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Cover Page Footnote

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LEARNING TOGETHER: JUSTICE MARSHALL'S DESEGREGATION OPINIONS

*MARIA L. MARCUS**

In this Article, Professor Marcus examines the influence of Justice Thurgood Marshall on the Supreme Court's current school desegregation agenda. Justice Marshall was part of the majority in desegregation cases during his earlier years on the high Court; subsequently, however, his role became one of dissenter. Professor Marcus analyzes the divisive issues facing the Court in desegregation litigation, Marshall's positions on such issues, and his legacy to the Court in this area. Finally, the Article assesses the vitality of this legacy in light of two Supreme Court decisions issued after Justice Marshall's retirement.

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INTRODUCTION

Our Nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.

*Justice Thurgood Marshall****

At some time, we must acknowledge that it has become absurd to assume . . . that violations of the Constitution dating from the days when Lyndon Johnson was President . . . continue to have an appreciable effect on current operation of schools. We are close to that time.

*Justice Antonin Scalia*****

As the advocate in *Brown v. Board of Education*,[1] Thurgood Marshall's unsentimental probing exposed the rationalizations supporting racial segregation.[2] His appointment to the high Court reflected the

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** Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

*** Freeman v. Pitts, 112 S. Ct. 1430, 1453 (1992) (Scalia, J., concurring).

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

2. *Brown*'s impact was cumulative. Judge Constance Baker Motley of the United States District Court for the Southern District of New York observes: "In the decade which followed the *Brown I* decision . . . the Supreme Court struck down racial segregation in all other areas of . . . public life . . . . Even the high [C]ourt seemed to realize that desegregated schools could not coexist with segregated . . . lunch counters." Constance Baker Motley, Remarks at *Brown v. Board of Education* and Its Legacy: A Tribute to Justice Thurgood Marshall 20 (Mar. 24, 1992) (transcript on file with the *Fordham Law Review*) (article based on speech included in this issue of the *Fordham Law Review*). Judge Louis H. Pollak, United States District Court Judge for the Eastern District of Pennsylvania, discussing the impact of *Brown* on cases involving voting, criminal proce-

public consensus that emerged from *Brown*'s optimistic espousal of minority rights. However, once appointed Marshall was one Justice out of nine, with intimate access to colleagues who by no means shared all his values.

Despite his expertise in desegregation matters, he authored very few opinions on the subject. Marshall did not have the option of assigning himself majority opinions that he deemed important. Majority decisions are given out by the Chief Justice, or by the senior Associate Justice of the majority block when the Chief Justice dissents.[3] Assignment considerations include the importance of the case,[4] the ability to win over possible defectors,[5] and "the public relations aspect of a decision expected to be unpopular."[6] Politically-motivated assignments are given to the Justice closest to the constituency that may be offended. For example, Marshall became the Court's representative in a decision proclaiming that Title VII of the Civil Rights Act of 1964 prohibits discrimination against Whites in the workplace "to the same extent it prohibits racial discrimination against [B]lacks."[7]

Marshall's sole avenue of expression in desegregation cases was to write dissents and concurrences. Part I of this Article presents a brief overview of his initial participation in the mainstream and subsequent dissents. Part II analyzes the issues that particularly challenged Marshall: the injured and the uninvolved innocent; integration or equalized separation; causation and demography. In Part III, his influence is traced through developments after his retirement. This Article

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dure, gender discrimination, freedom of speech, and international law, concludes: "*Brown*, in short, . . . was a decision whose limits we do not yet know." Louis H. Pollak, Remarks at *Brown v. Board of Education* and Its Legacy: A Tribute to Justice Thurgood Marshall 47 (Mar. 24, 1992) (transcript on file with the *Fordham Law Review*) (article based on speech included in this issue of the *Fordham Law Review*).

3. *See* Joseph F. Menez, Decision Making in the Supreme Court of the United States 61-62 (1984); Harold J. Spaeth, *Distributive Justice: Majority Opinion Assignments in the Burger Court*, *in* Studies in U.S. Supreme Court Behavior 80, 81 (Harold J. Spaeth & Saul Brenner eds., 1990).

4. "[T]he Chief Justice is expected to write [a landmark decision] and thus throw the weight of the Court behind it." Menez, *supra* note 3, at 61. *See also* Charles M. Lamb, *Chief Justice Warren E. Burger: A Conservative Chief for Conservative Times*, *in* The Burger Court: Political and Judicial Profiles 129, 148-49 (Charles M. Lamb & Stephen C. Halpern eds., 1991) (hypothesizing that Chief Justice Burger assigned himself the opinion in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), to assert his leadership, and explaining that he self-assigned Milliken v. Bradley, 418 U.S. 717 (1974), because of his reservations about busing).

5. *See* Menez, *supra* note 3, at 65 (discussing the strategy for assigning opinions); Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court—A Judicial Biography 704 (1983) (stating that Chief Justice Warren assigned Brennan the majority opinion in Green v. County Sch. Bd., 391 U.S. 430 (1968), in hopes of winning Black's vote and achieving a unanimous decision); Spaeth, *supra* note 3, at 81-82 (emphasizing that the author of a majority opinion must satisfy the views of at least four other Justices).

6. Spaeth, *supra* note 3, at 81.

7. Menez, *supra* note 3, at 63 (referring to McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)).

presumptuously offers a dissent that he might have written in one of these cases had he remained on the Court.

I. FROM MAINSTREAM TO DISSENT: AN OVERVIEW

A. *Marshall in the Majority*

In the thirteen years between Thurgood Marshall's successful advocacy in *Brown I* and his appointment as a Justice of the Supreme Court in 1967, the Warren Court's "all deliberate speed" formula for desegregation began to falter.[8] Local school officials, whose "good faith" conversion to non-discriminatory policies had been invoked by *Brown v. Board of Education*,[9] predictably stalled instead of speeding.[10] Nor did the local judges who were supervising the process accelerate the pace. As one Mississippi attorney put it, "We couldn't ask for anything better than to have our local, native Mississippi federal district judges [reviewing the desegregation problem] . . . . Our . . . judges know the local situation and it may be 100 years before it's feasible."[11]

In 1968, in an opinion joined by Justice Marshall, Justice Brennan signalled that the Court would grant no further adjournments. *Green v. County School Board*[12] required that the board "come forward with a plan that promises realistically to work, and promises realistically to work *now*."[13] *Green* involved the school system of New Kent, a rural Virginia county with no residential segregation and only two schools—one all-White, and the other all-Negro.[14] After a desegregation suit was

8. This formula, introduced in Brown v. Board of Education, 349 U.S. 294, 301 (1955) (*Brown II*), was found wanting in Griffin v. County School Board, 377 U.S. 218, 234 (1964). *Griffin* acknowledged that "[t]here has been entirely too much deliberation and not enough speed." *Id.* at 229. "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these . . . children their constitutional rights to an education equal to that afforded by the public schools . . . ." *Id.* at 234.

9. 349 U.S. 294 (1955) (*Brown II*). *Brown II* initially confided to school boards the task of devising procedures for admitting Blacks to formerly White schools on a non-discriminatory basis. *See id.* at 299. Local courts were to "consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." *Id.*

10. *See, e.g.*, J. Harvie Wilkinson, From *Brown* to *Bakke*: The Supreme Court and School Integration: 1954-1978, at 78-79 (1979). Discussing southern resistance to desegregation and the Supreme Court's failure to grapple with it in the 1950s and early 1960s, Wilkinson states:

> [T]he Court ducked a leading role by refusing even to review most rulings of the lower federal courts. The Court spoke mainly when it absolutely had to: at the point of crisis when obstruction was so apparent, delay so prolonged, or violation of constitutional principle so manifest that quiet was no longer feasible.

Id. at 79.

11. Reed Sarratt, The Ordeal of Desegregation 200 (1966). *But see* Wilkinson, *supra* note 10, at 75, 77 (discussing the advantages of the "all deliberate speed formula" as an alternative to massive resistance, as well as the errors made in implementing and monitoring the formula).

12. 391 U.S. 430 (1968).

13. *Id.* at 439.

14. *See id.* at 432. Twenty-one school buses travelled overlapping routes to transport

filed on behalf of Black students, the board's concern about remaining eligible for federal financial aid led to adoption of a "freedom of choice" plan that permitted pupils to choose annually between the two schools.[15] In rejecting the plan as ineffectual, the Court emphasized that the board, not the children and their parents, had the burden of dismantling the de jure dual system[16] and that geographic zoning could "readily" accomplish this goal.[17]

Justice Marshall was also in accord with two significant follow-up opinions, *Alexander v. Holmes County Board of Education*,[18] and *Swann v. Charlotte-Mecklenburg Board of Education*.[19] *Alexander* held per curiam that the "all deliberate speed" standard was no longer constitutionally permissible, substituting instead "at once," "now," and "immediately" as the operative terms.[20] *Swann*, written on behalf of a unanimous Court by Chief Justice Burger, disclaimed any requirement that desegregated schools "must always reflect the racial composition of the . . . system as a whole."[21] Nevertheless, "when local authority defaults,"[22] the courts may then mandate remedies that are "administratively awkward, inconvenient, and even bizarre, in some situations"[23] in

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pupils to these segregated enclaves. *See id.* Racial segregation was initially mandated under Virginia's constitutional and statutory provisions which were struck down by the Supreme Court in *Davis v. County School Board*, 347 U.S. 483, 487 n.1 (1954), a companion case to *Brown I*. The State's enactment of further segregation statutes after *Brown* is described in *Green*, 391 U.S. at 432.

15. *Green*, 391 U.S. at 433-34. The plan established that "every student, regardless of race, may 'freely' choose the school he will attend." *Id.* at 437. Those students who made no choice were assigned to the school previously attended. *See id.* at 434. After three years, however, no White students switched schools, and only 15% of the Negro students did; thus, "[t]he school system [remained] a dual system." *Id.* at 441.

16. *See id.* at 441-42.

17. *See id.* at 442 n.6. The Supreme Court vacated the decision below insofar as it affirmed the district court's acceptance of the "freedom of choice" plan under the facts in the case. *See id.* at 442.

18. 396 U.S. 19 (1969) (per curiam).

19. 402 U.S. 1 (1971).

20. *Alexander*, 396 U.S. at 20. In a per curiam opinion, the Court vacated the lower court decision and remanded with instructions that jurisdiction be retained "to insure prompt and faithful compliance." *Id.* at 20-21.

21. *Swann*, 402 U.S. at 24.

22. *Id.* at 16.

23. *Id.* at 28. The Charlotte-Mecklenburg school system encompassed 550 square miles and served more than 84,000 students in 107 schools. *See id.* at 6. In June of 1969, approximately 14,000 of 21,000 Negro students in the City of Charlotte attended 21 schools that were more than 99% Negro. *See id.* at 7.

The Court found that the school board's actions had caused this segregated education. *See id.* Moreover, the "assignment of children to the school nearest their home . . . would not produce an effective dismantling of the dual [school] system." *Id.* at 30.

Describing the nature of bus transportation as "an integral part of the public education system for years," *id.* at 29, the Court approved a plan that called for students to be transported from the schools nearest their homes to the schools they would attend. In total, "[t]he trips for elementary school pupils average about seven miles and . . . would take 'not over 35 minutes at the most.' " *Id.* at 30 (quoting the district court's findings).

order to eliminate "all vestiges of state-imposed segregation."[24]

As a circuit justice, Marshall cited *Alexander* in his sardonic denial of a stay application by the Jefferson Parish School Board:[25]

> The schools involved have been mired in litigation for seven years. Whatever progress toward desegregation has been made apparently, and unfortunately, derives only from judicial action initiated by those persons situated as perpetual plaintiffs below. The rights of children to equal educational opportunities are not to be denied, even for a brief time, simply because a school board situates itself so as to make desegregation difficult.[26]

B. *Marshall as Dissenter: Four Opinions*

In a memorandum drafted while he was a law clerk to Supreme Court Justice Robert Jackson, William Rehnquist said:

> To the argument made by Thurgood not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.[27]

This statement is remarkable for its literal truth; for the consciousness of power that underlies it; for the fortuity of comparing a man who would later be a Supreme Court Justice with a predecessor of the same name. It also poses starkly the dilemma and frustration of the dissenter whose constitutional interpretations are becoming less influential.

1. *Milliken* and Geography (1974)

Prior to 1974, Marshall approved the Court's direction, although he was not always in accord with each member's approach to unravelling

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24. *Id.* at 15.

25. *See* Jefferson Parish Sch. Bd. v. Dandridge, 404 U.S. 1219, 1220 (1971). The United States District Court for the Eastern District of Louisiana had ordered the board to implement a desegregation plan. Justice Marshall recognized that implementation would lead to "difficulties normally incident to the transition from a dual to a unitary school system," *id.* at 1219, but denied a stay.

26. *Id.* at 1220.

27. Mark V. Tushnet, with Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 Colum. L. Rev. 1867, 1910 (1991) (discussing the testimony of the Hon. William H. Rehnquist during hearings before the Senate Judiciary Committee on Rehnquist's nomination as Chief Justice of the United States Supreme Court). The memorandum, written while the Supreme Court Justices were engaged in their *Brown* deliberations, was entitled "*A Random Thought on the Segregation Cases.*" Rehnquist later explained that this memorandum was written at Justice Jackson's request as a rough draft of Jackson's views. *See* 2 Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality 767-68 n.* (1975). *See also* Tushnet, with Lezin, *supra*, at 1878-80 (discussing the extent to which the memorandum reflected Jackson's opinions). Professor Tushnet concludes that "[h]owever humane and libertarian he was, Jackson was deeply ambivalent about the question of race." *Id.* at 1880.

the administrative tangles of desegregation.[28] However, his disagreement with the majority's rejection of an inter-district remedy in *Milliken v. Bradley*[29] became the first of several comprehensive dissents in school cases.

Chief Justice Burger's opinion for the *Milliken* majority[30] moved the Court away from *Swann*'s emphasis on correcting historical and institutional injustice, and instead parsed the actions of particular wrongdoers who had injured particular victims. Burger reasoned that federal courts should not solve a Detroit segregation problem by imposing an area-wide remedy which included suburban school districts that had not engaged in segregative acts.[31] Since intentional discrimination against Negro students had occurred only within the Detroit school system, the remedy must be confined to that system.[32]

The majority chided the courts below for shifting their focus to the metropolitan area "only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable"[33]—a balancing act that was not required under the Constitution.[34] Moreover, school district lines could not be "casually ignored," in view of the deeply rooted tradition of local control over the operation of public schools.[35]

Justice Marshall, representing a panel of four dissenters,[36] bitterly denounced the Court's "giant step backwards."[37] His opinion, which will

28. *See generally* Carter v. West Feliciana Parish Sch. Bd., 396 U.S. 290 (1970) (per curiam) (reversing lower court judgments that permitted delays in implementing desegregation). A concurring opinion by Justice Harlan, joined by Justice White, concluded that "the time from the finding of noncompliance with the requirements of the *Green* case to the time of the actual operative effect of the relief [should not exceed] approximately eight weeks." *Id.* at 293.

Justice Marshall joined Justices Black, Douglas, and Brennan in a statement noting their disagreement with this concurring opinion, and emphasizing that "those views retreat from our holding in *Alexander v. Holmes County Board of Education* . . . that 'the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.' " *Id.* (citation omitted).

29. 418 U.S. 717 (1974) (*Milliken I*).

30. The Chief Justice was joined by Justices Stewart, Blackmun, Powell, and Rehnquist. *See id.*

31. *See id.* at 744-45.

32. *See id.* at 745.

33. *Id.* at 739-40.

34. See discussion of *Swann*, *supra* notes 21-24 and accompanying text.

35. *See* Milliken v. Bradley, 418 U.S. 717, 741 (1974) (*Milliken I*).

36. Justices Douglas, Brennan, and White joined Marshall's opinion. Justice Douglas also filed a separate dissent, pointing out: "Education in Michigan is a state project with very little completely local control . . . . [T]he school districts by state law are agencies of the State." *Id.* at 758-59 (Douglas, J., dissenting). Yet another dissent issued by Justice White and joined by Justices Douglas, Brennan, and Marshall concluded that "until now the Court has not accepted the proposition that effective enforcement of the Fourteenth Amendment could be limited by political or administrative boundary lines demarcated by the very State responsible for the constitutional violation and for the disestablishment of the dual system." *Id.* at 776 (White, J., dissenting).

37. *Id.* at 782 (Marshall, J., dissenting).

be more fully explored in Part II of this Article, unfurled a critique of the majority's methodology and assumptions. It was not just the Detroit Board of Education's purposeful use of attendance lines, school construction, feeder patterns and busing that had confined Black children to "an expanding core of virtually all-Negro schools immediately surrounded by a receding band of all-white schools."[38] It was also the State of Michigan that had contributed to this pattern by passing legislation prohibiting implementation of a 1970 desegregation plan proposed by the Detroit School Board; refusing transportation aid for Detroit pupils while supplying it for other areas, necessitating the construction of small walk-in schools in Detroit's segregated neighborhoods; and finally permitting transportation funds to be allocated for intra-city travel, but not if such travel involved cross-busing to end racial segregation.[39]

Nor was Detroit's school district line a sacrosanct product of local control over education. Marshall pointed out that unlike other states, Michigan operated a single state-wide system of education with suburban and city school districts as auxiliaries that had little or no relation to local political units.[40] The State retained full authority to consolidate and merge school districts without the consent of such districts or their citizens.[41] Thus, the state government was neither innocent of the wrongdoing nor powerless to end it.[42]

2. *Spangler* and Demography (1976)

The next occasion for a dissenting opinion by Justice Marshall concerned federal authority to prevent resegregation in a district that was undergoing population changes. In *Pasadena City Board of Education v. Spangler*,[43] school officials requested deletion of a district court requirement that no Pasadena public schools should have " 'a majority of any

38. *Id.* at 785.

39. *See id.* at 791. The record also indicated that during the 1950s, Black high school students from outside Detroit were bused past a closer suburban White school to a more distant Negro school in Detroit, and that the State Board of Education knew about this arrangement. *See id.* at 792.

40. *See id.* at 793-94.

41. *See id.* at 796. Marshall pointed out that the State controlled the financing of education via statewide taxation and power over equalized property valuations. Furthermore, the State approved bus routes, equipment, and drivers, determined part of the required curriculum, and established procedures for student discipline. *See id.* at 794-96.

42. At least two methods were available to end the segregation. The State had the power to consolidate districts; over 1000 consolidations had already taken place. *See id.* at 811. Short of consolidation, the State could authorize inter-district contracting for education services; public funds could be used to pay one district to educate another district's residents. *See id.* at 811-12. As to the feasibility of busing, *see infra* notes 100-01 and accompanying text.

43. 427 U.S. 424 (1976). In January, 1970, the district court concluded that the Pasadena Board of Education's policies were segregative. Rather than appeal, the board submitted a desegregation plan. In March, 1970 the district court approved the "Pasadena Plan," but in 1974, the board sought relief from the 1970 order. *See id.* at 427-35.

minority students.' "[44] Rehnquist, who was joined by five other Justices, granted this restriction on the lower court's power. The majority found that although changing residential patterns had caused Black enrollment to exceed fifty percent at some schools, these demographic shifts were not the result of "segregative actions" on the petitioners' part.[45]

The dissent made no claim that redrawing of attendance lines could be required in perpetuity.[46] However, present circumstances signalled a need for vigilance. Several members of the Pasadena Board of Education had consistently opposed the court-approved desegregation plan[47] and the board had presented an alternative plan that would probably have resulted in "rapid resegregation."[48] Thus, the dangers that formed the basis for the original finding of unconstitutional conduct had not diminished enough to justify a change in the level of judicial supervision.[49]

3. *Crawford* and Ballots (1982)

Judicial authority to alleviate segregation was again at issue in *Crawford v. Board of Education*,[50] but with a special twist. The voters of California had ratified an amendment (Proposition I) to the state constitution[51] that precluded state courts from ordering mandatory pupil assignment or transportation unless a violation of the United States Constitution had occurred.[52] Justice Powell's majority opinion noted that repeal of an existing state anti-discrimination measure does not in itself

44. *Id.* at 428 (quoting Spangler v. Pasadena Bd. of Educ., 311 F. Supp. 501, 505 (C.D. Cal. 1970)).

45. *See id.* at 435-36.

46. *See id.* at 444 n.1.

47. *See id.* at 442.

48. *Id.* at 442 (quoting with approval the view of a member of the panel of the Court of Appeals for the Ninth Circuit below, in Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430, 435 (9th Cir. 1975)).

49. *See id.* at 442-43. The Court did not reach the question of whether a total withdrawal of federal supervision would be appropriate. *But see infra* Parts II.C. and III.A.

50. 458 U.S. 527 (1982). In 1978, a California trial court ordered desegregation through pupil reassignment and transportation. *See id.* at 531. In 1979, California amended its constitution (Proposition I) to prohibit state courts from ordering student reassignment and busing without a finding of de jure segregation in violation of the United States Constitution. The school district challenged the prior desegregation order; the trial court held that Proposition I did not apply because it had found de jure segregation in 1970.

Justice Rehnquist, as circuit justice, denied a stay because "a stay granted less than a week before the scheduled opening of school . . . would not be a proper exercise of my function as a circuit justice, even though were I voting on the merits of a petition for certiorari challenging the plan I would, as presently advised, feel differently." Board of Educ. v. Superior Court, 448 U.S. 1343, 1349 (1980). The school district appealed the trial court's decision; the California Court of Appeals reversed; and the California Supreme Court denied a hearing.

51. The amendment was a proviso to article I, section 7(a) of the California Constitution. The constitution had previously been interpreted as mandating the elimination of segregation regardless of its cause. *See* discussion *infra* note 61.

52. Proposition I did not prohibit voluntary action by school boards to implement "integration." *See* Cal. Const. art. I, § 7(a).

violate the Fourteenth Amendment—the people can give, and the people can rescind.[53]

While acknowledging that "court-ordered busing in *excess* of that required by the Fourteenth Amendment, as one means of desegregating schools, prompted the initiation and probably the adoption of Proposition I,"[54] the majority accepted the California Court of Appeals conclusion that the voters "were not motivated by a discriminatory purpose."[55] A desire for the educational benefits of neighborhood schools is racially neutral.[56]

Justice Marshall's dissent, which was not joined by any of his colleagues, found the case indistinguishable from a companion decision, *Washington v. Seattle School District No. 1*.[57] In *Seattle*, a voter initiative had precluded school boards from ordering mandatory school assignments except to remedy de jure segregation. This initiative had unconstitutionally differentiated between those seeking to eradicate de facto segregation and others seeking non-racial educational goals (e.g., we want more gym equipment); only the former had to appeal to more remote entities like the state legislature rather than to local school boards.[58] Marshall noted that California's Proposition I similarly removed an avenue for obtaining compliance[59] with the state constitution's guarantee that racial isolation will be alleviated by all reasonable means.[60] That avenue—the judiciary—is "the only branch of government that has been willing to address this issue meaningfully."[61]

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53. *See Crawford*, 458 U.S. at 538-39.

54. *Id.* at 538 n.18.

55. *Id.* at 545.

56. *See id.* at 543. Justice Brennan, rather than join the dissent, signed on to a concurrence by Justice Blackmun that strenuously sought to distinguish the case at bar from a companion decision, Washington v. Seattle School District No. 1, 458 U.S. 457 (1982). *Seattle* struck down a voter initiative in the State of Washington that prevented school boards from ordering mandatory school assignments without a finding of de jure segregation. This initiative was unconstitutional, the concurrence concluded, because it effected a structural change in the political process, thereby " ' "mak[ing] it *more* difficult for certain racial . . . minorities [than for other members of the community] to achieve legislation that is in their interest." ' " *Crawford*, 458 U.S. at 546 (Blackmun, J., concurring) (second alteration in original) (quoting *Seattle*, 458 U.S. at 470; in turn quoting Hunter v. Erickson, 393 U.S. 385, 395 (1969) (Harlan, J., concurring)). In *Crawford*, however, "those political mechanisms that create and repeal the rights ultimately enforced by the courts were left entirely unaffected." *Id.* at 547.

57. 458 U.S. 457 (1982). *See supra* note 56.

58. *See Crawford*, 458 U.S. at 553 (Marshall, J., dissenting) (describing *Seattle*).

59. *See id.* at 555. Prior to the passage of Proposition I, the minority community could ask the school board to eliminate racial segregation, and if that failed, could petition the state courts "to require school officials to live up to their obligations." *Id.*

60. *See id.* at 549.

61. *Id.* at 561. The application of the state constitution's equal protection and due process clauses to de facto segregation had been established by a unanimous California Supreme Court decision, Jackson v. Pasadena City School District, 382 P.2d 878, 881-82 (1963). Even though the source of judicial power to prevent unconstitutional conduct may be "the people," this power cannot be granted on a discriminatory basis. *See Crawford*, 458 U.S. at 558 (Marshall, J., dissenting). The dissent pointed out the repeated

4. *Dowell* and Disengagement (1991)

Marshall recognized that the Court's jurisprudence had vacillated for more than a decade between demanding "root and branch" elimination of segregation[62] and denouncing "judicial tutelage for the indefinite future."[63] His last school-case dissent, in *Board of Education of Oklahoma City v. Dowell*,[64] offered a blueprint for deciding when a desegregation decree should be terminated.

The majority opinion, written by Chief Justice Rehnquist, held that such a decree, unlike injunctions in other contexts, should be dissolved when the purpose of the litigation has been achieved.[65] To say that this purpose is the establishment of a "unitary" school district[66] does not

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attempts prior to Proposition I to stop California courts and school boards from enforcing the state constitution's demand that de facto segregation be combatted by all feasible means. The question of whether Proposition I was motivated by discriminatory intent should have been decided after an inquiry, rather than mere conclusory statements by the lower courts. *See id.* at 561-62.

62. *See* Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968). Other decisions also expressing this view, which Justice Marshall joined, were issued in the late 1970s and early 1980s. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 (1982); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459-60 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979).

63. Board of Educ. v. Dowell, 111 S. Ct. 630, 638 (1991). *Dowell* was presaged by Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), discussed *supra* at Part I.B.2, although the *Spangler* majority did not reach the question of whether a total withdrawal of federal supervision was warranted by the facts. The circuit court on remand, however, noted "the Board's present compliance and its representations that it would continue to engage in affirmative action . . . in support of integration" and ordered termination of judicial control. Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1241-42 (9th Cir. 1979).

64. 111 S. Ct. 630 (1991).

65. *See id.* at 636-37. The Court found that the Tenth Circuit's test for dissolving a desegregation decree, evolved from restraint of trade cases, was too stringent. That test would continue an injunction unless there was a showing of " 'grievous wrong evoked by new and unforeseen conditions.' " *Id.* (quoting United States v. Swift & Co., 286 U.S. 106, 119 (1932), *overruled by* Board of Educ. v. Dowell, 111 S. Ct. 630 (1991)). In desegregation cases, local control over education (which permits innovation) requires a more flexible standard. The *Dowell* majority remanded the case to the district court to determine whether the vestiges of past intentional discrimination had been eliminated to the extent practicable. *See id.* at 638.

66. Courts have used the word "dual" to mean a school system that intentionally segregates students by race and "unitary" to signify a school system "which has been brought into compliance with . . . the Constitution." *Id.* at 636.

In 1977, the district court concluded that the school board was in "substantial compliance" with constitutional requirements. It held further that "the board is entitled to pursue . . . its legitimate policies without the . . . supervision of this court." *Id.* at 633-34.

In 1985, on motion, the district court made a finding that the school system was integrated and nondiscriminatory, and refused to reopen the case. The court of appeals reversed, holding that although the district court had ceased active supervision of the case, "the school district was still subject to the desegregation decree." *Id.* at 634. Therefore, the respondents could challenge the school board's actions. *See id.*

On remand, the district court vacated the previous injunction, finding that present residential segregation arose from private decisionmaking and economics, and not from school board policy. *See id.* at 634-35. The court of appeals again reversed. It held that "the Board had the ' "affirmative duty . . . not to take any action that would impede the

yield the "precise" statement of duties that a school board needs.[67] The decree can be lifted when local authorities have obeyed it for a reasonable period of time.[68] The majority remanded the case to the district court with instructions to review the school board's performance in every category of school operations,[69] but added no precision as to how complete and effective the compliance in these categories must be.[70]

The dissent, which urged restoration of the injunction, highlighted theories that will be examined more fully in Part II of this Article. Marshall formulated the questions that should be considered before federal withdrawal from a school case, and politely told the majority how these questions should have been answered. Is the school district committed to the establishment of an integrated system? (No, because the board at first exploited residential segregation to enforce school segregation,[71] and later used student reassignments to undercut a court-ordered desegregation plan).[72] Will the approach favored by the board foster lasting integration which, in turn, could produce quality education? (No, mostly-White and mostly-Black schools have re-emerged, and this shift will generally be accompanied by the assignment of fewer resources and worse teachers to Black children).[73]

Marshall also emphasized feasibility. Has the board justified its failure to use an available and more effective desegregation plan? (No, the board's past actions have increased racial isolation in schools and perhaps also in residential patterns, and therefore all reasonable measures must be taken to give "make whole" relief).[74] Are the educational bene-

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process of disestablishing the dual system and its effects." ' " *Id.* at 635 (quoting Dowell v. Board of Educ., 890 F.2d 1483, 1504 (10th Cir. 1989); in turn quoting Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979)).

67. *See id.* at 636.

68. *See id.* at 637.

69. *See id.* at 638.

70. A school board's profession that discrimination will cease would be insufficient, but good faith, as evidenced by conduct, is relevant. *See id.* at 637.

71. *See id.* at 639-40 (Marshall, J., dissenting). The dissent, joined by Justices Blackmun and Stevens, noted that racially-restrictive covenants buttressed by state and local law created a segregated residential pattern in Oklahoma City, and that the school board located all-Negro schools in the largest segregated area. *See id.*

72. *See id.* at 640. The board had displayed " 'unpardonable recalcitrance.' " *Id.* (quoting from the district court opinion, 338 F. Supp. 1256, 1271 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972), ordering implementation of a desegregation plan evolved by plaintiffs' expert (the "Finger Plan")). The board had not offered any effective plan of its own, arguing that "public opinion [was] opposed to any further desegregation." *Id.* (alteration in original). After the board had complied with the Finger Plan for five years, the district court ceased its active supervision of the case but did not dissolve the desegregation injunction. *See id.* at 640-41. In 1985, the board superimposed a new assignment policy that caused racial imbalance to resurface. As a result, the majority of the elementary schools had student bodies greater than 90% Black or 90% White and certain other minorities. *See id.* at 641.

73. *See id.* at 642-43 & n.5; *see also infra* notes 131-32 and accompanying text (noting that Black schools receive inferior resources).

74. *See* Board of Educ. v. Dowell, 111 S. Ct. 630, 645-46 & n.8. (1991). The reciprocity between school and housing segregation is discussed *infra* at notes 91-92 and

fits flowing from continuation of an injunction outclassed by the benefits of local control over education? (No, retaining a decree that does not entail a return to active supervision is a light burden when compared to the stigmatizing effect of segregated schooling).[75]

II. DEFINING THE INJURY, CRAFTING THE REMEDY, AND DECLARING VICTORY: JUSTICE MARSHALL'S QUARREL WITH THE MAJORITY

As the Supreme Court developed narrower concepts of harm and causation to support federal withdrawal from desegregation conflicts, Justice Marshall honed his counter-arguments. Puncturing perceived inconsistencies, and prominently displaying evidence that his colleagues failed to mention, he predicted that allowing racial isolation in public schools would have broader consequences that the people "will ultimately regret."[76]

A. *Who's Hurt, and Who's Innocent?*

Conceptions of injury and innocence in *Milliken v. Bradley*[77] presented embarrassing features for both the majority and the dissent. For the majority, the difficulty was the admitted injury left unredressed. The Court's self-described mandate was to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[78] Yet, after assuming arguendo that several state agencies participated in the maintenance of Detroit's segregation,[79] Chief Justice Burger left Black children in a school system characterized by increasing racial isolation.[80] The harm, he emphasized, had occurred in Detroit—a point that had not only geographical but moral ramifications.

Ascending to the higher ground of innocence, the majority held that suburban school districts had not manipulated boundary lines, nor committed acts that fostered segregation.[81] This fact effectively protected them from the punishment of involvement in an inter-district remedy. A period when suburban Negro students were bused past a White suburban school to a more distant Black school in Detroit was dismissed as an

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accompanying text. The dissent cites "magnet" schools as an example of educational innovation that could have been used to benefit all Oklahoma City school children. *See id.* at 646 n.9.

75. *See id.* at 648.

76. Milliken v. Bradley, 418 U.S. 717, 815 (1974) (Marshall, J., dissenting) (*Milliken I*).

77. 418 U.S. 717 (1974) (*Milliken I*). *See supra* Part I.B.1.

78. *Id.* at 746.

79. *See id.*

80. *See generally* Milliken v. Bradley, 418 U.S. 717 (1974) (the Court reversed the decision of the court of appeals which had affirmed the relief granted by the district court).

81. *See id.* at 748.

"isolated" occurrence.[82] The constitutional wrong had not involved the suburbs, and suburban authorities had no duty to correct it.

While reaffirming the propriety of "a balancing of the individual and collective interests,"[83] the Chief Justice did not balance injury and innocence against each other. The opinion avoided weighing the disadvantages for Black children who remained in racially isolated schools against the disadvantages of pairing such schools with nearby White schools on the other side of the presently-drawn district line. Rather, it cited a laundry list of tax and administrative problems arising out of inter-district relief[84]—problems that had obviously been solved in the thousands of school district consolidations that had taken place in Michigan.[85]

The Court reasoned that although " '[s]eparate educational facilities are inherently unequal,' "[86] the remedy could nevertheless be restricted because it must be determined by " 'the nature of the violation.' "[87] This rubric permitted the injury flowing from racially-separate schools to continue because the "nature" of the infringement could be fragmented: the site selections of an urban school board, the enactments of a distant state legislature, the isolated suburban act of discrimination. Under such an approach, the effect of the violation recedes into the background.

For Marshall, the injury point was easy. The dissent kept the impact of racial isolation in the foreground, underlining the frustration of children who have been denied "an equal opportunity to reach their full potential as citizens."[88] He noted that after years of stigmatizing confinement to all-Negro schools surrounded by all-White schools, these children would not be comforted by the fact that the barrier between the races was now a school district boundary.[89] The nature of the violation "was not some *de facto* racial imbalance, but . . . intentional, massive, *de jure* segregation."[90]

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82. *See id.* at 750.

83. *Id.* at 738 (citing with approval from Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

84. *See id.* at 743.

85. *See supra* note 42 and accompanying text (discussing consolidation and other methods of inter-district cooperation).

86. Milliken v. Bradley, 418 U.S. 717, 737 (1974) (*Milliken I*) (quoting the seminal statement in Brown v. Board of Educ., 347 U.S. 483, 495 (1954)).

87. *Id.* at 738 (quoting with approval Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

88. *Id.* at 783 (Marshall, J., dissenting).

89. *See id.* at 805. Although the Detroit metropolitan area is perceived by its residents as one unit, with suburbanites working in the city (and many city dwellers employed in the suburbs), the city schools would remain racially identifiable and in sharp contrast to neighboring schools in the metropolitan community. *See id.* at 804.

90. *Id.* at 785. *See* discussion *supra* Part I.B.1. Justice Marshall's opinions did not call for "racial balancing," i.e. mandatory federal remedies in situations where government-supported discrimination had no impact. *See Milliken I*, 418 U.S. at 803. *See also* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 444 n.1 (1976) (Marshall, J., dissenting) (disapproving the view that continuous redistricting can be required even after a desegregation plan has been implemented and the effects of discrimination eliminated).

The question of suburban innocence was more problematic. All-White suburbs had no students to segregate, and had not drawn segregative district lines. The dissent met these points by describing the State's role in accelerating the development of White enclaves outside the inner-city limits. The placement of schools influences the development of metropolitan housing patterns.[91] Moreover,

> [h]aving created a system where whites and Negroes were intentionally kept apart so that they could not become accustomed to learning together, the State is responsible for the fact that many whites will react to the dismantling of that segregated system by attempting to flee to the suburbs. Indeed, by limiting the District Court to a Detroit-only remedy . . . the Court today allows the State to profit from its own wrong and to perpetuate for years to come the separation of the races it achieved in the past by purposeful state action.[92]

This point does not quite reach the suburbanites as individuals. Marshall made no assumptions about whether suburban voters supported the State's stream of segregative actions.[93] Nonetheless, the majority's invocation of geography[94] was more than matched by Marshall's point that the district lines were entirely under the State's control and generally unrelated to political subdivisions.[95] These "boundaries" should therefore have been highly permeable.

Turning to the question of appropriate redress, the dissent stressed the modesty of its aims, noting that it was not seeking "some ideal degree" of integration.[96] The defect in a Detroit-only decree was that it achieved no actual desegregation, but left all students in racially identifiable schools. Justice Marshall captured for his own use the majority's axiom that the nature of the infringement governs the scope of the remedy; this axiom simply meant that "the function of any remedy is to cure the violation to which it is addressed."[97] Equity therefore favored an inter-district approach.[98]

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91. *See Milliken I*, 418 U.S. at 805-06.

> "[Action taken] to maintain the separation of the races . . . does more than simply influence the short-run composition of the student body . . . . It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy."

Id. (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971)). *See supra* notes 21-24 and accompanying text (discussing the *Swann* decision, rendered at a time when Justice Marshall was comfortably in accord with the Supreme Court majority).

92. *Milliken I*, 418 U.S. at 806.

93. *See* discussion *supra* Part I.B.1.

94. *See Milliken I*, 418 U.S. at 745; *supra* note 32 and accompanying text.

95. *See Milliken I*, 418 U.S. at 796.

96. *See id.* at 803.

97. *Id.* at 806.

98. *See id.* at 808-09. The district court judge, who had reluctantly flowed into the vacuum left by the Board of Education's failure to submit a desegregation plan, would

Any desegregation order necessarily involves some disruption, whether its ambit is one district or two.[99] Yet a metropolitan decree would have required fewer new buses[100] and compared favorably (as to the number of students transported and the time spent riding) with the transportation plan previously used.[101]

As Marshall calibrated the interests at stake on each side, ingrained racial attitudes and public opposition are less weighty than enforcement of door-opening constitutional guarantees. Reluctantly, he concluded that in avoiding a feasible remedy, the majority had chosen popularity over principle—a choice that would create more problems than it solved.[102]

B. *Integration, or Higher Quality Segregated Schools?*

The question of whether integration is guaranteed by the Constitution to Black children, and whether integration (mandated or voluntary) benefits all students or some students, has evoked intense judicial and academic interest.[103] The so-called "Briggs dictum," rendered by a panel of district court judges in South Carolina after *Brown II*,[104] had maintained

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have used a panel of experts representing both plaintiffs and defendants to develop such a plan. *See id.* at 809-10.

One commentator has concluded that after *Milliken I*, lower courts were reluctant to grant inter-district decrees. *See, e.g.*, Note, *Out of Focus: The Misapplication of Traditional Equitable Principles in the Nontraditional Arena of School Desegregation (A Case Study of Desegregation in Little Rock, Arkansas)*, 44 Vand. L. Rev. 1315, 1339 (1991). *But see* Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, Nos. A-4912-89T5, A-6384-90T5 & A-6385-90T5, slip op. at 70 (N.J. Super. Ct. App. Div. June 15, 1992) (holding that state courts are free to accord metropolitan-area redress to remedy violations of the state constitution); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 Colum. L. Rev. 1463, 1656, 1659-1660 (1990) [hereinafter Liebman, *Desegregating Politics*] (citing examples of such desegregation orders).

99. *See* Milliken v. Bradley, 418 U.S. 717, 814 (1974) (*Milliken I*) (Marshall, J., dissenting). *See* discussion *infra* Part II.B. for discussion of how integration measures affect White students.

100. *See Milliken I*, 418 U.S. at 813-14.

101. *See id.* at 812-13. Pairing up Black schools near Detroit's edge with White schools close by on the other side of the district line was also feasible. *See id.* at 814.

102. *See id.* at 814-15.

103. *See, e.g.*, Wilkinson, *supra* note 10; Shades of *Brown*: New Perspectives on School Desegregation (Derrick Bell ed., 1980) [hereinafter Shades of *Brown*]; Liebman, *Desegregating Politics*, *supra* note 98; Tushnet, with Lezin, *supra* note 27; Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728 (1986) [hereinafter Gewirtz, *Choice*]; Drew S. Days, III, *Vindicating Civil Rights in Changing Times*, 93 Yale L.J. 990 (1984); James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection and Litigatively Enforced Legislative Reform*, 76 Va. L. Rev. 349 (1990) [hereinafter Liebman, *Implementing* Brown]; Paul Gewirtz, *Remedies and Resistance*, 92 Yale L.J. 585 (1983); Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 Cath. U. L. Rev. 795 (1989); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 Wm. & Mary L. Rev. 1 (1990); Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758 (1990).

104. Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*). *Brown II* remanded

that although a student could not be barred from any public school on racial grounds, states need not "mix persons of different races in the schools."[105] Segregation could therefore remain in place, except as to Negro children who requested transfers to White schools.

It was not until thirteen years later that the Supreme Court disavowed this dictum. *Green v. County School Board*[106] rejected an ineffective "freedom of choice"[107] plan, noting that the school board had an affirmative duty of conversion to "a system without a 'white' school and a 'Negro' school, but just schools."[108] Nevertheless, the Court subsequently reiterated in cases ranging from *Swann* to *Spangler* that there is no constitutional right to "any particular degree of racial balance."[109] Mathematical ratios may be used as a starting point in shaping a remedy, but not as an inflexible requirement.[110]

1. The Equal-But-Separate Model

The tension between a "just schools" rubric and a "no-particular-degree" rubric can be seen in *Austin Independent School District v. United States*,[111] where three of the Justices concurring on remand of a desegregation order scolded the Fifth Circuit for overreaching in applying the *Green* principles. Even if Austin school authorities had intentionally segregated minorities, the desegregation plan went further than was necessary to eliminate the consequences of official misconduct. The concurrence quoted with approval the argument of the Solicitor General of the United States that " 'there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action.' "[112]

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the companion cases, including the South Carolina litigation Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955).

105. *Briggs*, 132 F. Supp. at 777.

106. 391 U.S. 430, 437-38 (1968).

107. *See id.* at 441.

108. *Id.* at 442. *Green* is discussed *supra* at Part I.A. Commentators have pointed out that community intimidation in the South effectively prevented "freedom of choice" from leading to desegregation. *See, e.g.*, Diane Ravitch, *Desegregation, Varieties of Meaning*, *in* Shades of *Brown*, *supra* note 103, at 38.

109. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971), *quoted with approval in* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976).

110. *See Swann*, 402 U.S. at 25, *quoted with approval in Spangler*, 427 U.S. at 434; *supra* notes 21-24 and accompanying text. See also Part I.B.2. for discussion of *Swann* and *Spangler*.

111. 429 U.S. 990 (1976) (remanding desegregation litigation to Fifth Circuit for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976)). *See infra* notes 113 & 154.

112. *Austin*, 429 U.S. at 993 n.2 (quoting the Brief for the United States). Racial segregation imposed by White legislatures and school authorities has never been viewed as stigmatizing Whites. Thurgood Marshall, as the advocate in *Brown*, argued that classification by race could only be justified by "an inherent determination that the people who were formerly in slavery . . . shall be kept as near that stage as is possible; and now is the time, we submit, that this Court should make clear that this is not what our Constitution stands for." Transcript of Oral Argument at 21-22, Brown v. Board of Educ., 347 U.S.

Among the multiple meanings embedded in that statement might be: all-Black schools are now perceived in the same way as all-White ones; Black schools are wrongly perceived as inferior, but that perception has no effect on students; if it were not for misperceptions, Black schools could educate students equally well; or, Black schools become inferior only if they are given less resources than White schools.

Justice Marshall did not pick up the gauntlet on the Solicitor General's modernized equal-but-separate credo; his one-sentence dissent merely noted that the court below was right.[113] His views on de facto segregation, however, can be gleaned from his *Crawford* dissent.[114] There, he affirmed that racial isolation is harmful regardless of its genesis because it deprives minority students of "an equal opportunity for education" and "an integrated educational experience."[115]

Although Marshall was increasingly alienated from the Supreme Court majority on integration issues, he joined the rest of his colleagues "wholeheartedly" when they ordered compensatory measures for Negro students remaining in mostly-Black schools in the second round of *Milliken v. Bradley*.[116] His concurrence noted:

> That a northern school board has been found guilty of intentionally discriminatory acts is, unfortunately, not unusual. That the academic development of black children has been impaired by this wrongdoing is to be expected. And, therefore, that a program of remediation is necessary to supplement the primary remedy of pupil reassignment is inevitable.[117]

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483 (1954), *in* 49A Landmark Briefs and Arguments of the Supreme Court of the United States 522-23 (Philip B. Kurland & Gerhard Kasper eds., 1975).

113. *Austin*, 429 U.S. at 990-91. The history of segregation and desegregation in Austin, Texas is chronicled in United States v. Texas Education Agency, 467 F.2d 848 (5th Cir. 1972), and United States v. Texas Education Agency, 532 F.2d 380 (5th Cir.), *vacated*, 429 U.S. 990 (1976).

114. Crawford v. Board of Educ., 458 U.S. 527 (1982). *Crawford* is discussed *supra* at Part I.B.3.

115. *Crawford*, 458 U.S. at 548-49 (Marshall, J., dissenting) (quoting with approval two opinions of the California Supreme Court, Jackson v. Pasadena City Sch. Dist., 382 P.2d 878, 880-81 (1963), and Crawford v. Board of Educ., 551 P.2d 28, 43 (1976)). *But see supra* note 90.

116. 433 U.S. 267, 291 (1977) (Marshall, J., concurring) (*Milliken II*).

117. *Id.* at 291-292. The majority affirmed the Sixth Circuit's holding that appropriate state-supported compensatory measures must include reading and counseling components, without which Black students could be hampered in their motivation and achievement levels. *See id.* at 278, 287, 289-90. The majority also recognized the consequences of racial separation (but without acknowledging that these consequences would occur even in situations of de facto segregation):

> Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream.

Id. at 287.

The irony of the two *Millikens*, rejecting an effective desegregation plan but embracing a state-financed infusion of additional resources for inner-city schools, has not escaped comment. As Paul R. Dimond puts it, "[p]erhaps, in its own way, it is a 'separate but equal' result for our times."[118]

Some African-American scholars, such as Professor Derrick Bell, have suggested that "[d]esegregation remedies that do not integrate"[119] may produce substantial educational benefits. A mostly-Black school that is run by experienced minority educators, staffed by teachers with high expectations of student achievement, buttressed by parental involvement, and supported by a budget that at least matches the "best" White schools in the district,[120] could provide self-assurance and academic enrichment to Black students.[121] Such students would not be exposed to the "racial harassment ranging from exclusion from extra-curricular activities to physical violence" that has occurred at some integrated facilities.[122]

Judge Robert L. Carter,[123] a leading attorney in the *Brown* litigation, states:

> While we fashioned *Brown* on the theory that equal education and integrated education were one and the same, the goal was not integration but equal educational opportunity . . . . If I had to prepare for *Brown* today, instead of looking principally to the social scientists to demonstrate the adverse consequences of segregation, I would seek to recruit educators to formulate a concrete definition of . . . equality in education, and I would . . . seek to persuade the Court that equal education in its constitutional dimensions must, at the very least, conform to the contours . . . defined by the educators.[124]

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118. Paul R. Dimond, Remarks at *Brown v. Board of Education* and Its Legacy: A Tribute to Justice Thurgood Marshall 88 (Mar. 24, 1992) (transcript on file with the *Fordham Law Review*) (article based on speech included in this issue of the *Fordham Law Review*).

119. Derrick Bell, Brown *and the Interest-Convergence Dilemma*, *in* Shades of *Brown*, *supra* note 103, at 101.

120. *See id.* at 130.

121. *See id.* at 138. *Black Issues in Higher Education*, a bi-weekly publication, recently reported that most Black Ph.D.'s still come from Black colleges. *See* Karen De Witt, *Rise in Number of Black Ph.D's Is Reported*, N.Y. Times, May 5, 1992, at A21; *see also* Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 Yale L.J. 1285, 1287 (1992). Jarvis discusses the view that Black children, whose ancestors and experiences are "marginalized" in many schools, should be offered an Afrocentric perspective. Black parents, however, might object that "such a program in a resegregated setting only further stigmatizes graduates" unless it also prepares students for standardized tests and a competitive place in society. *Id.* at 1300.

122. Bell, Brown *and the Interest-Convergence Dilemma*, *in* Shades of *Brown*, *supra* note 103, at 100.

123. Judge Carter, of the United States District Court for the Southern District of New York, was formerly General Counsel of the NAACP.

124. Robert L. Carter, *A Reassessment of* Brown v. Board, *in* Shades of *Brown*, *supra* note 103, at 27. Judge Carter notes the "reality" that hundreds of thousands of urban poor Black children presently attend mostly-Black schools that do not give them the skills needed to join the economic and social mainstream. *See id.* at 26.

2. The Integration-Plus Model

Justice Marshall called busing "one of the basic emotional and legal issues underlying [segregation] cases."[125] His decisions invariably included a feasibility analysis of the remedy under consideration.[126]

Before *Brown I*, busing had been (unemotionally) regarded as a convenient way of getting to school. Indeed, the Supreme Court had unanimously held in its *Swann*[127] phase that quite apart from the desegregation context, bus transportation was a "normal and accepted" part of educational policy involving millions of public school children each year.[128]

In Marshall's view, however, transportation for integration provoked a different response because of the message of Black inferiority that Whites and Blacks have both heard. That message produced the "unique harm associated with a system of racially identifiable schools."[129] His *Crawford* dissent observed that White resistance to desegregation emanated from racial as well as anti-busing concerns:

> [T]he allegedly compelling interest in establishing "neighborhood schools" so often referred to by the majority appears nowhere in [Proposition I's] official list of justifications . . . . [This] is not surprising in light of the fact that the Proposition's ban on student "assignment" [covers] desegregation remedies that would not require a student to leave his "neighborhood."[130]

Always the pragmatist, Marshall concluded that segregation not only has a psychological impact, impairing the motivation of African-American children, but also has an economic consequence. School boards, he wrote in 1991, continue to allocate inferior facilities, teachers, and

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125. Milliken v. Bradley, 418 U.S. 717, 812 (1974) (Marshall, J., dissenting) (*Milliken I*).

126. *See, e.g., Milliken I*, 418 U.S. at 813 (comparing a 40-minute ceiling each way with present busing of one and a quarter hours or more each way; overall, the plan contemplated by the district court compared favorably with the transportation regimen already in use); *see also* Board of Educ. v. Dowell, 111 S. Ct. 630, 647 & n.11 (1991) (Marshall, J., dissenting) (emphasizing the "proven feasibility" of the district court's desegregation plan, and noting that the board had a variety of devices at its disposal to minimize busing but failed to use them).

127. Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (discussed *supra* at notes 21-24 and accompanying text).

128. *See id.* at 29. Chief Justice Burger's *Swann* opinion added: "All things being equal, with no history of discrimination, it might well be desirable to assign pupils 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." *Id.* at 28. See also *Implementing* Brown, *supra* note 103, at 364 n.68, collecting authorities showing that busing is safer than walking to school. The amount and distance of busing have not had a significant effect on the degree of "white flight" caused by different desegregation plans. *See* Liebman, *Desegregating Politics*, *supra* note 98, at 1623 n.672.

129. *Dowell*, 111 S. Ct. at 642.

130. Crawford v. Board of Educ., 458 U.S. 527, 559 n.6 (1982) (Marshall, J., dissenting). *See supra* Part I.B.3. for discussion of Proposition I.

courses to many Black schools.[131] Professor Paul Gewirtz suggests that "green follows white"—a school where White students are in the majority is protected against discriminatory distribution of money and resources.[132]

Quite apart from his doubts about the viability of an updated equal-but-separate model, Justice Marshall valued integration because it confers positive benefits on all children. He identified "learning together" as a crucial factor in the ability to live together as adults, with mutual respect for similarities as well as differences.[133]

For Black children, desegregation provides personal contact with "the environment in which they must ultimately function and compete, if they are to enter and be a part of [the larger] community."[134] Professor Leroy Clark notes that although there have been instances where Black students in newly-integrated facilities have been ostracized or have segregated themselves, such students must deal with their own feelings of distrust because they will be interacting with Whites in their future employment.[135] Studies indicate that adults who have attended integrated elementary and secondary schools are "significantly more comfortable in integrated work and social settings" than graduates of segregated institutions.[136]

Academic achievement of Blacks in desegregated schools tends to accelerate, with gains in test scores ranging from "moderate" to "significant."[137] Scholars have noted that teachers in integrated classes are less

131. *Dowell*, 111 S. Ct. at 643 n.5, 648 n.12 (Marshall, J., dissenting). *Dowell* is discussed *supra* at Part I.B.4., and *infra* at Part II.C.

132. *See* Gewirtz, *Choice*, *supra* note 103, at 776. On the question of whether Black-run school boards or decentralized control of schools could counter the problem of unequally distributed resources, some authorities have expressed skepticism. State governments generally control the political and economic resources that would be needed to upgrade local schools, and long-term experiments with decentralized schools have been disappointing. *See* Liebman, *Desegregating Politics*, *supra* note 98, at 1489-90 n.142. Professor Liebman comments:

> The absence of this equality-assuring condition in my view dooms [the] gilded-ghetto remedies, for in the long run white taxpayers are less likely to gild someone else's schools—particularly those of a race against whom they have discriminated persistently in the past—than they are to gild their own children's (and, if integrated, everyone else's) schools.

Id. at 1617 n.650.

133. *See* Milliken v. Bradley, 418 U.S. 717, 806 (1974) (*Milliken I*) (Marshall, J., dissenting); *id.* at 783. One function of education is to provide children with the information and skills necessary to evaluate new life-plan options. *See* Amy Gutmann, Democratic Education 30-31 (1987).

134. Milliken v. Bradley, 433 U.S. 267, 287 (1977) (*Milliken II*). *Milliken II* is an opinion with which Justice Marshall enthusiastically concurred. *See id.* at 291.

135. Clark, *supra* note 103, at 802-03. In an integrated school, "minority students potentially learn the extra-academic social and cultural modes of the majority community (and vice versa) and develop personal alliances that give access to information, jobs, or other opportunities." *Id.* at 802.

136. Liebman, *Desegregating Politics*, *supra* note 98, at 1626-27. This finding was applicable to Whites as well as Blacks.

137. *See id.* at 1624-25 n.675 (collecting authorities). Researchers generally agree that

likely than their counterparts in all-Black settings to convey low expectations of achievement to the students.[138]

Integration would not adversely affect Whites, Marshall had suggested in his *Brown* argument, because schools could "[p]ut the dumb colored children in with the dumb white children, and put the smart colored children in with the smart white children."[139] Commentators have concluded from the available data that integration neither hurts nor helps the academic accomplishments of Whites,[140] and that Whites who actually had a family member attending a desegregated school generally viewed the resulting experience favorably.[141]

Yet, dissatisfaction can infect the "lasting integration"[142] that Marshall invoked if the energy poured into the initial phases of a desegregation plan is not rechannelled into delivering educational quality. A tale of two systems illustrates this point. Parents and officials in the Charlotte-Mecklenburg district that was the focus of *Swann* have recently called for new initiatives such as magnet schools with specialized offerings. "Busing wasn't addressing the educational excellence we needed,"[143] noted a newly-elected board member.

Hillsborough County, near Tampa, Florida, provides a contrasting example of a school district that captured the talent and money required to

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the kind of expectations that are conveyed to students are a key factor in the success of schooling. *See id.* Desegregation may also have a substantial impact on Black IQ scores. *See id.* The likelihood of dropping out of school, becoming pregnant, or engaging in acts of delinquency is also lower than among Black children in segregated schools. *See id.* at 1625-26.

138. *See id.* at 1624-25 n.675.

139. Argument: The Oral Argument Before the Supreme Court in *Brown v. Board of Education of Topeka*, 1952-55, at 402 (Leon Friedman ed., 1983). Critics have pointed out that Black children attending predominantly White schools often are inappropriately "tracked" into lower level classes or towards less competitive post-secondary schools. *See* Jarvis, *supra* note 121, at 1292.

Although "white flight" from desegregation occurs, particularly in northern cities where school districts do not cover the whole metropolitan area as in *Milliken I*, some studies suggest that after three years this phenomenon slows and sometimes reverses itself as parents choose a high-quality integrated school. *See* Liebman, *Desegregating Politics*, *supra* note 98, at 1622-23, 1633-34.

140. *See, e.g.*, Willis D. Hawley et al., Strategies for Effective Desegregation 10 (1983); Susan E. Mayer & Christopher Jencks, *Growing Up in Poor Neighborhoods: How Much Does It Matter?*, 243 Science 1441, 1443 (1989).

141. *See, e.g.*, Jennifer L. Hochschild, The New American Dilemma: Liberal Democracy and Social Desegregation 179-87 (1984) (also noting that the number of White supporters of integrated schools has increased most dramatically among the ranks of southerners whose children were affected by court desegregation decrees).

142. Board of Educ. v. Dowell, 111 S. Ct. 630, 643 (1991) (Marshall, J., dissenting) (also discussing the remedial measures needed to prevent "the stamp of inferiority placed upon Afr[ican]-American children from becoming a self-perpetuating phenomenon").

143. Peter Applebome, *Busing is Abandoned Even in Charlotte*, N.Y. Times, Apr. 15, 1992, at B11. Community representatives and students nevertheless reaffirmed their commitment to integration. A former school superintendent remarked, "I remember when [President] Ronald Reagan made a speech here and described busing as a social experiment that has not worked, and he was met with dead silence. What happened in Charlotte became a matter of community pride." *Id.*

produce superior education as segregation was being dismantled. Professor Drew Days[144] described key elements in this creative effort: a large committee composed of representatives of the business and civic community, civil rights organizations, and (yes) White supremacist groups that helped plan and implement the desegregation mandated by a committed district court judge; educational enrichment programs assisted by federal grants; and pairing and clustering of schools in the city and suburbs.[145] The schools have been desegregated for almost twenty-one years; the "students know that at the end of the bus ride . . . [is] quality education."[146]

C. *"Attenuated" Causation and the Graceful Exit*

In the 1990s, causation analysis has been the Supreme Court's avenue of exit from the field of desegregation. A district with racially identifiable schools can be termed desegregated, the *Dowell* majority indicated, once "the effects of past intentional discrimination" have been remedied.[147] Federal judges should relinquish control rather than attempting to eliminate a condition that was not caused by a constitutional violation.[148]

Probably so, but what standard do we apply in deciding whether the old pollution has disappeared, making it unnecessary to wade through any complexities to analyze a new one? The majority was silent on the burdens of proof that might guide a district judge in assessing competing claims. Nor did the Court decide whether a school board has an affirmative duty to use every practical and available clean-up device.

Instead, Chief Justice Rehnquist's opinion identified two critical factors—time and demography—that could renovate the history of a district's discrimination. Before the litigation that resulted in a desegregation order (the "Finger Plan"), the State had imposed residen-

144. Professor Days, Alfred M. Rankin Professor at Yale Law School, had multiple connections with the Hillsborough situation. He was formerly on the legal staff of the NAACP Legal Defense and Educational Fund, and represented the plaintiffs in Mannings v. Board of Public Instruction, 306 F. Supp. 497 (M.D. Fla. 1969), which resulted in the desegregation decree. He had also lived in the Hillsborough area from the years 1947 to 1953 and attended its segregated schools.

145. *See* Drew S. Days, III, Remarks at *Brown v. Board of Education* and Its Legacy: A Tribute to Justice Thurgood Marshall 66-68 (Mar. 24, 1992) (transcript on file with the *Fordham Law Review*) (article based on speech included in this issue of the *Fordham Law Review*).

146. Days, *supra* note 145, at 70. For other examples of successful desegregation plans, see Liebman, *Desegregating Politics*, *supra* note 98, at 1467.

147. Board of Educ. v. Dowell, 111 S. Ct. 630, 637 (1991) (citing with approval the concurring opinion of Justice Kennedy, then Judge Kennedy of the Ninth Circuit, in Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979)). *See supra* Part I.B.4. for a discussion of *Dowell*.

148. A constitutional right to integration, a commentator has suggested, "would require permanent court supervision of school districts and judicial restructuring of local government entities." *The Supreme Court, 1990 Term—Leading Cases*, 105 Harv. L. Rev. 177, 273 (1991).

tial segregation and Oklahoma City had intentionally segregated both housing and schools.[149] After more than ten years of implementing the Finger Plan, the school board adopted a reassignment policy based on neighborhood patterns. Under this policy, a majority of the city's elementary schools became more than ninety percent Black or ninety percent non-Black.[150]

Looking backwards can be overdone, the Court indicated. The litigation commenced almost thirty years ago. The board had now complied for a reasonable period with constitutional demands, and continuation of the desegregation decree "in perpetuity" would displace local authority.[151]

Population movements could account for any stubborn problem. Residential segregation presently existing in Oklahoma City resulted from "private decisionmaking and economics, and . . . was too attenuated to be a vestige of former school segregation,"[152] the district court had found. Uncertain as to whether the Tenth Circuit had rejected this finding as clearly erroneous, Chief Justice Rehnquist's remand instructed both courts below to reconsider the issue.[153]

If private choice had dictated current housing patterns, with previous state-imposed residential segregation playing too attenuated a role to count, would the board be free to base a student assignment policy on these neighborhood patterns? The majority apparently assumed without discussion that such a policy could be justified even if the segregative results were foreseeable.[154]

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149. *See Dowell*, 111 S. Ct. at 633 (setting out the district court's findings).

150. *See id.* at 634.

151. *See id.* at 637.

152. *Id.* at 638 n.2.

153. *See id.* at 638. In prior phases of the case, the district court had been reversed twice by the Tenth Circuit. After the district court denied the plaintiff's motion to reopen the case, the circuit court held that an earlier finding that the school district was unitary did not affect the vitality or duration of the permanent injunction. *See* Dowell v. Board of Educ., 795 F.2d 1516, 1519 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

The second reversal came in response to the district court's dissolution of the desegregation decree. The Tenth Circuit stated that the focus is "not on whether the [new] Plan is nondiscriminatory but whether it solves the problems created by the changed conditions in the District." Dowell v. Board of Educ., 890 F.2d 1483, 1504 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991). The circuit court found that the new plan would restore the effects of past discrimination, *see id.* at 1504, and remanded with orders to use the Finger Plan, which could be modified as necessary. *See id.* at 1505-06.

154. It is curious that although *Dowell* referred briefly to the present board's "good faith," *see* Board of Educ. v. Dowell, 111 S. Ct. 630, 634 (1991), the Court made no mention of Austin Independent School District v. United States, 429 U.S. 990 (1976). Citing Washington v. Davis, 426 U.S. 229 (1976), *Austin* vacated the decision in United States v. Texas Education Agency, 532 F.2d 380 (5th Cir. 1976). There, the Fifth Circuit had reasoned: "[S]chool authorities may not constitutionally use a neighborhood assignment policy . . . in a district with . . . segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy [and, therefore] we may infer that the school authorities have acted with segregative intent." *Texas Education*, 532 F.2d at 392. Justice Powell's concurring opinion in the Supreme Court angrily retorted that in areas where boundary-line changes, contiguous pairing of schools,

The remand's causation inquiry—was residential segregation the "result of" or "too attenuated"[155]—did not come with any further instructions as to how to measure or weigh the impact of prior state activity. Justice Marshall's dissent attempted to refine this inquiry, suggesting that the district court should decide whether the school board's past conduct had been a "contributing cause" to the housing patterns[156]—that is, would the relevant neighborhoods have been more integrated but for the board's unlawful acts.

Any measurement of causation is problematic here until we engage in a further dissection of *what* has been caused. Marshall would respond in one word: attitudes. If the State labels Black children as undesirable schoolmates, it is also labeling them as undesirable neighbors.

The dissent could not accept the notion of "private decisionmaking"[157] in a vacuum. In *Keyes v. School District No. 1*,[158] the Supreme Court had noted that school segregation could have "a profound reciprocal effect on the racial composition of residential neighborhoods."[159] Oklahoma City policy illustrated this reciprocity. The board had in the past used a neighborhood school policy to track and extend all-Negro housing, destroying integrated neighborhoods and, in the process, increasing the number of segregated schools.[160]

Because the board "creat[ed] 'all-Negro' schools clouded by the stigma of segregation—schools to which white parents would not opt to send their children,"[161] housing patterns were altered. A school district that

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or magnet schools will not produce desegregation, school boards are not obliged to achieve racial balance by extensive cross-busing. *See Austin*, 429 U.S. at 994-95 (Powell, J., concurring). *Austin* is discussed further *supra* notes 111-13 and accompanying text.

155. *See Dowell*, 111 S. Ct. at 638 n.2.

156. *See id.* at 646 n.8 (the dissent quoted with approval Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 n.13 (1979)).

157. *See id.* at 638 n.2.

158. 413 U.S. 189 (1973).

159. *Id.* at 202.

160. *See* Board of Educ. v. Dowell, 111 S. Ct. 630, 646 (1991) (Marshall, J., dissenting) (citing the findings of the district court). Because the school board had contributed to residential segregation, the district court did not allow the board to use a neighborhood plan in the racially-isolated northeast quadrant. *See id.*

161. *Id.* A recent New York Times account notes that while housing segregation results in part from "enclaves . . . developed around religious institutions and shared cultures . . . like in Little Italy and Jewish sections of the Lower East Side," some racially segregated residential patterns in New York State are the result of suburban zoning regulations and "steering" by the City Housing Authority. Sam Roberts, *Shifts in 80's Failed to Ease Segregation*, N.Y. Times, July 15, 1992, at B1, B4.

Professor Ted Shaw concludes:

> We are very ahistorical, for segregation in this country . . . is the result of decades and decades of state and private action, federal action, actions taken on the local level, all [of] which interact . . . to produce the segregative patterns that exist now, which we take for granted and which we assume to be the result of choice, or merit, or some other . . . factor that ignores the history of racism and segregation.

Theodore M. Shaw, Remarks at *Brown v. Board of Education* and Its Legacy: A Tribute

contributed to creating such parental "preferences" should not be permitted to build on them to construct a student assignment policy.

Nonetheless, the board's decade of prior good behavior posed a challenge to Marshall's approach. Such a challenge might have been even more formidable if the question of dissolving the desegregation decree had arisen before the offending new resegregative policy.[162]

Drawing carefully from the Court's prior (though now less-favored) jurisprudence, the dissent reminded the majority of the role of presumptions. Racially identifiable schools, emerging in a district where past de jure segregation has been proven, are presumptively the result of intentional discrimination. The burden then shifts to the school board to show that there is no causal link and to "justify use of . . . resegregative methods."[163]

The claim that the current board was pursuing legitimate policies in good faith[164] did not conclusively rebut the causal presumption. The board could prove its commitment to "the ideal of an integrated system"[165] by choosing the feasible and effective desegregation measures at

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to Justice Thurgood Marshall 97 (Mar. 24, 1992) (transcript on file with the *Fordham Law Review*) (article based on speech included in this issue of the *Fordham Law Review*).

162. The dissent treated this before-the-resegregation point as irrelevant, because "the Board's readoption of neighborhood attendance zones cannot be ignored arbitrarily." *Dowell*, 111 S. Ct. at 645 n.7. The majority, however, instructed the district court to decide "whether the Board made a sufficient showing of constitutional compliance as of 1985, when the [new policy] was adopted, to allow the injunction to be dissolved." *Id.* at 638.

163. *Id.* at 647 n.10 (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537-38 (1979); Wright v. Council of Emporia, 407 U.S. 451, 467 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971); Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968)).

164. The majority's statement of facts gives demographics and inner-city isolation as the reason for the board's adoption of a reassignment policy. *See id.* at 634; *supra* notes 128 & 139 (discussing studies of "white flight").

Neither the dissent nor the majority devoted much discussion to the fact that the students involved in the board's neighborhood plan were those in kindergarten through fourth grade, not older children. Chief Justice Rehnquist referred briefly to the busing burden on "young black students," *see* Board of Educ. v. Dowell, 111 S. Ct. 630, 634 (1991), while Justice Marshall concluded that the prior successful use of the Finger Plan (busing first through fourth grades) proved its feasibility. *See id.* at 647-48 (Marshall, J., dissenting).

165. *Dowell*, 111 U.S. at 644 n.6. A criterion of commitment to integration could also take into account the larger community that brings influence to bear on a school board. Professor Liebman has suggested consideration of negative indicia, such as "the conformity of segregative political decisions to the expressly racial preferences of members of the constituency," Liebman, *Desegregating Politics*, *supra* note 98, at 1593 n.550, and positive indicia, including the growth of residential integration and "a history of substantial minority representation among the leadership and staff of the various previously discriminatory agencies." *Id.* at 1653.

In his persuasive and comprehensive article, Professor Liebman analyzes prevalent theories of desegregation and develops a reformative approach that locates the violation found in the Supreme Court's desegregation decisions in the political rather than the educational process. *See id.* at 1475. This reconstruction "recognizes that citizen-participants [in American society] must pay the republican price of civic virtue (modernized,

its disposal.

Turning the thirty-years-of-supervision lament back on the majority, the dissent noted that the board had not only restricted the successful "Finger Plan," but had also failed to use school site location and magnet schools to promote integration and decrease busing. This default was a poor predicate for a sympathy plea: "A school district's failures . . . should not lead federal courts . . . to renounce supervision of unfinished tasks because of the lateness of the hour."[166]

Some observers have concluded that judges can shorten the supervision period by insisting on results instead of the familiar "deliberate speed." Professor Drew Days states that the successful desegregation of the Hillsborough County, Florida schools[167] occurred in part because the federal district court judge assigned to it

> was truly committed to making *Brown* a reality in that school district . . . . [H]e constantly applied to the school board to achieve further desegregation . . . [and] made clear that he meant business. In other cases I handled during that period, the desegregation process languished because the district judges lacked the conviction or the guts to get the job done.[168]

The dissent's reluctance to lift the *Dowell* decree reflected its disagreement with the majority's ranking of the competing values involved: the decree's vintage versus its failure; the board's autonomy versus the cramped educational opportunities for Black children left in racially identifiable schools. Such a ranking must be governed by the Constitution rather than convenience or personal outlook. Justice Marshall was willing to tinker with the mechanics of the (already passive) supervision process, entertaining the possibility of modifying the injunction.[169]

He was unwilling, however, to accommodate a change in the standards that would govern future cases. The Court's inclination towards ac-

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pluralized, and economized into a duty of 'equal concern and respect') in return for the benefits of participation." *Id.* at 1632.

166. *Dowell*, 111 S. Ct. at 647 n.11. Justice Marshall also quoted the district court's explanation of why the Finger Plan had been imposed in 1972: " 'This litigation has been frustratingly interminable, not because of insuperable difficulties of implementation of the commands of the Supreme Court . . . and the Constitution . . . but because of the unpardonable recalcitrance of the . . . Board.' " *Id.* at 640 (quoting the district court opinion, 338 F. Supp. 1256, 1271 (W.D. Okla. 1972)).

167. *See* further discussion of the Hillsborough County litigation *supra* notes 144-46 and accompanying text.

168. Days, *supra* note 145, at 66. *Cf.* Nathaniel R. Jones, Remarks at *Brown v. Board of Education* and Its Legacy: A Tribute to Justice Thurgood Marshall 80-82 (Mar. 24, 1992) (transcript on file with the *Fordham Law Review*) (article based on speech included in this issue of the *Fordham Law Review*) (providing an example of a district judge with the conviction to desegregate schools).

A number of studies have supported Justice Marshall's assumption that court decrees significantly increase the likelihood that racially identifiable schools will become "just schools," in the *Green* parlance. *See* Liebman, *Desegregating Politics*, *supra* note 98, at 1467-68.

169. *Dowell*, 111 S. Ct. at 648.

cepting "attenuated" causation and its failure to apply the presumptions established in prior decisions could signal a departure from the desegregation field. This departure would be tantamount to a declaration that the impact of State-sponsored segregation has been countered. Justice Marshall would reserve such declarations of victory for cases in which there are no "unfinished tasks."

III. JUSTICE MARSHALL REJECTED AND REMEMBERED

After Justice Marshall's 1991 retirement, the high Court continued to examine the question of when to entrust the operation of schools to local authorities. In *Freeman v. Pitts*,[170] the Justices issued a cluster of views (but no dissents) easing federal control of elementary and secondary schools.[171] By contrast, *United States v. Fordice*[172] concerned universities, and produced an unexpected eight-to-one disapproval of Mississippi's freedom-of-choice plan.

A. *The Incremental Withdrawal*

The point on which all the Justices in *Freeman* agreed in principle was that a district court has discretion to relinquish supervision over some aspects of a formerly segregated school system, even if violations are continuing in other aspects.[173] Justice Kennedy's opinion for the Court held that the ultimate goal of returning schools to local authorities should be accomplished by pouring all the supervisory resources of the district courts into the desegregation decree at the outset of the litigation, and then providing for an orderly withdrawal from control when sufficient

170. 112 S. Ct. 1430 (1992).

171. *See generally id.* (rejecting the court of appeals mandate of judicial supervision over local school board's compliance with desegregation plans).

172. 112 S. Ct. 2727 (1992).

173. *See Freeman*, 112 S. Ct. at 1443. Dekalb County School System ("DCSS") experienced enormous growth in its minority population, expanding from 5.6% in 1969 to 47% in 1986. *See id.* at 1438. As more Black families moved into DeKalb County, a distinct segregative pattern reflecting housing enclaves emerged. Fifty percent of the Black students attended schools that were more than 90% Black. *See id.* The district court, nonetheless, found DCSS to be in compliance with constitutional requirements with respect to four of the six factors discussed in *Green*—student assignments, extracurricular activities, transportation, and physical facilities. *See id.* at 1441-42. The district court terminated active supervision in those areas and decided to supervise only the implementation of the remaining *Green* factors—faculty and staff assignments, and quality of education. *See id.* at 1442.

The Eleventh Circuit reversed, holding that DCSS had an affirmative duty to correct racial imbalance in student assignments. *See id.* The Supreme Court, reversing the court of appeals ruling, found that the district court had correctly decided to relinquish control gradually:

> It was an appropriate exercise of its discretion for the District Court to address the elements of a unitary system discussed in *Green* . . . . By withdrawing control over areas where judicial supervision is no longer needed, a district court can concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated . . . .

Id. at 1446-47.

compliance has been demonstrated.[174] The "bizarre" measures permitted by *Swann*[175] to achieve racial balance are not appropriate in the late phases of carrying out a decree when demographics rather than discrimination have created the racial isolation.[176]

Modern society is mobile, the Court concluded, and "[r]esidential housing choices and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies."[177] Moving towards the updated equal-but-separate model, Justice Kennedy suggested that the DeKalb County School System ("DCSS") could direct scarce resources to improving the quality of education, rather than concentrating on the racial composition of the student body.[178]

A concurrence "in the judgment" by Justice Blackmun, joined by Stevens and O'Connor, expressed serious reservations about the Court's causation analysis and its withdrawal plan.[179] DCSS had used attendance zones and new school construction to create schools that were over fifty percent Black even when the district-wide Black student population was less than six percent.[180] At this stage in the litigation, it would be naive for the district court to "disarm" itself by restricting its jurisdiction in reliance on the board's promises.[181] In the same vein, Justice Souter

174. *See id.* at 1445.

175. *See id.* at 1447 (referring to Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971)).

176. *See id.*

177. *Id.* at 1448. The Court viewed these demographic shifts as the inevitable result of suburbanization. *See id.* at 1440. The causes were specifically stated as an increase in work opportunities, a decline in the birth rate in White families, the completion of a new interstate highway, and "blockbusting of formerly white neighborhoods leading to selling and buying of real estate . . . on a highly dynamic basis." *Id.* The district court had found that the school system's prior unconstitutional actions did not contribute to the residential segregation, which would have occurred regardless of any off-setting measures the board might have used. *See id.*

178. *See id.* at 1448.

179. *See id.* at 1457-60.

180. *See id.* at 1458-59. DCSS tracked residential patterns in Black areas, built new schools that were virtually all-White, and used administrative devices to undermine the "majority to minority" program that should have facilitated the transfer of Negro students to White schools. The concurrence stated that because "many families are concerned about the racial composition of a prospective school and will make residential decisions accordingly," *id.* at 1457, the courts below should have considered whether factors such as a racially identifiable faculty and student body could have contributed to subsequent demographic changes. *See id.* at 1458. The district court had concluded in 1976 that the system's policies contributed to the increasing racial imbalance in its student population. *See id.* at 1459. Justice Blackmun's concurrence suggested that, at a minimum, DCSS should have been required to demonstrate that "but for the demographic changes between 1976 and 1985," *id.*, its actions would have been sufficient to convert racially identifiable schools into "just schools." *See id.* at 1459-60 (referring to the credo of Green v. County Sch. Bd., 391 U.S. 430, 442 (1968)). The court of appeals, which had not reached the causation issue, should review the district court's findings. *See id.* at 1460.

181. *See id.* at 1456. The two areas of the school system that indisputably remained

observed that federal judges should proceed cautiously in releasing school districts from supervision, because vestiges of discrimination remaining in some aspects of the school system may "act as an incubator for resegregation in others."[182]

In Justice Scalia's view, the Court's narrowly based incremental withdrawal strategy was too timid rather than too reckless.[183] Instead of sifting through " 'a mélange of past happenings' "[184] to see if there are vestiges of prior discrimination, the Justices should have concentrated on restructuring the way that burdens of proof are allocated in desegregation cases.[185]

The placement of burdens of proof determines the result in most causality inquiries. If school boards must prove a negative—that imbalance does not stem from their past illegalities—they will generally lose. Conversely, plaintiffs will "almost always lose" if they have the burden of showing that present racial separation is in part attributable to former de jure violations.[186]

The choice of compelling defendants to negate causality was made twenty-five years ago in *Green*, as a way of justifying "an affirmative duty to desegregate."[187] School authorities were expected to eliminate what was presumably (and virtually irrebuttably) the residue of their misconduct. In 1992, the rational basis for this presumption of causality "must dissipate as the *de jure* system and the school boards who produced it recede further into the past."[188] Invoking "ordinary principles of our law, of our democratic heritage,"[189] Justice Scalia urged that soon the burden of proof on causation be switched to plaintiffs.[190] Public education in the North and South should be under the control of parents and locally elected officials.[191]

* * * *

Assume that Justice Marshall was still on the bench during the *Freeman* deliberations, and that he was moved to issue a dissent rather than to join the Blackmun or Souter concurrences. What follows, offered on

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out of compliance—expenditures and teacher assignments—are the "factors over which DCSS exercises the greatest control." *Id.*

182. *Id.* at 1455.

183. Justice Scalia's concurrence concluded that the Court's decision would have little impact "upon the many other school districts . . . that are still being supervised by federal judges, since it turns upon the extraordinarily rare circumstance of a *finding* that no portion of the current racial imbalance is a remnant of prior *de jure* discrimination." *Id.* at 1450.

184. *Id.* at 1451 (quoting Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 512 (1979) (Rehnquist, J., dissenting)).

185. *See id.* at 1452.

186. *See id.*

187. *Id.* at 1453 (citation omitted).

188. *Id.*

189. *Id.* at 1454.

190. *See id.*

191. *See id.*

the basis of Marshall's prior expressions and insights, is a draft opinion that he might have written.

JUSTICE MARSHALL, DISSENTING

Today, the Court announces that in order to restore the "true accountability," *ante*, at 1445, of local authorities, it will approve incremental withdrawal of judicial supervision over a formerly *de jure* segregated system before full compliance with the Fourteenth Amendment has been achieved. In so doing, it reverses a court of appeals decision that requires only that a school board demonstrate its "accountability" to the judiciary and the Constitution by maintaining racial equality in all its operations for at least three years.[1]

Despite the modesty of this requirement, the DeKalb County School System could not meet it. Throughout their history, DCSS schools have remained both separate and unequal. By 1975, as my brother Blackmun notes, almost three-quarters of black elementary students and the majority of black high school students were attending mostly-black schools, even though the percentages of African-American students in the district as a whole were only 20% and 13%, in these two respective age groups. *Ante*, at 1459.

School officials now plead that demography is destiny, and that they were unable to contain the further rise of segregation because of post-1975 population changes. Under our prior holdings, these changes should be viewed in light of the "profound reciprocal effect" that school segregation has on residential patterns.[2] Keyes v. School District No. 1, 413 U.S. 189, 202 (1973). The majority manages on the one hand to admit a "correlation" between the two, and on the other to pronounce that correlation to be no more than evidence of "private choices." *Ante*, at 1448. The board's responsibility in creating all-black schools through site location and student assignments is virtually read out of the picture.

Indeed, the Court suggests that in fixing such legal responsibilities, we must not "overstate" the consequences of past

1. *See* Pitts v. Freeman, 887 F.2d 1438, 1450 (11th Cir. 1989). Other circuit courts have adopted this approach. *See* Morgan v. Burke, 926 F.2d 86, 91 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1664 (1992); Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 752 (5th Cir. 1989); Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 227 (5th Cir. 1983); Youngblood v. Board of Educ., 448 F.2d 770, 771 (5th Cir. 1971).

2. When white parents make residential choices, they do not gravitate towards districts where their children would be assigned to black schools stigmatized by segregation. *Cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971) (the "building [of] new schools in the areas of white suburban expansion farthest from Negro population centers" may promote segregation in residential patterns as well as schools).

discrimination. *Id.* I believe that *understatement* is the real danger. Again,

> a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. . . . In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 552-53 (1989) (MARSHALL, J., dissenting).

The Court's optimism about the effect of time in causing vestiges of segregation to diminish is matched by its pessimism about the "practical ability of the federal courts to try to counteract" great demographic changes. *Ante*, at 1446, 1448. Yet respondents' brief in this Court suggests a number of available techniques in the area of student assignments.[3]

I recognize that the majority's remand permits further development of these issues. Unfortunately, however, the emphasis in the Court's guiding opinion on the "ultimate objective" of returning school districts to local control, *ante*, at 1445, when coupled with its unrealistically narrow view of causality, may lead the courts below to favor premature and piecemeal federal withdrawal.

On the key question of the board's intent, the majority indicates that new proceedings are appropriate to determine whether school officials have merely refrained from acting in bad faith, or whether they have met the standard[4] of showing "an affirmative commitment to comply in good faith with the entirety of a desegregation plan." *Ante*, at 1450. Application of this standard to DeKalb County demonstrates, on the ample record already before us, that time has not been a purifier.

3. Respondents' Brief at 40 n.21. DCSS could implement a large-scale magnet program (rather than the few existing magnet classrooms that involve only 1% of the student population), grade reorganization, and a busing plan which would have a desegregative effect. *Id.* Although the district court stated that " 'massive bussing . . . is not considered a viable option by either [of] the parties or this court,' " App. to Pet. for Cert. 46a, respondents argued that the court's failure to consider bus transportation was erroneous. Respondents' Brief at 40 n.21. This error, and others, led the court "to the perplexing conclusion that maximum practical desegregation had been achieved though more desegregation could be accomplished." *Id.*

4. Because we have established an affirmative duty to desegregate, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971); Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968), respondents need not show discriminatory intent to establish the unconstitutionality of policies traceable to prior *de jure* segregation.

> DCSS still discriminates. In some areas, its black students have trailers as classrooms, while none of its white students are similarly treated. Faculty assigned to its African-American students are less experienced and less well-educated. DCSS offers no adequate compensation for these disadvantages. Quite the contrary, the per capita expenditure for black schools is lower than for white schools. *Ante*, at 1442.
>
> Desegregation is often a complex task, and it becomes more so when a school board delays or discounts its affirmative obligation to dismantle a dual system. By exalting convenience and public complaint over constitutional guarantees, this Court adopts rationalizations that bear an uncomfortable resemblance to those in *Plessy v. Ferguson*, 163 U.S. 537 (1896):
>
> > "The great principle . . . is, that . . . all persons without distinction of age . . . or color . . . are equal before the law. . . . But, when this . . . principle comes to be applied to the actual . . . conditions of persons in society, it will not warrant the assertion . . . that children and adults are legally to . . . be subject to the same treatment; but only that the rights of all . . . are equally entitled to . . . paternal consideration . . . ."
>
> *Plessy*, 163 U.S. at 544 (quoting Roberts v. City of Boston, 5 Cush. 198, 206 (1849)).
>
> Black children do not ask to be treated as though they were adults, just to be treated like any other children.
>
> I dissent.

* * * *

B. *Causality in the Colleges*

Professor Mark Tushnet reveals that during the deliberations on the pre-*Brown* decisions about university segregation,[192] the Justices of the Supreme Court "believed that the federal courts could pull off immediate desegregation of universities."[193] Justice Tom Clark noted that although desegregation of elementary schools could cause intense hostility, any fear that ending segregation in college or graduate schools would provoke defiance was unfounded.[194] At the level of higher education, "the

192. *See generally* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (Black graduate student was compelled to sit apart in an alcove separated from his White classmates); Sweatt v. Painter, 339 U.S. 629 (1950) (Texas did not offer Blacks legal education that was equivalent to that of Whites). *Sweatt* was argued by Thurgood Marshall, and he also participated in the preparation of the *McLaurin* brief.

193. Mark V. Tushnet, Remarks at *Brown v. Board of Education* and Its Legacy: A Tribute to Justice Thurgood Marshall 30 (Mar. 24, 1992) (transcript on file with the *Fordham Law Review*) (article based on speech included in this issue of the *Fordham Law Review*).

194. Tushnet, with Lezin, *supra* note 27, at 1891.

forces of progress in the South" were already at work.[195]

Those forces were hardly precipitate in Mississippi; it was not until twenty years later that race-neutral policies were adopted[196] at the state's eight public colleges and universities.[197] This adoption had little impact on the percentages of Black students attending the formerly all-White institutions,[198] and it failed to ward off a lawsuit by private plaintiffs charging that the schools had maintained the segregative effects of their prior dual educational system.[199] Eventually, however, the State's efforts were approved by a district court after trial and by the en banc Fifth Circuit.[200]

Universities were so different in character from primary schools, the court of appeals reasoned, that many of the responsibilities described in *Green* did not apply.[201] A student's decision to go to college is a matter of choice rather than a product of the compulsory education law governing the lower grades.[202] Mississippi does not assign students to a particular institution, and these institutions are "not fungible."[203] The common tools of desegregation such as busing and zoning are irrelevant.

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195. *See id.*

196. *See* United States v. Fordice, 112 S. Ct. 2727, 2733 n.2, 2735-36, 2737 (1992). In 1981, Mississippi reorganized its public universities by issuing "Mission Statements." *See id.* at 2733. The universities were divided into three categories: "comprehensive, urban, and regional." *Id.* The "comprehensive" group included the University of Mississippi, Mississippi State, and Southern Mississippi—those having the greatest resources. *See id.* The only "urban" university was Jackson State; it was given a limited mission. *See id.* The "regional" universities included Delta State, Mississippi University for Women, Alcorn State, and Mississippi Valley. *See id.* Their mission was to serve as undergraduate institutions. *See id.*

197. Mississippi's public university system began in 1848 with the establishment of the White-only University of Mississippi. *See id.* at 2732. Twenty-three years later, the State opened Alcorn State University to educate Blacks. *See id.* By 1925, four more exclusively White facilities were added: Mississippi State University (1880), Mississippi University for Women (1885), University of Southern Mississippi (1912), and Delta State University (1925). *See id.* The State had a total of eight universities after opening two more schools for Blacks: Jackson State University (1940) and Mississippi Valley State University (1950). *See id.* It was not until 1962 that the first Black student was admitted to the University of Mississippi, pursuant to a court proceeding. *See* Meredith v. Fair, 306 F.2d 374 (5th Cir.), *cert. denied*, 371 U.S. 828, *enforced per curiam*, 313 F.2d 532 (5th Cir. 1962) (en banc), *cert. denied*, 372 U.S. 916 (1963).

198. *See Fordice*, 112 S. Ct. at 2733.

199. In 1975, the original plaintiffs alleged that Mississippi "maintained the racially segregative effects of its prior dual system . . . in violation of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d." *See id.* The United States intervened as plaintiff, "charging that State officials had failed to satisfy their obligation under the Equal Protection Clause of the Fourteenth Amendment and Title VI." *Id.* The parties attempted for twelve years to reach a resolution. The universities remained segregated, and, by 1987, the parties still disagreed on whether the State had fulfilled its obligation to end de jure segregation. *See id.* at 2734.

200. *See id.* at 2735.

201. *See id.* at 2736.

202. *See id.*

203. *See id.*; *supra* note 196.

Thus, neutral policies alone should be sufficient to wipe out the prior de jure status.[204]

The Supreme Court disagreed, producing a decision in which causation was broadly defined and local autonomy was narrowly construed. Its analysis and disapproval of Mississippi's admissions procedure illustrates this point.

The State had urged that there was no connection between its past and present policies because it had replaced racial admissions criteria with an objective test devised by an independent organization, the American College Testing Program ("ACT").[205] This plea failed to win over a single Justice. Noting that the test was originally instituted for a racially discriminatory purpose, was being employed in an inappropriate manner, and was continuing to cause the same segregative patterns, the Court held that the State had not yet met its burden of demonstrating that changing the testing policy would erode sound educational goals.[206]

Nor was the Court favorably impressed by the array of choices the State offered to college applicants. "Unnecessary" program duplication of non-core subjects at the various institutions,[207] combined with "wasteful and irrational" maintenance of eight universities (some quite close to each other)[208] all stemmed from Mississippi's long-established dual system. Recognizing that private decisions can be shaped by public policy, Justice White's opinion for the majority directed the lower courts to de-

204. Essentially, the circuit court was embracing the *Briggs* dictum, *see supra* notes 104-05, instead of *Green*.

205. Mississippi's rule was that every resident under 21 who applied to the university system must take the ACT test. The score obtained guaranteed either automatic acceptance or rejection, but the minimum score required for success differed according to which institution was doing the selecting. The cut-offs were higher for the flagship historically White universities, and it was known that on the average, Black students scored too low on the test to qualify. *See* United States v. Fordice, 112 S. Ct. 2727, 2738-40 (1992).

206. The Court pointed out that the test was never meant even by its creators to be adequate as a sole basis for admission, and that most states used it in conjunction with other criteria. *See id.* at 2740. Justice Scalia also agreed that the use of the ACT requirements should be reviewed, but dissented on other aspects of the Court's decision, including its broad causation language. *See id.* at 2746-49; *infra* notes 210 and 213.

Justice O'Connor's concurrence strongly endorsed the majority's hard look at the facts, noting that the lower courts must examine the State's "proffered justifications . . . to ensure that such rationales do not merely mask the perpetuation of discriminatory practices." *Fordice*, 112 U.S. at 2744. Easy acceptance of these justifications would lead to further loss of "educational and career opportunities." *Id.* at 2743-44.

207. *See id.* at 2740-41. The district court had concluded that " 'there is no proof that the elimination of unnecessary program duplication would be justifiable from an educational standpoint or that its elimination would have a substantial effect on student choice.' " *Id.* at 2741 (quoting the district court opinion, 674 F. Supp. 1523, 1561 (N.D. Miss. 1987)). The Supreme Court was critical of this conclusion on two grounds. The lower court had in effect conceded lack of educational justification by finding that duplication was unnecessary and " 'cannot be justified economically or in terms of providing quality education.' " *Id.* (quoting the district court opinion, 674 F.Supp. at 1541). Moreover, the district court appeared to be erroneously placing the burden of proof on plaintiffs to establish that Mississippi had not dismantled its prior dual system. *See id.*

208. *See id.* at 2742-43.

termine whether this duplication itself affects student choice and perpetuates the segregated higher education system.[209] The proliferation of institutions with similar curricula could—in combination with other factors—influence Black students not to seek admission to a traditionally all-White school.[210]

The "duplication" issue had controversial implications for the historically Black colleges. Should they all be retained, and perhaps be funded as fully as the White institutions,[211] or should one or more be eliminated? The majority charted a careful course, observing that "[e]limination of program duplication and revision of admissions criteria may make institutional closure unnecessary."[212] Separate-but-equal funding was rejected, but the possibility of approving a monetary increase "to achieve a full dismantlement" was left for consideration on remand.[213]

The Court's penetrating look at the facts, its refusal to assume that time alone can break the chain of causation, and its insistence on desegregative results are reminiscent of Justice Marshall's opinions. If he had remained on the bench, Marshall would have concurred "wholeheartedly"[214] with the majority's skepticism about the "free" choice being offered to Mississippi students and with the rejection of an equal-but-separate compromise. Professor J. Clay Smith, Jr., who had filed a brief in the case on behalf of a group of Black colleges and the Congressional Black Caucus, approved the tone and breadth of the decision, conclud-

209. *See id.* at 2742. What are the differences and similarities between the state-affected choices in *Freeman* and those in *Fordice*? The fundamental distinction is that at the elementary school level, parents are selecting a residence because the school comes with it, while at the university level the choice is among types of institutions. Still, there is a similarity in both situations: official policies that have deliberately created racially identifiable schools also have an impact on the "free" decision-maker.

210. The majority was apparently referring to the combination of traditional attendance patterns at schools with a long history of racial exclusion, the "missions" attached to the various schools, and admissions criteria, as having the potential to change applicant choices. Justice Scalia's dissent on this aspect of the majority's decision indicates that he would have agreed that policies restricting decisions could be suspect. Policies expanding choices through proliferation of same-race schools would not be suspect, regardless of the State's prior history. *See id.* at 2747.

211. This was a course that the private plaintiffs apparently favored. *See id.* at 2743.

212. *Id.* Justice Thomas concluded that these colleges had "sustained blacks during segregation," and that it would therefore be ironic to destroy them in an effort to combat segregation's vestiges. *See id.* at 2746.

213. *See id.* at 2743. Justice Scalia commented that "whether or not the Court's antagonism to unintegrated schooling is good policy, it is assuredly not good constitutional law." *Id.* at 2752. He reasoned that the Constitution neither requires nor prohibits the government from maintaining mostly-Black and mostly-White schools (which do not exclude applicants on racial grounds) and giving them equal funding. *See id.*

214. This was a phrase Justice Marshall used in his *Milliken II* concurrence, expressing his complete accord with the majority's holding that the damage inflicted by state-enforced racial separation must be remedied by extensive compensatory measures. *See* Milliken v. Bradley, 433 U.S. 267, 291 (1977) (Marshall, J., concurring) (*Milliken II*); *supra* notes 116-17, 134 and accompanying text.

ing: "The spirit of Thurgood Marshall lives on in this Court."[215]

CONCLUSION

"I continue to believe that an individual's interest in education is fundamental," Justice Marshall wrote, "and that this view is amply supported 'by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.' "[216] In his hierarchy, learning ranked with voting, speech, and religion as a right entitled to the highest level of legal protection.

His dissents did not call for "racial balancing," although he recognized that allowing metropolitan regions to be divided into "two cities—one white, the other black—"[217] could have dangerous economic and social consequences. Instead, he dealt with injury and causation issues, with the effects of publicly sponsored discrimination and the feasible measures that could eliminate those effects.

One of the two desegregation decisions issued since Marshall's retirement showed distinct traces of this analysis. The other evidenced a readiness to decamp from the field that has been more characteristic of the current majority.[218] From some twenty-first century vantage point, Justice Marshall's dissents may be read only as a reflection of earlier attitudes. Or, with another change in the Court's direction, they may form the basis for a new majority view. After all, "[d]issenters (whether the Marshalls or the Scalias) hope to become like Holmes and Brandeis—prophets vindicated by the future, dissenters who became great prophets because (indeed, only because) they were vindicated by history."[219]

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215. Linda Greenhouse, *Court, 8-1, Faults Mississippi on Bias in College System*, N.Y. Times, June 27, 1992, at A1, A11.

216. Plyler v. Doe, 457 U.S. 202, 230 (1982) (Marshall, J., concurring) (quoting from his prior dissent in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 111 (1973)). *Plyler* struck down a statute that precluded the children of illegal aliens from attending public schools, noting that even if the educational right at stake was not fundamental, it was important enough to require that the State show a substantial interest served by the discrimination. *See id.* at 223-24, 227. The Court has left unsettled the question of "whether a minimally adequate education is a fundamental right" that a state cannot infringe on a discriminatory basis without triggering "heightened equal protection review." Papasan v. Allain, 478 U.S. 265, 285 (1986).

217. Milliken v. Bradley, 418 U.S. 717, 815 (1974) (Marshall, J., dissenting).

218. *See supra* Parts II.C. and III.A.

219. Paul Gewirtz, *Tribute: Thurgood Marshall*, 101 Yale L.J. 13, 17-18 (1991).