BROWN, SCHOOL CHOICE, AND THE SUBURBAN VETO

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MANY who are familiar with *Brown v. Board of Education*[1] and the Southern response to the decision are at least vaguely aware that Southern states and school districts relied on school choice as one tool in their strategy of massive resistance. *Brown*'s relationship to school choice, however, is more complicated, more long-lasting, and more important than this limited and familiar connection. In this Essay, I will describe that relationship in more detail and explain why it is not only of historic interest, but of contemporary concern as well.[2] It is a story rich in irony and unintended consequences, and one with no clear resolution. In short, it is the perfect Southern tale, though its lessons and scope extend well beyond the South.

The basic plot line is as follows: *Brown*, ironically and unintentionally, helped make the use of vouchers at religious schools constitutional. That is, *Brown* helped create the political and social conditions that made possible the Supreme Court's 2002 decision in *Zelman v. Simmons-Harris*, upholding the use of vouchers at religious schools.[3] The Court's approval of vouchers, in turn, is helping to fuel a broader school choice movement. While once a threat to the realization of *Brown*'s promise, school choice may now be one of the only ways to achieve integration. Whether school choice will successfully promote integration, however, depends to a large degree on whether the political legacy of *Milliken v. Bradley*[4]—what I call "the suburban veto"—can be overcome.

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[1] 347 U.S. 483 (1954).

[2] This Essay draws from and builds upon earlier work that I co-authored with John C. Jeffries, Jr., and Michael Heise, respectively. See John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279 (2001); James E. Ryan & Michael Heise, The Political Economy of School Choice, 111 Yale L.J. 2043 (2002).

[3] 536 U.S. 639 (2002).

[4] 418 U.S. 717 (1974).

I. *BROWN* AND CHRISTIAN ACADEMIES

It is certainly true that Southern states and school districts relied on school choice to avoid integration. So-called freedom-of-choice plans, for example, offered students a choice among public schools that was free in theory but not in reality.[5] Most Southern states also passed legislation threatening to close any schools that integrated, with the tacit or explicit promise to open and financially support segregated private academies in their wake.[6]

Freedom-of-choice plans, along with other resistance strategies, largely succeeded in thwarting desegregation—so much so that few public schools were closed and few private academies were created in the ten years after *Brown*.[7] To be sure, there were notable exceptions, including the creation of all-white private academies, with state financial assistance, in Prince Edward County in Virginia.[8] But overall, private school enrollment in the South did not grow much in the first decade after *Brown*.[9]

Change began in the mid-1960s, when desegregation became a reality in many parts of the South. The Civil Rights Act of 1964, the Supreme Court's decisions in *Green v. County School Board of New Kent*[10] and *Swann v. Charlotte-Mecklenburg Board of Education*,[11] and federal threats to eliminate education funding all meant that, finally, Southern schools would be desegregated. In response, a significant number of whites scrambled to find private alterna-

[5] See, e.g., Green v. County Sch. Bd. of New Kent, 391 U.S. 430, 438–42 (1968) (describing New Kent County's "freedom-of-choice plan," which resulted in little integration).

[6] Numan V. Bartley, The Rise of Massive Resistance: Race and Politics in the South During the 1950's, at 248–50, 274–75, 278–279, 281–84, 288–89 (1969); J. Harvie Wilkinson, III, From *Brown* to *Bakke*: The Supreme Court and School Integration: 1954–1978, at 82 (1979).

[7] See Benjamin Muse, Ten Years of Prelude: The Story of Integration Since the Supreme Court's 1954 Decision 156–57 (1964).

[8] Wilkinson, supra note 6, at 97–102; Kara Miles Turner, Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and *Brown*, 90 Va. L. Rev. 1667, 1690 (2004). See generally Bob Smith, They Closed Their Schools: Prince Edward County, Virginia, 1951–1964 (1965) (giving a thorough anecdotal account of the Prince Edward County experience).

[9] See Muse, supra note 7, at 157; David Nevin & Robert E. Bills, The Schools That Fear Built: Segregationist Academies in the South 6–7 (1976).

[10] *Green*, 391 U.S. 430 (1968).

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

tives. From 1964 to 1969, for example, enrollment in private schools in the South grew ten-fold,[12] and those numbers continued to increase quite dramatically during the next decade and beyond.[13] Many of the first schools were secular,[14] but later ones were increasingly affiliated with churches.[15]

The most significant and enduring of these schools were the Christian academies or Christian day schools, which were sponsored by a range of evangelical Protestants.[16] That these academies were a response to desegregation is sometimes disputed, but the timing and location of the schools, as well as the candid admissions by those who created and attended them, all demonstrate quite clearly that avoiding integration was the main impetus for their creation. As for the timing, as mentioned, the schools first appeared in significant numbers when desegregation became a reality in the South. As for the location, the schools, at least initially, were overwhelmingly concentrated in the South; indeed, as private school enrollment exploded in the South during the late 1960s, it actually decreased in other parts of the nation.[17] As for the admissions, this one, from the creator of the Elliston Baptist Academy in Memphis in the early 1970s, was typical: "I would never have

[12] Jeremy A. Rabkin, Taxing Discrimination: Federal Regulation of Private Education by the Internal Revenue Service, *in* Public Values, Private Schools 133, 138–39 (Neal E. Devins ed., 1989).

[13] Jeffries & Ryan, supra note 2, at 331–37.

[14] See Matthew Lassiter, Twentieth-Century Secessionism, The Segregated Private School Movement in the South 10, 14 (unpublished manuscript, on file with the Virginia Law Review Association) (describing the early efforts to create private schools in Arkansas and Virginia); John C. Walden & Allen D. Cleveland, The South's New Segregation Academies, 53 Phi Delta Kappan 234, 234 (1971) (describing the early segregation academies).

[15] See Jeffries & Ryan, supra note 2, at 333, 335–36.

[16] James C. Carper, The Christian Day School, *in* Religious Schooling in America 110, 111–15 (James C. Carper & Thomas C. Hunt eds., 1984); Donald A. Erickson, Choice and Private Schools: Dynamics of Supply and Demand, *in* Private Education: Studies in Choice and Public Policy 82, 88–91 (Daniel C. Levy ed., 1986); Susan Rose, Christian Fundamentalism and Education in the United States, *in* 2 Fundamentalism and Society: Reclaiming the Sciences, the Family, and Education 452, 453–55 (Martin E. Marty & R. Scott Appleby eds., 1993). See generally Nevin & Bills, supra note 9, at 19–88 (describing the schools and the families whose children enrolled in them); Paul F. Parsons, Inside America's Christian Schools 3–110 (1987) (outlining the mission, pedagogy, and moral foundations of the schools).

[17] Jerome C. Hafter & Peter M. Hoffman, Note, Segregation Academies and State Action, 82 Yale L.J. 1436, 1442 n.45 (1973).

dreamed of starting a school," reported Brother Floyd Simmons, "hadn't it been for busing."[18]

Once created, of course, these academies were sustained by more than a desire to flee integration. The Supreme Court's decisions banning prayer and Bible reading in public schools,[19] along with a general trend toward secularization, also encouraged many white evangelicals to flee what they saw as the godlessness and immorality of public schools.[20] In fact, in the eyes of some, the Court's integration and religion decisions were linked. "They put the Negroes in the school," remarked a Southern congressman shortly after the school prayer decision, "and now they're driving God out."[21] A desire to avoid integration was thus not the only reason why Christian academies were maintained and continued to grow during the last three decades of the twentieth century. At the same time, however, there is no mistaking the fact that the Court's decision in *Brown* and the consequent desire of some to avoid school desegregation played a pivotal role in the creation of these schools.

II. FROM CHRISTIAN ACADEMIES TO SCHOOL VOUCHERS

At the time of *Brown*, and at the time when most Christian academies were created, the Supreme Court endorsed a principle of fairly strict separation of church and state. Most importantly, the Court prohibited any meaningful public financial support for religious schools or those who chose to attend them. To be sure, the Court allowed some incidental aid to flow to schools. Even in *Everson v. Board of Education*, for example, in which the Court first embraced strict separationism, it approved public funding for transportation to and from Catholic schools.[22] Following *Everson*, the Court occasionally drew a fine and somewhat bewildering line

[18] Nevin & Bills, supra note 9, at 29–30.

[19] Engel v. Vitale, 370 U.S. 421 (1962) (banning school prayer); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (banning devotional Bible readings in public schools).

[20] Nevin & Bills, supra note 9, at 26; Parsons, supra note 16, at 124–26.

[21] Godfrey Hodgson, The World Turned Rightside Up: A History of the Conservative Ascendancy in America 168 (1996) (quoting U.S. Rep. George Andrews of Alabama).

[22] 330 U.S. 1 (1947).

between incidental aid that was permissible and incidental aid that was impermissible. But until the 1990s, the line itself was drawn quite far to one side—the separationist side—of the spectrum of church-state relations.[23]

The Court's fairly strict prohibition of aid to religious schools cannot be traced to the language or to any plausible original understanding of the Establishment Clause.[24] This prohibition did fit perfectly, by contrast, with the dominant political sentiment of the mid-twentieth century. Specifically, strict separation, insofar as it meant no funding of religious schools, was supported by the full range of Protestant opinion, both liberal and conservative, Northern and Southern, rural and urban.[25] Protestants' views mattered because they were both numerous and politically powerful.[26]

Both Jews and public secularists, who strongly opposed aid to religious schools, added voice and strength to the Protestant opposition.[27] This last group, which includes the so-called secular elite, is admittedly difficult to quantify or to describe with precision, but it obviously exists. Suffice it to say that it was (and is) a group loosely affiliated around the belief that religion is a private affair, and it was a group that, at the time of *Brown*, was strongly committed to the democratizing mission of public schools. As a number of commentators have remarked, the real religion of public secularists was

[23] See Jeffries & Ryan, supra note 2, at 288–90 (discussing the relevant cases).

[24] Id. at 291–97.

[25] Richard E. Morgan, The Supreme Court and Religion 81–88 (1972); Ronald James Boggs, Culture of Liberty: History of Americans United for Separation of Church and State, 1947–1973, at 5 (1978) (unpublished Ph.D. dissertation, Ohio State University) (on file with the Virginia Law Review Association).

[26] See Will Herberg, Protestant-Catholic-Jew: An Essay in American Religious Sociology 46, 64 n.2 (rev. ed. 1960) [hereinafter Herberg, Protestant-Catholic-Jew] (noting that, as of 1953, 68% of Americans identified themselves as Protestants according to a report by *The Catholic Digest*); Boggs, supra note 25, at 5 ("Protestants held . . . a disproportionate share of economic, social, and political power and status in the 1940's. As individuals, they dominated most of the important American institutions and established the norms for American culture.").

[27] On Jewish opposition to school aid, see Will Herberg, The Sectarian Conflict over Church and State, 14 Comment. 450, 457–59 (1952) [hereinafter Herberg, The Sectarian Conflict]; see also Robert Booth Fowler et al., Religion and Politics in America: Faith, Culture, and Strategic Choices 48–49 (2d ed. 1999) (describing most American Jews as secular and Reform Jews in particular as "assertive champions of . . . church-state separation"). On the views of public secularists, see Morgan, supra note 25, at 85–88; Robin M. Williams, Jr., American Society: A Sociological Interpretation 290–91 (2d ed. 1960); Herberg, The Sectarian Conflict, supra, at 456.

democracy itself and what might be called the "American Way of Life," and the established church of this religion was the public school.[28]

In some sense, it was easy for all of these groups to oppose aid to private religious schools, at least prior to the advent of Christian academies. The reason was simple: Almost all religiously affiliated private schools at the time were Catholic. As late as 1965, for example, 87% of all students in private schools attended Catholic schools.[29] Into the mid-1960s, to say you were in private school was essentially to say that you were in a Catholic parochial school. Practically speaking, government support of private schools would mean government support of Catholic schools and, indirectly, the Catholic Church. And on this issue, as historian Richard Morgan described, "all sorts of Protestants, Jews, and secularists—those politically and doctrinally conservative, and those of extremely liberal persuasions . . . could make common cause."[30]

With hindsight, one can see that this coalition was not destined to last. The pressure came from those who created and supported Christian academies. Faced with the need to support their own schools, evangelicals flipped on the issue of aid to religious schools. The flip was more gradual and perhaps more accidental than deterministic hindsight might suggest, but flip they did.[31] There are numerous examples of this about-face, but none more explicit (or

[28] See, e.g., Herberg, Protestant-Catholic-Jew, supra note 26, at 75–90 (describing the growing faith of the American people, in the mid-twentieth century, in the "common religion" of "the American Way of Life"); Martin E. Marty, The New Shape of American Religion 80 (1959) (arguing that the so-called religion of democracy "has an 'established church' in the field of public education").

[29] Kenneth A. Simon & W. Vance Grant, U.S. Dep't of Health, Educ. and Welfare, Digest of Educational Statistics 32 (1968).

[30] Morgan, supra note 25, at 85. Opponents of aid to religious schools did not hesitate to emphasize the fact that Catholic schools dominated the private school universe. Paul Blanshard, for example, a strident critic of the Catholic Church, wrote (with some exaggeration) in 1963 that "the sectarian financial issue is 99 per cent a Catholic issue. . . . Here is joined a Catholic versus American battle, with organized world Catholicism committed to a program and a philosophy of ecclesiastical education . . . while the law and tradition of the United States favor public support for public schools only." Paul Blanshard, Religion and the Schools: The Great Controversy 120 (1963).

[31] See Jeffries & Ryan, supra note 2, at 339–52 (describing the gradual process by which numerous evangelical leaders transformed themselves from opponents to supporters of government aid for religious schools).

humorous) than the one involving the Reverend W.A. Criswell, who was pastor of the First Baptist Church of Dallas, the largest congregation in the Southern Baptist Convention. In 1960, prior to the advent of Christian academies, the Reverend Criswell declared, "It is written in our country's constitution that church and state must be, in this nation, forever separate and free."[32] By 1984, when Christian academies constituted the fastest growing segment of private education, the Reverend Criswell had changed his tune. "I believe this notion of the separation of church and state," he said on the *CBS Evening News*, "was the figment of some infidel's imagination."[33] When the Reverend Criswell and other evangelical leaders flipped sides on the issue of school aid, their congregations and supporters followed suit.[34]

The support of conservative evangelicals transformed the political landscape of school aid. Protestants were no longer united in opposition to school aid, and the groups that now supported such aid (conservative evangelicals) were becoming larger and more powerful just as the groups that remained opposed to such aid (the mainline denominations of Episcopalians, Methodists, and Presbyterians) were losing members and political clout.[35] Conservative evangelicals also formed new and previously unthinkable alliances with Catholic groups in an effort to secure funding for religious schools.[36] As conservative white evangelicals became more politically active and more powerful, the consequences of their realignment grew. Indeed, this group, which constitutes about one-quarter of the electorate, played a crucial role in the election of President Reagan and the first President Bush, who between them appointed all five of the justices in the majority in *Zelman*.[37]

[32] W.A. Criswell, Religious Freedom and the Presidency, 19 United Evangelical Action, Sept. 1960, at 9–10.

[33] Richard A. Pierard, The Historical Background of the Evangelical Assault on the Separation of Church and State in the U.S.A., *in* International Perspectives on Church and State 65, 65 (Menachem Mor ed., 1993).

[34] A. James Reichley, The Evangelical and Fundamentalist Revolt, *in* Piety and Politics: Evangelicals and Fundamentalists Confront the World 69, 76 (Richard John Neuhaus & Michael Cromartie eds., 1987); Rose, supra note 16, at 480.

[35] Jeffries & Ryan, supra note 2, at 343–58.

[36] Fowler et al., supra note 27, at 69–73, 250–51; John Herbers, Activism in Faith: Big Shift Since '60, N.Y. Times, Sept. 12, 1984, at B9; John Herbers, Church Issues Spread to State Races, N.Y. Times, Sept. 19, 1984, at B9.

[37] Hodgson, supra note 21, at 169, 184; Fowler et al., supra note 27, at 92, 118–20.

While support for funding religious schools and vouchers grew during the 1980s and 1990s, confidence in public education waned. Disappointment over the failure of school desegregation in many urban school systems and the dismal state of such school systems made secular elites, of all political stripes, much more open to the idea of private alternatives.[38] African-Americans also expressed increasing support for vouchers, a position that would have been virtually unthinkable in 1954.[39] The increased attention to test scores and academic performance, and a concomitant loss of faith in the civic purposes of public schools, has also worked to dampen commitment to the socialization and assimilative function of public schools.[40] With academic and vocational goals predominant, those who once championed public schools as necessary to promote democracy and racial harmony—including public secularists and African-Americans—have begun to focus instead on the academic deficiencies of public schools and the promise of private alternatives.[41]

Thus, by the time the Court finally approved vouchers, there was a much larger and more active coalition pushing for aid to religious schools, while the traditional opposition had fractured and weakened. In addition, school aid could no longer be seen as aid to a particular church. By the 1997–98 school year, and for the first time in the twentieth century, Catholic schools accounted for less than half of private school enrollment.[42] Other religious schools, most of which were Christian academies, accounted for nearly 35% of private school enrollment.[43] The increasing prevalence of non-Catholic religious schools made it easier to see school aid as neutral among religions, which has always been a key factor in the

[38] Jeffries & Ryan, supra note 2, at 362–64.

[39] See, e.g., James Brooke, Minorities Flock to Cause of Vouchers for Schools, N.Y. Times, Dec. 27, 1997, at A1 (reporting poll results indicating that 72% of black parents support vouchers).

[40] See, e.g., Stephen Macedo, Diversity and Distrust: Civic Education in a Multicultural Democracy 16 (2000) ("What is striking in debates over public school reform is that the emphasis on markets, choice, and cultural diversity often seems accompanied by a profound loss of faith in civic purposes.").

[41] See Peter W. Cookson, Jr., School Choice: The Struggle for the Soul of American Education 8–9 (1994); Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 91–92, 209–13 (1999).

[42] Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Private School Universe Survey 1997–98, at 2–3 (1999).

[43] Id.

Court's Establishment Clause jurisprudence.[44] Finally, the participation of poor minority students in voucher programs, including the one before the Court in *Zelman*, made it easier to see the voucher question as less about religion and more about educational opportunity.[45]

All of these factors combined to make the Court's approval of vouchers, if not inevitable, quite predictable and understandable. The Supreme Court may not slavishly follow election returns, but it does not operate in a political vacuum. By the time the Court decided the voucher case, church-state politics had changed dramatically, as had the realities of aid to religious schools. So, too, had the Court's members, with conservative justices replacing more liberal justices. All of these changes can be traced back, one way or another, to the Court's decision in *Brown*.

Brown, of course, is not solely responsible for these changes. As mentioned, the Court's prayer and Bible reading decisions, and later its decision to protect abortion, obviously played a role in the growth and maintenance of Christian academies and the political activism of conservative Christians.[46] Other factors have also contributed to the growing conservatism in American politics and the American judiciary during the last thirty years.[47] Nonetheless, it seems fair to identify the Court's approval of vouchers in *Zelman* as an unintended consequence of *Brown*.

III. SCHOOL CHOICE AND THE SUBURBAN VETO

If one were looking backward and in a pessimistic mood, it would be possible to conclude that Southern resistance finally won the war when the Court approved vouchers. As a result of that decision, white and black students are ostensibly free to separate themselves in private schools, and to do so with the help of gov-

[44] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) ("Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

[45] Some liberal commentators, for example, have argued for vouchers strictly on educational grounds. See Robert B. Reich, The Case for "Progressive" Vouchers, Wall St. J., Sept. 6, 2000, at A26; William Raspberry, Let's At Least Experiment with School Choice, Wash. Post, June 16, 1997, at A21.

[46] See Reichley, supra note 34, at 76; Fowler et al., supra note 27, at 142; supra notes 19–21 and accompanying text.

[47] See generally Hodgson, supra note 21.

ernment funding. Indeed, this possibility helps explain why some civil rights groups, supportive of school integration, have opposed vouchers and some other forms of school choice.

But I see the potential for another ironic twist to this story. School choice was once an obstacle to school integration. Today, school choice, vouchers included, may be one of the only tools left to achieve integration. Given that court-ordered desegregation is in its twilight phase, there are three ways that integration can occur. One is through neighborhood integration, which is not happening very quickly.[48] Another is through voluntarily adopted, but mandatory, integration plans—that is, plans requiring integration but adopted by local and state legislatures rather than imposed by courts. Such plans, however, do not seem politically plausible at this point.[49] The last option is through school choice plans that are structured either to encourage or require integration.

The reality is that neighborhoods are segregated by race and income in most parts of the country.[50] If mandatory busing for integration is no longer an option, the only way to avoid segregated schools is to give students a chance to attend schools outside of their neighborhoods and, in many places, outside of their home districts. Magnet schools, which are choice schools, have already been used in desegregation plans, so the use of school choice is not completely new to the cause of integration.[51] But more than magnet schools will have to be employed if integration is going to occur on a large scale. Indeed, for those interested in using choice to promote integration, all forms of school choice should be considered,

[48] Lewis Mumford Center for Comparative and Urban Research, Ethnic Diversity Grows, Neighborhood Integration Lags Behind, (last modified Dec. 18, 2001) at http://mumford1.dyndns.org/cen2000/WholePop/WPreport/MumfordReport.pdf (on file with the Virginia Law Review Association).

[49] To cite just one pertinent example: Even though the Connecticut Supreme Court read its state constitution to prohibit de facto segregation in schools and cited existing school district lines as the main cause of such segregation, not even the plaintiffs in that case have requested mandatory busing for integration. See Robert A. Frahm, Legislators Approve Sheff Settlement, House Votes 87-60 for Integration Plan, Hartford Courant, Feb. 26, 2003, at B1 (discussing Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996)).

[50] Lewis Mumford Center for Comparative and Urban Research, supra note 48.

[51] Rolf K. Blank et al., After 15 Years: Magnet Schools in Urban Education, *in* Who Chooses? Who Loses? Culture, Institutions, and the Unequal Effects of School Choice 154, 158–59 (Bruce Fuller & Richard Elmore eds., 1996).

including vouchers, as all have the potential to increase integration. Because all choice plans, whether public or private, *could* include provisions that promote or require integration, it is short-sighted to exclude some choice plans from consideration on the ground that a particular type of school choice—for example, vouchers or charter schools—will necessarily exacerbate rather than promote integration. Specifically, those who profess to support integration but oppose school vouchers ought to reconsider their opposition and focus instead on ways to shape voucher programs to promote integration.

With that said, those interested in using choice or any other tool to foster school integration face an uphill battle. In particular, they must confront the political legacy of the Court's decision in *Milliken v. Bradley*.[52] This is, coincidentally, also an anniversary year for *Milliken*, which was decided in 1974. It is unlikely, however, that there will be many public celebrations of the case. The Court's decision in *Milliken* excluded the suburbs from desegregation remedies absent some showing of an interdistrict violation, which was quite difficult to prove.[53] As a result, interdistrict desegregation was rarely an option after *Milliken*. The decision dealt a crushing blow to urban desegregation in the North and West, where school district lines separated urban and suburban schools, and where urban schools were increasingly dominated by minority students.[54] Unable to include suburban schools, desegregation plans in urban areas were largely futile, for the simple reason that there were not enough white students left in public schools.

Just as the Court's school aid decisions have been consistent with dominant political opinion, so, too, was the decision in *Milliken*. Public sentiment at the time was strongly opposed to cross-district busing. President Nixon delivered a televised address specifically to

[52] 418 U.S. 717 (1974).

[53] Plaintiffs essentially would have to show that school district lines were altered in order to obtain relief. Id. at 744–45. This rarely occurred, however, because residential segregation between cities and suburbs made it unnecessary to alter school district lines. See Gary Orfield et al., Deepening Segregation in America's Public Schools: A Special Report from the Harvard Project on School Desegregation, 30 Equity & Excellence in Educ. Nos. 2, 5, 12 (1997).

[54] James E. Ryan, Schools, Race, and Money, 109 Yale L.J. 249, 261 (1999).

denounce cross-district busing,[55] and politicians from both sides of the aisle introduced measures, prior to *Milliken*, to prohibit it.[56] To be sure, the decision could have come out the other way. The case was decided by a 5-4 vote, with Justice Blackmun, who would later become one of the Court's most liberal justices, voting with the majority.[57] That the decision was consistent with public sentiment does not mean that it was preordained. At the same time, however, even had the case been decided differently, there is reason to question whether it would have been enforced or whether it would have been ignored or resisted, as *Brown* was during the first decade following the decision.[58]

Putting to one side speculation on the motivation behind *Milliken* and the efficacy of a decision going the other way, it is fair to say that *Milliken* both reflected and enhanced the political power of suburbanites. That power has only grown since the decision. In particular, the ability of suburban schools to remain separate from their urban counterparts has remained intact. Indeed, suburban schools possess what might be called "the suburban veto," which effectively gives them the power to limit any education reform that would interfere with suburban autonomy. *Milliken* endorsed suburban autonomy in the field of desegregation, but the suburban veto has also been used to limit school finance remedies and to shape existing school choice plans. School finance reform rarely requires suburban school districts to forfeit or share locally raised revenues, and school choice plans rarely require suburban schools to send or receive students elsewhere. Despite each major effort in the last half-century to equalize educational opportunities—desegregation, school finance, and school choice—suburban schools have managed to remain physically and financially independent.[59]

This point is particularly salient when contemplating the prospects of school choice to accomplish integration. A good deal of

[55] Transcript of Nixon's Statement on School Busing, N.Y. Times, Mar. 17, 1972, at 22.

[56] Ryan & Heise, supra note 2, at 2053–55.

[57] See Linda Greenhouse, Documents Reveal the Evolution of a Justice, N.Y. Times, Mar. 4, 2004, at A1 (describing Justice Blackmun's trajectory from conservative to liberal).

[58] See John C. Jeffries, Jr., Justice Lewis F. Powell, Jr., 315–18 (1994).

[59] For further discussion and examples, see Ryan & Heise, supra note 2, at 2050–88.

segregation today occurs between, rather than within, school districts.[60] Most school choice plans, however, involve choices within single school districts. The No Child Left Behind Act of 2001, for example, gives students in "failing" schools the right to transfer to another school, provided that it is within the same district.[61] The voucher plan in Cleveland, to cite another example, allows students to use vouchers at private religious schools or public suburban schools that volunteer to accept voucher students, which not a single suburban school has done.[62] There are some counterexamples, including cross-district choice plans in the Hartford, Rochester, Boston, and Milwaukee metropolitan areas. But these plans are exceptional and quite limited in scope.[63] Unless and until meaningful choice across districts lines is not only tolerated but encouraged, the promise of school choice to accomplish integration will be stymied. And many metropolitan areas will remain just as divided as Justice Marshall, writing in dissent in *Milliken*, predicted.[64]

[60] Id. at 2094–96.

[61] No Child Left Behind Act of 2001 § 101, 20 U.S.C. § 6316 (2002).

[62] Ohio Rev. Code Ann. §§ 3313.974–979 (Anderson 1999); Simmons-Harris v. Zelman, 234 F.3d 945, 949 (6th Cir. 2000), rev'd, 536 U.S. 639 (2002).

[63] Ryan & Heise, supra note 2, at 2066–73.

[64] *Milliken*, 418 U.S. at 814–15 (Marshall, J., dissenting) ("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 black—but it is a course, I predict, our people will ultimately regret.").