The Course of Federal Desegregation Litigation Since Brown: How Conflict Gave Way To Collusion

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Brown v. Board of Education\(^1\) is unquestionably one of the proudest watersheds of our Nation’s constitutional jurisprudence. Fifty years after that decision was handed down, it is well worth commemorating the birth of Brown’s sterling principle; and it is equally worth celebrating the slow but sure death of the ignominious policy of intentional segregation of public schools that was its sworn and bitter enemy. Now, in the 21st Century, the notion that government can or should segregate its schools so as to forbid children of different races from attending alongside one another has been thoroughly vanquished as an ugly relic of a shameful past – Brown v. Board is its rightful conqueror.

Yet the judicial armies marshaled in defense of Brown have not left the battlefield and have jealously retained their armaments. Federal courts continue to superintend countless public schools, invoking formidable coercive powers to command their every movement and to dictate answers to vexing, nuanced problems of social and public policy. Rather than restoring public schools to local decision-making and leaving questions of educational policy to the local administrators and officials duly elected and appointed to resolve them, as commanded by our Constitution, federal courts maintain their rule, seemingly unaware that the war declared by Brown has been won; and hundreds of school districts throughout the country remain frozen in an effective state of judicial martial law. In short, despite the triumph and fulfillment of Brown’s principle of nondiscrimination, the restraints of judicial oversight persist under its auspices, thus perversely giving rise to a separate constitutional violation.

Part I of this paper traces the development of federal law governing desegregation from Brown I through the present. Part II then explores the existing dynamics of federal desegregation

\(^1\) 347 U.S. 483, 493 (1954) ("Brown I").
litigation, offering legal and practical reasons why federal courts have continued to retain oversight that is, in the vast majority of cases, inconsistent with their constitutional obligations and ill-advised as a matter of policy.

I. THE EVOLUTION OF FEDERAL DESEGREGATION LAW FROM BROWN I THROUGH THE PRESENT.


The command of the Supreme Court’s initial decision in Brown ("Brown I") was at once simple and momentous: From May 17, 1954 forward, “in the field of public education the doctrine of ‘separate but equal’ has [had] no place” in our Nation. In a preceding series of cases, the United States Supreme Court had declined to overrule Plessy v. Ferguson and instead held that, under the facts of each case, particular institutions reserved for white students were not equal to those to which black students were relegated. In Brown, however, Chief Justice Warren wrote for a unanimous Court in expressly overruling Plessy on the ground that, even assuming equality of facilities and other tangible factors, “[t]o separate [minority children] from

2 Many a scholar has examined at length the circumstances and history surrounding Brown. For an illustrative work, see Richard Kluger’s book, SIMPLE JUSTICE (1977).

3 347 U.S. at 495.

4 163 U.S. 537 (1896). The Supreme Court in Plessy had upheld a Louisiana statute providing for “separate but equal” railway accommodations for white and “colored” passengers. It did so on the ground that a statute “impl[y]ing] merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality” thereof, id. at 543, and that any “badge of inferiority” felt by the “colored” race “is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” Id. at 551. Justice Harlan dissented, concluding that “[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and equality before the law established by the Constitution.” Id. at 562 (Harlan, J., dissenting).

others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” On that basis, the intentional segregation at issue in each of the cases consolidated in Brown was held to violate the Equal Protection Clause of the Fourteenth Amendment.

In Brown I, the Court expressly reserved judgment on the question of an appropriate remedy. The following year, on May 31, 1955, the unanimous Court left the question of an appropriate remedy to district courts, in light of their “proximity to local conditions” and ability to conduct “further hearings”; and the Court famously and controversially instructed the lower courts to frame and implement such remedial decrees as were “necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to this case.”


As we now know all too well, “deliberate speed” proved far from lightning quick. Efforts to implement Brown were met with a phalanx of committed opposition in the South, including outright legal defiance and forcible resistance. Thus, the Supreme Court was soon called upon to decide cases in which various States sought essentially to countermand the directive of Brown I and to declare it an invalid statement of constitutional law; and to resist

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6 Id. at 494-95.
7 See id. at 495.
8 See id.
10 Id. at 301.
efforts to implement *Brown II* on the ground through any and all available means. In *Cooper v. Aaron*, for instance, decided in 1958, the Court addressed “an amendment to the [Arkansas] State Constitution flatly commanding the Arkansas General Assembly to oppose ‘in every Constitutional manner the Un-constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court.’” The State’s opposition to desegregation took many forms, including mobilizing the Arkansas National Guard, acting under the Governor’s order, to forcibly bar integration of black students over a period of three weeks. The Court remained unanimous in *Aaron* and did not mince its words in emphasizing the necessary import and force of the principle announced in *Brown I*: the “constitutional rights of children not to be discriminated against in school admissions on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation.” And the Court pointedly invoked “some basic constitutional propositions which are settled doctrine,” such as the supremacy of federal law and the centrality of the federal judiciary in construing it. To be sure, “the responsibility for public education is primarily the concern of the States,” the Court acknowledged, but it is “equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action.”

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12 *Id.* at 8-9.
13 *See id.* at 11.
14 *Id.* at 17.
15 *Id.* at 17-18.
16 *Id.* at 19.
Alas, efforts to resist the Brown decisions did not obligingly subside in the wake of Aaron. Instead, they took a subtler form. Many southern States “[i]n 1959 . . . abandoned ‘massive resistance’ to desegregation and instead turned to what was called a ‘freedom of choice’ program.” Judge Wisdom, writing for the Fifth Circuit in 1966, roundly criticized the use of such programs in the desegregation context:

School authorities in this circuit, with few exceptions, have turned to the “freedom of choice” method for desegregating public schools. The method has serious shortcomings. Indeed, the slow pace of integration in the Southern and border States is in large measure attributable to the manner in which free choice plans have operated. . . .

. . . .

Courts should scrutinize all such plans. Freedom of choice plans may be invalid because the freedom of choice is illusory. The plan must be tested not only its provisions, but by the manner in which it operates to provide opportunities for a desegregated education.19

The obvious concern was that “freedom of choice” was typically and readily used by government officials to brace themselves against judicial scrutiny while simultaneously retaining segregated schools, by discouraging “Negro students from enrolling in white schools,” requiring “inconvenient or burdensome arrangements for transfer,” and employing excuses such as overcrowding in order “to avoid transfers of Negro children.”20

With respect to Prince Edward County, Virginia, the Supreme Court had specifically held in Brown itself that the de jure segregation as it existed was unconstitutional, remanding for the


18 The Eleventh Circuit was not established until 1980. Thus, in 1966, the Fifth Circuit’s jurisdiction extended throughout the better part of the Southern United States, including Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

19 United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 888-89 (5th Cir. 1966) (internal quotations and citations omitted).

20 Id. at 890.
district court to supervise appropriate desegregation efforts. In the ten ensuing years, Virginia went from “freedom of choice” to “freedom from choice”; it “repealed [its] compulsory attendance laws and instead made school attendance a matter of local option.” The Supervisors of Prince Edward County had “in 1956 resolved that they would not operate [desegregated] public schools” and for that reason, in the face of court orders requiring integration, “refused to levy any school taxes for the 1959-60 school year” – as a result, those schools remained closed even as “the public schools of every other county in Virginia . . . continued to operate under laws governing the State’s public school system and to draw funds provided by the State for that purpose.” At the same time, a “private group . . . was formed to operate private schools for white children in Prince Edward County.”

In 1964, the Supreme Court in *Griffin v. County School Board of Prince Edward County* unanimously took umbrage at this egregious state of affairs. It made clear that its patience had been exhausted by “the inordinate delays which have already occurred in this protracted litigation,” which it said had been marked by “entirely too much deliberation and not enough speed.” Nor could Virginia and Prince Edward County stand on a prerogative to run and close schools as they saw fit.

[T]he record in the present case could not be clearer that Prince Edward’s public schools were closed and private schools operated in their place with state and county assistance for one reason, and one reason only: to ensure . . . that white and colored children in Prince Edward County would not, under any

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21 *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. at 222.

22 *Id.* at 223.

23 *Id.*

24 *Id.* at 226 (internal citation and quotation omitted).

25 *Id.* at 264.
circumstances, go to the same school. Whatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.26

Finally, the Court noted it was imperative that the ensuing relief “be quick and effective,” as “[t]he time for mere ‘deliberate speed’ ha[d] run out.”27 The district court on remand was to order whatever action might be necessary to ensure that an integrated system of public schools thenceforward be opened, operated, and maintained.28

Four years later, in the seminal case of *Green v. County School Board of New Kent*,29 the unanimous Court in 1968 expressed its frustration at the progress, or lack thereof, of desegregation under Virginia’s “freedom of choice” plan. There, a lawsuit had been brought seeking injunctive relief forbidding the maintenance of segregated schools in New Kent County; although there was residential integration of blacks and whites within the County, two separate schools were being maintained – one “white combined elementary and high school” and “one Negro combined elementary and high school” — with overlapping attendance zones and busing routes.30 In describing “[r]acial identification of the system’s schools” as “complete,” the Court specifically pointed to “faculty, staff, transportation, extracurricular activities and facilities”;31 these would become the so-called “*Green* factors” that are now a touchstone of a federal court’s

26 *Id.* at 231.
27 *Id.* at 232, 234.
28 *Id.* at 232-33.
30 *Id.* at 432.
31 *Id.* at 435.
inquiries into whether a particular school system has become unitary such that judicial oversight may terminate.

The persistence of segregation in New Kent County was constitutionally indefensible in the face of Brown’s clear command more than a decade earlier. “School boards such as the respondent then operating state-compelled dual systems were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”32 These references in Green to the end-goals of a “unitary system” and the elimination of discrimination “root and branch” were to be repeated many times subsequently in the context of federal desegregation cases.

The Court in Green expressly declined to hold that freedom of choice plans were unconstitutional per se.33 But it noted that even this “step did not come until some 11 years after Brown I was decided and 10 years after Brown II,” during which time “the harm of such a [segregated] system” could “only have [been] compounded.”34 The reality was that “the general experience under ‘freedom of choice’ to date has . . . indicate[d] its ineffectiveness as a tool of desegregation,” and that such an approach could not be expected to cure the violations in question.35 “The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”36

32 Id. at 437-38.
33 See id. at 439.
34 Id. at 438.
35 Id. at 440-41.
36 Id. at 442.
The message from the Court was clear: The principle of *Brown I* was being compromised by recalcitrant noncompliance, with brazen defiance of the Court’s command giving way to concerted evasion of it. Strong measures were required to cure the persisting effects of past intentional segregation, and the unanimous Court administered strong medicine indeed in *Swann v. Charlotte-Mecklenburg Board of Education*,\(^37\) which in 1971 blessed forced busing as a potential remedy. In *Swann*, the Court considered an effort, beginning in 1966, to desegregate “[t]he Charlotte Mecklenburg school system, the 43d largest in the Nation, encompass[ing] the City of Charlotte and surrounding Mecklenburg County, North Carolina.”\(^38\) The Court contrasted its articulation in *Brown I* of “large constitutional principles” with the “flinty, intractable realities of day-to-day implementation of those constitutional commands” that had been encountered by “other federal courts,” whose experiences the Court’s “effort to formulate guidelines must take into account.”\(^39\) And it commented at length upon the accumulated weight of those experiences, emphasizing the “many difficulties . . . encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then.”\(^40\) The Court reiterated that “[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.”\(^41\) Only a

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38 *Id.* at 6.

39 *Id.* at 6.

40 *Id.* at 13-14.

41 *Id.* at 15.
dereliction of that constitutional duty by school authorities would warrant intervention by federal courts. “[J]udicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.”

The challenge for federal courts was to ensure that school districts properly cured any persisting effects specifically attributed to prior intentional segregation, while taking care not to hold school districts strictly liable for larger societal forces and perhaps even discrimination outside of the schools.

The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination . . .

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all of the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

Significantly, the Court in Swann accepted numerical ratios, but not rigid racial quotas, as a potential component of remedying prior intentional segregation. The district court had incorporated in its order a general objective of achieving a seventy-one percent to twenty-nine percent racial ratio of African Americans to whites in individual schools. In addressing arguments directed against that general objective, the Court noted: “The fact that no such objective was actually achieved—and would appear to be impossible—tends to blunt th[e]

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42 Id. at 15-16.
43 Id. at 22-23.
claim” that a racial quota had been imposed, as did the district court’s express acknowledgment in its order “that variation ‘from [its] norm may be unavoidable.’ ”44 The Supreme Court then cited two reasons for approving the district court’s approach: “First, [the district court’s] express finding . . . that a dual school system had been maintained by the school authorities at least until 1969; second, its finding . . . that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own.”45 The Court made clear, however, “that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement,” and “that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law.”46

Finally, and most controversially, the Court refused to rule out the use of forced busing, which the district court had ordered, as part of a desegregation decree. “All things being equal, with no history of discrimination, it might well be desirable to assign people to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.”47 Clearly, forced busing, with its tendency to “significantly impinge on the educational process,”48 was not supposed to last long. “At some point, these school authorities and others like them should have achieved full compliance with

44 Id. at 23-24.
45 Id. at 24.
46 Id. at 25-26.
47 Id. at 28.
48 Id. at 30.
this Court’s decision in Brown I. The systems would then be ‘unitary’ in the sense required by our decision[ ] in Green.”

The potential remedies approved in Swann are, to be sure, designedly potent and sweeping. But Swann was no charter for federal courts to supervise the racial compositions of public schools on an ongoing basis:

Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the state has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

After Swann, the use of forced busing in order to achieve integration was clearly authorized for consideration by the lower courts in appropriate circumstances. So in the companion case of Davis v. Board of School Commissioners of Mobile County, in which it was argued that “a school desegregation plan for Mobile County, Alabama” was “inadequate,” the Court reversed and remanded for consideration of such a remedy. Because the courts below had not contemplated the prospect of achieving integration through busing, a remand was in order. “Having once found a violation, the district judge or school authority should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the

49 Id. at 31.
50 Id. at 32.
51 Id. at 33.
52 Id. at 34.
practicalities of the situation.”53 “On the record before us, it is clear that the Court of Appeals felt constrained to treat the eastern part of metropolitan Mobile in isolation from the rest of the school system, and that inadequate consideration was given to the possible use of bus transportation and split zoning.”54

The next element of the Court’s evolving desegregation jurisprudence was added two years after Swann, in 1973, by the decision in Keyes v. School District No. 1.55 The claim advanced in that case was that the Denver School Board had practiced systematic and intentional discrimination, “by use of various techniques such as the manipulation of student attendance zones, schoolsite selection and the neighborhood school policy,” in order to segregate a particular school district in Park Hill.56 Even so, no constitutional or statutory provision could be pinpointed that officially mandated segregation on the basis of race.57 That did not matter to the Court’s analysis, for the bottom-line was that the “School Board had engaged in an unconstitutional policy of deliberate racial segregation in the . . . schools.”58 Nor was the Court persuaded by the argument “that a finding of state-imposed segregation as to a substantial portion of the school system can be viewed in isolation from the rest of the system.”59 “[W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation

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53 Id. at 37.
54 Id. at 38.
56 Id. at 191.
57 See id. at 191.
58 Id. at 198.
59 Id. at 200.
affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.\textsuperscript{60} In light of that predicate, the defendants had “assume[d] an affirmative duty ‘to effectuate a transition to a racially nondiscriminatory school system,’ that is, to eliminate from the public schools within their school system ‘all vestiges of state imposed segregation.’”\textsuperscript{61}

Although Denver schools outside of the Park Hill school district were also segregated, especially within the “core city area,” the question remained in Keyes “whether respondent School Board’s deliberate racial segregation policy with respect to the Park Hill schools [made] the entire Denver system a dual system.”\textsuperscript{62} That, said the Court, would require a factual determination from the district court upon remand as to whether the Denver school district “might be divided into separate, identifiable and unrelated units.”\textsuperscript{63}

Assuming that question were answered in the affirmative, the ensuing question would be what, if any, bearing the constitutional violation with respect to the Park Hill schools should have in examining segregation as it existed in other Denver schools. As to that, the Court described how \textit{de jure} segregation (intentional segregation on the basis of race) should be crucially differentiated from \textit{de facto} segregation (unintentional or incidental disparate impact on different races), in the desegregation context.

\begin{center}
[\textit{W}e hold that a finding of intentionally segregative school board actions in a meaningful portion of the school system, as in this case, creates a presumption}
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\textsuperscript{60} \textit{Id.} at 201.
\textsuperscript{61} \textit{Id.} at 200.
\textsuperscript{62} \textit{Id.} at 204.
\textsuperscript{63} \textit{Id.} at 204.
that other segregated schooling within the system is not adventitious. It establishes, in other words, a *prima facie* case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. . . . We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate.64

While mere disproportionality of racial representation in schools, in the absence of government intent to segregate, does not amount to a constitutional violation, in Denver “school authorities ha[d] been found to have practiced *de jure* segregation in a meaningful portion of the school system by techniques that indicate that the ‘neighborhood school’ concept ha[d] not been maintained free of manipulation.”65

*Keyes* thus carefully steered clear of suggesting that a system of neighborhood schools could be deemed unconstitutional, or deserving of remedy, merely because of a disparate racial impact. Instead, the inquiry would proceed in accordance with the “burden-shifting principle” laid out by the Court that was “not new or novel,” and would require consideration of the facts of each case in order to determine whether the segregation at issue stemmed from intentional acts by the relevant government defendants.66 The Court therefore remanded for the district court to determine whether the Park Hill schools could properly be differentiated from the remainder of the Denver school district, and, if so, whether the segregation in other Denver schools reflected the same, or similar, intentional policies and practices identified in Park Hill.

64 *Id.* at 208.

65 *Id.* at 212.

66 *Id.* at 209.
Keyes brought an end to the Court’s unanimity in school desegregation cases – thereafter, the Court would become increasingly divided. Justice Rehnquist dissented,67 and Justice Powell penned an especially provocative and prescient separate opinion, concurring in part and dissenting in part. Although Justice Powell agreed that “the distinction between de jure and de facto segregation was consistent with the limited constitutional rationale of [Brown I],” he believed that the Court’s transformation, in cases such as Green and Swann, of “the concept of state neutrality . . . into the present constitutional doctrine requiring affirmative state action to desegregate school systems” had since obviated that distinction.68 Justice Powell also warned of the larger, unintended social consequences that might flow from the Court’s endorsement of forced districtwide busing as an available remedy:

[C]ourts in requiring so far-reaching a remedy as student transportation solely to maximize integration, risk setting in motion unpredictable and unmanageable social consequences. No one can estimate the extent to which dismantling neighborhood education will hasten an exodus to private schools, leaving public school systems the preserve of the disadvantaged of both races. Or guess how much impetus such dismantlement gives the movement from inner city to suburb, and the further geographical separation of the races. Nor do we know to what degree this remedy may cause deterioration of community and parental support of public schools, or divert attention from the paramount goal of quality in education to a perennially divisive debate over who is to be transported where.

. . . . The problem [of integration], especially since it focused on the “busing issue,” has profoundly disquieted the public wherever extensive transportation has been ordered. I make no pretense of knowing the best answers. Yet, the issue in this and like cases comes to this Court as one of constitutional law. As to this issue, I have no doubt whatever. There is nothing in the Constitution, its history, or—until recently—the jurisprudence of this Court that mandates the employment of forced transportation of young and teenage children to achieve a single interest, as important as that interest may be.69

67 Id. at 254-65 (Rehnquist, J., dissenting).
68 Id. at 220-23 (Powell, J., concurring in part and dissenting in part).
69 Id. at 250-51.
These concerns about forced busing have echoed through the present. Justice Powell elaborated upon them seven years later, noting the phenomenon of “white flight” and its perverse consequences:

The pursuit of racial balance at any cost – the unintended legacy of *Green* – is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems. Parents with school-age children are highly motivated to seek access to schools perceived to afford quality education. A desegregation plan without community support, typically one with objectionable transportation requirements and continuing judicial oversight, accelerates the exodus to the suburbs of families able to move.70

**Principled Limits To Enforcing Brown’s Principle: The Supreme Court Clarifies the Law of Desegregation Remedies, from 1974 through 1979.**

Every principle must have its stopping point. As potent and far-reaching as the remedies for racial segregation could be under *Green* and *Swann*, the Court made clear as of 1974, in *Milliken v. Bradley*71 (“*Milliken I*”), that no such remedy could be imposed in the absence of a predicate constitutional violation; that is, a court’s exercise of remedial power may extend no further than the constitutional principle that justifies and underlies it. In *Milliken I*, the lower courts had concluded that the schools of Detroit, Michigan, had been segregated on the basis of race in violation of *Brown I*.72 Because African American children were concentrated within the Detroit school system whereas whites were concentrated in the school systems of the outlying suburbs, and integration plans proposed for Detroit threatened to trigger a further exodus of whites to the suburbs, the district court had concluded that a desegregation plan limited to Detroit “would not accomplish . . . desegregation,” and that it needed “to look beyond the limits of the


71 418 U.S. 717 (1974) (“*Milliken I*”).

72 See id. at 736.
Detroit school district for a solution to the problem.”73 It therefore ordered an interdistrict remedy of forced busing encompassing “53 of the 85 suburban school districts plus Detroit.”74 The Sixth Circuit agreed that “any less comprehensive solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems” and that “the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts.”75

The obvious problem in *Milliken I* was that, no matter the perceived salutary effects of a remedy that was interdistrict in scope, the record contained “evidence of *de jure* segregated conditions only in the Detroit schools” — there had been no showing that any surrounding school district had, in dereliction of *Brown I*, engaged in intentional segregation.76 This was, in essence, a classic case of a remedy in search of a violation. The fundamental question for the Supreme Court was whether an interdistrict remedy was permissible in the absence of an interdistrict violation. To that, it emphatically answered no: “without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”77 This followed from basic principles, according to which “the scope of the remedy is determined by the nature and extent of the constitutional violation”,78 and injunctive relief is meant simply to “restore the victims of discriminatory conduct to the position they would have occupied in the

73 *Id.* at 732-33.
74 *Id.* at 733.
75 *Id.* at 735.
76 *Id.* at 745.
77 *Id.*
78 *Id.* at 744.
absence of such conduct.”79 If de jure segregation neither extended nor had effects beyond Detroit, the remedy for that segregation was, of necessity, similarly bounded.80

Twin constitutional concerns about, on the one hand, trammeling upon local control of schools and, on the other, overextending the authority of federal courts, combined to animate the Court’s decision in Milliken I. As to the former:

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to maintenance of community concern and support for public schools and to quality of the educational process . . . . [L]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of programs to fit local needs, and encourages “experimentation, innovation, and a healthy competition for educational excellence.”81

And as to the limitations on federal courts:

[A]bsent a restructuring of the laws of Michigan relating to [the boundaries and organization of] school districts the District Court will become first, a de facto “legislative authority” to resolve these complex questions, and then the “school superintendent” for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.82

The Supreme Court’s ultimate disposition in Milliken I was to reverse and remand for “prompt formulation of a decree directed to eliminating the segregation” specifically limited to Detroit, at least in the absence of any showing of “racially discriminatory acts for which any of the 53 outlying school districts were responsible.”83 Just as Brown I had articulated a

79 Id. at 746.
80 See id. at 746-47.
81 Id. at 742.
82 Id. at 744.
83 Id. at 752-53.
constitutional principle, *Milliken I* clarified that the remedies to which it gave rise had principled limits.

Following on the heels of *Milliken I*, the Court in 1976 and 1977 provided further guidance as to the principled limits governing desegregation remedies. In *Pasadena City Board of Education v. Spangler*, the Court reversed a judicial decree that prescribed continuing maintenance of a specified racial mix of students in the Pasadena school system, such that “there shall be no school in the District . . . with a majority of any minority students.” Such an ongoing, perpetual decree of numerical balancing was impermissible, for it “appear[ed] to contemplate the ‘substantive constitutional right to a particular degree of racial balance or mixing’ which the Court in *Swann* expressly disapproved.” “Inflexible” insistence upon racial quotas was misconceived and unjustified, particularly since “subsequent changes in the racial mix of the Pasadena schools might be caused by factors for which the defendants could not be considered responsible.” Because there had been “no showing . . . that . . . post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants,” the District Court was not entitled to require [the Pasadena authority] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its

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85 *Id.* at 428.
86 *Id.* at 434.
87 *Id.* at 434.
88 *Id.* at 434-35.
function of providing the appropriate remedy for previous racially discriminatory attendance patterns.\textsuperscript{89}

Thus, \textit{Spangler} instructed that any reliance upon racial percentages had to be limited to correcting racial imbalances traceable to prior constitutional violations; such measures could not be maintained in perpetuity in order to counteract extrinsic factors, and had to be lifted as soon as the predicate violations were cured.

In \textit{Dayton Board of Education v. Brinkman ("Dayton I")},\textsuperscript{90} the Court provided similar guidance. In that case, the Sixth Circuit had effectively insisted upon a plan of desegregation for the school district of Dayton, Ohio “involving districtwide racial-distribution requirements, after rejecting two previous, less sweeping orders by the District Court.”\textsuperscript{91} Stressing, once again, that, “local autonomy of school districts is a vital national tradition,” the Court reiterated that “displacement of the local authorities by a federal court in a desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles.”\textsuperscript{92} Although the district court had identified “three instances of segregative action,” the Sixth Circuit had not “tailor[ed] a remedy commensurate to the three specific violations” and

\textsuperscript{89} \textit{Id.} at 436-37. Following remand in \textit{Spangler}, the Ninth Circuit ultimately determined in 1979 that the time had come for the district court to dissolve its injunction and to relinquish jurisdiction over the Pasadena schools. \textit{See Spangler v. Pasadena City Bd. of Educ.}, 611 F.2d 1239 (9th Cir. 1979). Then-Judge Anthony Kennedy, concurring, wrote that the operative “policy favoring neighborhood schools is not synonymous with an intent to violate the constitution.” \textit{Id.} at 1245 (Kennedy, J., concurring). He concluded that “compliance with the Pasadena Plan for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies. Further delay in returning fully responsibility for administration to the school board is unjustified.” \textit{Id.} at 1244.

\textsuperscript{90} 433 U.S. 406 (1977).

\textsuperscript{91} \textit{Id.} at 408.

\textsuperscript{92} \textit{Id.} at 410.
had instead “imposed a systemwide remedy going beyond their scope.”\textsuperscript{93} The Court accordingly vacated the decision below, remanding for the District Court in the first instance, subject to review by the Court of Appeals, [to] determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as currently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to address that difference, and only if there has been a systemwide impact may there be a systemwide remedy.\textsuperscript{94}

Even as it stressed the constitutional principles constraining the scope of remedial measures, the Court made clear that a remedy could entail affirmative measures quite distinct from the constitutional violation it sought to cure, provided that the remedy was designed specifically to redress any persisting effects of that constitutional violation. When \textit{Milliken v. Bradley} (“\textit{Milliken II}”),\textsuperscript{95} returned to the Supreme Court, the Court in 1977 approved “remedial and compensatory educational components,” ordered by the district court for schools in Detroit:\textsuperscript{96} (i) in-service training for teachers and administrators, (ii) guidance and counseling programs, (iii) revised testing procedures, and (iv) a remedial reading and communications skills program.\textsuperscript{97} In considering the measures, the Court initially assayed “three factors” that it characterized as generally governing federal courts’ application of “equitable powers” within the desegregation context:

In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation.

\textsuperscript{93} \textit{Id.} at 406.

\textsuperscript{94} \textit{Id.} at 420.

\textsuperscript{95} 433 U.S. 267 (1977).

\textsuperscript{96} \textit{Id.} at 274; \textit{id.} at 279.

\textsuperscript{97} \textit{See id.} at 272 & n.5, 275-76.
Swann . . . Second, the decree must be remedial in nature, that is, it must be
designed as nearly as possible “to restore the victims of discriminatory conduct to
the position they would have occupied in the absence of such conduct.” [Milliken
I]. Third, the federal courts in devising a remedy must take into account the
interests of state and local authorities in managing their own affairs, consistent
with the Constitution.98

Elaborating upon the first factor, the Court explained that “federal-court decrees exceed
appropriate limits if they are aimed at eliminating a condition that does not violate the
Constitution or does not flow from such a violation . . . or if they were neither involved in nor
affected by the constitutional violation, as in Milliken I.” In Milliken I, though, a constitutional
violation had indeed been established with respect to the Detroit schools. And where “a
constitutional violation has been found, the remedy does not ‘exceed’ the violation if the remedy
is tailored to cure the ‘condition that offends the Constitution.’”99 In Milliken II, “the District
Court found that the need for educational components flowed directly from constitutional
violations by both state and local officials.”100 Such use of educational components comported
with the approaches of other federal courts that had confronted similar circumstances.101 And
the Court identified a sound basis in Milliken II for just such a remedy. Noting that there was
“no one plan that will do the job in every case,”102 the Court concluded:

On this record, . . . we are bound to conclude that the decree before us
was aptly tailored to remedy the consequences of the constitutional violation.
Children who are culturally set apart from the larger community will inevitably
acquire habits of speech, conduct and attitudes reflecting their cultural isolation . .

98 Id. at 266-67.
99 Id. at 282.
100 Id. at 282.
101 See id. at 283-86.
102 Id. at 287 (quoting Green).
Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures.\textsuperscript{103}

Thus, \textit{Milliken II} established that educational components could have a place within a desegregation decree to the extent that any educational lag was specifically and fairly identified as a condition arising from intentional segregation; and the inclusion of educational components in that case was affirmed.

Much as he had in \textit{Keyes}, Justice Powell penned a particularly incisive concurrence in \textit{Milliken II}, remarking upon the paradoxical state of affairs in which the parties, antagonistic for years, have now joined forces apparently for the purpose of extracting funds from the state treasury \textit{via} the district court’s decree\textsuperscript{104}. The Board enthusiastically supports the entire desegregation decree even though the decree intrudes deeply on the Board’s own decisionmaking powers. Indeed, the present School Board \textit{proposed} most of the educational components included in the District Court’s decree\textsuperscript{104}.

Thus, the only complaining party is the State of Michigan (acting through state officials) and its basic complaint concerns money, not desegregation. It has been ordered to pay about $5,800,000 to the Detroit School Board. This is one-half the estimated “excess cost” of 4 of the 11 educational components included in the desegregation decree: remedial reading, in-service training of teachers, testing, and counseling. The State, understandably anxious to preserve the state budget from federal-court control or interference, now contests the decree.\textsuperscript{104}

These themes would rise to the fore in the ensuing decades of desegregation litigation, as school boards increasingly aligned themselves with plaintiffs for the sake of (among other things) crafting consent decrees that maximized their entitlement to state funding.\textsuperscript{105} The fiscal demands

\textsuperscript{103} \textit{Id.} at 287-88.

\textsuperscript{104} \textit{Id.} at 293-94 (Powell, J., concurring).

\textsuperscript{105} \textit{See infra} at p. 56.
imposed by those decrees for states and localities escalated dramatically over the years, into the hundreds of millions, and, in some cases, even the billions.106

In 1979, the Court decided companion cases of *Columbus Board of Education v. Penick*107 and *Dayton Board of Education v. Brinkman*108 ("Dayton II"), further applying the presumptions and burden shifting it had announced in *Keyes* as governing a showing of intentional segregation. In the *Columbus* case, the Sixth Circuit had affirmed the district court’s findings that state officials had intentionally segregated the school system in Columbus, Ohio, on the basis of race prior to *Brown I* and had, through the 1970s, systematically acted to maintain a segregated school system. The Sixth Circuit found that the degree of racial segregation resulting from intentional segregation could be remedied on a systemwide basis.109 The Supreme Court affirmed this determination, explaining that, even if the record did not show that all of the imbalanced schools in Columbus were intentionally segregated, “purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual system and supports a finding to this effect absent sufficient contrary proof by the Board, which was not forthcoming in this case.”110 Nor was the imposition of a systemwide remedy in *Columbus* inconsistent with the Court’s holding in *Dayton I*, for in *Columbus* “the District Court repeatedly emphasized that it had found purposefully segregative

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106 See infra at p. 38.


108 443 U.S. 526 (1979) ("Dayton II").

109 443 U.S. at 452-54.

110 Id. at 457.
practices with current, systemwide impact.”¹¹¹ The inferences reflected in these findings were simply those “permitted by Keyes [and] recognized by Swann.”¹¹²

In Dayton II, the district court, following the Court’s remand instruction in Dayton I, had dismissed the case on the ground that “plaintiffs . . . failed to show either discriminatory purpose or segregative effect, or both.” The Sixth Circuit, however, reversed, concluding that the failure to dismantle the dual school system in place prior to Brown I, “together with the intentional segregative impact of various practices since 1954, were of systemwide import and an appropriate basis for systemwide remedy.”¹¹³ The Supreme Court held that the Sixth Circuit had the better of the analysis: “[T]he systemwide nature of the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts,” which proof defendants had failed to rebut.¹¹⁴ And the Sixth Circuit was “quite justified in using the Board’s total failure to fulfill its affirmative duty – and indeed its conduct resulting in increased segregation – to trace the current, systemwide segregation back to the purposefully dual system of the 1950s and to the subsequent acts of intentional discrimination.”¹¹⁵ The decision of the Sixth Circuit was therefore affirmed in Dayton II, as in Columbus.

¹¹¹ Id. at 466.
¹¹² Id. at 468.
¹¹³ 443 U.S. at 532-34.
¹¹⁴ Id. at 537-38.
¹¹⁵ Id. at 541.

The 1980s brought a conspicuous lull in the Supreme Court’s desegregation docket. During that time, a handful of lower courts began following through on the Court’s consistent promise, drawn from the Constitution itself, that federal courts’ supervision of public schools around the country would be the exception and not the rule, that the remedies imposed upon those schools would, if met with good-faith compliance, be but interim measures, and that local control over schools would be promptly and rightfully restored. In *Ross v. Houston Independent School District*, the Fifth Circuit in 1983 affirmed a district court’s determination that the public schools of Houston, Texas had become unitary “[a]fter twenty-five years of court proceedings and twelve years of operation under a court-ordered desegregation plan.”117 “The vestiges of all discrimination ha[d] been eliminated in every aspect of school operations, but efforts at integration ha[d] failed in one aspect alone: the district ha[d] not achieved integrated student attendance.”118 That one caveat could “not bar judicial recognition that the school system is unitary,” because it stemmed not from “any residue of past official discrimination” but from “immutable geographic factors and post-desegregation demographic changes,” including the flight of white students in response to integration efforts.119 “After twelve years of court-supervised desegregation efforts, this case has reached the stage where no benefit can be derived

116 699 F.2d 218 (5th Cir. 1983).
117 Id. at 219.
118 Id.
119 Id. at 225.
from further probing for the perhaps unmeasurable sins of the past because no additional remedies are available from the efforts of [the Houston schools] alone.”120

In 1986, the Fourth Circuit followed suit in *Riddick v. School Board of the City of Norfolk*,121 affirming the 1975 determination of a district court that public schools within the City of Norfolk, Virginia had become unitary by that time such that the court’s supervision could terminate. (No appeal was taken from that decision until 1983, when the school board, in response to declining enrollment of white students, decided to abandon busing and to assign students to schools on the basis of geography.)122 The Fourth Circuit upheld the district court’s finding that Norfolk, after abiding by the terms of a desegregation order (inclusive of cross-town busing), which had been in place since 1971, had become unitary. “[O]nce the goal of a unitary school system is achieved, the district court’s role ends.”123

In 1991, the Supreme Court returned to the school desegregation stage. In *Board of Education of Oklahoma City v. Dowell*,124 the Court established the central template governing unitary status determinations, ushering in the modern era of desegregation litigation. The district court had determined in 1963 that the public schools in Oklahoma City had been intentionally segregated; it further determined in 1965 that recourse to neighborhood schools had failed to remedy past segregation; and in 1972 it ordered an integration plan involving forced busing. After the desegregation order had been in place for five years, the Oklahoma City School Board

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120 Id. at 227.

121 784 F.2d 521 (4th Cir. 1986).

122 See id. at 525.

123 Id. at 535.

moved for a declaration of unitary status. Determining “that substantial compliance with constitutional requirements has been achieved,” the district court granted the motion and terminated its jurisdiction.\(^{125}\) No appeal was then taken. The school district, however, continued to adhere voluntarily to the 1972 desegregation plan until 1985, when the Board began adopting neighborhood school attendance zones, and African American students and their parents moved to reopen the case on the ground that unitary status had not been achieved.\(^{126}\) The district court denied the motion but was reversed by the Tenth Circuit, which reasoned that the determination of unitary status had “merely ended the District Court’s active supervision of the case, and because the school district was still subject to the desegregation decree, respondents could challenge” the change in plans proposed by the School Board.\(^{127}\) On remand, the district court again found unitary status, and the Tenth Circuit again reversed, holding that despite the Oklahoma schools’ unitary status, the injunctive relief remained in place so as to retain a life of its own.\(^{128}\)

The Supreme Court reversed in *Dowell*, confirming that, “[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination.”\(^{129}\) Indeed, that design was a constitutional imperative.

Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs . . . . The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the

\(^{125}\) *Id.* at 241-42.

\(^{126}\) *See id.* at 242.

\(^{127}\) *Id.* at 243.

\(^{128}\) *See id.* at 243-44.

\(^{129}\) *Id.* at 247.
local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that “necessary concern for the important values of local control of public school systems dictates that a federal court’s regulatory control of such systems does not extend beyond the time required to remedy the effects of past intentional discrimination.”\textsuperscript{130}

As such, it was impermissible for the Tenth Circuit to “condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future.”\textsuperscript{131}

The appropriate questions for the district court were “whether the Board has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.”\textsuperscript{132} As to the latter question, the Court specified, quoting \textit{Green}, that “the District Court should look not only at student assignments, but ‘to every facet of school operations – faculty, staff, transportation, extracurricular activities and facilities.’ ”\textsuperscript{133} That inquiry, prescribed for the district court to conduct upon remand, quickly became the touchstone for determinations of unitary status.

The following Term, in \textit{Freeman v. Pitts},\textsuperscript{134} the Court further clarified that determinations of unitary status need not be all or nothing, but may be made with respect to individual \textit{Green} factors. \textit{Freeman} concerned judicial supervision of desegregation in a suburb of Atlanta, where a federal court had been superintending a consent order since 1969.\textsuperscript{135} In 1986, the district court had determined that, although the school system had not attained unitary

\textsuperscript{130} \textit{Id.} at 248.

\textsuperscript{131} \textit{Id.} at 249.

\textsuperscript{132} \textit{Id.} at 249-50.

\textsuperscript{133} \textit{Id.} at 250.

\textsuperscript{134} 503 U.S. 467 (1992).

\textsuperscript{135} \textit{See id.} at 470-72.
status in all respects, it had done so with respect to student attendance and three other factors; and the court had accordingly “relinquished remedial control as to those aspects of the system in which unitary status had been achieved, and retained supervisory authority only for those aspects of the school system in which the district was not in full compliance.”136 The Eleventh Circuit reversed based on its belief that a district court “should retain full remedial authority over a school system until it retains [complete] unitary status . . . for several years.”137

The Supreme Court reversed and remanded, “holding that a district court is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan. A district court need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system.”138 The Court, emphasized, once again, the constitutional imperative that federal supervision terminate as soon as the remnants of intentional segregation, proscribed under Brown I, are eliminated.

Just as the court has the obligation at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of its decree, so too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance . . . .

As we have long observed, “local autonomy of school districts is a vital national tradition.”139 Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial

136 Id. at 472.

137 Id.

138 Id. at 472.

supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.\textsuperscript{140}

Nor could the mere persistence or recurrence of racial imbalance justify continued supervision by a federal court “when the imbalance is attributable neither to the prior \textit{de jure} system nor to a later violation by the school district but rather to independent demographic forces.”\textsuperscript{141}

Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once \textit{de jure} segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.

In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the \textit{de jure} violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a \textit{de jure} violation. And the law need not proceed on that premise.

As the \textit{de jure} violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior \textit{de jure} system.\textsuperscript{142}

\textsuperscript{140} 503 U.S. at 490.

\textsuperscript{141} \textit{Id.} at 493.

\textsuperscript{142} \textit{Id.} at 495-96.
This spelled the end of arguments that persisting racial imbalance in schools could ground ongoing federal supervision if the imbalance was simply reflective of underlying housing segregation and did not stem specifically from prior *de jure* segregation.

**The Missouri v. Jenkins Experiments: Federal Courts’ Desegregation Efforts in Kansas City.**

The latest word from the Supreme Court in the desegregation area has come in a series of three decisions, under the caption *Missouri v. Jenkins*, concerning a federal court’s oversight of integration efforts in Kansas City, Missouri. “This litigation began in 1977 as a suit by the Kansas City Missouri School District [KCMSD]. . . , the school board, and the children of two board members, . . . [alleging] that the State, surrounding school districts, and various federal agencies had caused and perpetuated a system of racial segregation in the schools of the Kansas City metropolitan area.” The KCMSD was subsequently realigned as a party defendant. In 1984, the district court had dismissed the federal defendants and suburban school districts (finding no persisting interdistrict effects), but found the State of Missouri and the KCMSD liable for unconstitutional segregation. The district court initially ordered that the State and the KCMSD fund intradistrict remedies “including $260 million in capital improvements and a magnet-school plan costing over $200 million.” The case first reached the Supreme Court in 1989, when the Court in *Jenkins I* held that (i) the Eleventh Amendment did not bar imposition of enhanced attorney’s fees for a State’s delay in making payment and (ii) attorney’s fees for

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145 See *Jenkins I*, 491 U.S. at 276.
work by law clerks and paralegals could be calculated and imposed on the basis of their market rates.\textsuperscript{146}

The remedial decree initially imposed by the district court required that the KCMSD “improve the quality of the curriculum and library, reduce teaching load, and implement tutoring, summer school, and child development programs”; that “an extensive capital improvement program . . . rehabilitate the deteriorating physical plant”; and that various measures be implemented “to reduce class size and to improve student achievement.”\textsuperscript{147} Within a year, in November 1986, the district court approved a proposal to operate six magnet schools, and then, one year later, to expand the magnet program markedly.\textsuperscript{148} Some months later, the district court adopted a plan requiring capital improvements well in excess of the financial ability of the KCMSD (which was, along with the State, responsible for bearing the costs) to fund.\textsuperscript{149} Indeed, Missouri law specifically forbade the increase in property taxes that would be required in order for the KCMSD to meet its obligations under the district court’s order.\textsuperscript{150} The district court nonetheless ordered that the levy of property taxes be raised sufficiently to fund its decree and that the resulting revenues be used to retire capital improvement bonds, which orders precipitated \textit{Jenkins II}.\textsuperscript{151}

\textsuperscript{146} See id. at 278-89.

\textsuperscript{147} Jenkins II, 495 U.S. at 39 n.4.

\textsuperscript{148} See id. at 39-40.

\textsuperscript{149} See id. at 41.

\textsuperscript{150} See id. at 38-41, 55-58.

\textsuperscript{151} See id. at 42.
The Eighth Circuit affirmed the district court but instructed, going forward, that the district court should take account of comity concerns by leaving it to the school district itself to levy the requisite taxes and simply enjoining the operation of state laws that might stand as obstacles thereto.152 For purposes of its 1990 decision in Jenkins II, the Supreme Court “accept[ed], without approving or disapproving, the Court of Appeals’ conclusion that the District Court’s remedy was proper.”153 And, in considering the district court’s tax levy, the Court likewise deemed “it unnecessary to reach the difficult constitutional issues” raised by the order, “agree[ing] with the State that the tax increase contravened the principles of comity that must govern the exercise of the District Court’s equitable discretion in this area.”154 As to the Eighth Circuit’s conclusion that the district court should order the school district to impose the tax, the Court agreed that “a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court.”155 The Court therefore affirmed the Eighth Circuit “insofar as it required the District Court to modify its funding order and reversed insofar as it allowed the tax increase imposed by the District Court to stand.”156

Following Jenkins II, the district court continued its supervision and the magnet school continued to operate at an annual cost of $448 million. In addition to the magnet program, capital improvements, and various educational programs required by the decree, the district court in 1987 ordered salary assistance for the School District’s 5,000 employees at an annual cost of

152 See 882 F.2d 1295, 1313-14 (8th Cir. 1988); see also Jenkins II, 495 U.S. at 43.
153 Jenkins II, 495 U.S. at 53.
154 Id. at 50.
155 Id. at 55.
156 Id. at 58.
more than $200 million. The KCMSD meanwhile “pursued a ‘friendly adversary’ relationship with the plaintiffs [and] continued to propose ever more expensive programs.” The district court’s order ultimately called for annual expenditures approaching $200 million in order to finance such things as:

“high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; green houses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast cable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; a 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities.”

“The District Court candidly . . . acknowledged that it has ‘allowed the District planners to dream’ and ‘provided the mechanism for those dreams to be realized.’” When the State appealed the district court’s requirement that it fund salary increases and remedial educational programs, the Eighth Circuit affirmed.

When Jenkins III was decided by the Supreme Court in 1995, the desegregation litigation was “enter[ing] its 18th year,” some forty years after Brown I and Brown II had been handed down. The Court rejected “the District Court’s order of salary increases for virtually all

157 In dissenting from the Eighth Circuit’s denial of rehearing en banc prior to Jenkins III, Judge Beam observed that during the eighth school years that the remedy was in place, “the total . . . expenditure[ ] for the desegregation plan alone has been in excess of $902,473,047 and [wa]s escalating”; in fact, the State calculated that the total costs associated with the remedy had exceeded $1.2 billion. Jenkins v. Missouri, 19 F.3d 393, 398-99 & n.3 (Beam, J., joined by Bowman, Wollman, Loken, and Morris Sheppard Arnold, J., dissenting from denial of rehearing en banc).


159 Id. at 79 (quoting Jenkins II, 495 U.S. at 77 (Kennedy, J., concurring)).

160 Id. (citation omitted).

161 See Jenkins by Agyei v. Missouri, 11 F.3d 755 (8th Cir. 1993).
instructional and noninstructional staff,’” and its requirement that the State “continue to fund remedial ‘quality education’ programs because student achievement levels were still ‘at or below national norms at many grade levels.'”\(^{162}\) The Court reiterated that “the District Court’s orders challenged here . . . must rest upon their serving as proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct and their eventual restoration of ‘state and local authorities to the control of a school system that is operating in compliance with the Constitution.’”\(^{163}\)

With that in mind, the contested aspects of the district court’s remedy could not withstand scrutiny. The district court had justified the salary increases by reasoning that, in the absence of an interdistrict remedy (which was unavailable under \textit{Milliken I}), the only way to integrate the desired number of white students into the predominantly minority schools in Kansas City was “to create a school district that was equal to or superior to the surrounding” suburban school districts, thus striving toward “desegregative attractiveness” and “suburban comparability.”\(^{164}\) This rationale had effectively become, in the Supreme Court’s view, “‘the hook on which to hang numerous policy choices about improving the quality of education in general’” \(^{165}\) and a source of “‘limitless authority’ for the district court.”\(^{165}\) And the district court’s “purpose [wa]s to attract non-minority students from outside the KCMSD . . . . In effect, the District Court . . . devised a remedy to accomplish indirectly what it admittedly lack[ed] the remedial authority to

\(^{162}\) \textit{Jenkins III}, 515 U.S. at 73.

\(^{163}\) \textit{Id.} at 89 (quoting \textit{Freeman}, 503 U.S. at 489).

\(^{164}\) \textit{Id.} at 91.

\(^{165}\) \textit{Id.} at 98 (quoting \textit{Jenkins II}, 495 U.S. at 76 (Kennedy, J., concurring in part and concurring in judgment)).
mandate directly: the interdistrict transfer of students.”

Worst of all, as conceived and implemented by the district court, this remedy would persist indefinitely, if not perpetually:

Each additional program ordered by the District Court—and financed by the State—to increase the “desegregative attractiveness” of the school district makes the KCMSD more and more dependent on additional funding from the State; in turn, the greater the KCMSD dependence on State funding, the greater its reliance on continued supervision by the District Court. But our cases recognize that local autonomy of school districts is a vital national tradition, Dayton I, 433 U.S. at 490, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution.

The District Court’s pursuit of the goal of ‘desegregative attractiveness’ results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that we believe it is beyond the admittedly broad discretion of the District Court.

The remedial education programs ordered by the district court fared no better. The district court had erroneously deemed it appropriate to require those programs until such time as “achievement levels were [no longer] ‘at or below national norms at many grade levels.’ ”

[T]he District Court should sharply limit, if not dispense with, its reliance on this factor. Just as demographic changes independent of de jure segregation will affect the racial composition of student assignments, Freeman, [503 U.S.] at 494-495, so too will numerous external factors beyond the control of the KCMSD and the State affect minority students achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus. Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the KCMSD will be able to operate on its own.

166 Id. at 92.

167 Id. at 99-100.

168 Id. at 100.

169 Id. at 101-02 (internal citations omitted).
Because minority students in “kindergarten through grade 7 in the KCMSD schools always ha[d] attended AAA-rated schools,”170 and “minority students in the KCMSD that previously attended schools rated below AAA ha[d] since received remedial education programs for a period of up to seven years,” the district court’s focus upon the need to improve the educational programs offered was misplaced.171 The Supreme Court therefore reversed.

After Jenkins III, the district court supervising the Kansas City schools in 1999 sua sponte declared them unitary.172 In doing so, the court expressed its doubt “about the efficacy of continued judicial control” after the “twenty-third year of Court supervision,” fifteen of which had involved direct supervision over a decree with which the school district had fully complied in good faith.173 Indeed, the court suggested that “retention of judicial control may be more disruptive than beneficial to the KCMSD,” and that the school district’s “ability to use the Court as a shield from responsibility and accountability negatively impacts its motivation to take the actions necessary to be an effective school district.”174 The district court relinquished its jurisdiction, finding that the “KCMSD is not in any way segregating its students or otherwise discriminating on the basis of race [and] has not done so for many years,” and that it had “made every practicable effort to eliminate the lingering vestiges of prior segregation.”175 The Eighth

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170 As the Court explained in Jenkins III, “an AAA classification [was] the highest classification awarded by the State Board of Education,” and ensuring that the KCMSD schools attained that classification had been an express goal of the district court’s order. Id. at 75.
171 Id. at 102.
173 Id. at 1077.
174 Id. at 1079.
175 Id. at 1080.
Circuit was obliged to reverse, however, on the ground that the district court erred in granting unitary status without previously “giving notice either to the constitutional violator or to the victims or permitting the parties to present evidence and argue the[] issues.”¹⁷⁶

**The Supreme Court Recedes from the Fore: Lower Courts’ Determinations of Unitary Status, from 1996 through the Present.**

While the Kansas City litigation was winding its torturous course, various courts of appeals, in keeping with the Supreme Court’s guidance, were declaring compliant school districts unitary and terminating desegregation decrees that had been in place for well over a decade. Thus, in *Coalition To Save Our Children v. Board of Education of the State of Delaware*,¹⁷⁷ the Third Circuit in 1996 affirmed a district court’s determination of unitary status and thereby “br[ought] to a close . . . more than four decades of litigation designed to desegregate the public schools of Delaware.”¹⁷⁸ The Third Circuit recognized that, much as “racism and bigotry continue to tear at the fragile social fabric of our national and local communities, . . . court-supervised school desegregation alone cannot eliminate racial discrimination.” “In light of this sobering truth, it is all the more important that we write the final chapter in this long period of supervision by the federal courts . . ., for only in so doing can we permit [local authorities] to resume their full role in the larger social and political effort to make our nation worthy of the best ideals of its members.”¹⁷⁹ Desegregation efforts in Delaware had first begun prior to *Brown I*, but, because racially identifiable schools had persisted in the City of Wilmington, the district court ordered in 1978 an interdistrict student assignment remedy

¹⁷⁶ *Jenkins ex rel. Jenkins v. Missouri*, 216 F.3d 720, 726 (8th Cir. 2000) (en banc).

¹⁷⁷ 90 F.3d 757 (3d Cir. 1996).

¹⁷⁸ *Id.* at 756.

¹⁷⁹ *Id.* at 756-57.
along with eight forms of ancillary relief.\textsuperscript{180} After marching through the \textit{Green} factors and the eight forms of ancillary relief specified in the 1978 order, the Third Circuit held that the school system had indeed achieved unitary status.\textsuperscript{181} And it concluded with trenchant commentary on the forces underlying the litigation and the considerations requiring its termination:

[Plaintiff] Coalition repeatedly has failed properly to acknowledge the importance of pervasive socioeconomic conditions that account for discrepancies among the races in educational performance. Indeed, the Coalition avoids the responsibility of carefully examining the roots of the continuing black/white achievement gap, a brutal national phenomenon first documented in the 1960s and substantiated in various recent studies that “demonstrate that if socioeconomic characteristics are more equalized, achievement levels are more equalized”

* * *

As humans, we acknowledge with melancholy the fact that many socioeconomic factors militate against the completely level playing field in our society. As judges, however, we are powerless to alter formidable social, economic and demographic forces and conditions over which no legal precept has control. Moreover, we are constrained to fulfill an obligation to address only those constitutional questions properly presented to us, and to show fealty to appropriate standards of review, lest we abandon the limits on judicial power that give coherence to our political system . . . .

The history of our jurisprudence contains no true precedent for the micromanagement of school systems by the federal courts . . . .

This equitable remedy and, by definition, its jurisprudential legitimacy, were meant to have a limited lifespan. The remedy was designed to serve only as an implement for monitoring and guidance, not as a permanent substitute for state and local school boards, or indeed, for the state legislature. Thus in our zeal to insure maximum educational opportunities for all Delaware school students, the federal courts must bear in mind the responsibility for administering the schools ultimately belongs to locally elected officials. Indeed, we must acknowledge that although it has been proper for us to supervise multiple generations of students in the service of unassailable ideals, in the process we have also denied multiple generations of elected officials the freedom to participate fully in representative government. For 20 years there has been a constant colloquy between federal

\textsuperscript{180} See id. at 757.

\textsuperscript{181} See id. at 759-76.
judges and officers of these political institutions, a score of years in which to achieve desegregation “with all deliberate speed,” as ordered in *Brown II.* 182

Meanwhile, to the west, the Seventh Circuit was wrestling with the litigation begun in 1973 to desegregate Rockford, Illinois. In 1994, the district court determined, based upon an educational achievement gap between white and minority students and the absence of effective integration, that the Rockford school district had engaged in unconstitutional discrimination. 183 In a series of opinions, Judge Posner wrote for the Seventh Circuit expressing increasing frustration at the lack of meaningful efforts by the parties to bring the litigation to a fitting and timely close. In a 1997 opinion, he admonished against using desegregation litigation “to launch the federal courts on ambitious schemes of social engineering” or to make “[c]hildren, the most innocent persons occasionally brushed by draconian decrees, . . . subjects of utopian projects.” 184 In 1998, he noted that “this year six more appeals have been filed, and there is no end in sight;” 185 and he urged the parties and the magistrate judge and special master handling the litigation “to heed the admonition of the Supreme Court . . . to bend every effort to winding up school litigation and returning the operation of the schools to the local authorities.” 186 In 1999, he noted that the school district was “missing the proper route to the speedy termination of this litigation that is [its] rightful goal.” 187 As he further explained:

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182 Id. at 778-80 (internal citations omitted); see also 349 U.S. 294.

183 See *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 532 (7th Cir. 1997).

184 See id. at 534.

185 *People Who Care v. Rockford Bd. of Educ.*, 153 F.3d 834, 835 (7th Cir.1998).

186 Id. (internal citations omitted).

187 *People Who Care v. Rockford Bd. of Educ.*, 171 F.3d 1083, 1085 (7th Cir. 1999).
[C]ompliance does not mean eliminating every disparity between white and minority achievement or performance that might conceivably be attributed to past discrimination. Full compliance so defined would never be achieved. Th[is] school district of a modest-sized city is being required to pay in excess of $20 million a year to fund the decree. That’s more than $120 million between 1996 and 2002. That’s an awful lot of compliance, and it is not purchased cheaply; legal fees in the litigation already exceed $20 million. Expenditures beyond the $120 million figure might be difficult to justify as being needed to pay for programs realistically designed just to remedy the lingering effects of racial and ethnic discrimination now years in the past, which is the only legitimate function of a remedial decree. The logical next step, therefore, is for the board to propose to the magistrate judge, after consultation with the plaintiffs and the master, a modification of the decree that will include an appropriate termination date . . . contingent on the achievement of specific targets demonstrating a reasonable approximation to full compliance by then.188

Finally, in 2001, Judge Posner wrote for the Court in addressing the magistrate judge’s denial of a motion to declare the system unitary and to dissolve the decree as of June 2002. He noted that through the end of 1999 (two years prior to the decision) “Rockford had incurred total costs of $238 million to comply with the 1996 decree,” which consumed “[t]wenty percent of the school district property taxes,” and that the school district had indeed “succeeded in desegregating its schools.”189 These facts, combined with the “length of the litigation,” made for “compelling arguments to end this litigation.”190 According to the Court, the desegregation remedy should end once desegregation had been achieved.

The reality is that until minority students achieve parity of educational achievement with the white students in the Rockford public schools, the plaintiffs will contend that the minority students are victims of the unlawful discrimination of an earlier period in Rockford’s history. Yet it is obvious that other factors besides discrimination contribute to unequal educational attainment, such as poverty, parents’ education and employment, family size, parental attitudes and behavior, prenatal, neonatal, and child health care, peer-group pressures, and ethnic culture. Some of these factors may themselves be due to or exacerbated by

188 Id. at 1091.
189 People Who Care v. Rockford Bd. of Educ., 246 F.3d 1073, 1075 (7th Cir. 2001).
190 Id.
discrimination, but not to discrimination by the Rockford school board. The board has no legal duty to remove those vestiges of discrimination for which it is not responsible. Insofar as the factors that we have mentioned, rather than unlawful conduct by the Rockford school board in years past, are responsible for lags in educational achievement by minority students, the board has no duty that a federal court can enforce to help those students catch up. It may have a moral duty; it has no federal constitutional duty.191

The Seventh Circuit therefore “reversed with instructions to grant the relief requested by the School Board,” warning “[i]t should go without saying that if the school board takes advantage of its new freedom from federal judicial control to discriminate against minority students in violation of federal law, it will expose itself to a new and draconian round of litigation. We trust that $238 million later, it has learned its lesson.”192

The Eleventh Circuit and Fourth Circuit followed similar courses in 2001. In Manning v. School Board of Hillsborough County,193 the Eleventh Circuit reversed a district court’s denial of unitary status with respect to the schools in Hillsborough County, Florida, which were under a consent decree that dated back to 1971 and had been substantially modified in 1991.194 The Eleventh Circuit explained that the magistrate judge, in recommending that unitary status be granted, had “structured her factual findings around the six Green factors, plus a seventh factor, quality of education, which has been used by some courts to evaluate a school district’s unitary status.”195

191 Id. at 1076.
192 Id. at 1078.
193 244 F.3d 927 (11th Cir. 2001).
194 See id. at 929-30.
195 Id. at 934.
The district court in Manning had refused to grant unitary status, disagreeing with the magistrate’s findings on the questions of student assignments and the school district’s good-faith compliance. In reversing, the Eleventh Circuit emphasized that, “[a]s the district judge stated time and time again, a shift in demographics was a substantial or significant cause of the [persisting] racial imbalances, and [the school authorities] did not deliberately cause the racial imbalances.”196 Student assignments therefore offered no basis for retaining supervisory authority. “Where a defendant school board shows that demographic shifts are a substantial cause of the racial imbalances, the defendant has overcome the presumption of de jure segregation. Courts shall not assume that demographic shifts are a result of the past de jure segregation.”197 The district court also erred in finding a lack of good faith compliance based on what it described as “apathy” and failure to establish a majority-to-minority transfer program. As to the former, the district court’s error stemmed from its misconception that “a defendant school district [must] take every conceivable step in attempting to desegregate.”198 As to the latter, because defendants had neither violated any court order nor incurred any sanctions, and had consulted extensively with minority parents in implementing student assignments, the mere absence of a majority-to-minority transfer program did not demonstrate an absence of good faith.199 The Eleventh Circuit therefore remanded the case for entry of “judgment declaring the

196 Id. at 937.
197 Id. at 944.
198 Id. at 945 (internal citation omitted).
199 Id. at 946.
Hillsborough County system unitary[, whereupon] federal judicial supervision . . . shall cease.”\textsuperscript{200}

Later in 2001, the Fourth Circuit, sitting \textit{en banc} in \textit{Belk v. Charlotte-Meckleburg Board of Education},\textsuperscript{201} affirmed a district court’s determination that the Charlotte-Mecklenburg school district — the same system at issue in \textit{Swann} — had attained unitary status. Since 1971, those schools had been operating under a federally supervised desegregation plan, during which time “two generations of students ha[d] passed through [the schools] and . . . not one person ha[d] returned to court alleging that segregative practices ha[d] been continued or revived.”\textsuperscript{202} The Fourth Circuit found firm support for the district court’s determination that each of the \textit{Green} factors had been satisfied, describing “student assignment” as “perhaps the most critical \textit{Green} factor because state-mandated separation of pupils on the basis of race is the essence of the dual system.”\textsuperscript{203} Although data showed that racial imbalance had recently been increasing in certain schools, “[l]ong periods of almost perfect compliance with the court’s racial balance guidelines, coupled with some imbalance in the wake of massive demographic shifts, strongly supports the district court’s finding that present levels of imbalance are in no way connected with the \textit{de jure} segregation once practiced” in Charlotte-Mecklenburg.\textsuperscript{204} The Fourth Circuit then canvassed the remaining factors and concluded that “[a]fter more than three decades of federal court supervision, . . . [t]he dual system has been dismantled and the vestiges of prior discrimination

\begin{itemize}
\item \textsuperscript{200} \textit{Id.} at 947.
\item \textsuperscript{201} 269 F.3d 305 (4th Cir. 2001).
\item \textsuperscript{202} \textit{Id.} at 312.
\item \textsuperscript{203} \textit{Id.} at 319.
\item \textsuperscript{204} \textit{Id.} at 322.
\end{itemize}
have been eliminated to the extent practicable. 205 Thus ended federal courts’ oversight of desegregation in Charlotte-Mecklenburg.

Desegregation Litigation and Unitary Status Today: A Postscript.

The steady trend toward granting unitary status 206 might be mistaken as signaling that the end of desegregation cases is fast drawing nigh. It should not be — for, as explained below, the vast majority of desegregation decrees imposed by federal courts remain frozen in stasis, neither challenged by the parties nor reexamined by the courts. Nevertheless, there can be little doubt that, under the principles propounded by the Supreme Court and now uniformly followed by the courts of appeals, the constitutional charter for federal courts’ supervision of desegregation efforts has long since expired in the vast majority of cases.

Before turning to the status and implications of federal desegregation litigation as it currently exists on the ground, a denouement to the story of Brown I through the present must be added. It is, alas, most unsettling. As clear as Brown’s principle was, and as conscientiously as the Supreme Court struggled to reconcile it against permitting racial balancing to remedy the effects of prior de jure segregation, the Court recently clouded that principle and betrayed its own teachings in casually approving use of race for purposes of admission to public schools, specifically in the context of higher education. In Gratz v. Bollinger 207 and Grutter v.

205 Id. at 335.

206 A separate trend, beyond the scope of this paper but worthy of note and deserving of comment elsewhere, is the simultaneous advance of litigation in state courts, grounded in state constitutional provisions, over students’ affirmative entitlements to integration, equality, and adequacy of public schools. See Quentin A. Palfrey, The State Judiciary’s Role in Fulfilling Brown’s Promise, 8 Mich. J. Race & L. 1 (2002); Al Lindeth, Educational Adequacy Lawsuits: The Rest of the Story (Kennedy School of Gov’t, Harvard Univ. Apr. 2004 Conf., “50 Years After Brown”).

207 539 U.S. 244 (2003).
the Court simultaneously struck down the University of Michigan’s use, in its undergraduate admissions, of a clear-cut, quantitative bonus mechanically allotted to applicants on the basis of race, while upholding the law school’s use of an ill-defined, qualitative bonus individually allotted to applicants on the basis of race. Although the implications of *Grutter* and *Gratz* lie largely beyond the scope of this paper and are ably treated elsewhere, their bitter irony in this context must be noted: in *Grutter*, the Court proved most willing to “defer” to the “expertise of the university” officials whose race-conscious practices it was reviewing, without seriously questioning their aims or probing their chosen methodology. It did so in order to uphold express consideration of race for the sake of an amorphous “diversity” rationale vastly removed from the rigorous efforts to identify and remedy the effects of intentional discrimination that had propelled the Court’s desegregation decisions from *Brown I* onward.

The Court said in *Grutter* that it applies the same “strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” But the deference and complacency that characterize *Grutter* are irreconcilable with *Brown* and its offspring and with the massive federal oversight of schools and administrators that persists to this day. In truth, *Grutter* jettisoned the Court’s traditional strict scrutiny of intentional racial discrimination in favor of an equal protection jurisprudence that depends entirely on what a particular Justice

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209 See John Munich and Andrew W. Broy, The “Grutter-Gratz split doubleheader”: The Use of Student Race in School Admission, Attendance, and Transfer Policies at the K-12 Level (Kennedy School of Gov’t, Harvard Univ. Apr. 2004 Conf., “50 Years After Brown”).

210 *Grutter*, 539 U.S. at 332.

211 *Grutter*, 539 U.S. at 330 (internal quotations and citations omitted) (emphasis added).
deems bad or good.\textsuperscript{212} Indeed, the legislative character of the decision is highlighted by the Court’s sunset provision: “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”\textsuperscript{213} The Court purported to ground its legislative proviso on an increase in the number of minority applicants with high grades and test scores in the “25 years since Justice Powell first approved the use of race”\textsuperscript{214} in \textit{Regents of the University of California v Bakke}.\textsuperscript{215} But that welcome, albeit modest, progress hardly instills confidence, let alone certitude, that the persistent and severe achievement gap we continue to confront will be successfully bridged in the next 25 years. The realities of racially imbalanced schools and continuing federal supervision 50 years after \textit{Brown} should teach that, as societal change ebbs and flows, the remedies that courts fashion today may well fall short of or even frustrate their intended goals.

\textbf{II. PRESENT REALITIES AND IMPLICATIONS OF DESSEGREGATION LITIGATION IN THE FEDERAL COURTS.}

As adverted to earlier, federal desegregation litigation as it exists today is largely governed by phenomena quite apart from the doctrine fashioned by the Supreme Court. It is therefore essential to examine the actual practice of modern desegregation litigation before

\begin{itemize}
\item \textsuperscript{212} One wonders what the Supreme Court would make of the racial classification in \textit{Hampton v. Jefferson County Bd. of Educ.}, 102 F. Supp. 2d 358, 377 (W.D. Ky. 2000), in which a magnet program seeking to achieve racial balance refused to “admit any more black students unless it also attracts an equal number of non-black students. As a result, for the 1999-2000 year as in preceding years, [it] turned away many African-American applicants solely on the basis of their race.” That, of course, was a quota and unconstitutional under \textit{Gratz}. But if the magnet school shifted to an individualized admissions process, under which being African American were viewed as a “minus” factor in order to achieve the desired racially diverse mix, would \textit{Grutter} require a different result? If so, what then of \textit{Brown I} and its progeny?
\item \textsuperscript{213} \textit{Gutter}, 539 U.S. at 342.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} 438 U.S. 265 (1978).
\end{itemize}
offering some observations about its proper role in larger efforts to reshape and reform our public schools.

“Friendly Adversaries”: Why Desegregation Decrees Endure Despite the Elimination of De Jure Segregation.

In the typical litigation, if the parties reach agreement, the case is dismissed. In modern school desegregation litigation, agreement between the parties prevents the case from being dismissed.

Although the total number of school districts that are operating under federal judicial decrees is not known, there are still some 360 school desegregation cases nationwide in which the Department of Justice is a party. That number consistently decreases from year to year, but it does so at a glacial pace; there were approximately 419 such cases in 1998, and the number has decreased by an average of 10 or so per year through 2004.

In a recent study of this phenomenon, Professor Wendy Parker examined federal courts’ written opinions (from 1983 to 1999) and docket sheets (from 1963 to 1999) in desegregation cases spanning a total of 192 different school districts throughout a number of Southern jurisdictions. She found that desegregation cases tend to be marked by “extreme dormancy”; “few defendants request dismissal of their lawsuits,” even after Dowell, Freeman, and Jenkins, and most cases “languished for at least one ten-year period with little substantive activity.”

Specifically, Professor Parker found that only 32 of the 192 school districts (17%) had even

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sought unitary status; only 24 (13%) of the cases had been dismissed; and the number of school districts seeking and obtaining unitary status actually declined after Dowell.217

That there are several hundred school desegregation cases still pending 50 years after Brown I raises the gloomy prospect that like numbers of de jure dual school systems continue to dot the American educational landscape. This alarming statistic, however, need not dampen the celebration of Brown’s golden anniversary, for in the vast majority, if not all, of these cases, the school district “has complied in good faith with the desegregation decree . . ., and . . . the vestiges of past discrimination have been eliminated to the extent practicable.”218 Indeed, the vast majority, if not all, of the school districts involved in these cases have by now been unitary for many years, and are thus continuing to labor under the constraints of an injunctive decree that has fulfilled its remedial purpose. But a desegregation decree has a second purpose, one that is affirmatively frustrated by any court-ordered remedial measure that has outlived the constitutional violation that it was designed to eliminate. As the Supreme Court put it in Jenkins III: The “end purpose [of a desegregation decree] is not only ‘to remedy the violation’ to the extent practicable, but also ‘to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.’ ”219 This important objective is not new. “No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of

217 See id. at 1207.

218 Jenkins III, 515 U.S. at 89 (internal quotation and citation omitted).

219 515 U.S. at 102 (quoting Freeman, 503 U.S. at 489).
community concern and support for public schools and to the quality of the educational process.”

The point of the Supreme Court’s unitariness cases is that the exercise of federal judicial authority is not the natural state of things. Federal judicial power cannot be legitimately invoked in the absence of a federal law violation, and it cannot be legitimately continued after the violation is remedied. And in this context, more is at stake than just the jurisdictional limitations inherent in Article III of the United States Constitution. State and local educational authorities have a constitutional right and a constitutional responsibility to govern themselves; and as the Supreme Court put it in Dowell, the only “legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities.” So every day that an injunctive decree remains on a federal court’s docket after the violation has been remedied, an independent constitutional violation has occurred, no less than the original violation that gave rise to the decree in the first place.

Why, then, do federal courts still retain jurisdiction over hundreds of desegregation cases? The answer is that school boards typically have little incentive and powerful disincentive to seek termination of federal judicial supervision. As a result, the default norm is for desegregation decrees to remain unchallenged and undisturbed.

This inertia is primarily attributable to a kind of litigation Stockholm Syndrome in which, as Justice Powell observed in Milliken II, the school board “join[s] forces” with the plaintiffs in support of desegregation decrees. Of course, as a legal and constitutional matter,

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220 Milliken I, 418 U.S. at 741-42.

221 Dowell, 498 U.S. at 248.

222 Id. at 293-94 (Powell, J., concurring); see also Jenkins III, 515 U.S. at 79 (describing “friendly adversary” relationship between school board and plaintiffs).
the mere agreement of the parties cannot ground a federal court’s jurisdiction under Article III of the Constitution where none in fact exists. Moreover, state and local authorities stand to be supplanted from their rightful roles and the constituents of school districts deprived of their democratic choices wherever a federal court decree lives beyond the scope or duration of its jurisdictional charter, be it unchallenged or otherwise.

The Supreme Court in *Jenkins III*, where the Kansas City school board was itself among the plaintiffs that had initiated the suit, aptly described the all-but-unbreakable cycle of dependence that can develop as federal courts order agreed-upon remedies, simultaneously enabling and requiring school boards to obtain financial assistance sufficient to fund them: “Each additional program ordered by the District Court . . . makes the KCMSD more and more dependent on additional funding from the State; in turn, the greater the KCMSD’s dependence on state funding, the greater its reliance on continued supervision by the District Court.”224 With this guaranteed financial assistance, and the ability to point to a federal district court as the ultimate decisionmaker, comes a lack of accountability, such that, as the district court in Kansas City commented following *Jenkins III*, “District leaders [may attempt] to avoid accountability by hiding under the Court’s oversight.”225

223 *See, e.g., Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (“When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.”).

224 *Jenkins III*, 515 U.S. at 99; *see also* Parker, 94 NW. U. L. REV. at 1212 (“Court orders may provide school districts with additional funding if the state is held responsible for desegregation costs (although this is a rare situation) or a the district may receive federal funds for magnet schools required by a remedial order.”).

225 73 F. Supp. 2d 1079; *see also* Parker, 94 NW. U. L. REV at 1212 (“a school district may appreciate the political cover provided by outstanding remedial measures”).
School districts have additional disincentives, quite apart from commanding funding or obtaining political cover, against seeking relief from desegregation decrees. Litigating a motion for a declaration of unitary status can come at a steep price, in terms of both financial and political costs. A local school board typically needs to retain outside counsel in order to mount an effective challenge and to pay legal expenses associated with developing an extensive factual record necessary to demonstrate that the vestiges of the dual system have been eliminated. Such cases also frequently involve the retention of experts and treating with novel legal questions raised by the plaintiff’s lawyers, who invariably seek to preserve federal judicial control at any and all costs.

The political costs can be no less formidable, as school board members that favor seeking unitary status risk being denounced as racially insensitive, or worse, merely for criticizing remedial measures and/or challenging the basis for ongoing federal control.226 Indeed, in the People Who Care case the magistrate judge pointedly observed that the school board’s questioning of the basis for ongoing supervision did not show the court, “much less the minority community, a good faith commitment to the decree or the principles underlying it.”227 The Seventh Circuit resoundingly rejected any notion that a school board displays bad faith simply by criticizing or challenging a decree: “Are elected officials, the members of the school board, elected long after and not complicit in the illegalities that gave rise to the litigation, forbidden, under threat of never resuming control of the public school system that they were elected to govern, to criticize a decree that in pursuit of an ambitious and possibly quixotic scheme of

226 Cf. Parker, 94 NW. U. L. REV. at 1212 (“the divisiveness of school desegregation issues may make school districts hesitant to seek unitary status”).

social engineering has imposed a formidable tax burden on the people who elected these
officials?” But such charges persist, and a school board that seeks unitary status is certain to
confront them.

In light of the continued financial support and stability associated with existing decrees,
and the obvious downside associated with challenging them, then, the status quo understandably
seems relatively friendly from the perspective of most school districts. Indeed, many of the
recent cases in which unitary status has been sought have been initiated not by a local school
board, but by minority students denied admission to magnet programs on the basis of race;
by students adversely affected by the terms of an ever-changing busing decree; by a state
legislature and state officials weary of the financial demands imposed by a decree; or by a
federal court inquiring, sua sponte, into whether it has jurisdiction to continue its supervision.
Such challenges are, as a practical matter, the exception and not the rule, and desegregation
decrees normally remain unquestioned and undisturbed in the face of school boards’ continuing
acquiescence.

Much as this state of affairs may nicely comport with the limited interests school officials
have in acceding to federal courts’ existing oversight, it is neither contemplated by our

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228 246 F.3d at 1077.

229 See Parker, 94 NW. U. L. REV. at 1213 (“School districts may prefer the known condition
(i.e., the outstanding remedial order) to the unknown outcome of unitary status proceedings,
which could impose new obligations or lead to closer judicial supervision.”).


231 See Charlotte-Mecklenburg, 57 F. Supp. 2d at 240.

232 See Coalition to Save Our Children, 90 F.3d at 758 & n.4.

233 See Jenkins, 73 F. Supp. 2d at 1079-80 & n.5.
Constitution nor consistent with good policy. As the Supreme Court put it in *Freeman*:

“Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.”  

**Racial Imbalance and Achievement Gaps: The Inability of Federal Courts To Fashion the Cure.**

Whatever one’s legal, academic, or pedagogical perspective on *Brown* and desegregation litigation, the troubling reality is that racial integration and racial parity in academic achievement are not among *Brown*’s successes. Virtually every commentator in this area agrees that racial segregation in public schools is worsening, and, similarly, that the pronounced achievement

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234 *Freeman*, 503 U.S. at 490.

235 *See, e.g.*, Gary Orfield and Chungmei Lee, *Brown at 50: King’s Dream or Plessy’s Nightmare?* at 2 (The Civil Rights Project, Harvard Univ. Jan. 2004) (“Orfield Study”) (“Our new work . . shows that U.S. schools are becoming more segregated in all regions for both African American and Latino students. We are celebrating a victory over segregation at a time when schools across the nation are becoming increasingly segregated.”); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461 (2003) (“The simple and tragic reality is that American public education is separate and unequal. Schools are more segregated today than they have been for decades, and segregation is rapidly increasing.”); Molly McUsic, *Brown at Fifty: The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334 (2004) (“[L]egal scholars will be obliged to note that . . . the changes [*Brown*] prompted are everywhere being reversed. . . . As an articulation of principle, *Brown* has succeeded. As a tool of integration, it has failed. American children today attend increasingly segregated schools.”); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55-56 (2003) (“Reports of the 2000 census confirm a disturbing pattern: while America is becoming more racially and ethnically diverse, the nation’s inner cities today are more segregated than they were 50 years ago . . . Efforts to desegregate urban schools in many areas have failed because of the persistence of segregated housing.”).
gap between racial groups is persisting. The precise contours and causes of these sobering realities lie beyond the scope of this paper, and are best treated elsewhere by those who have been struggling with them in all of their daunting complexities. The same is true, for the most part, with respect to policies available to grapple with these realities. What can and must be said here is that Brown and its progeny do not supply the answer, and that federal courts, enforcing the Constitution’s equal protection guaranties, cannot solve these seemingly intractable problems.

This is not to gainsay the progress made as a result of the efforts of federal courts in the 50 years since Brown. Quite the contrary, the pathbreaking principle of Brown I has vanquished the shameful era of de jure segregation. Federal courts labored tirelessly and often courageously to secure and cement that signal achievement. The serious problems that now persist are not legal problems; they are problems of educational, social, and public policy that are neither properly posed to, nor well addressed by, federal courts. And when federal courts try to fix

236 See, e.g., Gratz, 539 U.S. at 300-01 & n.5 (Ginsburg, J., joined by Souter, J., dissenting) (“ ‘Urban public schools are attended primarily by African-American and Hispanic students’; students who attend such schools are disproportionately poor, score poorly on standardized tests, and are far more likely to drop out than students who attend nonurban schools”); Coalition To Save Our Children, 30 F.3d at 778; Chester E. Finn, Leaving No Black Children Behind 8-11 (Kennedy School of Gov’t, Harvard Univ. Apr. 2004 Conf., “50 Years After Brown”) (“In 2004, the main education problem faced by black Americans is not state-enforced racial segregation. It is unacceptably weak academic achievement.”); Dora W. Klein, Beyond Brown v. Board of Education: The Need To Remedy the Achievement Gap, 31 J.L. & EDUC. 431, 437, 456-57 (2002) (“The present racial inequality perhaps most harmful to black students is lower academic achievement than white students. Most desegregation cases decided under Brown, however, are incapable of addressing the disparities that exist between the academic achievement of black and white students. . . . To bring about racial equality, school systems must reduce the disparity in academic achievement between black and white students.”).

237 See, e.g., Ron Haskins, Preschool Programs and the Achievement Gap: The Little Train That Could; Derek Neal, Resources and Racial Skill Gaps; Margaret Raymond and Eric Hanushet, School Accountability and the Black-White Test Score Gap; David Armor, Black Achievement 50 Years After Brown (Kennedy School of Gov’t, Harvard Univ. Apr. 2004 Conf., “50 Years After Brown”).
them, the resulting repairs can be at once ephemeral and costly, as seen in Kansas City, Rockford, and school districts around the country. Federal courts can order the building of planetariums and vivariums, can require the raising of taxes to pay for them. But the courts have found, at great cost, that they cannot fill these facilities, no matter how dazzling, with students from outside the district. The baseball adage, “if you build it, they will come,” has not held true in the interdistrict desegregation era. Nor can courts alter the underlying socioeconomic factors that have confounded educational efforts to close the racial achievement gap.\(^{238}\) If our public school classrooms are to become laboratories for social change, then surely federal judges are not the ones who should be running them, for they are conspicuously unschooled in this particular science, and their experiments are very costly.

That is the lesson foreshadowed by Justice Powell’s concurrence in *Keyes*\(^{239}\) and learned the hard way over the ensuing decades. Where federal courts have attempted to force integration by legal mandate, social forces have flowed around and through those mandates, as white families have departed for the suburbs in lieu of the urban areas in which minorities are concentrated and busing decrees are in force.\(^{240}\) While there are numerous causes for this

\(^{238}\) See, e.g., David Armor, *The End of School Desegregation and the Achievement Gap*, 28 HASTINGS CONST. L.Q. 629, 647 (2001) (“The most likely explanation [of the achievement gap] is the socioeconomic differences between black and white families.”); Belk, 269 F.3d at 331; *Coalition to Save Our Children*, 90 F.3d at 778-79.

\(^{239}\) See *supra* at p. 17-18; see also 413 U.S. at 250-51.

\(^{240}\) See, e.g., *Estes*, 444 U.S. at 450; *Freeman*, 503 U.S. at 495-96; *Riddick*, 784 F.2d at 539-40; *Ross*, 699 F.2d at 226; *Belk*, 269 F.3d at 320-22; *Manning*, 244 F.3d at 936-37; see also Chemerinsky, 81 N.C. L. REV. at 1605.
ongoing phenomenon of “white flight,” the crucial point is that the further and harder the courts reach, the more the desired population eludes them.241

Efforts to remedy the achievement gap seem similarly misguided and ill-fated in this context. A complex of factors is responsible for that gap, with socioeconomic factors playing a dominant role.242 To be sure, vestiges of prior de jure segregation were undoubtedly among the relevant factors, as minority students were designedly relegated to schools with inadequate facilities, resources, and deprived of educational opportunities. That is why educational components designed specifically to address those vestiges have long had their proper place in federal desegregation decrees.243 But, as the Supreme Court has repeatedly instructed, such remedial measures serve only to eliminate the vestiges of the prior de jure segregation, not to close the achievement gap writ large. And, in the vast run of cases, the former goal, the constitutional one, has been thoroughly achieved. Yet the achievement gap stubbornly persists.244

There are those such as Professor Gary Orfield who maintain, and passionately so, that the blame for the educational ills that persist 50 years after Brown is squarely laid at the doorstep of federal courts – not because they have overextended themselves and usurped their authority, but because they have shrunk from their constitutional obligations by not doing more.245 The

241 It therefore is not credible to contend that this demographic pattern of recent decades is owed to prior de jure segregation; if anything, it has been spurred by integration decrees.

242 See supra at p. 61 n.238.

243 See Milliken II, at 287-88.

244 See supra at p. 60 n.236.

245 See Teresa Baldas, Saying Goodbye to Desegregation Plans, 25 NAT’L L.J. at 4 (June 16, 2003) (quoting Professor Gary Orfield as saying, “I blame the courts. Because the courts are responsible for the resegregation of the South”); Orfield Study at 37 (“It is very clear . . . that
federal courts seem a peculiar and undeserving scapegoat for such a critique. Indeed, the 50-year record speaks to the contrary. The very schools in which Professor Orfield now says, in his latest study, that “desegregation is declining rapidly” are ones in which federal decrees had been in place and complied with for preceding decades.\textsuperscript{246} The reality is that the courts could not and did not arrest the underlying societal factors that are now causing any incremental increase in segregation. Far from offering a panacea, those courts were merely serving as artificial counterweights against larger social forces, and Professor Orfield’s solution would thus require the courts to maintain in perpetuity their supervisory role over the districts and the steadily declining enrollment of students able to flee them. Moreover, although Professor Orfield (despite acknowledging forces such as “spreading housing segregation, immigration, differential birth rates, etc.” that have contributed to resegregation\textsuperscript{247}) strongly suggests a causal relationship specifically between the end of federal supervision in various districts and increased segregation of those districts, his very careful and helpful analysis shows corresponding resegregation of schools throughout the country.\textsuperscript{248} Of course, Professor Orfield attributes increased segregation elsewhere to the “three Supreme Court decisions between 1991 and 1995”\textsuperscript{249} yet those decisions had little practical effect, as unitary status has seldom been sought and federal decrees have, in

\textsuperscript{246} Orfield Study, at 37.

\textsuperscript{247} Id.

\textsuperscript{248} Compare Orfield Study, at 35-37, with Orfield Study, at 16-20.

\textsuperscript{249} Orfield Study, at 18.
the main, remained firmly in place.\textsuperscript{250} The reality is that racial imbalance in schools is increasing in districts throughout the country, including those that are still laboring under desegregation decrees and those that have never been under desegregation decrees; and Professor Orfield’s data offer no warrant to trust in the practical ability of federal courts to achieve the goals he would set out for them.

It is telling that criticisms of the federal courts lack of vigor tend to conclude with calls for sweeping and fundamental constitutional changes, such as reversal of the Supreme Court’s decision in \textit{Rodriguez}\textsuperscript{251} denying a constitutional right to “equality in school funding and educational opportunity”;\textsuperscript{252} or forcibly requiring “every child [to] attend public school through high school” and simultaneously abolishing private schools and home schooling;\textsuperscript{253} or altering residential housing patterns;\textsuperscript{254} or initiating lawsuits based on concentrated poverty.\textsuperscript{255} Whatever the wisdom of these proposals, they at least identify and engage fundamental causes of segregation in the public schools. None, however, finds support in the principle of \textit{Brown}.\textsuperscript{256}

Assuming that federal courts must and will eventually cede control over public schools to ordinary democratic processes, the question becomes whether elected officials, communities, and

\textsuperscript{250} See supra at pp. 53-54.


\textsuperscript{252} Chemerinsky, 81 N.C. L. REV. at 1620.

\textsuperscript{253} Chemerinsky, 52 AM. U. L. REV. at 1472.

\textsuperscript{254} See \textit{Ware}, 9 WIDENER L. SYMP. J. 55-56.

\textsuperscript{255} See Patrick McQuillan and Kerry Englert, 28 HASTINGS CONST. L.Q. 739 at 757-61 (2001).

\textsuperscript{256} Some may find support in state constitutional provisions, however. See supra at pp. 49-50 n.206.
school administrators, will be adequate to the task at hand. That question has yet to be answered, but there is cause for cautious optimism. Certainly, the premises of our Republic and the Constitution under which it was founded are that democratic processes are essential to sound decisionmaking and good governance; that large questions of public policy are properly left to legislatures rather than courts, and that issues pertaining to education and schools are quintessentially reserved for the states and localities that are closest and most attuned to them. The last of these was of course necessarily suspended in the face of constitutional violations and their ensuing redress. But it was not jettisoned for all time and all purposes, and there is cause for hope that restoration of control to state and local authorities, when and as it finally arrives, will bring more action rather than less. Once judicial shackles are withdrawn, the political muscles that have atrophied will heal and flex, and may well prove resurgent. And the course followed by school districts will again be left to their communities and constituents. If that is the wrong approach, then its error far transcends any of Brown’s progeny, for it stems from the very Constitution under which Brown was decided.

257 Criticisms directed at federal courts for their lack of supervision seem, in large part, predicated upon the cynical belief that the answer is no. See Chemerinsky, 81 N.C.L. Rev. at 1600 (“Desegregation will not occur without judicial action; desegregation lacks sufficient national and local political support for elected officials to remedy the problem.”); Chemerisky, 52 Am. U. L. Rev. at 1472 (There is no “political . . . will to deal with the growing segregation and inequalities in American schools. No political candidate is addressing the issue.”).

258 Indeed, those who would rely upon the institutional competence of courts to operate as moral leaders that shape social policy typically deem it courts’ role to announce broad principles, such as that of Brown I; they most assuredly do not deem it within the competence of courts to supervise and structure the intricacies of human relations and day-to-day operations, as courts do in desegregation cases. Cf. Ronald Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve, 65 Fordham L. Rev. 1249, 1267 (1997) (“judges acquit their duty to keep faith with the Constitution by reaching the result in the case before them that, in their considered opinion, follows from the best interpretation of an abstract principle of constitutional morality”).