its lasting harms.

To understand how to best address the inequities COVID-19 has exacerbated in our nation's public schools, this Part proceeds in three main subsections. First, this Part looks to history as a framework by exploring school segregation jurisprudence from the 1800s to the present, specifically focusing on the Court's shortcomings in the 1974 decision, *Milliken v. Bradley*.[40] Second, this Part examines how the *Milliken* court's failure to remedy school segregation—and the power *Milliken* gave and codified for local school districts—eroded the safeguards against segregation in public schools first erected in *Brown*.[41] Accordingly, our current public school system in America remains rife with segregation, and the COVID-19 pandemic has already begun to—and will only further marginalize—the already persistent inequities that many of America's public-school children face.[42] Third and finally, this Part discusses the ongoing inequities in K-12 public education today—inequities intensified by the COVID-19-induced eLearning Era.[43] Specifically, this Part breaks these inequities into three categories: (1) quality, which involves the exclusion of opportunities for Black and Latinx students;[44] (2) access, which

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37 *See infra* Section I.B.

38 *See* discussion *infra* Section I.C.ii.

39 *Id.*

40 *See* discussion *infra* Section I.A.

41 *See* discussion *infra* Section I.B.

42 *See* discussion *infra* Section I.B.

43 *See* discussion *infra* Section I.C.

44 *See* discussion *infra* Section I.C.i.

disproportionately harms students from low socioeconomic backgrounds;[45] and (3) evaluation, which hinders the progress of students with disabilities.[46]

A. Education Equity Jurisprudence: The Reconstruction Era to the Present

To understand segregation and the obstacles hindering equitable opportunities for students in America's K–12 public education system, it is essential to reflect on the history of Supreme Court decisions focused on racial equity in public spaces generally. As such, this Part begins in 1883 with *The Civil Rights Cases*,[47] and explores the progeny of cases concerning education rights and racial disparities occurring for the subsequent 150 years. In so doing, this Part considers *Plessy v. Ferguson*,[48] *Cumming v. Richmond County Board of Education*,[49] *Brown v. Board of Education*,[50] *Swann v. Charlotte-Mecklenburg Board of Education*,[51] *Keyes v. School District No. 1*,[52] *Milliken v. Bradley*,[53] and, most recently, *Parents Involved in Community Schools v. Seattle School District No. 1*.[54] Ultimately, this Part suggests that looking to the past to unpack the history of education equity jurisprudence helps ground our understanding of the new challenges America faces in overcoming segregation in K-12 public education—segregation that will emanate from the eLearning Era during COVID-19.

Understanding education equity and amplified school segregation during the eLearning Era requires exploring the racial backdrop of the Supreme Court's education rights jurisprudence, starting during the Reconstruction Era. With the passage of the Civil Rights Act of 1875, Congress sought to ensure civic equality for all races in places of public accommodation.[55] Eight years after the Act's passage, in *The Civil Rights Cases*, the Supreme Court struck down the public accommodations section of the Civil Rights Act, contending that Congress "lacked the power under the Thirteenth and Fourteenth Amendments" to prohibit discrimination by private individuals.[56] In the eyes of the Court, Congress could only enact remedial laws if a state were to restrict the rights of individuals of a certain race.[57] By striking down the public accommodations section of the Civil Rights Act of 1875, the Court

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45 *See* discussion *infra* Section I.C.ii.

46 *See* discussion *infra* Section I.C.iii.

47 United States v. Stanley (The Civil Rights Cases), 109 U.S. 3 (1883).

48 Plessy v. Ferguson, 163 U.S. 537 (1896).

49 Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528 (1899).

50 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

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

52 Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

53 Milliken v. Bradley, 418 U.S. 717 (1974).

54 Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

55 Mckenna Kohlenberg, Note, *Booked but Can't Read: "Functional Literacy," National Citizenship, and the New Face of* Dred Scott *in the Age of Mass Incarceration*, 44 N.Y.U. REV. L. & SOC. CHANGE 213, 235 (2020); *see* Civil Rights Cases, 109 U.S. 3, 4 (1883).

56 *The Civil Rights Cases*, 109 U.S. at 23–26; Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE. L. REV. 169, 187 (1999).

57 *See* Kohlenberg, *supra* note 55, at 235.

dismantled a significant legislative achievement of the Reconstruction Era[58]—securing rights for former slaves who later became free citizens.[59] Over a decade later in *Plessy v. Ferguson*, the Supreme Court codified what legal scholars now call the "separate but equal" doctrine[60] by holding that Louisiana's Separate Car Act of 1890[61], which required Black and white train passengers to enjoy "equal but separate accommodations," was lawful.[62] In other words, the *Plessy* court held that separation based on race in the sphere of public transportation did not violate the Equal Protection Clause of the Fourteenth Amendment.[63]

At the end of the nineteenth century, and less than five years after *Plessy*, the Court considered the doctrine of "separate but equal" in the context of education in *Cumming v. Richmond County Board of Education*[64]—the Court's first-ever decision on racial discrimination in schools.[65] In *Cumming*, Black parents in Georgia challenged a school board decision[66] that "attempted to ease overcrowding" in a Black elementary school.[67] The Richmond County School Board believed they could address overcrowding by converting an all-Black high school to an elementary school, leaving the area with one fewer high school for Black students.[68] Relying on the doctrine of "separate but equal" established in *Plessy*, the lawyers representing the parents of Black students argued that the district's operation of a high school for white students was only equitable if the district maintained a similar school for Black students.[69] Specifically, the lawyers asserted that if the district was not willing to allocate resources to open a new high school for Black students, the district should achieve parity among the races by closing the high school it had for white students, because doing so would result in an equal number of schools open for white and Black pupils.[70]

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58 *See* Joondeph, *supra* note 56, at 187.

59 *Civil Rights Cases*, BRITANNICA, https://www.britannica.com/topic/Civil-Rights-Cases?.

60 *Plessy v. Ferguson*, HISTORY, (Jan. 20, 2022) https://www.history.com/topics/black-history/plessy-v-ferguson.

61 Olivia B. Waxman, *Louisiana Governor Pardons Homer Plessy, 125 Years After SCOTUS 'Separate But Equal' Ruling*, TIME (Jan. 5, 2022, 12:58 PM), https://time.com/6128436/homer-plessy-ferguson-pardon/.

62 Plessy v. Ferguson, 163 U.S. 537, 540, 551–52 (1896).

63 *See id.* at 562–64 (Harlan, J., dissenting). *See generally* John A Powell, *The Law and Significance of Powell*, RUSSELL SAGE FOUND. J. SOC. SCIS. (Feb. 2021).

64 Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528, 529–31 (1899).

65 *See* J. Patrick Mahon, *Cumming v. Board of Education of Richmond County*, BRITANNICA (Dec. 11, 2020), https://www.britannica.com/topic/Cumming-v-Board-of-Education-of-Richmond-County.

66 Bd. of Educ. of Richmond Cnty. v. Cumming, 29 S.E. 488, 488–89 (Ga. 1898); Derrick A. Bell, Jr., *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257, 260 (1970).)

67 Bell, *supra* note 66, at 260.

68 Bell, *supra* note 66, at 260 (discussing Cumming v. Richmond Cnty. Bd. of Educ.).

69 *See Cumming*, 175 U.S. at 530–31; Bell, *supra* note 66, at 260.

70 *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 32 (2018).

Although the Georgia trial court agreed with the parents of Black students, the Georgia Supreme Court ultimately reversed the trial court's findings.[71] Later, in an opinion written by Justice Harlan, the United States Supreme Court unanimously affirmed the Georgia Supreme Court's decision, holding that the school board's actions did not violate the Equal Protection Clause of the Fourteenth Amendment.[72] Specifically, Justice Harlan cautioned that if white schools were closed as the *Cumming* plaintiffs argued for, "the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities."[73] As a result, shutting schools would not advance the education of Black children.[74] In conclusion, Justice Harlan explained: "[T]he education of the people in schools . . . is a matter belonging to the respective States."[75] With these words, Justice Harlan made it explicit that the federal judiciary possessed no decision-making authority over issues belonging to the states and therefore that K-12 public education is left in the hands of states themselves.[76] Even though *Cumming* failed to generate much reaction, and the case garnered little attention at the time and in subsequent legal scholarship,[77] it remained the leading case on discrimination in public education for four decades.[78]

Against the backdrop of courts using the *Plessy*-originated "separate but equal" doctrine as a "constitutional justification for segregation" in places like public schools,[79] in 1954, a new wave of the fight to establish fundamental rights to equal education began with the *Brown v. Board of Education of Topeka* decision.[80] *Brown* marked the culmination of efforts by Black parents "to correct through litigation the injustices their children suffered in public schools."[81] The specific claim giving rise to *Brown* started in 1950 in Topeka, Kansas, when Oliver Brown tried to enroll his seven-year-old daughter Linda at the local elementary school—the Sumner School.[82] Just as Mr. Brown predicted, the principal of Sumner told him that Linda could not attend the school.[83] The principal reasoned that due to state

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71 *Cumming*, 175 U.S. at 535–36.

72 *See* Bell, *supra* note 66, at 260; DRIVER, *supra* note 70, at 32; *Cumming*, at 544–45.

73 *Cumming*, 175 U.S. at 544.

74 *Id.*

75 *Id.* at 545.

76 DRIVER, *supra* note 70, at 32–33.

77 *Id.* at 33.

78 *See* J. Morgan Kousser, *Separate but* Not *Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J.S. HIST. 17, 17–18 (1980).

79 Kohlenberg, *supra* note 55, at 236 (quoting Kahlil Chism, *A Documentary History of Brown: Using Primary Records to Understand Brown et al. v. Board of Education of Topeka et al.,, in* THE UNFINISHED AGENDA OF BROWN V. BOARD OF EDUCATION 7, 13 (The Editors of Black Issues in High Educ., ed., 2004) (internal quotations omitted).

80 Brown v. Bd. of Educ., 347 U.S. 483 (1954). "In one sense, the modern law of race relations may be thought of as dating from the Supreme Court's school integration decision in 1954, *Brown v. Board of Education*." Arthur Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 471 (1969).

81 Bell, *supra* note 66, at 260.

82 DRIVER, *supra* note 70, at 243.

83 *Id.* at 244.

legislation granting individual Kansas school districts the authority to segregate or integrate their schools as they saw fit, Sumner *lawfully* did not accept Black students.[84] As a result, Linda was left to resume her studies at the all-Black Monroe School—an approximately eighty-minute commute each way from her home.[85]

Several years later, with the assistance of the NAACP Legal Defense and Educational Fund (LDF),[86] the Browns successfully challenged racial segregation in Kansas's public schools.[87] On May 17, 1954, Chief Justice Earl Warren wrote for a unanimous United States Supreme Court, holding that segregation in public schools violated the Equal Protection Clause.[88] Specifically, Chief Justice Warren held that to decide this case by applying an originalist viewpoint of the Fourteenth Amendment at the time of its adoption would be improper.[89] The Chief Justice asserted:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in light of its full development and its present place in American life throughout the nation . . . .
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> . . . .
>
> [T]hese days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[90]

In reaching this holding, the Court emphasized that educational opportunity is a state issue and that the federal government will only step in if a state denies its citizens the opportunity to obtain an education on "equal terms."[91]

While *Brown* reversed the *Plessy* "separate but equal" doctrine per the written law on the books,[92] the seminal case "did not reverse the actual experiences of [B]lack and [B]rown people [across] the nation."[93] Unfortunately, after *Brown*,

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84 *See id.*

85 *Id.*

86 *Id.* at 243.

87 *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

88 *Id.* at 495 ("In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws . . . .").

89 *See id.* at 492–93.

90 *Id.*

91 *See id.* at 493; Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006); Kohlenberg, *supra* note 55, at 237.

92 *Brown*, 347 U.S. at 495.

93 Gloria J. Ladson-Billings, *Can We at Least Have* Plessy? *The Struggle for Quality Education*, 85 N.C.L. REV. 1279, 1287 (2007).

segregation largely persisted in America's K-12 public schools.[94] The reason for this was that even though it represented a landmark win for racial equality, *Brown* brought the issue of segregation to the forefront of society, forcing people to adopt a position on the "segregationist spectrum."[95] Consequently, the *Brown* case engendered an era of social deconstruction in the South—a "racial hysteria" that dismantled the privileges and progress that Black individuals enjoyed and incited violence and brutality.[96]

Due to the societal unrest *Brown* caused, education decisions that came after *Brown*, like *Milliken v. Bradley*[97]—the focus of this Article—began to undermine many of the freedoms *Brown* solidified.[98] Before the Supreme Court decided *Milliken* in 1974, federal courts regarded schools as the "product of *state* action that entailed ultimate *state* responsibility."[99] For example, throughout the 1950s and 1960s, the Warren Court repeatedly emphasized the power of district judges to determine the best remedies for desegregation and underscored that lower court judges possessed broad decision-making powers.[100] However, despite the Warren Court's pattern of deference to lower courts in segregation cases, the new era of the Supreme Court—the era of Chief Justice Warren Burger beginning in 1969—charted a different course.[101]

Starting in the early 1970s, the Burger Court issued a trilogy of cases further defining the contours of legal standards around segregation and issues of equity in public education[102]—*Swann v. Charlotte-Mecklenburg Board of Education*,[103] *Keyes v. School District No. 1, Denver, Colorado,*[104] and *Milliken v. Bradley*.[105] In *Swann*, the Court began to explore segregation issues that were not uniquely Southern. The litigation in *Swann* began in 1964 after six-year-old James Swann was told he could not attend his local elementary school in Charlotte, North Carolina because he was Black and the school only allowed white students.[106] At issue in *Swann* was a plan to desegregate the city of Charlotte and its surrounding suburbs—an area with a

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94 *See id.*

95 *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 453–54 (2005).

96 *See id.* at 454–58.

97 Milliken v. Bradley, 418 U.S. 717 (1974).

98 *See* Ladson-Billings, *supra* note 93, at 1289. In the words of Senator Elizabeth Warren in a student comment she wrote in 1975 while attending Rutgers University, *Milliken* "indicate[d] that the judiciary [would] no longer forge the tools necessary to desegregate the nation's schools." Elizabeth Warren, Comment, *Busing—Supreme Court Restricts Equity Power of District Courts to Order Interschool Busing*, 28 RUTGERS L. REV. 1225, 1256 (1975).

99 Mark C. Rahdert, *Obstacles and Wrong Turns on the Road from* Brown*:* Milliken v. Bradley *and the Quest for Racial Diversity in Education*, 13 TEMP. POL. & CIV. RTS. L. REV. 785, 791 (2004).

100 *Id*. at 789, 791–92.

101 *See id.* at 790–92; *Examining the Legacy of Chief Justice Warren Burger*, NATIONAL CONSTITUTION CENTER, (June 9, 2021) https://constitutioncenter.org/blog/examining-the-legacy-of-chief-justice-warren-burger.

102 *See* DRIVER, *supra* note 70, at 264.

103 Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1970).

104 Keyes v. Sch. Dist. No. 1., 413 U.S. 189 (1973).

105 Milliken v. Bradley, 418 U.S. 717 (1974).

106 DRIVER, *supra* note 70, at 264.

school district comprised of 29% Black and 71% white students—with nearly 70% of the Black students attending much more poorly funded and resourced schools in the inner city.[107] To lessen the effects of such disparate funding and resources for these racially isolated schools, a North Carolina federal district court ordered Mecklenburg County in Charlotte to begin a busing program to bus students between city and suburban schools.[108] The school district—the Charlotte-Mecklenburg Board of Education—appealed.[109] In a unanimous decision written by Chief Justice Burger,[110] the Supreme Court upheld the district court's busing remedy.[111] Calling the school bus "a normal and accepted tool of educational policy,"[112] Chief Justice Burger "emphatically refused to invalidate . . . the practice of busing."[113] Overall, the *Swann* Court determined that once a school district was found liable for *de jure* segregation—legal segregation based on policies like Jim Crow laws—[114] it had to take affirmative steps to eliminate this discrimination.[115] Further, the Court declared that school districts must eradicate any "vestiges" of past discrimination present in their schools.[116]

Swann was the Supreme Court's "last unanimous school desegregation decision."[117] Two years after *Swann*, Chief Justice Burger's Court heard *Keyes v. School District No. 1, Denver, Colorado*—the first *northern* school case decided by the Supreme Court.[118] In *Keyes*, the plaintiffs alleged that local school officials created and maintained segregated schools in the Park Hill area of the Denver school district.[119] As such, the plaintiffs sought an order requiring all schools in the

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107 *See Swann*, 402 U.S. at 6–7; Joondeph, *supra* note 56, at 175.

108 *Id.* at 9–11.

109 Joondeph, *supra* note 56, at 175; Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 135 (4th Cir. 1970).

110 *Swann*, 402 U.S. at 4.

111 *Id.* at 29–32 ("Bus transportation has been an integral part of the public education system for years . . . . Thus the remedial techniques used in the District Court's order were within that court's power . . . .").

112 *Id.* at 29.

113 DRIVER, *supra* note 70, at 268.

114 *See* Charles Ogletree, *All Too Deliberate*, in THE UNFINISHED AGENDA OF *BROWN V. BOARD OF EDUCATION* 55 (*Black Issues in Higher Education*, James Anderson & Dara N. Byrne eds., 2004).

115 *Swann*, 402 U.S. at 15; Joondeph, *supra* note 56, at 176. In determining that in the presence of de jure segregation, a school must take measures to eradicate this discrimination. The Supreme Court reaffirmed the corrective approach to desegregation remedies it first announced in *Green v. County School Board of New Kent County* in 1968. 391 U.S. 430, 438 n.4 (1968) ("[T]he [C]ourt has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.") (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)). Overall, the Court's decision in *Green* required that desegregation plans achieve integration. *See* Paul Eric Gutermann, *School Desegregation Doctrine: The Interaction Between Violation and Remedy*, 30 CASE WESTERN RSRV. L. REV. 780, 799, 814–15 (1980).

116 *Swann*, 402 U.S. at 15, 26.

117 Myron Orfield, Milliken, Meredith*, and Metropolitan Segregation*, 62 UCLA L. REV. 363, 384 (2015).

118 Gutermann, *supra* note 115, at 796.

119 Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 191–92 (1973).

Park Hill district, and specifically those in the inner-city area,[120] to integrate.[121] Because the District Court for the District of Colorado found no intentional segregation at the core of the school district, it simply ordered that the district take measures to equalize facilities—not to integrate any of the district's schools.[122] The Tenth Circuit affirmed.[123] In a 7–1 decision, Justice Brennan wrote for the majority of the Supreme Court,[124] modifying and remanding the case to the lower courts.[125] Brennan emphasized that the Denver Colorado School District worked to maintain segregation by gerrymandering attendance zones near the city's predominantly Black Park Hill community and by building a small school in the middle of that neighborhood.[126] According to Justice Brennan, these decisions demonstrated the district's "intent to segregate."[127] Overall, the *Keyes* Court held that once state-imposed segregation is identified within a school district, the school district has an affirmative duty to desegregate the school system in its entirety.[128]

The *Swann* and *Keyes* decisions "sweepingly expanded the meaning of *Brown*."[129] Implicit in both these cases was the Supreme Court's understanding that "school segregation arises from a host of state induced or perpetuated patterns, particularly residential segregation."[130] The framework for the remedies created in *Swann* and *Keyes* is straightforward—it relies on the Equal Protection Clause of the Fourteenth Amendment like the education rights jurisprudence previously decided by the Court.[131] This framework posited that "local governments, such as school districts, are creatures of the state," with no autonomy or constitutional status.[132] Importantly, *Swann* and *Keyes* stressed that once a constitutional violation is found in a state, it is up to federal courts to remedy the effects of that segregation.[133] Yet, one year after *Keyes*, the promises of *Brown* came crashing down,[134] when, in

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120 Gutermann, *supra* note 115, at 796.

121 Keyes v. Sch. Dist. No. 1, Denver, Colo., 313 F. Supp. 61, 63 (D. Colo. 1970).

122 Gutermann, *supra* note 115, at 796 (discussing *Keyes v. Sch. Dist. No. 1*, 313 F. Supp. 61, 69–73 (D. Colo. 1970)).

123 Keyes v. School Dist. No. 1., 445 F.2d 990 (10th Cir. 1971).

124 *Keyes*, 413 U.S. at 190.

125 *Id.* at 214.

126 *Id.* at 205–06; DRIVER, *supra* note 70, at 268.

127 *Id.* at 208.

128 *Id.* at 191; Anthony Gingerelli, Note, *The Unfinished Business of* Brown *and School Integration*, 50 SETON HALL L. REV. 1117, 1125 (2020) (citing Jason M. Breslow, *The Return of School Segregation in Eight Charts*, PBS FRONTLINE (July 15, 2014), https://www.pbs.org/wgbh/frontline/article/the-return-of-school-segregation-in-eight-charts/).

129 Orfield, *supra* note 200, at 373.

130 Joshua P. Bogin, Comment, Milliken v. Bradley, *Roadblock or Guidepost?: New Standards for Multi-District School Desegregation*, 48 TEMP. L.Q. 966, 992 (1975).

131 Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 12; *see Keyes*, 413 U.S. at 197–98.

132 Orfield, *supra* note 200, at 390.

133 *See* Green v. Cnty. Sch. Bd. of New Kent Cnty., Va., 391 U.S. 430, 438 n.4 (1968); *Swann*, 402 U.S. 1; *Keyes*, 413 U.S. 189.

134 Joondeph, *supra* note 56, at 171.

Milliken, the Supreme Court slammed the door on any hope of meaningful metropolitan integration.[135]

The story of *Milliken* began in 1970 when the NAACP sued Michigan state officials, including Michigan's then-governor, Governor Milliken, to desegregate Detroit's public schools.[136] Specifically, the lawsuit had its roots in an integration plan put forth by the Detroit Board of Education, known as the April 7 Plan.[137] The April 7 Plan sought to create a balanced ratio of Black and white students by transferring somewhere between ten and twelve thousand students among twelve schools in the Detroit area over a three-year period to achieve "quality integrated education."[138] In response to public outcry and bomb threats from disgruntled white citizens after the Detroit Board of Education enacted the April 7 Plan,[139] the Michigan Legislature enacted Public Act 48, Section 12.[140] Section 12 of Act 48 sought to nullify the Detroit Board of Education's April 7 Plan by mandating: "[t]he implementation of any attendance provisions for the 1970–71 school year determined by any first-class school district board shall be delayed . . . ."[141] Although on its face Section 12 of Act 48 applied to "any first-class school district," in 1970, the Detroit school system was Michigan's *only* first-class school district.[142] Thus, despite the Detroit School Board's plan to integrate Detroit's schools, with the passage of Act 48, Section 12, the Michigan Legislature determined that Detroit's schools could remain segregated.[143]

Shortly after Michigan's governor, William Milliken, signed Act 48 into law, the NAACP, led by its General Counsel, Nathaniel Jones,[144] filed suit in the District Court for the Eastern District of Michigan on behalf of Ronald Bradley—a Black second-grade student at Detroit's Clinton Elementary.[145] Specifically, the NAACP sought a preliminary injunction to challenge Section 12 of Act 48.[146] After three

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135 Milliken v. Bradley, 418 U.S. 717, 752 (1974) ("[A]bsent an interdistrict violation, there is no basis for an interdistrict remedy.").

136 Hertz, *supra* note 31; Kalyn Belsha and Koby Levin, *45 Years Later, This Case is Still Shaping School Segregation in Detroit–and America*, Chalkbeat (July 25, 2019, 11:50AM), https://www.chalkbeat.org/2019/7/25/21121021/45-years-later-this-case-is-still-shaping-school-segregation-in-detroit-and-america.

137 Bradley v. Milliken, 433 F.2d 897, 898 (6th Cir. 1970), *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974).

138 *Id.* at 898–99.

139 Meinke, *supra* note 13, at 20.

140 *Bradley*, 433 F.2d at 900.

141 *Id.*

142 *Id.*

143 *See id.* at 901.

144 Meinke, *supra* note 13, at 20.

145 Ken Coleman, Milliken v. Bradley*: The Michigan Court Case at the Heart of the National Dem Debate over Busing*, MICH. ADVANCE (July 12, 2019, 11:15 AM), https://www.michiganadvance.com/2019/07/12/milliken-v-bradley-the-michigan-court-case-at-the-heart-of-the-national-dem-debate-over-busing/.

146 *Bradley*, 433 F.2d at 901; Nathaniel R. Jones, *The Judicial Betrayal of Blacks—Again: The Supreme Court's Destruction of the Hopes Raised by* Brown v. Board of Education, 32 FORDHAM URB. L.J. 109, 121 (2004).

days of hearings in the District Court for the Eastern District of Michigan, Judge Stephen Roth denied the application for a preliminary injunction and dismissed the Governor of Michigan and Michigan's Attorney General as defendants in the case.[147] Subsequently, the plaintiffs appealed to the Sixth Circuit Court of Appeals,[148] which agreed with them that Section 12 of Act 48 was unconstitutional and remanded the case for further proceedings.[149] On remand to the District Court for the Eastern District of Michigan, after a forty-one-day trial during which plaintiffs presented significant evidence of segregation, Judge Roth held that the State of Michigan "acted directly to control and maintain the pattern of segregation in the Detroit schools" and therefore the Acts violated the Fourteenth Amendment.[150] Specifically, Judge Roth found that for nearly twenty years, the Board of Education of Detroit either "employed or sanctioned racially discriminatory policies" to create and maintain separate education zones for white and Black children.[151] Thus, Judge Roth believed that the Board was liable for *de jure* segregation[152]—segregation "resulting from purposeful discrimination by the government."[153] To remedy the damage caused by the State of Michigan, Judge Roth posited that a desegregation plan including "not only Detroit, but also [Michigan's] fifty-three surrounding . . . school districts" was necessary.[154]

The Sixth Circuit affirmed the district court's decision and again remanded the case for a trial on the merits.[155] Back at the district court, Judge Roth concluded that Detroit and its surrounding suburbs had been problematically treated as a single metropolitan unit and the court could invoke a metropolitan remedy to remove any vestiges of state-imposed segregation in Detroit.[156] On appeal, in an en banc decision, the Sixth Circuit affirmed the district court's findings and conclusions and agreed with Judge Roth that a Detroit-only remedy would result in

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147 *Bradley*, 433 F.2d at 901; *see* PAUL R. DIMOND, BEYOND BUSING: REFLECTIONS ON URBAN SEGREGATION, THE COURTS, AND EQUAL OPPORTUNITY 32–33 (2005).

148 *Bradley*, 433 F.2d at 897.

149 *Id.* at 904–05.

150 Bradley v. Milliken, 338 F. Supp. 582, 589–93 (E.D. Mich. 1971), *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974).

151 David A. Smith, *Developing Litigation Strategies for Multidistrict Relief: The Legal Implications of* Milliken v. Bradley *on Metropolitan School Desegregation*, 11 URB. L. ANN. 187, 188–89 (1976) (citing *Bradley*, 338 F. Supp. at 587–88).

152 *Bradley*, 338 F. Supp. at 592–95; Milliken v. Bradley, 418 U.S. 717, 721 (1974).

153 Elise C. Boddie, *The Muddled Distinction Between De Jure and De Facto Segregation*, *in* THE OXFORD HANDBOOK OF U.S. EDUCATION LAW 1 (Kristine L. Bowman ed., 2020) (ebook).

154 Terry Gorman, *Busing Across District Lines: The Ambiguous Legacy of* Milliken v. Bradley, 18 HOUSTON L. REV. 585, 591 (1981). The stark dichotomy between urban and suburban districts in Michigan is illustrated by the fact that in 1970, in inner-city Detroit, Black students constituted 63.8% of the population. On the other hand, in Detroit's surrounding suburban areas, less than 1% of the student population was Black. Bogin, *supra* note 130, at 973, n.56 (citing Brief for Appellees at 22, Milliken v. Bradley, 418 U.S. 717 (1974)).

155 Bradley v. Milliken, 438 F.2d 945, 945–46 (6th Cir. 1971), *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974).

156 Bradley v. Milliken, 345 F. Supp. 914, 935 (E.D. Mich. 1972), *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974).

an insular Black school district surrounded by a border of all-white suburban districts.[157] Subsequently, the State of Michigan and various Detroit suburban school districts appealed the decision to the United States Supreme Court.[158]

In a 5–4 opinion authored by Chief Justice Burger,[159] the Supreme Court rejected the District Court for the Eastern District of Michigan's findings on how to address racial segregation in Detroit.[160] Specifically, the Burger Court asserted that the lower courts failed to prove that the actions of suburban school districts impacted the de jure segregation existing within Detroit's public schools.[161] The Court posited that only when "a constitutional violation within one district that produces a significant segregative effect in another district . . . or where district lines have been deliberately drawn on the basis of race"[162] is the implementation of an interdistrict remedy proper.[163] Further, Chief Justice Burger opined: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process."[164]

Overall, the *Milliken* Court held that any remedy for de jure segregation in Detroit's public schools was confined to that school system's boundaries.[165] Thus, the Court decided in favor of local autonomy as opposed to state responsibility[166] and remanded the case to the district court to craft a Detroit-only plan.[167] In a sharp dissent from the majority, Justice Marshall was prophetic.[168] Justice Marshall remarked that under the plan proposed by the majority, "white and Negro students will not go to school together. Instead, Negro children will continue to attend all-Negro schools. The very evil that *Brown I* was aimed at will not be cured, but will be perpetuated . . . ."[169] Further, Justice Marshall stressed:

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157 Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973) (en banc).

158 Milliken v. Bradley, 418 U.S. 717, 717 (1974); Meinke, *supra* note 13, at 21.

159 *Milliken*, 418 U.S. at 720.

160 *Id.* at 753; Rahdert, *supra* note 99, at 794.

161 *Id.* at 745; Levon G. King & Marsha M. Woods, Milliken v. Bradley*: Turning the Buses Around*, 1975 DET. COLL. L. 125, 127–28 (1975); *Milliken*, 418 U.S. at 745.

162 *Milliken*, 418 U.S. at 745.

163 *Id.; see* Rahdert, *supra* note 99, at 794.

164 *Milliken*, 418 U.S. at 741–42.

165 > [I]t must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. . . . In such circumstances an interdistrict remedy would be appropriate. . . . The record before us . . . contains evidence of *de jure* segregated conditions only in the Detroit schools. . . . With no showing of significant violation by the 53 outlying school districts. . . . [t]o approve the remedy ordered by the court would . . . [be] wholly impermissible.
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> *See id.* at 745.

166 Sedler, *supra* note 35, at 536; *see id.* at 741–42.

167 Bradly v. Milliken, 402 F. Supp. 1096 (E.D. Mich. 1975); King & Woods, *supra* note 161, at 128.

168 *See* Jones, *supra* note 146, at 126.

169 *Milliken*, 418 U.S. at 802 (Marshall, J., dissenting).

> Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other [B]lack—but it is a course, I predict, our people will ultimately regret.[170]

Marshall was correct—"[w]hether the Justices who composed the majority in *Milliken* knew it or not, the case was the first move in what became the Supreme Court's school desegregation endgame."[171]

Over thirty years after *Milliken*, in 2007, the Supreme Court decided the case of *Parents Involved in Community Schools v. Seattle School District No. 1*.[172] *Parents Involved* concerned public school systems in Louisville, Kentucky, and Seattle, Washington,[173] which adopted plans wherein they used race as a factor in assigning students to schools for the purpose of achieving greater racial diversity.[174] In a 5–4 decision written by Chief Justice John Roberts,[175] the Supreme Court held that both the Kentucky plan and the Washington plans were unconstitutional.[176] Specifically, the Roberts Court found that Seattle and Louisville lacked a "'compelling' government interest" for their school desegregation efforts—a necessary component of strict scrutiny review.[177] Taking a page out of Justice Thurgood Marshall's playbook, Justice Breyer used his dissent to echo Justice Marshall's fears in *Milliken*. Justice Breyer explained:

> The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. . . . This is a decision that the Court and the Nation will come to regret.[178]

Scholars like Professor Erwin Chemerinsky—the current Dean of Berkeley Law School[179]—believe that *Parents Involved* "has most obviously affected the desegregation efforts of the school districts pursuing existing integration plans"[180] and that the "decision operates to scare schools away from adopting desegregation

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170 *Id.* at 814–15 (Marshall, J., dissenting).

171 Rahdert, *supra* note 99, at 787.

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

173 Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in* Community Schools v. Seattle District No. 1, 2014 MICH. ST. L. REV. 633, 635 (2014).

174 *Id.* at 709–10.

175 *Id.* at 708–09; Chemerinsky, *supra* note 173, at 635.

176 *Id.* at 747–48.

177 *See id.* at 720–21 (quoting Johnson v. California, 543 U.S. 499, 505–06 (2005) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.")

178 *Id.* at 868 (Breyer, J., dissenting).

179 *Erwin Chemerinsky*, BERKELEY L., https://www.law.berkeley.edu/our-faculty/faculty-profiles/erwin-chemerinsky/#tab_profile.

180 Chemerinsky, *supra* note 173, at 639 (2014).

measures."[181] In sum, despite being decided over three decades after *Milliken*, *Parents Involved* perpetuated the Black-white school district boundaries that *Milliken* solidified and upheld as lawful.

B. Milliken *and the Metropolitan Downfall —A Cautionary Tale*

Despite more than a century of fighting to alleviate segregation in public education, experts point to segregation in America's K-12 public schools as being more pervasive than ever before. At present, an "urban-suburban dynamic in public education" is present in metropolitan areas across the country.[182] In these areas, public schools serve vast minority populations in city centers while suburban public schools cater to a middle- to upper-class group of mostly white students.[183]

Unfortunately, the "district lines made sacrosanct by *Milliken* represent a major impediment to confronting the persistent gap in educational opportunity."[184] For example, in 2019, Detroit was even more segregated than it was in 1974—the year the Supreme Court decided *Milliken*.[185] Currently, in Detroit's public schools, "multiple classrooms [are] staffed by substitute teachers or those with little or no training; facilities [do] not comply with city health and safety codes; instructional materials [are] out of date and inadequate; and student proficiency rates on state assessments languish[] below 10 percent."[186] Further, the school district boundary between Detroit and its nearby white, affluent suburb Grosse Pointe remains one of the most divided in the nation.[187] For example, in the 2018–19 school year, Detroit Public Schools enrolled 97.30% percent minority students, whereas Grosse Pointe enrolled only 22.05% minority students.[188] Statistics like these confirm the evils of *Brown* that Justice Marshall warned about in his 1974 *Milliken* dissent.[189]

What began in Detroit in the wake of *Milliken*, however, is not a Michigan-only problem. In states across America, but especially in places like New York and California that have vast metropolitan areas surrounded by suburbs, racial

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181 *Id.* at 641.

182 Daniel Kiel, *The Enduring Power of* Milliken*'s Fences*, 45 URB. LAW. 137, 138 (2013).

183 *Id.*

184 *Id.*

185 Elissa Nadworny & Cory Turner, *This Supreme Court Case Made School District Lines a Tool for Segregation*, NPR (July 25, 2019, 5:00 AM), https://www.npr.org/2019/07/25/739493839/this-supreme-court-case-made-school-district-lines-a-tool-for-segregation.

186 Rocco E. Testani, *A Short-Lived Constitutional Right to Education*, EDUC. NEXT, https://www.educationnext.org/short-lived-constitutional-right-to-education-sixth-circuit-rehear-gary-b-whitmer/ (last updated May 21, 2020).

187 Kalyn Belsha & Koby Levin, *45 Years Later, This Case Is Still Shaping School Segregation in Detroit—and America*, CHALKBEAT (July 25, 2019, 11:50 AM), https://www.chalkbeat.org/2019/7/25/21121021/45-years-later-this-case-is-still-shaping-school-segregation-in-detroit-and-america.

188 Gingerelli, *supra* note 128, at 1126.

189 *Milliken v. Bradley*, 418 U.S. 717, 814–15 (Marshall, J., dissenting).

disparities in education are omnipresent.[190] For example, New York schools have the lowest ratio of Black to white students in the same school, with only 15.2% of Black students attending the same schools as their white peers.[191] In second place is California, where only 16.2% percent of Black students attend schools that are also attended by white students.[192] Tenth is Michigan where only 25.2% of Black students attend schools with white peers.[193]

Overall, in 2019 in America, approximately 8.9 million public school students, or roughly 20% of K-12 students, lived and attended school on the disadvantaged side of a dichotomous school district boundary.[194] These boundaries stem from federal redlining of neighborhoods and racially-restrictive covenants that precluded Black families from living in certain areas in the early-to-mid twentieth century.[195] Specifically, these policies relegated Black families to the urban core of cities across America while, in a process known as "white flight," their white neighbors fled to suburbia.[196] Because school districts rely on taxpayer dollars for funding, white flight to the suburbs meant fewer people in urban areas paying taxes, and thus fewer financial resources available for schools.[197] Consequently, the Black-white divide in America is not only problematic for students in terms of lack of diversity in K-12 public school settings but also because it controls which schools have the resources to succeed and, conversely, which schools are not as fortunate. As a whole, unaddressed school segregation leads to persistent performance gaps between Black and white children because it consigns Black children to schools that put them behind academically.[198] Such segregation is especially problematic in the wake of the eLearning Era because the pandemic has already begun to—and will only further marginalize—the already persistent inequities that many of America's K-12 public-school children face.[199]

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190 ERICA FRANKENBERG, JONGYEON EE, JENNIFER B. AYSCUE & GARY ORFIELD, HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN*, 26 (2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf. A report conducted by the Civil Rights Project at the University of California-Los Angeles found that, in 2016, two of the most segregated states for Black students were New York and California. *Id.* In these states, the majority of Black students attended a school that enrolled less than ten percent of white students. *Id.*

191 *Id.* at 27.

192 *Id.*

193 *Id.*

194 Belsha & Levin, *supra* note 187.

195 *See* Stateside Staff, *"This Is a System That We Created." How Segregated Neighborhoods Lead to Segregated Schools*, STATE OF OPPORTUNITY (Feb. 1, 2017, 3:42 PM), https://stateofopportunity.michiganradio.org/post/system-we-created-how-segregated-neighborhoods-lead-segregated-schools.

196 *See* Belsha & Levin, *supra* note 187.

197 *See* Nadworny & Turner, *supra* note 185.

198 *See* Emma García, *Schools Are Still Segregated, and Black Children Are Paying a Price*, ECON. POL'Y INST. (Feb. 12, 2020), https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/.

199 *See infra* Section I.C.

C. The eLearning Era—A Widening of Racialized Academic Achievement Gaps

According to scholar Myron Orfield, Earl R. Larson Professor of Civil Rights and Civil Liberties Law at the University of Minnesota Law School,[200] "[h]ad *Milliken* been decided differently, the nation would undoubtedly be less segregated and socioeconomically unequal."[201] By now, the district lines *Milliken* made sacrosanct[202] "have developed into firmly entrenched fences."[203] Unfortunately, the Black-white divide in our current public-school education system stands to be further exacerbated by the eLearning Era transpiring during the time of COVID-19. Put simply, the pandemic is amplifying school segregation as we know it and widening racialized academic achievement gaps in an unparalleled manner.[204] In the eLearning Era, segregation persists in three main areas: (1) quality of education; (2) issues of access; and (3) evaluation and measurement of student learning, progress, and academic achievement—especially for students with disabilities. This Part will explore COVID-amplified inequities in the areas of quality, access, and evaluation in turn.

i. Quality: Pandemic Pods

In the eLearning Era, disparities in quality of education have been amplified in numerous ways, particularly through the development of "pod learning," which many children do not have equal opportunity to access.[205] "Pods" refers to learning pods, in which a small number of students from a group of families study or participate in online learning together in person, facilitated by a teacher or tutor.[206] Pod prices generally range anywhere from thirty to one hundred dollars per hour per child and typically include somewhere between three to ten children.[207] The goal of pods is to supervise, or even supplement, online coursework to help provide children with structure in the wake of school closures due to COVID-19.[208]

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200 *Myron Orfield*, UNIV. OF MINN. L. SCH., https://www.law.umn.edu/profiles/myron-orfield (last visited Sep. 27, 2021).

201 Orfield, *supra* note 200, at 372.

202 *See* Kiel, *supra* note 182, at 138.

203 *Id.* at 156.

204 *See infra* notes 205–13 and accompanying text.

205 *See* Anna North, *Pandemic Learning "Pods" Don't Have to Be Just for the Rich: How to Make Education More Equitable During the Covid-19 Crisis*, VOX (July 28, 2020, 3:00 PM), https://www.vox.com/2020/7/28/21340222/learning-pods-covid-private-pandemic-education-school.

206 Cody Venzke & Hugh Grant-Chapman, *Student Privacy and Learning Pods: New Education Models in a Pandemic*, CTR. FOR DEMOCRACY & TECH. (Nov. 13, 2020), https://cdt.org/insights/student-privacy-and-learning-pods-new-education-models-in-a-pandemic/.

207 Dani Blum & Farah Miller, *What Parents Need to Know About Learning Pods*, N.Y. TIMES (Aug. 18, 2020), https://www.nytimes.com/article/learning-pods-coronavirus.html.

208 Venzke & Grant-Chapman, *supra* note 206.

According to education policy experts, because parents from low-income families are less likely to be able to pay for a tutor or rent a space to host pods than affluent families, and because pods form mostly among neighbors within wealthier neighborhoods, pod learning amplifies the segregation and inequities that already persist in our American education system.[209] One such policy expert, Clara Green, a social and emotional learning specialist in Atlanta Public Schools, penned an op-ed for *The New York Times* in July of 2020 discussing "pandemic pods."[210] Green contends—based on data that echoes findings in large metropolitan districts across the country—that wealthier, white families are more likely to form pods with families who have a similarly low exposure to COVID-19.[211] Green believes that in practice, this will exclude the Black and Latinx families who are disproportionately impacted by the virus and thereby intensify segregation.[212] Moreover, in addition to excluding Black and Latinx children, pandemic pods often exclude students with disabilities;[213] when one child has different learning needs from others, the ability to create a streamlined academic solution for all pod learners presents a challenge for educators to provide a quality educational experience for all students.[214]

Even though, since Green's July 2020 article, community-based pods have formed in low-income areas like Brownsville in Brooklyn, where roughly 380 of the area's 5,000 public school children joined learning pods during the pandemic,[215] these free pods are distinct from those for which affluent families shell out hundreds of dollars each week.[216] Specifically, the learning pods that have materialized in areas like Brownsville—a predominantly Black neighborhood[217]—are aimed at making sure students are in class completing their assigned work, and these groups are typically supervised by furloughed school foodservice workers or paraprofessionals hired by outside agencies.[218] In the pods that exist in more affluent areas, like Manhattan, children receive instruction far beyond simple Zoom

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209 *See* North, *supra* note 205 Clara Totenberg Green, *The Latest in School Segregation: Private Pandemic 'Pods,'* N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/opinion/pandemic-pods-schools.html; Blum & Miller, *supra* note 207 (discussing that pod rates vary widely, with some costing $30 an hour, while others can cost $100 an hour or higher).

210 Green, *supra* note 209.

211 *See id.*

212 *Id.*

213 Lauren Constantino & Jacqueline Neber, *Learning Pods Are Now Helping Vulnerable Students. Will the Trend Survive the Pandemic?*, THE CITY (Apr. 14, 2021, 9:40 PM), https://www.thecity.nyc/2021/4/14/22384788/learning-pods-helping-vulnerable-students-pandemic; Abby Goodnough, *Families Priced Out of 'Learning Pods' Seek Alternatives*, N.Y. TIMES (Aug. 15, 2020), https://www.nytimes.com/2020/08/14/us/covid-schools-learning-pods.html.

214 Meg St-Esprit, *Pandemic Learning Pods Are Leaving Out Kids with Disabilities*, ROMPER (July 31, 2020), https://www.romper.com/p/pandemic-learning-pods-are-leaving-out-kids-with-disabilities-30476105.

215 Constantino & Neber, *supra* note 213.

216 *See* Blum & Miller, *supra* note 207.

217 *See, e.g.*, Joseph Goldstein & Matthew Sedacca, *Why Only 28 Percent of Young Black New Yorkers Are Vaccinated*, N.Y. TIMES, https://www.nytimes.com/2021/08/12/nyregion/covid-vaccine-black-young-new-yorkers.html (last updated Oct. 13, 2021) (explaining that Brownsville is a predominantly Black neighborhood in New York City).

218 Constantino & Neber, *supra* note 213.

supervision.[219] For example, in the "West 4th Pod" comprised of children attending Public School 41 in Manhattan's West Village—a predominantly white area—four- and five-year-old students work on craft projects and discuss topics like presidential elections between their Zoom classes.[220]

While public school children from affluent backgrounds, like those in the West 4th Pod, fared well during the pandemic—with some even reading months ahead of schedule—these children fell behind in other ways, such as by only interacting with peers from similar backgrounds.[221] One parent of a West 4th Pod child recognized that pod learning would likely "create more inequity" among students because the pods are a "fake world" created by parents who are friends with one another.[222] Scholar Osamudia James, Professor of Law at the University of North Carolina Law School, agrees that pandemic pods will exacerbate existing racial divides, sharing that pandemic pods are merely the "latest in a long line of education policies . . . hostile to the concerns of poor people, of people of color, and of poor people of color."[223]

ii. Access: The Digital Divide

Beyond the formation of pandemic pods that routinely exclude students of color, students with disabilities, and students from low socioeconomic backgrounds, another inequality that persists in the eLearning Era is that of unequal access to technology, digital devices, and other online resources and educational tools essential for remote learning. In March of 2020, while some New York City parents "were posting cute photos of their children waving to their classmates and teachers as lessons were streamed live . . . thousands of other children living in . . . shelters and in overcrowded apartments did not have devices with built-in internet."[224] In fact, door-to-door polling at a family shelter in the Bronx, New York, showed that only fifteen out of seventy-nine families had a computer or tablet.[225] These seventy-nine families represented 177 school-aged children who attended more than 100 schools across the Bronx.[226] Similarly, a study conducted by Common Sense Media and the Boston Consulting Group in 2020 found that roughly fifteen to sixteen

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219 *See* Lizzie Widdicombe, *Why Learning Pods Might Outlast the Pandemic*, THE NEW YORKER (Mar. 14, 2021), https://www.newyorker.com/news/annals-of-education/why-learning-pods-might-outlast-the-pandemic.

220 *Id.*

221 *See id.*

222 *Id.*

223 Osamudia R. James, *The Political Economy of Pandemic Pods*, 96 N.Y.U. L. REV. ONLINE 89, 102–03 (2021).

224 Nikita Stewart, *She's 10, Homeless and Eager to Learn. But She Has No Internet*, N.Y. TIMES, (Apr. 13, 2020) https://www.nytimes.com/2020/03/26/nyregion/new-york-homeless-students-coronavirus.html.

225 *Id.*

226 *Id.*

million children, or thirty percent of America's K-12 population, live in a home without access to internet, an adequate device for learning at home, or both.[227]

Also in 2020, McKinsey & Company published a report[228] concluding that for the cities in which in-person instruction does not resume until January 2021 or later, Black students are likely to be, on average, 10.3 months behind their white peers, while Hispanic students will be approximately 9.2 months behind their white classmates.[229] This data represents a widening of existing academic achievement gaps by 15% to 20%.[230] Madeline Hafner, Executive Director of the Minority Student Achievement Network Consortium at the University of Wisconsin Center for Education Research, also believes that the eLearning Era during COVID-19 will "have grave implications for minority and disadvantaged students."[231] Hafner stresses that COVID-19 has illuminated the "racial disparities that have persisted for generations."[232] Sadly, these disparities will not only affect children when they get back into the classroom—they will no doubt continue to impact students for years to come. For example, according to the same McKinsey & Company report, if students did not return to classrooms until January 2021 or later, the average student would lose up to approximately $82,000 in lifetime earnings.[233] Broken down by race, Black students will earn approximately 3.3% less per year than they would have pre-pandemic, whereas white students will earn 1.6% less.[234]

While some of America's K-12 schools *did* return to in-person learning in early 2021,[235] many children still engaged in remote instruction. As of March 2021, while 58% percent of white fourth graders were enrolled in full-time, in-person instruction, only 36% percent of Black and 35% percent of Latinx students attended school in person, full time.[236] That same month, the U.S. Census Bureau reported[237] that approximately 7.2% percent of Black families and 9.6% percent of Latinx families with a child enrolled in K–12 education still lacked consistent or reliable Internet access.[238]

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227 Fox, *supra* note 6.

228 Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, MCKINSEY & CO. (June 1, 2020), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime#.

229 *Id.*

230 *Id.*

231 Fox, *supra* note 6.

232 *Id.* (internal quotations omitted).

233 *Id.*

234 *Id.*

235 *See Where Schools Are Reopening in the US*, CNN (Mar. 1, 2021), https://www.cnn.com/interactive/2020/health/coronavirus-schools-reopening/.

236 OFF. FOR CIV. RTS., DEP'T OF EDUC., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA'S STUDENTS 12 (2021), https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf.

237 *Week 26 Household Pulse Survey: March 3 – March 15*, U.S. CENSUS BUREAU (Mar. 24, 2021), https://www.census.gov/data/tables/2021/demo/hhp/hhp26.html.

238 *See Education Table 3: Households with Children in Public or Private School by Select Characteristics: United States*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/2021/demo/hhp/hhp26.html -

In July 2021—over a year after its first study—McKinsey & Company published a follow-up report on the lingering effects of COVID-19 on education.[239] McKinsey found that by the end of the 2020–21 school year, Black students were, on average, six months behind in reading (compared to four months for their white peers) and six months behind in math (compared to three months for white students).[240] Latinx students fared the same as Black students in math but were five months behind in reading instead of six.[241] The report also found that for low-income families making $25,000 or less per year, children were, on average, seven months behind in math and six months behind in reading.[242]

Access goes far beyond the digital divide, however. For many students of color, students with disabilities, and students of low socioeconomic status, struggles to obtain a quality public school education during COVID-19 did not stop at a weak WiFi signal or a broken tablet. Instead, problems obtaining therapy services, food insecurity, and new childcare responsibilities aggravated the challenges these students already face in the eLearning Era. For example, in the case of students with disabilities, students who typically received speech or behavioral therapy twice a week received it only a few times over the entire spring of 2020—with the parents of these students receiving educational videos teaching them how to provide the therapy themselves.[243] For other students, like those from low-income backgrounds, the pandemic meant babysitting younger siblings while logged onto online school.[244] For yet a third group of children—seventeen million to be exact—food insecurity became an issue, with many K-12 public school students turning to food banks when schools were closed because students no longer had access to free school meals.[245]

iii. Evaluation: Feedback and Support

:~:text=%5B<1.0 MB%5D-,Table 3. Computer and Internet Availability in Households with Children in Public or Private School, by Select Characteristics,-%5B<1.0 MB%5D (last visited Nov. 7, 2021).

239 Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, *COVID-19 and Education: The Lingering Effects of Unfinished Learning*, McKinsey & Co. (July 27, 2021), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning.

240 *Id.* at 4.

241 *Id.*

242 *Id.*

243 Anna North, *We Need to Talk About What School Closures Mean for Kids with Disabilities*, Vox (Aug. 6, 2020, 1:40 PM), https://www.vox.com/2020/8/6/21353154/schools-reopening-covid-19-special-education-disabilities.

244 Widdicombe, *supra* note 219.

245 *See* Erin Einhorn, *Covid is Having a Devastating Impact on Children—and the Vaccine Won't Fix Everything*, NBC News (Dec. 15, 2020, 1:05 PM), https://www.nbcnews.com/news/education/covid-having-devastating-impact-children-vaccine-won-t-fix-everything-n1251172.

On top of the COVID-19 pandemic widening racial divides and further amplifying student inequities in terms of quality and access to education, the eLearning Era during COVID-19 was, and continues to be, particularly troublesome for students with disabilities in America's public schools. In the United States, the nearly seven million students with disabilities in public schools make up approximately 14% of the total nationwide public school enrollment.[246] Among these children, the most common disability is a learning disability or cognitive impairment, such as Attention Deficit Hyperactivity Disorder or dyslexia.[247] In total, 34% of America's seven million K-12 public school students with disabilities struggle with a specific learning disability, with the state of New York serving the largest total share of students with disabilities in the country.[248]

Passed by Congress in 1975, the Individuals with Disabilities Education Act (IDEA) mandates that K-12 public school districts identify children with disabilities and "provide [them with] a free and appropriate public education" through accommodations and related services "in the least restrictive environment" possible.[249] Under the IDEA, public school children with disabilities receive individualized education plans (IEP).[250] Each child's IEP delineates the specific accommodations and related services the child will receive to ensure that they learn at, and have access to the same opportunities for progress as their peers without disabilities.[251] Pursuant to the IDEA, if a school district is unable to meet a child's needs, that district is legally required to pay for the child's placement at a private school that can adequately serve the child's educational needs.[252]

In March 2020, the United States Department of Education emphasized that in light of school closings for in-person instruction due to COVID-19, all public schools providing a virtual education must continue to educate and serve their students with disabilities.[253] An educational non-profit, ParentsTogether, surveyed parents of students with disabilities just two months after many schools transitioned to eLearning.[254] That survey revealed that nearly 40% of children who

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246 Katherine Schaeffer, *As Schools Shift to Online Learning Amid Pandemic, Here's What We Know About Disabled Students in the U.S.*, PEW RES. CTR. (Apr. 23, 2020), https://www.pewresearch.org/fact-tank/2020/04/23/as-schools-shift-to-online-learning-amid-pandemic-heres-what-we-know-about-disabled-students-in-the-u-s/.

247 *See id.*

248 *Id.*

249 *See* Hallie Levine, *As School Returns, Kids with Special Needs Are Left Behind*, N.Y. TIMES, (Sept. 17, 2020), https://www.nytimes.com/2020/09/16/parenting/school-reopening-special-needs.html.

250 Katharine Bohrs, *COVID-19 School Closures Present Uncertainties in Special Education Entitlements*, HARV. CIV. RTS. – CIV. LIBERTIES L. REV. (Mar. 25, 2020), https://harvardcrcl.org/covid-19-school-closures-present-uncertainties-in-special-education-entitlements/.

251 *See id.*

252 20 U.S.C. § 1412(B)(i); Levine, *supra* note 249.

253 U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK 2 (2020), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf.

254 *See ParentsTogether Survey Reveals Remote Learning is Failing Our Most Vulnerable Students*, PARENTSTOGETHER ACTION (May 27, 2020), https://parentstogetheraction.org/2020/05/27/parentstogether-survey-reveals-remote-learning-is-failing-our-most-vulnerable-students/.

typically receive special education services in an in-person setting received no support when school went remote.[255] In total, only 20% of the children with disabilities whose parents took the survey received all the services listed in their IEP.[256] These statistics, which demonstrate that students with disabilities were not receiving the services the IDEA entitled them to during the eLearning Era,[257] seem incongruous with the Supreme Court's 2017 decision in *Endrew F. v. Douglas County School District*.[258] In *Endrew F.*, the Roberts Court "held that the IDEA imposes a substantive obligation on schools to provide an IEP that is 'reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.'"[259] The discrepancy between the Supreme Court's edict in *Endrew F.* and the lack of support for students with disabilities during COVID-19 eLearning illustrates that during the eLearning Era, America's public school systems are left to their own devices, as the federal government has been largely unsupportive and unresponsive. In turn, schools are failing their students with disabilities across the board.

Evidence of the lack of support provided to public school students with disabilities during the pandemic is already apparent. For example, in the fall of 2020, a Virginia school district saw a 111% increase in the number of students with disabilities receiving failing grades in two or more classes.[260] Likewise, data from one Maryland school district suggested that in parts of the state, the number of sixth-grade students with disabilities failing English had doubled since before the pandemic began.[261] Moreover, students face continual challenges even when they return to in-person instruction. As for students with disabilities like autism, for example, wearing a face mask presents a challenge.[262] This has resulted in elementary schools in Sarasota, Florida, and Meriden, Connecticut, sending children with autism, or other special needs, home from school for failing to keep their masks on.[263] Additional challenges for students with disabilities persist in

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255 *Id.*

256 *Id.* Of the children entitled to services under the IDEA within each racial group is as follows: American Indian/Alaska Native (0.85%), Black or African American (13.79%), White (51.09%), Two or More Races (4.04%), Hispanic/Latino (24.87%) Native Hawaiian or Other Pacific Islander (0.20%), Asian (5.17%). *See OSEP Fast Facts: Race and Ethnicity of Children with Special Disabilities Served Under IDEA Part B*, OFF. OF SPECIAL EDUC. PROGRAMS, https://sites.ed.gov/idea/osep-fast-facts-race-and-ethnicity-of-children-with-disabilities-served-under-idea-part-b/ (last updated Aug. 9, 2021).

257 *See* PARENTSTOGETHER ACTION, *supra* note 254f.

258 Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017).

259 *See* Bohrs, *supra* note 250 (quoting *Endrew F.*, 137 S. Ct. at 1002).

260 OFFICE FOR CIV. RTS, *supra* note 236, at 26.

261 *See id.*

262 *See Special Needs Student Pushed Out of Sarasota School for Not Being Able to Wear a Face Mask, Mother Says*, WFLA (Sept. 23, 202, 8:35 AM); https://www.wfla.com/community/health/coronavirus/special-needs-student-pushed-out-of-sarasota-school-for-not-being-able-to-wear-a-face-mask-mother-says/.

263 *Id.*; Hannah Natanson, Valerie Strauss & Katherine Frey, *How America Failed Students with Disabilities During the Pandemic*, WASH. POST (May 20, 2021, 7:00 AM), https://www.washingtonpost.com/education/2021/05/20/students-disabilities-virtual-learning-failure/.

public school districts that do not have a mask mandate in place for students. In these districts, parents see in-person instruction as "a lifeline for their children with disabilities" but struggle with the reality that sending their children to school could exacerbate their pre-existing health conditions.[264]

Overall, through lack of access to equitable educational settings like pod learning, fewer resources in terms of digital devices and necessary tools for eLearning, and limited academic support programs, the eLearning Era disproportionately impacts Black students, students from low-income families, and students with disabilities. Considering that the eLearning Era during COVID-19 will amplify already persistent inequities in our K-12 public education system,[265] the way we consider remedies to close the racialized academic achievement gap engendered by eLearning must account for the segregation our country's schools faced pre-pandemic.

II. WHAT DOES ACADEMIC ACHIEVEMENT LOOK LIKE IN THE POST ELEARNING ERA?

The ongoing global pandemic has amplified and evolved the inequities in our country's public education system that *Milliken* codified and perpetuated. Although the segregation that was prevalent across America throughout the 1960s and 1970s looks different in the eLearning Era, its deleterious effects remain. For Black students, students from low socioeconomic backgrounds, and students with disabilities who attend America's K-12 public schools, COVID-19 is exacerbating the inequities they faced in the classroom before the pandemic hit. With these inequities in mind, the way we seek to mitigate school segregation and close racialized academic achievement gaps must be reimagined.

Using *Milliken* as a cautionary tale, this Part analyzes how to address the inequities in K-12 public education that manifest themselves in the eLearning Era. In doing so, this Part proceeds in two main sections. First, this Part explores the central question of who decides. Specifically, what do our country's failures in the wake of *Milliken* teach us about which institutions are best suited to shape our decision making moving forward? Second, acknowledging the limitations of governmental actors like federal courts and local school districts, this Part posits that state legislatures are best suited to narrow racialized academic achievement gaps and integrate America's public schools after the eLearning Era.

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264 *See* Erica L. Green, *For Parents of Disabled Children, School Mask Wars Are Particularly Wrenching*, N.Y. TIMES, (Sept. 28, 2021), https://www.nytimes.com/2021/09/23/us/politics/disabled-students-mask-mandate.html. Two scholars even posit that immunocompromised students may be able to bring suit under the Americans with Disabilities Act, seeking the ability to wear masks as a reasonable accommodation in school districts without mask mandates in place. *See* Doron Dorfman & Mical Raz, *Students with Disabilities Could Sue Their Schools to Require Masks*, WASH. POST (Aug. 19, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/08/19/school-masking-americans-disability-act/.

265 *See generally* OFF. FOR CIVIL RTS., *supra* note 211 (detailing the disproportionate impact of COVID-19 upon marginalized groups).

A. Who Decides? Why Federal Courts and School Districts Are Not the Answer

This section considers which institutions should be responsible for remedying the pervasive inequities COVID-19 has amplified in our nation's K-12 public schools. In doing so, it explores the potential avenues of the federal courts and local school districts themselves, eventually positing that neither offers the best solution. Ultimately, federal courts risk creating a *Milliken* 2.0, and local school districts do not possess adequate resources to craft the most equitable solution. Thus, remedying the racialized academic achievement gaps perpetuated by the eLearning Era must be left in the hands of state legislatures.

i. The Federal Courts and Federalism Concerns

In *Milliken v. Bradley*, the Burger Court voted 5–4 to overturn the "Ruling on Desegregation Area and Order for Development and Plan of Desegregation"[266] presented by Judge Roth at the district court level.[267] Judge Roth's desegregation plan laid out a framework for integration by which public school students in the metro-Detroit area would be bused between districts.[268] Looking at Judge Roth's integration plan, the Burger Court contended that school district boundaries could not be "casually ignored or treated as a mere administrative convenience" because local control of school districts was a tradition "deeply rooted" in America's history.[269] However, the Court also clarified that school district lines were "not sacrosanct."[270] Thus, according to the Burger Court, despite school district lines being part of America's history, if school district lines were found to conflict with the Fourteenth Amendment's equal protection guarantees, it would be up to federal courts to remedy the harm.[271]

Although today's school district lines make America's public schools both separate *and* unequal,[272] the Burger Court's suggestion in *Milliken* that federal courts are the proper recourse to remedy equal protection violations in public education is incorrect.[273] Proof for this stems from the Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*,[274] a case

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266 *See* Milliken v. Bradley, 418 U.S. 717, 720, 752–53 (1974).

267 Bradley v. Milliken, 345 F. Supp. 914, 916 (E.D. Mich. 1972) *sub nom.* Milliken v. Bradley, 418 U.S. 717 (1974).

268 *See id.* at 916–18.

269 *Milliken*, 418 U.S. at 741.

270 *Id.* at 744.

271 *See id.* at 741, 744.

272 Take, for example, the fact that across the United States there are nearly 1,000 school district borders between which the racial makeup of students varies by twenty-five percentage points or more. Nadworny & Turner, *supra* note 185.

273 *See Milliken*, 418 U.S. at 744.

274 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

concerning whether a school financing system based on property taxes violated the Equal Protection Clause of the Fourteenth Amendment.[275] In *Rodriguez*, the Burger Court explicitly rejected education as a fundamental right,[276] thereby asserting that education is a state issue.[277] Therefore, the Court established that the burden for providing public education falls to the individual states.[278]

Rodriguez is significant because it clarifies that the burden for providing public education is a state, as opposed to a federal, issue. However, looking at *Rodriguez* alongside the Court's decision roughly twenty years earlier in *Brown* illustrates an apparent tension between the power of different institutions in the sphere of public education. In *Brown*, the Court held that it is up to the federal government to intervene if a state denies its citizens an education on "equal terms."[279] Thus, the *Brown* decision underscored that the denial of an equal education is a constitutional violation best remedied by the federal government. In *Rodriguez*, on the other hand, the Court left the power of providing a public education up to the states.[280]

The discord between *Brown* and *Rodriguez* highlights an apparent tension between rights and privileges. Under *Rodriguez*, states have the *right* to control and oversee their public education systems and ensure equality among students,[281] but pursuant to *Brown*, unless states outright deny their students access to an equal education, the federal government need *not* step in to remedy any school segregation that may persist.[282] Due to the conflict between rights and privileges delineated in *Rodriguez* and *Brown*, if the current Supreme Court or another federal court took up the issue of amplified school segregation due to the inequities of the eLearning Era, it would likely adopt what is known in constitutional law as the right-privilege distinction[283]—a framework established in two cases from the Supreme Court's Burger era, *Maher v. Roe*[284] and *Harris v. McRae*.[285]

The *Maher*/*McRae* framework offers courts a "workable approach" to distinguish between rights and privileges.[286] In *Maher*—a case about whether the State of Connecticut had a duty to provide free abortion services to indigent

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275 *See id.* at 4, 6, 10.

276 *Id.* at 35.

277 *See id.* at 35, 37.

278 *See* Emily Parker, *50-State Review*, EDUC. COMMISSION STATES 1 (Mar. 2016), http://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf.

279 *See* Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954); Liu, *supra* note 91, at 334; Kohlenberg, *supra* note 55, at 237.

280 *Rodriguez*, 411 U.S. at 37, 58.

281 *Id.* at 58.

282 *See* Brown, 347 U.S. at 495–96.

283 Mary Ziegler, *The New Negative Rights: Abortion Funding and Constitutional Law After* Whole Woman's Health, 96 NEB. L. REV. 577, 596 (2018).

284 Maher v. Roe, 432 U.S. 464 (1977).

285 Harris v. McRae, 448 U.S. 297 (1980).

286 Ziegler, *supra* note 283, at 598. It is important to note that some scholars refer to what this Article calls the *Maher*/*McRae* framework as the right-privilege distinction, whereas other scholars refer to this dichotomy as the relationship between positive and negative rights. *See id.* at 579.

women—the Burger Court explained that although women have the constitutional *right* to obtain an abortion, "the Constitution does not provide judicial remedies for every social and economic ill."[287] Thus, in the eyes of the Court, just because selective government funding may limit an indigent woman's ability to obtain an abortion—a fundamental constitutional right[288]—this does not mean that the government is acting in an unconstitutional manner.[289] Three years after *Maher*, in *Harris v. McRae*—another case concerning financial assistance in the context of abortions[290]—the Burger Court extended its *Maher* reasoning.[291] In *McRae*, the Court suggested that just because the government may not place obstacles in the path of an abortion-seeking woman, this does not mean the government has a duty to "remove those [obstacles] not of its own creation."[292] Viewed together, *Maher* and *McRae* illustrate the right-privilege distinction in constitutional law[293]—the idea that despite guaranteeing citizens certain fundamental rights (for example, the right to obtain an abortion), the federal government does not have an affirmative duty to ensure that these rights are realized (that is, a duty to offer privileges to citizens that make an abortion easily accessible).[294]

Overall, if a federal court took up the issue of the amplified segregation of America's Black students, low-income students, and students with disabilities in K-12 public education face as a result of the eLearning Era, the court would likely rely on the right-privilege distinction espoused in *Maher* and *McRae*. Take the context of pandemic pods,[295] for example. Relying on the *Maher*/*McRae* framework and looking to *Milliken* as precedent, a federal court might assert that unless a state has hindered the ability of students to join with others in pod learning, federal courts need not resolve the amplified segregation that stems from lack of access to such an educational opportunity. Specifically, a federal court might assert that despite pandemic pods providing better access to education for Black students and students from low-income families during the pandemic, it is the poverty of these students—just like the indigence of the women in *Maher* and *McRae*—that renders them unable to join in pod learning.[296] As such, a federal court would likely find that the federal government has no affirmative duty to intervene because the poverty of the

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287 *Maher*, 432 U.S. at 479 (quoting Lindsey v. Normet, 405 U.S. 56, 74 (1972)) (internal quotations omitted).

288 *Roe v. Wade*, 410 U.S. 113, 153 (1973).

289 *Maher*, 432 U.S. at 471–75.

290 *McRae*, 448 U.S. at 300–01.

291 *Id.* at 316.

292 *Id.*

293 Ziegler, *supra* note 283, at 596. Broken down even further, a right is an activity the government cannot exclude completely, whereas a privilege is something that the government has the power to exclude. *The Use and Misuse of the Right-Privilege Distinction in License Revocation: What's So Hot About Cosmetology School?*, 31 U. CHI. L. REV. 577, 577–78 (1964).

294 *See* Jenna MacNaughton, Note, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750 (2001).

295 *See supra* Section I.C.i.

296 *See* Maher v. Roe, 432 U.S. 464, 470–71 (1977); *McRae*, 448 U.S. at 316.

students is what excludes them from pods, and poverty is not a government-created obstacle to equitable educational opportunities. Such a ruling from a federal court could further subvert progress toward integration and education equity in America's K-12 public schools and potentially engender a *Milliken* 2.0—a decision that continues to erode the promises of *Brown*.

Further, the appointment of Justice Amy Coney Barrett to the Supreme Court, which now solidifies the Court's 6–3 conservative majority,[297] also stresses why federal courts are not the institutions best suited to offer relief to the inequities engendered by the eLearning Era. In Justice Barrett's confirmation hearings, she indicated that she considers *Brown v. Board of Education* "super-precedent."[298] According to Justice Barrett, super-precedent refers to a case so established that no one tries to push courts to overrule it.[299] News outlets warn that Justice Barrett's view that *Brown* is super-precedent is problematic because it suggests that "state or local governments [can] implement more discriminatory school policies without fear of being challenged" in court.[300] The reason for this is that even if litigants challenged discriminatory school policies, by the time the case made its way to the now-conservative Supreme Court, the Court would find that it does not need to remedy any discrimination because, due to its status as super-precedent, *Brown* offers the final word on education equality.[301] With this in mind, to avoid potentially undermining constitutional safeguards at this time, it seems best to keep any issue involving segregation in education away from the federal courts.

ii. The Urban/Suburban Divide—*Milliken's* Enduring Fences

With the federal courts out of the question as the proper avenue to seek relief, this section analyzes why it would be similarly problematic for school districts to remedy inequities from the eLearning Era. The Supreme Court upheld the power of local school district control in *Milliken* and *Rodriguez*,[302] and these cases still remain good law. For example, in *Milliken*, the Burger Court rejected the district court's assertion that school district boundaries were "no more than arbitrary lines on a map," instead asserting that local control is "essential" to the "quality of the educational process."[303] Likewise, in *Rodriguez*, despite acknowledging that local control of schools can often result in significant variations

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297 Susan Davis & Nine Totenberg, *The Docket: The First Term with A New Conservative 6-3 Majority on the Supreme Court*, NPR (July 3, 2021, 1:00 PM), https://www.npr.org/2021/07/02/1012670108/the-docket-the-first-term-with-a-new-conservative-6-3-majority-on-the-supreme-co.

298 Jonathan Allen, *Barrett Reveals Formula for Reversing Landmark Rulings*, NBC NEWS (Oct. 13, 2020, 7:28 PM), https://www.nbcnews.com/politics/supreme-court/barrett-reveals-formula-reversing-landmark-rulings-n1243248.

299 Brian Naylor, *Barrett Says She Does Not Consider* Roe v. Wade *'Super-Precedent,'* NPR (Oct. 13, 2020, 3:55PM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent.

300 Allen, *supra* note 298.

301 *See id.*

302 *See* Milliken v. Bradley, 418 U.S. 717, 741–42; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50.

303 Milliken v. Bradley, 418 U.S. 717, 741–42 (1974).

in school quality, the Burger Court upheld Texas's school financing system as constitutional.[304] Regardless of the rulings in these two cases, hyper-localized control via school districts is not the answer to addressing the exacerbated segregation our nation's K-12 public school children will face after the eLearning Era.

For Black students, students from low socioeconomic backgrounds, and students with disabilities in America's K-12 public schools, COVID-19 is amplifying the segregation these students faced pre-pandemic.[305] In large part, this segregation is due to cases like *Milliken*, in which the Court held that local school districts had power over school district lines.[306] Unsurprisingly, because public schools are funded in large part by property taxes, school district lines represent fences between America's poorest Black neighborhoods and its most affluent white ones.[307] These fences are so entrenched in American history,[308] that in the 2015–16 school year alone, despite serving the *same* number of students, non-white school districts received $23 billion *less* in funding than white school districts.[309]

Exploring the Black-white divide in K-12 public education in California, New York, and Michigan underscores that if school districts are in charge of addressing the amplified school segregation that will persist in the wake of the eLearning Era, *Milliken*'s problematic legacy will persist. On average, in California, "[p]redominantly *nonwhite* school districts have 20% [less] funding on average than predominantly *white* school districts."[310] Further, 64% of California's students attend school in racially isolated school districts.[311] The racialized academic achievement disparities that persist in California are best visualized through an illustration of California's Bay Area, in which the Oakland Unified School District borders the Piedmont City Unified School District.[312] Despite the proximity of these two districts, they are worlds apart. The Oakland District has a total enrollment of 49,760 students, ninety percent of whom are nonwhite, and total revenue of $12,721

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304 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 53–55 (1973).

305 *See* discussion *supra* Section II.C.

306 *Milliken*, 418 U.S. at 741–42.

307 *See* Sarah Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite Ones? $23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html.

308 *See* Belsha & Levin, *supra* note 187.

309 *$23 Billion*, EDBUILD 2, https://edbuild.org/content/23-billion/full-report.pdf (last visited Nov. 8, 2021).

310 *Nonwhite School Districts Get $23 Billion Less Than White Districts Despite Serving the Same Number of Students*, EDBUILD, https://edbuild.org/content/23-billion#CA (last visited Nov. 8, 2021) (emphasis added) (This webpage is an interactive webpage, whose contents reveal themselves, or "pop-up", as you scroll. To access the information for California, cited here, simply scroll down until "The State Story" appears on your page. Then, in the dialog box that says, "Select a State", click on the drop box and select California.).

311 *Summary Data*, EDBUILD, https://edbuild.org/content/23-billion/methodology#:~:text=Download%20summary%20data (last visited Nov. 8, 2021).

312 Preston Gannaway, Talia Herman, Alex Matzke, Elissa Nadworny & Jesse Neider, *PHOTOS: Where the Kids Across Town Grow Up with Very Different Schools*, NPR (July 25, 2019, 11:06 AM), https://www.npr.org/2019/07/25/739494351/separate-and-unequal-schools.

per student.[313] Conversely, Piedmont City only has 2,692 students, 40% of whom are nonwhite, and its revenue per student is $17,725—approximately $5,000 *more* than Oakland's.[314]

Next, a look at the Big Apple. In New York, 79% of students attend school in racially isolated school districts.[315] Further, New York's high-poverty, nonwhite school districts enjoy $4,094 *less* in funding per student than high-poverty white school districts.[316] Just outside of New York City, one of the most racially segregated school barriers in America exists: the border between the Garden City Union Free School District and the Hempstead Union Free School District.[317] In Hempstead, where 8,392 total students are enrolled, 98% of students are nonwhite.[318] In the adjoining town, covered by the Garden City District, only 12% of students are nonwhite.[319] Unsurprisingly, Garden City's revenue per pupil is $28,327—nearly $5,000 *more* than in the Hempstead Union District.[320]

Lastly, in Michigan—*Milliken*'s own backyard—segregation based on school district lines is also omnipresent. In Grosse Pointe, Michigan, there are 8,113 students.[321] The district composition is 75% white, 16% Black, 3% Hispanic, 3% Multiracial, and 2% Asian.[322] Just a fifteen-minute drive away in Detroit, the Detroit City School District is 82% Black, 13% Hispanic, 2% Asian, and only 2% white.[323] As expected, the Detroit City School District only receives $8,142 in revenue per pupil, whereas Grosse Pointe Public Schools receive $10,224—approximately $2,000 *more*.[324]

Overall, from looking at California, New York, and Michigan—three states whose school districts rely heavily on local taxes[325]—it is evident that wealthy,

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313 *Id.*

314 *Id.* Frustrated with the situation on the ground, Oakland District spokesman John Sasaki shared: "A child has no control over where they're born or raised. . . . Under no circumstances should the ZIP code in which they're raised dictate that they have less funding in their schools." *Id.*

315 *Summary Data*, *supra* note 311.

316 *See Nonwhite School Districts Get $23 Billion Less Than White Districts Despite Serving the Same Number of Students*, EDBUILD, https://edbuild.org/content/23-billion - NY (last visited Nov. 8, 2021) (This webpage is an interactive webpage, whose contents reveal themselves, or "pop-up", as you scroll. To access the information for New York, cited here, simply scroll down until "The State Story" appears on your page. Then, in the dialog box that says, "Select a State", click on the drop box and select New York.).

317 *See* Gannaway et al, *supra* note 312.

318 *Id.*

319 *Id.*

320 *Id.*

321 *Grosse Pointe Public Schools*, PROPUBLICA: MISEDUCATION, https://projects.propublica.org/miseducation/district/2625740 (last updated Oct. 2018).

322 *Id.*

323 *Detroit City School District*, PROPUBLICA: MISEDUCATION, https://projects.propublica.org/miseducation/district/2612000 (last updated Oct. 2018).

324 *2019-2020 School District Foundation Amounts*, MICHIGAN.GOV, https://www.michigan.gov/documents/cyfound_11728_7.pdf (last visited Feb. 4, 2021).

325 *$23 Billion*, *supra* note 309, at 2; *See* Susanna Loeb, *Local Revenue Options for K-12 Education*, CENTER FOR EDUCATION POLICY ANALYSIS, https://cepa.stanford.edu/sites/default/files/Loca%20Revenue.pdf (last visited Feb. 4, 2022).

smaller communities benefit to the detriment of their less affluent, and often nonwhite, neighbors.[326] As legal scholar Daniel Kiel emphasizes, the more than forty years since the Burger Court decided *Milliken* "have seen a hardening of the fences the Court fortified."[327] This hardening of fences is exactly what Justice Marshall cautioned against in his *Milliken* dissent when he explained that if we "allow our great metropolitan areas to be divided up each into two cities—one white, the other [B]lack—but it is a course . . . our people will ultimately regret."[328] Considering that in the nearly fifty years since the Burger Court decided *Milliken*, America's K-12 public education system is now more segregated than *ever before*, allowing school districts to take "local control" of the amplified school segregation[329] that will persist in the face of the eLearning Era[330] is not the answer.

B. Rethinking Remedies

Whether the barrier is a district boundary or a computer screen, in 2020 and 2021, Black students, students from low-income households, and students with disabilities face new realities of public-school segregation—segregation that is amplified and exacerbated by the eLearning Era. With this in mind, and avenues for relief at the federal court and school district levels out of the question,[331] which institution is most apt to decide these issues? The states; not at the hyperlocal level—which represents a patchwork quilt of policies that vary among school districts—but at the level of the state legislature, with the support of federal funds, will provide the best solution.

State legislatures are the institutions best suited to deal with the widening of racialized academic achievement gaps that will persist post-pandemic for two main reasons. First, because states can exercise primary authority over public education decisions, states can enact uniform policies that span all school districts they oversee, thereby making it easier to mitigate COVID-19-related academic harms in K-12 public schools. Second, because states can exert authority over school districts within their borders, and states have received millions in federal funds since COVID-19 began, state legislatures can ensure that federal grant money is apportioned to the school districts where the widest racialized academic achievement gaps present themselves.

i. The State Solution

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326 *See* Mervosh, *supra* note 307.

327 Kiel, *supra* note 182, at 180.

328 Milliken v. Bradley, 418 U.S. 717, 815 (1974) (Marshall, J., dissenting).

329 *See* Lallinger, *supra* note 33.

330 *Milliken*, 418 U.S. at 741–42.

331 *See supra* Sections II.A.i–ii.

Although the Burger Court emphasized the power of "local control" in *Rodriguez* in 1973,[332] and again in *Milliken* a year later,[333] district control over public education has led to an uncontroverted backtrack in integration efforts. For example, in the 1970–71 school year, 32% of the students in a typical Black student's school were white.[334] Yet, in 2016, only 25% of the students in a typical Black student's school were white,[335] and in 2016, 40% of Black students attended schools that were 90% or more nonwhite.[336] As such, to narrow racialized academic achievement gaps and to ensure the best possible academic outcomes for students post-pandemic, states themselves—not individual school districts—must take charge of the increased school segregation that will stem from the eLearning Era.

Even though state governments currently delegate responsibility for K-12 public education to local school districts,[337] states can and should exert control over education in the context of the educational disparities engendered by COVID-19. A leading example of state legislatures usurping local power in the context of public education is the adoption of the Common Core standards by forty-one states and the District of Columbia since 2010.[338] The Common Core standards are a set of academic benchmarks in mathematics and language arts designed to best prepare students for college and future careers.[339] In implementing the standards, each state generated its own success metrics for student achievement in math and language arts and created evaluation programs to track progress among districts and see which districts might benefit from additional support.[340]

While the data on the success of the Common Core standards presents a mixed picture due to factors like lack of school access to the resources needed to

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[332] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973). In *Rodriguez*, the Supreme Court emphasized: "Each locality is free to tailor local programs to local needs. . . . [This] affords some opportunity for experimentation, innovation, and . . . educational excellence." *Id.*

[333] *Milliken*, 418 U.S. at 742–42. In *Milliken*, Chief Justice Burger opined: "No single tradition in public education is more deeply rooted than local control over the operation of schools." *Id.*

[334] Valerie Strauss, *Report: Public Schools More Segregated Now Than 40 Years Ago*, WASH. POST (Aug. 29, 2013), https://www.washingtonpost.com/news/answer-sheet/wp/2013/08/29/report-public-schools-more-segregated-now-than-40-years-ago/.

[335] FRANKENBERG ET AL., *supra* note 190, at 22.

[336] Gloria J. Browne-Marshall, *Busing Ended 20 Years Ago. Today Our Schools Are Segregated Once Again*, TIME (Sept. 11, 2019, 8:12 AM), https://time.com/5673555/busing-school-segregation/.

[337] *How Are the Local, State and Federal Governments Involved in Education? Is This Involvement Just?*, CTR. FOR PUB. JUST., https://www.cpjustice.org/public/page/content/cie_faq_levels_of_government (last visited Dec. 20, 2020) [hereinafter CTR. FOR PUB. JUST].

[338] *Standards in Your State*, COMMON CORE STATE STANDARDS INITIATIVE, http://www.corestandards.org/standards-in-your-state/ (last visited Dec. 20, 2020); Jeb Bush, Opinion, *Let States Take the Lead in Education*, WASH. POST (Mar. 6, 2015), https://www.washingtonpost.com/opinions/let-states-take-the-lead-in-transforming-schools/2015/03/06/0c5ecbb8-c132-11e4-9ec2-b418f57a4a99_story.html.

[339] Libby Nelson, *Everything You Need to Know About the Common Core*, VOX (May 13, 2015, 1:36 PM), https://www.vox.com/2014/10/7/18088680/common-core.

[340] CTR. FOR PUB. JUST, *supra* note 337.

properly implement the program,[341] some areas, like Washington, D.C., have seen increased student achievement in areas like reading.[342] Overall, however, the implementation of the Common Core standards by forty-one states and D.C. is significant because it demonstrates state ability to implement a mostly uniform policy in the context of K-12 public schools, wherein state officials can track district progress to best support student success.[343] Hopefully, states can look to the adoption of the Common Core standards as an example when they consider how to remedy the amplified academic achievement gaps that will particularly affect Black students, low-income students, and students with disabilities in the wake of COVID-19.

ii. Federal Funds

States legislatures are the actors who must be responsible for tackling the exacerbated K-12 public school segregation that will disproportionately impact Black students, students from low-income families, and students with disabilities in the wake of the eLearning Era. However, states cannot effectuate meaningful education integration and equity policies on their own. In particular, states need financial assistance from the federal government because, due to COVID-19, state and local government revenues will decline by $145 billion by 2022.[344]

Enacted in March of 2020, the Elementary and Secondary School Emergency Relief Fund (ESSER) was designed to address the impact of COVID-19 on elementary and secondary schools across America.[345] While, to date, Congress has allotted $189.5 billion in funding to ESSER,[346] ESSER is not aimed at integration efforts or the mitigation of racialized academic achievement gap issues post-COVID-19. Instead, it concerns matters like purchasing sanitization supplies, providing meals to eligible students, offering mental health services, and granting principals and other school administrators needed resources—with 5% of total resources going

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341 *See* Matt Barnum, *Nearly a Decade Later, Did the Common Core Work? New Research Offers Clues*, CHALKBEAT (Apr. 29, 2019, 6:42 PM), https://www.chalkbeat.org/2019/4/29/21121004/nearly-a-decade-later-did-the-common-core-work-new-research-offers-clues.

342 Dana Goldstein, *After 10 Years of Hopes and Setbacks, What Happened to the Common Core?*, N.Y. TIMES (Dec. 6, 2019), https://www.nytimes.com/2019/12/06/us/common-core.html.

343 *See* CTR. FOR PUB. JUST., *supra* note 337.

344 Louise Sheiner & Sophia Campbell, *How Much is COVID-19 Hurting State and Local Revenues?*, BROOKINGS (Sept. 24, 2020), https://www.brookings.edu/blog/up-front/2020/09/24/how-much-is-covid-19-hurting-state-and-local-revenues/.

345 *See Elementary and Secondary School Emergency Relief Fund*, OFF. ELEMENTARY & SECONDARY EDUC. (Sept. 13, 2021) https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/.

346 *CARES Act Education Stabilization Fund: Background and Analysis*, CONG. RSCH. SERV. (Aug. 6, 2020), https://crsreports.congress.gov/product/pdf/R/R46378; *Elementary and Secondary School Emergency Relief Fund*, *supra* note 345 (adding together all of the funds Congress has allocated to the ESSER in the CARES, CRRSA, and ARP Acts total $189.5 billion allotted to the fund to date).

toward "learning loss."[347] Thus, to best remedy the pervasive inequities COVID-19 has amplified in our nation's public schools, states should also seek other funds. Enter, the Strength in Diversity Act.

In May of 2019 citing "unconscionable levels" of school segregation in their states, Senator Chris Murphy of Connecticut and United States Representative Marcia Fudge of Ohio introduced the Strength in Diversity Act.[348] The Act proposed a federal grant program to fund racial and economic school desegregation efforts across America.[349] "[T]he bill would allow districts to apply for one-year planning grants or multi-year grants" to begin the school integration process.[350] Grants obtained under the Strength in Diversity Act may be used for "creating or expanding innovative school programs that can attract students" from other areas of a state, "revising school boundaries," and "developing evidence-based plans to address socioeconomic and racial isolation."[351] In addition to being available on an independent, school-district-by-school-district basis, the Act would also provide funding to districts on a collaborative level so they can work with neighboring districts to implement policies to eradicate segregation.[352] Senators Bernie Sanders and Elizabeth Warren were early co-sponsors of the bill,[353] and then-Senator Kamala Harris signed on in early July 2019.[354] On September 15, 2020, the Act passed in the House by a vote of 248–167,[355] but the bill did not advance because Congress adjourned before the possibility of further action in the Senate.[356] In February 2021, however, Congressman Robert C. Scott reintroduced the bill in the House of Representatives.[357]

Now titled the Strength in Diversity Act of 2021,[358] the current bill largely reflects the language found in its previous versions.[359] Even though the bill does not

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347 Phyllis W. Jordan, *What Congressional Covid Funding Means for K-12 Schools*, FUTUREED (Nov. 5, 2021), https://www.future-ed.org/what-congressional-covid-funding-means-for-k-12-schools/.

348 Kalyn Belsha, *What It Means When Democratic Frontrunners Say They Support the Strength in Diversity Act*, CHALKBEAT (July 11, 2019, 4:49 PM), https://www.chalkbeat.org/2019/7/11/21121013/what-it-means-when-democratic-frontrunners-say-they-support-the-strength-in-diversity-act.

349 Strength in Diversity Act of 2020, H.R. 2639, 116th Cong. § 2, § 4 (2020).

350 Belsha, *supra* note 348.

351 Press Release, Rep. Andy Levin, WATCH: Levin Speaks Out Against Metro Detroit School Segregation (Sept. 15, 2020), https://andylevin.house.gov/media/press-releases/watch-levin-speaks-out-against-metro-detroit-school-segregation.

352 *See id.*

353 Belsha, *supra* note 348.

354 *Id.*

355 *H.R. 2639: Strength in Diversity Act of 2020*, GOVTRACK (Sept. 15, 2020, 5:28 PM), https://www.govtrack.us/congress/votes/116-2020/h189.

356 Kimberly Ayudant, Comment, *A Call for Desegregation in Education: Examining the Strength in Diversity Act*, 89 FORDHAM L. REV. ONLINE 60, 70 (2021); *H.R. 2639: Strength in Diversity Act of 2020*, *supra* note 355.

357 *Id; see also* Strength in Diversity Act of 2021 (H.R. 729), Section by Section, H. Comm. on Educ. & Lab., https://edlabor.house.gov/imo/media/doc/2021-02-02%20Strength%20in%20Diversity%20Act%20Section%20by%20Section.pdf (last visited Feb. 4, 2022).

358 Section by Section, *supra* note 357.

359 Ayudant, *supra* note 356, at 70. *Compare* H.R 2639 (2020) *with* H.R. 729 (2021).

have an exact dollar amount associated with it,[360] it would allow "the federal government to play an active role in desegregation efforts"—an opportunity "long overdue [that] should be pursued to the fullest extent possible",[361] especially in the context of the racialized academic achievement gaps amplified by the eLearning Era. Because the grants provided by the bill would be limited to only communities that apply for the funds and communities that need the grants most might be too overwhelmed to apply,[362] states themselves might consider applying for these federal funds. For one, states would likely have an easier time than individual school districts in meeting the application requirements of proving they have "consult[ed] with . . . community entities, including local housing or transportation authorities," and that they have spoken with "students and families in the targeted district or region."[363] Moreover, with the grant money they might receive, state legislatures could be sure to divvy the money among struggling districts—thereby ensuring that communities in which children face the greatest inequities due to lack of quality education, access, and evaluation during the pandemic receive the support they need.

In sum, our country's failures to achieve integration in America's K-12 public schools in the wake of *Milliken* underscore that state legislatures are best suited to narrow racialized academic achievement gaps and mitigate segregation in America's public schools after the eLearning Era. Due to the Supreme Court's now-conservative majority, the obvious answer of seeking recourse in the federal courts would be problematic, as it could engender a *Milliken* 2.0—something we must steer clear of at all costs. Likewise, the "local control"[364] the *Milliken* Court gave school districts across America in 1974 has resulted in a society where now, more than ever, public school children attend deeply segregated schools. As such, school districts themselves are not the answer, and our only hope lies in the power of state legislatures.

CONCLUSION

Milliken's fences endure. But to ensure they are not everlasting in the wake of the eLearning Era—an era in which Black students, students from low-income families, and students with disabilities are disproportionately impacted—state legislatures must step in to limit the widening of racialized academic achievement

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360 Belsha, *supra* note 348. *What It Means When Democratic Frontrunners Say They Support The Strength in Diversity Act*, Chalkbeat (July 11, 2019, 4:49 PM), https://www.chalkbeat.org/2019/7/11/21121013/what-it-means-when-democratic-frontrunners-say-they-support-the-strength-in-diversity-act.

361 *Id.* at 73.

362 *Id.* at 71.

363 *Id.* (alteration in original) (quoting Strength in Diversity Act of 2021, H.R. 729, 117th Cong. § 5 (2021)) (internal quotations omitted).

364 Milliken v. Bradley, 418 U.S. 717, 741–42 (1974).

gaps and work toward fulfilling *Brown*'s promise of equal education.[365] Education policy experts share that when children live in and attend school within racially isolated settings, these children are at risk of developing discriminatory attitudes and prejudices to certain racial groups.[366] The reality is, in today's K-12 system of public education in America, there is a stark divide between Black and white students, with one-fifth of schools enrolling almost no Black students, and another one-fifth enrolling few, if any, white students.[367] In a news cycle lately dominated by instances of extreme racial bias[368] and story after story of the unarmed killings of Black and Brown men and women, one ponders whether things would be different—whether we would live in a more inclusive, equitable society, free from racial stereotyping and race-based violence—had the *Milliken* Court decided the other way. While we cannot travel back in time, we are left with evidence from Justice Thurgood Marshall, who, in his prophetic *Milliken* dissent, proclaimed: "[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together."[369] The time is now to rewrite the narrative and change the course of history for future generations—after all, the time of COVID-19 is like no other.

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365 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

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367 Lallinger, *supra* note 33.

368 *See, e.g.*, Erik Ortiz, *Inside 100 Million Police Traffic Stops: New Evidence of Racial Bias*, NBC NEWS (Mar. 13, 2019), https://www.nbcnews.com/news/us-news/inside-100-million-police-traffic-stops-new-evidence-racial-bias-n980556; Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns; Li Cohen, *Police in the U.S. Killed 164 Black People in the First 8 Months of 2020. These Are Their Names (Part I: January–April)*, CBS NEWS (Sept. 10, 2020, 4:39 PM), https://www.cbsnews.com/pictures/black-people-killed-by-police-in-the-u-s-in-2020/; Diedre McPhillips, *Deaths From Police Harm Disproportionately Affect People of Color*, U.S. NEWS (June 3, 2020, 4:07 PM), https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color.

369 Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).