

# ***Brown II*'s “All Deliberate Speed” at Fifty: A Golden Anniversary or A Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?**

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Thanks: for encouragement and comments at two crucial points, Professor Elaine Shoben; for reading and commenting on an earlier draft, Mr. John Rendleman and Professors Allan Ides and Ron Krotoszynski; for research assistance, Mr. Dan Wolf and Ms. Byrony Renner; and for vital support, the Frances Lewis Law Center and its director Professor Blake Morant.

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“[T]he problem of the Twentieth Century is the problem of the color-line.”

W.E.B. DuBois, *The Souls of Black Folk*<sup>1</sup>

“‘You are misinterpreting the facts of the case,’ said the priest. ‘The verdict is not suddenly arrived at, the proceedings only gradually merge into the verdict.’”

Franz Kafka, *The Trial*<sup>2</sup>

## I. INTRODUCTION

*Brown v. Board of Education* was at once the twentieth century’s pivotal judicial event and the Warren Court’s paradigm decision.<sup>3</sup> The Supreme Court held that public schools segregated by race violated minority students’ rights protected by the Constitution’s Equal Protection Clause. This Article will analyze the remedies doctrines the Court developed following *Brown*. Its major goal is to describe, briefly, for a contemporary audience the Court’s injunction remedies to vindicate plaintiffs’ rights under the *Brown* decision.

The Article has an additional goal. The professional debates about the boundary between a person’s constitutional right and her remedy, the role of the judge’s discretion in drafting and administering an injunction, the relationship between the defendant’s violation and the injunction, and the legitimacy of courts’ large scale or “structural” injunctions are overarching themes below. These professional debates began immediately after *Brown* and continue today; indeed in 2003, two important scholarly books were published making those discussions contemporary.<sup>4</sup> This

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1. W.E. BURGHARDT DUBOIS, *THE SOULS OF BLACK FOLK* vii (1903).

2. FRANZ KAFKA, *THE TRIAL* 264 (English translation 1956).

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

4. OWEN FISS, *THE LAW AS IT COULD BE* (2003); ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003). In order to provide full disclosure, the Author notes that he has published a casebook with Professor Fiss, OWEN M. FISS & DOUG RENDLEMAN,

Article's additional goal is to contribute to that professional debate by clarifying the distinction between right and remedy in a structural injunction, defining and discussing separate remedies principles for a constitutional injunction, and describing the way remedies principles channel the judge's discretion.

The background for *Brown* encompasses the toxic heritage of chattel slavery, the later failure of Reconstruction after the Civil War, and the unjust Jim Crow system of segregation under positive law that followed. It also includes the ugly heritage of explicit racial prejudice and tension just beneath the surface even today. Persistent legacies of this history are the unequal educational opportunities and economic disparities that continue to haunt the nation.

The Supreme Court based *Brown* on legal and social trends that had been evolving for some time.<sup>5</sup> Although state and local governments in Southern and some border states required racially segregated public education, at mid-century, legally mandated segregation was isolated morally and rested on an unsteady legal foundation. Inconsistent all along with the core democratic and equality values of the Declaration of Independence and the Reconstruction amendments to the Constitution, official segregation was insupportable in light of the United States' recent defeat of the Nazi German dictatorship and the repudiation of its explicit racist ideology.<sup>6</sup>

Several things, however, militated against a precipitous legal death sentence for state-mandated segregation.<sup>7</sup> The status quo of white supremacy was buttressed by the ideologies of individualism, property owners' rights, states' rights, and a limited federal government role in state and local government functions. To many conservative lawyers, the Court's nineteenth century decision in *Plessy v. Ferguson* was a stable

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INJUNCTIONS (2d ed. 1984), and is sympathetic with most (but not all) of his positions.

5. Allan Ides, *Tangled Up in Brown*, 47 HOW. L.J. 3 (2003); WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 496-97 (1973).

6. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 450 (2004) ("By 1954, segregation seemed like such an egregious evil . . . that the justices simply could not make themselves sustain it."); Neal Devins, *What Brown Teaches Us About the Rehnquist Court's Federalism Revival*, 37 PS. POL. SCI. & POL. 211 (2004), available at <http://www.apsanet.org/PS/april04/devins.pdf> (last visited Nov. 12, 2004) (arguing that social and political forces were crucial factors in the *Brown* Court's decision).

7. See Genna Rae McNeil, *Before Brown: Reflections on Historical Context and Vision*, 52 AM. U. L. REV. 1431, 1432-54 (2003) (giving a short history of the legal and social struggle leading up to *Brown*).

and dependable constitutional underpinning that buttressed segregated public schools.<sup>8</sup> Finally, in the period following the New Deal, the Supreme Court was inclined to eschew a vigorous role in setting social policy directions.

The *Brown* Court's specific holding was that "in the field of public education the doctrine of 'separate but equal' has no place."<sup>9</sup> The decision doomed the Southern way of life of racial segregation required by positive law. The Court's principle, interdicting public school segregation, developed into a broadly generative constitutional rule that official segregation by any level of government violates a minority group member's right to equal protection of the law. This broad rationale spawned a judicial "Second Reconstruction" which ended the notion that United States law would recognize two kinds of people and two kinds of public services.<sup>10</sup>

After addressing what courts and legal scholars mean by "remedy" in Part II, this Article will develop school desegregation plaintiffs' remedies in aid of the *Brown* Court's specific holding. It will progress in three stages: Part III—*Brown II* and "All Deliberate Speed." Part IV—*Green* and "Now." Part V—The Court's "Unitary" Exit Strategy. Having summarized the way courts defined the plaintiffs' constitutional right to desegregated education, developed injunctions to implement their right, and began to withdraw from adjudication, the Article resolves, however, in Part VI, that courts' roles in school desegregation lawsuits are likely to persist at least in the near future. For anyone who has not already figured it out by then, my answer to the question in the title will be in the conclusion.

## II. REMEDY

After a court decides that the defendant has violated a plaintiff's right protected by the governing substantive law, it begins to analyze the plaintiff's remedy. A remedy, as this Article defines it, is what a court orders at the end of a lawsuit on behalf of a successful plaintiff. The court will endeavor to frame a solution for the plaintiff that will transform her reality to correspond with the substantive law.

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8. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown I*, 347 U.S. 483 (1954); see HARBAUGH, *supra* note 5, at 492 (summarizing the reasons South Carolina's lawyer, John W. Davis, felt confident of victory in *Brown*).

9. *Brown I*, 347 U.S. at 495.

10. FISS, *supra* note 4, at 244; see also *Johnson v. Virginia*, 373 U.S. 61 (1963). After a trial judge held Ford Johnson in contempt for sitting in the "white" seating section in a courtroom in Richmond, the Supreme Court reversed in a decision that confirmed the overarching point that state-required race segregation of a public facility violated the Constitution. *Id.* at 62.

In plaintiffs' school desegregation lawsuits, the courts decided that the United States Constitution's Equal Protection Clause outranked state statutes and other positive law that called for racial segregation. The desegregation plaintiffs' judicial remedy is an injunction—a court order telling the defendant to do something or to refrain from doing something.<sup>11</sup> The judge grants an injunction to compel the defendant to end the violation and to deliver the practical effect of the substantive decision to the plaintiffs. For the plaintiffs, while the court's substantive decision states the abstract law, the court's injunctive remedy is a salutary practical fact.

To formulate the plaintiffs' injunction, the judge, aided by the adversaries, pursues several inquiries. Defendant's violation of the

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11. In this Article and in all constitutional litigation in federal court where plaintiffs are seeking an "equitable" injunction remedy, the federal judge will find the facts, apply the substantive rule, and formulate the injunction without a jury.

School desegregation plaintiffs eschewed any "legal" remedy, recovery of compensatory money damages. In the early 1950s, the Court had not developed the qualified immunities that protect an official administering in good faith an unconstitutional program. However, the defendants' Seventh Amendment right to a jury trial in "Suits at common law" may have been one reason for desegregation plaintiffs in the Deep South in the 1950s to spurn damages. U.S. CONST. amend. VII.

In an email responding to an earlier draft of this Article, Professor Allan Ides speculated about damages. "I wonder whether a damages remedy would have sped the process along—including personal damages against those executive officers who, without reasonable good faith, attempted to obstruct the student's ability to attend schools regardless of race. The states and local communities then become the monitors of their own process with the stick of damages hanging over their head." Email from Allan Ides, William M. Raines Fellow, Loyola Law School, to Doug Rendleman, Robert E.R. Huntley Professor of Law, Washington and Lee University School of Law (Mar. 24, 2004) (on file with author).

Moreover, when the constitutional plaintiffs are seeking an injunction or other equitable remedy, the judge encounters the irreparable injury rule; phantom or not, the "rule" is that the judge will deny plaintiffs' request for an injunction unless plaintiffs show that, without the injunction, their legal remedy will be inadequate, and that they will be irreparably injured. Plaintiffs' irreparable injury from unconstitutional official race discrimination is palpable, straightforward, and virtually uncontested. Doug Rendleman, *Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1380–83 (2002).

The school desegregation plaintiffs did not seek another form of equitable relief, the judge's appointment of a receiver to operate the defendant school district. See 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* 30 (2d ed. 1993) (explaining that a court could enforce integration of a school by appointing a receiver to manage it and displacing the school board and administrators).

Finally, in this Article, "Plaintiffs" is plural because school desegregation lawsuits are and were plaintiff class actions.

plaintiffs' rights under substantive law relegated them to a second-best world and prevented them from enjoying a better world. After being satisfied that the defendant breached the plaintiffs' right, the judge inquires into the plaintiffs' actual situation. What comprises their real, but second-best, world? The judge next fashions a counterfactual world: what would the plaintiffs' actual "better world" have been if the defendant had obeyed the substantive standard? The judge, finally, decides how to formulate an injunction to move the plaintiffs from their actual but second-best condition to the better world the defendant's breach prevented. By granting an injunction the judge seeks to transform the plaintiffs' reality to correspond with their substantive right.

A reader of courts' decisions and professors' articles will not always discern the straightforward distinction between the plaintiffs' substantive constitutional right and the judge's injunction remedy outlined in the preceding paragraph. Although this Article endeavors to clarify what is meant by remedy and to outline the remedial inquiry, many judges and scholars define plaintiffs' substantive rights and their remedy differently or, perhaps, do not define them at all. Definitions of right and remedy are elusive; the distinctions between them are unstable; and definitions and distinctions from one setting may, but usually should not, carry over to another setting. One reason for this muddle is the murky relationship between the right-remedy distinction and judicial discretion; this distinction will be treated below after discussing some views about right and remedy.

The Supreme Court's majority opinions have defined school desegregation plaintiffs' substantive constitutional rights imprecisely. This imprecision, according to David Kirp, a leading scholar of education law, has led courts to a reasoning process "which defines the wrong by inspecting what is required by way of remedy. . . . Wrong defines remedy, which in turn redefines wrong." The result according to Kirp? A "decision-making strategy," not a way of solving a problem.<sup>12</sup>

The late Professor Abram Chayes, a notable scholar of constitutional injunctions, described the right-remedy distinction. The *Brown* Court, Chayes wrote, established students' "right" to attend a desegregated school system.<sup>13</sup> A judge cannot reason directly from the students' "right" to their injunctive remedy, to discern "the content of the decree in any particular case."<sup>14</sup> The *Brown* Court "did not establish a particular structure or methodology for eliminating segregation in the schools, but

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12. DAVID L. KIRP, *JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION* 52 (1982).

13. Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 50-51 (1982).

14. *Id.* at 50.

instead mandated an effort for wide-ranging systemic reform—in the first instance by school authorities and, failing that, by the courts.”<sup>15</sup> Moreover, according to Chayes, a judge cannot “work backward from the relief to define the contours of the right.”<sup>16</sup>

Professor Chayes maintained that uncoupling the plaintiffs’ right from their remedy augmented the judge’s discretion in formulating the injunction’s terms. Although the plaintiffs’ right is closely linked to their remedy in what he identified as “the classical litigation model,”<sup>17</sup> in framing “prospective and affirmative” constitutional injunctions, however, the judge’s “discretionary component is dramatically enhanced.”<sup>18</sup> “This [judicial] discretion makes it impossible to identify a unique remedial regime that follows ineluctably from and is measured by the [judge’s] determination of [the defendant’s] substantive liability.”<sup>19</sup>

A reader-critic may gasp at Chayes’s leap from the defendant’s substantive violation to the plaintiffs’ injunction and the surfeit of discretion he endowed on the judge. In short, a hypothetical reader-critic may decry Chayes’s audacity in unbridling a judge to make up plaintiffs’ injunctions as the lawsuit goes along. This contemporary reader-critic gasps in the best tradition of seventeenth-century commentator John Seldon, who joked about “roguish” equity and focused on the menace of subjective, ruleless decisionmaking.<sup>20</sup> Suppose, Seldon wrote, the law “should make the standard for the measure we call a foot to be the Chancellor’s foot; what an uncertain measure would this be; One Chancellor has a long foot, another a short foot, a third an indifferent foot.”<sup>21</sup>

More positivistic judges and scholars seek techniques and principles of confinement to contain the judge’s discretion within predictable walls. In his Blackstone Lecture at Pembroke College, Oxford, the late Regius Professor Peter Birks maintained that a court’s use of the concept of a plaintiff’s remedy, as separate from her substantive right, erodes predictability and fosters a poisonous pattern of destabilized judicial decisionmaking that he named “discretionary remedialism.” “This is a

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15. *Id.* at 51.

16. *Id.* at 50.

17. *Id.* at 45.

18. *Id.* at 46.

19. *Id.*

20. JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43 (Sir Frederick Pollock ed., 1927) (1689).

21. *Id.*

nightmare trying to be a noble dream. The core of discretionary remedialism is the separation of liability and remedy. Liability triggers the courts' discretion in the matter of the remedy."<sup>22</sup> A court might cure this malady of "remedialists [doing] their best to dissolve the law in pools of misdirected good intentions," Birks concluded, by "preferring the language of rights," and downgrading or abolishing the concept of "remedy" as distinct from "right."<sup>23</sup>

This Article's treatment of plaintiffs' right and remedy is both more channeled and positivist than Chayes's and more nuanced and functional than Birks's. It first distinguishes plaintiffs' right and remedy along the lines of principle, rule, and remedy. Principle is the most abstract level of generalization in a court's decision. Here the reader may think of the constitutional language.

The second and more specific level of articulation is the substantive rule which defines the plaintiffs' substantive right. Court decisions that give meaning to a constitutional provision's values and principles often comprise the source of these rules. Then, in a lawsuit, the court finds that the defendant has violated plaintiffs' rights as defined by the constitutional provision and earlier decisions. The judge's remedy is the solution; it is the order the judge formulates to change the plaintiff's situation in the world to achieve her right. "Rights," as Professor Owen Fiss phrased the distinction between right and remedy, "operate in the realm of abstraction, remedies in the world of practical reality. . . . A remedy is more specific, more concrete, and more coercive than the mere declaration of right; it constitutes the actualization of the right."<sup>24</sup>

This Article builds on my proposition that a court's substantive constitutional decision differs from its constitutional injunction.<sup>25</sup> The priest in Kafka's *The Trial* might have been describing the present-day judge's analytical segue from right to remedy. The desegregation lawsuit's substantive "proceedings only gradually merge" into the plaintiffs' practical reality in an injunction.<sup>26</sup> Despite the difficulty of distinguishing, each stage of school desegregation below displays remedies principles discrete from substantive rules.

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22. Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 23 (2000).

23. *Id.* at 36–37.

24. FISS, *supra* note 4, at 44.

25. See also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

26. KAFKA, *supra* note 2, at 264. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1042 (2004) (writing about prison injunctions, the authors observe that "[o]nce liability is found, the process of proof merges with that of implementation: a major focus of implementation is the continuous measurement of compliance").

The judge needs discrete remedies standards to implement a substantive right. The judge's standards for remedy include, nevertheless, the core idea that the plaintiffs' remedy ought to advance the substantive principle and rule.<sup>27</sup> A judge with discretion to select the terms of the plaintiffs' injunction formulates it separately from deciding their right, but with their right always in view.<sup>28</sup> The *Brown I* Court's<sup>29</sup> substantive decision that segregated public education violated the plaintiffs' rights under the Equal Protection Clause differs from its delayed remedial opinion in *Brown II*<sup>30</sup> charting the Court's goals to implement a remedy for the students, the subject this Article turns to next. The courts' separate remedial standards for school desegregation injunctions developed, improved, and dwindled during the phases that followed.

### III. *BROWN II* AND "ALL DELIBERATE SPEED"

In 1955, the plaintiffs' adjudicated equal protection deficit was already more than a year old. After that "fifty-four-week cooling-off period,"<sup>31</sup> the Court, following rebriefing and reargument, promulgated *Brown II*, its remedies decision. Because of its significance for this Article, four paragraphs follow:

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial

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27. DOBBS, *supra* note 11, at 27; FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

28. Other helpful discussions of right-remedy include Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475 (1999) [hereinafter Parker, *The Supreme Court and Public Law Remedies*]; Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1737 n.247 (2004) [hereinafter Parker, *Connecting the Dots*]; Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 285 (2002); Tracy Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy*, 41 SAN DIEGO L. REV. 1633, 1636-40 (2004) (arguing that successful plaintiffs' right to a remedy is a fundamental one protected by the Fourteenth Amendment's Due Process Clause); Rendleman, *supra* note 11, at 1353-55.

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

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

31. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 716 (1975).

appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below . . . are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.<sup>32</sup>

The *Brown II* Court expressed several remedial guidelines.<sup>33</sup> The plaintiffs' ability to enjoy their constitutional rights is critical; nevertheless, theirs is not the only interest in play. First was the Court's novel proposition that the defendants, the school authorities who lost the lawsuit, have the "primary responsibility" for resolving the constitutional incongruity. The Court put the proverbial fox in charge of desegregating the plaintiffs' schoolhouse.

The second responsibility, the trial judges', was consistent with the

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32. *Brown II*, 349 U.S. at 299–301 (citations omitted).

33. The material in this Part is a summary of complex developments. For a fuller treatment, see Parker, *Connecting the Dots*, *supra* note 28, at 1706–16; J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978*, at 61–102 (1979).

foregoing. It dealt with timing. Although a decree admitting the plaintiff-students had been suggested, the Court rejected a fixed date or a planned schedule.<sup>34</sup> Indeed, at the oral argument in what would turn out to be an optimistic prediction, Thurgood Marshall had addressed timing; he could conceive

of nothing administrative-wise that would take longer than a year. . . . I submit that a longer period of time would get the lower court into the legislative field . . . .

. . . I am a firm believer that, especially insofar as the federal courts are concerned, their duty and responsibility ends with telling the state, in this field at least, what you can't do.<sup>35</sup>

The Court did not order an immediate injunction. Instead it initiated a transition period by telling the trial judges to retain jurisdiction over the lawsuits until the plaintiffs' rights were implemented.

Almost as if it were responding to Thurgood Marshall's argument, quoted above, the Court mentioned, alluded to, or reminded the trial judges of three related but separate remedial countervailing considerations that militated against the plaintiffs' immediate enjoyment of their constitutional rights: First, because of separation of powers, a judge's injunctive task will involve the delicate and then unfamiliar task of supervising executive and administrative decisionmaking.<sup>36</sup> Second, under principles of federalism, a United States judge drafting and administering an injunction to desegregate a school will thrust himself into an unfamiliar territory, the heart of a state and local government function.<sup>37</sup> Third, the transition's logistics, the actual job of building the plaintiffs' path to their constitutional right, will compel the judge to devise and grant an injunction that will

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34. KLUGER, *supra* note 31, at 737, 742–45.

35. Rebuttal Argument of Thurgood Marshall, Esq., on Behalf of Appellants, Harry Briggs, Jr., et al., at 14–15, *Briggs v. Elliott*, No. 101, before the United States Supreme Court (Dec. 8, 1953), available at [www.lib.umich.edu/exhibits/brownarchive/oral/ReargumentBriggs.pdf](http://www.lib.umich.edu/exhibits/brownarchive/oral/ReargumentBriggs.pdf) (last visited Nov. 11, 2004); see also KLUGER, *supra* note 31, at 707 (noting that Chief Justice Earl Warren's concluding paragraph in *Brown I*, setting further oral argument to formulate decrees because of the "considerable complexity" and "wide applicability" of these class-action cases, showed his dexterous use of power and compromise).

36. *Brown II*, 349 U.S. at 300–01 (stating that in deciding whether defendants are in good faith compliance with *Brown I*, "the courts may consider [various] problems related to administration . . . and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems . . .").

37. *Id.* at 299 ("Full implementation of [*Brown I*'s] constitutional principles may require solution of varied local school problems.").

alter a cumbersome educational bureaucracy's trajectory from an unconstitutional to a constitutional one.<sup>38</sup>

The Court's countervailing remedial considerations qualified the plaintiffs' substantive rights by saying explicitly that other things may come first—sometimes the court's injunction will fall short of correcting the defendant's violations immediately.<sup>39</sup> The Court augmented the year's delay, the school authorities' responsibility, the courts' retained jurisdiction, and the countervailing considerations with the ominous oxymoronic phrase, originally suggested by Justice Frankfurter, that the transition from segregated to constitutional schools was to occur with "all deliberate speed."<sup>40</sup> "All deliberate speed" by itself emphasized that the judge's injunction would be tardy.

A court will often resort to something like "all deliberate speed" under an unwritten remedial principle called "let the loser down easy," more felicitously known as "transitional jurisprudence." An analogy comes from post-Apartheid South Africa. A discriminatory practice persisted after the democratic elections in 1994: African children walked to school, while white children rode to school in subsidized buses. Responding to public pressure, the new minister decided in the middle of the second school term that the subsidies had to stop. The school principals argued, however, that the decisionmaker had not followed proper procedure and that the sudden termination was unfair and would disrupt the children's schooling. The court upheld the principals' contention. Although the unjust subsidies had to cease, "this had to be done in an orderly and reasonable fashion with fair procedures." The court ordered that the subsidies would continue until the end of the school year.<sup>41</sup> If judicial compromises for logistics are an inevitable part of a transition, the remedial process becomes a series of pragmatic judgments. How much delay and amelioration is too much—and what principles guide it?

The Supreme Court's guidance was delphic. In school desegregation, the trial judge would, the Court maintained, employ traditional equitable principles, including that hallmark of chancery, copious discretion. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and

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38. *Id.* at 300 ("To effectuate [plaintiffs' interest in nondiscriminatory admission to public schools as soon as practicable] may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown I*].").

39. See Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 585–90 nn.7–12 (1983) (collecting cases).

40. KLUGER, *supra* note 31, at 742–44.

41. Premier, Mpumalanga v. Ass'n of State-Aided Sch., 1999 (2) SALR 91 (CC); see A.L. Sachs, *The Challenges of Post-Apartheid South Africa*, 7 *GREEN BAG 2D* 63, 66 (2003).

flexibility are inherent in equitable remedies."<sup>42</sup>

One countervailing consideration that the Supreme Court's *Brown II* opinion omitted to feature was, nevertheless, implicit in racism's toxic legacy. Prejudiced opponents of desegregation would oppose a judge's concrete desegregation injunction in unpredictable and emotional ways, perhaps leading to extreme behavior, including possible violence.<sup>43</sup> In the vernacular—many of *Brown*'s opponents were meaner than a skilful of rattlesnakes, about as predictable, and potentially as lethal.

Vituperative segregationists who dominated state and local politics countenanced semiofficial brutality against peaceful demonstrators. The national media broadcasted these scenes to an appalled nation; the notorious publicity almost literally hoisted the segregationists on their own petard by persuading Congress to pass two civil rights acts in the 1960s.<sup>44</sup>

Other opponents of desegregation were wilier.<sup>45</sup> Desegregation's foes interpreted the phrase "all deliberate speed" to be an omen of the Court's lack of resolve.<sup>46</sup> The lower courts' delay allowed public opposition to galvanize and harden into conspicuous resistance. The politicians used the discredited rhetoric of "interposition" to nurture segregationists' hostile sentiments and to encourage them to think that *Brown* itself violated the constitution but that official segregation did not. Segregationists adopted "Massive Resistance," a phrase coined by Virginia's Senator Byrd, as an indispensable article of political faith in states with separate schools.<sup>47</sup> Southern members of Congress subscribed to the Southern Manifesto which pledged opposition to school desegregation. Dual racial systems persisted in the public sphere.<sup>48</sup>

If the Supreme Court's justices needed a legal reminder of segregationists' resistance, Little Rock's *Cooper v. Aaron* soon supplied it.<sup>49</sup> In 1957, Arkansas's Governor Orval Faubus led a campaign to stop

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42. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

43. Gewirtz, *supra* note 39, at 666, 674 nn.222, 224 & 242.

44. KLARMAN, *supra* note 6, at 350, 367, 441–42, 462.

45. Parker, *Connecting the Dots*, *supra* note 28, at 1708–16 (summarizing the state statutes and the litigation during this period); WILKINSON, *supra* note 33, at 64–102.

46. Ides, *supra* note 5, at 28; KLARMAN, *supra* note 6, at 320.

47. JACK BASS, *TAMING THE STORM* 107 (1993).

48. Carl Tobias, *Public School Desegregation in Virginia During the Post-Brown Decade*, 37 WM. & MARY L. REV. 1261 (1996) (interesting on three levels of desegregation: individual, local, and statewide). WILKINSON, *supra* note 33, at 61–127.

49. *Cooper v. Aaron*, 358 U.S. 1 (1958).

a federal judge's phased and gradual desegregation injunction from taking effect in Little Rock.<sup>50</sup> Public defiance including grotesque obstruction and threats of violence followed.<sup>51</sup> The President dispatched Army troops and National Guard companies to assure order.<sup>52</sup> The school board petitioned to delay the effective date of the judge's controversial desegregation schedule. The Supreme Court responded with an emphatic "no" based on the principle that public hostility may neither stop nor defer a federal judge's desegregation order from taking effect. In denying the Little Rock authorities' request to delay desegregation, the Court ruled that the state and local authorities could not preserve public order "by depriving the Negro children of their constitutional rights" to a desegregated school.<sup>53</sup>

What occurred under *Brown II*? After the initial dust had settled and the Supreme Court had rattled its sabre in *Cooper v. Aaron*, not much had actually happened in the practical world of K-12, primary and secondary, education in the South.<sup>54</sup> To begin with, the Court had condemned state-enforced segregation negatively; but it had not established a positive desegregation remedies program that generally required judges to enjoin states and localities to integrate their schools.<sup>55</sup> The content of the plaintiffs' rights depended on something that had not happened: judges' implementation with broadly based concrete injunctions.

On the whole, the Southern school districts' parallel systems of race-based attendance zones remained intact. The federal courts implemented *Brown* on a piecemeal basis with orders to a school to integrate at the behest of an individual plaintiff. A school district continued to be segregated until someone took the initiative to petition a court for change.<sup>56</sup> Pupil placement evolved under "freedom-of-choice" injunctions.<sup>57</sup> A judge would order a black child, sometimes children, admitted to a formerly "white" school. In 1964, only 2.3% of Southern black students

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50. *Aaron v. Cooper*, 156 F. Supp. 220 (E.D. Ark. 1957).

51. Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 390-96.

52. *Cooper*, 358 U.S. at 12.

53. *Id.* at 16.

54. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 132 (1994). Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1603-04 (2003); GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?*, The Civil Rights Project at Harvard University 6, 19, 36 (2004), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf> (last visited Aug. 25, 2004).

55. *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

56. JEFFRIES, *supra* note 54, at 170.

57. *Bowman v. County Sch. Bd.*, 382 F.2d 326, 327-28 (4th Cir. 1967), *vacated* *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Briggs*, 132 F. Supp. at 777; Tobias, *supra* note 48, at 1278, nn.98-100 & 122-37 (collecting authorities); ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 176-79 (1992).

attended majority-white "integrated" schools and in 1968 77.8% of Southern black students attended 90–100% minority schools.<sup>58</sup> All over the South, black children walked or rode by "white" schools on their way to their "black" schools.

The *Brown* decision's first decade was one of delayed and microinjunctions. To a detached observer, the persistent incongruity between the abstract substantive principle of *Brown I* and the reality of remedial immobility under *Brown II* revealed the irony of one set of values for display, another for use. Something more than logistics was at work. "The lack of a firm remedy, the lack of a definite timetable for implementation, and the Court's subsequent unwillingness to fill in these blanks significantly muted the social and political impact of the decision," wrote Professor Ron Krotoszynski.<sup>59</sup> For a Southern black child who started first grade in an underfunded and segregated elementary school in 1954 or 1955 after the Court decided *Brown I*, and who twelve years later finished high school in the same still-segregated school district,<sup>60</sup> the *Brown* Court's principle was a broken promise.

#### IV. GREEN AND "NOW"

Although it took a long time, events and lower court decisions convinced the Supreme Court that a school district's "freedom-of-choice" plan was, to use the commentators' almost unanimous adjective, an unacceptable "foot-dragging" response to the plaintiffs' unconstitutional predicament. Two of Judge John Minor Wisdom's decisions for the Fifth Circuit Court of Appeals foreshadowed the Supreme Court's more activist stance. Judge Wisdom insisted that merely stopping segregation would not suffice and that the school board had a positive duty to desegregate right away.<sup>61</sup>

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58. ORFIELD & LEE, *supra* note 54, at 19–20.

59. Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 982; *see also* Gewirtz, *supra* note 39, at 673 n.237 ("The courts' words about the nature of their remedies (whether candid or dishonest) may be irrelevant. Once the ideal has been expressed—which is the important step—reality may 'speak' for itself about whether the ideal has been implemented."); KLUGER, *supra* note 31, at 752–53 ("Throughout the balance of the Fifties, the South interpreted 'all deliberate speed' to mean 'any conceivable delay,' and desegregation was far more a figment in the mind of the Supreme Court than a prominent new feature on the American social landscape.").

60. WILKINSON, *supra* note 33, at 61, 79.

61. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 869 (5th Cir. 1966). "As we see it, the law imposes an absolute duty to desegregate, that is, disestablish

Under the New Kent County, Virginia school board's "freedom-of-choice" plan at issue in *Green v. County School Board*, any child could attend either the county's formerly white school or its formerly black school.<sup>62</sup> All the white children but only fifteen percent of the black children attended the formerly white school leaving no white and eighty-five percent of the minority children in the "formerly" black school.<sup>63</sup> The Supreme Court found that solution diverged from the *Brown* Court's principle of desegregation because the racial identification of both schools persisted and the system remained "dual." This led the Court in 1968 to strike down New Kent's freedom-of-choice plan. In addition, "the burden on a school board today," the Court concluded, "is to come forward with a plan that promises realistically to work, and promises realistically to work now."<sup>64</sup> The Court articulated its goal: a "unitary, nonracial system of public education."<sup>65</sup>

How did the *Green* Court's injunctive remedies work? The *Green* decision altered a trial judge's remedial agenda. Under the prior regime of "freedom of choice" and "all deliberate speed," the judge would forbid segregation that was required by state law and integrate the school district on an individual or piecemeal basis. The judge's new duty was to create a district's positive duty to cease official segregation and to show concrete results in the school system. Because students in New Kent were about 50/50 minority/white in a suburban/rural area without large scale housing segregation, that judge could desegregate the district with an injunction that required the school board to assign each student to the closest school.<sup>66</sup>

"All deliberate speed" implemented with microinjunctions passed from the scene; the Supreme Court's new principle was that hereafter the judge would evaluate a school district's efforts to desegregate by the

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segregation. And an absolute duty to integrate." *Id.* at 846 n.5; *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 729 (5th Cir. 1965) ("The time has come for footdragging public school boards to move with celerity toward desegregation."); see WILKINSON, *supra* note 33, at 111–12 ("Wisdom transformed the face of school desegregation law. . . . 'Those cases mark the most important doctrinal change' in school integration law since *Brown* itself. 'Their importance cannot be overemphasized.'" (quoting Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROBS. 1, 20 (1975))).

62. *Green v. County Sch. Bd.*, 391 U.S. 430, 431–32 (1968).

63. *Id.* at 441.

64. *Id.* at 439.

65. *Id.* at 436; JEFFRIES, *supra* note 54, at 171–72, 282; Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 357 n.256 (2004).

66. *Green*, 391 U.S. at 442 n.6.

results, as quantified in real numbers. Trial judges began to reduce the number of public schools that were racially identifiable.<sup>67</sup>

As the federal district courts entered a more active period of desegregation after *Green*, several new words and phrases entered the vocabulary of desegregation remedies and injunctions—Neighborhood Schools, Busing, Racial Balance, Segregation Up North, White Flight, De Jure vs. De Facto racial separation, the Structural Injunction, the Tailoring Principle, Local Control (what this Article calls The Bus Stops Here), and, lastly, Plaintiff-Group Diffusion. This Article will review the active period of courts' desegregation injunctions by summarizing these developments and ideas.

*Neighborhood Schools.* Suppose a school system in a small Southern town which, before *Brown*, operated two elementary schools, one historically black, the other historically white. Under the trial court's "freedom-of-choice" injunction, a few middle-class minority students attended the white school, but no white students selected the black school. After *Green* interred freedom-of-choice remedies, the judge's next step was an injunction requiring the school district to divide itself into two elementary school attendance zones, one zone for each school, and to replace the parallel segregated systems with two neighborhood school attendance zones. Each child in the district was assigned to attend the school in the zone where he or she lived.<sup>68</sup>

A judge could grant a neighborhood-school injunction to desegregate a school district in a rural area or a small town. In an urban area or a city with segregated residential housing, however, a judge's neighborhood-school order left all-black and all-white schools.<sup>69</sup> Because an elementary school serves a small area, a neighborhood-school plan left numerous racially identifiable elementary schools. Nor did neighborhood attendance zones desegregate large urban areas with multiple school districts because the plaintiffs' desegregation lawsuits were organized around school district defendants and the school districts' boundaries often coincided with racially identifiable city and county housing areas.

*Busing.* To form the Charlotte-Mecklenberg, North Carolina, school

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67. JEFFRIES, *supra* note 54, at 172. Congress helped the courts. Segregated public schools receiving federal education grants would lose federal funds under the federal statutes and regulations. MATTHEW A. CRENSON & BENJAMIN GINSBERG, *DOWNSIZING DEMOCRACY: HOW AMERICA SIDELINED ITS CITIZENS AND PRIVATIZED ITS PUBLIC* 140 (2002).

68. *Green*, 391 U.S. at 441–42.

69. JEFFRIES, *supra* note 54, at 282.

system, the city, Charlotte, and the county, Mecklenberg, had merged the city school district and its suburban districts into one large school district with an overall white majority. The district's racial composition was a starting place for a judge to shape an attendance plan. Judge James McMillan's solution, which the Supreme Court approved, was twofold: redrawing attendance zones and, more importantly, busing. The school district's buses transported children between neighborhood schools to combine them in a less segregated majority-minority mix than neighborhood attendance zones.<sup>70</sup>

The school district's racial composition was the judge's starting place in shaping the attendance plan. Then the judge could order the district to transport students between schools to implement that attendance plan. But the Supreme Court rejected the idea that all schools in a district had to have the same racial composition, that of the district as a whole. The courts' bridge concept was "racial balance."

*Racial Balance.* Racial balance is one of the least precise terms or concepts in the imprecise vocabulary of desegregation injunctions. Suppose a school district is divided equally between minority and nonminority children, that is 50/50. If the school district's elementary schools vary no more than the judge's "tolerable" or target racial-balance variation, so that they are within 60/40–40/60, then the unit "balances."<sup>71</sup>

If the school district is round and if the minority group students are concentrated in the center, then the judge can desegregate the schools in the district and achieve the acceptable target or "balance" by cutting the district's attendance zones like pieces of pie and ordering busing. A white child riding a bus from the outer suburban fringe to school in the center city will meet a minority child on her way from the center to her suburban school.

*Segregation Up North.* Legally mandated segregation existed almost exclusively in the Southern and border states. The Supreme Court's decision in *Keyes v. School District* expanded courts' injunction remedies to school districts without legally compelled segregation.<sup>72</sup> Although lacking formal segregation under positive law, the Denver schools had maintained substantial racial separation through a building

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70. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6–11 (1971); see also Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343, 384 (2002) ("[T]he busing remedies that addressed the social and economic causes of educational segregation redefined the scope of the equal protection guarantee into a de facto rather than a de jure right.").

71. See, e.g., *Swann*, 402 U.S. at 22–25 (upholding district court's use of ratio as starting point, rather than an inflexible requirement).

72. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 202 (1973).

program augmented by mobile classrooms and optional attendance zones. Although racially "unbalanced" schools may develop because of residents' migration patterns, not because of the school board's decisions, the *Keyes* trial judge thought this separation comprised segregation imposed by the state government, albeit indirectly.<sup>73</sup> Moreover the judge found that the school district authorities had manipulated attendance districts which warranted a busing order for the whole city and school district. The *Keyes* Supreme Court approved, holding that plaintiffs can show segregation that violates minority students' equal protection guarantees by proving the cumulative effect of official decisions on pupil assignments, school construction, transportation, and finance.<sup>74</sup> Accordingly, when the school authorities make a series of ostensibly separate and unrelated official decisions, which cumulatively facilitate racial separation, the judge could diagnose official segregation and "cure" it with a district-wide busing injunction aimed to achieve acceptable racial balance.<sup>75</sup> The Court's *Keyes* decision expanded the potential reach of the trial courts' desegregation and transportation injunctions and in turn generated social countermoves, among them white flight.

*White Flight.* Middle-class people had been moving to the suburbs before the Court decided *Brown*. The white middle-class continued its migration, school-aged youngsters in tow, accelerated by neighborhood-school injunctions and pupil-transportation decrees. In some places, desegregation's opponents' racial prejudice was explicit and their rhetoric was inflamed. To put it more gently, a judge's busing decree could erode white middle class parents' support for public education. These white parents might lack a positive interest in distant schools where their children attended classes with poor and minority children; they might choose private schools or opt to move to a suburb.<sup>76</sup> White residents' migration exacerbated the trial courts' difficulty in desegregating school districts with Neighborhood Schools and busing injunctions. The courts evaluated the effect of white flight under the rubric of the distinction between de jure and de facto segregation.

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73. *Keyes v. Sch. Dist. No. 1*, 303 F. Supp. 279, 282, 287-88 (D. Colo. 1969), modified 413 U.S. 189 (1973).

74. *Keyes*, 413 U.S. at 202.

75. *Id.* at 213.

76. Tobias, *supra* note 48, at 1288-89.

*De Jure vs. De Facto.* The *Brown* Court's finite principle was negative: state-mandated school segregation violated a minority child's rights under the Equal Protection Clause. Particularly after the *Keyes* Court's expansion of official segregation beyond explicitly official segregation, the courts had to contend with the thorny task of defining when segregation was state-mandated. Courts developed the Latin-sounding Legal English categories of *de jure* and *de facto* to contain their answers to this mixed substantive-remedial conundrum and to limit desegregation injunctions.

The Supreme Court had not said that a child had an enforceable constitutional right to attend an integrated school. Only a school district's official racial segregation, segregation *de jure* or by positive law, violated the excluded person's right to equal protection. But racial separation, *de facto* or in-fact segregation, does not. What proponents of the *de jure-de facto* distinction identify as *de facto* segregation is school segregation resulting from residential housing patterns, which occur because of thousands of families' private choices of where to live. These homeowners' private choices, they argued successfully, absolve the school authorities from desegregating their schools. "It's not our problem," the school board would insist.

Detractors of the *de jure-de facto* distinction urged, unsuccessfully, that when a court distinguished between *de jure* and *de facto* school segregation and then treated the categories differently, it was employing a bogus characterization that stunted its response to official and semiofficial segregation. The detractors pointed out that earlier government decisions led to the segregated housing patterns. The earlier official decisions fell under the headings of judicial enforcement of restrictive covenants, city councils' discriminatory zoning, biased Federal Housing Administration policies, and local governments' racially motivated public housing siting.

Proponents of the *de jure-de facto* distinction, its opponents maintained, concealed the reality of race discrimination when they labeled the school segregation that resulted as *de facto*. In other words, as Professor Richard Ford observed, *de jure* and *de facto* distinguish "between policies that explicitly call for segregation and those that achieve it without naming it . . ." <sup>77</sup> Indeed the state or local government could be found responsible for both kinds of conditions that led to school segregation. Thus, without more, a segregated school district could be eligible for a judge's desegregation remedy, including attendance zones and a busing injunction. This argument did not succeed, leaving "*de facto*" minority-majority separation a major substantive-remedial limitation on a judge's ability to desegregate schools.

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77. Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1308 (2004).

*The Structural Injunction.* A Green-era desegregation injunction was complicated. The judge had to contend with several of the defendant school system's features: distinctions between de jure and de facto segregation, students' attendance zones and pupil assignments, faculty and staff assignments, facilities, extracurricular activities, and transportation.<sup>78</sup> A mature desegregation injunction is an archetype of what Professor Owen Fiss named the "structural injunction." In the 1970s, Professor Fiss formulated and articulated the concept of the structural injunction to describe a complex court order that a judge grants to redirect a school district's trajectory from its unconstitutional "dual" path toward a "unitary" and constitutional target.<sup>79</sup>

As described by Professor Abram Chayes, "public law litigation" leading to a structural injunction has several characteristics.<sup>80</sup> Structural litigation is "polycentric." Numerous plaintiffs and interest groups are contesting future government policy.<sup>81</sup> State and local governments are the defendants. The federal constitution is the source of the plaintiffs' rights.

The judge's substantive decision in public law and structural litigation is merely the prologue to a lengthy remedial production. In a state with a statute that required segregated schools, the trial judge's substantive equal protection decision was, after *Brown I*, rudimentary: the statute as well as the practices that flowed from it violated minority-student plaintiffs' constitutional right to equal protection.<sup>82</sup>

The judge's fundamental and troublesome questions focused almost exclusively on the plaintiffs' remedy. Since the plaintiffs were not seeking compensatory damages, the judge's lone feasible remedy was an injunction, whose size and shape was yet to be divined. After a glance at history to confirm the school district's violation of the plaintiffs' substantive rights, the litigants and judge turn forward to focus on what should happen to the school district and its program in the future.

Instead of a retrospective money judgment, the judge's structural

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78. *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968).

79. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 9 (1978) [hereinafter FISS, *THE CIVIL RIGHTS INJUNCTION*].

80. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

81. *Id.* at 1310.

82. See Sabel & Simon, *supra* note 26, at 1062–63 (asserting that determining substantive liability is the least controversial aspect of institutional reform adjudication and is often uncontested); see also Parker, *Connecting the Dots*, *supra* note 28, at 1708–14 (summarizing several legislative ruses and the courts' responses).

remedy is a prospective injunction that will affect future governmental policy and touch upon the lives of many people. Judges had to depart from the modest prohibitive injunction that Thurgood Marshall suggested at oral argument which avoids improper executive or legislative enactments and simply tells the school district's authorities what they "can't" do.<sup>83</sup> A judge's desegregation injunction became a mandatory decree that requires conduct and tells the defendants what they "must" do. At the remedy stage, the judge enters a structural injunction to suppress the school district's constitutional violations and, after *Green*, to direct its policy into constitutional channels. Because of its forward-looking orientation and the complexity of developing and administering a structural injunction, public law litigation is protracted, becoming a lengthy process that two alliterative scholars labeled a "rolling-rule regime."<sup>84</sup> Public law litigation, Chayes posited, alters the center of gravity between the litigants and their lawyers, on the one hand, and the judge, on the other, spurring the trial judge to assume a more central role because of the litigation's governmental policy component.<sup>85</sup>

While most of Chayes's description remains prescient, a structural lawsuit's future dynamic undercuts the last point, that the judge manages and directs structural-injunction litigation. Plaintiffs and school district defendants developed a yearly cycle of negotiating, drafting, and submitting a "plan," seeking judicial approval of the year's plan, and incorporating the plan into a complex structural injunction.<sup>86</sup> The lawyers' and experts' yearly cycle thrusts those specialist lawyers and education "experts" into the core of policymaking and upstages the judge. The negotiated consent decree leading to "settlement" becomes the principal script.<sup>87</sup> Although the judge who must approve a class action settlement<sup>88</sup> is not completely offstage, the lawyers and their allied interest groups become the central players in structural injunction litigation.<sup>89</sup>

The structural injunction has been controversial. The structural phenomena spread from schools to other state and local government functions and departments. Judges have granted structural injunctions against state hospitals, prisons, and jails. Supporters of the structural

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83. See *supra* note 35 and accompanying text.

84. Sabel & Simon, *supra* note 26, at 1069.

85. Chayes, *supra* note 80, at 1284.

86. Sabel & Simon, *supra* note 26, at 1067–72.

87. *Id.*

88. FED. R. CIV. P. 23(e).

89. SANDLER & SCHOENBROD, *supra* note 4, at 118–22; Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2010–22 (1999); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1628 (2003) [hereinafter Parker, *The Decline of Judicial Decisionmaking*].

injunction focus on the court's need to protect plaintiffs' rights primarily under the U.S. Constitution and its goal of implementing effective remedies; in short, the court's structural injunction makes the plaintiffs' constitutional rights real.<sup>90</sup> And, proponents maintain, the skeptics' common arguments against structural relief including principles of federalism, separation of powers, and the rule of law, as well as their logistic arguments against structural relief are not persuasive when balanced against society's need to vindicate plaintiffs' constitutional rights.<sup>91</sup>

In granting structural relief, a judge's school desegregation injunction may include increased resources for learning as well as for transportation. Similarly courts developed educational techniques like the magnet school. A magnet school has an enriched program and curriculum that the administrators believe will draw or attract both minority and majority students; this attraction leads, they maintain, to more education, less busing.<sup>92</sup> Someone, however, has to pay for a structural injunction, which is another phrase for an under- or un-funded mandate. School administrators and other structural injunction defendants learned how to take advantage of the cycle of court injunctions based on plans and negotiated consent decrees to increase available resources. While the judge cannot appropriate money, the judge and the litigation's publicity and momentum frequently stimulate other bodies to augment the defendants' funds.<sup>93</sup> "The judge made me do it," the education authorities can tell their appropriating body. "Winning by losing" is the name Professor Margo Schlanger gave this feature of structural litigation.<sup>94</sup>

Taking a less rosy and sanguine view, two Supreme Court Justices, Scalia and Thomas, have objected to how long structural relief takes and

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90. Hon. Frank M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981); Hon. Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979) (symposium on *Brown's* 25th Anniversary); FISS, *THE CIVIL RIGHTS INJUNCTION*, *supra* note 79, at 92–93; Poser, *supra* note 28, at 297–98; Thomas, *supra* note 65, at 302.

91. See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998); Poser, *supra* note 28, at 318; Wendy Parker, *The Future of School Desegregation*, 94 N.W. U. L. REV. 1157, 1221 (2000) [hereinafter Parker, *The Future of School Desegregation*]; Sabel & Simon, *supra* note 26, at 1090–100.

92. Gewirtz, *supra* note 39, at 653.

93. Sabel & Simon, *supra* note 26, at 1082.

94. Schlanger, *supra* note 89, at 2012; see also Sabel & Simon, *supra* note 26, at 1065, 1092.

how complex the injunctions are.<sup>95</sup> Justice Scalia has expressed concern about whether a federal judge ought to employ a complex injunction at all.<sup>96</sup> Indeed, Justice Scalia wrote in a decision that was not about education, the federal district court's "equitable jurisdiction," which he defined as the conditions amenable to a chancellor of equity's injunctive solution and the type of injunction the chancellor can grant, is restricted to the type of relief the English Chancery court could have granted in the late eighteenth century,<sup>97</sup> hardly a time of active school desegregation.

According to Justice Thomas, a judge who concludes, based on a school district's attendance zone and majority-minority imbalance, that the district has fostered past discrimination is saying, implicitly, that black children are inferior to white and need to be in school with white children to learn.<sup>98</sup> Thomas also assails the U.S. courts' structural injunctions as exceeding the "inherent limitations" on the federal courts' remedial authority.<sup>99</sup>

Scholars skeptical about the structural injunction have proposed a comprehensive agenda of procedural and remedies rules to curb what they perceive as a wrongheaded judicial proclivity to overindulge in granting and approving structural injunctions:<sup>100</sup> A United States judge, in their view, should decline altogether to grant or approve an injunction that would create state or local government policy, dictate specific means, or supplant state or local officials.<sup>101</sup> A judge who does approve a structural injunction should be amenable to updating and modifying it, according to their position.<sup>102</sup> In any event, the skeptics argue that a governmental defendant's remedial obligations in a consent decree should end when the official who consented to it leaves office.<sup>103</sup> Charges of contempt against a defendant for violating a structural injunction should not be assigned to the judge who originally granted or approved the injunction. A judge, moreover, should rotate off a structural injunction lawsuit after an eight-year "term limit."<sup>104</sup> A structural injunction should contain the timetable for its finale.<sup>105</sup> Short of that,

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95. *Missouri v. Jenkins*, 515 U.S. 70, 125 (1995) (Thomas, J., concurring); *Freeman v. Pitts*, 503 U.S. 467, 500 (1992) (Scalia, J., concurring).

96. *Int'l Union, UMW v. Bagwell*, 512 U.S. 821, 843–44 (1994) (Scalia, J., concurring).

97. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

98. *Jenkins*, 515 U.S. at 118–19 (Thomas, J., concurring).

99. *Id.* at 124.

100. SANDLER & SCHOENBROD, *supra* note 4, at 197–221.

101. *Id.* at 204.

102. *Id.* at 213–14.

103. *Id.* at 214.

104. *Id.* at 216.

105. *Id.* at 219.

according to the skeptics, the judge should terminate an injunction whenever the defendant stops threatening plaintiffs' substantive rights.

Although the skeptics have not secured comprehensive success for their reform program, courts dealing with structural injunctions to desegregate schools developed new variations on the countervailing considerations mentioned above,<sup>106</sup> called the tailoring principle and local control.

*The Tailoring Principle.* The tailoring principle is one technique a legislature or an appellate court can employ to reduce a trial judge's remedial discretion and to rein in his discretion if it becomes too exuberant. Tailoring requires the judge to build an injunction on a substructure of findings of fact; it leads the judge to draft an injunction that forbids defendants' activity but only to protect the particular plaintiffs from illegal injury from defendant's identified misconduct. The judge, in the Supreme Court's language, should formulate an injunction to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."<sup>107</sup> "[T]he nature of the [plaintiffs' injunction] remedy is to be determined by the nature and scope of the [defendant's] constitutional violation."<sup>108</sup>

Critics of the structural injunction agree with the tailoring principle as part of their overall program to curb improper judicial activism, to guard against excessive judicial discretion, and to prevent a judge from usurping executive and legislative power. The federal judge, who is appointed, not elected, should, they insist, leave decisions about the general direction of governmental policy to the elected, or "political," executive and legislative, branches of government. In particular, the judge should identify the defendant's violation and the plaintiffs' injury and then draft an injunction that orders the defendant to correct past violations and forbids the defendant from future violations of plaintiffs' rights. The judge should require plaintiffs "to show that the harm to be repaired was in fact caused by defendants' illegal action and that the decree provisions are narrowly targeted to repair those injuries."<sup>109</sup> Nothing more.

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106. See *supra* notes 36–39 and accompanying text.

107. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (*Milliken II*, quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (*Milliken I*)). In the sentence in the text, "restore" is overstated. After decades of state mandated segregation, "restoring" or *returning* a child, school desegregation plaintiff, to where she would have been absent the official segregation seems contradictory, if not impossible.

108. *Id.*

109. SANDLER & SCHOENBROD, *supra* note 4, at 197–200, 203.

Proponents of the structural injunction criticize the tailoring principle. The tailoring principle, Professor Fiss wrote, addressing the relationship between right, remedy, and discretion, may mislead a casual reader because it “suggests that the relationship between remedy and violation is deductive or formal, and thereby gives us an impoverished notion of remedy.”<sup>110</sup> The tailoring principle, Fiss maintained, circumscribes the judge’s remedial choices and possibilities. It ties the plaintiffs’ injunction to the defendant’s violation: the defendant’s violation becomes the sole source of the plaintiffs’ injunction, only one injunctive remedy fits the violation, and that injunction is tethered logically to the defendant’s violation. This connection, Fiss wrote, is too attenuated to allow the judge to correct the intricacies of a bureaucratic defendant’s constitutional infraction. The judge’s remedial task requires discretion and flexibility. The judge’s structural reform ceases to be “command and control,” if it ever was.<sup>111</sup> Suppressing all of a shrewd defendant’s unconstitutional agenda may oblige the judge and the plaintiffs’ lawyers to nurse a complex structural injunction through several stages, adjusting it to a changing, gradually improving, world, learning all the while from the defendants, as well as from experience.<sup>112</sup>

The tailoring principle’s proponents and opponents debate the merits of the structural injunction along a major fault line between champions and skeptics. The concepts below that follow the tailoring principle also form a bridge to the next Part of this Article, which discusses the remedies rules for dissolving and modifying a desegregation injunction.

*Local Control.* The judge, in drafting a desegregation injunction, “must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.”<sup>113</sup> Local control is another way for a policymaker, lawyer, or judge to talk about two countervailing considerations discussed above: federalism and separation of powers.<sup>114</sup> Much of the discussion of local control comes under the heads of technical expertise and specialization. The school’s operation reverts to state and local government officials where members of the community and specialists direct its future.<sup>115</sup>

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110. FISS, *supra* note 4, at 39; *see also* Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 47 (1979) [hereinafter Fiss, *Forms of Justice*].

111. Sabel & Simon, *supra* note 26, at 1052.

112. FISS, *supra* note 4, at 40; Fiss, *Forms of Justice*, *supra* note 110, at 46; *see also* Poser, *supra* note 28, at 359–60 (discussing Fiss’s right-remedy analysis and advocating an “Interest Theory” of rights).

113. *Milliken II*, 433 U.S. at 280–81.

114. *See supra* notes 36–37 and accompanying text; *see also* Parker, *Connecting the Dots*, *supra* note 28, at 1746–60 (discussing the connection between local control, federalism, and separation of powers).

115. In Virginia during the period of the Supreme Court’s “all deliberate speed” and

The kernel of truth in local control as a guiding concept is that public education is a tax-supported government service that exists in a fragile state and local government's political environment. If a public consensus that education is crucial is lacking, the educational system as a social enterprise is endangered.<sup>116</sup> Local control is a convenient policy anchor for many federal judges who had experience in state and local government and politics before taking the bench. This policy anchor may lead a judge to subordinate the imprecise nature of the plaintiffs' substantive right to a desegregated school to the concrete value of local control by local people.

Another note of caution about local control is appropriate. On the one hand, the "control group" may incorporate local control into the dynamic cycle of plan submission and approval leading to structural consent decrees. On the other, however, the local citizens who implement local control may be cast from the same mold as the people who operated the segregated system in the first place. The judge may be at risk of putting the son of the proverbial fox in charge of desegregating the schoolhouse.<sup>117</sup>

*The Bus Stops Here.* This concept addresses the issue of whether a judge may grant an injunction to attain "racial balance" by ordering the school districts to transport children across school district lines. The metropolitan Detroit area, as one example, is shaped like a metaphorical donut, not a pie: the city of Detroit is the donut's hole, and, on land, Detroit is almost surrounded by other separately organized political units with their own school districts. In *Milliken v. Bradley*, the Supreme Court rejected a trial judge's desegregation decree for the city district of Detroit that transported children to and from neighboring school districts to achieve better racial balance in the whole metropolitan area.<sup>118</sup> The judge's injunction, the Court held, was restricted to the discrete defendant school district as a political unit.<sup>119</sup> Unless the judge found an

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the state government's "massive resistance," see *supra* notes 45–48 and accompanying text, "local control" also meant moderation—that is a school district in compliance with *Brown II*'s gradual desegregation approach, as opposed to the state government's "massive resistance."

116. JEFFRIES, *supra* note 54, at 285.

117. Cf. Parker, *The Supreme Court and Public Law Remedies*, *supra* note 28, at 479 ("The Supreme Court's approach to school desegregation in particular and public law remedies in general has prevented lower court judges from undertaking principled, well-grounded remedial processes and has ceded too much remedial power to the defendants, the alleged or adjudicated wrongdoers.")

118. *Milliken I*, 418 U.S. 717, 752–53 (1974), *aff'd*, 433 U.S. 267 (1977).

119. *Id.* at 744–46.

interdistrict violation, he could not order interdistrict busing of students. Because of the consequences for third persons in non-party districts, the trial judge had to tailor a school district's desegregation injunction to the "wrongdoer" defendant-school district's violation, the Court said.<sup>120</sup> One effect of a single-district injunction is to limit the length and duration of students' bus rides.

At first blush, the Michigan district judge's multidistrict injunction resembled a judge's improper decree enjoining nondefendant Ben because of defendant Alice's tort. An observer who views the overall problem of segregation more spaciouly, however, may criticize the *Milliken* Court on the ground that it focused too narrowly on the particular school district's lines instead of on zoning and other governmental policies that may have affected parents' decisions about where to live. The Court's approach isolated school segregation from the rest of society. A school desegregation injunction, the Court held, is not a permissible way to attack other forms of segregation, separate from educational segregation.<sup>121</sup> The Court's decision in *Milliken* qualified *Green* by allowing racially identifiable schools in different school districts; it also affected third parties outside the formal litigation because busing children only to the school district's border often places the third-party burden on the working- and lower-middle class members of both the majority and the minority groups.<sup>122</sup>

The Court's *Milliken* decision was a dividing line. If the Court began a second (but judicial) reconstruction in *Brown*, it withdrew from active reconstruction in *Milliken*.<sup>123</sup>

*Plaintiff-Group Diffusion*.<sup>124</sup> During the *Green* era, the African-American or "plaintiffs" group began to articulate more diffuse goals. Under one reading of *Brown*, legally compelled racial segregation isolated minority children culturally and psychologically, imposed a stigma, and undermined their ability to learn. When a court ends a child's isolation, under this reading, her learning will improve. If multiracial

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120. *Id.*

121. *Milliken II*, 433 U.S. 267, 281–82 (1977).

122. JEFFRIES, *supra* note 54, at 319; *see* Gewirtz, *supra* note 39, at 604–05 (describing how effective remedies are often not possible without imposing significant costs—such as long-distance transportation—on nonviolating third parties).

123. FISS, *supra* note 4, at 246; *see* Derrick Bell, *Brown v. Board of Education: Brief for Respondents*, 52 AM. U. L. REV. 1401, 1405 (2003) (describing the challenges of transitioning from separate to mixed schooling); *see also* Ford, *supra* note 77, at 1312–13 (describing *Milliken I* as undermining *Brown* by reinforcing segregationist background rule of legally-responsible local government entities).

124. This segment summarizes a complex and textured history. For a fuller treatment, in the context of injunctions to implement *Brown* in Atlanta, *see* Tomiko Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, 48 ST. LOUIS U. L.J. 991 (2004).

schools were the solution, courts' busing and interdistrict remedies were indispensable. This led proponents to maintain that a nonbusing injunction may compromise the students' constitutional rights.

What is the goal, others ask, racial balance and desegregation or educational opportunity and quality? They discount racial balance and emphasize learning—which they contend can occur any place, even close to home.<sup>125</sup> These skeptics argue that busing children leads to spending scarce money on transportation, money that could be better spent directly on education. In any event, judge-ordered busing only to the school district line was a halfhearted solution because while it "balanced" the schools within a district, it left the "balance" among systems alone. Local control again emerged as a policy goal, but this time on the plaintiffs' side.

If an African-American consensus on techniques to desegregate schools ever existed, the debate summarized above shows that it fractured in the 1970s and 1980s.<sup>126</sup>

Even qualified by countervailing considerations, as discussed above, the courts' *Green*-era injunctions setting neighborhood attendance zones and using busing to achieve better attendance zones changed minority-majority school demography. In 1972–1973, in formerly segregated states, 36.4% of black children attended majority white schools and in 1988, 43.5% of black children attended majority white schools.<sup>127</sup> Was the afternoon bell ringing for desegregation litigation?

## V. THE "UNITARY" EXIT STRATEGY

In 2004, four generations of school children have started kindergarten and completed high school under federal judges' injunctive eye. Desegregation litigation continues.<sup>128</sup> Obvious desegregation has occurred in many school districts.<sup>129</sup> How does a judge tell when to withdraw judicial oversight? In short, school-desegregation litigation and the injunction end when the defendant school district is "unitary."

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125. Bell, J., *Dissenting*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 185–200 (Jack M. Balkin ed., 2001).

126. WILKINSON, *supra* note 33, at 232–34.

127. ORFIELD & LEE, *supra* note 54, at 19, tbl. 7.

128. Parker, *The Future of School Desegregation*, *supra* note 91, at 1207–08.

129. See generally William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751 (2003).

“Unitary” started its career in desegregation injunctions’ vocabulary meaning “not dual.” “Dual” meant one school system in a school district for majority students, another parallel “separate” system in the same district for minority students.<sup>130</sup> The “dual” school district is a relic of history. The Supreme Court left the positive side of the meaning of “unitary” unclear; the length of a school system’s journey from “dual” to “unitary” in time and treasure remained mostly obscure.<sup>131</sup> A judge will use the term “unitary” to express his conclusion that a school desegregation lawsuit is over. That decision will occur in the ready-made procedural-remedial context for dissolving and modifying all kinds of injunctions.<sup>132</sup>

Federal Rule of Civil Procedure 60(b)(5) tells a judge to relieve a defendant from a final judgment, an injunction, when “it is no longer equitable that the judgment should have prospective application.”<sup>133</sup> In an inquiry that folds substantive doctrine into remedial analysis, many courts have attempted to develop operative definitions of “unitary” to decide school districts’ motions to modify and dissolve desegregation injunctions.<sup>134</sup>

In a 1932 opinion written by Justice Cardozo, the Supreme Court in *United States v. Swift & Co.*, had established the stringent “grievous wrong” test for dissolving a consent decree in an antitrust injunction:

We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers,

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130. *Green v. County Sch. Bd.*, 391 U.S. 430, 435–36 (1968).

131. Parker, *The Future of School Desegregation*, *supra* note 91, at 1162. The Court, Chief Justice Rehnquist observed, does not need to define “unitary.” *Bd. of Educ. v. Dowell*, 498 U.S. 237, 245–46 (1991).

132. The Supreme Court’s decisions to terminate desegregation injunctions in selected school districts overlap with lower courts’ desegregation decisions in other lawsuits. Parker, *The Future of School Desegregation*, *supra* note 91, at 1178–80. In addition, the 1990s were a period of conservative judicial and legislative “injunction reform.” Two of the Court’s termination-modification decisions concerned “conditions injunctions,” federal courts’ structural injunctions in prison lawsuits. *Lewis v. Casey*, 518 U.S. 343 (1996); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). The courts’ cluster of injunction-termination decisions in schools and prisons foreshadowed Congress’s 1996 legislative “injunction reform,” the Prison Litigation Reform Act, codified in 18 U.S.C. § 3626 (2000); 28 U.S.C. §§ 1346(b), 1915, 1915A (2000); 42 U.S.C. § 1997 et seq. (2000). Aimed at prison injunctions, the PLRA, among other things, legislates the tailoring principle, curbs consent decrees, reduces attorney fees, and accelerates termination of injunctions. Schlanger, *supra* note 89, at 2034.

133. FED. R. CIV. P. 60(b)(5).

134. David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform After Dowell, Rufo, and Freeman*, 20 HASTINGS CONST. L.Q. 579 (1993) (contributing to a symposium on *Brown’s* legacy at forty).

once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.<sup>135</sup>

In structural desegregation litigation, a judge implements change over a period of time using specific and complex injunctive provisions to end an unconstitutional official segregated regime. Reasoning from the discussions above about the distinction between right and remedy, the judge's discretion and the tailoring principle, the judge's structural task calls for a termination standard more pragmatic, more experimental, and more responsive to legal and factual change than *Swift's* "grievous wrong" test.

Professor Owen Fiss wrote that a structural decree has a "tentative and hesitant character." A judge's "particular choice of [injunctive terms] can never be defended with any certitude. [The injunction] must always be open to revision . . . . A revision is justified if the [injunction] is not working effectively or is unnecessarily burdensome."<sup>136</sup> Skeptics of structural injunctions are close to agreement: constitutional-injunction defendants should be able to persuade the judge to modify an injunction "whenever they have a reasonable basis for doing so."<sup>137</sup>

In 1986, in a prescient and perspicacious article, Professor Tim Jost predicted that the judicial standard for dissolving an injunction would be tested and forged in the crucible of the more conservative post-Warren Court judges' response to the structural injunctions that stemmed from the Warren Court's substantive constitutional decisions.<sup>138</sup> In *Board of Education v. Dowell*, a school desegregation lawsuit, the Supreme Court vindicated Jost's prediction and repudiated *Swift's* "grievous wrong" standard.<sup>139</sup>

The Supreme Court's *Dowell* "unitariness" test to determine whether a judge should terminate a school-desegregation injunction has two, perhaps three, elements: first, whether the school district is complying in

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135. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

136. FISS, *supra* note 4, at 41.

137. SANDLER & SCHOENBROD, *supra* note 4, at 213–14.

138. Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1106–07 (1986).

139. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991); Levine, *supra* note 134, at 624.

good faith with the injunction; and, second, whether district's vestiges of past discrimination have been eliminated "to the extent practicable."<sup>140</sup> The Court rejected an even more relaxed test, that of whether the school district's compliance with the desegregation injunction equals unitary status.<sup>141</sup> The Court's phrase "to the extent practicable" underscored the judge's flexibility, discretion, and need to consider logistics. A possible third element is whether the school district is fully rehabilitated, or stated in the negative, whether it will reoffend.<sup>142</sup>

In *Freeman v. Pitts*, the Court reaffirmed the *Dowell* test and added "partial unitariness"; this allows a judge to modify a desegregation injunction to whittle away at its original scope.<sup>143</sup> School districts, parents, lawyers, and trial judges must litigate around the lack of clarity about what is a "remedy" and what "unitary" and "vestige" mean.<sup>144</sup>

In *Missouri v. Jenkins*, the trial judge had based the injunction on the concept of "desegregative attractiveness"—if the judge orders the school authorities to improve the desegregated public schools sufficiently, then the public schools will attract nonminority students from private schools and other public school districts.<sup>145</sup> The Supreme Court thought "desegregative attractiveness" raised the specter of unlimited liability; it rejected the trial judge's solution as too extravagant and too detached from the defendants' equal protection violation.<sup>146</sup>

The unitariness standard for a judge to dissolve an injunction preserves the de facto-de jure characterization. If a "good-faith" school district's "vestige" of segregation is "de facto" and not due to the school authorities' official decisions, then the district nevertheless may be "unitary." For example, a particular school district's lack of "racial balance" may result from the demography or voluntary changes in housing patterns.<sup>147</sup>

The Court's more general point is that when a school district proves that the effects of intentional segregation are behind it, the judge should release it from the injunction. The judge's "retained-jurisdiction" oversight that may have begun with *Brown II* should cease. As a remedial principle, the "unitariness" test, even as the Court elaborated it in *Dowell*

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140. *Freeman v. Pitts*, 503 U.S. 467, 492 (1992); *Dowell*, 498 U.S. at 249–50.

141. *Dowell*, 498 U.S. at 249–50.

142. *Id.* at 247; Parker, *The Future of School Desegregation*, *supra* note 91, at 1164.

143. *Freeman*, 503 U.S. at 489; Levine, *supra* note 134, at 610.

144. *See, e.g., Dowell*, 498 U.S. at 245–46.

145. *Missouri v. Jenkins*, 515 U.S. 70, 91 (1995).

146. *Id.* at 89–98; *see also* Thomas, *supra* note 65, at 333–35 (discussing *Jenkins* and other recent cases where the Court has required properly targeted relief).

147. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 322 (4th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 986 (2002). For follow-up, see John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1394–95 (2003); Celeste Smith, *When Busing Ends*, N.Y. TIMES EDUC. LIFE, Jan. 18, 2004, at 30.

and *Freeman*, is potentially susceptible to abuse by a trial judge because it is too subjective and delegates too much discretion to the trial judge.

As the *Green* era of desegregation injunctions winds down, many institutional-reform lawsuits have developed their own pattern and momentum and their structural injunctions endure. After an initial look back at the defendant's substantive violation and perhaps a period of contentious adversary activity, the litigants developed a cycle of negotiating detailed consent decrees. The proceedings relax, and class action settlement hearings begin to focus on technicalities. Parallel specialist bureaucracies emerged through the cycles of negotiation focused on the defendant's court-ordered periodic reports and plans, and the judge's successive approvals of plans embodied in consent decrees.<sup>148</sup> The litigants concentrate more on how to micromanage the details of administering schools than on injunctions or constitutional law.<sup>149</sup> Judicial decisions are detailed examinations of implementation and procedure.<sup>150</sup> When this happens, desegregation litigation and injunctions begin to fly under the legal scholar's radar. The bevy of articles that scholars had published earlier about "legitimacy" and the meta-meaning of constitutional values, now largely irrelevant to the actual business being conducted, gathers dust on the litigants' library shelves.<sup>151</sup>

The *Dowell* test to free the defendant from a court decree places a costly and imprecise burden on the school district.<sup>152</sup> The district may not want liberation.<sup>153</sup> For one thing, the school district's process of petitioning to seek release may itself expose embarrassing facts.<sup>154</sup> Another potential reason for a defendant to be reticent is that its administrators may have figured out that the judge can be, in effect, an ally in tapping sources of appropriations otherwise not available.<sup>155</sup>

Many school districts have disdained to ask the courts for "unitary"

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148. Parker, *The Future of School Desegregation*, *supra* note 91, at 1216 n.347. See generally Sabel & Simon, *supra* note 26.

149. Sabel & Simon, *supra* note 26, at 1067–72; SANDLER & SCHOENBROD, *supra* note 4, at 118–22; Schlanger, *supra* note 89, at 2010–22; Parker, *The Decline of Judicial Decisionmaking*, *supra* note 89, at 1628.

150. Parker, *The Future of School Desegregation*, *supra* note 91, at 1191–95.

151. See Sabel & Simon, *supra* note 26, at 1082 ("[M]uch academic and appellate doctrinal discussion of public law litigation is not responsive to the most promising elements of recent practice.").

152. Parker, *The Future of School Desegregation*, *supra* note 91, at 1164, 1166.

153. *Id.* at 1207–09.

154. *Id.* at 1160.

155. Schlanger, *supra* note 89, at 2012.

findings, although larger districts are more likely to petition. As a result, school desegregation litigation continues with hundreds of injunctions and consent decrees still in effect.<sup>156</sup> In other words, although the Court adjusted the test a judge applies to terminate an injunction to favor a school-district defendant, the new yardstick has not galvanized all defendants to terminate their very own structural injunctions. After half a century, school-desegregation litigation is institutionalized.

VI. THE AUTHOR'S OBSERVATIONS ABOUT  
THE PAST, SPECULATIONS ABOUT THE  
FUTURE, AND CONCLUSIONS ABOUT  
SUBSTANCE AND REMEDY

A. *The Past*

*Brown I* was a watershed—"a decision of unquestioned correctness, a starting point for normative reasoning in domains far removed from schools and race."<sup>157</sup> *Brown* succeeded in ending racial segregation required by positive law.<sup>158</sup>

*Brown II* was, however, a low-keyed starting point for school desegregation. That decision and the way the lower courts implemented it with school-desegregation injunctions earn fewer laurels because ending segregation proved elusive. In retrospect, Justice Hugo Black, who opposed withholding "a person's constitutional right for any reason once that right had been determined,"<sup>159</sup> seemed to favor a better remedy—to order the trial judges at the outset to require the school district-defendants to admit the named and class plaintiffs immediately to schools with race-neutral attendance zones.<sup>160</sup>

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156. Sabel & Simon, *supra* note 26, at 1018–19. *But see* Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143 (2003) (overworking the metaphor that the structural injunction is "dead").

157. FISS, *THE CIVIL RIGHTS INJUNCTION*, *supra* note 79, at 5.

158. See Tobias, *supra* note 48, at 1291 & nn.144–49 (dealing with library segregation-desegregation, a subject closely related to formal education); MATTHEW BATTLES, *LIBRARY: AN UNQUIET HISTORY* 180–84 (2003).

159. Charles A. Reich, *Deciding the Fate of Brown: The Populist Voices of Earl Warren and Hugo Black*, 7 GREEN BAG 2D 137, 140 (2004).

160. Ides, *supra* note 5, at 28 (ordering plaintiffs admitted was "the remedy to which they were entitled").

Professor Erwin Chemerinsky's more activist remedial recipe is to abolish private schools, create metro-wide systems, and equalize per-pupil spending statewide. See Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1472 (2003). Notably, Professor Chemerinsky would not abolish the states as separate political entities.

Contrast Professor Mark Tushnet who, when quoted on the effect of "all deliberate speed," observed that because of white resistance, "an order directing immediate desegregation would have had no greater effect." Wendell LaGrand, *Brown at 50*, ABA JOURNAL, Apr. 2004, at

By severing the plaintiffs' remedy from their right, the *Brown II* Court's "all deliberate speed" sent the wrong signal to friends and opponents alike. The decision to detach the plaintiffs' remedy from their right seems to have stemmed from several Supreme Court justices' compromise, formal or informal, that, by allowing the plaintiffs' remedy to be delayed, achieved the goal of unanimity.<sup>161</sup> Opponents read it, however, as a tacit signal of the Court's lack of resolve.<sup>162</sup> Segregationists honed their tactics of opposition, obfuscation, intimidation, disputation, and delay to take advantage of the Court's lack of determination.<sup>163</sup> If *Brown II*'s "all deliberate speed" was not a mistake from the beginning, it became one as time passed; but it lasted long enough for a black first-grade child to graduate from a segregated high school. Some of the reasons follow.

A critic who blames the lower courts' dilatory, think-small solutions to school segregation exclusively on three words in *Brown II* overlooks centuries of history and more than a decade of other decisions and decision makers. "All deliberate speed" may have expressed the justices' naive trust in articulated abstraction and graduated progress divorced from the practical reality of implementation. But I prefer the Court's naiveté to the obtuseness, moral numbness, and explicit hostility that the *Brown* principle encountered in an antagonistic white South and, to some extent, the whole United States.

In *Green*, the Court moved from Fabian solutions to the positive and imperative remedial program of ordering the defendants to desegregate their schools "now."<sup>164</sup> Although educational opportunities improved for many children, countervailing considerations and officials' prejudice continued to impede desegregation. The *Swann* decision which approved attendance zones and busing was also "a murky opinion that seemed to look in several directions at once."<sup>165</sup> In *Milliken*, the Court erected an

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38, 44; see also Bell, *supra* note 123, at 1405–07 (proposing separate but really equal); Bell, *supra* note 125, at 185–200 (asserting that *Brown* perpetuates our long history of racism and suggesting realistic rather than symbolic relief).

161. Jack M. Balkin, *The History of the Brown Litigation*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 29, 37–38 (Jack M. Balkin ed., 2001).

162. Ides, *supra* note 5, at 28.

163. Tobias, *supra* note 48, at 1300; Ides, *supra* note 5, at 27–28.

164. *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968); see *supra* notes 62–67 and accompanying text.

165. JEFFRIES, *supra* note 54, at 287; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); see *supra* text accompanying note 42.

unnecessary stop sign at the school district's border.<sup>166</sup> In the meantime, population shifts resegregated urban school districts.<sup>167</sup> Did busing flunk the test because courts halted the bus at the district line? Or did it disappoint observers because it was part of a halfhearted remedial program to start with?<sup>168</sup>

Enough desegregation occurred in many school districts, however, for those courts to conclude that the districts had achieved “unitary” status and to disengage from direct school monitoring. Elsewhere desegregation litigation continues.<sup>169</sup>

A report card reveals several grades. In the Southern states that started the *Brown* epoch with dual systems, the percentage of black children who attended predominantly white schools increased during the period this Article summarizes. In 1954 it was zero; in 1964 under the freedom-of-choice recipe for an injunction, only 2.3% of southern minority students attended integrated schools. After a slow start, the courts' desegregation of schools accelerated in its second, or *Green*, era. Busing beyond neighborhood attendance zones meant that in the 1972–1973 school year, 36.4% of black children attended majority white schools in the former Confederate states; by 1988, the figure was 43.5%. However, that 43.5% was the peak; demography, white flight, and court decisions braked desegregation. By 2000, the percentage of black children in majority white schools in the South had dropped to thirty-one.<sup>170</sup> The period of decline follows judges' decisions that found school districts “unitary,” dissolved or modified their injunctions, and allowed them to stop busing students.

Real educational and vocational opportunities exist for children today because of school desegregation. “[L]egal and political developments in the half-century since *Brown* have alleviated, but by no means eliminated, the racial stratification of American society,” said Professor Reva Siegel in 2004.<sup>171</sup>

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166. *Milliken I*, 418 U.S. 717, 752–53 (1974), *aff'd*, 433 U.S. 267 (1977); *see supra* notes 118–23 and accompanying text.

167. Boger, *supra* note 147, at 1385.

168. Roslyn Arlin Mickelson, *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat From Race Sensitive Remedies: Lessons From North Carolina*, 52 AM. U. L. REV. 1477 (2003).

169. Parker, *The Future of School Desegregation*, *supra* note 91, at 1207.

170. ORFIELD & LEE, *supra* note 54, at 19, tbl. 7; David J. Garrow, *Clarendon County in Black & White: A Visit to the Home of Briggs v. Elliot, 50 Years After Brown v. Board of Education*, 7 GREEN BAG 2D 237 (2004). This was confirmed by Mr. Joseph Delaine, a native of Clarendon County and a member of the Presidential Commission on the Brown Decision in a presentation at the South Eastern Association of Law Schools on July 31, 2004. Mr. Delaine was on a panel, Southern History & Perspectives: A Retrospective on *Brown v. Board of Education*, organized by Professor Lewis Burke. See the popular account in TONY HORWITZ, CONFEDERATES IN THE ATTIC: DISPATCHES FROM THE UNFINISHED CIVIL WAR 367–71, 377–78 (1998).

171. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values*

*B. The Future*

In 2004, explicit racism is unfashionable in "mainstream" culture. Fifty years ago, many people believed that the human race was divided into a hierarchy of scientifically differing racial groups.<sup>172</sup> Among scientists today, those pseudo-scientific racial theories are extinct. Contemporary social scientists define "race" as a social-cultural, not a scientific, concept; different cultures define race differently; and physical scientists have trouble defining it at all.<sup>173</sup> Scientists and educators have not completed this task, for only a fool would assert that race prejudice has been extirpated from the United States.<sup>174</sup>

Fifty years after *Brown* the United States is no longer merely divided into black and white. Hispanic-Latino people comprise the largest minority group. Latin-Americans speaking Spanish and Portuguese languages are viewed as coming from all "races," economic backgrounds, and cultures. Urban school districts also have large numbers of south and east Asian students.

Education litigation has branched out. Plaintiffs file educational finance lawsuits in state courts under state constitutions and allege unequal or inadequate state and regional spending. These plaintiffs' state lawsuits have achieved some success, encountered some failures and some real morasses, and triggered prodigious conflict between state courts and state legislatures.<sup>175</sup> The major present-day threat to strong and effective public education comes not from the courts but from state legislatures' and Congress's parsimoniousness.

Primary and secondary school desegregation litigation will inevitably be affected by the Supreme Court's decision in 2003 that racial diversity is a compelling government interest for a state university to consider in its admissions.<sup>176</sup> Along with a broadened concept of equal educational

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in *Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1546 (2004).

172. HARBAUGH, *supra* note 5, at 495 (quoting the lawyer who argued for South Carolina in *Brown*).

173. Michael J. Bamshad & Steve E. Olson, *Does Race Exist?*, 289 SCI. AM. 78, 80-81 (Dec. 2003); *see also* Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. (forthcoming 2005).

174. HORWITZ, *supra* note 170, at 253-54.

175. Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1342-54 (2004); Sabel & Simon, *supra* note 26, at 1023-28; Thomas, *supra* note 28, at 1635-36.

176. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *see* Parker, *Connecting the Dots*, *supra* note 28, at 1739-45 (comparing affirmative action's notion of deference with school desegregation's allowance of local control); *Id.* at 1760-67 (discussing

opportunity, a judge's consideration may extend to students' parents' income in crafting attendance zones, transportation plans, and magnet schools.<sup>177</sup> In the words of Kafka's priest, the Court's substantive premise of diversity in affirmative action will "gradually merge" into the solutions for K-12 school desegregation.

### C. Substance, Remedy, and Discretion

Judges in our decentralized court system found it difficult to implement *Brown's* substantive equal protection holding in practice because the Supreme Court never clearly spelled out the principle. In the early 1970s, an Alabama school district's lawyer complained to me about the Court's failure to explain what a "unitary" school was. "To this day," Professor Reva Siegel wrote in 2004, "equal protection law remains unclear about the nature of the harm it is rectifying and the values it is vindicating."<sup>178</sup> As a consequence of the Court's lack of substantive leadership, direction and guidance, the trial judges had no single plan or program and not much coordination.

The judge's remedial enterprise differs from his substantive decisionmaking. The successful plaintiffs' remedy differs from their right. The judge's remedy, while differing from the plaintiffs' right, nevertheless ought to vindicate their right.<sup>179</sup> The judge should convert an abstract substantive principle into a concrete solution consistent, or, at least, not inconsistent, with the principle.

"All deliberate speed" was a remedial, not a substantive, principle, and it was a wrongheaded principle at that. Many school-desegregation injunctions were remedies delayed, too delayed in retrospect; an injunction often left the plaintiffs far short of where they would have been had the defendant never violated the constitution and thwarted plaintiffs' constitutional rights to desegregated schools.

The *Milliken* or single-district injunction was a myopic, excessively constraining, remedial principle.<sup>180</sup> The Court later modified the concept of a "unitary" school district from an undefined goal into an imprecise exit strategy without ever articulating principled intermediate standards to channel discretion away from improper and subjective considerations.<sup>181</sup>

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desegregation's lessons for affirmative action); see also Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From Bakke to Grutter*, 92 KY. L.J. 219, 220-23 (2003).

177. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 56-77 (2003).

178. Siegel, *supra* note 171, at 1546.

179. Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 1 (1989).

180. *Milliken I*, 418 U.S. 717, 744-46 (1974), *aff'd*, 433 U.S. 267 (1977).

181. See *supra* Part V.

Several factors appear to be at work in the courts' transitional jurisprudence. The judge's efforts must occur within the framework of federalism and separation of powers. The perplexing logistics of hacking through hundreds of complex bureaucratic systems was another factor. That many of the systems' authorities were hostile beyond obdurate "foot-dragging" was another.<sup>182</sup> Some judges may have adduced the countervailing considerations to mask their hostility, lack of resolve, or fear of the segregationist opposition and exercised their inevitable logistical discretion as a cloak for lack of sympathy with the substantive goals.

As mentioned above, Professor Birks suggested that legal taxonomists ought to abandon or downgrade the concept of remedy as something separate from the plaintiff's substantive right.<sup>183</sup> Casting remedy overboard would be a mistake.

The judge's substantive and remedial tasks diverge enough to justify discrete remedies principles. The judge's remedial tasks must, however, respond to Professor Birks's more general point. The remedies principles and standards ought to be correct principles that serve substantive goals and policy justifications. This Article has singled out three actually or potentially unsound remedies principles that circumscribe plaintiffs' remedy to less than their substantive entitlement: "all deliberate speed," single-district injunctions, and the unitary exit strategy. I hope that in addition this Article has adduced principles of remedial confinement to dispel Birks's nightmare of "discretionary remedialism."<sup>184</sup>

Our constitution sets aside many individual rights to protect them from ordinary majority measures; a court will administer the constitution to protect those individual rights, usually granting the plaintiff a preventive injunction to protect the plaintiff's constitutional claims. When a legislature enacts or an executive executes an unconstitutional positive law decision, a court will undertake judicial review and nullify the improper law to achieve or to preserve a plaintiff's constitutional right.<sup>185</sup> Next the judge will implement judicial review with a constitutional injunction—the judge's principal remedy to construct for the plaintiff

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182. See *supra* notes 45–53 and accompanying text.

183. See *supra* notes 22–23 and accompanying text.

184. Birks, *supra* note 22, at 23.

185. For a spirited defense of judicial review, see Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416, 1416–17 (2000) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).

and the public a practical world where the plaintiffs' constitutional principle is not thwarted. The courts' inevitable logistics of transition and implementation will accompany every shift from unconstitutional to constitutional. Every U.S. court that annuls a state or local provision must attend to federalism and separation of powers considerations. Official school segregation was a large scale faulty decision built on slavery and Jim Crow; judges had to grant large scale, even structural, injunctions for a remedy. Official educational discrimination had taken a long time to develop. It will take courts, legislatures, and other educators a long time to disassemble it and to attend to its bad consequences.

Most people idealize decisions about future projects. "We are *all* overly optimistic about completion times," writes management professor Allen Bluedorn, "and we are so most of the time. This characteristic is called the planning fallacy."<sup>186</sup> Anyone who has remodeled an old house knows from "experience" that when you start something complex, you don't know what problems you will encounter before you "finish." "Law," wrote Professor Kevin Crotty, "is not a rational system that possesses some specified excellences; instead, the values animating a legal system are a destabilizing feature, a principle of movement ensuring that law never stops in a single place."<sup>187</sup>

Perhaps W.E.B. DuBois knew more than he said when, as quoted above, he underestimated "the color line" as a problem for the "twentieth century." For had he told the whole truth then, the task may have been too daunting to begin. Fifty years after *Brown II* we should be grateful for the justices' collective naïve idealism. A Court more realistic about the logistical difficulties and the segregationists' hostility that militated against prompt desegregation might have been too intimidated to start. A contemporary observer should credit the Court for the optimism to launch the venture. Quoting Justice Tom Clark, Professor (now Judge) Wilkinson described the Court's remedial doctrines as growing "in small individual steps, 'like Topsy,' with no grand design."<sup>188</sup> In retrospect, the *Brown II* Court initiated a remedial process; the plaintiffs, the defendants, and the judges followed common law case-by-case constitutional decisionmaking. Everyone muddled through.

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186. ALLEN C. BLUEDORN, *THE HUMAN ORGANIZATION OF TIME: TEMPORAL REALITIES AND EXPERIENCE* 215 (2002). Bluedorn observes that people are more optimistic about their own than about others' completion times. *Id.* Remanding the lawsuits to their respective trial judges is incongruous with the speculation that the justices may have thought their Court could effect the needed changes.

187. KEVIN M. CROTTY, *LAW'S INTERIOR: LEGAL AND LITERARY CONSTRUCTIONS OF THE SELF* 144 (2001).

188. WILKINSON, *supra* note 33, at 101.

## VII. A SHORT CONCLUSION

A Golden Anniversary summons our respect for an institution's survival and our veneration for its strength and endurance. People celebrating a major ritual, however, often ignore embarrassing, inconvenient, or incongruous details as they sweep unfinished business under the rug.

A midlife crisis, on the other hand, may occur about the same time, that is during or at the end of a fifth decade. Typically someone approaching this crossroads appraises his past critically, observes his successes skeptically, agonizes about his incorrect decisions that are in retrospect irrevocable, and seeks to deflect his trajectory toward a more fulfilling target.

*Brown* is an ideal—"and like most ideals," said Professor Richard Ford, "its merit is not that it is readily achieved, but that it is worth struggling for."<sup>189</sup> That my modest effort on *Brown II*'s fiftieth anniversary commemorates rather than celebrates it and describes its midlife crisis rather than its golden anniversary is an inevitable part of this optimistic remedial realist's idea that law is never finished.

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189. Ford, *supra* note 77, at 1333.

