Examining *Pennsylvania Human Relations Commission v. School District of Philadelphia*: Considering How the Supreme Court's Waning Support of School Desegregation Affected Desegregation Efforts Based on State Law

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ABSTRACT

This study examines the enforcement of desegregation orders mandated under state law as a result of the Supreme Court's handling of school desegregation cases at the federal level. The Article tracks the development of school desegregation cases starting shortly before *Brown v. Board of Education* and continues through the recent voluntary school desegregation case, *Parents Involved in Community Schools v. Seattle School District No. 1*. The Article establishes four distinct generations of school desegregation cases at the federal level and determines that the political tides created, in large part, by the U.S. Supreme Court's handling of federal school desegregation cases severely limited efforts to pursue state-mandated school desegregation in the state of Pennsylvania, where the Pennsylvania Human Relation Act required the state to remedy even *de facto* school desegregation in Philadelphia. The study reaches this conclusion after bringing to bear the fact that the *Philadelphia School Desegregation Case* also has four generations of court rulings, and those rulings align temporally and politically with the four generations of federal school desegregation cases.

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INTRODUCTION

Despite the federal government's rhetoric, it has been less than adamant about its commitment to desegregate the nation's public schools.

Although *Brown v. Board of Education*[1] is held as the holy grail of desegregation cases, *Brown I*'s progeny has betrayed the milestone in race relations (at least in public schools) set forth by the Supreme Court of the United States in 1954. In *Brown I*, the Court ruled unequivocally that segregation would no longer be tolerated in public education.[2] However, *Brown I*'s promise has eroded substantially over time. In particular, the role of the federal courts in enforcing the nation's ban on segregation in public schools is more questionable now than ever before.[3] Since the Court's decision in *Milliken v. Bradley*,[4] few, if any, Supreme Court cases have advanced the cause of desegregation in a meaningful way. Further, the Court appears to have redoubled its efforts at retracting the advancements of the civil rights movement as those advancements relate to the desegregation of public schools. In the 1990s, the Court began to unceremoniously bow out of its mandate to assure that public schools were desegregated,[5] and as recently as the mid-2000s, the Court's resistance to school desegregation manifested itself through the rejection of efforts aimed at the voluntary integration of public schools.[6]

This study examines the shifting role of the federal courts on the holdings of school desegregation cases brought under state law. Specifically, this study aligns with the extraordinarily long *Philadelphia School Desegregation Case* (1972–2009), a desegregation case brought under state law, with the various eras of federal school desegregation case law. This study argues that, based on the results of this Pennsylvania case study, the holdings in school desegregation cases at the federal level have preempted—politically rather than legally—states' abilities to achieve

1. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

2. *See id.* at 495; *see also* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955) (stating that courts should pursue integration with the public interest in mind); Steven L. Nelson, *Different Script, Same Caste in the Use of Passive and Active Racism: A Critical Race Theory Analysis of the (Ab)use of "House Rules" in Race-Related Education Cases*, 22 WASH. & LEE J. C.R. & SOC. JUST. 297, 301–02 (2016) [hereinafter *A Critical Race Theory Analysis*] (arguing that the Court provided more protection for White Americans than for Black Americans in *Brown II*).

3. GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT, *E PLURIBUS…* SEPARATION 78–79 (2012) [hereinafter THE CIVIL RIGHTS PROJECT], http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf [https://perma.cc/9D4R-B6CE].

4. Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974). See discussion of *Milliken I*, *infra* note 21 and accompanying text.

5. *See* Freeman v. Pitts, 503 U.S. 467, 490–91 (1992); *see also* Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 250 (1991).

6. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 702–03 (2007); *see also* Erica Frankenberg et al., *Fighting "Demographic Destiny": A Legal Analysis of Attempts of the Strategies White Enclaves Might Use to Maintain School Segregation*, 24 GEO. MASON U. C.R.L.J. 39 (2013) (arguing that the Supreme Court, although rejecting the voluntary integration efforts in Seattle and Louisville, reaffirmed diversity as a compelling state interest).

school desegregation through state-based legislation. Thus, even well-intentioned states enacting legislation and remedies for school desegregation may fall victim to the political tides set in motion by the federal courts. Although legal scholars often cite *Sheff v. O'Neill*[7] as evidence of states' abilities to remedy school desegregation, the *Philadelphia School Desegregation Case* warns of potential dangers in relying solely on state law-based attacks of school desegregation.

First, this study discusses the federal courts' shunting of efforts to desegregate schools. Second, it considers the facts of the *Philadelphia School Desegregation Case*. Third, it explores the similarities of the federal school desegregation cases and the *Philadelphia School Desegregation Case*, with particular attention paid to the more-than-coincidental similar time points for changes in the course of school desegregation at each level. Finally, this study considers whether the impact of federal case law on state case law may be a harbinger of things to come for future litigants pursuing educational equity through state law-based efforts to desegregate public schools.

I. THE ROLE OF THE FEDERAL COURTS IN SCHOOL DESEGREGATION: TWO STEPS FORWARD, TWO STEPS BACK?

Immeasurable research has assessed the role of the federal courts in school desegregation. Legal scholars' fascination with the federal courts' impact on movements toward the desegregation of the nation's public schools is well placed, because a substantial portion of watershed cases mandating movements toward educational equity through the desegregation of public schools has occurred at the behest of the federal judiciary. Considering the relatively large number of federal court cases (as compared to state court cases) that have addressed educational equity through desegregation, it is proper and necessary to evaluate the role of the federal courts in desegregation in various eras.

The first generation of school desegregation cases occurred between the 1930s and mid-1950s.[8] The second generation of school desegregation cases occurred between the mid-1950s and the early-to-mid 1970s.[9] The third generation of school desegregation cases occurred during the early-

7. In *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (holding that the state needed to take measures to integrate its public schools).

8. McLaurin v. Okla. St. Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948).

9. *E.g.*, *Brown I*, 347 U.S. 483 (1954); *Brown II*, 349 U.S. 294, 300 (1955); Cooper v. Aaron, 358 U.S. 1 (1958); Griffin v. Cty. Schl. Bd. of Prince Edward Cty., 377 U.S. 218 (1964); Green v. Cty. Schl. Bd. of New Kent Cty., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenberg Bd. of Educ., 401 U.S. 1 (1971).

to-mid 1970s until the beginning of the twenty-first century.[10] Finally, the fourth and current generation of school desegregation cases is occurring contemporaneously with this study.[11] The next part of this study will identify the pertinent cases and the driving phenomena belonging to each generation of school desegregation cases.

A. Before Brown I *and* Brown II*: The First Generation of School Desegregation Cases*

Before the Supreme Court's consideration of the segregation of Black and White students in public schools, federal courts had already considered the segregation of immigrants,[12] as well as English language learners.[13] In the 1940s and early 1950s, the Court set the stage for the desegregation of public primary and secondary schools and sent a firm message that neither state-sponsored law schools[14] nor graduate schools[15] could deny an applicant admission on race alone. Unanimous Court decisions, involving extraordinary efforts at consensus building, opened educational opportunities previously limited for, if not totally foreclosed to, Black students.[16] The Court's period of unanimity continued with *Brown I*.[17] In *Brown I*, the Court explicitly and unequivocally overturned the "separate but equal" doctrine[18] of *Plessy v. Ferguson*;[19] *Brown I* mandated the replacement of the "separate but equal" policy[20] with one

10. *E.g.*, Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237 (1991); Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977); *Milliken I*, 418 U.S. 717 (1974); Keyes v. Sch. Dist. No. 1, Denver, Co., 413 U.S. 189 (1973); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of Emporia, 407 U.S. 451 (1972); *see also* Missouri v. Jenkins, 515 U.S. 70 (1995).

11. *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

12. For example, the Ninth Circuit Court of Appeals would prevent a school district from segregating students with "Mexican blood." *See* Westminster Sch. Dist. of Orange Cty. v. Mendez, 161 F.2d 774, 780–81 (9th Cir. 1923).

13. The United States Supreme Court would prevent the state of Nebraska from banning the teaching of foreign languages to students who had not passed eighth grade. *See* Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

14. Sweatt v. Painter, 339 U.S. 629, 635 (1950) (preventing the state of Texas from creating a law school for its Black students when the creation of that law school was for the purpose of avoiding the integration of its all White law school).

15. McLaurin v. Okla. St. Regents, 339 U.S 637, 642 (1950) (following its Texas decision with a unanimous decision holding that the same constitutional provision forbade the state of Oklahoma from mandating that a Black student, admitted to graduate school, be required to sit outside of the classroom—although adjacent to the classroom—to maintain segregated learning environments for Black and White students).

16. *See* Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948); *Sweatt*, 339 U.S. at 635; *McLaurin*, 339 U.S at 642.

17. *Brown I*, 347 U.S. 483 (1954).

18. *Id.* at 494–95.

19. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

20. *Brown I*, 347 U.S. at 494–95.

that explicitly required school districts to desegregate their public schools.[21] *Brown I* and its remedies version, *Brown v. Board of Education II*—in which the Court told school districts that they must desegregate with "all deliberate speed"[22]—stand among the most prolific and heralded Court decisions establishing equity and equality (as defined by school desegregation) for Black students in the United States. However, some scholars have argued against such a solitary and restrictive method of achieving educational equity and therefore are much less praiseworthy of society's interpretation of the school desegregation efforts of *Brown I* and its progeny.[23]

B. Desegregation or Bust: The Second Generation of School Desegregation Cases

Soon after *Brown I* and *Brown II*, in *Cooper v. Aaron*, the Court soundly rejected the state's argument that the desegregation of the state's public schools was not feasible.[24] Throughout the 1960s, the Court continued to unanimously rule in favor of school desegregation and educational equity for minority students.[25] In *Griffin v. County School Board of Prince Edward County*, after the district delivered vouchers to White families to attend private schools in lieu of attending public schools to avoid desegregation, the Court banned the closing of Prince Edward County's public schools.[26] In 1968, in *Green v. County School Board of New Kent County*, a unanimous Court required school districts to take affirmative acts to desegregate public schools by establishing the *Green* factors (a desegregation checklist) that determined whether meaningful desegregation had occurred in a given school district.[27] Until the early 1990s, school districts were required to fulfill these requirements in

21. Gary Orfield, *Prologue: Lessons Forgotten*, *in* LESSONS IN INTEGRATION 1, 1–6 (Erica Frankenberg & Gary Orfield eds., 2007) (discussing how school desegregation cases had national affect and effect, but the primary area of focus in desegregating schools was in the American South. Northerner segregation was, to some extent, not viewed as a problem).

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

23. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); *A Critical Race Theory Analysis*, *supra* note 2, at 301–02 (arguing that the forwardness and exceptionalism associated with *Brown II* is a fictitious creation of White America).

24. Cooper v. Aaron, 358 U.S. 1, 16–20 (1958).

25. *E.g.*, Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 231 (1964); *see also* Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 441–42 (1968).

26. *Griffin*, 377 U.S. at 230–31.

27. *Green*, 391 U.S. at 441–42. The *Green* factors are the racial proportions of students, faculty and staff assigned to specific schools as well as absolute equality of transportation, facilities, and extracurricular activities. *Id.* at 435.

relative temporal proximity in order to end federal district court supervision.[28]

C. An End to Affirmative Desegregation Attempts? The Third Generation of School Desegregation Cases

In the early 1970s, the Supreme Court began to show signs of exhaustion with school desegregation. Although the Court began the 1970s with unanimous decisions,[29] judicial decisions began to split, with less of an effort toward consensus building than had occurred in the 1950s and 1960s. In *Swann v. Charlotte-Mecklenberg Board of Education*, a unanimous Court upheld the busing of students to and from school as a remedy for *de jure* segregation,[30] while in *Wright v. Council of Emporia* and *United States v. Scotland Neck City Board of Education*, the unanimity of the Court began to dissolve. In these two cases, proponents of school desegregation avoided attempts to resegregate (or maintain segregation in) public schools.[31]

The cracks in the former consensus finally became insurmountable in *Milliken v. Bradley* (*Milliken I*).[32] In *Milliken I*, the Court limited school desegregation plans to districts previously guilty of *de jure* segregation.[33] In this case, a majority of the Court used artificial and arbitrary geographic boundaries to draw a line in the proverbial sand of desegregation. Post-*Milliken I*, integration-minded school officials were constrained to pursue equal educational opportunity while maintaining racial segregation, as opposed to using desegregation to effectuate educational equity.[34] After *Milliken I*, state statutes pursuing integration became ineffective. Moreover, the guidance from *Milliken II* and other lawsuit remedies aimed at increasing financial capital for struggling predominantly minority school districts continued to be of little to no avail.[35]

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28. *See* Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 250 (1991); Freeman v. Pitts, 503 U.S. 467, 489–90 (1992); Gary Orfield, *Turning Back to Segregation*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 1 (Gary Orfield et al. eds., 1996) [hereinafter *Turning Back to Segregation*].

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

30. *Id.* at 30.

31. *See* Wright v. Council of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972). In both *Wright* and *Scotland Neck*, all justices agreed in the result of the case, despite the fact that four justices in each case submitted varying rationales for reaching the holding in each case. *Id.* Both cases involved the attempted creation of splinter districts in the wake of mandatory desegregation orders. *Id.*

32. *Milliken I*, 418 U.S. 717 (1974).

33. *Id.* at 761.

34. *See Milliken II*, 433 U.S. 267, 281 (1977).

35. Alison Morantz, *Money and Choice in Kansas City*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 241 (Gary Orfield et al. eds., 1996).

D. Moving Toward Resegregation: The Fourth Generation of School Desegregation Cases

Although *Milliken I* was not strong enough to kill efforts at desegregating the nation's public schools, the 1990s saw the Court issue multiple rulings that effectively ended affirmative efforts toward school desegregation. Combined, *Freeman v. Pitts*[36] and *Board of Education of Oklahoma City Public Schools v. Dowell*[37] allowed school districts to fulfill one *Green* factor at a time and to no longer be accountable to federal courts upon the piecemeal fulfillment of the individual *Green* factors. As the Court reneged on its promise to desegregate the nation's public schools, there was a simultaneous return to segregation. Research by the UCLA Civil Rights Project indicates that the only period of substantial school integration was the decade immediately following the enactment of the civil rights legislation of the 1960s.[38] This same research concluded that schools became increasingly segregated in the 1980s;[39] since then, efforts at school desegregation have slowed, if not completely stagnated or regressed. In particular, only the most segregated schools in the country—those that are almost exclusively filled with students of one race—have seen significant progress; the integration of all other schools has severely faltered since the 1980s.[40] This finding is unsettling because a plethora of literature supports the notion that students in integrated schools have better academic, social, and occupational trajectories than students in segregated schools.[41]

II. STATE COURT INVOLVEMENT IN SCHOOL DESEGREGATION: THE CASE OF *PENNSYLVANIA HUMAN RELATIONS COMMISSION V. SCHOOL DISTRICT OF PHILADELPHIA*

Because of their nature, school desegregation cases tend to stretch over years, and often decades. The contentious and politically charged issues of school and neighborhood segregation engender protracted debate; indeed, intentionally lengthening a case may even be a strategy to delay an unpopular decision or outlast one's opponents. Moreover, it takes time to discern the extent, causes, and possible solutions to segregation in a community. Even when a decision is reached, it takes years to ensure that the remedy is effective. In fact, some desegregation cases last such a

36. 503 U.S. 467, 492 (1992).

37. 498 U.S. 237, 245 (1991).

38. THE CIVIL RIGHTS PROJECT, *supra* note 3, at 3.

39. *Id.* at 18.

40. *Id.*

41. *E.g.*, Erica Frankenberg, *School Integration—The Time is Now*, *in* LESSONS IN INTEGRATION 7 (Erica Frankenberg & Gary Orfield eds., 2007).

long time that the length of the case influences its trajectory, leaving desegregation cases subject to outside influences. *Pennsylvania Human Relations Commission* (*PHRC*) *v. School District of Philadelphia* (*SDP*) is such a case, spanning nearly forty years before the parties could reach a resolution. The exceptional length of the case is intriguing in itself, but it also became a critical factor in its evolution. It changed the goal from desegregating Philadelphia's public schools to providing equal educational opportunities for all students in Philadelphia's public schools, even if those opportunities were provided in segregated schooling environments.

A. Contextualizing the Case

In fact, *PHRC v. SDP* arose out of the indecision of another long case. From 1961 to 1971, *Chisholm v. Board of Public Education* worked its way from state court to federal court, finally ending when a panel of federal judges in the Third Circuit Court of Appeals debated whether the SDP stood in violation of its own nondiscrimination policy.[42] When the federal judge dismissed the case without prejudice in the mid-1960s, the PHRC refiled in state court in the Commonwealth Court of Pennsylvania.[43] This time, the PHRC chose not to pursue the case under the Equal Protection Clause of the Fourteenth Amendment but instead relied on a state statute: the Pennsylvania Human Relations Act (PHRA).[44] The PHRA, passed in 1955, provided for state intervention to resolve issues of *de jure* and *de facto* segregation.[45] In addition, the PHRA established the PHRC to resolve violations of the PHRA, including *de facto* segregation[46] in public schools.[47]

The *Philadelphia School Desegregation Case* spanned nearly forty years, but scant attention was paid to school segregation when the case was finally resolved. Instead, the PHRC and the SDP settled on a pledge to improve school quality. Given the continuing segregation in Philadelphia's public schools, the case seems to have failed its original promise of offering Philadelphia's public school students a desegregated

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42. Dale Mezzacappa, *Phila. School Fight Difficult, Enduring*, PHILLY.COM (July 11, 2004), http://articles.philly.com/2004-07-11/news/25371735_1_Black-teachers-Black-students-Black-children [https://perma.cc/AV8Q-XQLM].

43. *Id.*

44. *Id.*; Pennsylvania Human Relations Act of 1955 (PHRA), Pub. L. No. 744, Pa. Laws 222 (codified as amended at 43 PA. CONS. STAT. ANN. §§ 951–963 (West 2017)).

45. *Id.*

46. In law, *de facto* segregation indicates segregation that is the result of purported individual choices whereas *de jure* segregation indicates segregation that is the result of explicit government policies that promote the alleged segregation.

47. *See* Sch. Dist. of Phila. v. Pa. Human Relations Comm'n (*HRC I*), 294 A.2d 410 (Pa. Commw. Ct. 1972).

education. As the case progressed, minority student enrollment increased while White students left the district en masse, making desegregation difficult to achieve.[48] Table 1 displays Philadelphia's changing demographics over the course of the *Philadelphia School Desegregation Case*.

Table 1
Racial/Ethnic Demographics Among Entire Population in Philadelphia Since 1950[49]

Year	White	Black	Asian	Of Latin@[50] Origin
1950	81.7	18.2	0.1	Negligible
1960	73.3	26.4	0.2	Negligible
1970	65.6	33.6	0.3	2.4
1980	58.2	37.8	1.1	3.8
1990	53.5	39.9	2.7	5.6
2000	45.0	43.2	4.5	8.5
2010	41.0	43.4	6.3	12.3

During each stanza of the *Philadelphia School Desegregation Case*, the broader national sentiments regarding school desegregation appear to have affected its trajectory. In the 1970s, the PHRC found sympathetic jurists and a relatively sympathetic public. Unfortunately, the SDP and the PHRC failed to leverage that sympathy in order to reach an agreement to integrate Philadelphia's public schools. Then, in the 1980s, having missed the pro-integration attitudes of the 1970s, the PHRC was met with desegregation fatigue, if not open hostility, toward mandatory integration plans. Judicial efforts at forcing the SDP to integrate failed, and the SDP's independent integration efforts resulted in further school segregation. The 1990s, fueled by new stakeholders holding even more hostility toward desegregation, produced results not initially anticipated in the original conceptualization of the *Philadelphia School Desegregation Case*. Finally, in the 2000s, desegregation fatigue allowed a settlement that fell short of both desegregated schools and the quality education promised to the SDP students.

48. *See* Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* (U.S. Census Bureau, Working Paper No. 76, 2005), https://www.census.gov/population/www/documentation/twps0076/twps0076.pdf [https://perma.cc/BN9U-VETF].

49. *Id.* at 94 (Table 39).

50. The use of the @ symbol affords gender neutrality.

B. Prior to the Mid-1970s: The Aggressive Years of State Law-Based Desegregation in Philadelphia

The first major issue facing resolution of the *Philadelphia School Desegregation Case* was whether the PHRC could legally target *de facto* segregation.[51] In a subsequent case, *PHRC v. Uniontown Area School District*,[52] the Supreme Court of Pennsylvania argued that *de facto* segregation in Pennsylvania was as important as *de jure* segregation.[53] Agreeing with that contention, Judge Wilkinson of the Commonwealth Court of Pennsylvania clarified that the Commonwealth of Pennsylvania could address issues of *de facto* segregation through state law— which it had done through the PHRA.[54]

After the Pennsylvania state legislature passed legislation to rid the state's public schools of desegregation and made the PHRC responsible for implementation, the PHRC was empowered to compel the school district to remedy *de facto* segregation.[55] According to Judge Wilkinson's opinion, the federal decisions had little to no effect on an enforcement action properly brought by an appropriate party under the PHRA because federal law did not ban state law from addressing desegregation that was the result of explicit state policies.[56]

Notwithstanding Judge Wilkinson's ultimate order enforcing the PHRC's order, the SDP refused to cooperate with the PHRC, leading to another iteration of the case.[57] According to the PHRC, the SDP failed to furnish plans to rectify all or any indications of *de facto* segregation. The PHRC argued that the SDP was unable to finance any plan that would result in meaningful integration.[58] The Commonwealth Court of Pennsylvania dismissed this argument under the reasoning that a plan had to be developed before the school district could place a meaningful price tag on the plan.[59] After developing a plan, the school district could then appeal to the PHRC to accommodate the district's inability to implement the best possible integration plan.[60] The court ordered the school district

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51. *HRC I*, 294 A.2d at 411.

52. Pa. Human Relations Comm'n v. Uniontown Area Sch. Dist., 313 A.2d 156, 170 (Pa. 1973) (arguing that the PHRC had legislative authority to pursue the eradication of *de facto* segregation and that the court was in no position to question the wisdom of the legislature's actions that are properly and constitutionally undertaken).

53. *Id.* at 162.

54. *HRC I*, 294 A.2d at 414.

55. *Id.* at 412–13.

56. *Id.*

57. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC II*), 352 A.2d 200, 209 (Pa. Commw. Ct. 1976).

58. *HRC I*, 294 A.2d at 414.

59. *Id.* at 413.

60. *Id.*

to make appropriate and compliant provisions to remedy its issues with school segregation.[61] Once again, the state court judges of Pennsylvania expressed a sympathetic ear toward the PHRC and the PHRC's efforts at public school integration.

In contravention of the court's previous order, by the late 1970s the SDP had not developed adequate plans to integrate its schools. Therefore, in the late 1970s, the PHRC sought another enforcement action from the Commonwealth Court of Pennsylvania.[62] The school district submitted plans to the PHRC that rested almost entirely on a voluntary desegregation effort—in clear violation of previous requests for long-term involuntary reassignment.[63] The school district also failed to provide any immediate desegregation plans using involuntary reassignment. The SDP's proposed plans also excluded 91 of the 287 (or nearly a third of) Philadelphia schools from its integration plans.[64] The PHRC, but not the Commonwealth Court, found the SDP's plan unacceptable, especially given the numerous extensions, delays, and misgivings previously found in this case.[65] The Commonwealth Court, though reliably sympathetic to the PHRC, hinted in its opinion that the PHRC might have been overreaching in enforcing the PHRA.[66] Although the court acknowledged the PHRC's frustration, it was unwilling to make the leap to busing, an unpopular option for both Blacks and Whites in Philadelphia.[67] Additionally, the PHRC had argued that the voluntary nature of the school district's plan was reliant on the same human capital that initially segregated the school district via housing.[68] It made no sense to rely on those same minds to overcome racial segregation.

On appeal, the Supreme Court of Pennsylvania affirmed the Commonwealth Court in the 1978 case, *PHRC v. SDP*.[69] This installment of the *Philadelphia School Desegregation Case* resulted in the Commonwealth Court of Pennsylvania refusing the PHRC's demands for pairing of schools and busing under the theory that students in Philadelphia needed some plan—even if not the perfect plan—to resolve issues with *de facto* segregation.[70] The PHRC was required, under this order, to wait until the 1980s to institute another enforcement action if the school district's

61. *Id.* at 414.
62. *See HRC II*, 352 A.2d 200.
63. *Id.* at 209.
64. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC III*), 390 A.2d 1238 (Pa. 1978).
65. *Id.* at 1262.
66. *See HRC III*, 374 A.2d at 1016.
67. *Id.*
68. *Id.*
69. *HRC III*, 390 A.2d at 1247.
70. *Id.* at 1250.

plan did not produce more integrated schools.[71] The move for school desegregation in Philadelphia in the 1970s reflected broader national trends. In the early 1970s, the courts sided solidly with those pursuing desegregation of the Philadelphia public schools.[72] As the decade unfolded, the Philadelphia desegregation advocates faced some pushback, although slightly behind the national backlash. This backlash, though new from the courts, had existed for some time in the general population and was becoming the new reality for advocates of school desegregation. The 1980s brought further backlash and, to some extent, signaled the end to exclusively desegregation-oriented forces on the Commonwealth Court. Although both the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania issued the SDP a reprieve, the school district never made good on its promise to integrate its public schools.[73]

C. Approaching and Navigating the 1980s: State Efforts at Desegregation Falter in Philadelphia

If the mid-to-late 1970s, case law from the *Philadelphia School Desegregation Case* was a reprieve for SDP (especially in that it required that the PHRC give the SDP additional time to attempt to desegregate), the 1980s case law was nearly a dismissal of the school district's duty to desegregate the city's public schools.[74] While the Supreme Court of Pennsylvania sanctioned the voluntary integration plan in the 1970s,[75] the voluntary plan resulted in not simply a segregated school district, but in a school district that in some ways was more segregated than the district previously was.[76] In fact, the voluntary integration plan resulted in no schools becoming integrated and at least two formerly integrated schools becoming segregated.[77] While the school district had made some dubious progress in integrating the schools, the PHRC, unlike the Commonwealth Court, found the progress to be inadequate.[78]

Under previous court opinions in the 1970s, the Commonwealth Court had approved the PHRC's rule that a school's population could not

71. *Id.*

72. *E.g.*, *HRC I*, 294 A.2d 410, 414 (Pa. Commw. Ct. 1972); Pa. Human Relations Comm'n v. Uniontown Area Sch. Dist., 313 A.2d 156, 170 (Pa. 1973).

73. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC IV*), 443 A.2d 1343, 1344 (Pa. Commw. Ct. 1982).

74. *Id.*

75. *Id.*

76. *HRC III*, 390 A.2d 1238, 1252 (Pa. 1978).

77. *Id.*

78. *Id.* at 1243.

vary thirty percent above or below the city's population.[79] A school outside of the thirty percent rule was considered segregated.[80] Both the PHRC and the school district advanced divergent measures of the voluntary integration program's success.[81] Under both the PHRC's 1968 and 1979 definitions, the SDP saw marginal gains in integrating the city's public schools.[82] Under both of these methods of evaluation, the school district saw around a one percent increase in integrated schools.[83] The school district argued, however, that it had made more impressive gains in integration under its own definition. Tables 2–7 enable a comparison of each definition's change in integration.

Table 2
Schools Integrated Under the PHRC 1968 Definition

Year	Integrated Schools	Total Schools	Percentage of Schools in Philadelphia Integrated
1977	51	294	17.3
1980	57	287	19.9

Note. Under the PHRC's 1978 definition of a segregated school, a segregated school is a school where Black enrollment was not within thirty percent of the average Black student enrollment in an SDP school.[84]

Table 3
Philadelphia Public School Students in Integrated Schools Under the PHRC 1968 Definition

Year	Students in Integrated Schools	Total Students	Percentage of Students in Integrated Schools
1977	38,644	250,932	15.4
1980	40,180	224,339	17.9

79. Pa. Human Relations Comm'n v. Norristown Area Sch. Dist., 374 A.2d 671, 679 (Pa. 1977).
80. *Id.*
81. *HRC IV*, 443 A.2d 1343, 1344–45 (Pa. Commw. Ct. 1982).
82. *Id.*
83. *Id.* at 1344.
84. *Id.* at 1355.

Table 4
Schools Integrated Under the PHRC 1979 Definition

Year	Integrated Schools	Total Schools	Percentage of Schools in Philadelphia Integrated
1977	30	294	10.2
1980	37	287	12.9

Note. Under the PHRC's 1979 definition of a segregated school, a segregated school is a school where less than twenty-five percent of the students were White or less than forty percent of the students were Black unless it contained more than twenty percent Latin@ enrollment. If Latin@ enrollment was more than twenty percent, the school is deemed segregated if either Blacks or Whites were less than twenty-five percent enrollment.[85]

Table 5
Philadelphia Public School Students in Integrated Schools Under the PHRC 1979 Definition

Year	Students in Integrated Schools	Total Students	Percentage of Students in Integrated Schools
1977	23,705	250,932	9.4
1980	26,453	224,339	11.8

Table 6
Schools Integrated Under the School District 1978 Definition

Year	Integrated Schools	Total Schools	Percentage of Schools in Philadelphia Integrated
1977	54	294	18.4
1980	79	287	27.5

85. *Id.* at 1345.

Note. Under the SDP's 1978 definition of a segregated school, a school with less than 25 percent or more than 75 percent White enrollment would be considered segregated.[86]

Table 7
Philadelphia Public School Students in Integrated Schools Under the PHRC 1979 Definition

Year	Students in Integrated Schools	Total Students	Percentage of Students in Integrated Schools
1977	43,593	250,932	17.4
1980	62,255	224,339	27.8

If the Commonwealth Court, once solidly in the corner of integration, had remained on the side of the PHRC, the court would have demanded more of an effort from the school district. Instead, the takeaway from the 1982 installment of the *Philadelphia School Desegregation Case* was that the Commonwealth Court was no longer staunchly in favor of forced desegregation. The court, despite evidence pointing to a lack of serious effort to overcome *de facto* segregation, allowed another extension of the timeline to remedy public school segregation in Philadelphia—one that produced another voluntary plan for integration to begin in 1983, deemed the 1983 Modified Plan.[87]

Regardless of the definition used,[88] the court found the increase in integrated schools misleading.[89] The court found that no schools had joined the rank of integrated schools.[90] The percentage increase was actually the result of seven schools closing and the students being reassigned as a result, and two schools becoming more racially integrated due to an increase in other minority students (namely Asians and Latin@s) but not from an increase in White students attending the school.[91] The court, nevertheless, determined another extension of the deadline was

86. *Id.*
87. *Id.* at 1354.
88. *See HRC IV*, 390 A.2d 1238, 1262 (Pa. 1978); *HRC III*, 374 A.2d 1014, 1016 (Pa. Commw. Ct. 1977); *HRC I*, 294 A.2d 410, 413–14 (Pa. Commw. Ct. 1972); *HRC II*, 352 A.2d 200, 209 (Pa. Commw. Ct. 1976).
89. *HRC IV*, 443 A.2d 1343, 1352 (Pa. Commw. Ct. 1982).
90. *Id.*
91. *See HRC IV*, 443 A.2d at 1352; Table 1.

necessary to fully desegregate Philadelphia's public schools.[92] In addition to proving that desegregation was no longer as high of a priority for the Commonwealth Court, the case also proved that the court was no longer fully supportive of those seeking to integrate the public schools of Philadelphia (even if the court was not in the corner of the anti-integration factions, it was no longer reliably pro-integration).

The judicial actions of the Commonwealth Court during the 1980s reflected the general national consensus of frustration with integration-related actions. Evidence suggests that the order should have better aligned with the desires of the PHRC because the court embraced a plan that minimally decreased the number of schools that were racially isolated; in fact, the number of schools that were racially isolated increased. Instead, the court chose to grant the school district more years to remedy the segregation-related issues previously facing Philadelphia's public schools and the segregation-related issues newly created by the previous years of desegregation gone awry. The order from the early 1980s held until the 1990s and resulted in jumpstarting the next trend: a movement away from desegregation toward equal access to public education, without regard to the delivery of those opportunities in segregated educational environments. In other words, the case would move from a *Brown I* and *II*-based effort into a *Milliken II*-based[93] effort in the next decade.

D. A New Judge and a New Case: The 1990s and an Opportunity Missed for State Law-Based Desegregation in Philadelphia

As the *Philadelphia School Desegregation Case* moved into its third decade, the PHRC appointed an Independent Settlement Team (the Settlement Team) to assess the SDP's progress toward desegregation.[94] The Settlement Team's report, released in 1992, confirmed that most SDP schools were severely segregated.[95] Moreover, the Settlement Team concluded that the district had not effectively pursued or achieved "maximum feasible desegregation."[96] Ultimately, the Settlement Team recommended the use of busing to reassign students and foster racial balance.[97] Reinvigorated by the report, several representative parent groups requested another hearing in April 1993 seeking either to force or

92. *HRC IV*, 443 A.2d at 1354.

93. *See supra* note 15 and accompanying text.

94. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC V*), 651 A.2d 177, 179 (Pa. Commw. Ct. 1993).

95. *Id.*

96. *Id.* at 181.

97. *Id.* at 179–80.

to prevent the SDP from implementing busing for integration.[98] At this point, ASPIRA officially joined the case as a plaintiff-intervenor.[99] ASPIRA, an organization dedicated to developing educational and leadership opportunities for Latin@ youth, brought to the case the force of a national organization and a broader definition of minority youth who could potentially benefit from the case's resolution. From the beginning of the case in the early 1970s to the turning point in the early 1990s, the Latin@ proportion of the population had more than doubled; by the ending of the case, the Latin@ proportion of the population had increased more than five-fold.[100] Together, the PHRC and ASPIRA argued that the SDP had failed to achieve the maximum possible desegregation and that busing was the best option.[101]

In response to the new efforts by the PHRC and ASPIRA, the SDP attempted to bring contiguous suburban districts into the case, arguing that a metropolitan strategy would be necessary to achieve desegregation, a tactic that had been rebuffed by the federal court in *Milliken I*.[102] The SDP also requested to join the Commonwealth of Pennsylvania, the Governor, and the Pennsylvania Department of Education to the case, suggesting that state-level political support would facilitate the funding, implementation, and enforcement of desegregation plans.[103] The SDP then sought appropriate compromises with the PHRC, with both parties ultimately aiming toward desegregation. Neither the petitioners nor the District yet realized that a new judge, Judge Doris Smith, would completely redefine the case in a matter of months.

In June 1993, Judge Smith granted the SDP's request for a directed verdict, concluding that the PHRC had "failed to demonstrate that mandatory desegregation measures were feasible."[104] In her opinion, Judge Smith cited Judge Wilkinson's 1972 opinion[105] as substantiation that "it is the Commission which logically and legally bears the burden of adducing evidence in support of its determinations as to the efficacy of a plan devised by the District and as to the curative measures needed."[106]

In contrast to earlier judges, who had generally ceded to the PHRC's judgment, Judge Smith demanded a higher burden of proof from the PHRC. In doing so, she also established the Commonwealth Court as the

98. *Id.*
99. *Id.*
100. *See* Table 1.
101. *See* Table 6.
102. *HRC V*, 651 A.2d 177, 182 (Pa. Commw. Ct. 1993).
103. *Id.* at 178.
104. *Id.* at 180.
105. *HRC I*, 294 A.2d 410, 414 (Pa. Commw. Ct. 1972).
106. *HRC V*, 651 A.2d at 181.

final authority on the state of school segregation, rather than the PHRC.[107] Ultimately, the PHRC could not meet Judge Smith's higher standard. Judge Smith faulted the PHRC for taking too long to alert the SDP of continued segregation and for inappropriately estimating bus times.[108] Moreover, Judge Smith held that the Commission's recommendations were based on unproven assumptions, concluding that

> the Commission proffered no evidence in support of the proposition that mandatory busing would effectuate further desegregation than has been accomplished under the modified plan, and it neither proved the feasibility of mandatory reassignment per busing nor any cause and effect relationship between busing, if indeed it were feasible, and increased desegregation.[109]

Thus, Judge Smith ruled that the Commission had failed to prove that the SDP had not achieved maximum possible desegregation or that mandatory busing was a feasible solution. Indeed, she adamantly declared that she would "no longer consider mandatory busing as an issue in this case."[110]

Finally, Judge Smith denied the request to involve suburban school districts, the Governor, and the Department of Education.[111] She cited earlier opinions from when the District had attempted to join other parties and concluded that the requested parties were neither indispensable nor necessary.[112] Although Judge Smith left the door open slightly for another attempt, she stated, "[i]t should be noted that neither the District nor the Commission appealed this Court's refusal to order creation of a metropolitan school district."[113] In either case, precedent in other northern urban districts suggested that the inclusion of suburban districts was unlikely to succeed.[114] The fact that Judge Smith had imposed a heightened burden of proof made it even more unlikely that she would pursue a radical or unprecedented restructuring of the district.

Hence, by June 1993, the desegregation case had effectively disappeared. Overturning decades of prior opinions, Judge Smith declared

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107. *Id.* at 180–83.

108. *Id.* at 180–83.

109. *Id.* at 183.

110. *Id.* at 185.

111. *Id.* at 177.

112. *Id.* at 183.

113. *Id.* at 183–84. (citing the *Philadelphia School Desegregation Case*'s origins from as early as 1972 as method to avoid establishing a metropolitan-wide school district for the sake of desegregation and arguing that the PHRC's and/or the SDP's failure to appeal the 1972 ruling banning a metropolitan school district was sound reasoning for avoiding the establishment of a metropolitan school district two decades later). Judge Smith's 1993 opinion does not consider the vastly different circumstances—especially the shifting demographic statistics—in her refusal to establish a metropolitan-wide school district. *Id.*

114. *See Milliken I*, 418 U.S. 717 (1974).

the court the final authority on the extent of desegregation, introduced a higher standard of proof for the petitioners, dismissed busing as a possibility, and denied the involvement of suburban districts or state agencies.[115] This left the petitioners with a quality of education case; the only pathway to educational equity in the SDP would be equal access to educational opportunities, even if those opportunities were, in fact, segregated.[116] Judge Smith's apparent exchange of desegregation in favor of separate but equal educational opportunities[117] was not just a betrayal of the spirit of the PHRA,[118] but also stood in direct opposition to the Court's orders in *Brown I*[119] and its progeny.[120] In fact, at the end of her opinion, Judge Smith specifically noted that the District's modified plan included goals aimed at educational improvement, and she detailed the racial achievement gaps in the District. The judge did not mention desegregation.[121] As such, Judge Smith established her openness to facilitating a case for quality education and therefore shaped the petitioners' new strategies.

Over the next year, both the PHRC and the SDP appealed the case to the Supreme Court of Pennsylvania.[122] Both petitions were denied a hearing before the Supreme Court in June 1993, and the parties returned to Judge Smith's court.[123] The SDP then took advantage of Judge Smith's new perspective on the standards for proving desegregation, and in November 1993 moved for a directed verdict that the District had not failed to achieve maximum possible desegregation.[124] In particular, the SDP argued that neither the Commission nor the intervenors had presented evidence of busing, school pairings, magnet schools, or any other strategies that would have been effective in decreasing segregation.[125] Moreover, the District reiterated that it was financially unable to pursue desegregation strategies.[126] As such, the SDP suggested "this lengthy litigation should be ended by the Court once and for all."[127]

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115. *HRC V*, 651 A.2d 177 (Pa. Commw. Ct. 1993).

116. *Id.* at 183–84.

117. *Id.* at 184–85.

118. Pennsylvania Human Relations Act of 1955 (PHRA), Pub. L. No. 744, Pa. Laws 222 (codified as amended at 43 PA. CONS. STAT. ANN. §§ 951–963 (West 2017)).

119. *Brown I*, 347 U.S. 483 (1954).

120. *E.g.*, Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430 (1968).

121. *See HRC V*, 651 A.2d.

122. *See* Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC VI*), 638 A.2d 304 (Pa. Commw. Ct. 1994).

123. *Id.* at 306.

124. *Id.*

125. *Id.* at 308.

126. *Id.* at 306.

127. *Id.* at 308.

Although Judge Smith's weariness of the ongoing battle was beginning to show, she denied the request for a directed verdict.[128] In addition to questioning the extent of possible desegregation, Judge Smith also heard arguments as to whether the SDP provided equal educational opportunities to minority students.[129] The SDP claimed that there was no evidence of correlation between segregation and a racial achievement gap, a claim that Judge Smith forcefully rejected by opining, "the Court categorically rejects the School District's assertion that disparities in educational achievement are irrelevant. To the contrary, disparities in educational achievement of students within the School District are one of the paramount and most fundamental issues presented in this case."[130] Judge Smith again asserted the issue of quality education as the principal question as opposed to aiming to desegregate the Philadelphia public schools, which framed the case quite differently. Judge Smith, thereafter, upheld the Commission's authority to correct *de facto* segregation, as well as its right to use race-based student assignments to do so.[131] Indeed, she noted the SDP "has a legal responsibility and duty to take steps to correct the condition [of school segregation], and its failure to do so constitutes a violation of the Human Relations Act."[132] Moreover, she noted that the holdings of *Swann v. Charlotte-Mecklenberg*, *Freeman v. Pitt*, and *Milliken I* still allow state courts to remedy *de facto* segregation.[133]

However, Judge Smith reaffirmed her earlier ruling against busing, finding that there was no new evidence to establish its feasibility as a means to decrease segregation.[134] In addition, testimony was presented and Judge Smith focused on evidence of unequal educational opportunities over evidence of segregation.[135] Her summary of the PHRC's arguments, for example, sets aside the complaints of segregation and emphasized quality education:

> Despite the Commission's continued concern for further integration of the School District's schools through mandatory measures, the Commission also recognizes that disparate educational opportunities must also be addressed, and emphasizes that an important element of

128. *Id.* at 307.
129. *Id.* at 308.
130. *Id.*
131. *Id.* at 309.
132. *Id.* at 311.
133. *Id.* at 310–11.
134. *Id.* at 328 (ordering the litigants to pursue equal educational opportunities for students in racially isolated schools).
135. *Id.* at 315–19.

> any school desegregation case . . . [is to] guarantee a more equitable outcome in terms of student achievement.[136]

Thus, the PHRC had begun to shift its arguments in response to Judge Smith's leads, balancing desegregation strategies with achievement goals. ASPIRA also heavily emphasized inequities, citing "fewer resources including, among other things, less experienced and less highly rated teachers, older school facilities requiring greater repair, fewer dollars spent on educational improvement in these schools" and limited school choices for minority students, resulted in lower standardized test scores and lower graduation rates in the School District of Philadelphia.[137] In response, the SDP maintained its claim that any further desegregation efforts would be counterproductive, as it had already achieved maximum possible desegregation.[138] The SDP cited low funds, union restrictions, and the additional needs of minority and low-income students as constraints on its ability to use funds to improve student achievement.[139]

To assess these claims, Judge Smith examined the results of an integration plan crafted in the mid-1980s, specifically focusing on the "educational improvement" components, explaining that "the Court must and shall look to student achievement results, among other things, to determine whether an equal educational opportunity has been made available to all students within the public schools."[140] Judge Smith noted racial gaps in test scores across grades and subjects, as well as in grades, graduation rates, and access to Advanced Placement courses.[141] She concluded that the results

> unequivocally support[] the contention [of the petitioners] . . . race is a factor with regard to the levels of academic achievement even correlating for other variables . . . . Thus the parties have sustained their burden of showing that race is a significant factor in the achievement gaps which continue to widen . . . .[142]

Yet, Judge Smith also described the findings of researchers and district staff, who highlighted highly segregated schools that still fostered high levels of academic achievement.[143] She concluded that with a strong culture of achievement and high expectations for students, schools could

136. *Id.* at 311.
137. *Id.* at 312.
138. *Id.* at 312–13.
139. *Id.* at 313.
140. *Id.* at 319.
141. *Id.* at 317–18.
142. *Id.* at 320.
143. *Id.* at 308.

overcome the obstacles of segregation and poverty.[144] In other words, Judge Smith equated the fact that because some students overcame the effects of segregation, therefore, all students facing segregation have the ability to overcome the same.

Given the gap between examples of successful schools and the average performance of segregated schools, Judge Smith determined that the "overall implementation [of the Modified Plan] has been ineffective . . . . [A]ll available measures or strategies have either not been considered or implemented by the School District which could enhance integration of its students and eliminate the racial disparities in achievements."[145] Judge Smith listed additional strategies for decreasing segregation, including new school construction and strategies for raising the academic achievement of minority students, such as strong preschool programs, extended school years, and collaboration with community groups.[146] Unfortunately, the SDP's actions had been counterproductive and even directly opposed to these goals. Ultimately, Judge Smith concluded,

> [T]he School District has failed to desegregate the public schools by all feasible means and continue[d] to maintain a racially segregated school environment where all of the students do not receive equal educational opportunities or a quality education . . . . Consequently, the Commission's petition to enforce the law is granted.[147]

She ordered the SDP and the PHRC to "discuss the process for development of a desegregation plan and timetable for implementation."[148] Judge Smith specified elements to be included in the plan, namely steps to improve the academic achievement of minority students.[149] The only elements she named to improve desegregation were voluntary school choice measures and the suggestion that new schools be constructed in naturally integrated neighborhoods, somewhat tentative measures compared to her extensive list of strategies focused on achievement.[150]

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144. *Id.* at 317.

145. *Id.* at 326.

146. *Id.* at 326–27. Suggesting this list was a precursor of the ultimate consent decree; the list included a vast focus on things like discipline, professional development and separate but equal facilities.

147. *Id.* at 328.

148. *Id.* at 329.

149. *Id.* at 326–27.

150. *Id.* at 328.

Subsequent proceedings reinforced Judge Smith's focus on academic achievement.[151] Based on testimony by the superintendent and other district staff, research on urban school districts, and recent federal legislation, Judge Smith emphasized the goal of "reinvesting in public school education where the focus is on high academic achievement of all students."[152] Judge Smith partly accepted the first proposal, which was submitted in November 1994.[153] Judge Smith approved recommendations for professional development, improved school climate, stringent discipline, and monitoring; she partially approved recommendations for organizational restructuring, facilities, and for use of resources.[154] In addition, Judge Smith ordered that the SDP develop plans to promote school safety, parental involvement, and "strong basic educational skills."[155] Moreover, for the first time, Judge Smith explicitly acknowledged the retrenchment of efforts toward desegregation.[156]

Development and implementation of the plan proved to be a battle in its own right. First, the SDP applied for a stay of Judge Smith's order, which Judge Smith denied in January 1995.[157] The PHRC then challenged the District's plan in April 1995, causing Judge Smith to reaffirm her requirements.[158] She reiterated the need for parental involvement, but also added requirements for curriculum revision and a new equity formula taking into account a school's status as racially isolated for purposes of resource allocation.[159] Rather than seeking desegregation, Judge Smith sought to take intractable segregation into account and still improve educational outcomes.[160] In June 1995, Judge Smith again ordered specific improvements to the plan, which called for measures to provide professional development, curb absenteeism, and invite community input into a restructuring plan.[161]

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151. *E.g.*, Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC VII*), 651 A.2d 186 (Pa. Commw. Ct. 1994); Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC IX*), 658 A.2d 470 (Pa. Commw. Ct. 1995).

152. *HRC VII*, 651 A.2d at 187.

153. *Id.* at 189.

154. *Id.*

155. *Id.* at 188–93.

156. *Id.* at 188 ("Likewise, no amount of reform strategies or additional financial resources can effectively alter the status quo unless those persons central to the reform effort are committed to making it work."). Judge Smith's quote foreshadowed the defeat of the state-based movement toward desegregation.

157. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC VIII*), 654 A.2d 96 (Pa. Commw. Ct. 1995).

158. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC X*), 658 A.2d 470 (Pa. Commw. Ct. 1995).

159. *Id.* at 475.

160. *Id.*

161. *HRC X*, 658 A.2d at 474–76.

As the plan developed and the SDP was forced to implement additional provisions, the District sought funding to execute the new requirements.[162] In 1996, Judge Smith at last granted the SDP's request to join the Commonwealth, the Governor, the City of Philadelphia, and the mayor in order to determine funding liability.[163] Judge Smith concluded that the PHRA required the Commonwealth, but not the city, to fund remedial orders.[164] The Commonwealth and the Governor appealed to the Supreme Court of Pennsylvania for relief in 1999, and Judge Smith's joinder decision was vacated.[165] The SDP, then, was left with a new series of requirements but no new funding, support, or enforcement powers. As the 1990s drew to a close, so did the lengthy litigation. The SDP developed a new plan focused on educational improvement rather than desegregation, guided predominately by Judge Smith. Neither the city nor the state was willing to or required to fund the new plan, leaving doubts about its feasibility and efficacy. But the fate of the case was sealed and hardly recognizable to the parties that started the case more than two decades ago.

E. Placing the Proverbial Nail in the State Law-Based Desegregation Coffin: The Case of the School District of Philadelphia in the 2000s

After a protracted battle over the design of the new plan, the SDP's Comprehensive Safety and Security Plan and Curriculum Renewal Plan were approved in 2001.[166] Judge Smith found that the plans sufficiently addressed historical discrimination while providing minority students with equal educational opportunities.[167] At long last, the court was satisfied that the SDP had made significant efforts and taken all feasible steps to improve education for minority students in segregated schools. The School Safety and Security Plan, based on input from other large urban districts, constituted a "comprehensive approach to school safety."[168]

Measures to improve school climate included security technology, systematic collection of school discipline data, and professional development on juvenile justice issues.[169] Racially isolated schools were to have first priority, but the plan was to be phased in throughout the

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162. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC XI*), 667 A.2d 1173 (Pa. Commw. Ct. 1995).

163. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC XII*), 681 A.2d 1366, 1389 (Pa. Commw. Ct. 1996).

164. *Id.* at 1366.

165. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC XIII*), 732 A.2d 578 (Pa. 1999).

166. Pa. Human Relations Comm'n v. Sch. Dist. of Phila. (*HRC XIV*), 784 A.2d 266 (Pa. Commw. Ct. 2001).

167. *Id.* at 266.

168. *Id.* at 270.

169. *Id.* at 271.

District over two years.[170] The plan also specified target outcomes, including increased involvement of parents and community partners, decreased absenteeism, a revised Code of Student Conduct, data collection, and audit procedures.[171] The Curriculum Renewal Plan further called for the District to develop and implement academic standards in core subjects in order to "foster uniformity in instructional practices and district-wide coordination in instruction and assessment."[172] The plan promised extensive professional development that was focused on helping special education students in the general classroom.[173] Target outcomes for the Curriculum Renewal Plan included reevaluation of textbooks and assessments, regular meetings to review student achievement data, and targeted professional development.[174]

Finally, Judge Smith ordered full-day kindergarten for eligible students in segregated schools, literacy interns in elementary schools, and school councils in segregated schools.[175] Although segregated and racially isolated schools were repeatedly mentioned, there were no plans to decrease segregation.[176] Judge Smith's order, which was nearly devoid of a focus on desegregation of the Philadelphia public schools, betrayed the origins of the lengthy case. However, Judge Smith ordered the PHRC to monitor the implementation of the various plans and requested closure of the case when it was satisfied with the District's implementation.[177] Thus, the case began to wind down and responsibility passed back from the Court to the SDP and the PHRC.

The case formally ended in 2009 when the SDP, the PHRC, and ASPIRA reached a consent agreement.[178] Judge Smith dismissed the case with prejudice because the PHRC had withdrawn its complaint. The agreement was based on a five-year strategic plan entitled "Imagine 2014."[179] Imagine 2014 was designed to raise academic achievement of minority students so that every child in every Philadelphia classroom received an excellent education.[180] The SDP identified five priorities that would help achieve this goal: quality instruction, school choice, excellent

170. *Id.* at 274.
171. *HRC XIV*, 784 A.2d 266, 275 (Pa. Commw. Ct. 2001).
172. *Id.* at 271.
173. *Id.*
174. *Id.* at 273.
175. *Id.*
176. *See id.*
177. *HRC XIV*, 784 A.2d 266, 275 (Pa. Commw. Ct. 2001).
178. Pa. Human Relations Comm'n v. Sch. Dist. of Phila., No. 1056 C.D. 1973, slip op. at 1 (Pa. Commw. Ct. July 13, 2009) (consent order settling the case), http://www.philasd.org/desegregation/image-Img8C2B_1248206855.pdf [https://perma.cc/LLP8-DYQ9].
179. *Id.* at 4, 6–7.
180. *Id.* at 6.

staff, accountability, and improved facilities and operations.[181] The *Philadelphia School Desegregation Case* ended without mention of desegregation of the city's schools. At long last, the *Philadelphia School Desegregation Case* had come to mirror *Milliken I* and *II*—school desegregation was no longer a sought after remedy.[182] The case was now about providing students of racial and ethnic minority backgrounds with a quality education, even if that had to occur in segregated schools.

III. MAKING THE CASE: ALIGNING *PENNSYLVANIA HUMAN RELATIONS COMMISSION V. SCHOOL DISTRICT OF PHILADELPHIA* WITH THE GENERATIONAL CHANGES OF SCHOOL DESEGREGATION CASES

The *Philadelphia School Desegregation Case* took a variety of turns over its nearly forty-year history. In the 1970s, the case enjoyed general success with judges who seemingly sympathized with desegregation efforts.[183] However, in the late 1970s, the case saw the beginnings of a backlash against desegregation efforts, and this backlash led to an era of hostility toward integration efforts in the 1980s.[184] The 1980s gave way to the 1990s when the case met new participants in terms of judiciary and plaintiffs.[185] These new additions facilitated the resolution of the case but only after the purpose of the case shifted from desegregation to equal educational opportunities. In the 2000s, the case reached a resolution that focused heavily on offering minority students in Philadelphia an opportunity that matched those afforded to their White counterparts.[186] This resolution became known as Imagine 2014 and purported to offer five targeted improvements to the quality of education to Philadelphia's minority students.[187]

New stakeholders, such as Judge Smith and ASPIRA, influenced the outcome of the case. Both the duration of the case and the additions in the 1990s to the plaintiffs and the judiciary played key roles in reshaping the

181. *HRC VII*, 651 A.2d 186, 189–95 (Pa. Commw. Ct. 1994).

182. *See Milliken I*, 418 U.S. 717 (1974) (severely limiting the abilities of inner city school districts to include suburban school districts in desegregation plans); *see also Milliken II*, 433 U.S. 267 (1977) (creating equal educational access, even if in segregated schools, as a remedy in lieu of school desegregation).

183. *See HRC IV*, 443 A.2d 1343 (Pa. Commw. Ct. 1982); *HRC IV*, 390 A.2d 1238 (Pa. Commw. Ct. 1978); *HRC III*, 374 A.2d 1014 (Pa. Commw. Ct. 1977); *HRC II*, 352 A.2d 200 (Pa. Commw. Ct. 1976); *HRC I*, 294 A.2d 156 (Pa. Commw. Ct. 1973); *HRC I*, 294 A.2d 410 (Pa. Commw. Ct. 1972).

184. *See HRC IV*, 443 A.2d 1343; *HRC III*, 374 A.2d 1014; Pa. Human Relations Comm'n v. Sch. Dist. of Phila. v. Norristown Sch. Dist., 374 A.2d 671 (1977).

185. *See supra* notes 94–165 and accompanying text.

186. *See supra* notes 166–184 and accompanying text.

187. Pa. Human Relations Comm'n v. Sch. Dist. of Phila., No. 1056 C.D. 1973, slip op. at 4 (Pa. Commw. Ct. July 13, 2009) (consent order settling the case), http://www.philasd.org/desegregation/image-Img8C2B_1248206855.pdf [https://perma.cc/LLP8-DYQ9].

Philadelphia School Desegregation Case. First, the duration of the case allowed for the outcomes to be shaped by prevailing trends in school desegregation, especially trends influenced by the federal courts' holdings in school desegregation cases. Table 8 lists the changes in the *Philadelphia School Desegregation Case* within the context of the four generations of federal school desegregation cases.

Table 8
Timeline of Desegregation Eras for Federal Cases and Pennsylvania State Case

Generation of Cases	Federal	Pennsylvania
First Generation: The Road to Desegregation	*Sipuel* (1948); *Sweatt* (1950); *McLaurin* (1950); *Brown I* (1954); *Brown II* (1955)[188]	Ending with the passage of the Pennsylvania Human Relations Act in 1955 (PHRA)[189]
Second Generation: Desegregation by Mandate	*Cooper* (1958); *Griffin* (1964); *Green* (1968); *Swann* (1971)[190]	*SDP v. PHRC* (*HRC I*) (1972) → *PHRC v. SDP* (*HRC II*) (1976)[191]
Third Generation: Manifestation of Waning Support of Desegregation	*Wright v. Council of Emporia* (1972) and *United States v. Scotland Neck City Board of Education* (1972); *Milliken I* (1974); *Milliken II* (1977); *Dowell* (1991); *Freeman* (1992)[192]	*PHRC v. SDP* (*HRC II*) (1976) → *PHRC v. SDP* (*HRC XII*) (1996)[193]
Fourth Generation: Explicit Return to "Separate but Equal"	Aftermath of *Dowell* (1991) and *Freeman* (1992)[194]	*PHRC v. SDP* (2001); *PHRC v. SDP* (2009) (consent order); to current[195]

188. Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. St. Regents, 339 U.S. 637 (1950); *Brown I*, 347 U.S. 483 (1954); *Brown II*, 349 U.S. 294 (1955).

189. Pennsylvania Human Relations Act of 1955 (PHRA), Pub. L. No. 744, Pa. Laws 222 (codified as amended at 43 PA. CONS. STAT. ANN. §§ 951–963 (West 2017)).

190. Cooper v. Aaron, 358 U.S. 1 (1958); Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218 (1964); Green v. Cty. Sch. Bd. of New Kent Cty., Va., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

191. *HRC I*, 294 A.2d 156 (Pa. Commw. Ct. 1973); *HRC II*, 352 A.2d 200 (Pa. Commw. Ct. 1976).

192. Wright v. Council of Emporia, 407 U.S. 451 (1972); U.S. v. Scotland Neck Bd. of Ed., 407 U.S. 484 (1972); *Milliken I*, 418 U.S. 717 (1974); *Milliken II*, 433 U.S. 267 (1977); Bd. of Educ. of Okl. Cty Pub. Sch. v. Dowell, 498 U.S. 237 (1991); Freeman v. Pitts, 503 U.S. 467 (1992).

193. *HRC I*, 294 A.2d 410; *HRC XII*, 681 A.2d 1366 (Pa. Commw. Ct. 1996).

194. *Freeman*, 503 U.S. 467; *Dowell*, 498 U.S. 237.

195. *HRC XIV*, 784 A.2d 266 (Pa. Commw. Ct. 2001); Pa. Human Relations Comm'n v. Sch. Dist. of Phila., No. 1056 C.D. 1973, (Pa. Commw. Ct. July 13, 2009) (consent order settling the case), http://www.philasd.org/desegregation/image-Img8C2B_1248206855.pdf [https://perma.cc/LLP8-DYQ9].

A. New Stakeholders, Altering Results: The Impact of Judge Smith and ASPIRA

The addition of new stakeholders proved to be pivotal to the outcome of the *Philadelphia School Desegregation Case*.[196] Judge Smith immediately expressed her desire to establish equal educational opportunities and reverse decades of precedent grounded in theories advocating the necessity of school integration. Her efforts to offer quality education to all students (instead of fully integrating the Philadelphia public schools) were steeped in attacks on the credibility of the PHRC's evidence. Citing erroneous information about transportation times, the judge effectively foreclosed one of the primary apparatuses for achieving desegregation: busing. Furthermore, Judge Smith made clear that an acceptable integration plan would be evaluated by the opportunities to achieve academic success. Several hearings and proceedings were dedicated to drafting the SDP's plans for desegregating Philadelphia's public schools. While these plans often mentioned desegregation, their core focused on offering minority students an education that was comparable to their White counterparts. There were no plans that explicitly described how students in Philadelphia public schools would ultimately attend desegregated schools.

ASPIRA's involvement in the lawsuit gave the PHRC a national organization with national resources. ASPIRA's strategy mirrored that of Judge Smith. ASPIRA's complaint focused on a lack of resources and opportunities. Judge Smith was sympathetic to these complaints in the way that the earlier judges were sympathetic to the PHRC's complaints. PHRC must have realized that joining forces with ASPIRA and Judge Smith would create a three-to-one advantage at the negotiating table. Judge Smith constantly and often resoundingly denied arguments against potential school desegregation; thus, PHRC had almost no choice other than joining the equal educational opportunities bandwagon. The Commission faced either a complete loss of quality education for students in Philadelphia or offering those same students at least some semblance of a quality education in their current environments. ASPIRA's introduction as a plaintiff helped create this shift in the potential outcomes.

B. The Impact of Time: Aligning the Generational Changes in Federal and State Desegregation Cases

The notion of a four-decade legal case is overwhelming. The wheels of justice may turn slowly but seldom as slowly as they did in the *Philadelphia School Desegregation Case*. Comparing the decisions of the

196. *Supra* notes 94–165 and accompanying text.

case with their contemporary national court cases and school desegregation trends, it can be seen that the *Philadelphia School Desegregation Case* was highly influenced by the prevailing attitudes toward school desegregation. At times when the nation—or at least the nation's courts—was pro-integration, the Commonwealth Court of Pennsylvania appeared to be very pro-integration. Following decisions such as *Green*[197] and *Swann*,[198] the PHRC found favor with the court. The court seemed to rule in favor of the PHRC at every ruling during the early 1970s. In the early to mid-1970s, the Commonwealth Court often went as far as demanding that the SDP make every effort to integrate the Philadelphia public schools, notwithstanding the expenses involved.

However, as the 1970s ended and the decade changed, the country tired of desegregation efforts. This attitude affected the decisions of the Commonwealth Court. Post-*Milliken*,[199] it became clear that efforts at desegregating the country's public schools would have boundaries. The Commonwealth Court of Pennsylvania established those boundaries by reining in the previous desegregation demands in the late 1970s and ultimately offering great latitude to the SDP in the 1980s—despite evidence that the school district, when left to its own devices, further segregated the Philadelphia public schools. The 1990s presented new challenges as the country believed that integration would not work. This philosophy found its way to the courtrooms of the Commonwealth Court. Recall that Judge Smith, in the early 1990s, shifted the focus of the case. No longer was desegregation a critical part of the case; the new issue was whether minority students had equal access to quality learning opportunities in Philadelphia's public schools.

The *Philadelphia School Desegregation Case*, a state law-based desegregation case, paralleled the trajectory of federally based desegregation cases. The Pennsylvania state legislature passed the PHRA in 1955.[200] Not coincidentally, the PHRA arose during the heyday of efforts to end segregation and advance movements toward equity for racial and ethnic minorities.[201] The PHRA afforded the Commonwealth of Pennsylvania an opportunity to explicitly address issues of segregation in public accommodations. In fact, the PHRA was much broader than the

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

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

199. *Milliken I*, 418 U.S. 717 (1974); *Milliken II*, 433 U.S. 267 (1977).

200. Pennsylvania Human Relations Act of 1955 (PHRA), Pub. L. No. 744, Pa. Laws 222 (codified as amended at 43 PA. CONS. STAT. ANN. §§ 951–963 (West 2017)).

201. The Pennsylvania State Legislature passed the PHRA just a year after the Court's decision in *Brown I* (1954) and in the same year as the Court's decision in *Brown II* (1955), which reasserted a federal commitment to ending segregation in public places.

Court's mandates in *Brown I* and *Brown II* because the PHRA explicitly allowed for the state to address *de facto* as well as *de jure* segregation.

The lengthy *Philadelphia School Desegregation Case* can be compared with the second generation of federal desegregation cases. During the years immediately following *Brown I* and *Brown II*, the *Philadelphia School Desegregation Case* enjoyed persistent and consistent attacks on school desegregation; the state court judges from the case's origin to about the mid-1970s accepted few, if any, arguments from the SDP on its inability to desegregate public schools. At one point, the school district maintained that the desegregation of its public schools was not financially feasible. The state courts rebuffed this argument, requiring that the school district pursue the desegregation of its public schools notwithstanding the alleged financial peril that such desegregation would create for the SDP. In particular, the second generation of federal school desegregation cases included cases such as *Cooper v. Aaron* (1958), *Griffin v. County School Board of Prince Edward County* (1964), *Green v. County School Board of New Kent County* (1968), and *Swann v. Charlotte-Mecklenberg Board of Education* (1971).[202] In each of these cases, school districts argued that the desegregation of the districts' schools was either financially or politically unfeasible; in each of those cases, the federal courts—just as the state court in the *Philadelphia School Desegregation Case*—claims fell on deaf ears. Thus, neither the Pennsylvania state court nor the United States Supreme Court would accept any defiance of its order to desegregate public schools.

The third generation of federal school desegregation cases resulted in the retrenchment of the federal courts' efforts toward desegregation; the same was true of the Pennsylvania state courts. During the third generation[203] of the *Philadelphia School Desegregation Case*, the Pennsylvania state courts relaxed their no excuses approach to school desegregation and began to reason with the school district about the feasibility of desegregating the public schools. In the most glaring segment of this phase of litigation, the state court entertained whether the school district could afford to desegregate its public schools. However, the state court mandated that the school district produce some plan to allow for an

202. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430 (1968); Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958).

203. The third generation of school desegregation cases commenced with the Supreme Court's decisions in *Wright v. Council of Emporia*, 407 U.S. 451 (1972) and *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484 (1972). The third generation of school desegregation cases included *Milliken I*, 418 U.S. 717 (1974) and *Milliken II*, 433 U.S. 267 (1977). The third generation of school desegregation cases concluded with the Supreme Court's decisions in *Freeman v. Pitts*, 503 U.S. 467 (1992), and *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991).

assessment of the true cost of desegregating the district's schools. Further, the Pennsylvania state courts were unwilling to even entertain the idea of costliness; the state courts demanded desegregation of Philadelphia's public schools irrespective of the cost. Federal school desegregation cases were experiencing waning judicial support while the *Philadelphia School Desegregation Case* was enduring its loss of support.

At that time, the Court narrowly sustained desegregation in cases such as *Wright v. Council of Emporia* and *United States v. Scotland Neck City Board of Education*.[204] The Court decided both *Council of Emporia*[205] and *Scotland Neck*[206] by 5–4 majorities as opposed to the unanimity enjoyed in the first generation of federal school desegregation cases. The third generation of federal school desegregation cases hit its stride with the Court's decision in *Milliken I*, effectively issuing White suburban parents a veto against school desegregation.[207] The Court's decision in *Milliken I* made clear that parents seeking to avoid desegregated schools could simply move immediately outside of district boundaries to maintain segregated schools. Not surprisingly, Philadelphia (and other cities) faced increased White flight and denser minority populations within urban school districts post-*Milliken I*. *Milliken I* was most effective at preventing desegregation because the case substantially limited the number of White students available for desegregation efforts while simultaneously banning school districts from reaching across district boundaries to capture those parents who had now fled to the suburbs.

In its fourth generation of school desegregation case law, the *Philadelphia School Desegregation Case* followed the fourth generation of federal desegregation cases. This generation of cases was marked by diminished resolve to desegregate public schools, or desegregation fatigue and, most importantly, an apparent acceptance of segregated schools. In many ways, the fourth generation of school desegregation cases at both levels was a return to separate but equal. Federal school desegregation cases, namely *Freeman v. Pitts*[208] and *Board of Education of Oklahoma City v. Dowell*,[209] stalled attempts at school desegregation. In fact, Orfield argued that the 1990s would go on to excuse school districts from desegregation and allow the resegregation of public schools in previously court-monitored school districts.[210]

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204. *Wright*, 407 U.S.; *Scotland Neck*, 407 U.S.

205. *Wright*, 407 U.S.

206. *Id.*

207. *See* James E. Ryan, *Brown, School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635 (2004).

208. 503 U.S. 467 (1992).

209. 498 U.S. 237 (1991).

210. *Turning Back to Segregation*, *supra* note 28.

Similarly, this phase of the *Philadelphia School Desegregation Case* dismissed desegregation as a viable option for advancing educational equity. Instead of school desegregation, Judge Smith set forth equal educational opportunities or a modern version of separate but equal. The Civil Rights Project has found that public schools in the United States are as segregated now as schools were in 1968.[211] Similarly, the schools are still segregated in Philadelphia. As such, one could conclude that the state and federally based school desegregation cases followed similar pathways and produced similar results. Moreover, there is little to suggest that equal educational opportunities in segregated schools have assisted the academic growth of the students of the SDP.

CONCLUSION

The *Philadelphia School Desegregation Case* can be divided into four phases with each running almost conterminously with a decade. The case's final outcome can be attributed to two factors. First, the introduction of like-minded new stakeholders from the judiciary and the general public led to a movement away from desegregation and toward equal educational opportunities within segregated schools. Likewise, the case's near-four-decade duration made the case more susceptible to changing national and federal views on school integration that became increasingly unpopular. Although it is not possible, given the scope of this study, to articulate the origins of shifting public discourse and thoughts on school desegregation efforts, there appears to be a correlation between the manner in which the federal courts and the Pennsylvania state court handled school desegregation cases. Although the federal courts often handled cases pertaining to *de jure* segregation and the Pennsylvania state court handled a case pertaining to *de facto* segregation, the lineages of the cases appear on their face to have progressed identically. The addition of new and powerful stakeholders and the protracted nature of the *Philadelphia School Desegregation Case* effectively allowed for the shifting of aims of the *Philadelphia School Desegregation Case* and, more importantly, curtailed the possibility that students in Philadelphia's public schools would eventually attend integrated schools.

The *Philadelphia School Desegregation Case* provides one example of the impact of the federal court system on state court systems, notwithstanding widely variant designs of desegregation statutes. In some ways, the *Philadelphia School Desegregation Case* calls into question the fidelity maintained—or not maintained—in the shared federalism assumed among the federal and state governments in the United States.

211. *A Critical Race Theory Analysis*, *supra* note 2.

Likewise, the *Philadelphia School Desegregation Case* provides a glaring example of the dangers of state involvement in governmental and civil rights affairs thought to be the province of the federal government. Unfortunately, the result of the *Philadelphia School Desegregation Case* suggests that state legislative involvement in desegregation may not be the great progressive hope that we desire in terms of racial and educational equity. Further, there is little, if any, hope that federal interventions in school desegregation will enhance movements toward racial desegregation as a means to educational equity given the development of federal case law. It is worth returning to the discussion of *Sheff*[212] in this context; some states have been better than others at pursuing racial desegregation as a means of achieving educational equity. As new paradigms in education, law, policy, and politics embrace segregative mechanisms,[213] it is important that scholars and practitioners assess the ability of differing judicial systems to maintain separate, yet coexisting, systems of judgment and avoid preemption in the articulation of decisions addressing civil rights.

212. Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996).

213. Erica Frankenberg et al., *Choice Without Equity: Charter School Segregation*, 19 EDUC. POL'Y ANALYSIS ARCHIVES 1 (2011), http://epaa.asu.edu/ojs/article/download/779/878 [https://perma.cc/8A39-ZQS5] (finding that the charter school movement has contributed to the resegregation of public schools). Charter schools do not merely aid in the resegregation of students. Literature exists that suggests that students and parents of students enrolled in charter schools have less political power due to the disproportionate appointment of White Americans on charter school boards. *See* Steven L. Nelson, *Gaining "Choice" and Losing Voice*, *in* ONLY IN NEW ORLEANS: SCHOOL CHOICE AND EQUITY POST-HURRICANE KATRINA 237, 246–47 (Luis Mirón et al. eds., 2015). *See also* Steven L. Nelson & Heather N. Bennett, *Are Black Parents Locked out of Challenging Disproportionately Low Charter School Board Representation? Assessing the Role of the Federal Courts in Building a House of Cards*, 12 DUKE J. CONST. L. & PUB. POL'Y 153 (2016). This lack of political power has, in some cases, had negative impacts on student achievement. *See* Steven L. Nelson, *Killing Two Achievements with One Stone: The Intersectional Impact of Shelby County on the Rights to Vote and High Performing Schools*, 13 HASTINGS RACE & POVERTY L.J. 225 (2016)) and increased access points to the school-to-prison pipeline (*see* Steven L. Nelson & Jennifer E. Grace, *The Right to Remain Silent in New Orleans: The Role of Self-Selected Charter School Boards on the School-to-Prison Pipeline*, 40 NOVA L. REV. 447 (2016); Steven L. Nelson, *Racial Subjugation by Another Name? Using the Links in the School-to-Prison Pipeline to Reassess State Takeover District Performance*, 9 GEO. J.L. & MOD. CRIT. RACE PERSP. 1 (2017)).