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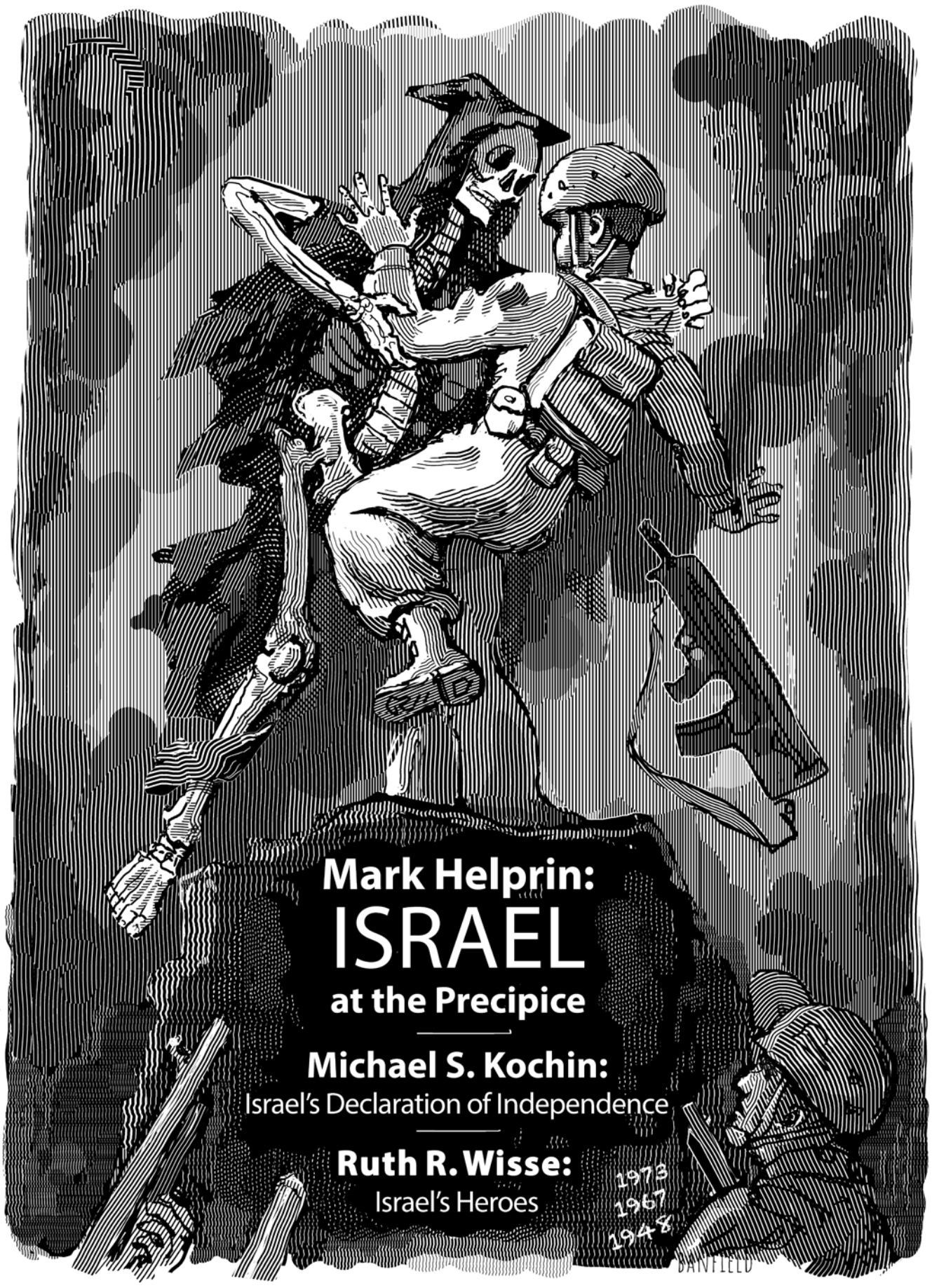


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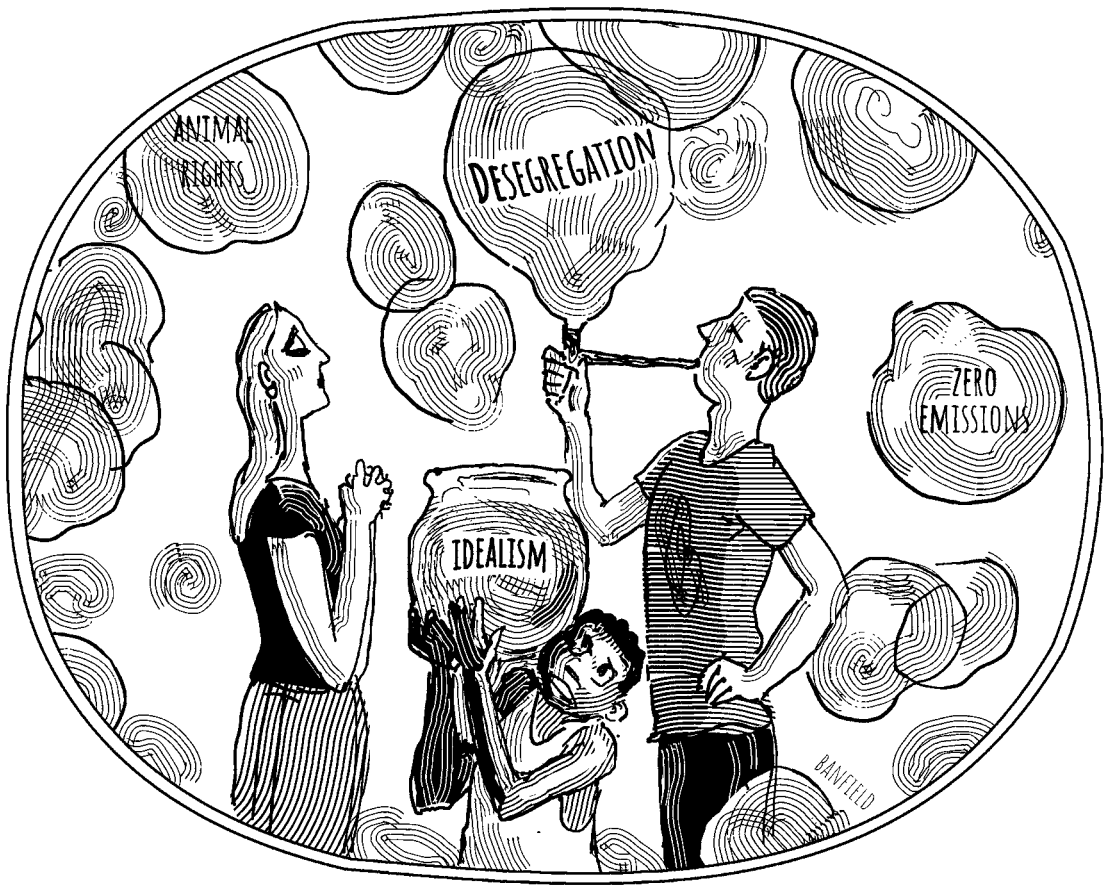
Book Review by Thomas F. Powers

# The Politics of Moral Intoxication

*The Crucible of Desegregation: The Uncertain Search for Educational Equality*, by R. Shep Melnick.
The University of Chicago Press, 336 pages, $105 (cloth), $35 (paper)




Some 60 years after its signature political victories, the civil rights revolution continues to generate moral energy. In their abhorrence of racial discrimination, Americans have discovered a new moral continent, making a commitment to justice central to American life. At the same time, the logic of liberal democracy—limited government, individual rights, pluralism, toleration—treats crusades warily, as endeavors that should be religious or civic, but not political.

The story of desegregation and school busing illuminates the resulting tension with particular clarity. School desegregation was the most ambitious undertaking of what Boston College political scientist R. Shep Melnick calls the "civil rights state." In its quest to end injustice, the federal government cast aside constitutional norms by taking hold of state and local governments' educational policies and institutions.

Not coincidentally, desegregation is also the leading example of an important civil rights policy that failed, became politically discredited, and was abandoned. The sky did not fall. Today, no one laments the loss of busing and only a few radicals regard its demise as evidence of American racism. This combination of moral zeal and political failure makes the story of school desegregation both interesting and important.

Melnick is well positioned to explain it. In *The Transformation of Title IX* (2018) he demonstrated deep knowledge of the politics of civil rights and education, and the necessity of detailing how institutions function. In addition, he interprets legal questions, necessary for analyzing the subject, without grinding any doctrinal axes.

Though Melnick urges the reader to discard "simple morality tales" about desegregation, whether it is wise or even possible to do so is a question that hangs over *The Crucible of Desegregation*. Melnick provides exhaustive evidence of American desegregation policy's many shortcomings, but cannot bring himself to frame his analysis in generally critical terms. Instead, he rejects any "global assessment that either desegregation 'worked' or that it 'failed.'" This is a curiously disengaged posture, given that no one has made the contrarian case that school desegregation was, in fact, an unheralded policy success.

This puzzle is solved, it seems to me, by reckoning with Melnick's inarguable judgment that segregated education in the South was "obviously unjust." But desegregation's numerous, complex failings compel us to treat the injustice of separate-and-unequal school systems for black and white students in the Old Confederacy as a first but not the last word on the larger project. Melnick's careful study helps us beyond that point, toward a more critical assessment of the failed effort to make desegregation a national undertaking, extrapolated from the campaign to end segregation in the South.

Melnick returns, again and again, to one sharply critical judgment—the Supreme Court's failure to provide a coherent legal framework to guide desegregation policy. This preoccupation is puzzling since, as he shows, no one else ever sorted out the mess that was

desegregation. But explicating desegregation's history helps the reader understand how the character of the policy changed dramatically several times during its 50-year run. In one way, this is a story of rise and fall. After *Brown v. Board of Education* in 1954, there was a decade of embarrassing inaction. In 1964 and 1965, landmark legislation and federal funding empowered desegregation's cause. In short order, the federal judiciary, with support from the executive branch, led an effective attack on Southern segregation. Inspired by their victory in the South, the federal courts quickly turned desegregation into a national policy, which proved enormously unpopular. By the 1990s, desegregation policy was in retreat and soon thereafter died a quiet death.

A better way to understand this history is to divide it into two parts, following a simple moral-political basis. Before 1973, desegregation policy was aimed at the South's *de jure* segregation. (The Supreme Court did not hear any cases from outside the South before that year.) After 1973, desegregation cases became, as Melnick says, "harder and harder": it was easy to argue that segregation in the South was unjust and needed to be ended. But when courts sought to impose desegregation on the rest of the county, the endeavor became a failed crusade, a tale of moral overreach and judicial hubris. Melnick neither advances nor disputes this conclusion, but the evidence presented in *The Crucible of Desegregation* makes it hard for the reader to arrive at any other interpretation.

*Brown*'s demand to desegregate American schools was, for more than a decade, painful evidence of the judiciary's impotence. Gerald Rosenberg argued in *The Hollow Hope* (1991) that the Supreme Court had proven incapable of bringing about real social change. Only when the president, Congress, and pressure groups were fully engaged, so this story goes, did segregated education in the South come to an end. The 1964 Civil Rights Act and the 1965 Elementary and Secondary Education Act furnished the carrot—federal money—and stick, Title VI's power to withhold those funds from state and local governments.

Melnick persuasively challenges Rosenberg's interpretation, insisting that it was ultimately the federal judiciary that made desegregation a reality. The new laws did not have an immediate magical effect. At the outset, the Department of Health, Education, and Welfare (HEW) was unenthusiastic and inept. Even when HEW finally got moving, its main enforcement tool, the Title VI funding cut-off threat, proved politically unpopular and ineffective.

In Melnick's liveliest chapter he shows how judges of the Fifth Circuit Court of Appeals, which oversees several Southern states, began in 1966 to devise a formula that ultimately broke the back of *de jure* segregated schooling in the South. These judges, the clear heroes of Melnick's story, stood up to the injustice of segregation with courage, determination, and creativity.

Melnick is clear and convincing when showing how Southern *de jure* segregation was taken down only by a breathtaking rearrangement of institutional roles that disregarded the Constitution's separation of powers. Beyond federal intrusion into state and local control of education, Melnick is more interested in the relationship between HEW and the courts. Here the executive branch acted as legislator, eventually issuing clear guidelines, "timetables and percentage targets," for the racial composition of Southern schools. This necessary policy clarity, which may have exceeded the strictures of the Civil Rights Act, still left HEW powerless to enforce these mandates using the Title VI funding cut-off threat. In response, the federal judiciary began issuing orders to school districts applying HEW's percentage guidelines for the number of black and white students in individual schools. (The ratio of whites to blacks would need to be 80%/20% or 70%/30% or other like formulas.)

When HEW backed off after Richard Nixon succeeded Lyndon Johnson in the White House, the courts continued independently. Judicial power grew through other innovations, the most important being the novel, far-reaching "structural injunction," which permitted the imposition of complex judicial guidance concerning many different practices of American schools all at once, over an extended period of time, and without an expiration date. Another remarkable innovation was "expedited appellate review." School districts in the South would no longer be able to gum up the works with legalistic delay tactics. Batch reviews by the federal courts of appeals, with no lengthy written opinions, turned desegregation litigation into a form of "mass production" and "desegregation progressed at an unprecedented rate." Melnick, whose book on Title IX made much of institutional abuses and departures from the norm by the Department of Education, seems to be largely sympathetic to such developments in this case.

The Supreme Court followed the Fifth Circuit's lead. After several years of silence on the issue, the high court issued 13 decisions between 1968 and 1973, showing that the tide had turned. Even if, as Melnick complains, it did not devise a coherent set of legal doctrines, the Supreme Court clearly signaled a determination to use the federal judiciary to desegregate public education in the South. In a short time, between 1966 and 1972, "*de jure* segregation in the South finally came to an end."

Why didn't desegregation stop there? Why did the federal judiciary make desegregation a national policy and expand its reach to the point where the policy would become widely hated and, within a short time, repudiated? This came to mean expanding busing to racial minority groups besides blacks—Hispanics and Asians—who were not asking for it. It meant implying that residential segregation was evidence of white racism, while also holding that it was morally unproblematic for racial or ethnic minorities to sort themselves voluntarily into distinct neighborhoods. It was also a monumental task, one the federal judiciary was not suited to and proved incapable of undertaking. It was certainly not a goal or process intended by the justices who authored the *Brown* ruling or the legislators who passed the 1964 Civil Rights Act.

One answer to why the courts took the policy national may be found in the logic of the law. Once the Supreme Court came up with a general legal framework—a notion of "unitary" (as opposed to "dual," segregated black-white) schools—it was perhaps natural to extend it. As Justice Lewis Powell argued in 1973, the Supreme Court's decisions from 1968 on had expanded the command of *Brown* and shown the need to "formulate constitutional principles of national rather than merely regional application."

But it would be a mistake to ignore a simpler, more obvious cause of the judicial misadventure. Beyond institutional momentum and judicial hubris, only moral zeal can explain what the courts undertook to do. Suddenly successful in the South, desegregation was quickly extended to the rest of the country. Lawsuits by the NAACP and other groups had a new kind of moral clout. Judges, emboldened by their achievements, proved willing to use their newfound power and moral authority to extend desegregation to the cities of the North and West. Chief Justice Warren Burger's decision in *Milliken v. Bradley* (1974) was important, not because it clarified the law—Melnick is especially hard on Burger—but because it drew a crude but clear political line that halted desegregation efforts at the city border, effectively excluding suburbs and their school systems from mergers with adjacent cities. That important limitation aside, the period of the 1970s and early 1980s was the era of busing.

Nowhere in American civil rights law are the terms "desegregation" or "discrimination" ever defined. The most famous legal distinction of the desegregation debate, the opposition between illegal *de jure* ("state action") segregation and *de facto* segregation (based on the private choices of individuals), plays an important role. But the *de jure/de facto* difference was not stable. As Melnick puts it in summarizing the Left point of view, "so-called *de facto* segregation is the product not just of school districts' siting and assignment decisions," but also of "residential segregation, which itself is in part the product of decades of government policies." Something like this view became plausible even to justices like Powell, a Nixon appointee, who would say that the *de facto/de jure* distinction had "outlived its time."

This is one reason the courts' main orienting goal became instead the quest for "unitary" school districts. In Justice William Brennan's opinion in the important 1968 case *Green v. County School Board*, this became what Melnick calls "the crux of desegregation jurisprudence," at least until the 1990s. This central legal term didn't work out so well. Looking back in 1992, Justice Anthony Kennedy would go so far as to admit that "the term 'unitary' does not have fixed meaning or content." Outside the South, "unitary" lost its only obvious sense: the opposite of "dual" systems, one for whites and one for blacks. The term would be interpreted by judges, Melnick shows, in a variety of competing, incompatible formulas. In addition, "unitary" clearly could not be defined against "dual" when large numbers of Hispanics and Asians were added to the equation. And if the unitary concept offered no solid foundation for policy, then other key legal terms related to it—racial "balance," "isolation," or "separation"—likewise failed to provide a clear standard.

The dramatic nationalization of desegregation rested on this unstable legal foundation. In a prescient warning, Justice Powell said in 1973 that the new national policy, which he was prepared to consider necessary, would nevertheless have to be weighed against serious dangers such as the "deterioration of community and parental support of public schools" and the possibility that "the paramount goal of quality in education" would be discarded. He saw, too, the "risk [of] setting in motion unpredictable and unmanageable social consequences," the likelihood of "an exodus to private schools," and "the movement from inner city to suburb."

The questions raised by Powell, and others like them, now begin to take center stage. One obvious problem was that nobody could agree on desegregation's fundamental aim. In *Brown* one can already see two competing goals—racial comity and educational equality. A third, educational *quality*, is implicit in the second and appeared frequently in the desegregation debate. But it competes with the others and with a fourth, namely "to improve the quality of education provided to *minority* students." (For Melnick, this is "the ultimate purpose of desegregation.") Then, finally, there is a fifth: the blunt, brute, *literal* meaning of desegregation that too often guided judges in actual cases. This was "racial mixing," or opposition to "racial isolation"—what Justice Thurgood Marshall would term, approvingly, "actual desegregation," and what Justice Kennedy would later reject, when desegregation was on the way out, as "racial balance…for its own sake." Taken together, these goals map out an extraordinarily ambitious, unwieldy program. Only actors under the influence of moral conviction could ignore their contradictions or practical barriers.

The lack of a clear goal—and of clear legal standards—meant considerable variation in the meaning of desegregation in practice. As Chief Justice William Rehnquist said, schools faced "the disturbing prospect of very different remedies being imposed [based on] the predilections of individual judges and their good-faith but incongruent efforts to make sense of this Court's confused pronouncements." In its rulings, the Supreme Court told courts of appeal to stop

second-guessing their trial court judges' desegregation orders. That meant that individual federal district court judges, armed with extensive authority but no clear guidance, did pretty much what they wanted without supervision from above.

Exacerbating all of this was a great expansion in the very meaning of desegregation, which came to encompass much more than racial mixing and busing. As Justice Brennan had said in *Green*, desegregation efforts ought to extend "not just to the composition of student bodies" but "to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." These so-called "*Green* factors" then added a new layer of legal criteria to be used routinely in desegregation orders. Other policy issues touching civil rights in one way or another—education for the disabled, for English language learners, for low-income students—were also added to the mix. Likewise, a variety of different kinds of initiatives, appearing under the heading of educational equality, came to play an increasingly important role in many judges' thinking. "Disparities" in educational resources, in academic performance, in testing, in school discipline—these and other like considerations, touching now on the substance of education, became part of the conversation as well.

The challenge was made all the greater because federal judges did not in fact know much about education or running schools. Their plans were typically drawn up and administered by "education school professors with little experience in the classroom or in the principal's office," in Melnick's words. Judges also had to rely on social scientists to assess the educational benefits of desegregation efforts, an echo of social science's role from the very start, in *Brown*. Melnick offers an extended discussion of the social science contribution, and while he notes that there are a few studies finding slight educational benefits, he concludes more globally that "the strength of the scholarly consensus on desegregation issues has been inversely proportional to the amount of available evidence."

Tackling the variable conditions of *25,000* school districts in the United States might have given the courts pause. "Northern, southern; urban, rural; large, small; led by cooperative and hostile school officials; largely white, predominantly black, increasingly Hispanic—the variations," says Melnick, "were endless." Some of the famous cases he summarizes illustrate these differences, and the disturbing aspects of desegregation policy in practice.

In San Francisco, the first city where desegregation involved large numbers of Hispanic and Asian students, the quest for some elusive "racial balance" was key. When the case began in 1970 the judge imposed a rule requiring schools "to reflect the racial makeup of the entire district, with an allowable variance of plus or minus 15 percent." A decade later, after shifts in the racial composition of the district's student population, the formula changed. Now, after *nine* racial and ethnic groupings were specified, every school was to include students from at least four of them—with the caveat that no one grouping "should constitute more than 45 percent of the student population in any school." When blacks and Hispanics expressed their dissatisfaction with this baroque scheme, they were told by the judge that desegregation orders did not "establish an entitlement to a certain standard of academic excellence."

In Kansas City, however, educational excellence was central. The federal judge in that case, Russell Clark, sought to make the education in city schools as good or better than in the surrounding suburbs. "To accomplish this goal," Melnick writes,

> Clark overhauled the entire school system, turning each city high school into a magnet school.... By 1995 Kansas City was spending over $10,000 per student—more than any comparable school system in the country. The cost of these court-ordered reforms was about $2 billion, most of which came from the state of Missouri and the rest from tax increases mandated by the court.

Unfortunately, the money, much of it wasted, did not in fact buy any improvement in educational outcomes. The state's department of education eventually "stripped the district of its accreditation because its students were performing so poorly."

In Detroit, the famous *Milliken* case displayed the amazing ambition of some judicial decrees—and their unpopularity. The basic problem, Judge Stephen Roth decided, was residential segregation, which was tainted by past decisions of government. He also dismissed complications arising from the question of how significantly government policies had factored into residential segregation. If "racial segregation in our public schools is an evil," Roth said, "then it should make no difference whether we classify it as de jure or de facto." His proposed solution was to create what Melnick describes as "a consolidated school district that incorporated fifty-three suburban districts, enrolled over half a million students, and covered an area nearly as big as the state of Delaware.... About 40 percent of the students in the district would be bused." The people rebelled. Michigan, ordinarily a liberal state, selected Alabama governor George Wallace in the 1972 Democratic presidential primary, the only state outside the South where Wallace broke 50%.

The divergent, unguided doings of individual federal judges started to look like the arbitrary use of power. Their efforts were also completely uncoordinated. Judges did not consult with one another or convene to compare notes. No desegregation paradigm emerged from the various federal desegregation cases to guide the rest. There was neither oversight nor accountability, other than the crude check of dissenting parents and politicians creating bad publicity. Their wide-ranging orders remained in effect "not just for years, but for decades." Nobody in the federal judiciary—or anywhere else—could even say how many school districts were under such orders.

By the early 1990s busing was too politically unpopular to go on. Desegregation policy was opposed in the end by a multicultural coalition. Black parents didn't like that their kids were bused across town any more than white parents did, and they didn't like it when their children had to remain on waiting lists for fancy new "magnet" schools designed in part to attract white students. Similarly, "Hispanic and Asian organizations and parents were frequently among the most vocal opponents of busing plans," Melnick writes, "preferring neighborhood schools that would provide more assistance to English learners and reflect the ethnic culture of the neighborhood." The wider debate over civil rights and education moved on to other questions. "Court-ordered desegregation had fallen to the bottom of the agenda" of even "civil rights organizations and education reformers." Federal judges began to suffer from what Melnick calls "desegregation fatigue."

After a decade of silence, the Supreme Court began to weigh in again, in what Melnick terms its 1990s "termination cases," signaling that desegregation would be allowed to end. Melnick faults the Court's "vague language" in three rulings authored by conservatives Rehnquist and Kennedy for, once again, failing to provide the lower courts with clear standards. But by this point Melnick's complaint wears thin: there are times where politics is central and law can do no more than bear embarrassed witness. Rehnquist and Kennedy stated a political but also sensible judgment that desegregation ought to be viewed as a

*temporary* measure. Their constitutional argument—about the dangers of judicial overreach and the proper roles of federal, state, and local government in the realm of education—was obviously relevant and compelling.

It is hard to name any criterion by which desegregation beyond the South was a success. It did not contribute to equal educational achievement. Melnick finds some evidence that it may have helped minority education outcomes—but the benefits are so slight, and the evidence that desegregation policy rather than something else was the cause so dubious, that it is hard to place any confidence in the social science findings he surveys.

It is certainly possible to see in this episode of American history unsettling institutional developments. The federal judiciary's role in desegregation is probably the single clearest example in American history where one of the three branches of government abandoned its traditional role to take on another. The great reach of the structural injunction—today a tool applied to, as Melnick points out, "institutions for the mentally ill and developmentally disabled, jails and prisons, police departments, and welfare agencies"—has given the federal courts an enduring power that looks more executive than judicial. Even if, once desegregation ended, the judicial branch seemed willing to retreat from acting in an executive capacity, desegregation helped usher in a seemingly permanent intrusion of the federal government into education policy, challenging one of the most essential functions of state and local government.

Nor did desegregation and busing orders' crude racial sorting improve race relations. Today the word "integration" seems almost to have disappeared from civil rights discourse. Does that have something to do with the failure of desegregation? Did the attempt to *impose* a regime of racial non-segregation work to discredit that aim? Melnick surveys allegations of "resegregation" and concludes that "in the aggregate, termination of desegregation orders had only a small effect" during a time when "residential segregation was declining slightly for African Americans, more significantly for Hispanics and Asians."

In the very long run, of course, such questions will be moot. Today it seems quaint that people used to make much of the religious divide of the "triple melting pot" sketched in Will Herberg's *Protestant—Catholic—Jew* (1955). According to a 2017 Pew study, interracial marriage among American Asians, blacks, Hispanics, and whites had increased from 3% in 1967 to 17% in 2015. Colorblind love and demographics are steadily reducing racial separation in America.

A more pressing question not taken up directly by Melnick concerns the general effect of desegregation on the *quality* of education. Melnick does see that everyone noticed a national decline in educational outcomes for American students of all races. *A Nation at Risk*, published by the U.S. National Commission on Excellence in Education in 1983, helped launch the "standards" movement in education. A large legislative effort to address the problem was initiated during the Clinton presidency, culminating in the No Child Left Behind Act signed into law by George W. Bush in 2001. Even the Obama Administration pushed educational quality, in the "Race to the Top" initiative. Although it is true that Left and Right fight over what to do about it, nobody today denies that American education has suffered a significant and worrisome decline over the past few decades. This decline had many causes, but it is hard to see how desegregation benefited the American education system in *any* way.

As a morally inspired but eventually repudiated and abandoned national policy, educational desegregation stands almost alone in American history. Perhaps its closest analog is Prohibition. In both cases, moral zeal carried policy beyond what the people were willing to accept. This lesson about the dangers of heedless moralizing in politics should be remembered. Unlike Prohibition, desegregation was part of a much larger political project, little of which seems likely to be repudiated or abandoned.

*Thomas F. Powers is professor of political science at Carthage College and the author of* American Multiculturalism and the Anti-Discrimination Regime *(St. Augustine's Press).*