

Saint Louis University Law Journal

Volume 63
Number 4 *Childress Lecture--Exploring
#STL2039: Policies for a Better Future (Summer
2019)*

Article 4

2019

Beyond Integration: Forward Through Ferguson/Backward Through Brown

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Recommended Citation

Anders Walker, *Beyond Integration: Forward Through Ferguson/Backward Through Brown*, 63 St. Louis U. L.J. (2019).

Available at: <https://scholarship.law.slu.edu/lj/vol63/iss4/4>

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BEYOND INTEGRATION: FORWARD THROUGH FERGUSON/BACKWARD THROUGH *BROWN*

ANDERS WALKER*

INTRODUCTION

Three months after the death of Michael Brown, Missouri Governor Jay Nixon appointed a commission to study racial inequality in St. Louis.¹ The ensuing report, styled *Forward Through Ferguson*, advanced 189 “calls to action” aimed at addressing racial disparities in the region, including reforms to criminal justice, youth services, and education. However, the document made no mention of racial integration, a remarkable omission given that at the time of Brown’s death in August 2014, St. Louis boasted the “largest and longest running school desegregation program” in the country.² That program, sparked by a 1972 lawsuit to desegregate St. Louis public schools, had involved the construction of magnet schools to draw white students into the city, mandatory busing within the city, and a voluntary busing program for black city students interested in attending majority-white suburban schools.³

That the Ferguson Commission did not even mention school integration in its report may reflect the busing program’s impending phase-out in 2019, or it may represent a larger shift in thinking about race and reform generally in the region. For example, recent data released by Saint Louis Public Schools suggests that even though students who were bused to suburban districts outperformed their peers in general city schools, city students who remained and accessed the twenty-three “magnet and choice programs” in St. Louis did even better.⁴ Such numbers seem to coincide with a larger shift in thinking about the value of integration generally in the United States, a shift reflected not only in *Forward Through Ferguson*, but also “Vision for Black Lives,” a policy platform endorsed by Black Lives Matter in 2016 (which did not mention integration),

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1. Stephen Deere, *Nixon announces members of Ferguson Commission*, ST. LOUIS POST-DISPATCH, Nov. 19, 2014, at A1.

2. Elisa Crouch, *St. Louis desegregation program headed for phase out*, ST. LOUIS POST-DISPATCH, June 10, 2016, at A1; *Forward Through Ferguson: A Path Toward Racial Equality* (2015) (hereinafter *Forward Through Ferguson*).

3. *Id.*

4. *Id.*; Eliza Shapiro, “I Love My Skin!” *Why Black Parents are Turning to Afrocentric Schools*, N.Y. TIMES, Jan. 8, 2019, at A1, A24.

and recent trends in cities like Milwaukee, Chicago, and New York, where growing numbers of black parents are opting for “schools explicitly designed for black children.”⁵

Taking such indicators as a cue, this paper will posit that racial reform has moved beyond integration, and that the future of racial progress in St. Louis, and perhaps the United States generally, no longer warrants the attention to racial balance that it once did. This does not mean that integration in schools does not bear benefits, to be sure, but it does mean that those benefits may not warrant the type of aggressive judicial attention to racial balance that they once incurred. To demonstrate, this article will proceed in two parts. First, it will canvass the history of desegregation efforts in the United States, arguing that *Brown v. Board of Education* bore a mixed blessing for urban America, particularly as the Supreme Court vacillated on how, precisely, it should be interpreted. Second, this paper will suggest that *Forward Through Ferguson’s* approach presents a new frame for thinking about race and reform in America, one that relies less heavily on litigation, is less fraught politically, and is more likely to contribute to urban growth and student well-being.

I. BACKWARD THROUGH *BROWN*

When the Supreme Court declared formal segregation unconstitutional in *Brown v. Board of Education* in 1954, it heralded a new era in American race relations, and an end to half a century of formal segregation in the American South.⁶ However, the ruling also engendered a vehement response.⁷ Grassroots activists in places like Indianola, Mississippi began immediate opposition to the opinion, and southern states gradually combined to resist the ruling through all lawful means, a move that culminated in a campaign of “massive resistance” unprecedented in American history.⁸ As southern segregationists saw it, the Constitution did not forbid the segregation of children in schools, so long as those schools were ostensibly equal, a position that the Supreme Court had sanctioned in 1895, but now rejected outright.⁹ According to Chief Justice Earl Warren, segregation violated equal protection regardless of whether facilities were equal, for it harmed black children, instilling in them a sense of inferiority that could not easily be undone.¹⁰

5. Yamiche Alcindor, *Black Lives Matter Coalition Makes Demands as Campaign Heats Up*, N.Y. TIMES, Aug. 1, 2016.

6. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290–92, 344–49 (2004).

7. *Id.* at 385–408.

8. NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950’S 85, 111, 270–92 (2nd ed. 1997); KLARMAN, *supra* note 6, at 390.

9. KLARMAN, *supra* note 6, at 354–357.

10. *Brown v. Board of Education*, 347 U.S. 483, 493–494 (1954).

To prove its point, the Court cited a series of sociological studies, among them a report by a Swedish sociologist named Gunnar Myrdal who declared that African Americans' institutions, fraternal organizations, and churches were not only inferior to their white counterparts, but pathological.¹¹ Myrdal argued that it was better to eliminate black spaces and order blacks into white schools than seek to preserve black culture, a radical solution to what Myrdal termed the "American dilemma."¹²

Not all African Americans agreed. Black writer and National Book Award winner Ralph Ellison rejected Myrdal's conclusions, accusing him of anti-black bias.¹³ African American writer Zora Neale Hurston concurred, accusing the Supreme Court of "insulting" her race.¹⁴

Few listened. As the federal government threatened southern schools with funding cuts, state legislatures began to remove overt racial classifications from southern codes, and racial barriers fell. By 1970, formal, *de jure* segregation was over.

However, the removal of racial classifications did not necessarily guarantee integrated classrooms. In many cases, students continued to attend segregated schools due to residential patterns, a situation that soon drew judicial scrutiny. In 1971, for example, the Supreme Court decided a case brought by black parents in Charlotte, North Carolina arguing that even though overt classifications had been removed from state law, their children were still trapped in segregated schools because they lived in predominantly black neighborhoods.¹⁵ To remedy this, the plaintiffs requested that districts bus students out of their neighborhoods to achieve racial balance, a type of Myrdalian solution to Charlotte's racial dilemma.¹⁶

The question of busing presented in the Charlotte case, styled *Swann v. Charlotte-Mecklenburg*,¹⁷ proved a political lightning rod. Some argued that it would harm children by subjecting them to long commutes; others complained that it would lead to a loss of community/school cohesion; and others posited that busing would drive whites from cities, taking their property tax dollars with them. Two of the earliest expositors of this theory were Virginia Attorney General Andrew Smith and Richmond lawyer Lewis F. Powell, Jr., who penned an amicus brief in *Swann* warning that if the Supreme Court sanctioned busing, it would spark white flight.¹⁸

11. ANDERS WALKER, *THE BURNING HOUSE: JIM CROW AND THE MAKING OF MODERN AMERICA* 22–24 (2018).

12. *Id.* at 23.

13. *Id.* at 55.

14. *Id.* at 27.

15. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 9, 23–36 (1971).

16. *Id.* at 30.

17. *Id.*

18. WALKER, *supra* note 11, at 181.

Few listened. A majority on the Court ruled in favor of busing, and white parents promptly pulled their children from urban schools.¹⁹ In St. Louis, talk of busing exacerbated an already dramatic decline in the city's population, which had dropped from 850,000 in 1950 to 750,000 in 1960, only to then drop dramatically during busing debates from 622,000 in 1970 to 397,000 by 1990.²⁰ While a variety of factors contributed to the depopulation of city, including deindustrialization and suburbanization, a recurring theme of the shift was race, including fears of black crime, fears of a negative black impact on property values, and concerns about the effect that black students might have on white schools. While historians debate the validity of these claims, they proved obstinate.²¹ Anti-black animus alone reflected centuries of racial thinking in St. Louis and, for that matter, the United States, which, up until the 1930s, had adhered to flawed notions that blacks were inferior to whites and regimes like racial segregation, whether *de facto* or *de jure*, made for good policy. This was not simply a populist notion but drew credence from academic disciplines like biology, genetics, anthropology, sociology, history, and even economics, all of which supported the notion that maintaining white supremacy guaranteed social prosperity while integration threatened societal decline.

Only in the 1940s did the federal government begin to reject such notions, a shift prompted by the rise of Nazi Germany and reinforced by new breakthroughs in science, but nevertheless hard for large numbers of Americans to accept. For many, even those from educated backgrounds, race continued to explain the rational order of things, a widespread presumption that helped fuel the panic over integration in St. Louis in the 1950s and 60s, just as black migration increased, civil rights surged, and whites disappeared.

Looked at broadly, in other words, the underlying causes of racial tension in St. Louis lie in part in the intransigence of racial thinking post-World War II, a problem not just in the Midwest but across the United States. Racist thinking formed part of a much larger worldview, or *mentalité*, that helped Americans make sense of their world through the nineteenth and early twentieth centuries, encapsulating their deepest fears and also their highest personal and national aspirations. Though the Supreme Court abruptly rejected such thinking in *Brown*

19. Historian Davison Douglas discusses the failure of integration post-*Swann*, meanwhile noting that Charlotte fared better than most cities. DAVISON M. DOUGLAS, *READING, WRITING & RACE: THE DESEGREGATION OF CHARLOTTE SCHOOLS* 246–47 (1995).

20. COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* 22 (2008).

21. Raymond Wolters argues that desegregation led to disciplinary problems in schools. *See, e.g.*, Raymond Wolters, *Why School Reform Failed*, *AM. RENAISSANCE*, Aug. 26, 2015, <https://www.amren.com/news/2015/08/why-school-reform-failed/> [<https://perma.cc/P96H-B4AX>] (last visited Apr. 3, 2019). Other historians, like Davison Douglas, suggest that school officials themselves may have improperly directed disciplinary actions against black students. *See, e.g.*, DOUGLAS, *supra* note 19, at 227.

v. Board of Education in 1954,²² the larger project of convincing the American public that race was a social construct that had no basis in scientific fact never quite succeeded; a problem that became apparent in 1972, when Richard Nixon won the White House by promising to end busing and realign the Supreme Court against the aggressive pursuit of racial balance.²³

One of the first Justices that Nixon appointed was Lewis F. Powell, Jr., the very same Virginia attorney who had declared that busing would lead to white flight in 1970. “Racial prejudices in the hearts of men cannot be legislated out of existence” argued Powell, as if to prove the point that he had made in his Charlotte brief, namely that judicial intervention could not change hearts and minds. As he saw it, prejudice “will pass only as human beings learn to respect and deserve to be respected by others,” a position that seemed to question the role of courts generally in the project of reform.²⁴

Powell moved quickly to protect the wealth of those who had escaped the city, a move that became apparent soon after his confirmation when the Court agreed to consider a Texas challenge to public school funding. The plaintiffs, poor children of Mexican-American descent, lived in “school districts with low property valuations,” prompting them to argue that funding schools through local property taxes led to gross inequalities in education, violating the Constitution’s guarantee of equal protection.²⁵ In Texas, for example, students who happened to live in wealthy school districts received an average of \$585.00 per pupil, while students in poor districts averaged only \$60.00 per pupil.²⁶ The plaintiffs argued that the resulting difference in educational quality harmed children and was therefore unconstitutional.²⁷

22. *Brown v. Board of Education*, 347 U.S. 483 (1954).

23. Even today, leading scientists refuse to accept that race is simply a social construct with no basis in scientific fact, a position endorsed most recently by Nobel Prize-winning biologist James Watson to his own detriment. See Amy Harmon, *James Watson Had a Chance to Salvage His Reputation on Race. He Made Things Worse*. N.Y. TIMES, Jan. 1, 2019, <https://www.nytimes.com/2019/01/01/science/watson-dna-genetics-race.html> [https://perma.cc/B8AP-U566] (last visited Apr. 4, 2019).

24. Lewis F. Powell, Jr., “The Attack on American Institutions,” Southern Industrial Relations Conference, Blue Mountain, North Carolina, July 15, 1970, 15, 21, 24 (on file with the Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law, Lexington, Virginia); Martin Luther King, Jr., *Why We Can’t Wait*, 124 (1964, New York: Signet, 2000); Robert Penn Warren interview with Ralph Ellison, “Warren on the Art of Fiction,” in *Talking with Robert Penn Warren* 47 (Floyd C. Watkins, John T. Hiers, Mary Louise Weaks, eds., Athens: University of Georgia Press, 1990).

25. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 n.51 (1973).

26. *Id.* at 75.

27. *Id.* at 20 n.51; Brief for Appellees at 3–4, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332); Memorandum from Covert E. Parnell, III to Lewis F. Powell, Jr., 2–3 (June 2, 1972) (on file with Washington & Lee Law School Library). Memorandum from Covert E. Parnell, III to Lewis F. Powell, Jr. (June 2, 1972), 2–4 (on file with Washington & Lee Law School Library).

Powell disagreed, seizing the case to demonstrate that one of the advantages of preserving inequality in school funding was that it kept schools tied to local communities, thereby inhibiting centralized state “control.”²⁸ Altering school funding, he warned, threatened to bring about “national control of education,” a move that he likened to totalitarianism. “I would abhor such control for all the obvious reasons,” complained Powell, noting that he had “in mind the irresistible impulse of politicians to manipulate public education for their own power and ideology — e.g., Hitler, Mussolini, and all Communist dictators.”²⁹ Powell’s fear of government creep introduced a startling new variable into the political equation of racial justice, not a straightforward appeal to white supremacy, to be sure, so much as a critique of the heavy-handed tactics that the Court had invoked in *Swann* and *Brown*, suggesting that both had paved the way for state over-reach.³⁰

Long opposed to Myrdalian programs like busing, Powell found inequality itself to have some benefit. “Each locality,” argued Powell in *San Antonio v. Rodriguez*, “is free to tailor local programs to local needs,” an arrangement that lent itself to a multiplicity of educational approaches, or what he called “pluralism.”³¹ “Pluralism,” argued Powell, “affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence,”³² meaning that even if some school districts received less money, they could always develop new ways of teaching, perhaps even arriving at more effective forms of pedagogy. This was a little obtuse, of course, for teachers with fewer resources would probably not turn down more money. However, Powell’s defense of inequality bolstered his case against centralized government, which in turn protected suburban enclaves from the reach of impoverished city children.³³

Powell’s endorsement of inequality in *Rodriguez* laid the foundation for a string of cases that he would use to cement white flight. For example, Powell rejected the idea that the Constitution guaranteed equal opportunity, something that “generations of southern conservatives” had rejected as “patent nonsense,” in part because it demanded massive exertions of state power to create level playing fields that were, on their face, just as difficult to guarantee as equal

28. *Rodriguez*, 411 U.S. at 130.

29. WALKER, *supra* note 11, at 179.

30. Memorandum from Lewis F. Powell, Jr. to Larry A. Hammond 3–4 (Oct. 9, 1972) (on file with Washington & Lee Law School Library).

31. *Rodriguez*, 411 U.S. at 50.

32. *Id.*

33. *Id.* at 1309.

outcomes.³⁴ Powell also rejected the idea that segregation in the North was somehow less pernicious than segregation in the South.³⁵

Powell called out the North for hypocrisy on October 12, 1972 when the Court heard a case brought by African American parents in Denver, Colorado complaining that the city's public schools were unconstitutionally segregated.³⁶ Though Colorado prohibited segregation as a matter of law, the plaintiffs alleged that the Denver School Board had nevertheless worked to keep black and Hispanic students contained in predominantly segregated schools through a variety of deliberate means, including "the manipulation of student attendance zones," the invocation of "a neighborhood school policy," and the "selection" of sites for new schools in neighborhoods that the board knew would yield segregated results.³⁷ Denver was far from Charlotte, to be sure, but the plaintiffs hoped the Court might extend their southern rulings to states in the North and West.³⁸

Writing for the majority, Justice William Brennan seemed amenable to this idea, but only in cases where deliberate efforts to preserve segregation could be shown.³⁹ So long as plaintiffs could demonstrate a "purpose or intent to segregate," argued Brennan, then "*de facto*" districts that did not openly endorse segregation could be treated as "*de jure*" districts, which did, and federal courts could order a variety of remedial measures to achieve racial balance, like busing.⁴⁰ However, in cases where segregation occurred accidentally, due to longstanding residential patterns or demographic shifts from one neighborhood to another, for example, the Court found no Constitutional foul.⁴¹

In a startling concurrence, Powell declared that the *de facto/de jure* distinction should be abandoned, and all school districts treated the same.⁴² Rather than "perpetuate the *de jure/de facto* distinction," argued Powell,

I would hold, quite simply, that where segregated public schools exist within a school district to a substantial degree, there is a *prima facie* case that the duly constituted public authorities (I will usually refer to them collectively as the 'school board') are sufficiently responsible to warrant imposing upon them a

34. WALKER, *supra* note 11, at 180.

35. EUGENE D. GENOVESE, *The Voice of Southern Conservatism*, in EUGENE D. GENOVESE, *THE SOUTHERN FRONT: HISTORY AND POLITICS IN THE CULTURAL WAR* 252 (Columbia: University of Missouri Press, 1995).

36. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

37. *Id.* at 191.

38. *Id.* at 192.

39. *Id.* at 213.

40. *Id.* at 208.

41. *Keyes*, 413 U.S. at 208.

42. *Id.* at 223–25, 229–33 (Powell, J., concurring).

nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system.⁴³

This was a surprise. Powell's claim that *de facto* segregation was just as bad as *de jure* appeared, on its face, to be a remarkably progressive position, an effort to hold school districts accountable whether they had intentionally segregated minority students or not.⁴⁴

However, Powell had long rejected the *de jure/de facto* distinction, most notably in *Swann v. Charlotte-Mecklenburg*, when he and Virginia Attorney General Andrew Miller had argued that intrusive efforts like busing went far beyond what *Brown v. Board of Education* had originally intended.⁴⁵ As Powell saw it, *Brown* demanded an end to overtly segregationist law, nothing more. Further inquiries into the status of segregated schools, he argued, whether they were intentionally segregated or not, struck him as ill-advised, likely to drive white parents out of urban districts and into distant suburbs, as had already happened in Richmond and St. Louis. Powell argued forcefully that courts should allow urban school districts considerable freedom in determining how, precisely, integration should be achieved.⁴⁶ Districts that ended up with predominantly black schools due to housing patterns, he maintained, should not be burdened with draconian mandates that they achieve racial balance.⁴⁷ "Overzealousness in pursuit of any single goal is untrue to the tradition of equity and to the 'balance' and 'flexibility which this Court has always respected," noted Powell in *Keyes*.⁴⁸ According to him, the Constitution did "not require that school authorities undertake widespread student transportation solely for the sake of maximizing integration."⁴⁹ Better to retain some segregation, he maintained, than subject children to arduous commutes in the name of "racial balance," a goal that *Brown* had never envisioned.⁵⁰

A trace of regret haunted Powell's words. Though he had defended suburban school districts in San Antonio, he also seemed disappointed that cities had

43. *Id.* at 224.

44. *Id.*

45. WALKER, *supra* note 11, at 181.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. WALKER, *supra* note 11, at 181. As Powell saw it, "[a]n integrated school system does not mean—and indeed could not mean in view of the residential patterns of most of our major metropolitan areas—that every school must in fact be an integrated unit." *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 226–27 (1973) (Powell, J., concurring). In fact, integrating all units struck Powell at best naïve and at worst dangerous. *See id.* After all, whites could, and probably would, simply leave onerous school districts, as they had done in Richmond, leaving cities across the country segregated, bankrupt, and worse off than they had been under Jim Crow. The Constitution provided no remedy for black students in such situations, since federal causes of action only arose when segregation was alleged "within" school districts. *Id.* at 226–28.

declined to the extent they did, a misfortune that may have been forestalled had they accepted some segregation. Now, sadly, American cities faced re-segregation and also bankruptcy, as whites left and took their property taxes with them. This became apparent in 1974 when Powell joined a majority opinion styled *Milliken v. Bradley* that prohibited federal judges from merging school districts in order to prevent white flight.⁵¹ The case came from another northern city, Detroit, and was also brought by African American plaintiffs who argued that the city's school district had deliberately taken measures to segregate black students.⁵² Thanks to white flight, however, the only practical solution to segregation was to merge the city district with adjoining suburban districts in the "three-county metropolitan area."⁵³ Unless such a "metropolitan plan" was imposed, argued the plaintiffs, Detroit would be left with "an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area."⁵⁴ While this was true, Chief Justice Warren Burger held that school district lines constituted a "deeply rooted" American commitment to "local control" and could not be "casually ignored or treated as a mere administrative convenience."⁵⁵ To support this point, Burger cited Powell, invoking the Virginian's holding in *San Antonio v. Rodriguez* that "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'"⁵⁶ Though *Rodriguez* had only implicitly involved the question of race—it was decided primarily on the grounds of wealth—*Milliken* made the racial connection explicit. By citing Powell, Burger could claim that the neighborhood school remained one of the last bastions of local community control in America—a value that outweighed the problem of segregation and protected white flight.⁵⁷

Burger's invocation of Powell in *Milliken* suggested that *Brown's* influence was fading. While Chief Justice Earl Warren had invoked federal power to intervene in local affairs and fight racism, in other words, local affairs were now being cited as a firewall to racial reform. Of course, the landscape was different because overt classifications were a thing of the past. Yet, the question remained as to whether state action had not orchestrated segregation in the North—just as it had in the South (albeit in more subtle ways). Justice William O. Douglas seemed to think it had. In an eloquent dissent, Douglas outlined all the various

51. 418 U.S. 717 (1974).

52. *Id.* at 777.

53. *Id.* at 729–30.

54. *Id.* at 735.

55. *Id.* at 741–42.

56. *Milliken*, 418 U.S. at 742.

57. *Id.* at 729–730.

ways that government action had contributed to school segregation in the North, including the enforcement of covenants barring blacks from white neighborhoods, the construction of public housing “to build black ghettos,” and the diligent maintenance of school district lines between them.⁵⁸ All of these factors, which scholars would eventually lump under the umbrella of “structural racism,” could—argued Douglas—easily have led Burger to endorse Detroit’s metropolitan plan.⁵⁹

But he did not. Instead, Burger cited Powell; thereby consecrating arguments that the Virginian had long made, including the importance of local ties to local schools, the inevitability, nay utility, of inequality, and the dispassionate observation that the migration of families from one district to another to avoid integration was simply part of the “American scene,” not something that courts could, or should, be able stop.⁶⁰ To Douglas, this was maddening. As he put it, Burger’s opinion took the nation “back to the period that antedated the ‘separate but equal’ regime of *Plessy v. Ferguson*,” a time when public schools were at once segregated and unequal.⁶¹ Douglas implicated Powell directly in this shift, noting that his opinion in *Rodriguez* had sanctioned the very arrangement by which “the poorer school districts must pay their own way,”⁶² a position that—when coupled with the residential segregation caused by white flight—meant public schools could be both racially segregated and unequal. “So far as equal protection is concerned,” fumed Douglas, “we are in a dramatic retreat from the 7-to-1 decision in 1896 that blacks could be segregated in public facilities, provided they received equal treatment.”⁶³

Powell had prevailed. His rulings had successfully protected unequal funding between districts in *Rodriguez*, absolved the South of moral guilt in *Keyes*, and now helped provide the rationale for holding school district lines constitutionally insurmountable in *Milliken*. Further, he had done so with the full cooperation of a majority of his colleagues on the Court, and arguably a majority of the voting public as well. Though *Milliken*, *Keyes*, and *Rodriguez* all drew criticism from civil rights circles, few mainstream politicians—including the President and Congress—disagreed with the decisions.⁶⁴

58. *Milliken v. Bradley*, 418 U.S. 717, 761 (1974) (Douglas, J., dissenting).

59. Relying on the majority opinion in *Keyes*, Burger held that federal judges could not simply discount district lines to achieve integration unless plaintiffs could prove that the districts in question had taken deliberate measures to segregate blacks. *Milliken*, 418 U.S. at 745. See also Joseph Coates & Arnold Sagalyn, *Crime, Violence, and Social Disorder*, SCIENCE 170, Dec. 4, 1970, at 1120–21.

60. *Milliken*, 418 U.S. at 785, 804–05.

61. *Milliken v. Bradley*, 418 U.S. 717, 759 (1974) (Douglas, J., dissenting).

62. *Id.* at 760.

63. *Id.* at 761.

64. Daniel Hertz, *You’ve probably never heard of one of the worst Supreme Court decisions*, 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/?utm_term=.0b25c5da

For St. Louis, Powell's campaign had mixed results. His defense of disparate school funding created a firewall around wealthy suburban districts in St. Louis County, while his campaign against busing failed to sway local judges in the city. In fact, city officials joined county administrators to create a voluntary cross-district busing program that would transport city students to county schools for the next three decades.⁶⁵ However, not all students who wanted to be bused were given slots, nor would county students be forced into city schools. The plan worked in part because it was not mandatory, not comprehensive, and also not permanent. The federal government removed oversight in 1999, and it is slated to end in 2019.⁶⁶ This might explain why *Forward Through Ferguson* did not mention the plan in its report, but it may also indicate a shift in thinking. After half a century of court involvement, St. Louis public schools have lost most of their white students, with eighty-two percent of its total school population of 30,000 identifying as black.⁶⁷

The St. Louis story underscores the complicated relationship between race and geography in the United States. So long as African Americans remained in their own neighborhoods and schools—the case from 1865 to 1948—whites remained in the city. The prevailing thinking on race at the time condoned this, holding that segregation was a mutually acceptable arrangement that preserved racial harmony and promoted the public good. Flight began in earnest, however, when the Supreme Court began to change course following World War II, part of a larger federal effort to end racist thinking, a project that the Court initiated by striking down restrictive covenants in St. Louis in *Shelley v. Kraemer*⁶⁸ in 1948 and desegregating primary and secondary schools in *Brown v. Board of Education* in 1954.⁶⁹ These two decisions prefigured the largest exodus of residents in the city's history, something that had not happened in 1938, when the Court simply required that Missouri provide African Americans, like plaintiff Lloyd Gaines, with their own law school.⁷⁰ From a population of

93e5-MB [<https://perma.cc/F95K-WLAQ>] (last visited Apr. 22, 2019); Rachel F. Moran, *Untoward Consequences: The Ironic Legacy of Keyes v. School District No. 1*, 90 DENVER L. REV. 1209, 1218–19 (2012); Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1980 (2008); Jesse T. Moore, Jr., *Seeking a New Life: Blacks in Post-Civil War Colorado* 78 J. OF NEGRO HIST. 166–187 (1993).

65. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L. J. 2043, 2071–72 (2002)

66. Crouch, *supra* note 2.

67. Kickboard, *Case Study, St. Louis Public Schools*, KICKBOARD, 2017, https://www.kickboardforschools.com/images/uploads/case-studies/St_Louis_Case_Study_2017_v1.1.pdf [<https://perma.cc/STK8-BTG9>] (last visited Apr. 22, 2019).

68. *Shelley v. Kraemer*, 334 U.S. 1, 21–22 (1948).

69. *Brown v. Board of Education*, 347 U.S. 483 (1954).

70. *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

850,000 in 1950, for example, St. Louis dropped to 453,000 by 1980, just as fears of busing were beginning to spread.⁷¹

The out-migration of white residents from St. Louis was facilitated by freeway construction and suburban development, to be sure, but most historians agree that there was a racial component as well. Beginning in the 1940s, for example, black migration to St. Louis increased dramatically, as African Americans found themselves replaced by machinery on southern farms, lured by promises of work in wartime factories, and tired of Jim Crow.⁷² The total number of black migrants to St. Louis from Mississippi alone, for example, jumped 300% from 1940 to 1970, from 31,649 to 110,000.⁷³ Meanwhile, the number of black migrants to St. Louis from Arkansas, the second largest source of southern newcomers, went from 12,379 to 47,800.⁷⁴ Between 1955 and 1959, at the peak of southern resistance to *Brown*, 13,731 black migrants arrived in St. Louis, raising the African American population to 170,585.⁷⁵

While such population influxes would have been welcome in any other context—signs of urban growth—the fact that the migrants were African American only seemed to exacerbate white flight, as whites cited higher crime, lower property values, and struggling schools to rationalize their exodus. The interrelationship between these factors was complex but also real. As more and more whites put their houses on the market, for example, property values did in fact decline. And, as whites abandoned public schools, education suffered as well, not least because urban schools lost revenue. Finally, crime rose, a problem that criminologist Barry Latzer attributes to the arrival of black migrants who brought with them a “culture of violence” from the South.⁷⁶ While this is disputed, the federal government’s abrupt shift in racial policy only seemed to stoke white paranoia.

Rising crime rates, falling test scores, and declining property values struck many not as the product of external forces operating on black communities

71. AMY STUART WELLS & ROBERT L. CRAIN, *STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS* 46 (1999).

72. Clarence Lang, *Black Freedom and Social Class in St. Louis, Missouri Between the Great Depression and the Great Society*, BLACKPAST, Jan. 30, 2012, <https://www.blackpast.org/african-american-history/black-freedom-and-social-class-st-louis-missouri-between-great-depression-and-great-soc/> [<https://perma.cc/7J5Y-AGG5>] (last visited Apr. 6, 2019).

73. See, e.g., Jacob Lawrence, *African American Migration Patterns*, <https://lawrencemigration.phillipscollection.org/culture/migration-map> [<https://perma.cc/V56R-TTB5>] (last visited Apr. 6, 2019).

74. *Id.*

75. Townsend Price-Spratlen, *Urban Destination Selection among African Americans during the 1950s Great Migration*, 32 SOC. SCI. HIST. 437, 445 (2008).

76. BARRY LATZER, *THE RISE AND FALL OF VIOLENT CRIME IN AMERICA* 87 (2017). See also German Lopez, *Confronting the myth that “black culture” is responsible for violent crime in America*, VOX, Sept. 1, 2016, <https://www.vox.com/2016/9/1/11805346/violent-crime-america-barry-latzer-book-review> [<https://perma.cc/AG92-BBG8>] (last visited Apr. 2, 2019).

(which they were), but rather as innate characteristics of the people in those communities. Even as the federal government and intellectual elites moved away from racialist thinking, in other words, average Americans did not, finding evidence of longstanding racialist presumptions in the very urban landscapes that they had left behind. Geography, in other words, reinforced and even revived a racialist, and ultimately racist, *mentalité*, a worldview of which race was an integral part.

II. FORWARD THROUGH FERGUSON

While the past half-century of integration-based reforms have failed, *Forward Through Ferguson* offers a fresh approach, one that takes the structural factors underlying racial inequality into account, without ignoring the persistence of a deep-seated racialist *mentalité* in the region. For example, the report acknowledges the role that bias can play in white/black interactions, particularly between citizens and police, even calling for “bias screening” during the police hiring process.⁷⁷ The report also addresses the problem of bias in the media, calling for “statewide training, best practices and accountability measures for broadcasters” tasked with covering racial issues.⁷⁸ Such directives may sound disconnected from problems of persistent poverty and segregation, but nevertheless indicate an awareness of the problem that racialist thinking alone can play in perpetuating racial inequality, whether by affecting police/community interactions, or media portrayals of community events.

The acknowledgment of racialist thinking as a distinct problem distinguishes *Forward Through Ferguson* from earlier court-ordered schemes aimed at achieving racial integration. Often, such schemes discounted the possibility that racialist thinking might be deeply ingrained in average people, presuming instead that once individuals of different races interacted, they would simply abandon their racist views. The opposite, however, too often proved to be true. Sometimes, interracial interaction tended to intensify racialist sentiments, particularly among those tasked with unpleasant duties, like police. *Forward Through Ferguson* acknowledges this point, focusing heavily on anti-bias training, social interaction training, cultural responsiveness training, and tactics aimed at de-militarizing and de-escalating police/community interactions.⁷⁹ Such efforts stem in part from the work of scholars like Tracey Meares, who have argued for a de-emphasis on “crime reduction” and an increased attention to police/community relations, positing in part that “people generally care much more about how they are treated by police than whether

77. *Forward Through Ferguson* at 85.

78. *Id.* at 153.

79. *Id.* at 96–97.

those police are effective crime fighters.”⁸⁰ Ironically, precisely such positive police/community relations might also lead to crime reduction by increasing the degree to which the community cooperates with police investigations.

Of course, spending time on relationships, bias training, and attitude adjustment may be wasted if perceived reality is not also changed in a way that corroborates new, more tolerant lines of thinking. For example, telling police and the media not to associate African Americans with criminality is unlikely to succeed if African Americans are statistically more represented in criminal activity. Nor are community relations programs likely to work if African Americans themselves become victimized by crime, and demand police action.⁸¹

To address this issue, however, requires attention not simply to biased perceptions, but to the underlying causes of criminal behavior, something that *Forward Through Ferguson* takes into account. For example, at least one third of *Forward Through Ferguson*'s 189 calls to action place “youth at the center” of reform, recommending a series of initiatives aimed at providing poor children with the resources and education they need to move directly and successfully into decent paying jobs, avoiding the type of illicit markets otherwise available to isolated, impoverished minority youth. Such markets “continued to thrive” after white flight and are readily accessible in metro St. Louis, as sociologist Jennifer Hamer has shown.⁸² According to Hamer, teenagers facing “blocked opportunities to mainstream labor markets,” whether due to geographic isolation, poor transportation, or insufficient education, are more likely to consider “the illegal underground economy” as a substitute for “legitimate employment.”⁸³ Even criminal violence itself can assume the guise of “work,” a problem that exacts a toll on offenders, victims, and cities as a whole.⁸⁴ For example, “continuous exposure” to high crime neighborhoods, a recurring

80. Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV., Aug. 1, 2017, <https://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> [<https://perma.cc/FX7HJGKK>] (last visited Apr. 23, 2019).

81. James Forman, Jr. explains the dilemma of African American crime victims, showing how segregation increased the odds that African Americans would be victims of crime, pressing them to demand heavier policing of black communities. See C. D. Rogers, *Locking Up Our Own: Crime and Punishment in Black America* by James Forman, Jr., FLA. B.J., September/October 2018, at 87, 88.

82. See SUDHIR VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY AND THE URBAN POOR* 17 (2006) (discussing the survival of illicit urban markets during the post-civil rights era); JENNIFER HAMER, *ABANDONED IN THE HEARTLAND: WORK, FAMILY, AND LIVING IN EAST ST. LOUIS* 103-104, 107 (2011), citing ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* (2001).

83. HAMER, *supra* note 82, at 99, 104; Joseph Richardson & Christopher St. Vil, *Putting in Work: Black Male Youth Joblessness, Violence, Crime, and the Code of the Street*, SPECTRUM: A JOURNAL ON BLACK MEN 71, 72 (Spring 2015), citing MERCER L. SULLIVAN, *GETTING PAID: YOUTH CRIME AND WORK IN THE INNER CITY* (1989).

84. Richardson & St. Vil, *supra* note 83.

problem for urban minority youth, “has proven to increase depressive symptoms, anxiety symptoms, anger expression and aggression” in those youth, a problem that takes on a life of its own, independent of economic behavior.⁸⁵

Even a cursory reading of the *Forward Through Ferguson* report reveals a holistic response to the problem of youth violence and the underground economy that, if implemented, could dramatically improve the lives of St. Louis children, perhaps even reversing much of the damage caused by the divisive politics of integration. For example, the report recommends eliminating bureaucratic hurdles to the federal government’s Supplemental Nutrition Assistance Program (SNAP) which provides poor children with free or subsidized lunch, a program that over eighty percent of St. Louis public school students access. This alone provides a tangible benefit to disadvantaged youth, not to mention a glimpse into the manner in which the report focuses not simply on changing the composition of classrooms, but providing poor children with resources that their middle and upper middle class peers already have.

Along these lines, the report calls for establishing “school based health centers,” capable of providing students with “access to mental health, case management, and reproductive health.”⁸⁶ Such centers might perform a variety of functions targeting deeper issues of poverty and deprivation. For example, the report mentions classes on “healthy eating,” treatment for “behavioral health issues,” and “evidence-based trauma-informed training,” all services that affluent students would arguably contract for privately, through health insurance.⁸⁷ Student health centers could also help alleviate logistical challenges facing poor families, including time off for doctor’s visits and trips to the pharmacy. The report’s nod to reproductive health could prove controversial, a problem that has emerged in states where minors are allowed to have IUDs implanted “without parental consent.”⁸⁸ Missouri rejects this, but programs geared towards reproductive health have nevertheless proven effective at reducing teen pregnancy in some states, prompting the American Academy of Pediatrics to recommend Long-Acting Reversible Contraception Programs, or LARCs, for teenagers free of charge.⁸⁹ Missouri requires parental consent before such devices can be prescribed, but some parents may be willing to approve

85. Danielle M. Perry, Karen Tabb, & Ruby Mendenhall, *Examining the Effects of Urban Neighborhoods on the Mental Health of Adolescent African American Males: A Qualitative Systematic Review*, 84 J. NEGRO EDUC. 265 (Summer 2015).

86. *Forward Through Ferguson* at 42.

87. *Id.*

88. Jacoba Urist, *Schools, Birth Control, and Parental Consent: A Debate over whether School-Based Health Centers should be able to offer IUDs*, THE ATLANTIC, Sept. 8, 2015, https://www.theatlantic.com/education/archive/2015/09/student-health-centers-schools-contraception/403954/?utm_source=twb [https://perma.cc/Z3VJ-R7D4] (last visited Apr. 3, 2019).

89. *Id.*

them, particularly since St. Louis ranks first in the nation for rates of chlamydia and gonorrhea.⁹⁰

Beyond health care and lunch programs, the education component of *Forward Through Ferguson* covers early childhood education and job training, including training for parents who have children in early childhood education. This approach takes into account the reality that many parents living below the poverty line are themselves in need of education and lack the resources to pay for child care while going back to school. For primary and secondary school students, the Report recommends integrating “high quality career and technical education (CTE) into the curriculum in part through work-based learning,” a type of vocational training geared towards providing low income students with high income jobs.⁹¹

Looked at broadly, the proposals in *Forward Through Ferguson* go far beyond what conventional notions of public education might entail, a type of coordinated social service delivery system for children, teenagers, and even their adult parents.⁹² That the Ferguson Commission deemed such measures necessary, or at least important enough to include in their Report, is worth underscoring. Collectively, the calls to action regarding education in St. Louis paint a startling portrait of the lives of children in the region. Rather than a population simply lacking daily contact with white youth, the predominantly black children of St. Louis require a panoply of services that strain the very concept of education itself, including trauma counseling, comprehensive health care, vocational training, food, and even shelter. For example, one section of the report recommends “financial literacy and technical assistance” for Section 8 housing beneficiaries, an end to predatory lending, and a requirement that private developers address the “affordable housing needs of the state, region, and locality where they will be located.”⁹³

While potentially expensive, none of the reforms involve issues that are particularly controversial, particularly not when compared to the mandatory busing of children to distant schools. Instead, the changes either recommend modifications to the way that services are currently provided, or new services to address specific, poverty-related problems. Arguably the biggest challenge to the plan is funding, a question that the report does not address. Those

90. Blythe Bernhard, *After Screw-up, St. Louis again reigns as STD capital of America*, ST. LOUIS POST-DISPATCH, Oct. 9, 2017, https://www.stltoday.com/lifestyles/health-med-fit/health/after-screw-up-st-louis-again-reigns-as-std-capital/article_1ca44413-8447-524c-91f8-bffbbae046c8.html [https://perma.cc/ZG5W-N7Z7] (last visited Apr. 3, 2019); Guttmacher Institute, *Minors' Access to Contraceptive Services*, <https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services> [https://perma.cc/Z4N9-ALWR] (last visited Apr. 3, 2019); *Forward Through Ferguson* at 41.

91. *Forward Through Ferguson* at 54.

92. *Id.* at 115.

93. *Id.* at 136, 147, 153.

components of the plan that involve federal entities, for example, may require mustering support at the federal level, as with requests for expansions in things like Medicaid, from the state. However, most revenue matters seem to be local in nature.

CONCLUSION

Woven through the lines of *Forward Through Ferguson* is fifty years of failed judicial policy, a policy that halved the city's population, depleted its coffers, and left its children in crisis. That the initial phase of this policy was well-intentioned is hard to deny. Certainly no one would argue that we should return to a policy of *de jure* segregation today, but the Court went too far. Disregarding warnings that aggressive measures like busing would prove catastrophic, the Court dove headfirst into disaster, fueling white flight, fostering urban decline, and facilitating an electoral backlash that vaulted figures like Lewis F. Powell, Jr. to the Supreme Court.

Once there, Powell helped reverse the Court's path in *Swann v. Charlotte-Mecklenburg*,⁹⁴ and in so doing curtailed any hope that school funding might be equalized, school districts merged, and white flight reversed. Instead, Powell cemented decline by constitutionalizing the urban crisis in a way that has yet to be outdone. Opinions like *San Antonio v. Rodriguez*, *Denver v. Keyes*, and *Milliken v. Bradley* left cities like St. Louis more segregated than before, and poorer.⁹⁵

Against this backdrop, *Forward Through Ferguson* provides hope. Instead of fixating on unpopular measures like busing, the report advances 189 proposals that are relatively uncontroversial yet still hold the potential for transforming children's lives, largely through a rethinking of urban education. Of course, the grand irony of this is that the greatest obstacle to implementing such a plan is funding, an issue more trying today given the depopulation of the city than it would have been fifty years ago. Imagine, for example, if the Supreme Court had leveraged white opposition to busing and proposed instead the measures outlined in *Forward Through Ferguson*, in 1971?

Such thought experiments help put our current dilemma in perspective. Even if aspects of the Ferguson Commission Report seem fanciful, they are unlikely to spark a backlash. They may even provide a way forward, an emphasis on urban development and reform that abandons the racial chauvinism undergirding *Brown v. Board of Education* and engages more productively the African American children of St. Louis.

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

95. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974).

