

Comparing Remedies for School Desegregation and Employment Discrimination: Can Employers Now Help Schools?

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I. INTRODUCTION

Ten years after the Supreme Court decided *Brown v. Board of Education*,¹ now a symbol of the beginning of the end of racial discrimination, Congress passed Title VII of the Civil Rights Act of 1964.² Title VII opened the workplace to all races and women in ways that had not previously existed. While discrimination in the workplace has not disappeared in the forty years since Title VII's enactment, one sees minorities and women in a greater variety of jobs, and at higher levels,³ than one would have seen a generation ago.⁴

The promise of *Brown*, however, has not been achieved.⁵ When one looks at public schools fifty years after *Brown*, a great number are still racially segregated, and those whose populations are made up primarily of minorities are often impoverished.⁶ Both *Brown* and Title VII identified the right to be free from discrimination, but that right was not self implementing. Eliminating discrimination required, and requires, effective remedies.

This Article compares and contrasts the lack of success in desegregating the schools with the greater success in eliminating discrimination from the workplace and suggests that the workplace and schoolhouse can act together for the benefit of both. Part II theorizes that *Brown* might, in

1. 347 U.S. 483 (1954) (*Brown I*).

2. 42 U.S.C. §§ 2000e–2000e-5 (2000).

3. See William L. Taylor, *Brown, Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1704–08 (1986) (describing gains made by blacks in the workplace, but also noting that many blacks still lack opportunities); cf. Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1669 (1991) (discussing the continuing existence of employment discrimination, but noting that empirical evidence shows employment gains for women and minorities because of Title VII as well as a change in cultural attitudes).

4. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 139 (2004) (noting that even six years after passage of the Civil Rights Act of 1964 most institutions were predominantly composed of white males).

5. See *id.* at 136 (“[T]he promise of *Brown* proved a mirage.”); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173, 175 (1994) (describing a theory that *Brown* failed because schools did not become desegregated); Davison M. Douglas, Introduction, *The Promise of Brown Forty Years Later*, 36 WM. & MARY L. REV. 337, 339 (1995) (claiming *Brown* did not fulfill the expectation that it would end racial inequality); Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the Brown Case*, 36 WM. & MARY L. REV. 665, 668 (1995) (arguing that the *Brown* decision has failed to eliminate racial segregation in the U.S.); Cheryl Brown Henderson, *The Legacy of Brown Forty Six Years Later*, 40 WASHBURN L.J. 70, 76 (2000) (noting that the majority of African-American students in the United States remain in segregated schools).

6. See BELL, *supra* note 4, at 114, 127–29 (stating that schools and neighborhoods, particularly inner urban and rural, tend to be more segregated and worse off than before *Brown*).

hindsight, have been more successfully implemented⁷ and demonstrates why what might have been done earlier probably would not work today. Part III compares the plight of students who have not been helped by *Brown* with the plight of working parents whose family demands have kept them from sharing fully in the promise of Title VII. It suggests, given the greater success of racial integration in the workplace than in the schoolhouse, that the workplace and schoolhouse might work together to benefit both.

II. DESEGREGATION DILEMMA

A. History

In 1954, the U.S. Supreme Court held that governments violated the equal protection clause of the Fourteenth Amendment to the Constitution when they required schools to be segregated by race, even if the schools had equal resources, which in reality they rarely, if ever, had.⁸ To overrule *Plessy v. Ferguson*,⁹ the Court relied on findings by trial courts, whose cases were consolidated in *Brown*, that the schools were separate but being equalized.¹⁰ *Plessy* had held, in the context of seating on railway carriages, that separate but equal facilities for blacks and whites satisfied the demands of equal protection.¹¹ A year after the Court in *Brown* overruled *Plessy*, it reviewed the remedial portion of the cases and ordered desegregation with “all deliberate speed.”¹²

Desegregation orders by district courts implementing *Brown* were resisted and defied.¹³ In the new era of television, people around the nation and the world saw the ugly resistance and defiance, and the often

7. See generally WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) (collecting alternative opinions from scholars); BELL, *supra* note 4, at 20–28 (writing an alternative opinion that *Brown* should have enforced the equality required by *Plessy* rather than overruling that case).

8. *Brown I*, 347 U.S. 483, 495 (1954).

9. 163 U.S. 537 (1896), overruled by *Brown I*, 347 U.S. at 483.

10. *Brown I*, 347 U.S. at 492 & n.9 (summarizing trial court findings of “substantial equality” between black and white schools or school districts progressing in good faith toward equalizing schools).

11. *Plessy*, 163 U.S. at 548–49.

12. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

13. See BELL, *supra* note 4, at 19 (noting resistance to desegregation was “open and determined”); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588 (1983) (describing many types of resistance by whites to desegregation).

violent mistreatment of blacks by whites.¹⁴ Against this background of discrimination, and following the command of equality articulated by *Brown*, Congress passed the Civil Rights Act of 1964.¹⁵ Title VII of that Act prohibited employers and unions from discriminating against employees because of “race, color, religion, sex, or national origin.”¹⁶

Even after the passage of Title VII, courts were still struggling with how to desegregate the schools despite the fact that the Act had included Title VI, which prohibited institutions, including schools, that received federal funds from discriminating on the basis of race.¹⁷ Title VI did not provide a structure for desegregating schools; rather, it provided that federal funds would be withdrawn from institutions that discriminated.¹⁸ Title VII provided a detailed approach for ending discrimination in the workplace.

The major affirmative remedy under Title VII was “reinstatement or hiring” of employees discriminated against.¹⁹ Although school districts differed in substantial ways from employers, courts attempted a type of “instatement” remedy, inclusion of black students into white schools. Although faced with delaying tactics by states and school districts,²⁰ some trial courts ordered administrators of previously all white public schools to admit a few black students.²¹ Those courts, however, did not

14. See BELL, *supra* note 4, at 134 (listing the types of abuse covered by television journalists).

15. See *id.* at 135–36 (describing differing views as to whether the Civil Rights Act was enacted because of *Brown* or would have been enacted in any event at that time).

16. 42 U.S.C. §§ 2000e-2(a)–2000(e)-2(b) (2000).

17. 42 U.S.C. § 2000d (2000).

18. *Id.* § 2000d-1(1). In the years following passage of the Civil Rights Act of 1964, regulations giving guidance for desegregation were promulgated pursuant both to Title VI, 29 U.S.C., and congressional acts that provided school funding. The guidance was not explicitly provided in the congressional statutes. See Neal Devins & James B. Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1245–57 (1984) (discussing regulations under Title VI and various education funding statutes).

19. 42 U.S.C. § 2000e-5(g)(1).

20. See ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION*, 187–202 (2003) (describing many of the tactics used by school boards to delay implementation of desegregation); BELL, *supra* note 4, at 96, 212–13 & n.4 (describing delays from procedural issues raised in courts).

21. See, e.g., *Adams v. Sch. Dist. No. 5*, 232 F. Supp. 692, 698 (E.D.S.C. 1964) (ordering school district to admit six black children to white school); *Cooper v. Aaron*, 358 U.S. 1, 5, 14 (1958) (affirming court order to require white high school in Little Rock, Arkansas to admit a few black students); see also BELL, *supra* note 4, at 95 (describing resistance to admission of black students into white high school in Little Rock, Arkansas by governor of Arkansas); cf. *Steiner v. Simmons*, 111 A.2d 574, 579 (Del. 1955) (holding, in a case prior to the decision of *Brown II*, that school board exceeded its authority in ordering black students be admitted to white schools because the U.S. Supreme Court in *Brown I* had not yet ordered desegregation).

deal first with the reality that the segregated schools were separate and unequal.²²

Although Title VII and *Brown* both had the goal of ending discrimination, employers and schools have different functions. Employers can choose among applicants and hire those needed for the work. Public schools, on the other hand, educate everyone. Thus, unlike school systems, most employers did not need to maintain separate but equal establishments to discriminate. Employers could just exclude those whom they did not want. At the time of *Brown*, in areas that permitted or required segregation, there were slots for blacks in black schools and whites in white schools. If those schools really had been separate but equal, as the Supreme Court had assumed, courts might have been able to desegregate schools by having a number of students trade places, sending some black students to white schools and some white students to black schools, especially in areas where the white and black schools were close together. In many places, while public schools were segregated, neighborhoods were somewhat integrated.²³

Schools did not exchange students, however.²⁴ Whether such an exchange would have worked will never be known, as the schools were not equal. While there were many talented and dedicated black teachers, the schools were seriously underfunded and lacked facilities and supplies.²⁵ Because schools were unequal, large numbers of students could not immediately be integrated. With only a few black students initially transferred to white schools, whites had safety in numbers while

22. The trial courts in three of the four cases consolidated in *Brown* had issued “equalization” orders to improve the black schools. See *Brown I*, 347 U.S. 483, 486 n.1 (1954).

23. See, e.g., *Adams*, 232 F. Supp. at 698 (ordering school district to enroll black students in “the white schools to which they would be entitled as a white child living in the same school zone”); see also BELL, *supra* note 4, at 90–91 (describing courts’ approval, prior to *Brown*, of sending black students to black schools further from their homes than white schools).

24. See, for example, *Norwalk Core v. Norwalk Board of Education*, 423 F.2d 121 (2d Cir. 1970), in which the court affirmed denial of a temporary restraining order to close all black school pending outcome of plaintiff’s motion to have black and white children exchanged between black and white schools. The court further refused to overturn the school board’s decision in a voluntary desegregation plan to close the minority school in an underprivileged area despite plaintiffs’ claim that closing the school and not busing children into it as well as out of it denied them equal protection because the school board was doing the best it could with existing resources. *Id.* at 122, 124.

25. See BELL, *supra* note 4, at 124–25 (describing talent of teachers but disparities in school budgets).

a few black students had to bear the brunt of taunts and threats.²⁶ Thus, courts ignored the racially separated schools' inequality at the peril of integration, illustrating that assumptions in a liability phase should not necessarily be carried into the remedial phase.

In hindsight, the courts might have tried a two-step remedy: courts might have first chosen to enforce the equality in "separate but equal," and second ordered elimination of the "separate." How long the time between the two orders should have been, one year or a generation, is only a subject of debate, as this, too, did not occur. The justices who decided *Brown*, however, did not have the benefit of hindsight. Because an order to equalize the black and white schools would most likely have been viewed as a decision to delay or even obstruct desegregation, it was probably unavailable.²⁷ If resources had been used to improve previously neglected black schools before desegregation, exchanging students between black and white schools might have been easier than sending a few black students to white schools.²⁸ Of course, hostility toward the idea of putting black and white children in the same school would have still been an enormous impediment. For example, county officials in Prince Edward County, Virginia, ordered the schools closed rather than have black and white children educated together.²⁹

In the employment field, the timing of Congressional legislation provides a picture of a brief "separate but equal" period. One year before Congress passed Title VII, it passed the Equal Pay Act.³⁰ That Act requires employers to pay women and men alike if both do the same work.³¹ Thus, the pay inequities between the sexes were addressed before the barriers to jobs were eliminated by Title VII. One can roughly analogize correcting unequal pay disparities with correcting school disparities before eliminating barriers to entry. Of course, the pay inequities were not corrected in a year, nor are they yet corrected,

26. See generally COTTRILL ET AL., *supra* note 20, at 195 (describing marshals escorting four black girls to elementary school amidst taunts and threats).

27. See generally BELL, *supra* note 4, at 27 (writing an alternative opinion to *Brown* directing resources to black schools to enforce *Plessy*, but acknowledging that such an opinion at the time would have been "condemned").

28. See Gewirtz, *supra* note 13, at 652–53 (suggesting, before *Jenkins* was decided, that improving schools might decrease white resistance to desegregation).

29. See *Griffin v. County Sch. Bd.*, 377 U.S. 218, 225 (1964) (holding unconstitutional the county's closing of public schools rather than having black and white children attend together); see also Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L. REV. 327, 330 (1997) (describing history of Prince Edward County's desegregation, including resistance of whites to desegregation despite financial hardship of resistance).

30. 29 U.S.C. § 206(d) (2000).

31. During World War II, a temporary Labor Board prohibited wage differentials based on race. See BELL, *supra* note 4, at 132–33.

but men knew (and know) that they would not be penalized by the improvement of women's salaries because the Act prohibited employers from reducing any salaries to equalize pay.³² Similarly, *Brown* might have ordered disparities between schools to be remedied, and then ordered that segregation be eliminated, with the idea that no student transferred would be disadvantaged by the transfer. Ironically, years after *Brown* was decided, courts did order that disparities among schools be remedied, but times and neighborhoods had changed, and that remedy was too late.

In recent years, some school districts that were under court orders for having unconstitutionally segregated schools have been permitted to terminate judicial supervision. It is not necessary for those school districts to prove that desegregation has been eliminated, but to show a good faith effort to do what they could to eliminate segregation.³³ The effects of "white flight" were held to be beyond the control of the courts.³⁴

B. Separate But Equal Too Late

1. White Flight

In *Missouri v. Jenkins*, the trial judge ordered, over the course of a number of years, that the Kansas City school system make major improvements.³⁵ These remedies were necessary, the court held, to eliminate the vestiges of unconstitutional segregation and to attract back nonminority students whose parents had fled to the suburbs or enrolled them in private schools.³⁶ The judge noted the difficulty of desegregating a district that was 68.3% black,³⁷ but was unable to order that students in the suburbs be exchanged with those who remained in Kansas City

32. 29 U.S.C. § 206(d)(1).

33. See *Freeman v. Pitts*, 503 U.S. 467, 471 (1992) (holding that judicial supervision of school districts can be terminated in incremental stages); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (remanding to the district court to assess whether school board complied in good faith with past decrees and eliminated vestiges of discrimination "to the extent practicable"). See generally Wendy Parker, *The Future of School Desegregation*, 94 *Nw. U. L. REV.* 1157 (2000) (analyzing desegregation cases, noting many have terminated jurisdiction but concluding there is still a role for courts in desegregating schools).

34. *Dowell*, 498 U.S. at 250 n.2 (noting that the district court had found residential segregation not to be a vestige of prior school desegregation).

35. *Missouri v. Jenkins*, 515 U.S. 70, 75–80 (1995) (*Jenkins III*).

36. *Id.* at 74, 76–77.

37. *Id.* at 76.

because of the Supreme Court's decision in *Milliken v. Bradley*.³⁸ In *Milliken*, the Court invalidated a city-suburban student exchange remedy in Detroit, holding that the remedy for segregation could not go beyond the city's political boundaries unless the outlying political subdivisions had also been responsible for the unconstitutional desegregation.³⁹ Because the suburbs around Detroit had not discriminated, the Court reasoned that they could not be included in the remedy.⁴⁰ The judge in *Missouri v. Jenkins* had similarly found that the suburbs of Kansas City were not guilty of intentional discrimination.⁴¹

Missouri v. Jenkins made three trips to the Supreme Court.⁴² The Supreme Court, in its third opinion, held that the ambitious remedy was beyond the scope of the constitutional violation.⁴³ The existing segregation was no longer the result of state action, but rather was the result of housing patterns. Whites who could afford to move had fled to the suburbs or private schools to avoid the results of segregation.⁴⁴ Presumably they fled not solely because of racial prejudice, but also because of concern about the quality of the public schools.⁴⁵ Thus, the trial court in *Missouri v. Jenkins* had sought to alleviate that latter concern by trying to correct the effects of segregation and to recapture the whites who had fled. Had some of the previously black schools not been inferior to the white ones, perhaps some of the white flight to the suburbs would not have occurred.⁴⁶ Once it had occurred, however, it was hard to reverse. Presumably it is easier to entice a family to stay put, than to entice one to return. Once a family has gone to the effort and expense of relocating, the family probably is not inclined to relocate again. And the family who did not move physically, but enrolled its children in private schools, probably does not want its children to change schools again. Had there been less white flight to the suburbs, desegregation might have been easier to achieve. Ironically, then, the remedy in *Missouri v. Jenkins* came too late.

38. *Id.* (citing *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), *aff'd*, 433 U.S. 267 (1977) (*Milliken II*)).

39. *Milliken I*, 418 U.S. at 745.

40. *Id.* at 752.

41. *Jenkins III*, 515 U.S. at 95.

42. The first involved attorneys' fees. *Missouri v. Jenkins*, 491 U.S. 274 (1989) (*Jenkins I*), *aff'd in part, rev'd in part*, 495 U.S. 33 (1990), *rev'd*, 515 U.S. 70 (1995). The second is described *infra* in the text accompanying notes 56–57.

43. *Jenkins III*, 515 U.S. at 94.

44. *Id.* at 94–95.

45. See BELL, *supra* note 4, at 112 (“[I]nferiority of black schools kept white families from moving into predominantly black neighborhoods.”). See generally Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1605–09 (2003) (describing causes of white flight).

46. Cf. Gewirtz, *supra* note 13, at 652–53 (suggesting, before *Jenkins* was decided, that improving schools might decrease whites' resistance to desegregation).

2. Cost

The Equal Pay Act required a number of private employers to increase women's wages.⁴⁷ Thus, a type of private antidiscrimination "tax" was imposed. That tax was either passed on to consumers or taken out of employers' profits to compensate for past economic discrimination of women. If courts had ordered school districts to allocate resources to equalize black and white schools as a first step, the costs imposed also would have been an antidiscrimination tax. Public schools, however, do not have profits to trim or customers to absorb costs. Public schools rely on the levy of "real" taxes.

A generation before the judge in *Missouri v. Jenkins* ordered the Kansas City public schools to be improved, courts enforcing *Brown* ordered desegregation rather than improvements to neglected black schools.⁴⁸ Had they ordered improvements, given the long period of neglect, the amount of money needed would probably have been enormous,⁴⁹ as it was in *Jenkins*.⁵⁰ In hindsight, again, that amount might have been less than the costs caused by active opposition that followed desegregation orders⁵¹ and the costs of busing and other later orders.⁵² Of course the courts might have had to use their contempt powers had school boards refused to raise and allocate money to the neglected black schools.⁵³ Failure to allocate resources in the past was

47. See generally HEIDI HARTMANN ET AL., EQUAL PAY FOR WORKING FAMILIES: NATIONAL AND STATE DATA ON THE PAY GAP AND ITS COSTS (1999) (providing examples of companies that have had to make back payments in order to adjust for wage discrimination).

48. See *supra* notes 27–33 and accompanying text.

49. The school board in the Delaware case consolidated with *Brown* in the Supreme Court had chosen desegregation as a cheaper alternative than equalizing the black and white schools. See BELL, *supra* note 4, at 25 (describing, in an alternative opinion, the experience of the Delaware case).

50. *Missouri v. Jenkins*, 515 U.S. 70, 78–79 (1995) (*Jenkins III*) (describing more than \$500 million in court ordered capital improvements and \$200 million in court ordered salary increases).

51. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2091 (2002) (describing the effects after the *Brown I* decision, generally mentioning the refusal of some school districts to desegregate and particularly detailing the events in Little Rock, Arkansas where the governor directed the school district to defy the *Brown I* decision).

52. See, e.g., *Milliken II*, 433 U.S. 267, 290 (1977) (holding that compensatory and remedial programs are permissible to correct segregation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971) (permitting courts to order busing of students to correct segregation).

53. Cf. *Spallone v. United States*, 493 U.S. 265, 267 (1990) (holding district court

one of the reasons the schools were inadequate in the first place.⁵⁴ On the other hand, localities might have felt that they were buying time from desegregation orders and allocated the funds as the lesser of two evils. Perhaps, during the period of time that schools were improved, some attitudes about desegregation might have changed or opposition to integration might have lessened.

While transferring students between equally good schools might have been more palatable than sending a few black children to white schools, a case that reached the Supreme Court a decade after *Brown* illustrates how far school officials would go to avoid desegregation. In *Griffin v. County School Board*, school officials closed public schools rather than integrate them. The Supreme Court upheld the trial judge's order to the officials to open the schools and levy taxes.⁵⁵ A generation later, in *Jenkins*, the Supreme Court invalidated the trial judge's order imposing taxes to pay for the ordered school improvement.⁵⁶ Citing *Griffin*, the Court held that while federal courts have the power to order officials to levy taxes, the trial court in *Jenkins* abused its discretion by imposing a tax itself.⁵⁷ Query whether the taxing order, like the improvement remedy, came too late.

3. Courts or Legislatures

Whether the local governments order a tax increase or whether a court imposes one relates to a more general question of the relationship between courts and legislatures. In comparing remedies for employment and educational discrimination, one notes that the employment remedies were enacted by Congress, while the desegregation remedies were ordered by courts. Although one would expect a constitutional right to education consistent with the equal protection clause to be enforced more vigorously than a statutory right to freedom from discrimination in both private and public workplaces, it may at times be the reverse.

abused its discretion in holding city council members personally in contempt without waiting to see if order against city would be effective in achieving the city's compliance with a consent decree in housing discrimination case). See generally COTTRILL ET AL., *supra* note 20, at 196–97 (describing contempt order against Governor of Mississippi's opposition to James Meredith's attendance at the University of Mississippi).

54. See generally BELL, *supra* note 4, at 15 (describing disparities between funding for black and white schools).

55. *Griffin v. County Sch. Bd.*, 377 U.S. 218, 233 (1964).

56. *Missouri v. Jenkins*, 495 U.S. 33, 51–52 (1990) (*Jenkins II*), *rev'd*, 515 U.S. 70 (1995).

57. *Id.* at 51–52, 55–56 (citing *Griffin*, 377 U.S. at 233 (upholding court order to county officials, who had closed the public schools rather than desegregate them and had contributed to the support of white private schools, to open public schools and raise taxes to support them)).

While there may not be universal support for a particular law, statutes are enacted pursuant to a democratic concept of elected officials following the will of the majority.⁵⁸ In addition, statutes can be enacted after hearings, detailed study, and consideration of broad ramifications. Statutes can delineate a complex remedial scheme, phase in relief, and design specific penalties to deter disobedience.⁵⁹

Federal judicial decisions, however, are indirectly democratic. Federal judges are appointed by those who are elected, but then the judges and justices serve for life and their salaries cannot be reduced.⁶⁰ Because judges are protected from reprisal, federal judges theoretically are able to reach conclusions that do not have majority support.⁶¹ Almost by definition, one area that might not have majority support is protection of minority rights. It becomes ironic that while one of the roles of the federal judiciary is to protect the rights of minorities, enforcement of those rights may depend on the support of the majority.⁶²

Had Congress had the support to pass a statute to implement *Brown* shortly after it had been decided, schools might be more integrated today. While Congress did pass Title VI of the Civil Rights Act of 1964, it did not provide statutory guidance for desegregation⁶³ the way Title VII of the same act provided a remedy for employment discrimination.

58. See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 323 (1995) (noting the perception that legislation is democratic and the practicality that unpopular legislation will probably not be enacted).

59. See *id.* at 322–25 (stating that the Congress can consider the broad implications of a matter, hold hearings, commission studies, and appropriate funds to enforce the remedy).

60. U.S. CONST. art. III, § 1.

61. See Bandes, *supra* note 58, at 303–04 (noting that courts protect civil liberties); *id.* at 323 (noting that the “politically insulated federal judiciary” can make unpopular decisions); Judith Resnik, *Trial as Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1014–15 (2000) (stating that the guaranteed life tenure for judges enables them to be independent of political pressure, but that the independence is limited by the judiciary’s reliance on Congress for funding the courts’ administrative staff).

62. See generally BELL, *supra* note 4, at 21 (writing an alternative *Brown* opinion saying that the “outraged resistance [of whites] could undermine and eventually negate even the most committed judicial enforcement efforts” to desegregate the schools).

63. See *supra* text accompanying notes 17–18.

III. EXCHANGE THE NEIGHBORHOOD SCHOOL FOR THE WORKPLACE SCHOOL

A. A Suggestion

While the idea of desegregating neighborhood schools may be unrealistic after more than a generation of white flight and the limits set by the Supreme Court in *Milliken* and *Jenkins*, perhaps it is time for the schools to leave the neighborhood and move to the workplace. Schools would “move” to the workplace if children could attend schools, either existing or newly built, where a parent works.⁶⁴ If so, then the demographic composition of schools might change. This suggestion would require, at a minimum, a re-examination of the neighborhood school concept, the cooperation of a number of jurisdictions, whether they be different school districts or different states, and money. Of course, having a school near a workplace would not be a particularly useful option if the school were poor. In the case of urban settings, local schools may be those from which whites fled years ago. If employers saw the availability of nearby schools as a family friendly employment option, then they should have an incentive to see that the schools improved. Employers might be able to provide money, time, or expertise to the schools or be able to interest local, state, or federal governments to do the same.⁶⁵ Whether schools working with employers could improve would be a serious matter of debate, as school districts with poor schools are struggling with how to improve them. A full “school-work” plan cannot be created in an essay, but a few benefits can be suggested.⁶⁶

B. Desegregation Benefit

Workplaces have become better integrated than neighborhoods and

64. See Candace Saari Kovacic-Fleischer, *United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 907 (1997) (suggesting that students be permitted to attend school near a parent's workplace); see also John C. Goodman, *School Choice vs. School Choice*, 45 HOW. L.J. 375, 387 (2002) (arguing that students should have a choice of schools not dependent upon the family income and noting that, in Barbados, parents can send their children to school where they live or work).

65. See, e.g., BELL, *supra* note 4, at 172–73 (describing the corporate support that the Frederick Douglass Academy in Harlem receives).

66. This Article does not solve problems with the “school-work” suggestion. Whether schools could be improved with resources from without the school system is a large question. Other problems suggest themselves: Who would fund the school? How can children be attracted from neighborhood or private schools to a school near an employment center? What would happen if an employee is terminated or resigns? What happens when workplaces and neighborhoods are in different jurisdictions? Who would elect the school board and make final decisions? Who might be potentially liable and for what? What type of transportation, if any would be provided? And so on.

thus neighborhood schools.⁶⁷ If schools were to follow employment patterns rather than housing patterns, more racial diversity should appear in the schools. More economic diversity should also appear because people who work in the same place do not have the same salaries.⁶⁸ Children who have not been helped by *Brown* might benefit by having an alternative to a neighborhood school or a substitute, such as a charter school or vouchers. Locating schoolrooms near workplaces could have advantages for employees and employers, too.

C. Employees' Benefits

Employees who are parents have been less well served than others by Title VII. With more employment opportunities for women and minorities, more families with children have begun to have both parents in the workplace. This has created a demand for childcare and other family accommodations, the lack of which has kept some parents, especially mothers, out of the workforce or underemployed.⁶⁹ There are very few statutes that help parents balance family and work responsibilities. Title VII provides that employers not discriminate against pregnant women.⁷⁰ The Family and Medical Leave Act⁷¹ provides job protection for employees of large companies who take twelve weeks of unpaid leave for the birth, adoption or serious illness of a child. Neither of these statutes helps parents with the many demands they face.⁷² While a bill was introduced in Congress to protect parents from employment discrimination, it did not pass.⁷³

67. See *supra* note 3.

68. Studies indicate that the same student will do better in a school in an affluent area than in a poor area. See Peter Zamora, Note, *In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and Its Effects upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL'Y 413, 413–14 (2003) (reviewing studies of achievement levels of students depending upon income levels).

69. See generally Kovacic-Fleischer, *supra* note 64 (arguing that more family friendly arrangements in the workplace should be required by Title VII).

70. 42 U.S.C. § 2000e(k) (2000).

71. 29 U.S.C. §§ 2601–2654 (2000).

72. See Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare*, 44 VILL. L. REV. 355, 355–57 (1999) (discussing the inadequacies of legal employment protections for childrearing).

73. See generally Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569 (2002) (analyzing the proposed Discrimination Against Parents Act and other legislative alternatives to protect parents in the workplace).

One of the major demands a parent faces is making sure a child is in a safe environment. For the middle class, that demand was often met by a mother at home. With more parents no longer at home all, the need for daycare has expanded.⁷⁴ A school near a parent's workplace could fulfill two functions: education for the child and daycare for the parent. This would be particularly helpful if the school had hours coordinated with the workplace and educated children younger than those now considered "school aged." Besides providing peace of mind, it might enable a parent to spend more time with children by commuting together or being close enough to spend some time at the school. Since parental involvement is frequently cited as an important factor in the success of a child,⁷⁵ children and schools would benefit as well as parents.

D. Employer Benefits

Employers could also benefit. They lose productivity when their workers worry about whether they have enough time with their children or where they are. Nearby schools might give parents peace of mind and employers a boost in productivity. Many employers see that family friendly benefits help attract and retain good employees.⁷⁶

Some employers are concerned about a shrinking pool of educated workers, making it particularly important for them to be able to attract and retain employees.⁷⁷ With schools available as family friendly benefits, both parents and employers would be invested in the success of the schools. Better schools and better student success would contribute to better future workers. Well-educated children would become another generation of employees.

IV. CONCLUSION

The era of desegregation has created many ironies: the remedy of improving minority schools was ordered too late, the remedy of court ordered taxes was too late, congressional action was too little, and courts now have terminated judicial supervision of school districts without

74. See Kovacic-Fleischer, *supra* note 64, at 905–07 (discussing need for nonparental childcare because many women who traditionally had raised children at home are now in the workforce).

75. See Nancy Buchanan, *The Effects of Parental Involvement on 12th Grade Achievement*, 4 GEO. PUB. POL'Y REV. 75 (1998) (reviewing studies and conducting a study showing correlations between differing types of parental involvement and student success).

76. See Kovacic-Fleischer, *supra* note 64, at 905 n.337 (discussing employers who find family friendly policies cost effective).

77. See SYLVIA ANN HEWLETT, *WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN* 20 (1991).

having achieved desegregation of the schools. The era of desegregation also created Title VII and much desegregation of the workplace. Perhaps it would be possible to place schools in a location less segregated than the neighborhood. Employers and school districts might want to consider a school-near-work because the interests of employers, employees, and children intersect with each other, and with the goal of improved and desegregated education.

