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JUDICIAL METHODOLOGY, SOUTHERN SCHOOL DESEGREGATION, AND THE RULE OF LAW

THE HONORABLE DAVID S. TATEL*

Americans have fiercely debated the proper role of Article III courts in our constitutional system ever since Chief Justice John Marshall declared in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is."[1] This debate often has focused on Supreme Court decisions involving some of our nation's most historic events: the Court's 1873 evisceration of the Fourteenth Amendment's Privileges or Immunities Clause,[2] its use of substantive due process to strike down progressive legislation at the turn of the century,[3] its invalidation of key New Deal

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All unpublished memoranda cited in this paper are available in the Nixon Papers at the National Archives.

1 5 U.S. (1 Cranch) 137, 177 (1803).

2 The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

3 *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

programs,[4] and its opinion in *Roe v. Wade*[5] are but a few of the decisions that have reignited the controversy over the meaning and risks of "judicial activism."

This paper focuses on one of the more recent chapters in this centuries-old debate. Reacting to what they perceived to be judicial activism under Chief Justice Earl Warren's leadership, Presidents Richard Nixon, Ronald Reagan, and George H.W. Bush all promised to appoint "strict constructionists" to the Supreme Court rather than "activists" who would pursue personal policy agendas.[6] Those three Presidents appointed the five Justices who, led by Chief Justice William Rehnquist, now make up the Supreme Court's most frequent majority. Have these Justices fulfilled their appointing Presidents' promises? Those who answer "yes" point to decisions involving the Commerce Clause, federalism, criminal law, and church-state relations, and argue that the Rehnquist Court has refrained from the expansive constitutional jurisprudence that characterized the Warren Court, adhered to the text and original understanding of the Constitution, and restored the proper balance between states and the federal government.[7] Those who answer "no" cite many of the same cases

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[4] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[5] 410 U.S. 113 (1973).

[6] *See, e.g.*, DONALD GRIER STEPHENSON JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 181 (1999) (noting Nixon's promise to nominate Supreme Court Justices who "would be strict constructionists who saw their duty as interpreting law and not making law" and who "would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social forces and political viewpoints on the American people"); *Campaign Notes, Reagan: Look at "Philosophy" for High Court*, WASH. POST, Oct. 2, 1980, at A3 (noting Reagan's promise to appoint judges who would interpret Constitution without "cross[ing] over the line, as many times the Supreme Court has in recent years, and usurp[ing] legislative functions"); David Hoffman & T.R. Reid, *Bush, Dukakis Duel over Ideology, Identity*, WASH. POST, Oct. 14, 1988, at A1 (noting George H.W. Bush's promise to select judges who will "interpret the Constitution" and "not legislate from the bench"); *cf.* Mark Z. Barabak, *Gore, Bush Clash over Drug Plans, Taxes, Abortion*, L.A. TIMES, Oct. 4, 2000, at A1 (noting George W. Bush's promise to appoint Justices who would "strictly interpret the Constitution and not use the bench to write social policy"). *See generally* STEPHENSON, *supra*, at 179–82, 199–209 (describing campaign rhetoric in 1968, 1980, and 1984 presidential elections); William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 434–72 (2002) (describing campaign rhetoric and commentary in presidential elections from 1968 to 2000).

[7] *See, e.g.*, KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE (2002) (distinguishing post–Warren Court activism as lacking zeal for reshaping society and as more principled and cautious); Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275 (2002) (arguing that Rehnquist Court's invalidation of Gun-Free School Zones Act and portion of Violence Against Women Act was not activist because statutes exceeded Congress's power under Commerce Clause); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002) (coneluding that Rehnquist Court has pursued jurisprudence based on decentraliza-

and, of course, *Bush v. Gore*,[8] arguing that the Rehnquist Court has become one of the most activist Courts in history.[9]

To explore the debate about judicial activism, I have looked back at the Rehnquist Court's opinions in two school desegregation cases, *Board of Education v. Dowell*[10] and *Missouri v. Jenkins*.[11] I did not choose these cases only because I know them well from my work before joining the D.C. Circuit.[12] Rather, I chose them because of their relationship to *Brown v. Board of Education*[13] and its progeny, decisions that perhaps best exemplify the Warren Court's view of the

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tion and types of private norms celebrated by De Tocqueville); Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245, 265–73 (2001) (asserting that Rehnquist Court has re-established proper limits on Congress's Commerce Clause power); William H. Pryor Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167 (2002) (arguing that Rehnquist Court's federalism decisions reflect classical liberal perspective consistent with James Madison's political vision).

[8] 531 U.S. 98 (2000).

[9] *See, e.g.*, JOHN T. NOONAN JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002) (criticizing Rehnquist Court's federalism decisions as lacking both principled justification and basis in Constitution's text); THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., 2002) (presenting critical analyses by several authors); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) (criticizing Rehnquist Court decisions as amounting to new constitutional revolution and creating partisan entrenchment); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001) (arguing that Rehnquist Court has become excessively critical of Congress and that its repeated invalidations of congressional acts threaten separation of powers); Ruth Colker & Kevin M. Scott, *Dissing States? Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301 (2002) (relying on quantitative analysis to argue that Rehnquist Court's decisions redefined federalism to include activism on behalf of conservative political agenda); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) (arguing that Rehnquist Court has interpreted judicial supremacy to mean that executive and legislative understandings of Constitution carry no weight); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002) (noting that while much Rehnquist Court activism may be defensible and less excessive in comparison to historic norms, its defenders err in contending that it is more principled); William L. Taylor, *Racial Equality: The World According to Rehnquist*, *in* THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT, *supra*, at 52–54 (concluding that Rehnquist Court's civil rights decisions cannot be justified as strict constructionist or respectful of precedent and that they often rely on "arid legalisms").

[10] 498 U.S. 237 (1991).

[11] 515 U.S. 70 (1995). The case discussed in this paper is often referred to as *Jenkins III*, since the Supreme Court had ruled on other aspects of the Kansas City litigation on two prior occasions. *See* Missouri v. Jenkins, 495 U.S. 33 (1990) (*Jenkins II*); Missouri v. Jenkins, 491 U.S. 274 (1989) (*Jenkins I*); *see also infra* note 263 (discussing *Jenkins II* in more detail).

[12] In the interest of full disclosure, I should add that although I was personally involved in neither case, I did serve as counsel for the school district in earlier stages of the *Jenkins* litigation, and some arguments I advanced in a similar case in St. Louis were eventually rejected by *Jenkins*.

[13] 347 U.S. 483 (1954) (*Brown I*).

Constitution and of federal court power. Given the Rehnquist Court's very different views of constitutional interpretation and the role of the federal courts, and given that a crucial test for any court is its ability to follow precedent with which it may disagree, I thought it would be interesting to examine how the Rehnquist Court dealt with Warren Court precedents. There is another reason for focusing on these two decisions: 2004 is the fiftieth anniversary of *Brown v. Board of Education*, and this paper is my contribution to the *Brown* retrospective.

Let me begin with the entirely misleading label "judicial activist." The term is usually used by a politician or commentator who, unhappy with a decision's outcome, accuses the judge of pursuing a personal agenda, often adding, as though it proves the point, that the judge is an appointee of President X or President Y. Such results-focused criticism may advance the critic's rhetorical or political cause, but whether a decision is a legitimate act of judging turns on far more than its outcome. It turns primarily on whether its outcome evolved from those principles of judicial methodology that distinguish judging from policymaking. For example, is the decision consistent with principles of stare decisis—that is, does the decision follow precedent, or, if not, does it either explain why otherwise controlling case law does not apply or forthrightly overrule that case law on principled grounds? Is the decision faithful to constitutional and statutory text and to the intent of the drafters? Does it appropriately defer to the policy judgments of Congress and administrative agencies? Does it apply the proper standard of review to lower-court fact findings? Are the issues it resolves generally limited to those raised by the parties? Does it avoid unnecessary dictum? And finally, are its results openly and rationally explained? As the Supreme Court has stated, "a decision without principled justification would be no judicial act at all."[14]

Of course, such principles, even if assiduously applied, will never standardize decisionmaking completely, for interpreting precedent, as well as constitutional and statutory text, requires judgment, and reasonable judges can disagree. By following these and other rules of judging, however, life-tenured judges from across the political spectrum maximize the extent to which their decisions are driven not by personal policy agendas, but by the application of law to established fact. Critical to the principle of judicial restraint, these standards help federal courts avoid intruding on the policymaking function and retain the credibility they need to serve in our democracy as the arbiter of constitutional issues and the ultimate protector of constitutional

[14] Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992).

rights. Courts that disregard these principles abuse their power. They contribute, as Justice Potter Stewart once put it, to "the popular misconception that this institution is little different from the two political branches of the Government."[15] "No misconception," Justice Stewart warned, "could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."[16]

I am asked frequently whether I find these methodological principles constraining. Of course I do, but I also find them immensely reassuring. Most D.C. Circuit cases involve difficult and complex policy questions. Will limits on the number of subscribers that any one cable company may reach increase diversity of information or promote competition? Are restrictions on picketing and demonstrating near the Capitol needed in our post–September 11th world to protect members of Congress? At what level should national air quality standards be set to promote public health? Although my colleagues and I have personal views about such questions, we have neither the expertise to resolve them nor the accountability to the electorate for doing so. What we are good at and what we are accountable for is determining whether policymakers responsible for resolving such issues have done so lawfully. Judges may not know whether a cap on the number of subscribers any cable company may reach is necessary to promote diversity, but by applying relevant Supreme Court and circuit decisions, we know how to determine whether a statute authorizing such caps is consistent with the First Amendment.[17] Judges may be ill-equipped to assess the Capitol's security needs, but we do know how to determine whether a particular restriction on picketing meets constitutional standards established by controlling case law.[18] And although judges may lack expertise to select national air pollution standards, we certainly know how to assess whether in doing so the Environmental Protection Agency satisfied the requirements of the Administrative Procedure Act.[19]

These methodological constraints do mean that we judges sometimes sustain actions we think make little sense, invalidate programs we like, or apply precedents we believe were wrongly decided. For example, I once wrote an opinion for the court upholding a congres-

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[15] Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).

[16] *Id.* Justice Stewart expressly addressed stare decisis, commenting that "unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so." *Id.* at 634.

[17] *See, e.g.*, Time Warner Entm't Co. v. United States, 211 F.3d 1313, 1320–22 (D.C. Cir. 2000); *see also* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1129–30 (D.C. Cir. 2001).

[18] *See, e.g.*, Lederman v. United States, 291 F.3d 36, 41, 44 (D.C. Cir. 2002).

[19] *See, e.g.*, Am. Trucking Ass'ns v. EPA, 283 F.3d 355, 362 (D.C. Cir. 2002).

sional ceiling on attorneys' fees in special education cases brought against the District of Columbia public school system. Though believing that law quite unwise, I was unable to conclude that it was "irrational"—the applicable standard in such cases.[20] In another case, my opinion for the court sustained a police stop based on a rather vague description of a suspect obtained from an emergency 911 caller because the stop was consistent with circuit case law, even though I thought our precedents insufficiently protected Fourth Amendment rights.[21] In still another case, my opinion for the court sustained a challenge to a creative state program that made low-cost drugs available to the poor because, applying canons of statutory construction, my fellow judges and I concluded that the agency lacked authority for the program.[22] I could list just as many opinions that sustained programs or policies that I thought were sound, many of which were joined by colleagues who may not have been as pleased as I about the outcomes but who nonetheless followed basic principles of judging. In all these cases, though we may have been troubled by the outcomes, we knew that vindicating the rule of law was far more important to our constitutional system than the issues at stake in any particular case. Oliver Wendell Holmes, Jr. put it this way: "It has given me great pleasure to sustain the Constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what the Constitution permits."[23]

Measured against these principles—principles that, because of the Supreme Court's virtual unaccountability, apply to it with even greater force than to the "inferior courts"—*Dowell* and *Jenkins* are flawed. They are flawed in multiple ways, but particularly with respect to their departure from principles of stare decisis.[24] The deci-

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[20] Calloway v. District of Columbia, 216 F.3d 1, 9 (D.C. Cir. 2000) (upholding attorney fee cap under Individuals with Disabilities Education Act after applying rational-basis review).

[21] United States v. Davis, 235 F.3d 584, 586 (D.C. Cir. 2000) (stating that *Terry* stops are constitutional if police can show "'minimal level of objective justification'" (quoting INS v. Delgado, 466 U.S. 210, 217 (1984))).

[22] Pharm. Research & Mfrs. of Am. v. Thompson, 251 F.3d 219 (D.C. Cir. 2001).

[23] LOUIS MENAND, THE METAPHYSICAL CLUB 67 (2001) (internal quotation marks omitted).

[24] Although stare decisis is not an "inexorable command,"

> when [a] [c]ourt reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, [it] may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether relatcd princi-

sions sharply departed from two of the Supreme Court's most important post-*Brown* desegregation cases, *Green v. County School Board of New Kent County*[25] and *Swann v. Charlotte-Mecklenburg Board of Education*,[26] which set demanding desegregation standards for southern school systems and for federal courts, yet neither *Dowell* nor *Jenkins* acknowledged, let alone explained, its disregard for those two precedents. The two decisions certainly produced *politically* conservative outcomes—they cut back on one of the Warren Court's most dramatic assertions of judicial power—but do not confuse that result with their methodology, for as I will show, *Dowell* and *Jenkins* arrived at their conservative outcomes through decidedly unconservative means.

Before analyzing the two decisions, this paper begins with some history. Part I examines the origins of *Green* and *Swann* and summarizes the powerful desegregation principles they announced. Understanding these principles is critical to seeing how far *Dowell* and *Jenkins* strayed from precedent. Part II discusses Richard Nixon's 1968 presidential campaign and his effort, once elected, to limit *Green* and *Swann* and to curtail court-ordered desegregation. Although unnecessary to understanding *Dowell*'s and *Jenkins*'s methodological flaws, this history provides the background against which the public may perceive the two decisions and, ultimately, the courts themselves. Parts III, IV, and V—the heart of this paper—then undertake a detailed, methodological analysis of *Dowell* and *Jenkins*.

Three last introductory points. First, although this article deals with school desegregation, it is not about busing. It is about judicial methodology. The fundamental problem with *Dowell* and *Jenkins* is not their outcome—the curtailing of school desegregation remedies—but the manner by which they reached that result.

Second, in offering this critique, I realize that by comparison to the lower federal courts, the Supreme Court faces far more issues for which precedent provides little or no guidance. That said, this simply means that other principles of judging—in particular, the requirement to provide rational explanations for holdings—become even more critical to ensuring that the Supreme Court is not perceived as a policymaking institution.

> ples of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Planned Parenthood v. Casey, 505 U.S. 833, 854–55 (1992) (citations omitted).

[25] 391 U.S. 430 (1968).

[26] 402 U.S. 1 (1971).

Finally, some friends who read drafts of this paper wondered why a sitting appeals court judge would criticize the court that reviews his opinions—or as my dear friend Judge Louis Oberdorfer puts it, the court that "grades his papers." That is a good question, and I have thought long and hard about it. But after ten years as a federal judge, I too am increasingly concerned about the growing public perception that courts are blurring the distinction between judging and policymaking. This perception is reinforced by the results-focused criticism of judicial decisions, by the increasingly bitter, and again, results-focused confirmation process, and sometimes by the courts themselves. I hope this analysis of *Dowell* and *Jenkins* will help refocus the national debate about the role of Article III courts and persuade combatants in the "judicial wars" to pay attention to methodology. Rigorous judicial methodology is not only essential to the legitimacy of any opinion, but it also protects the judiciary's integrity, the public's confidence in the courts, and the rule of law. It is in that spirit that I offer this year's Madison Lecture.

I

I could begin this paper at several points in American history: the Constitution's failure to abolish slavery; *Dred Scott v. Sandford*;[27] the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments; the *Civil Rights Cases*;[28] or *Plessy v. Ferguson*.[29] Although my topic has its roots in all these critical events, this paper begins a little later, with *Brown v. Board of Education*[30] and the condition of schools that black children attended in the years leading to *Brown*.

Although *Plessy v. Ferguson* had held that separate but equal public facilities did not offend the Fourteenth Amendment,[31] the segregated black schools that were mandated or authorized by state law

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27 60 U.S. (19 How.) 393 (1856).

28 109 U.S. 3 (1883).

29 163 U.S. 537 (1896).

30 347 U.S. 483 (1954) (*Brown I*).

31 163 U.S. at 544, 548. *Plessy* upheld a Louisiana statute requiring railways to provide "equal but separate accommodations," *id.* at 540 (quoting 1890 La. Acts 111), on the grounds that "[l]aws permitting, and even requiring . . . separation [of the races] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power," *id.* at 544. According to the Court, any "badge of inferiority" inflicted on black citizens "is not by reason of anything found in the act, but solely because the colored race chooses to put that construction" upon statutory segregation. *Id.* at 551. Justice Harlan dissented, arguing that the "Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.* at 559 (Harlan, J., dissenting).

in the seventeen former slave and border states were notoriously unequal to those that white students attended. By the 1950s, southern school systems spent on average twice as much to educate white children as they did to educate black children.[32] The percentage of whites finishing high school was four times higher than the percentage of blacks.[33]

In his seminal book, *Simple Justice*, Richard Kluger describes conditions in Clarendon County, South Carolina, one of the four school systems at issue in *Brown*.[34] Some 276 white children attended two brick schools whose combined value (including buildings, grounds, and furnishings) was four times that of the three wooden schools attended by more than 800 black children.[35] One black school had no running water; another had no electricity. While both white schools had indoor flush toilets, the black schools had only outhouses and, according to Kluger, "not nearly enough of them."[36] The white schools had desks for all children, while one of the black schools had no desks at all. The two white schools offered bus transportation, but the three black schools, located in rural, isolated areas, offered none; to attend school, two black six-year-olds had to walk ten miles each day.[37] The white elementary school had one teacher for every twenty-eight children; the student-teacher ratio at the black schools was forty to one.[38]

The condition of black schools throughout the South was deplorable, but when the Supreme Court reconsidered *Plessy* in *Brown,* it did not rely on such inequalities, instead recognizing a more basic harm: Even in the rare districts where facilities were in fact equal,[39] compulsory segregation itself stigmatized black students by

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[32] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION and Black America's Struggle for Equality 256–57 (1975); *see also* LEON E. PANETTA & PETER GALL, BRING US TOGETHER: THE NIXON TEAM AND THE CIVIL RIGHTS RETREAT 38 (1971).

[33] KLUGER, *supra* note 32, at 257.

[34] *Id.* at 331–32.

[35] *Id.* at 332.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Brown* involved four consolidated cases from three federal courts and one state court. In the Topeka, Kansas, case, the federal court found that facilities were substantially equal; in the Clarendon County, South Carolina, and Prince Edward County, Virginia, cases, the federal courts found that equalization programs were underway. Brown v. Bd. of Educ., 347 U.S. 483, 486–87 n.1 (1954) (*Brown I*). All three federal courts denied relief to the plaintiffs despite the Kansas court's finding that segregation had a detrimental effect on black children. *Id.* In the fourth case, the Delaware Chancellor concluded that New Castle County schools were unequal and ordered the immediate admission of the plaintiffs to white schools. *Id.* at 487–88 n.1. Although the Chancellor also determined that segrega-

"generat[ing] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[40] "We conclude," the Court therefore declared unanimously, "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[41]

The South responded to *Brown* with Massive Resistance. Led by race-baiting demagogues like George Wallace—who later declared in his 1963 inaugural address as Alabama Governor, "Segregation now! Segregation tomorrow! Segregation forever!"[42]—political leaders responded with a series of actions that rejected *Brown*'s very legitimacy. For instance, Louisiana's so-called "interposition resolution"

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tion itself produced an inferior education, he did not rest his decision on that ground. *Id.* at 488 n.1. Because of these equalization findings, *Brown* "[could] not turn on merely a comparison of . . . tangible factors," as had previous decisions involving segregation in higher education. *Id.* at 492 (citing McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)).

[40] *Id.* at 494. The Court based its conclusion on two factors, noting first that education had become so important in modern times that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* at 493. Second, building on *Sweatt*, 339 U.S. at 634, and *McLaurin*, 339 U.S. at 641, which had found black graduate-school programs unequal to their white counterparts based, in part, on intangible factors such as the inability of black students to engage in discussions with white peers, the Court emphasized the findings of the Kansas and Delaware trial courts that segregation was inherently harmful. *Brown I*, 347 U.S. at 493–94. This aspect of *Brown* has received considerable criticism. *See infra* note 279.

[41] *Brown I*, 347 U.S. at 495. Before remanding, the Court requested further argument on remedial issues. *Id.* at 495–96; *see also infra* note 46 and accompanying text (describing *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*)).

[42] JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 94 (2001) (internal quotation marks omitted) (citation omitted); *see also* DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 74–109 (2d ed. La. State Univ. Press 2000) (1995) (describing Wallace's early political career and increasingly segregationist rhetoric). Others baldly tapped into the worst racial stereotypes and southern fears of miscegenation. During one of the first instances of open defiance to *Brown*, the founder of the National Association for the Advancement of White People (NAAWP) called on white residents of Milford, Delaware to boycott desegregated schools. Holding up his three-year-old daughter, he shouted, "Do you think I'll ever let my little girl go to school with Negroes? I certainly will not!" PATTERSON, *supra*, at 73 (internal quotation marks omitted). Later the same evening, the NAAWP President went on to assert that "[t]he Negro will never be satisfied until he moves into the front bedroom of the white man's home." *Id.* at 73–74 (internal quotation marks omitted). Such leaders saw integration as threatening the natural order of society. "Ole Ross" Barnett, who would become governor of Mississippi, summed up such views: "The good Lord . . . was the original segregationist. He put the Negro in Africa—separated him from all other races." FRANCIS M. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE 89 (1973) (internal quotation marks omitted). *See generally id.* at 85–90 (discussing demagogues' role in Massive Resistance).

rejected federal authority to exercise power over state and local officials, forbidding such officials from complying with court desegregation decrees.[43] At the national level, in 1956 Senator Strom Thurmond and ninety-five other members of Congress signed the infamous Southern Manifesto, decrying *Brown* as an "exercise [of] naked judicial power" and pledging "to use all lawful means to bring about a reversal of this decision . . . and to prevent the use of force in its implementation."[44] The signers "commend[ed] the motives of those States which ha[d] declared the intention to resist forced integration by any lawful means."[45]

Although the Supreme Court's second *Brown* decision in 1955 (*Brown II*) directed school officials and federal district courts to plan "a transition to . . . racially nondiscriminatory school system[s]" with "all deliberate speed,"[46] many southern states instead radically altered their education laws to thwart desegregation. Several states adopted pupil assignment laws that used facially "objective" factors such as student preparation, dangers to public order, and the supposed interests of children and parents to assign students to the same effectively

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[43] J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 234–35 (Univ. of Ill. Press 1971) (1961); WILHOIT, *supra* note 42, at 46, 69–70, 137–41. The constitutional theory of "interposition," revived in response to *Brown*, has a long pedigree dating from the famous Virginia and Kentucky Resolutions, which were passed in opposition to the Alien and Sedition Acts. The doctrine's basic premise is that the Constitution is a compact between sovereign states that delegates strictly limited powers to the federal government. According to the theory, when the federal government exceeds those limits, states have a right to "interpose" their authority between the federal government and their citizens. *See* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S, at 127–44, 335–38 (1969); Judith A. Hagley, *Massive Resistance—The Rhetoric and Reality*, 27 N.M. L. REV. 167, 171–72 & n.24, 190–95 & n.177 (1997). The Supreme Court rejected the doctrine as "without substance" in *United States v. Louisiana*, 364 U.S. 500, 501 (1960).

[44] 102 CONG. REC. 4515–16 (1956), *reprinted in* WILHOIT, *supra* note 42, app. at 286–87; *see also* BARTLEY, *supra* note 43, at 116–17.

[45] 102 CONG. REC. 4516 (1956), *reprinted in* WILHOIT, *supra* note 42, app. at 287.

[46] *Brown II*, 349 U.S. at 301. The Court held that school officials bear "the primary responsibility" for solving varied local problems necessary to admit the plaintiff schoolchildren "to public schools as soon as practicable on a nondiscriminatory basis." *Id.* at 299–300. While some planning time might be needed, the Court emphasized that "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them" and put the burden on school districts to justify any delay as "necessary in the public interest and . . . consistent with good faith compliance at the earliest practicable date." *Id.* at 300; *see also infra* note 260 (discussing later cases' use of *Brown II*). Although the Court directed southern school systems to "admit [black schoolchildren] to public schools on a racially nondiscriminatory basis with all deliberate speed," *Brown II*, 349 U.S. at 301, many officials interpreted its language as an excuse for "all deliberate delay." PELTASON, *supra* note 43, at 93; *see infra* notes 47–65 and accompanying text.

segregated schools that they had attended before *Brown*.[47] Some states abandoned compulsory attendance altogether, authorizing local officials to close schools rather than integrate them,[48] and adopted publicly funded tuition payment plans and other measures to make it easier for white children to attend segregated private academies.[49] Georgia made it a felony for local officials to spend public money on desegregated schools, while Mississippi and Louisiana outlawed attendance at integrated schools.[50]

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[47] BARTLEY, *supra* note 43, at 77–78; PELTASON, *supra* note 43, at 78–92; WILHOIT, *supra* note 42, at 139–40, 143, 173–74. Many statutes contained transfer procedures that were so intentionally convoluted that southern school boards could deny transfer requests for technical reasons, such as a failure to have signatures notarized or even more minor mistakes in filling out forms. PELTASON, *supra* note 43, at 79–80. Initially, some district courts upheld the laws against facial challenges. *See, e.g.*, Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958). Beginning in the 1960s, however, lower federal courts consistently struck down these laws. *See, e.g.*, Green v. Sch. Bd., 304 F.2d 118 (4th Cir. 1962); Northcross v. Bd. of Educ., 302 F.2d 818 (6th Cir. 1962); Gibson v. Bd. of Pub. Instruction, 272 F.2d 763 (5th Cir. 1959); *see also* McCoy v. Greensboro City Bd. of Educ., 283 F.2d 667 (4th Cir. 1960) (holding school board's assignment and transfer policies deprived children of constitutional rights).

[48] PATTERSON, *supra* note 42, at 99–100; PELTASON, *supra* note 43, at 193–220; WILHOIT, *supra* note 42, at 35–36, 137–40, 143, 145–46, 149; *see, e.g.*, Griffin v. County Sch. Bd., 377 U.S. 218, 222 n.4 (1964); Jackson v. Sch. Bd., 203 F. Supp. 701, 706 (W.D. Va. 1962); Bush v. Orleans Parish Sch. Bd., 188 F. Supp. 916, 936–38 (E.D. La. 1960); *see also infra* notes 66, 119, and accompanying text (discussing *Griffin*).

[49] PELTASON, *supra* note 43, at 193–220; WILHOIT, *supra* note 42, at 137, 139–40, 145, 149, 153–55; *see, e.g.*, *Griffin*, 377 U.S. at 218, 221–22; Lee v. Macon County Bd. of Educ., 231 F. Supp. 743, 749 (M.D. Ala. 1964); *Jackson*, 203 F. Supp. at 706; Hall v. St. Helena Parish Sch. Bd., 197 F. Supp. 649, 653–55 (E.D. La. 1961); *see also infra* notes 66, 119, and accompanying text (discussing *Griffin*).

[50] BARTLEY, *supra* note 43, at 74–77; PATTERSON, *supra* note 42, at 99. *See generally* WILHOIT, *supra* note 42, at 34–36, 44–45, 136–51, tbl.A (cataloguing Massive Resistance legislation by state). In the first six years after *Brown*, southern legislatures adopted more than 200 pro-segregation statutes, resolutions, and constitutional amendments, but direct legislative resistance began to taper off in the early 1960s. BARTLEY, *supra* note 43, at 320–39; WILHOIT, *supra* note 42, at 150–51.

Southern whites also subjected desegregation proponents to severe legal and social coercion. For instance, several states passed laws directed against members of the NAACP, whom ardent segregationists like Senator James Eastland of Mississippi referred to as "pro-communist agitators and other enemies of the American form of government." WILHOIT, *supra* note 42, at 83 (internal quotation marks omitted) (citation omitted). Some statutes required the NAACP and other civil rights organizations to file membership lists, while others required dismissal of their members or even made it a misdemeanor to employ them.

Even uglier than the governmental responses to *Brown* were the extralegal pressures exerted on individual black southerners who dared to advocate desegregation. Retaliation against blacks became more systematic after the organization of Citizens' Councils—middle-class groups that used economic pressure rather than the Ku Klux Klan's overt violence and lawlessness. *See* BARTLEY, *supra* note 43, at 82–107, 124–25, 161–66, 171–75, 190–210; WILHOIT, *supra* note 42, at 49–50, 111–15. *See generally* NEIL R. MCMILLEN, THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954–64 (1971). As one leader of the Citizens' Council movement in Mississippi put it, "we

Massive Resistance reached a new level in 1957 when Arkansas Governor Orval Faubus dispatched the National Guard to block school desegregation in Little Rock.[51] Americans watched on television while whites, their faces filled with hatred, screamed at nine black youngsters attempting to enter Central High School. Violence continued until the Little Rock federal court ordered the Guard withdrawn,[52] and a reluctant President Eisenhower deployed one thousand paratroopers from the 101st Airborne, the first time since Reconstruction that military force was used to protect black citizens in the South.[53] When the issue reached the Supreme Court in *Cooper v. Aaron*,[54] the Court responded with an assertion of the supremacy of federal judicial power as emphatic as its cornerstone pronouncement

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can accomplish our purposes largely with economic pressure in dealing with members of the Negro race who are not cooperating." MCMILLEN, *supra*, at 209 (citation omitted). A spokesman for the Selma, Alabama, council announced that his organization intended "to make it difficult, if not impossible, for any Negro who advocates desegregation to find and hold a job, get credit or renew a mortgage." *Id.* (citation omitted).

[51] The school system had voluntarily adopted a desegregation plan a few days before the Supreme Court handed down *Brown II* in 1955. Cooper v. Aaron, 358 U.S. 1, 7–8 (1958). A group of black plaintiffs sought faster implementation, but the federal courts upheld the original plan. Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957). After Governor Faubus called out the Arkansas National Guard and declared Central High School "off limits" to black students, the district court ordered the school system to proceed with desegregation anyway. *Cooper*, 358 U.S. at 9–11. *See generally* BARTLEY, *supra* note 43, at 251–69, 273–74, 327–32 (discussing Little Rock desegregation process and Supreme Court's *Cooper* decision); MCMILLEN, *supra* note 50, at 269–85 (same); PATTERSON, *supra* note 42, at 109–13 (same); PELTASON, *supra* note 43, at 154–57, 161–92, 195–207 (same); WILHOIT, *supra* note 42, at 170–71, 177–82 (same).

[52] Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957).

[53] *Cooper*, 358 U.S. at 11–12; ROBERT A. CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON 1002 (2002). The black students finally entered Central High School on September 23, 1957, nineteen days after their first attempt. *Cooper*, 358 U.S. at 11–12. They were briefly removed when state and local police officials had difficulty controlling crowds outside. *Id.* at 12. On September 25, President Eisenhower dispatched 1100 federal troops who remained until November 27, after which federalized National Guardsmen took over for the remainder of the academic year. *Id.*

[54] 358 U.S. 1 (1958). The school board filed a petition seeking to suspend all desegregation until 1960. Aaron v. Cooper, 163 F. Supp. 13, 14 (E.D. Ark. 1958). Insisting that it had acted in good faith, the board argued that the actions of Governor Faubus and the Arkansas Legislature had created "'chaos, bedlam and turmoil'" by encouraging desegregation opponents to resist implementation. *Id.* at 21 (quoting school-board testimony). Although the board was concerned that local police could not provide necessary protection and that the education of both black and white children was suffering, the Supreme Court rejected the board's legal position, declaring that "[t]he constitutional rights of [black children] are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature." 358 U.S. at 16.

Cooper was the first desegregation case since *Brown II* to receive plenary consideration by the Supreme Court. In the interim, the Court disposed of race cases summarily by per curiam order "to maximize the effect of *Brown* and to minimize controversy and resistance." Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 61 (1979).

in *Marbury v. Madison*.[55] Holding that the Governor and the Arkansas legislature were both bound by *Brown*, the Court declared that its 1954 decision was "now unanimously reaffirmed" and that "[its] principles . . . [were] indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us."[56] Emphasizing their unanimity, the nine Justices individually signed the opinion[57]—the only time that has ever happened.

After *Cooper*, segregationists gradually shifted from overt defiance to feigned acquiescence. In some states, public officials gerrymandered school district lines to create smaller, majority-white "carve-out" districts—predominantly white jurisdictions that seceded from larger, desegregating school systems.[58] Other school systems made desegregation as unpleasant as possible for the few black students who chose to attend desegregated schools. Such students often were subjected to excessively long bus rides, assigned to segregated classes within their new schools, harassed by white students and teachers, and unfairly expelled.[59]

The most common form of continued resistance to *Brown* was "freedom-of-choice," a popular tactic through which children were assigned to their original segregated schools unless they "chose" otherwise.[60] Freedom-of-choice appeared facially neutral, yet in many communities it produced, just as intended, far less integration than would have occurred had school districts simply adopted neighborhood schools. Faced with byzantine bureaucratic obstacles, social

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[55] Indeed, *Cooper* invoked *Marbury* for the propositions that the Constitution is "the fundamental and paramount law of the nation" and that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 358 U.S. at 18 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court concluded that "[i]t follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States." *Id.*

[56] *Cooper*, 358 U.S. at 19–20. The Court stressed that its adherence to *Brown*'s principles remained constant even though "three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in [*Brown*] as to its correctness . . . ." *Id.* at 19.

[57] *Id.* at 4.

[58] *See, e.g.*, Stout v. Jefferson County Bd. of Educ., 448 F.2d 403 (5th Cir. 1971); Haney v. County Bd. of Educ., 410 F.2d 920 (8th Cir. 1969); Aytch v. Mitchell, 320 F. Supp. 1372 (E.D. Ark. 1971). A seceding city district would offer to accept students from the surrounding county on a tuition basis; the intent was to allow white children in the county to transfer out of integrated schools into white city schools. *See, e.g.*, Wright v. City of Emporia, 407 U.S. 451, 457 (1972). The Supreme Court subjected carve-out plans to an effects analysis in *United States v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972), and *Wright v. City of Emporia*, 407 U.S. 451 (1972). *See infra* notes 67, 136–56, and accompanying text.

[59] WILHOIT, *supra* note 42, at 155.

[60] PANETTA & GALL, *supra* note 32, at 39–42; PATTERSON, *supra* note 42, at 100–01.

pressure, and even physical intimidation, few black parents "chose" to send their children to historically white schools.[61] The recollections of a young black student, Stanley Trent, are telling. Asked by his parents which school he wished to attend, young Trent replied, "I don't want to go to no white school." Reflecting on the experience later in life, Trent explained that his parents readily agreed because they worried that enrollment in a white school "would place us in physical, psychological, and emotional danger [and t]hey feared that our mere presence in one of the newly integrated schools would aggravate and intensify the hatred that had maintained our segregated communities, our segregated existence, for centuries."[62]

In reality, "freedom" to choose meant freedom for white children to attend all-white schools and, in the words of one black parent, freedom for black children to "go where you been going."[63] Proponents embraced freedom-of-choice as a sacred and historic right, but in fact, prior to *Brown* no southern students freely chose their own schools: Whites were assigned to neighborhood schools, while blacks were assigned to separate schools, often in remote areas.[64] Moderate white southerners well understood the true nature of the system: "You may be assured," wrote renowned *Atlanta Constitution* editor Ralph McGill, "that the freedom of choice plan is, in fact, neither freedom nor a choice. It is discrimination."[65]

Beginning in the mid-1960s, the Supreme Court, building on the principles of *Brown*, issued a series of decisions that unanimously and emphatically rejected these efforts to avoid desegregation. In *Griffin v. County School Board*, the Court held that a Virginia school district violated the Fourteenth Amendment's equal protection guarantee by shutting down its public schools and providing whites with tuition

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[61] PATTERSON, *supra* note 42, at 100; *cf. supra* note 47 (discussing similar procedural barriers under pupil assignment laws).

[62] PATTERSON, *supra* note 42, at 101 (citation omitted).

[63] PANETTA & GALL, *supra* note 32, at 41 (internal quotation marks omitted). As one district court put it, "we could imagine no method [of desegregation] more inappropriate, more unreasonable, more needlessly wasteful in every respect, than the so-called 'free-choice' system." Moses v. Wash. Parish Sch. Bd., 276 F. Supp. 834, 851 (E.D. La. 1967).

[64] In fact, many school systems in Mississippi, Georgia, and Florida found that total busing miles actually *decreased* after desegregation because students no longer had to be bused to separate white and black schools. GARY ORFIELD, MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY 140–41 (1978).

[65] Ralph McGill, *Listen, Please, Sec. Finch*, ATLANTA CONST., Feb. 4, 1969, at A1. McGill, who died the night before the column appeared, addressed it to Robert Finch, President Nixon's first Secretary of Health, Education, and Welfare (HEW), urging him to continue strict enforcement of the Civil Rights Act of 1964. *Id.*; *see also* PANETTA & GALL, *supra* note 32, at 79. Nixon, however, ordered HEW to soften its desegregation policies. *See infra* notes 94–99 and accompanying text.

grants and tax breaks to attend segregated private academies.[66] In *United States v. Scotland Neck City Board of Education*, the Court upheld an injunction that prevented a largely white North Carolina city from seceding from a predominantly black county school system to avoid desegregation.[67] In *Alexander v. Holmes County Board of Education*, the Court rejected Mississippi's plea to delay court-ordered desegregation, declaring that where "the denial of fundamental rights to many thousands of school children" was at stake, *Brown II*'s "standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible."[68] Instead, "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."[69]

The two most important cases in this series were *Green v. County School Board*[70] and *Swann v. Charlotte-Mecklenburg Board of Education*.[71] *Green* rejected a freedom-of-choice plan under which eighty-five percent of black children still attended historically black schools,[72] and *Swann*, the first desegregation case involving a major

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[66] 377 U.S. 218, 231 (1964). Prince Edward County was one of the four districts at issue in *Brown*. *Id.* at 220–21; *see supra* note 39. When the Fourth Circuit directed the district court to order desegregation in 1959–60, local officials refused to reopen the public schools and later approved tuition grants and property tax credits for those who contributed to private nonsectarian academies. *Id.* at 222–24. The Fourth Circuit found that such actions did not violate the Fourteenth Amendment, but the Supreme Court reversed, concluding that the closure's impact bore "more heavily on Negro children" because there were no private schools available to them at the time and because the record "could not be clearer" that local officials had acted solely out of opposition to desegregation. *Id.* at 230–31.

[67] 407 U.S. 484, 489 (1972). After negotiations with the Department of Justice, Halifax County agreed to desegregate, but the North Carolina legislature enacted a bill authorizing the creation of a separate city system. The Scotland Neck city schools would have been fifty-seven percent white, but an appointed school board approved transfers to and from the county system that would have boosted the white majority to seventy-four percent. *Id.* at 486–87. The Supreme Court held that carve-outs in the midst of desegregation must be judged based on their effects and may be enjoined where, as in *Scotland Neck*, they would impede the "dismantling [of] a dual school system." *Id.* at 489.

[68] 396 U.S. 19, 20 (1969) (per curiam). *Alexander* was decided one year after *Green v. County School Board*, 391 U.S. 430 (1968); *see infra* note 72 (discussing *Green*).

[69] *Alexander*, 396 U.S. at 20.

[70] 391 U.S. 430 (1968).

[71] 402 U.S. 1 (1971).

[72] 391 U.S. at 441. The Court emphasized that the "deliberate perpetuation" of segregation since *Brown* had "compounded the [constitutional] harm" and significantly changed the context in which it had applied desegregation precedents. *Id.* at 438. Although the Court did not invalidate freedom-of-choice plans categorically, it adopted an effects test which placed a "heavy burden" on school boards that advocated less effective desegregation measures. *Id.* at 439–41. The Court held that the New Kent County freedom-of-choice plan was unacceptable because it had "operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board." *Id.* at 441–42. Because the county was not residentially segregated, the Court pointed out that geographic zoning would have achieved desegregation. *Id.* at 442 & n.6.

urban school system, sustained a district court order requiring extensive busing beyond neighborhood attendance zones.[73] The two cases charged southern school authorities with an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"[74] and held that facially neutral student assignment policies were constitutionally unacceptable if they failed to produce promptly a "system without . . . 'white' school[s] and . . . 'Negro' school[s], but just schools."[75] Declaring that the objective of school desegregation was not just to strike down laws requiring segregated schools, but also "to eliminate from the public schools all vestiges of state-imposed segregation,"[76] the Court directed that if local officials failed to desegregate all aspects of school operations, federal district courts must themselves craft and implement effective desegregation plans.[77] *Green* and *Swann* established three key principles for district judges to use in evaluating local desegregation efforts:

1. Southern school boards bear the burden of proof. Courts must presume that all remaining one-race schools are vestiges of segregation and hold school boards responsible for desegregating them unless officials demonstrate that the schools are products of neither past nor present discrimination.[78] School officials also bear a "heavy burden" to justify choosing less effective desegregation methods (like freedom-of-choice) over more effective alternatives (like busing).[79]

2. Good faith is not enough. Federal courts must evaluate desegregation plans based on their effectiveness in eliminating vestiges of

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[73] 402 U.S. at 28–31. The Court held that where local school officials fail to meet their affirmative obligations to desegregate, federal courts may reassign faculty to eliminate racially identifiable staffs, *id.* at 19–20, scrutinize school construction and closing decisions to ensure that they do not perpetuate segregation, *id.* at 20–21, and impose student assignment plans that may involve "frank—and sometimes drastic—gerrymandering" of attendance zones, pairing or clustering of schools, and optional "majority-to-minority" transfer programs, *id.* at 26–27. Acknowledging that such desegregation remedies may involve some "awkwardness and inconvenience," *id.* at 28, the Court stated that busing is generally permissible unless "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process," *id.* at 30–31. For a detailed discussion of the case's background, the lower court decisions, and the Supreme Court's deliberations, see BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986). *See also infra* notes 128–31 and accompanying text (discussing evolution of Chief Justice Burger's opinion).

[74] *Green*, 391 U.S. at 437–38.

[75] *Id.* at 442.

[76] *Swann*, 402 U.S. at 15.

[77] *Id.* at 16.

[78] *Id.* at 26.

[79] *Green*, 391 U.S. at 439–41.

segregation, not on the school boards' intent.[80] A plan is not acceptable simply because it is facially neutral since it may fail to counteract the continuing effects of prior discriminatory decisions concerning school size and location that can affect residential segregation for years.[81]

3. Federal courts must tailor desegregation decrees to match the scope of the constitutional violations. Courts have "'not merely the power but the duty'" to craft remedies that eliminate the effects of segregation,[82] for "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad . . . and flexib[le]."[83] Courts must retain jurisdiction "until it is clear that state-imposed segregation has been completely removed."[84]

Applied by federal courts throughout the South in hundreds of lawsuits brought by the Department of Justice, the NAACP Legal Defense & Educational Fund, and other civil rights organizations, these three principles proved extremely effective in hastening desegregation, particularly when augmented by Title VI of the Civil Rights Act of 1964, which required the U.S. Department of Health, Education, and Welfare (HEW) to terminate federal funds to school districts

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[80] *Swann*, 402 U.S. at 25, 28; *Green*, 391 U.S. at 439. The Court's adoption of an effects test to evaluate desegregation remedies contrasts with its intent test for determining initial equal-protection violations. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (requiring invalidation only of official acts that reflect "racially discriminatory purpose[,]" not acts that have "racially disproportionate impact") (citation omitted); Washington v. Davis, 426 U.S. 229, 239 (1976) (same). In southern systems where segregation had been mandated or authorized by statute, there was no doubt after *Brown I* that system-wide constitutional violations had occurred.

[81] *Swann*, 402 U.S. at 28 (stating that facially neutral plans "may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation"). *Swann* emphasized that school construction decisions designed to reinforce school segregation "do[ ] more than simply influence the short-run composition of the student body of a new school. [They] may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races." *Id.* at 21. Thus, residential segregation may be a partial vestige of school segregation, and district courts may account for such issues in fashioning remedies because "[w]hen school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral." *Id.* at 28; *see also* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 202 (1973) (noting that intentional school segregation within one part of urban area may have "profound reciprocal effect on the racial composition of residential neighborhoods . . . thereby causing further racial concentration within the schools"); *infra* note 157 (discussing *Keyes*).

[82] *Green*, 391 U.S. at 438 n.4 (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).

[83] *Swann*, 402 U.S. at 15.

[84] *Green*, 391 U.S. at 439.

refusing to desegregate.[85] In the seventeen states covered by *Brown* where segregation had been mandated or authorized by law, the percentage of black children attending school with whites jumped from just eleven percent in 1964–65, a decade after *Brown*, to eighty-four percent in 1970–71.[86] Yet the principles of *Green* and *Swann*, responsible for so much desegregation, would not survive the political and especially the judicial forces that would soon be marshalled against them.

II

The political forces opposing court-ordered school desegregation had their origins in Massive Resistance, but they gained national potency during the 1968 presidential campaign and its aftermath. Although presidential hopeful Richard Nixon had taken relatively progressive civil rights stands early in his career—for example, he had supported the Civil Rights Acts of 1957 and 1964[87]—he decided that his presidential hopes and the Republican Party's future lay in a calculated "Southern Strategy"—an attempt to forge a new, long-term majority by combining northern and western suburban Republicans with blue-collar workers and white southerners dissatisfied with the Democratic Party's focus on civil rights.[88] On May 31, 1968, just four days after the Supreme Court announced its decision in *Green*, Nixon

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[85] 42 U.S.C. § 2000d-1 (1970); *see also* ORFIELD, *supra* note 64, at 279–85, 319–23 (describing HEW and Justice Department enforcement efforts during Johnson administration). *See generally* PATTERSON, *supra* note 42, at 136–42 (discussing impact of legislative and executive branch initiatives); Kenneth N. Vines, *Epilogue: 1970*, *in* PELTASON, *supra* note 43, at 255, 257–62 (same); WILHOIT, *supra* note 42, at 201–15 (same).

[86] U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1974, at 124 tbl.200 (1974).

[87] In contrast, Ronald Reagan and George H.W. Bush opposed the Civil Rights Act of 1964. DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 24 (2001).

[88] As explained by Kevin Phillips, an aide to Nixon's campaign manager (and later Attorney General) John Mitchell, the key to Nixon's Southern Strategy was to attract and energize white southerners without alienating the traditional Republican base of Sun Belt conservatives and rural and suburban northerners. KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY 26–36, 187–289 (1969). In 1964, Republican candidate Barry Goldwater, aligning himself with hard-core segregationists, swept the Deep South and in many southern states helped force moderate, reform-oriented Republicans out of leadership positions. In an effort more nuanced than Goldwater's strategy, Nixon attempted to create a long-term majority by reaching out to both disgruntled southerners and traditional Republican economic conservatives. *See* NUMAN V. BARTLEY & HUGH D. GRAHAM, SOUTHERN POLITICS AND THE SECOND RECONSTRUCTION 81–133 (1975); JACK BASS & WALTER DEVRIES, THE TRANSFORMATION OF SOUTHERN POLITICS: SOCIAL CHANGE AND POLITICAL CONSEQUENCE SINCE 1945, at 27–32 (1976); CARTER, *supra* note 42, at 324–31; *see also infra* notes 132–34 and accompanying text (discussing Nixon's tactics in 1972 election).

flew to Atlanta to court two of the South's most influential politicians, Republican Senators Strom Thurmond of South Carolina and John Tower of Texas.[89] To secure their support for the nomination, Nixon promised to protect the South's declining textile industry, to provide more money for defense, and to slow the pace of school desegregation. In particular, he promised to ease federal pressure on southern schools, to limit the use of busing, and to appoint "strict constructionists" to the Supreme Court.[90]

Once Nixon secured the Republican nomination, he set out to differentiate himself from the openly segregationist George Wallace by declaring that he supported "an orderly transition" to desegregation, meaning the removal of formal legal obstacles to integrated schools, but opposed "instant integration," by which he meant court-ordered measures to end segregation.[91] Nixon told campaign workers that the "Court was right on *Brown* and wrong on *Green*."[92] Late in the campaign, Nixon publicly supported freedom-of-choice and declared that he opposed withholding money from schools refusing to desegregate.[93]

Upon taking office, Nixon began by curtailing HEW's critical enforcement role,[94] ordering the department to make desegregation

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[89] *See* STEPHEN E. AMBROSE, NIXON: VOLUME TWO, THE TRIUMPH OF A POLITICIAN, 1962–1972, at 155 (1989); Bruce H. Kalk, *Wormley's Hotel Revisited: Richard Nixon's Southern Strategy and the End of the Second Reconstruction*, N.C. HIST. REV., Jan. 1994, at 85, 88.

[90] AMBROSE, *supra* note 89, at 155; Kalk, *supra* note 89, at 88.

[91] KOTLOWSKI, *supra* note 87, at 24 (internal quotation marks omitted) (citation omitted). History professor Dan Carter explains that Nixon's campaign rhetoric

> showed that he was the master of the wink, the nudge, the implied commitment. Without ever explicitly renouncing his own past support for desegregation, he managed to convey to his listeners the sense that, as President, he would do the absolute minimum required to carry out the mandates of the federal courts.

CARTER, *supra* note 42, at 329.

[92] WILLIAM SAFIRE, BEFORE THE FALL: AN INSIDE VIEW OF THE PRE-WATERGATE WHITE HOUSE 232 (1975) (internal quotation marks omitted).

[93] STEPHENSON, *supra* note 6, at 180; Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 416 & n.194 (2000).

[94] After the White House engineered the firing of Leon Panetta, the Director of HEW's Office for Civil Rights, for being a "disloyalist[ ]" because he supported desegregation efforts, HEW significantly reduced pressure on southern school districts to desegregate. Memorandum from Harry Dent, to H.R. Haldeman (Feb. 23, 1970) (Box 23, Folder: "Panetta, [Leon]," John D. Ehrlichman Files, White House Special Files, Nixon Presidential Materials, National Archives, College Park, Md.) (questioning whether Panetta should be allowed to stay in office for one more week and asking, "[w]hy not get rid of other disloyalists and limit their access to info that will be used against us eventually"). Nixon later told Ehrlichman that firing Panetta had been "worth dozens of speeches and statements about integrating the schools." TOM [NMI] WICKER, ONE OF US: RICHARD NIXON AND THE AMERICAN DREAM 501 (1991) (internal quotation marks

plans "inoffensive" to the "people" of the southern states.[95] HEW's laxity was so great that U.S. District Judge John Pratt found the Department guilty of subverting the Civil Rights Act of 1964.[96] Affirming the District Court's decision unanimously, the D.C. Circuit called HEW's inaction a "dereliction of duty."[97]

Then, in part to gain Mississippi Senator John Stennis's support for the anti-ballistic missile treaty, Nixon directed his HEW Secretary to ask the federal court in *Alexander v. Holmes County Board of Education*[98] to give Mississippi school districts more time to desegregate.[99] For the first time since *Brown*, Justice Department lawyers sat on the opposite side of the courtroom from lawyers for black schoolchildren. Ultimately, the administration's efforts failed, for in *Alexander*, a unanimous Supreme Court rejected any delay, declaring that

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omitted) (citation omitted). For a full year after Panetta's firing, HEW initiated not one fund-termination proceeding. ORFIELD, *supra* note 64, at 293.

[95] KOTLOWSKI, *supra* note 87, at 29 (internal quotation marks omitted) (citation omitted). In addition, within days of taking office, Nixon balked at cutting off federal funds to five southern school districts that had been approved by outgoing Johnson administration officials. Nixon's new HEW appointees, however, convinced him to allow the cutoff to proceed, and then to restore the money if the districts submitted acceptable desegregation plans within sixty days. PANETTA & GALL, *supra* note 32, at 66–77; WICKER, *supra* note 94, at 490. In July 1969, the Nixon administration issued an ambiguous statement that allowed for some delays in the Johnson administration's original desegregation deadlines. PANETTA & GALL, *supra* note 32, at 189–232; WICKER, *supra* note 94, at 491. *See generally* ORFIELD, *supra* note 64, at 280–81, 285–316 (detailing HEW's changes in policy and focus over course of Nixon and Ford administrations). Although HEW Secretary Finch initially urged strict enforcement of the Johnson administration's desegregation guidelines, Nixon, siding with Attorney General John Mitchell, ordered that desegregation be pursued through "U.S. Federal District Court actions rather than administrative compliance procedures." KOTLOWSKI, *supra* note 87, at 29 (internal quotation marks omitted); *see also* ORFIELD, *supra* note 64, at 286–87, 324–25. By shifting the burden to the courts, Nixon hoped to slow the pace of desegregation and avoid political blame. KOTLOWSKI, *supra* note 87, at 29.

[96] Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), *aff'd en banc, rev'd on other grounds*, 480 F.2d 1159 (D.C. Cir. 1973). *See generally* ORFIELD, *supra* note 64, at 291–97 (describing litigation and its aftermath).

[97] Adams v. Richardson, 480 F.2d 1159, 1163 (D.C. Cir. 1973).

[98] 396 U.S. 19, 20 (1969) (per curiam).

[99] KOTLOWSKI, *supra* note 87, at 30–31; ORFIELD, *supra* note 64, at 325–27; PANETTA & GALL, *supra* note 32, at 249–66, 295–300; Kalk, *supra* note 89, at 95. *See generally* ORFIELD, *supra* note 64, at 324–54 (discussing Justice Department's desegregation litigation during Nixon and Ford administrations). Although HEW had developed its desegregation plans in consultation with local school systems, Secretary Finch asked the Fifth Circuit to extend the department's deadline from August to December. The Justice Department filed a corresponding motion, which the Fifth Circuit granted. PANETTA & GALL, *supra* note 32, at 249–66, 295–300. Ninety percent of the attorneys in the Justice Department's Civil Rights Division "revolted" against the administration's position, signing a protest and refusing to seek delays in pending cases. ORFIELD, *supra* note 64, at 325; PANETTA & GALL, *supra* note 32, at 262, 368–69.

the obligation of every school district was to terminate dual school systems "at once."[100]

Rather than risk open confrontation with the Supreme Court, Nixon convened a Cabinet working group[101] and issued a statement that, like so much of his rhetoric, walked a fine line between endorsing *Brown*'s broad principles and signaling to the South that he meant to minimize *Green*'s and *Alexander*'s impact on white students.[102] The statement enunciated three basic points.

First, the statement declared a preference for neighborhood schools, despite the fact that neighborhood-based assignments would perpetuate many of the all-black schools created under the dual

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[100] *Alexander*, 396 U.S. at 20; *see also supra* note 69 and accompanying text.

[101] Again, Nixon sent mixed messages, appointing Vice President Spiro Agnew, a vocal desegregation critic, to chair the group. *See* LEONARD GARMENT, CRAZY RHYTHM: MY JOURNEY FROM BROOKLYN, JAZZ, AND WALL STREET TO NIXON'S WHITE HOUSE, WATERGATE, AND BEYOND . . ., at 203–17 (2001); KOTLOWSKI, *supra* note 87, at 34–37; WICKER, *supra* note 94, at 500; George P. Shultz, *How a Republican Desegregated the South's Schools*, N.Y. TIMES, Jan. 8, 2003, at A23. Before Nixon decided how to respond to *Alexander*, speechwriter Patrick Buchanan lobbied him to adopt "a posture of . . . freedom of choice" in defiance of the Court, predicting that "the ship of Integration is going down . . . and we cannot salvage it; and we ought not to be aboard. . . . If we could get Green versus New Kent County reversed, that would be enough." Memorandum from Patrick J. Buchanan, to the President 3 (undated) (Box 53, Folder: "Garment memos [on Busing]," Leonard Garment Files, White House Central Files, Nixon Presidential Materials, National Archives, College Park, Md.). Buchanan already had begun work on a speech for Vice President Agnew, opposing recent Court decisions that he predicted would "tear the scab off the issue of race in this country." GARMENT, *supra*, at 207. But Nixon decided to take the issue away from Agnew and to release his own statement hoping to encourage enough southern cooperation to avoid any further Supreme Court decisions like *Green* and *Alexander*. *Id.*; SAFIRE, *supra* note 92, at 233–35.

[102] Statement About Desegregation of Elementary and Secondary Schools, 1970 PUB. PAPERS 304 (Mar. 24, 1970). Nixon began the statement by "reaffirm[ing] [his] personal belief that the 1954 decision of the Supreme Court in *Brown v. Board of Education* was right in both constitutional and human terms," noting that he had endorsed the Civil Rights Act of 1964 and stating that "[t]he constitutional mandate will be enforced." *Id.* at 304–06. While demanding that school districts in all regions of the country immediately eliminate segregation of students and teachers as well as discrimination with respect to the quality of facilities and educational programs, however, the statement simultaneously asserted that school systems should be allowed to maintain neighborhood schools. *Id.* at 315–16; *see infra* note 103. The Statement suggested,

> [w]e should not provoke any court to push a constitutional principle beyond its ultimate limit in order to compel compliance with the court's essential, but more modest, mandate. The best way to avoid this is for the Nation to demonstrate that it does intend to carry out the full spirit of the constitutional mandate.

Statement About Desegregation of Elementary and Secondary Schools, *supra*, at 315. Months later, after Tower, Thurmond, and other southerners complained about the fall 1970 deadlines, Nixon told aides that he thought the statement had been too pro-desegregation. KOTLOWSKI, *supra* note 87, at 36.

system.[103] As revealed in the Nixon tapes, many of which I reviewed to prepare this paper, Nixon's private views were more blunt. For example, in an Oval Office meeting, Nixon told aides: "I want to take a flat-out position against busing, period. . . . I am against busing! I am for neighborhood schools!"[104]

Second, whereas the Supreme Court demanded a remedy for the victims of *segregation*, Nixon's statement demanded a remedy for the so-called "victims" of *desegregation*.[105] Throughout the tapes,

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[103] Statement About Desegregation of Elementary and Secondary Schools, *supra* note 102, at 315; *see, e.g.*, *id.* at 305 (criticizing some lower court decisions for raising fears that "the neighborhood school [is] virtually doomed"); *id.* at 307–08 (expressing continuing opposition to "compulsory busing . . . beyond normal geographic school zones"); *id.* at 314 (advocating part-time activities as alternative to busing so that "no one would be deprived of his own neighborhood school"); *id.* at 315 (stating that busing of students "beyond normal geographic school zones" would not be required). Aide Leonard Garment proposed encouraging school systems to adopt student reassignment plans that, although based on neighborhood schools, would use additional measures such as pairing schools to promote integration. Memorandum from Leonard Garment, to President Nixon 1 (Feb. 27, 1970) (furnished to author by Leonard Garment; on file with *New York University Law Review*) ("The second element is affirmative action to maximize desegregation, by reasonable procedures such as selective modification of attendance zones, pairing with *nearby* schools, majority to minority transfer privileges, new construction programs, etc., *but, again, all within the framework of the neighborhood school concept.*"). This "neighborhood school plus" plan never made it into the President's statement, however. Although neighborhood schools had been a rallying cry of southern politicians, the issue also resonated with northern whites who feared the Supreme Court would extend desegregation requirements beyond the South. Neighborhood school advocates often conveniently ignored the fact that under the dual system, black students in rural areas rarely attended neighborhood schools. PANETTA & GALL, *supra* note 32, at 50; *see also supra* note 64 and accompanying text.

[104] Audio tape: Conversation between Richard Nixon, John Mitchell, and John D. Ehrlichman, Oval Office of the White House, Washington, D.C. (Oct. 8, 1971) (Nat'l Archives Nixon White House Tape Conversation 587-3). The public statement made the same point in more politic language: "I believe it is preferable, when we have to make the choice, to use limited financial resources for the improvement of education . . . rather than buying buses, tires, and gasoline to transport young children miles away from their neighborhood schools." Statement About Desegregation of Elementary and Secondary Schools, *supra* note 102, at 309.

[105] In conversations with his staff, Nixon said that schoolchildren—meaning white children—were the "victims" of busing. *See, e.g.*, *infra* note 116 and accompanying text. The statement, however, did not use that term, instead portraying busing as frequently harmful, schools as overburdened, and children as extremely vulnerable to disruption and injury. *See, e.g.*, Statement About Desegregation of Elementary and Secondary Schools, *supra* note 102, at 308 (denouncing some lower court rulings because they would "divert such huge sums of money to non-educational purposes, and would create such severe dislocations of public school systems, as to impair the primary function of providing a good education"); *id.* at 312 ("[O]ur children are highly sensitive to conflict, and highly vulnerable to lasting psychic injury."); *id.* at 314 (describing busing as "taking children out of the schools they would normally attend, and forcing them instead to attend others more distant, often in strange or even hostile neighborhoods").

Suggesting that too much had been demanded of public schools, the statement asserted that "[c]hildren . . . have not been served, but used—in what all too often has

Nixon's constant theme was that busing was educationally harmful.[106]

Third, the statement asserted that "good faith is critical"[107] and that school boards should have "substantial latitude" to desegregate as long as they demonstrate good faith.[108] The Oval Office tapes reveal a President more concerned with limiting federal government involvement in local school districts than with achieving the effective desegregation required by *Green* and *Swann*.[109] While Nixon did call on local leaders to ensure that desegregation proceeded smoothly,[110]

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proved a tragically futile effort to achieve in the schools the kind of a multiracial society which the adult community has failed to achieve for itself." *Id.* at 312. The statement also lamented that "[w]hites have deserted the public schools, often for grossly inadequate private schools." *Id.* at 310. Although Nixon acknowledged a need to provide black students with educational opportunities denied to their parents, *see id.* at 319 ("We must give the minority child that equal place at the starting line that his parents were denied—and the pride, the dignity, the self-respect, that are the birthright of a free American."), the statement minimized the significance of racial discrimination by suggesting that the reason black schools were inferior to most white schools was "not really because they serve black children[,] . . . but rather because they serve poor children who often lack the home environment that encourages learning," *id.* at 313.

106 *See, e.g.*, Audio tape: Conversation between Richard Nixon and various members of Cabinet and staff, Cabinet Room of the White House, Washington, D.C. (Mar. 17, 1972) (Nat'l Archives Nixon White House Tape Conversation 95-1) ("But when you bus children, particularly young children, away from their neighborhood schools, that results—more often than not—in inferior education. So the question is, are you going to address one harm by compounding it with another wrong?"); Audio tape: Telephone Conversation between Richard Nixon and John D. Ehrlichman (Mar. 12, 1972) (Nat'l Archives Nixon White House Tape Conversation 21-47) ("Transportation which is excessive and which is detrimental to a child's education is wrong, because one year out of a child's life may be too important to be lost."); Audio tape: Conversation between Richard Nixon and various advisers, Cabinet Room of the White House, Washington, D.C. (Mar. 10, 1972) (Nat'l Archives Nixon White House Tape Conversation 94-3) ("And certainly education that is the result of busing in an excessive amount is an inferior education.").

107 Statement About Desegregation of Elementary and Secondary Schools, *supra* note 102, at 314.

108 *Id.* at 309; *see also id.* at 310 (describing "'rule of reason' . . . in which school boards, acting in good faith, can formulate plans of desegregation which best suit the needs of their own localities"); *id.* at 314 ("[I]f the essential element of good faith is present, it should ordinarily be possible to achieve legal compliance . . . through a plan designed to be responsive to the community's own local circumstances."); *id.* at 315 ("In devising local compliance plans, primary weight should be given to the considered judgment of local school boards—provided they act in good faith, and within constitutional limits.").

109 *See, e.g.*, Audio tape: Conversation between Richard Nixon and various members of Cabinet and staff, Oval Office of the White House, Washington, D.C. (Apr. 21, 1971) (Nat'l Archives Nixon White House Tape Conversation 484-2) ("I don't want any initiative undertaken by HEW or by Justice to go in and break up the plans. . . . I just do not want us, as the federal government, in this highly explosive area, to try to be heroic and rush down there and kick the South around.").

110 *See, e.g.*, Statement About Desegregation of Elementary and Secondary Schools, *supra* note 102, at 316 ("[T]he leaders of the communities [facing desegregation orders] will be encouraged to lead—not in defiance, but in smoothing the way of compliance. . . .

his statement implied that minimal local efforts would be sufficient even if significant vestiges of segregation remained.[111]

In the fall of 1970, many hold-out southern districts finally implemented desegregation plans, as Nixon had urged,[112] but in *Swann* the Supreme Court rejected Nixon's plea to protect neighborhood schools, unanimously affirming district court authority to order extensive busing, including of young children.[113] Reacting to *Swann* and other desegregation decisions, Nixon instructed domestic policy adviser John Ehrlichman to "get legislation or a const[itutional] amendment ready."[114]

Seeing busing as an ideal reelection issue, Nixon decided to propose a legislative moratorium on busing because he worried that a constitutional amendment, favored by many southerners, would take too long.[115] Any delay, he told Cabinet members,

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Where local leadership has failed, the community has failed—and the schools and the children have borne the brunt of that failure.").

[111] *See, e.g.*, *id.* at 314 (suggesting that part-time educational programs on "'neutral'" sites would be sufficient); *id.* at 315 (calling for immediate elimination of deliberate racial segregation, yet stating that neighborhood schools are most appropriate basis for student assignment and that busing beyond normal geographic school zones would not be required).

[112] GARMENT, *supra* note 101, at 215–18; KOTLOWSKI, *supra* note 87, at 15; WICKER, *supra* note 94, at 505–07; Shultz, *supra* note 101. Congress heeded Nixon's call to provide additional funds to support desegregating school systems, *see* Statement About Desegregation of Elementary and Secondary Schools, *supra* note 102, at 317, although it did not trust him to ensure that funding did not go to schools that resisted desegregation. Rather than leave the Executive Branch with discretion to decide whether to withhold money from resisting districts, Congress structured the Emergency School Aid Act to ensure that school systems could receive funds only by first demonstrating compliance with desegregation requirements. Pub. L. No. 92-318, 86 Stat. 354 (1972). Congress's appropriation of $75 million the previous year contained no provision for civil rights reviews, and much of this money went to districts that were continuing to resist desegregation. So when it strengthened the Emergency School Aid Act in 1972, Congress included desegregation requirements that were so clear that "HEW continued enforcing them long after it stopped enforcing the Civil Rights Act." ORFIELD, *supra* note 64, at 247. The Act, which I enforced during my tenure at HEW, eventually became one of the federal government's most effective desegregation tools.

[113] 402 U.S. 1 (1971). The Nixon administration submitted an amicus brief in *Swann* asserting that "a system of pupil assignment on the basis of contiguous geographic (residential) zones" should generally be sufficient to satisfy urban school systems' desegregation obligations. Brief for the United States as Amicus Curiae at 24–25, *Swann* (Nos. 281, 349); *see* ORFIELD, *supra* note 64, at 328–32; *supra* note 73 (discussing Supreme Court's holding).

[114] KOTLOWSKI, *supra* note 87, at 39 (quoting Nixon's notes on annotated news summary); *see also* The President's News Conference of February 10, 1972, 1972 PUB. PAPERS 347, 354–55 (stating that Nixon was considering both legislative moratorium and constitutional amendment proposals to protect neighborhood schools and curtail "busing for the purpose of racial balance").

[115] Nixon did so despite a warning from aide Leonard Garment that "Congress may not restrict or dilute a Constitutional right." Memorandum from Leonard Garment, to John

> means that school children who are truly [unintelligible] in the next school year and possibly the next school year, the hundreds of thousands will be the victims of new massive busing orders by the courts. So, therefore, it's too slow. I think that this issue, an issue that all of you know from your mail, all of you know from watching what is happening around the country, this issue is one that requires action now. It requires it because you just can't have a generation of children that are the victims, if you believe that busing's wrong, [unintelligible] are the victims of this kind of thing.[116]

Even if the Supreme Court were to invalidate the legislative moratorium, Nixon reasoned, "We wouldn't have lost everything. We'll just come up with a constitutional amendment. Period. And let the Democratic candidate be against it. It'll polarize the country. I'm telling you we're going to fight this battle, we're going to fight it."[117]

D. Ehrlichman 1 (Jan. 13, 1972) (Box 52, Folder: "Busing—Constitutional amendment [2 of 3]," Leonard Garment Files, White House Central Files, Nixon Presidential Materials, National Archives, College Park, Md.). Nixon worried that George Wallace would draw support from southerners who felt that Nixon had reneged on his campaign promises by failing to slow desegregation after *Alexander*. As a result, to solidify his support among voters in the South and elsewhere in the country where desegregation had become a hot-button issue, Nixon supported the moratorium and accelerated his attacks on busing. AMBROSE, *supra* note 89, at 499–500, 555–56, 586–87, 623; *see also* BARTLEY & GRAHAM, *supra* note 88, at 164–72; CARTER, *supra* note 42, at 422–26, 431–33, 445–50; KOTLOWSKI, *supra* note 87, at 19–21, 37–40; WICKER, *supra* note 94, at 490–91.

116 Audio tape: Conversation between Richard Nixon and various members of his Cabinet and staff, Cabinet Room of the White House, Washington, D.C. (Mar. 17, 1972) (Nat'l Archives Nixon White House Tape Conversation 95-1). After telling Ehrlichman of his initial decision, Nixon warned him against leaking anything to desegregation moderates such as Elliott Richardson and Leonard Garment: "Don't tell 'em I've made a decision, . . . I don't want them to lobby me in this damn thing. You know, I've heard all the arguments." Audio tape: Telephone Conversation between Richard Nixon and John D. Ehrlichman, (Mar. 12, 1972) (Nat'l Archives Nixon White House Tape Conversation 21-47). Aware that his policy shift might trigger additional backlash among lawyers at HEW and the Department of Justice's Civil Rights Division, President Nixon told Ehrlichman that he didn't care: "I know the concern expressed is that the lawyers will resign . . . . In my view, nothing better could happen. I'll tell you why: If anybody ever asks me about [it], I say I understand, I appreciate their conviction, but they were not elected and I was, and that's that." *Id.* Nixon added, "This idea that we have to be, really, hostage to a group of lawyers or experts in HEW and the civil rights division—the hell with it! I mean, they give their advice, and then we do what we want. Right?" *Id.* In fact, ninety-five attorneys in the Justice Department's Civil Rights Division later signed a letter to Congress urging defeat of Nixon's moratorium proposal. ORFIELD, *supra* note 64, at 338.

117 Audio tape: Conversation between Richard Nixon, H.R. Haldeman, and Charles W. Colson, Oval Office of the White House, Washington, D.C. (Mar. 30, 1972) (Nat'l Archives Nixon White House Tape Conversation 697-29). Nixon also directed the Justice Department to begin intervening in cases where lower courts had ordered desegregation plans that the department considered particularly burdensome. Address to the Nation on Equal Educational Opportunities and School Busing, 1972 PUB. PAPERS 425, 427 (Mar. 16, 1972). In an Oval Office conversation, Ehrlichman encouraged the President: "[This] puts the weight of the federal government on the side of the local school board. And that's a dramatic shift. That's a symbol that . . . has just never taken place [before]." Audio tape:

Supporting anti-busing legislation and curtailing federal government desegregation enforcement activities were not President Nixon's only efforts to limit school desegregation. As he had promised Senators Thurmond and Tower, Nixon also attempted to use Supreme Court nominations to change the Court's direction, though his first efforts failed. After successfully appointing Chief Justice Warren Burger, Nixon nominated Fourth Circuit Judge Clement Haynsworth, who had written one opinion upholding a freedom-of-choice plan that was unanimously reversed in a companion case to *Green*,[118] and another opinion allowing a Virginia county to close its schools to avoid court-ordered desegregation that was unanimously reversed by *Griffin*.[119] The Senate, concerned (among other things) about Judge Haynsworth's commitment to *Brown*, rejected his nomination.

Undaunted and angry, Nixon told aides to look "farther South and further right."[120] They did, and they found a little-known federal

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Conversation between Richard Nixon and John D. Ehrlichman, Oval Office of the White House, Washington, D.C. (Mar. 18, 1972) (Nat'l Archives Nixon White House Tape Conversation 688-12).

After his re-election, however, Nixon became so distracted by Watergate that he never followed through on the moratorium or constitutional amendment proposals. *See* ORFIELD, *supra* note 64, at 255; *id.* at 247–51 (decribing proposals). Some commentators—including Nixon's more moderate advisers who worked directly with the 1970 state committees to encourage peaceful implementation of *Alexander*'s mandate—have insisted that Nixon's desegregation record is better than he is credited for. *See, e.g.*, GARMENT, *supra* note 101, at 203–18 (describing Nixon's rejection of more conservative course of action and arguing that "[m]ore school desegregation took place during Nixon's first term than in all the preceding eighteen years following Brown"); KOTLOWSKI, *supra* note 87, at 15 (noting that "recent scholars have concluded that the president was neither a segregationist nor a conservative on the race question"); WICKER, *supra* note 94, at 484–507 (stating that "[t]here's no doubt . . . that it was Richard Nixon personally who conceived, orchestrated, and led the administration's desegregation effort"); Shultz, *supra* note 101 (detailing and praising Nixon's chosen "process to carry out the court's mandate"). In my view, however, they discount the fact that Nixon did not seek to facilitate desegregation until the Supreme Court forced his hand in *Alexander*. They also overlook the negative impact of his refusal to enforce Title VI, his conscious shift of responsibility for school desegregation to the courts, and his attempts to change the law through his moratorium proposals and Supreme Court nominations.

[118] Bowman v. County Sch. Bd., 382 F.2d 326 (4th Cir. 1967) (en banc), *vacated by* Green v. County Sch. Bd., 391 U.S. 430, 442 (1968); *see also Green*, 391 U.S. at 434 n.3 ("[*Green*] was decided *per curiam* on the basis of the opinion in [*Bowman*], decided the same day. Certiorari has not been sought for the *Bowman* case itself."); *supra* note 72 (discussing Supreme Court's opinion in *Green*).

[119] Griffin v. County Sch. Bd., 322 F.2d 332 (4th Cir. 1963), *rev'd*, 377 U.S. 218 (1964); *see also supra* note 66 and accompanying text (discussing Supreme Court's opinion in *Griffin*). Judge Haynsworth reasoned that local officials' refusal to reopen public schools did not deny black students equal protection "though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality." 322 F.2d at 337.

[120] Kalk, *supra* note 89, at 102 (internal quotation marks omitted).

judge from Florida named G. Harrold Carswell. After the press revealed that Carswell had once stated, "I yield to no man . . . in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed,"[121] the Senate rejected this nomination as well.[122]

When two additional Supreme Court seats opened up in 1971, Nixon told Attorney General Mitchell that he was determined to appoint at least one southerner:

> [I]t would be a slap to the South not to try for a southerner. So I would say that our first requirement is a southerner. The second requirement: He *must* be a conservative southerner. . . . Third, within the definition of conservative, he must be . . . against busing and against forced housing integration. Beyond that, he can do what he pleases.[123]

For the other vacancy, Nixon was more concerned about ideology than geography, explaining:

> I just feel so strongly about that. I mean when I think about what the busing decision has done to this thing in the South and when I think of what it could do if they get into de facto busing and forced integration in housing, I just, I just feel that, I just feel that if it's the last thing we do, we've got to have a conservative.[124]

The President directed Mitchell to talk personally with the final candidate to get an absolute commitment on busing:

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121 *See also id.* (internal quotation marks omitted). Carswell, who had been a judge on the U.S. District Court for the Northern District of Florida until he was elevated to the Fifth Circuit a few months before his nomination to the Supreme Court, was suggested to Nixon by Warren Burger while Burger was still Chief Judge of the D.C. Circuit. Carswell also was supported by Harry Dent, a former aide to Senator Thurmond. KOTLOWSKI, *supra* note 87, at 19–20; WICKER, *supra* note 94, at 497–98; Kalk, *supra* note 89, at 102–04; Snyder, *supra* note 93, at 426–29. Even Carswell's proponents, however, appeared tepid. Nebraska Republican Roman Hruska said in a televised interview from the Senate floor that "[e]ven if he were mediocre, there are lots of mediocre judges and people and lawyers. They're entitled to a little representation, aren't they? We can't have all Brandeises, Frankfurters and Cardozos and stuff like that there." Kalk, *supra* note 89, at 104 (internal quotation marks omitted); *see also* 116 CONG. REC. 7881 (1970) (reprinting Washington Post editorial concerning Hruska's comments as well as Hruska's response).

122 Nixon responded to the 51-45 vote by declaring that his next nominee would be a northerner because it was impossible to "successfully nominate to the Supreme Court any Federal Appellate Judge from the South who believes as I do in the strict construction of the Constitution." WICKER, *supra* note 94, at 498 (internal quotation marks omitted). Nixon's press release went on to state, "I understand the bitter feeling of millions of Americans who live in the South about the act of regional discrimination that took place in the Senate yesterday." WICKER, *supra* note 94, at 499 (internal quotation marks omitted).

123 Audio tape: Conversation between Richard Nixon and John Mitchell, Oval Office of the White House, Washington, D.C. (Sept. 18, 1971) (Nat'l Archives Nixon White House Tape Conversation 576-6).

124 *Id.*

> I want you to have a specific talk with whatever man we consider and I have to have an absolute commitment from him on busing and integration. I really have to. All right? Tell him we totally respect his right to do otherwise, but if he believes otherwise, I will not appoint him to the Court.[125]

After considering several candidates, Nixon ultimately selected Lewis Powell, formerly an American Bar Association president and chairman of the Richmond, Virginia, school board.[126] Powell had opposed Massive Resistance, but Nixon told aides that Powell was against busing. Referring to Powell, as well as to Senator Howard Baker, whom the President was considering for the other open seat, Nixon told aides: "Let me go over all of this, this issue of busing. Both these men are against busing. And that will help us like hell."[127]

III

Before turning to *Dowell* and *Jenkins*, I think it worth observing that signals of the Supreme Court's departure from *Brown* and its progeny appeared years earlier, starting with the internal deliberations over *Swann* itself. Although most Justices believed that the district court's desegregation order should be upheld, Chief Justice Burger's initial draft of *Swann* criticized the lower court because of "strong intimations" that it had relied on a "fixed mathematical racial balance."[128] Retreating from *Green*, the draft stated that "some of the problems . . . arise from viewing *Brown I* as imposing a requirement for racial balance, i.e., integration, rather than a prohibition

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[125] *Id.*

[126] *See generally* Snyder, *supra* note 93, at 431–49 (describing nomination process and candidates considered).

[127] Audio tape: Conversation between Richard Nixon and Richard Moore, Executive Office Building, Washington, D.C. (Oct. 20, 1971) (Nat'l Archives Nixon White House Tape Conversation 282-26). When Baker dithered over financial and political considerations, Nixon chose Assistant Attorney General William Rehnquist instead. *See* Snyder, *supra* note 93, at 432 (describing selection of Rehnquist).

[128] SCHWARTZ, *supra* note 73, app. A at 217 (reprinting draft opinion); *see also id.* at 100–05, 112 (reporting that Justices did not take formal vote during their first conference, but that only Justice Black and Chief Justice Burger suggested rejecting district court order); MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991, at 76–78 (1997) (same); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 100 (1979) (same). Marshall biographer Mark Tushnet reports that Chief Justice Burger set out to draft the opinion because he believed it was the role of the Chief Justice to speak for the Court in important cases, TUSHNET, *supra*, at 77, whereas Schwartz concludes that Burger tried to use his position to prevent a clear affirmance of the district court, SCHWARTZ, *supra* note 73, at 122. Woodward and Armstrong suggest that Burger was primarily concerned about ensuring a unanimous decision. WOODWARD & ARMSTRONG, *supra*, at 100.

against segregation."[129] Other Justices objected to the draft, but the Chief Justice, apparently misreading their objections, produced a second draft that was even more critical of the district court.[130] After Justice Stewart and others renewed their objections, Burger gradually refocused the opinion to affirm district courts' authority to craft effective desegregation remedies and to reject the challenge to the busing order at issue, explaining that "we are unable to conclude that the order of the District Court is not reasonable, feasible and workable."[131]

Burger's authorship of *Swann* disappointed Nixon, who worried that the South would hold him accountable.[132] Indeed, Nixon had been so concerned about *Swann* that he actually lobbied the Chief Justice while the case was pending. In an Oval Office meeting, Nixon told aides that three weeks before *Swann* was handed down, he had met with the Chief Justice: "Mitchell and Burger and I had breakfast about three months ago and I lit into Burger. I said, 'Now look here, I'll be honest with you, if you insist on busing . . . .' So I was sorta disappointed."[133]

A year later, the President again met with the Chief Justice, telling him that the Warren Court had led "[t]he people" to "los[e] confidence. They see these, you know, they see these hippies, and frankly, the Negro problem[,] . . . and then there's busing. That just

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129 SCHWARTZ, *supra* note 73, app. A at 215; *cf.* Winston-Salem/Forsyth County Bd. of Educ. v. Scott, 404 U.S. 1221, 1227 (Burger, Circuit Justice 1971) (finding it "disturbing" that lower courts might have read *Swann* too broadly as requiring precise racial balancing of individual schools). The draft adopted a narrow construction of *Green*, suggesting the decision had been misread "as a mandate for integration." SCHWARTZ, *supra* note 73, app. A at 215 n.10. Although the draft grudgingly permitted redrawing of attendance zones and some busing, it stated that any use of noncontiguous school zones (i.e., non-neighborhood schools) "should be closely examined" and articulated a series of "limitation[s]" on busing. *Id.* at 219–21. More broadly, the draft hinted that the scope of federal court remedial power in school desegregation cases was more limited than in other litigation, declaring that "the simplistic, hornbook remedies are not necessarily relevant" and that "[p]opulations, pupils or misplaced schools cannot be moved as simply as earth by a bulldozer, or property by corporations." *Id.* at 216; *see also id.* at 113–17 (summarizing draft); TUSHNET, *supra* note 128, at 77–78 (same); WOODWARD & ARMSTRONG, *supra* note 128, at 103–04, 110 (same).

130 *See* SCHWARTZ, *supra* note 73, at 130–36.

131 *Swann*, 402 U.S. at 31; *see* SCHWARTZ, *supra* note 73, at 118–84 (outlining objections of other Justices and discussing Burger's subsequent drafts); TUSHNET, *supra* note 128, at 78–82 (tracing evolution of Burger's opinion); WOODWARD & ARMSTRONG, *supra* note 128, at 104–12 (same).

132 Aide Harry Dent warned Nixon that Chief Justice Burger might "become the new Earl Warren." Audio tape: Conversation between Richard Nixon, Harry Dent, John Mitchell and others, Oval Office of the White House, Washington, D.C. (Apr. 21, 1971) (Nat'l Archives Nixon White House Tape Conversation 484-2).

133 *Id.*

drives them up the damn wall."[134] Apparently getting the message but not mentioning that *Swann* had approved busing of even young children, Chief Justice Burger told Nixon: "That *Swann* case was thoroughly misrepresented by the press. . . . They wanted it to be just a busing decision. . . . It was the first time the Court could put limits on busing."[135]

Later in 1972, Burger's discomfort with the principles he had enunciated in *Swann* surfaced publicly when, joined by Justices Blackmun, Powell, and Rehnquist, he authored the first dissent in a school desegregation case. *Wright v. City of Emporia*[136] involved Greensville County, Virginia, where, before *Brown*, white students had attended white schools in Emporia, the county's only city, and most black children, including those living in Emporia, had attended black schools in rural areas.[137] Two weeks after the district court, responding to *Green*, imposed a county-wide desegregation plan,[138] Emporia's city council suddenly announced that it would begin operating its schools as an independent system.[139] The district court enjoined Emporia's secession, finding that it would "plainly cause a substantial shift in the racial balance" and would "prejudice the prospects for unitary schools for county" students.[140] The Fourth Circuit reversed and remanded with instructions to dissolve the injunction.[141]

Justice Stewart, joined by four other Justices who also had participated in several key post-*Brown* decisions, including *Green* and *Swann*, authored the Court's majority opinion in *Wright*.[142] Concluding that the district court had acted within its equitable powers, the majority adhered to the principle established in *Green* and *Swann*

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134 Audio tape: Conversation between Richard Nixon and Warren Burger, Oval Office of the White House, Washington, D.C. (June 14, 1972) (Nat'l Archives Nixon White House Tape Conversation 733-10).

135 *Id.*

136 407 U.S. 451, 471–83 (1972) (Burger, C.J., dissenting).

137 *Id.* at 455.

138 *Id.* at 455–56. After a group of black schoolchildren filed suit in 1965, the district court approved a freedom-of-choice plan. Following *Green*, the district court ordered all students in a particular grade level assigned to the same school for the 1969–70 school year, eliminating any possibility of racial bias in student assignments. *Id.*

139 *Id.* at 456.

140 Wright v. County Sch. Bd., 309 F. Supp. 671, 678, 681 (E.D. Va. 1970). The court concluded that the changes in racial distribution within the two systems and the loss of city financial support and leadership would have a serious adverse impact on the black students left behind in the county system. *Id.* at 680–81.

141 Wright v. Council of City of Emporia, 442 F.2d 570, 574–75 (4th Cir. 1971).

142 The majority consisted of Justices Douglas, Brennan, Stewart, White, and Marshall. Justice Douglas had participated in *Brown*, while Justices Brennan and Stewart were among the new Justices who signed on to *Cooper*. Justice Marshall argued *Brown* on behalf of the plaintiff schoolchildren.

that to be constitutionally acceptable a desegregation plan, measured by its effects, must produce "a school system in which all vestiges of enforced racial segregation have been eliminated."[143] Although the Fourth Circuit had concluded that the dominant purpose of the Emporia secession was "benign,"[144] the Supreme Court majority rejected that conclusion as inconsistent with *Green*'s effects test.[145] Explaining that the district court's factual findings had adequate support in the record,[146] the majority found that the Emporia secession would have "purchased [a quality education for city students] only at the price of a substantial adverse effect upon the viability of the county system."[147] The majority acknowledged that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society,"[148] and stated that once the combined county system was unitary, Emporia would be free to establish an independent district.[149]

Although the four dissenters had joined the majority in a companion case that rejected a similar carve-out plan where the record contained direct evidence that public officials intended to perpetuate segregation,[150] they emphasized in their *Wright* dissent that no such evidence existed with regard to Emporia and concluded that sufficient desegregation would occur even if the city seceded.[151] Under such circumstances, the dissent stated, the district court was obligated to accept Emporia's carve-out plan, "unless there are strong reasons why a different plan is to be preferred," in order to protect what it called the "overriding importance" of local control of public schools.[152] In

143 *Wright*, 407 U.S. at 462–63.

144 442 F.2d at 574.

145 *Wright*, 407 U.S. at 461–63.

146 *Id.* at 463–66.

147 *Id.* at 468.

148 *Id.* at 469.

149 *Id.* at 470.

150 *See* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491–92 (1972) (Burger, C.J., concurring in result); *supra* note 67 (discussing Supreme Court opinion).

151 407 U.S. at 477, 482–83 (Burger, C.J., dissenting).

152 *Id.* at 477 (Burger, C.J., dissenting). The dissenters never acknowledged, however, the realities of local control in southern school districts in the early 1970s. The Voting Rights Act of 1965 had passed only recently, and whites in many southern communities continued their efforts to limit and dilute black voting. BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 21–25 (1992); Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 21–30 (Bernard Grofman & Chandler Davidson eds., 1992); Frank R. Parker, *Eradicating the Continuing Barriers to Effective Minority Voter Participation*, *in* FROM EXCLUSION TO INCLUSION: THE LONG STRUGGLE FOR AFRICAN AMERICAN POLITICAL POWER 73, 75–79 (Ralph C. Gomes & Linda Faye Williams eds., 1992). At the time of *Wright*, "local control" meant control by white officials like Emporia's mayor, who had argued that "it's ridiculous to move children from one

other words, contrary to *Green* and *Swann*, the dissent sought to protect local control even if that meant less effective desegregation and to impose on *plaintiffs* the burden of demonstrating the need for more effective desegregation measures.

The *Wright* dissent not only foreshadowed the Court's later change in direction, but also deviated from key principles of judicial methodology. In addition to disregarding precedent (i.e. *Green*), the dissent substituted its own judgment for the district court's on the key factual question at the heart of the case—the desegregative effects of the competing Emporia plans—and ignored *Swann*'s recognition that "'[b]ecause of [district courts'] proximity to local conditions . . . [they] can best perform th[e] judicial appraisal'" of the efficacy of a desegregation plan.[153] The district judge had found that Emporia's secession would "substantial[ly]" skew racial distributions and anticipated that white students moving to and from private academies could exacerbate such disparities.[154] The dissent viewed the facts very differently, dismissing the possibility of resegregation as "at best, highly speculative."[155] Then, itself speculating about the effect of the Emporia secession, the dissent accused both the district court and the majority of an inordinate focus on "racial balance."[156]

The following year, then-Justice Rehnquist authored a lone dissent in the Denver school desegregation case, *Keyes v. School District Number 1*, the first decision in which the Supreme Court extended *Brown* beyond southern states that had operated school systems segregated by law.[157] After explaining his disagreement with the

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end of the County to the other end, and one school to another, to satisfy the whims of a chosen few." Record at 62a, Wright v. City of Emporia, 407 U.S. 451 (1972) (No. 70-188) (internal quotation marks omitted). The Mayor never acknowledged that the county had long bused children to keep its schools segregated.

153 Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 12 (1971) (quoting Brown v. Bd. of Educ., 349 U.S. 294, 299–300 (1955) (*Brown II*)); *see also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 n.8 (1979) (*Dayton II*) (noting that "there is great value in appellate courts showing deference to the fact-finding of local trial judges" in desegregation cases); *Wright*, 407 U.S. at 466 (emphasizing that assessment of various desegregation proposals "is aided by a sensitivity to local conditions, and . . . is primarily the responsibility of the district judge").

154 Wright v. County Sch. Bd., 309 F. Supp. 671, 678, 680 (E.D. Va. 1970).

155 *Wright*, 407 U.S. at 474 (Burger, C.J., dissenting).

156 *Id.* at 473–74.

157 413 U.S. 189 (1973). Plaintiffs claimed that the Denver School Board had deliberately manipulated attendance zones and school locations to create and maintain segregated schools. *Id.* at 191. Holding that school officials' "*purpose* or *intent* to segregate" distinguishes unconstitutional *de jure* segregation from constitutional *de facto* segregation, *id.* at 208, the Court ruled that demonstrating that school officials had taken segregative actions in a "meaningful or significant segment of a school system" was sufficient to establish a prima facie case of system-wide *de jure* segregation and to shift the burden of proof to school officials, *id.* at 209. Although the district court had found intentional segregation in

majority, Justice Rehnquist called *Green* a "marked," "drastic," "significant," and "barely, if at all, explicated" extension of *Brown*.[158] He explained:

> To require that a genuinely "dual" system be disestablished, in the sense that the assignment of a child to a particular school is not made to depend on his race, is one thing. To require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by neutrally drawn boundary lines is quite obviously something else.[159]

In the school district involved in *Green*, however, the problem was not that "neutrally drawn boundary lines" had produced insufficient levels of integration. Instead, the school system had assigned students by default to their previously segregated schools—hardly neutral—giving them the "choice" to transfer to a school where they would be in the minority.[160] But because the district had little residential segregation, assigning students to the school nearest their homes—a "neutral" assignment plan—would have produced far more integration.[161]

For nearly two decades following *Keyes*, the Supreme Court remained focused on northern and western school desegregation. Unlike in the South, where racial segregation had been imposed systematically by law[162] and where the courts' primary focus since *Brown* had been on devising effective remedies for the vestiges of segregation,[163] courts in the north and west were required to determine

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only the largely black neighborhood of Park Hill, 313 F. Supp. 61, 65–66, 77 (D. Colo. 1970), the Court emphasized that such discrimination had "reciprocal effect[s]" by keeping nearby schools predominantly white and, in some cases, by affecting "the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools," 413 U.S. at 202.

158 *Id.* at 257–58 (Rehnquist, J., dissenting). Compare an earlier memo written by Assistant Attorney General Rehnquist calling *Green* and its companion cases "muddy" and "'disingenuous'" and stating that

> [i]n view of what appears to be a large body of public support for the idea of neighborhood schools, free from supervision by the federal courts, it would appear to be sound policy to couple with any amendment validating 'freedom of choice' plans a related provision validating 'neighborhood school' plans.

Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Egil Krogh, Jr., Deputy Assistant to the President for Domestic Affairs, Re: Constitutional Amendment to Validate "Freedom of Choice" and "Neighborhood Schools" 3–5 (Mar. 3, 1970) (Box 19, Folder "School desegregation," Egil G. Krogh Files, White House Special Files, Nixon Presidential Materials, National Archives, College Park, Md.) [hereinafter Memorandum to Egil Krogh].

159 413 U.S. at 258 (Rehnquist, J., dissenting).

160 Green v. County Sch. Bd., 391 U.S. 430, 434 (1968).

161 *See id.* at 442 & n.6.

162 *See supra* notes 47–65 and accompanying text.

163 *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 24 (1958); *see supra* note 54 and accompanying text.

whether racial imbalances stemmed from deliberate school board discrimination, from factors beyond school officials' control, or from a mixture of the two. Focusing on the value of local control of education, the Court emphasized that school boards cannot be deprived of authority absent a proven constitutional violation and that district courts should tailor remedies to match the scope of the violation.[164] Although the details of the northern cases are unnecessary to this paper, the cases are significant because, as I will show, *Dowell* and *Jenkins* transported the northern cases' concern for protecting local control into the southern context without ever acknowledging the critical differences between southern and northern segregation.[165]

IV

In the early 1990s, with Justice Rehnquist as Chief Justice and the addition of five Reagan and Bush appointees, the Court turned its attention back to southern desegregation, issuing *Board of Education v. Dowell*[166] in 1991 and *Missouri v. Jenkins*[167] in 1995. Like the Charlotte-Mecklenburg school system involved in *Swann*, the Oklahoma City and Kansas City school systems had been segregated by law prior to *Brown* and had resisted desegregation even after *Green*. By the time the two cases reached the Supreme Court, how-

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[164] *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*) (holding that plaintiffs need not prove incremental effects of individual constitutional violations where they have demonstrated that school board discrimination has had system-wide effect); Columbus v. Penick, 443 U.S. 449 (1979) (same); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (*Dayton I*) (holding that where school board has engaged in only isolated acts of discrimination, district courts should determine incremental segregative effects of those actions and style their remedies accordingly); Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*) (holding that desegregation remedies should be tailored to fit nature of violation, should strive to return victims of segregation to position they would have enjoyed absent discrimination, and should take into account state and local interests in managing their own affairs, consistent with Constitution); Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*) (holding that mandatory interdistrict remedies are only justified where interdistrict constitutional violations have caused interdistrict effects).

[165] *See infra* notes 254–70 and accompanying text.

[166] 498 U.S. 237 (1991).

[167] 515 U.S. 70 (1995). The Court also decided *Freeman v. Pitts*, 503 U.S. 467 (1992), in which it upheld a district court order declaring the DeKalb County School District near Atlanta unitary with regard to student assignments and certain other aspects of school operations while maintaining supervision over teacher and principal assignments, resource allocation, and quality of educational programs. I have not focused on *Freeman* because the question of partial unitary status does not go to the heart of the desegregation process. Also, the case presented a highly unusual—and uncontested—situation: The district court had found that the system's one-race schools were not vestiges of the prior dual system, but rather the result of massive demographic changes caused by suburbanization in the 1970s and 1980s. *Id.* at 474–81; *see also id.* at 500 (Scalia, J., concurring) (noting "the extraordinarily rare circumstance of a *finding* that no portion of the current racial imbalance is a remnant of prior *de jure* discrimination").

ever, the systems had operated under court-ordered desegregation plans for thirteen and seven years, respectively.[168] The cases presented two questions critical to the future of southern school desegregation. May a school system which has operated under a court-ordered desegregation plan for several years unilaterally scrap the plan and return to all-black neighborhood schools?[169] May states be ordered to fund magnet schools and other programs designed to attract white suburban students to inner-city schools?[170]

Students of the Supreme Court's early desegregation case law might have thought that the Court would not hesitate to resolve these issues in favor of black students and their parents. After all, under *Green* and *Swann*, southern school systems had a heavy burden to justify desegregation plans that included one-race schools if more effective options were available.[171] *Green* and *Swann* also had emphasized repeatedly that district courts possess broad power not only to scrutinize desegregation plans proposed by school officials, but also to order whatever additional steps were needed to redress the remaining vestiges of segregation.[172] Although in a later case involving the Detroit schools, *Milliken v. Bradley* (*Milliken I*), the Supreme Court had held that district courts could not compel innocent suburban districts to participate in metropolitan-wide desegregation plans,[173] the Court had never before suggested that district courts might lack authority to order constitutional violators to fund programs that encouraged suburban students to transfer voluntarily to city schools. Indeed, for many urban school systems that had become predominantly black, such voluntary programs represented one of the few ways to promote desegregation.

Such courtwatchers, however, would be surprised by the Court's holdings in *Dowell* and *Jenkins*. As the *Wright* and *Keyes* dissents had foreshadowed,[174] by the time the Court returned to southern school cases in the early 1990s, its view of court-ordered desegregation had

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168 *Jenkins*, 515 U.S. at 74–80, 102; *Dowell*, 498 U.S. at 240–42.

169 *Dowell*, 498 U.S. at 248–50.

170 *Jenkins*, 515 U.S. at 89–99.

171 Swann v. Charlotte-Mecklenberg Sch. Bd., 402 U.S. 1, 25–26 (1971) ("Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation."); Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (stating that availability of more promising desegregation plan places "heavy burden" on school board to explain its choice of less effective plan); *see supra* notes 72–73, 78–79, and accompanying text.

172 *Swann*, 402 U.S. at 15; *Green*, 391 U.S. at 438 n.4; *see supra* notes 77, 82–84, and accompanying text.

173 418 U.S. 717, 744–45 (1974) (*Milliken I*). See *infra* note 251 and accompanying text for further discussion of the Supreme Court's holding.

174 *See supra* notes 150–159 and accompanying text.

changed. In opinions written by Chief Justice Rehnquist for himself and four other Justices (Justices White, O'Connor, Scalia, and Kennedy in *Dowell*, and Justices O'Connor, Scalia, Kennedy, and Thomas in *Jenkins*), the Court shifted its focus from redressing the harms of segregation, as required by *Brown*, *Green*, and *Swann*, to restoring control to state and local school officials.

A. Dowell

Admitted to the Union in 1907 as a Jim Crow state, Oklahoma mandated segregation in public vehicles and places.[175] Most Oklahoma City neighborhoods were also segregated because deeds included restrictive covenants that prohibited the sale of lots to and property ownership by blacks.[176] Thus, from 1907 until at least 1954, "the Oklahoma [City] School District was completely and fully segregated."[177] During that period, Article XIII of the state constitution provided: "Separate schools for white and colored children with like accommodations shall be provided by the Legislature and impartially maintained."[178] Although the Supreme Court had declared race-based restrictive covenants unenforceable in 1948[179] and would outlaw school segregation six years later,[180] the damage in Oklahoma City was done. In 1963, the district court found that "[t]he patrons of the School District had lived under a dual school system and the children's residential areas were fixed by custom, tradition, restrictive covenants and laws."[181] As a result, when the city's school board adopted a neighborhood school plan, ostensibly to bring the school

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175 Dowell v. Sch. Bd., 219 F. Supp. 427, 431 (W.D. Okla. 1963).

176 *Id.* at 433.

177 *Id.* at 431.

178 OKLA. CONST. art. XIII, § 3 (repealed 1966). State statutes also required that public schools "be organized and maintained upon a complete plan of separation between the white and colored races." OKLA. STAT. ANN. tit. 70, § 5-1 (West 1951) (repealed 1965). School board members were required to "be of the same race as the children who are entitled to attend the school of the district," OKLA. STAT. ANN. tit. 70, § 5-3 (West 1951) (repealed 1965); teachers who willfully and knowingly allowed black children to attend white schools or vice versa could be convicted of a misdemeanor, fined, and suspended from teaching for at least a year, OKLA. STAT. ANN. tit. 70, § 5-4 (West 1951) (repealed 1965); and white students who attended schools "where colored persons [were] received as pupils" were subject to similar fines, OKLA. STAT. ANN. tit. 70, § 5-7 (West 1951) (repealed 1965).

179 Shelley v. Kraemer, 334 U.S. 1 (1948).

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

181 *Dowell*, 219 F. Supp. at 434. In the early 1960s, after official segregation had ended, the plaintiffs challenged the school system's student transfer policy and practice of assigning faculty to correspond to each school's racial majority. *Id.* at 429–30. The district court found that the school board had designed its policies "to perpetuate and encourage segregation" as much as possible. *Id.* at 441; *see also id.* at 444–45.

system into compliance with *Brown*, the plan merely imposed local attendance zones on highly segregated neighborhoods. Indeed, the district court found that by destroying integrated neighborhoods and reinforcing residential segregation, the school board's actions had worsened the problem.[182]

In 1972, after nearly two decades of school board resistance, the district court ordered complete desegregation of the school system.[183] But by 1985, shifting residential patterns had made the court-ordered plan burdensome for black students.[184] Rather than revising the plan to make it more equitable, however, the school board ended busing and returned to neighborhood schools. Because many neighborhoods were highly segregated, the board's action recreated at least seven of the very same all-black elementary schools that had existed prior to court-ordered desegregation.[185] In all, twenty-two elementary schools became ninety percent or more white (or nonblack minorities), and nearly half of the district's black elementary students were assigned to eleven virtually all-black schools[186]—their only alternative being an entirely ineffective voluntary transfer program.[187]

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182 Dowell v. Sch. Bd., 244 F. Supp. 971, 976–77 (W.D. Okla. 1965); *see also* Bd. of Educ. v. Dowell, 498 U.S. 237, 240–41 (1991) (noting this finding).

183 Dowell v. Bd. of Educ., 338 F. Supp. 1256 (W.D. Okla. 1972). Since the neighborhood plan and other desegregation efforts had failed, the court ordered the conversion of historically black elementary schools into fifth-grade centers and then paired them with historically white elementary schools that would serve grades one through four. Thus, all elementary students were bused except for children living in integrated neighborhoods, where schools qualified for "stand alone" status serving grades one through five. The court also restructured middle and high school attendance zones so that all schools served both black and white students. Dowell v. Bd. of Educ., 606 F. Supp. 1548, 1550 (W.D. Okla. 1985) (describing 1972 holding). In 1977, after complying with the desegregation order for five years, the school board moved to close the case. The district court granted the motion, finding "substantial compliance" and declaring that "[j]urisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal." Dowell v. Bd. of Educ., No. CIV-9452 (W.D. Okla. Jan. 18, 1977), *quoted in* 606 F. Supp. at 1551. Because the order did not dissolve the desegregation decree, however, the Supreme Court found it ambiguous. *Dowell*, 498 U.S. at 244–46 (holding that order did not bar plaintiffs' challenge to 1985 neighborhood-schools plan), *id.* at 249 n.1 (holding that school board's adoption of neighborhood-schools plan should not be considered breach of good faith because district's status was unclear after 1977 order).

184 Because the court order exempted from busing "stand-alone" elementary schools in integrated neighborhoods and because residential integration had increased in some areas, black inner-city students had to be bused greater distances to reach predominantly white schools in outlying suburbs. *See Dowell*, 498 U.S. at 242; Brief for Respondents at 10–12, *Dowell* (No. 89-1080).

185 The parties did not agree on the precise number of one-race schools. *Compare* Brief for Respondents at 15–16, *Dowell* (No. 89-1080) (listing ten such schools), *with* Brief of Petitioner at 6 n.8, *Dowell* (No. 89-1080) (listing seven).

186 *Dowell*, 498 U.S. at 242; *id.* at 255 (Marshall, J., dissenting).

187 *See* Dowell v. Bd. of Educ., 890 F.2d 1483, 1500–01 (10th Cir. 1989); *id.* at 1510 n.4 (Baldock, J., dissenting). The plan provided free transportation for students wishing to

Although the plaintiffs agreed that some adjustment to the court-ordered plan was needed, they objected to the resurrection of one-race schools.[188] This time, however, the district court agreed with the school board, holding that the school system had achieved unitary status and releasing it from further supervision.[189] According to the court, current residential patterns were too attenuated to be considered a vestige of segregation and school officials had not acted with discriminatory intent when they adopted the new neighborhood school plan.[190] The Tenth Circuit reversed, holding that the school system failed to meet its burden to justify dissolving the original desegregation order, that the district court findings regarding the causes of residential segregation were clearly erroneous, and that the district court should have focused on the *effects* of the neighborhood school plan, as required by *Swann*, rather than on school officials' *intent*.[191]

Reversing the Tenth Circuit, the Supreme Court began by holding that the appeals court had applied the wrong legal standard in determining when to end a school desegregation decree.[192] Although all eight Justices who took part in the case agreed on this issue, the five-Justice majority went on, in a seemingly innocuous remand

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transfer from schools where their race was in the majority to schools where they would be in the minority. Less than two percent of the district's K–4 students (332 of 18,000) exercised this option in the first year and about one percent (181 of 18,000) did so the following year. *Id.* at 1500–01; *id.* at 1510 n.4 (Baldock, J., dissenting). By comparison, approximately nine percent of the student population (115 of 1300 students) had transferred under the freedom-of-choice plan struck down in *Green*. Green v. County Sch. Bd., 391 U.S. 430, 432, 441 (1968).

188 Dowell v. Bd. of Educ., 677 F. Supp. 1503, 1517 (W.D. Okla. 1987).

189 *Id.* at 1519, 1522.

190 *Id.* at 1511–13, 1516–17.

191 *Dowell*, 890 F.2d at 1502–04. Applying the standard set forth in *United States v. Swift & Co.*, 286 U.S. 106 (1932), the Tenth Circuit held that modification or dissolution of the decree would be warranted only if the school board produced clear and convincing evidence that substantial changes in circumstances had rendered the plan unnecessary and imposed oppressive hardship. 890 F.2d at 1490–91. Though modification was needed to account for population shifts, the Tenth Circuit held that the district court should have focused on whether the school system's neighborhood school plan "relieve[d] the effects of changed circumstances and potential hardship," not just on the school board's intent in adopting it. *Id.* at 1499. Because the plan revived "those conditions that necessitated a remedy in the first instance" (i.e., one-race schools), *id.*, the court concluded that the plan had not effectively maintained the school system's unitary status, *id.* at 1500–04.

192 All of the Justices agreed that school desegregation decrees were not intended to extend in perpetuity and that the Tenth Circuit's approach was too rigid. *See Dowell*, 498 U.S. at 240; *id.* at 256 (Marshall, J., dissenting) ("I agree with the majority that the proper standard for determining whether a school desegregation decree should be dissolved is whether the purposes of the desegregation litigation, as incorporated in the decree, have been fully achieved."). Justice Souter did not participate in the case. *Id.* at 251.

instruction, to eviscerate several of *Green*'s and *Swann*'s key principles.

To begin with, in a footnote to the remand instruction, the majority discussed whether the residential segregation that was responsible for the reincarnation of one-race schools following the board's adoption of the neighborhood school plan could be considered a vestige of official discrimination.[193] The district court, in support of its conclusion that school officials had no duty to continue the desegregation plan, had found that modern residential segregation stemmed from economics and personal choice and was too attenuated to be considered a vestige of past official conduct.[194] The Tenth Circuit reversed, remanding the case for the district court to fashion an appropriate remedy,[195] but the Supreme Court majority then reversed the Tenth Circuit, explaining:

> Respondents contend that the Court of Appeals held that this finding was clearly erroneous, but we think its opinion is at least ambiguous on this point. The only operative use of "clearly erroneous" language is in the final paragraph of Subpart VI-D of its opinion, and it is perfectly plausible to read the clearly-erroneous findings as dealing only with the issues considered in that part of the opinion. To dispel any doubt, we direct the District Court and the Court of Appeals to treat this question as *res nova* upon further consideration of the case.[196]

This directive requires close scrutiny. It is true that the Tenth Circuit used "clearly erroneous" terminology once near the end of its analysis, in section VI.D. of the opinion, but it is not "perfectly plausible" that the court's clearly erroneous conclusion dealt exclusively with the issues considered in that subpart. Although the Tenth Circuit's opinion is less than a model of lucidity, one thing is quite clear: The appeals court concluded that the district court's findings regarding the current causes of neighborhood segregation were clearly erroneous. In the opinion's background section, the Tenth Circuit,

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193 *Id.* at 250 n.2.

194 *Dowell*, 677 F. Supp. at 1515–22.

195 *Dowell*, 890 F.2d at 1506.

196 *Dowell*, 498 U.S. at 250 n.2. In contrast, Justice Marshall believed that the record amply demonstrated "complicity in residential segregation on the part of the Board." *Id.* at 264 (Marshall, J., dissenting). He also believed that the district court should have put more weight on the

> roles of the State, local officials, and the Board in creating what are now self-perpetuating patterns of residential segregation. . . . [The district court also should have considered] the *unique* role of the School Board in creating 'all-Negro' schools clouded by the stigma of segregation—schools to which white parents would not opt to send their children.

Id. at 265 (Marshall, J., dissenting).

after summarizing the experts' conclusion that residential segregation was no longer a vestige of past discrimination,[197] expressly observed that appellants (the black schoolchildren) were challenging the district court ruling on the grounds that it had "abused its discretion by relying on clearly erroneous findings of fact."[198] Then, in its analysis sections, the Tenth Circuit used language that appellate courts typically employ when analyzing trial court fact findings pursuant to the clearly erroneous standard and embarked on a detailed, four-page critique of the expert testimony and the experts' voluminous exhibits.[199] The court pointed to defects in the experts' data and methodology, to conflicts in their testimony, and to contrary expert testimony unmentioned by the district court.[200] In the end, the Tenth Circuit

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[197] *Dowell*, 890 F.2d at 1487–88.

[198] *Id.* at 1489.

[199] *Id.* at 1493–97. The court discussed the residential segregation evidence in Part V of its opinion, where it evaluated whether the school board produced sufficient evidence of "changed circumstances or oppressive hardship" to warrant modification or dissolution of the decree under *United States v. Swift & Co.*, 286 U.S. 106 (1932). *Dowell*, 890 F.2d at 1493; *see also id.* at 1494–97. In Part VI, where the reference to the clearly erroneous standard appears, the Tenth Circuit discussed the district court's factual findings on faculty desegregation and the new assignment plan. *Id.* at 1498–1504. Those latter findings were not critical to the central issue on which the Tenth Circuit based its reversal of the district court. *See infra* note 203.

[200] *Dowell*, 890 F.2d at 1493–97. The Tenth Circuit first noted several flaws in the evidence supporting the district court's finding that there had been "a substantial amount of turnover in the black population" in historically black inner-city census tracts. *Dowell*, 677 F. Supp. at 1507. For example, the defendant's expert had studied only seven of sixteen tracts. In addition, the census data was "suspect" because of the way the long census form asked residents about prior moves. 890 F.2d at 1494. After examining a second expert's testimony, the Tenth Circuit then rejected the district court's conclusion that an index of dissimilarity had risen only "'slightly'" under the neighborhood school plan. *Id.* at 1495 (citation omitted). The opinion also noted that the district court had failed to acknowledge that the neighborhood plan created twenty-one elementary schools with less than ten percent black enrollment and failed to "address contrasting evidence in the record." *Id.* Specifically, the Tenth Circuit noted cross-examination testimony by one expert that "directly controvert[ed]" the results found by another expert, characterized certain statistics as "'guesstimates,'" and noted other factors that "undermined the method employed to create the figures the Board relied on to represent substantial demographic change and the oppressiveness of the decree." *Id.* (citations omitted). The Tenth Circuit also pointed to testimony by plaintiffs' experts that controverted the defendants' experts' conclusions, accusing those experts of "'chang[ing] the rules'" by redefining what constituted segregated schools. *Id.* at 1496 (citation omitted). Although the Tenth Circuit did not explicitly use "clearly erroneous" terminology in subpart V.B. of its opinion, it went on to conclude in subpart V.C. that the expert evidence on residential segregation "'demonstrate[d] . . . the facility with which numerical data may be manipulated and discriminatory policies may be masked,'" *id.* at 1497 (quoting Keyes v. Sch. Dist. No. 1, 609 F. Supp. 1491, 1516 (D. Colo. 1985)), and to announce in subpart V.D., "[s]imilarly, we are unable to conclude that these same numerical calculations support a finding that the [court-ordered] [p]lan became a hardship 'extreme and unexpected,'" *id.* (quoting Humble Oil & Ref. Co. v. Am. Oil Co., 405 F.2d 803, 813 (8th Cir. 1969)).

explained—as appellate courts must in order to reject a district court's finding as clearly erroneous—that it was "'left with the definite and firm conviction that a mistake ha[d] been committed.'"[201] This conclusion appeared in the opinion's penultimate section for a very good reason: The Tenth Circuit obviously knew it had an obligation to "total all of the evidence" on which the district court had relied—evidence relating not just to demographic changes, but also to such matters as faculty desegregation, the burden the court-ordered plan placed on black students, the system's majority-to-minority transfer policy, and the school board's intent in adopting the neighborhood school plan.[202] Where else would one expect the Tenth Circuit to state its ultimate conclusion about the district court findings than at the end of its analysis?[203] Equally significant, all parties agreed that the Tenth Circuit had overturned the district court's residential segregation finding as clearly erroneous. The school board devoted an entire section of its opening brief to demonstrating that, in its view, the Tenth Circuit had erred in finding clearly erroneous the district court's conclusion that blacks were voluntarily choosing to live in segregated neighborhoods;[204] for their part, the schoolchildren devoted

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[201] *Id.* at 1504 (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

[202] *Id.* The Tenth Circuit stated that under *Swann* it must total all evidence in order to determine if the "district court correctly found the Plan maintained unitariness in student assignments." *Id.* The court wrote:

> It is on this basis that we conclude the district court clearly erred in its findings of fact and consequent legal determinations. . . . Because the court failed to address or distinguish plaintiffs' contrary evidence, and because the court cast the evidence on which it relied in a form to provide an answer to the single question of discriminatory intent, we are convinced that the basis on which the court fashioned dissolution of the injunction was flawed.

Id. at 1503–04 (footnote omitted).

[203] The majority's suggestion that the Tenth Circuit's conclusion applied only to the factual findings it discussed in subpart VI.D. cannot be accurate. The findings discussed in Part VI related solely to faculty desegregation and to various aspects of the new reassignment plan. *See id.* at 1498–1504. In view of the Tenth Circuit's theory that the injunction could be lifted only by a showing that the "conditions which led to the original decree no longer exist," *id.* at 1491, its conclusion that the findings on these secondary matters were unsupported by the record was, by itself, hardly adequate to support reversal. The heart of the case, which the Tenth Circuit dealt with in Part V, was the reemergence of one-race schools, an issue that in turn depended on whether residential segregation was a vestige of past segregation. Perhaps the appeals court should have inserted a new subtitle at the end of Part VI to make clear that its reference to clear error applied as well to its factual analysis in Part V. Given the court's theory of the case, however, and its methodical destruction of the school district demographic experts in Part V, its clearly erroneous conclusion must have applied to that section of the opinion as well.

[204] *See* Brief of Petitioner at 48–50, *Dowell* (No. 89-1080). Although Petitioner initially suggested that "*Dowell*'s failure to defer to the district court's findings [on residential segregation] 'is difficult to fathom,'" *id.* at 50 (quoting Amadeo v. Zant, 486 U.S. 214, 227 (1988)), it asserted in a footnote to its Reply Brief that the Tenth Circuit's holding was "ambiguous," Reply Brief for the Petitioner at 16 n.14, *Dowell* (No. 89-1080).

almost as much space in their brief to defending the Tenth Circuit's finding.[205]

Instead of reviewing the expert testimony, the district court's findings, and the Tenth Circuit's analysis in order to determine whether the appeals court itself had erred, the Supreme Court majority simply directed the lower courts to consider the issue "*res nova*."[206] In doing so, the majority swept aside a major obstacle to ending court-ordered desegregation—after all, if residential segregation were a vestige of official discrimination, the district court would have had to continue the desegregation process.

Next, despite citing *Green* and *Swann* as apparent authority, the majority proceeded in its remand instruction to weaken some of those cases' most important principles. Specifically, the majority directed the district court to

> decide, in accordance with this opinion, whether the Board made a sufficient showing of constitutional compliance as of 1985, when the [neighborhood plan] was adopted, to allow the [1972] injunction to be dissolved. The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable. . . . After . . . decid[ing] whether the Board was entitled to have the decree terminated, . . . [the district court] should proceed to decide respondents' challenge to the [neighborhood plan].[207]

We need a microscope to see the significance of what actually happened here. Notice first that the majority indicated that unitary status should depend on good-faith compliance, as well as on whether the vestiges of segregation had been eliminated "to the extent practicable."[208] What became of *Green*'s and *Swann*'s directive to district courts to evaluate desegregation efforts based on their effects[209]—rather than school board intent—and to retain jurisdiction until "state-imposed segregation has been *completely* removed"?[210] In its remand instruction, the majority subtly shifted the emphasis from ensuring that black students receive a complete remedy for the harms of segregation to protecting the prerogatives of local officials who act

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205 *See* Brief for Respondents at 42–47 & n.31, *Dowell* (No. 89-1080).

206 *Dowell*, 498 U.S. at 250 n.2.

207 *Id.* at 249–50 (footnotes omitted).

208 *Id.* at 250.

209 *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971); Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

210 *Green*, 391 U.S. at 439 (emphasis added).

in good faith.[211] The majority declared: "Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes . . . 'necessary concern for the important values of local control of public school systems . . . .'"[212]

Notice also the remand instruction's use of the date 1985, the year the school system ended busing and reestablished one-race schools.[213] By directing the district court to decide unitariness as of 1985 and only *then* to consider plaintiffs' challenge to the resurrection of one-race schools, the majority separated the two issues. Instead of requiring the school system to justify a less effective assignment plan, as *Green* and *Swann* required,[214] the district court could declare the Oklahoma City school district unitary without regard to the reappearance of one-race schools—the primary vestige of the dual system.[215] If the system were unitary as of 1985, moreover, the district court

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[211] *Green* clearly had held that the "obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation." *Id.* Though *Green* mentioned good faith in passing, *id.* ("Where the court finds the board to be acting in good faith *and* the proposed plan to have real prospects for dismantling the state-imposed dual system at the earliest practicable date, then the plan may be said to provide effective relief.") (emphasis added) (internal quotation marks omitted), *Green* and later cases judged school desegregation plans based on whether they would eliminate vestiges of segregation from all aspects of school operations, *see, e.g.*, *Swann*, 402 U.S. at 15, 26. As for *Dowell*'s "extent practicable" standard, although previous Supreme Court cases had acknowledged the practical difficulties involved in desegregation, they also emphasized that local school systems had an obligation to "make every effort to achieve the greatest possible degree of actual desegregation." *Swann*, 402 U.S. at 26; *see also id.* at 15 (objective of school desegregation is to "eliminate from the public schools *all vestiges* of state-imposed segregation" (emphasis added)); *Green*, 391 U.S. at 439 (federal courts should retain jurisdiction until "state-imposed segregation has been *completely* removed") (emphasis added).

[212] *Dowell*, 498 U.S. at 248 (quoting Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)).

[213] *Id.* at 249.

[214] *See Green*, 391 U.S. at 439 ("[T]he availability to the board of other more promising courses of action may indicate a lack of good faith . . . ."); *Swann*, 402 U.S. at 25–26 ("Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation."); *supra* notes 72–73, 78–79, and accompanying text.

[215] The dissenters, led by Justice Marshall in his last desegregation opinion, asserted that because one-race schools were "one of the primary vestiges of state-imposed segregation," the decree should remain in place as long as there were reasonable alternatives available to combat such vestiges. *Id.* at 262 (Marshall, J., dissenting) (quoting Milliken v. Bradley, 418 U.S. 717, 802 (1974) (Marshall, J., dissenting) (*Milliken I*)). According to Justice Marshall, desegregation decrees should not be lifted "so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions." *Id.* at 252 (Marshall, J., dissenting); *see also infra* notes 216–17 and accompanying text (discussing Justice Marshall's response to specific elements of majority's analysis).

would then evaluate the new assignment plan not on the basis of its effects, as required by *Green*, but rather under an intent test, the result of which was a foregone conclusion given the district court's finding that the school board had not acted with a discriminatory motive.[216]

Taken as a whole, *Dowell* strongly suggested that regardless of the resurrection of one-race schools, a finding of unitariness would be justified because the school system had complied with the desegregation order in good faith and because black students had been exposed to the court-ordered plan for some period of time. Yet the opinion contained no explanation, or even acknowledgment, of how the majority transformed the *Green* and *Swann* mandates to eliminate the vestiges of segregation into a temporary requirement that school boards must comply with, however briefly, before they may be released from court desegregation orders. This silence is particularly striking in light of Justice Marshall's dissent, which expressly warned that "the majority risk[ed] subordination of the constitutional rights of Afro-American children to the interest of school board autonomy" despite "[o]ur jurisprudence requir[ing] . . . that the job of school desegregation be fully completed and maintained" before court supervision may be lifted.[217]

B. Jenkins

Having thus permitted the reestablishment of one-race schools in systems once segregated by law, the Supreme Court majority continued its departure from precedent in *Missouri v. Jenkins*.[218] As in Oklahoma City and Charlotte-Mecklenburg, schools in Kansas City were, by operation of state constitutional and statutory provisions, segregated by race prior to 1954.[219] After *Brown*, the Missouri

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[216] Dowell v. Bd. of Educ., 677 F. Supp. 1503, 1515–17 (W.D. Okla. 1987). Indeed, the *Dowell* majority specifically noted that if the district court released the school system from the injunction, the neighborhood school plan would be subject to the analysis used in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976). 498 U.S. at 250–51. In contrast to the effects test adopted in *Green* and *Swann*, those cases focused on determining whether official governmental actions have a discriminatory purpose, not a discriminatory impact. *See supra* notes 72, 80. Justice Marshall's dissent, in contrast, asserted that, in determining whether the system had achieved unitary status, the effect of the neighborhood school plan "cannot be ignored arbitrarily" because "a district court must anticipate what effect lifting a decree will have in order to assess dissolution." *Dowell*, 498 U.S. at 264 n.7 (Marshall, J., dissenting).

[217] *Dowell*, 498 U.S. at 266–67 (Marshall, J., dissenting).

[218] 515 U.S. 70 (1995).

[219] MO. CONST. art. IX, § 1 (repealed 1976); MO. REV. STAT. §§ 163.130, 165.117 (repealed 1957); *see also* Jenkins v. Missouri, 807 F.2d 657, 690 (8th Cir. 1987). By

Attorney General declared those provisions unenforceable, but the state failed to repeal them for years.[220] Although the school system took some steps to desegregate, those efforts were largely ineffective, and, by 1974, eighty percent of black school children still attended one-race schools.[221] In the mid-1980s, some thirty years after *Brown*, the district court found that severe vestiges of segregation remained: Twenty-five of the system's sixty-six schools were still ninety percent or more black, school facilities were "literally rott[ing]," and segregation had "caused a system-wide reduction in student achievement."[222] More than eighty percent of the district's elementary schools were below national levels in reading, and only fifty-one percent of secondary students passed standardized tests.[223] The district court also

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enforcing restrictive covenants and other discriminatory policies, Missouri also had "encouraged racial discrimination by private individuals in the real estate, banking and insurance industries." Jenkins v. Missouri, 593 F. Supp. 1485, 1502–03 (W.D. Mo. 1984). The district court recognized an "inextricable connection between schools and housing" because the city's racially segregated housing market and the tendency of residents to "'gravitat[e]' toward school facilities" had channeled new black residents into inner-city neighborhoods within the boundaries of the Kansas City school system. *Id.* at 1490–91.

220 *Jenkins*, 593 F. Supp. at 1490. At the time of *Brown*, the Kansas City system was less than twenty percent black. The school system responded to *Brown* by adopting neighborhood attendance areas, which, given residential segregation and white flight, produced little desegregation. Subsequent efforts to improve integration were undercut by a liberal transfer policy and by optional attendance zones, which provided students living within certain areas a choice of attending one of the two schools. In 1968, when the school system was about fifty percent black, the school board rejected a district-wide desegregation plan. *Id.* at 1493–94.

221 *Id.* at 1492–93. A 1977 plan desegregated sixteen all-white schools and reduced the number of all-black schools from thirty-nine to twenty-eight. *Id.* at 1492–93; *see also* Jenkins v. Missouri, 639 F. Supp. 19, 35–36 (W.D. Mo. 1986). Because by then the school system had become more than fifty percent black, the Kansas City school district filed suit along with black students seeking to compel several federal defendants, the States of Missouri and Kansas, and suburban districts in both states to participate in a metropolitan-area desegregation plan. Although the federal court realigned Kansas City as a defendant, Sch. Dist. v. Missouri, 460 F. Supp. 421 (W.D. Mo. 1978), the school district maintained a "friendly adversar[ial]" relationship with the plaintiffs through much of the litigation, *Jenkins*, 593 F. Supp. at 1487–88. By the mid-1980s, when the court began issuing remedial orders, total Kansas City enrollment had shrunk by about fifty percent, and the school system had become two-thirds black. *Id.* at 1492–95.

222 Jenkins v. Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987); *Jenkins*, 639 F. Supp. at 36, 24 (emphasis omitted). The school system's staffing, pupil-teacher ratios, curriculum, and resource levels were so poor that it was the only district in the area to be classified under the state's educational evaluation system as AA rather than AAA. 639 F. Supp. at 26–28. The school system had been unable to obtain passage of a bond referendum or levy increase since 1969, *Jenkins*, 672 F. Supp. at 411, which the district court attributed in part to the failure of the school system and state to correct the vestiges of segregation, *id.* at 403.

223 *Jenkins*, 639 F. Supp. at 24–25.

found that the defendants' actions had contributed to "white flight."[224]

The *Jenkins* plaintiffs had originally sought to require eleven suburban school districts to participate in a metropolitan-area desegregation plan.[225] The district court rejected that effort, relying on *Milliken I*, which held that suburban districts surrounding Detroit could not be compelled to participate in a desegregation remedy if they had neither committed nor been affected by intentional interdistrict segregation.[226] According to the district court, although prior to 1954 suburban school districts had transferred black students to Kansas City rather than providing their own segregated schools, those actions no longer had significant segregative effects.[227] The court also found that the suburban districts were not responsible for white flight from Kansas City and so dismissed them from the litigation.[228]

After hearing additional evidence, however, the district court concluded that actions by both the state and the Kansas City school system had caused white flight to suburban districts and ordered them both to share the costs of magnet schools and transportation to encourage white students to transfer voluntarily from private schools

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[224] Jenkins v. Missouri, No. 77-0420-CV-W-4, slip op. at 1 (W.D. Mo. Aug. 25, 1986). Although the court did not explain this finding, the plaintiff schoolchildren had introduced evidence that Kansas City officials had attempted to limit desegregation of historically white schools in the western part of the city at the expense of white neighborhoods in the southeast, prompting rapid demographic changes in and significant white flight from the latter areas into private schools and nearby suburban districts. Brief of Appellants at 32–35, 45, 51, Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1987) (Nos. 85-1765WM, -1949WM, -1974WM) (providing extended citations to district court record); *see also Jenkins*, 593 F. Supp. at 1494–95 (finding that "whites moved out" as blacks moved to or were bused to schools in southeastern neighborhoods and that defendants had failed to adopt effective district-wide stabilization plans). The Eighth Circuit upheld the district court's white-flight finding. Jenkins v. Missouri, 855 F.2d 1295, 1302–03 (8th Cir. 1988).

[225] *Jenkins*, 807 F.2d at 661–62 & n.6; *Jenkins*, 593 F. Supp. at 1488; *Sch. Dist.*, 460 F. Supp. at 430; *see also supra* note 221 (describing school system's initial attempt to participate in litigation as plaintiff seeking metropolitan-area plan).

[226] Jenkins v. Missouri, No. 77-0420-CV-W-4, slip op. at 6–42 (W.D. Mo. June 5, 1984) (repeatedly citing Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*)).

[227] *Id.*, slip op. at 15–19.

[228] Plaintiffs had argued that post-1954 housing discrimination and white flight from Kansas City had interdistrict effects, but the district court concluded that such "white flight[ ] does not implicate any [suburban school district] and must be rejected" as a basis for a mandatory interdistrict remedy because the suburban districts had not lured white families, discouraged black family migration, or contributed to residential segregation allegedly caused by various state and federal actors. *Id.* at 34–42; *see also id.* at 39 ("White flight is simply not a constitutional violation by any [suburban school district]."). In discussing specific high-school transfer statistics, the court stated that "the numbers involved are too insignificant to have had a segregative impact on the [Kansas City school district] or the [suburban school districts]," *id.* at 38–39, but it made no findings with regard to the total amount or significance of white flight from the Kansas City system.

and suburban districts into the Kansas City schools.[229] Relying on its finding that state and local school officials were responsible for the system-wide reduction in student achievement, the court also ordered them to fund remedial programs to address the system's educational deficiencies.[230] The Eighth Circuit upheld these remedial orders in large part,[231] but the Supreme Court reversed.[232] In doing so, the majority disregarded *Green*'s and *Swann*'s holdings that district courts have "'not merely the power but the duty to render . . . decree[s] which will so far as possible eliminate the discriminatory effects'" of past segregation,[233] and distorted several later precedents in the process.

The majority's reversal of the portion of the district court's order that required the state to fund remedial academic programs was problematic for several reasons. Not only did the majority address issues not fully framed by the parties,[234] but it strongly hinted—contrary to

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229 Jenkins v. Missouri, 639 F. Supp. 19, 34 (W.D. Mo. 1986) (magnet program); *id.* at 38–39 (voluntary interdistrict program); *id.* at 39–41 (capital improvements); *see also* Jenkins v. Missouri, 672 F. Supp. 400, 404–08 (W.D. Mo. 1987) (capital improvements). The district court's initial order directing the creation of a voluntary transfer program contained no findings regarding the extent or causes of white flight. 639 F. Supp. at 38–39. Perhaps this was because Eighth Circuit case law allowed the creation of such programs even where segregation had occurred only on an "intradistrict" basis and had caused neither interdistrict white flight nor other interdistrict effects. Liddell v. Missouri, 731 F.2d 1294 (8th Cir. 1994) (en banc); *see also* Jenkins v. Missouri, 807 F.2d 657, 683–84 (8th Cir. 1986) (en banc) (affirming district court order under *Liddell*). A later district court order, however, specifically found that the defendants' constitutional violations had had interdistrict effects, in that Kansas City's segregated schools had led to "white flight from the [Kansas City schools] to suburban districts, [and to a] large number of students leaving the schools of Kansas City and attending private schools." Jenkins v. Missouri, No. 77-0420, slip op. at 1 (W.D. Mo. Aug. 25, 1986); *see supra* note 224.

230 *Jenkins*, 639 F. Supp. at 26–35 (mandating funding for various academic programs, including magnet schools).

231 Jenkins v. Missouri, 855 F.2d 1295, 1301–06 (8th Cir. 1988), *cert. denied*, 484 U.S. 816 (1987); *Jenkins*, 807 F.2d at 682–86. The state never challenged the district court's finding that segregation had caused a system-wide reduction in student achievement.

232 Green v. County Sch. Bd., 391 U.S. 430 (1968).

233 *Id.* at 438 n.4 (1968) (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("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 flexibility are inherent in equitable remedies.").

234 The specific question relating to academic deficiencies on which the Supreme Court had granted certiorari was whether the remedial educational programs ordered by the district court "'fail[ed] to satisfy the Fourteenth Amendment (thus precluding a finding of partial unitary status) solely because student achievement in the District, as measured by results on standardized test scores, ha[d] not risen to some unspecified level.'" Missouri v. Jenkins, 515 U.S. 70, 144 (1995) (Souter, J., dissenting) (quoting Petition for a Writ of Certiorari, at i (No. 88-1150)). But the challenged order made no reference to test scores, and defendants never attempted to show that the district had achieved partial unitary status with regard to the academic vestiges of segregation. *Id.* at 148–50 (Souter, J., dis-

Green and *Swann*—that seven years of exposure to desegregation remedies was *by itself* sufficient to justify ending court-ordered desegregation.[235] Also, although Missouri had not challenged the district court's underlying finding that segregation had caused "a system wide reduction in student achievement," the majority took the district court to task for "never . . . identif[ying] the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs."[236] This is in striking contrast to *Milliken v. Bradley* (*Milliken II*), the first case in which the Supreme Court upheld a district court order requiring—on the basis of findings no more specific than those in *Jenkins*—state and local defendants to pay for remedial academic programs.[237] In rejecting the district court findings, moreover, the *Jenkins* majority cited just one case, *Dayton Board of Education v. Brinkman* (*Dayton I*),[238] a northern case in which the Supreme Court had held that, where a school board engaged in only isolated acts of discrimination affecting student assignment patterns, district courts should determine the incremental segregative effects of those actions and tailor remedies accordingly.[239] In later cases, however, the Court held that district courts need not make incremental-effects findings if they conclude that school board discrimination had a system-wide effect.[240] Although all desegregation remedies—northern and southern—must be tailored to match the

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senting); *see also* Freeman v. Pitts, 503 U.S. 467, 491 (1992) (establishing three-part test for partial unitary status); *supra* note 167 (describing *Freeman*). Accordingly, the dissenters would have upheld the district court until such time as the defendants properly framed a motion for partial unitary status. *Jenkins*, 515 U.S. at 153 (Souter, J., dissenting).

235 515 U.S. at 102 (emphasizing that "[i]nsistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [school district] will be able to operate on its own" and that "[t]he District Court also should consider that many goals of its quality education plan already have been attained"). After noting that several programs had been in place for seven years, the majority concluded by reminding the district court "that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'" *Id.* (quoting *Freeman*, 503 U.S. at 489).

236 515 U.S. at 101 (emphasis omitted).

237 433 U.S. 267 (1977). According to the Detroit district court, the programs were "needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation." Bradley v. Milliken, 402 F. Supp. 1096, 1118 (E.D. Mich. 1975).

238 433 U.S. 406 (1977).

239 *Id.* at 420.

240 *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 540 (1979) (*Dayton II*) (describing as "a misunderstanding of *Dayton I*" contention that plaintiffs must "prove with respect to each additional act of discrimination precisely what effect it has had on current patterns of segregation").

scope of the constitutional violations,[241] the *Jenkins* majority never explained why it applied the demanding *Dayton I* standard to a southern school system where uncontested findings showed that segregation had had a system-wide effect on student achievement. Perhaps the majority thought that detailed findings were needed because unlike one-race schools, which were the direct result—indeed, the very goal—of the dual system, academic deficiencies stem from multiple forces, only some of which are traceable to actions of school officials. If so, the majority never explained this distinction.[242]

As for the voluntary transfer program that the district court had ordered the state to fund, the Supreme Court majority held categorically that the district court lacked authority to increase the "desegregative attractiveness" of Kansas City schools.[243] According to the

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241 *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy.").

242 The majority left room, however, for the district court to continue the remedial programs, provided that it made sufficiently precise findings to support such relief. *Jenkins*, 515 U.S. at 101–02. On remand, the district court did make such findings regarding the incremental effects of segregation and continued many of the remedial programs. Jenkins v. Missouri, 959 F. Supp. 1151 (W.D. Mo. 1997), *aff'd*, 122 F.3d 588 (8th Cir. 1997).

Some observers have interpreted *Jenkins*'s holding as implicitly shifting the burden to plaintiffs to demonstrate the incremental effects of segregation. *See, e.g.*, Wendy Parker, *The Future of School Desegregation*, 94 Nw. U. L. REV. 1157, 1173 (2000); *see also* John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1739 (2000) (stating that *Jenkins* "seemed to reverse th[e] allocation" of burden of proof). Such a holding would directly overrule *Green* and *Swann*, which had clearly put the burden of proof on school boards. *Swann*, 402 U.S. at 26; *Green*, 391 U.S. at 437–38. But because *Jenkins* addressed only the district court's failure to make the requisite findings without explicitly mentioning which party bears the burden of proof, it is not clear that the opinion went that far. 515 U.S. at 101–02.

243 515 U.S. at 84 (citation omitted); *see also id.* at 83–100. Echoing their position with respect to the dispute over the remedial educational programs, *see supra* note 234 and accompanying text, the dissenters argued that the Court should not have reached the "desegregative attractiveness" issue because the parties had not properly framed it. *Id.* at 138–39 (Souter, J., dissenting). The dissenters pointed out that in an earlier round of the Kansas City litigation, the Court had expressly denied certiorari on the question of whether the interdistrict magnet plan ran afoul of *Milliken I*. *See* Missouri v. Jenkins, 495 U.S. 33, 53 (1990) (*Jenkins II*); *see also* Missouri v. Jenkins, 490 U.S. 1034 (1989) (granting certiorari on property-tax question only). They also emphasized that in the current case, the Court had granted certiorari only on the issue of whether the district court's order requiring employee salary increases conflicted with the rule that remedial orders must "'directly address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution.'" *Jenkins*, 515 U.S. at 144–45 (Souter, J., dissenting) (quoting Petition for a Writ of Certiorari, at i (No. 88-1150)). Because the parties had not briefed the broader "desegregative attractiveness" issue and because the district court had justified the magnet schools and salary increases as needed to remedy the academic vestiges of segregation, the dissenters would have upheld the order. *Id.* at 145–48, 154–58 (Souter, J., dissenting); *see also id.* at 159 n.4 (Souter, J., dissenting) (discussing magnet schools). *But see id.* at 83–85 (responding to argument that propriety of district court's remedy was not before Court); *id.* at 103–105 (O'Connor, J., concurring) (same).

majority, *Milliken I* did not permit an "interdistrict" remedy in response to an "intradistrict" violation.[244] In effect, the majority declared, "the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students."[245]

To reach this result, the majority first had to address the district court's key finding, repeatedly affirmed by the Eighth Circuit, that the defendants' failure to remedy the vestiges of segregation had stimulated white flight and thus produced interdistrict effects.[246] As in *Dowell*, this finding proved no obstacle. Once again failing to conduct a detailed analysis of the record,[247] the majority summarily dismissed the district court's finding, calling it "inconsistent internally, and inconsistent with the typical supposition, bolstered here by the record evidence, that 'white flight' may result from desegregation, not *de jure* segregation."[248] This statement ran counter to two principles of appellate judging: First, trial court fact findings affirmed by a court of appeals are generally reviewable by the Supreme Court only where there is an exceptional showing of obvious error,[249] and, second, an

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[244] *Jenkins*, 515 U.S. at 92–93.

[245] *Id.* at 92.

[246] *See supra* note 224 (discussing holding and Eighth Circuit's initial affirmance); *see also* Jenkins v. Missouri, 11 F.3d 755, 767–68 (8th Cir. 1993) (reexamining and upholding "the finding . . . that '[s]egregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD' as well as departures of whites to private schools and suburbs" as supported by "substantial evidence" (quoting Jenkins v. Missouri, 855 F.2d 1295, 1300 (8th Cir. 1988)).

[247] *Cf. supra* note 206 and accompanying text (describing similar behavior in *Dowell*).

[248] *Jenkins*, 515 U.S. at 95 (footnotes omitted). According to the majority, the district court's white flight finding was inconsistent with that court's earlier dismissal of the suburban districts on the grounds that there was no interdistrict violation causing interdistrict effects. *Id.* at 93–95 & n.7. As the dissenters pointed out, however, the two findings were not necessarily inconsistent, since the primary question with regard to dismissing the suburban districts was whether they had been so directly implicated in constitutional violations that they could be required to participate in a metropolitan-area desegregation plan under *Milliken I*. *Id.* at 159–61 (Souter, J., dissenting); *see also supra* note 226 and accompanying text (discussing district court's narrow interpretation of *Milliken I*); *infra* notes 251–65 and accompanying text (discussing *Milliken I* and later holdings). In later stages of the litigation, the district court found that the defendants who had created Kansas City's segregated schools and failed in their affirmative duty to remedy vestiges of that segregation had stimulated white flight. *See supra* note 224 and accompanying text. In his dissent, Justice Souter also suggested that the Court's assumption that there had been no interdistrict effects appeared particularly questionable given that the briefs had not thoroughly explored the underlying facts. *Id.* at 160–67 (Souter, J., dissenting).

[249] *See, e.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987); Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949). Four members of the *Jenkins* majority cited this rule in a dissent they issued just a few months before *Jenkins*. *See* Kyles v. Whitley, 514 U.S. 419, 456–57 (1995) (Scalia, J., dissenting); *see also* Bradley W. Joondeph, Missouri v. Jenkins *and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597, 642–45 & nn.251 & 254 (1996) (discussing "'two court rule,'

appellate court reviewing district court findings of fact must determine whether those findings are supported by record evidence, not whether evidence exists to support the appellate court's contrary view.[250]

Having engaged in its own fact finding, the majority went on to distort both *Milliken I*[251] and a later decision, *Hills v. Gautreaux*, in which a unanimous Supreme Court had made clear that *Milliken I* hinged on "the limits on the federal judicial power to interfere with the operation of state political entities that were not implicated in unconstitutional conduct."[252] As long as the order coerced no inno-

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under which the Court 'ordinarily' will not review factual findings made by a district court and approved by the court of appeals," and noting other cases in which members of *Jenkins* majority had invoked it).

250 *See, e.g.*, Anderson v. City of Bessemer City, 470 U.S. 564, 573–74 (1985).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id; see also supra note 153 and accompanying text (noting Supreme Court's particular deference to district courts in school desegregation cases as best able to assess local conditions). The Court's failure to mention either the clearly erroneous standard or Rule 52(a) is striking given the Court's criticism in *Dowell* of the Tenth Circuit for making only one "operative reference" to the clearly erroneous standard. 498 U.S. 237, 250 n.2 (1991); *see supra* note 196 and accompanying text.

251 Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*). Prior to the Supreme Court decision in *Milliken I*, the district court had held Detroit school officials and the State of Michigan liable for school segregation, 338 F. Supp. 582, 588–89 (E.D. Mich. 1971), but it made no such findings with regard to suburban districts that it ordered to participate in a metropolitan-wide desegregation plan. The Supreme Court held that the suburban districts could not be required to participate under such circumstances:

> [T]he scope of the remedy is determined by the nature and extent of the constitutional violation. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.

Milliken I, 418 U.S. at 744–45 (citation omitted). Thus, while a mandatory interdistrict remedy might be appropriate where a school district's discriminatory acts caused racial segregation in adjacent districts or where district lines were drawn on the basis of race, the Court held that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.* at 745. *Jenkins* interpreted this language as holding that "[a] district court seeking to remedy an *intra*district violation that has not 'directly caused' significant interdistrict effects exceeds its remedial authority if it orders a remedy with an interdistrict purpose," 515 U.S. at 97 (quoting *Milliken I*, 418 U.S. at 744–45), although *Milliken I* had no reason to rule on the permissibility of remedies seeking to promote purely *voluntary* interdistrict transfers.

252 425 U.S. 284, 298 (1976). In *Gautreaux*, black tenants and applicants for public housing sued the Chicago Housing Authority and the U.S. Department of Housing and Urban Development (HUD). After finding both defendants guilty of operating segregated housing, the district court rejected the plaintiffs' request for metropolitan-area relief because (1) the constitutional violations had been committed within city limits against city residents, and (2) plaintiffs had not alleged that the defendants had fostered racial segrega-

cent governmental units, *Gautreaux* explained, nothing in *Milliken I* created a per se rule forbidding a federal court to order constitutional wrongdoers to undertake remedial programs throughout a metropolitan area.[253] Because the Kansas City district court order likewise coerced no innocent school systems and was tailored to address the white flight caused by school officials' actions, one would have thought that it too did not exceed the district court's remedial authority. According to the *Jenkins* majority, however, because *Gautreaux* involved a federal defendant—the U.S. Department of Housing and Urban Development—that case had not raised "the same federalism concerns that are implicated when a federal court issues a remedial order against a State."[254] This statement is surprising given then-existing precedent.

To begin with, *Gautreaux* and *Milliken I* held that federalism protects *innocent* state and local actors, not governmental entities that *violate* the Constitution. In fact, *Gautreaux* specifically explained that in cases in which a metropolitan area remedy would otherwise be appropriate,[255] "[t]o foreclose such relief solely because [the defendant's] constitutional violation took place within the [central] city limits . . . would transform *Milliken*'s principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional con-

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tion in the suburbs. Gautreaux v. Romney, 363 F. Supp. 690, 691 (N.D. Ill. 1973). The Seventh Circuit reversed, concluding that to be effective, any remedial plan must be implemented on a metropolitan basis. Gautreaux v. Chi. Hous. Auth., 503 F.2d 930, 936 (7th Cir. 1974). Although the Supreme Court set aside the Seventh Circuit's findings that the defendants' acts had caused interdistrict effects, it nevertheless agreed that *Milliken I* did not preclude ordering HUD to take remedial measures throughout the metropolitan area. *Gautreaux*, 425 U.S. at 295 n.11, 297–300.

[253] 425 U.S. at 297–98.

> The critical distinction between HUD and the suburban school districts in *Milliken* is that HUD . . . violated the Constitution. . . . Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.

Id.

[254] 515 U.S. at 98.

[255] 425 U.S. at 299–300. In *Gautreaux*, although the Court reversed the Seventh Circuit's finding that there had been interdistrict effects, *id.* at 295 n.11, it nonetheless concluded that a metropolitan-area remedy would be "entirely appropriate" because "[t]he relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits," as HUD itself had recognized in its administration of housing programs, *id.* at 299; *cf. supra* notes 227–30 and accompanying text (discussing findings of interdistrict effects in *Jenkins*). At the same time, the Court emphasized that its opinion should not be interpreted as *requiring* a metropolitan-area order, explaining that "[t]he nature and scope of the remedial decree to be entered on remand is a matter for the District Court in the exercise of its equitable discretion." *Gautreaux*, 425 U.S. at 306.

duct."[256] In *Jenkins*, however, the majority never even acknowledged that, as Justice Souter observed in his dissent, it had "not only rewritten *Milliken I*," but also "effectively overruled . . . . *Hills v. Gautreaux*."[257] Indeed, the majority insisted that its decision was "fully consistent with *Gautreaux*."[258]

Moreover, the only case on which *Jenkins* relied for the importance of federalism concerns—*Milliken II*[259]—fell far short of holding that federalism imposes substantive limits on federal court authority to order effective remedies for Fourteenth Amendment violations by states or their political subdivisions. In *Milliken II*, the Supreme Court directed that in crafting desegregation decrees, federal courts must (1) ensure that the remedy matches the "nature and scope of the constitutional violation"; (2) design the order "'as nearly as possible' to restore the victims of [segregation] to the position they would have occupied" absent such discrimination; and (3) "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[260] Although *Milliken II* certainly suggested that courts should avoid unnecessary interference with

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256 425 U.S. at 300.

> The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

Id. at 296

257 *Jenkins*, 515 U.S. at 169 (Souter, J., dissenting).

258 *Id.* at 97.

259 *Id.* at 98 (citing *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*)).

260 *Milliken II*, 433 U.S. at 280–81 (citations omitted). Even *Milliken II*'s modest acknowledgment of federalism concerns represented a departure from prior precedent. *Milliken II* based its third factor on *Brown II*, stating that that case "squarely held that '[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems,'" *id.* (quoting 349 U.S. 294, 299 (1955)), but it took this quotation out of context. *Brown II* held that local school officials have an affirmative responsibility to address logistical matters necessary to implement desegregation as quickly as practicable, specifically noting that on remand the trial courts—which included both federal and state courts—could address "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 . . . and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at 300–01; *see supra* note 46 and accompanying text. Thus, *Brown II* stands for the proposition that local authorities bear responsibility for taking the lead in developing desegregation remedies, not for the proposition that local authorities' "interests" restrict federal court equitable power to devise, approve, and oversee such remedies. Moreover, as *Green* specifically noted in announcing its more rigorous enforcement standards, the deliberate perpetuation of segregation for more than a decade after *Brown II* "'significantly altered'" the context in which federal courts applied *Brown II*'s directives. Green v. County Sch. Bd., 391 U.S. 430, 438–39 (1968) (quoting Goss v. Bd. of Educ., 373 U.S. 683, 689 (1963)); *see supra* note 72 and accompanying text.

school district operations, nothing in the opinion stated either that state and local concerns trumped the interests of the victims of segregation or otherwise overruled *Green*'s and *Swann*'s holdings that federal courts must ensure that constitutional violators implement effective remedies for the vestiges of segregation.[261] Indeed, in upholding the district court order requiring state defendants to share the costs of remedial educational programs as sufficiently tailored to remedy the constitutional violation,[262] *Milliken II* rejected the state defendants' argument that the order violated the Tenth Amendment and general principles of federalism:

> The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. Nor are principles of federalism abrogated by the decree. The District Court has neither attempted to restructure

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261 Indeed, *Milliken II* specifically reiterated *Swann*'s holding that "[o]nce invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" 433 U.S. at 281 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)).

Supreme Court decisions in other contexts suggested that federalism and comity concerns placed some limitations on federal court authority, even with regard to Fourteenth Amendment claims. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 468–69 (1991) (stating that "the Fourteenth Amendment does not override all principles of federalism" and citing cases in which Court had applied relaxed standard of scrutiny to state citizenship requirements for key governmental jobs); City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (stating that "normal principles of equity, comity, and federalism . . . should inform the judgment of federal courts when asked to oversee state law enforcement authorities" in case involving alleged Fourteenth Amendment violations); Younger v. Harris, 401 U.S. 37, 44 (1971) (holding that, absent extraordinary conditions, federal courts should abstain from interfering with pending state court proceedings under principles of federalism and comity). *Jenkins*, however, cited none of these cases. And, beyond its passing citation to *Milliken II*, *see supra* text accompanying note 259, it did not explain a new rule or constitutional interpretation that justified federalism-based constraints on federal court authority under *Green* and *Swann* to ensure that state and local constitutional violators eliminate the vestiges of racial segregation. In the years since *Jenkins*, the Court also has held that principles of federalism and sovereign immunity impose some restrictions on Congressional power to enforce the Fourteenth Amendment, emphasizing that Congress may act only in response to a detailed record demonstrating repeated constitutional violations by state agencies, *see, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 368–69 (2001), and must ensure "congruence and proportionality" between the injury at issue and the legislation enacted, City of Boerne v. Flores, 521 U.S. 507, 508 (1997). These cases, however, neither address nor appear inconsistent with federal court remedial authority under *Green* and *Swann*. *See, e.g.*, *Swann*, 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.").

262 On remand after *Milliken I*, the district court ordered the implementation of several educational programs that it found were "needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation." Bradley v. Milliken, 402 F. Supp. 1096, 1118 (E.D. Mich. 1975).

> local governmental entities nor to mandate a particular method or structure of state or local financing.[263]

Yet in *Jenkins*, the majority relied on *Milliken II* to limit the scope of federal court remedial authority under the Fourteenth Amendment. Notwithstanding this distortion of *Milliken II*, the *Jenkins* majority stated that its "conclusion follow[ed] directly from *Milliken II*,"[264] and then went on to declare local school autonomy a "vital national tradition."[265]

C. Dowell *and* Jenkins *Together*

Stepping back from the details of *Dowell* and *Jenkins*, I am struck by the virtual absence in either opinion of any concern about the seriousness of the Fourteenth Amendment violations or the educational harms of segregation, particularly when compared to the majority's emphasis on the virtues of local control. This new focus represented a significant departure from *Brown*, *Green*, and *Swann*—a departure that began many years earlier in Chief Justice Burger's dissent in *Wright v. City of Emporia*, in which he chided the district court for failing to recognize the "overriding importance" of local control.[266]

What is particularly significant about the majority's engineering of this important shift in focus is that it did so in disregard of fundamental principles of judging. To begin with, the Court majority never acknowledged its transformation of *Brown*, *Green*, and *Swann*; it simply adopted the restoration of local control as a new national goal. In support, moreover, the majority relied on *northern* cases, which

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[263] *Milliken II*, 433 U.S. at 291 (citations omitted). Indeed, the Court concluded that the district judge "properly enforced the guarantees of the Fourteenth Amendment consistent with our prior holdings, and in a manner that does not jeopardize the integrity of the structure or functions of state and local government." *Id.* Indeed, in an earlier round of the Kansas City litigation, the Court had heavily relied on *Milliken II*'s federalism analysis in determining whether the district court had abused its discretion in ordering the school system to double local tax assessments to fund its share of the remedial desegregation programs. Missouri v. Jenkins, 495 U.S. 33, 50–58 (1990) (*Jenkins II*). The Court made it clear that the district court could require the Kansas City district to raise taxes and enjoin the operation of state laws that would have prevented such an increase, but at the same time, the Court held that the district court itself should not have ordered the tax increase. *Id.* at 51–52. Thus, while *Jenkins II* required the district court to adopt a less intrusive means of securing funding for the desegregation plan out of "proper respect for the integrity and function of local government institutions," *id.* at 51, it did not interpret *Milliken II* as imposing any substantive limitations on the court's ability to provide relief to victims of segregation.

[264] 515 U.S. at 97.

[265] *Id.* at 99 (citing Freeman v. Pitts, 503 U.S. 467, 489 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237, 247 (1991); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) (*Dayton I*)).

[266] 407 U.S. 451, 477 (1972); *see also supra* note 152.

dealt not with statutory segregation—the issue in the southern cases—but with far more complex situations involving racial imbalances stemming from a mix of school-district discrimination and factors beyond school district control.[267] Unlike in these northern cases, the constitutional violations in southern cases were both clear and system-wide, and *Green* and *Swann* imposed upon school officials an affirmative duty to eliminate the vestiges of those violations.[268] To be sure, *Brown II* referred to "the primary responsibility" of local school boards, but in doing so, the Court was referring to a school board's responsibility to help courts devise effective remedies.[269] And while acknowledging that "responsibility for public education is primarily the concern of the States," *Cooper v. Aaron* made clear that this responsibility "must be exercised consistently with federal constitutional requirements."[270] Distorting both *Brown II* and *Cooper* and ignoring the fundamental differences between northern and southern school segregation, the *Dowell* and *Jenkins* majorities imported the northern cases' concern for local control into the southern context.

The majority's anxiousness to restore local control is particularly questionable given the history of the two cases. Like many other southern communities, Oklahoma City and Kansas City resisted *Brown* and so had experienced little desegregation by the mid-1970s. When finally begun, the process of remedying decades of systemic discrimination proved difficult in both cities.[271] Indeed, by the time the Supreme Court decided the cases, Oklahoma City's desegregation plan had been in place for only thirteen years and Kansas City's for

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[267] The *Jenkins* majority relied on *Dayton I* for the proposition that "local autonomy of school districts is a vital national tradition," 515 U.S. at 99 (citing *Dayton I*, 433 U.S. at 410), and relied on *Freeman* for the rule that district courts' end purpose in desegregation cases must be "to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution" in addition to remedying vestiges of segregation to the extent practicable, *id.* at 102 (citing *Freeman*, 503 U.S. at 489). The *Dowell* majority relied on *Milliken II* and *Spangler* for the proposition that ending court supervision after school systems have complied for a reasonable time period recognizes the "necessary concern for the important values of local control." 498 U.S. at 248 (citing *Milliken v. Bradley*, 433 U.S. 267, 280–82 (1977) (*Milliken II*) and *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)).

[268] *See supra* notes 70–77 and accompanying text.

[269] Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955) (*Brown II*) ("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."); *see supra* note 47.

[270] 358 U.S. 1, 19 (1958).

[271] *Jenkins*, 515 U.S. at 74–80; *Dowell*, 498 U.S. at 240–44.

just seven.[272] As Justice Ginsburg pointed out in her *Jenkins* dissent, such remedies were "evanescent" in comparison to Missouri's two centuries of mandatory segregation going back to the reign of Louis XV of France.[273] Notwithstanding this history, and without examining the record to determine whether the vestiges of dual systems had been eliminated, the *Dowell* and *Jenkins* majorities repeatedly suggested that temporary exposure to desegregation was enough, and that ending district court supervision was long overdue. As Justice Marshall once wrote of another school desegregation opinion, *Dowell* and *Jenkins* leave the impression that their outcomes were "more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than [they were] the product of neutral principles of law."[274]

V

The Court's sharp change in direction is particularly striking when *Dowell* and *Jenkins* are compared to *Brown* itself. All three decisions had dramatic, though quite different, impacts on the victims of segregation and on constitutional doctrine. By overruling the "separate but equal" doctrine that had governed American race relations for over half a century,[275] *Brown* opened the doors for thousands of black children throughout the South to attend integrated schools. *Green* and *Swann* implemented *Brown*'s command.[276] In contrast, *Dowell* and *Jenkins* undermined the powerful principles articulated in *Green* and *Swann* that had brought about so much desegregation. *Dowell* made it possible for the Oklahoma City school system to return to a pre-*Green* world of one-race schools—some of which were the very same all-black schools that had existed under the dual system. The students' only alternative was an ineffective voluntary transfer program—in essence, a freedom-of-choice plan—that produced even less integration than the plan struck down in *Green*.[277] In Kansas City, where thousands of students still attended all-black schools decades after *Brown*, *Jenkins* made it more difficult for district courts to order remedial education programs and, in addition, blocked

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[272] *Jenkins*, 515 U.S. at 102; *Dowell*, 498 U.S. at 249.

[273] *Jenkins*, 515 U.S. at 175–76 (Ginsburg, J., dissenting).

[274] Milliken v. Bradley, 418 U.S. 717, 814 (1974) (*Milliken I*) (Marshall, J., dissenting).

[275] 347 U.S. 483 (1954) (*Brown I*); *see supra* notes 39–41 and accompanying text.

[276] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968); *see supra* notes 72–86 and accompanying text.

[277] *See supra* notes 185–187 and accompanying text.

a purely voluntary interdistrict transfer program—one of the only remaining avenues for promoting further integration.[278]

Methodologically, *Dowell* and *Jenkins* also stand in sharp contrast to *Brown*. Although *Brown* has attracted scholarly criticism,[279]

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[278] *See supra* notes 229–33, 243–48, and accompanying text. A recent study examining school desegregation patterns in the decade after *Dowell* found resegregation occurring in many districts freed from court-ordered desegregation. *See* GARY ORFIELD & CHUNGMEI LEE, HARVARD UNIV. CIVIL RIGHTS PROJECT, *Brown* at 50: King's Dream or *Plessy's* Nightmare? 15–16 (2004), *available at* http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf. Prior to the decision, the average black student in Oklahoma City attended schools that were thirty-two percent white. *Id.* at 37. Ten years later, the study found that white students comprised only twenty-one percent of the average black student's classmates. *Id.* In Kansas City, the average exposure of black students to white classmates fell from twenty-two percent in 1991 to nine percent in 2001. *Id.* at 37, 39. Presumably, the drop would have been less drastic had the Supreme Court permitted state funding of the voluntary interdistrict transfer program proposed by *Jenkins*. Although acknowledging that forces other than the end of court-ordered desegregation, such as immigration and housing patterns, contributed to the resegregation of schools, the study concluded that "it is very clear . . . that desegregation is declining rapidly in places the federal courts no longer hold accountable and that just a decade ago there were much higher levels of interracial contact." *Id.* at 37.

[279] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 74–84 (1990) (characterizing decision as disingenuous and "inconsistent with the original understanding of the equal protection clause"); WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) (providing nine scholars' alternate opinions); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1131–40 (1995) (criticizing *Brown*'s treatment of history and emphasis on education and social science); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22, 31–34 (1959) (criticizing Court's failure to view *Brown* in terms of associational rights); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24–31 (1959) (presenting draft of alternate "adequate" opinion). Indeed, footnote 11 of *Brown*, where the Court relied on seven social-science articles for the proposition that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority," 347 U.S. at 494–95 & n.11; *see also id.* at 494 n.10 (quoting holdings by Kansas and Delaware courts), has become perhaps "the most controversial footnote in American constitutional law," Paul L. Rosen, *History and State of the Art of Applied Social Research in the Courts*, *in* THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS 9, 9 (Michael J. Saks & Charles H. Baron eds., 1980). Commentators have debated the extent to which *Brown* relied on the seven studies, the quality of the cited research, and the appropriateness of basing constitutional decisions on social science. *See, e.g.*, BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 458–59 (1985) (discounting footnote's importance); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1960) (same); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 166–68 (1955) (admonishing against judicial reliance on social data); Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 691, 698–700 (1987) (understanding Court's emphasis on social science as overlooking "real problem with segregation," namely its origins in slavery).

Although apparently not the subject of widespread criticism, *Brown*'s treatment of the lower court findings also appears troubling from a methodological perspective. In citing the lower court findings that supported its holding, *Brown* neither explicitly acknowledged

the Supreme Court at least left no doubt about what it had done: The Court expressly acknowledged that *Brown*'s conclusion contradicted *Plessy*'s holding and declared that "any language in *Plessy v. Ferguson* [to the] contrary . . . is rejected."[280] By comparison, in *Dowell* and *Jenkins* the powerful desegregation principles of *Green* and *Swann*—the obligation to eliminate the vestiges of segregation "'root and branch,'"[281] the duty to convert to systems "without . . . 'white' school[s] and . . . 'Negro' school[s], but just schools,"[282] the burden on school systems to justify the adoption of less effective desegregation plans,[283] and the proposition that "a district court's equitable power[ ] to remedy past wrongs is broad . . . and flexib[le]"[284]—simply van-

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that a third court had reached the exact opposite conclusion nor ruled that its finding was clearly erroneous as urged by the NAACP. *See* Davis v. County Sch. Bd., 103 F. Supp. 337, 339–40 (E.D. Va. 1952) (concluding that plaintiffs had failed to prove their case on issue and stating "[w]e have found no hurt or harm to either race" from segregation); Brief for Appellants at 18–26, Davis v. County Sch. Bd., 347 U.S. 483 (1954) (No. 4) (arguing that Virginia court's finding was manifestly erroneous). The Court also seems to have ignored the Delaware defendants' argument that because the Delaware Supreme Court had yet to review the accuracy of the trial court's harmful effects finding, their case should be remanded for further proceedings if the Justices thought that the issue was critical to their decision. Brief for Petitioners at 14, Gebhart v. Belton, 347 U.S. 483 (1954) (No. 10).

280 347 U.S. at 494–95. The Court relied on both factual and legal developments to overrule *Plessy*. First, as a bridge between *Plessy* and *Brown*, the Court pointed to two intervening cases, *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), in which the Court had made explicit the proposition, implied in *Plessy*, that separate but unequal facilities were unconstitutional. *Brown* relied on both cases for the proposition that where educational facilities fail to afford equal opportunities to black and white students, they violate the Equal Protection Clause. 347 U.S. at 493–95. The Court also pointed to a major social transformation that had taken place since *Plessy*: Education had become "perhaps the most important function of state and local governments" and was now so important to Americans' ability to earn their living and exercise their democratic rights that it was "a right which must be made available to all on equal terms." *Id.* at 493. In the end, *Brown* rejected *Plessy* because, at least in the field of education, *Plessy*'s fundamental premise was false. *Plessy* had declared that if segregation stamps black citizens with "a badge of inferiority . . . it is not by reason of anything found in the [law], but solely because the colored race chooses to put that construction upon it." 163 U.S. 537, 551 (1896). Flatly rejecting that proposition, *Brown* found the inferiority to be very real: Schools segregated by law were "*inherently* unequal." 347 U.S. at 495 (emphasis added). The Supreme Court itself has described *Brown* as one of the quintessential examples of a principled overruling of precedent. *See* Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992) (describing *Brown*'s overruling of *Plessy* as "not only justified but required" because "the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954").

281 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (quoting Green v. County Sch. Bd., 391 U.S. 430, 438 (1968)).

282 *Green*, 391 U.S. at 442.

283 *Id.* at 437–38.

284 *Swann*, 402 U.S. at 15.

ished. Neither distinguished nor overruled, they were just overwhelmed by the new mandate to restore local control.[285]

Perhaps the *Jenkins* and *Dowell* majorities viewed busing as a failed social experiment. If so, they did not say so, nor would the record in either case have supported such a conclusion.[286] Or perhaps they believed, as then-Justice Rehnquist wrote in his *Keyes* dissent, that *Green* represented a "drastic" and "signficant" departure from *Brown*.[287] But *Dowell* and *Jenkins* identified no flaws in Green's reasoning, much less acknowledged that they were effectively overruling it.

When courts expressly overrule precedent, even on debatable grounds, we at least know that the law has changed and have a basis for evaluating the court's reasoning. One may or may not agree with *Brown*, or for that matter with *Garcia v. San Antonio Metropolitan Authority*,[288] *Agostini v. Felton*,[289] or *Lawrence v. Texas*,[290] but no one

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[285] Missouri v. Jenkins, 515 U.S. 70, 99, 102 (1995); Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991).

[286] In fact, the effectiveness of school desegregation and its benefits to both minority and non-minority students remain the subject of intense debate. *Compare Jenkins*, 515 U.S. at 120 n.2 (Thomas, J., concurring) (citing various conflicting studies for proposition that "there simply is no conclusive evidence that desegregation either has sparked a permanent jump in the achievement scores of black children, or has remedied any psychological feelings of inferiority black schoolchildren might have had"), DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 221 (1995) (describing evidence of achievement gains as "mixed at best"), *and* Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, *in* THE BLACK-WHITE TEST SCORE GAP 1, 9 (Christopher Jencks & Meredith Phillips eds., 1998) (reporting that schools' racial composition does not appear to affect math scores at any age or reading scores after sixth grade), *with* GARY ORFIELD, HARVARD UNIV. CIVIL RIGHTS PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 9–11 (2001), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (citing various studies concluding that desegregation has improved test scores and college attendance rates), Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, *in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 103, 103–25 (Christine H. Rossell & Willis D. Hawley eds., 1983) (concluding based on review of ninety-three studies that desegregation has positive effect on student achievement when it begins in early primary grades, involves "critical mass" of black students, and is performed on metropolitan-area basis), *and* Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597, 605–07 (James A. Banks ed., 1995) (summarizing recent long-term studies suggesting that desegregated schools increase "life outcomes" of black students).

[287] Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 258 (1973) (Rehnquist, J., dissenting); *see supra* note 158 and accompanying text; *see also* Memorandum to Egil Krogh, *supra* note 158, at 3 (criticizing *Green* in similar language).

[288] 469 U.S. 528, 557 (1985) ("National League of Cities v. Usery, 426 U.S. 833 (1976), is overruled.").

[289] 521 U.S. 203, 206 (1997) ("The doctrine of stare decisis does not preclude us from recognizing the change in our law and overruling *Aguilar* [*v. Felton*, 473 U.S. 402 (1985)].").

can doubt that those decisions overruled precedent. In *Dowell* and *Jenkins*, by comparison, the majority never explained its sharp departure from precedent or acknowledged the dramatic change it was executing in longstanding, carefully developed, Fourteenth Amendment remedial principles.

This lack of explanation is particularly surprising, given that there may well have been principled reasons for modifying the *Green* and *Swann* standards or for applying them differently in Oklahoma City and Kansas City. For example, the urban complexities of Oklahoma City probably warranted more attention to the precise causes of segregated schools. Because of advances in magnet programs since *Green* and *Swann*, perhaps busing in Oklahoma City could have been replaced with equally effective magnet schools. In Kansas City, the complex causes of academic deficiencies probably warranted requiring the district court to make more detailed findings concerning the incremental effects of segregation than are required with regard to student assignments. And perhaps the Kansas City district court had surpassed the limits of its ability to oversee long-term, complex institutional reform.

The passage of time also probably warranted reexamining the key holdings of *Green* and *Swann* that school officials have the burden of demonstrating that current racial imbalances are no longer a vestige of segregation.[291] Justice Scalia made this point in a concurrence to another desegregation decision, *Freeman v. Pitts*,[292] in which he suggested that as the passage of time makes it increasingly difficult to determine whether past segregation contributed to modern residential patterns, the allocation of the burden of proof will become outcome-determinative.[293] His statement that "it has become absurd to assume, without any further proof, that [constitutional violations] dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current [school] operations" has a certain facial appeal.[294] But neither *Dowell* nor *Jenkins* confronted this issue directly; indeed, doing so would have required the development of a considerably more sophisticated record and a principled decision on the merits.

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290 123 S. Ct. 2472, 2484 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

291 Green v. County Sch. Bd., 391 U.S. 430, 439 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971); *see supra* note 78 and accompanying text.

292 503 U.S. 467 (1992); *see generally* note 167 (describing case).

293 *Freeman*, 503 U.S. at 506 (Scalia, J., concurring).

294 *Id.*

CONCLUSION

I conclude by returning to where I began—the debate about judicial activism. Defenders of the Rehnquist Court cite *Dowell* and *Jenkins*, pointing out that the two decisions cut back on the Warren Court's expansive exercise of federal judicial power. Arguing just the opposite, critics insist that *Dowell* and *Jenkins* reflect the anti-desegregation policy views of the members of the majority and of the Presidents who appointed them.

In my view, neither observation properly assesses the two decisions as acts of judging. Such an assessment cannot turn on the results of the two decisions, nor on the Court's motive or on the views of the appointing Presidents. We have no way of ascertaining the motives of a five-Justice majority, and the Justices that made up the majorities in these two cases were appointed by four different Presidents, one of whom was a Democrat.

As I explained at the outset, whether decisions qualify as acts of judging, as opposed to policymaking, turns on whether their results evolved from the application of legal principles to established fact. For this reason, legitimate acts of judging—decisions that follow rules of stare decisis and that are fully and openly explained—do not lose their legitimacy just because they may coincide with the policy views of the judges or their appointing presidents.

Viewed methodologically, *Dowell* and *Jenkins* are flawed as acts of judging. As I have demonstrated, they never explain, much less acknowledge, their overruling of precedent, they discard lower court fact-findings and engage in fact-finding of their own, and they fail to provide "principled justification[s]"[295] for their outcomes. These methodological defects have additional consequences given *Dowell*'s and *Jenkins*'s historical context, in particular, the extent to which the two decisions could be seen as having accomplished what the political process could not: limiting court-ordered school desegregation and doing so, like President Nixon two decades earlier, by shifting the focus from providing effective remedies for the victims of segregation to restoring local control. By failing to anchor these results in principles of judicial methodology, I fear the Court may have contributed to the "popular misconception that this institution is little different from the two political branches of the Government."[296]

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[295] *See supra* text accompanying note 14.

[296] Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).