Equal Educational Opportunity: The Rehnquist Court Revisits Green and Swann

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EQUAL EDUCATIONAL OPPORTUNITY: THE REHNQUIST COURT REVISITS GREEN AND SWANN

Brian K. Landsberg*

I. INTRODUCTION

Last year I published a study of the twenty-nine race discrimination cases decided in the first five years of William H. Rehnquist’s tenure as Chief Justice of the United States Supreme Court.¹ I concluded that the Court had reached a crossroads in its approach to racial discrimination, in which one road could lead to the dismantling of the Burger Court’s legacy and the other could lead to the selective narrowing of that legacy.² I also observed that the Court’s momentum seemed to undermine the pillars of the Burger Court’s jurisprudence, including two principles embedded in Swann v. Charlotte-Mecklenburg Board of Education,³ the requirement of overcoming effects of past discrimination and the tailoring principle.

During its most recent term, the Court decided two school desegregation cases which provide some evidence that a wholesale counterrevolution against the Burger Court’s race discrimination doctrines will be the road not taken. Rather, a more cautious approach is emerging. I would now like to describe how we arrived at this moment in the development of school desegregation law and to examine the themes emerging from the first six years under Chief Justice Rehnquist’s leadership of the Supreme Court. Perhaps this review and analysis can provide some tools for approaching future school desegregation issues.

Crystal ball gazing is always risky business, and never more so than when the subject is the future of legal doctrine. Nonetheless, the school desegregation crystal ball contains two clear pictures. First, we cannot ex-

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* Professor of Law, McGeorge School of Law, University of the Pacific. Professor Colleen P. Murphy provided helpful criticism of this Article at the Thrower Symposium. Rob Vasquez played a very helpful role as my research assistant.

¹ Brian K. Landsberg, Race and the Rehnquist Court, 66 Tulane L. Rev. 1267 (1992) [hereinafter Race and the Rehnquist Court]. The present Article draws on that prior article and an earlier one, Brian K. Landsberg, The Desegregated School System and the Retrogression Plan, 48 La. L. Rev. 789 (1988) [hereinafter Retrogression Plan], but it also discusses new cases and presents revised analysis.

² Race and the Rehnquist Court, supra note 1, at 1334-35.

pect dramatic expansion of constitutionally protected rights to equal educational opportunity. Second, reversion to pre-Brown doctrine is inconceivable. A third picture exists, however. A now clouded crystal ball reveals not one answer but two possibilities under the case law of the past six years. Without rejecting Brown, the Court could reject the subsequent legacy of the Warren and Burger Courts as articulated in Green v. County School Board and Swann v. Charlotte-Mecklenburg Board of Education. The kernels of rejection can be found in some recent opinions. More likely, the Court may retain that legacy while cabining it within certain limits described below.

Debate about the future role of the courts in protecting equal educational opportunity often lacks grounding in mutual understanding of equal protection of the laws. Much debate about busing, for example, fails to distinguish between the legal bases for busing orders and the public policies which motivate individuals to support or oppose busing. The Court has held that the Equal Protection Clause of the Fourteenth Amendment speaks only to invidious discrimination; thus, busing orders may be entered only to remedy invidious discrimination. Parents, civil rights groups, politicians, educators, and neighborhood associations may bring or defend against school desegregation suits for a variety of reasons. They may wish to integrate or to separate; to improve or to preserve school quality; to equalize or to maintain social status; to preserve or to change the composition of neighborhoods; or to get elected. The legal issues primarily address equality of process. The social, educational, and political issues largely address distributive concerns—that is, how to divide the educational pie among various racial groups. These concerns are every bit as important as the legal concerns; indeed, they are arguably more

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5 391 U.S. 430 (1968).
7 "Busing" is an epithet coined by former Alabama Governor George C. Wallace as part of his campaign against desegregation. Black children had applied to attend two rural white schools in Macon County, Alabama and Judge Frank Johnson had ordered the school board to provide them with transportation, just as the state board of education had ordered that transportation be provided to white students. Governor Wallace charged that Judge Johnson was busing the students. JACK BASS, TAMING THE STORM 217 (1993). The term now refers to race-conscious student assignment plans designed to overcome racial imbalance in school systems. It is employed indiscriminately without regard to whether the imbalance stems from unlawful state segregative actions.
My study of equal opportunity in the courts, however, is limited to the law, and I leave to educators and legislators the pressing policy issues relating to equality and the schools.

The gap between the legal basis for busing and the aspirations of parties affected by school desegregation decrees renders it difficult to achieve a common ground for assessing the validity, the success, or the failure of a busing decree. The courts have ignored the policy concerns too often, and the policy debate has ignored the reasoning which led the Supreme Court to approve busing as a remedy for the officially maintained racially dual school system. This has led to the myth of busing as a failed remedy. Busing can succeed in purging state-sponsored racial discrimination from a school system, even if it does not improve education or preserve the system’s majority white enrollment. A successful busing plan achieves “a system without a ‘white’ school and a ‘Negro’ school, but just schools.”


Brown v. Board of Education held that racial segregation in the public schools deprived the black plaintiffs and others similarly situated of the equal protection of the laws. The Court’s reasoning was not as clear as its holding. In Brown, the Court seemed intent to respond to Plessy v. Ferguson, which had rejected the argument that racial segregation “stamp[ed] the colored race with a badge of inferiority.” Therefore, the Brown Court turned to psychology, noting that enforced racial segregation “generates a feeling of inferiority [in blacks] as to their status in the community that may affect their hearts and minds in a way unlikely ever to

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9 Professor Frances Lee Ansley suggests that “civil rights scholars who try to assimilate and accept formal equality unmodified will founder upon it. To accept or ignore class division and its ideological justifications at this juncture is to forfeit power to deal with race in a meaningful way.” Frances Lee Ansley, Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship, 74 Cornell L. Rev. 993, 1057 (1989). Her insight in no way detracts from the importance of seeking to understand the doctrinal bases of the formal equality decisions.


13 163 U.S. 537 (1896).

14 Id. at 551.
be undone.” Taking a more familiar approach to review of governmental actions in the companion case, *Bolling v. Sharpe*, the Court explained that “[s]egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia . . . an arbitrary deprivation of their liberty in violation of the Due Process Clause.” The two articulations may, perhaps, be harmonized by explaining that it is the stigmatic injury which destroys any logical relationship with a legitimate governmental objective, such as racial peace or better education. All that remains is the illegitimate governmental objective of elevating one race above another.

Two theories supporting *Brown* rely on subjective factors. State-imposed segregation might be unconstitutional because it imparts stigmatic feelings to black children; or the vice might be invidious motives of the state actors. Both of these theories treat the black child as a victim. A third theory relies simply on the objective fact of different treatment of the races; all children are victims under this theory. After *Brown*, there has been little occasion for the Court to refine its reasoning. It mattered little at the time whether *Brown* rested primarily on stigmatic injury, invidious intent, or the irrationality of race distinctions; each basis would support

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15 *Brown*, 347 U.S. at 494.
17 Id. at 500. Compare *id.* with *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“All legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [C]ourts must subject them to the most rigid scrutiny.”).
18 The difference between *Korematsu* and *Brown* was that the segregated schools in *Brown* curtailed the civil rights of both whites and blacks, rather than “a single racial group.” Blacks could not attend white schools; whites could not attend black schools. The Court subsequently held, however, that “the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.” *Loving v. Virginia*, 388 U.S. 1, 9 (1967). Indeed, as long ago as 1870, the Court in *Strauder v. West Virginia*, 100 U.S. 303 (1870), held that the Equal Protection Clause declares “that the law . . . shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws . . . .” *Id.* at 307.

19 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 153, 157 (1980) (referring to “first degree prejudice”—“official attempts to inflict inequality for its own sake”). Professor Andrew Kull argues that *Brown* was intentionally “historically and legally jejune” for political reasons and that *Bolling* “affords some idea of how the decision in *Brown* might have been explained had the Chief Justice not felt obliged to decide the Fourteenth Amendment issue in ostensible harmony with *Plessy*.” ANDREW KULL, THE COLOR-BLIND CONSTITUTION 152, 274 n.16 (1992). Justice Stevens relied on a combination of stigmatic harm and irrationality in dissenting from the Court’s approval of a federal 10% set-aside program for minority contractors. *Fullilove v. Klutznick*, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting).
the Court's holding. The lack of clarity as to which was the *ratio decidendi*, however, created the conditions in which later confusion would flourish.

*Brown II* added more ambiguity by virtue of its mandate that the school systems be ordered "to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." The case might be read to support the view which Justice Scalia attributes to "an observer unfamiliar with the history surrounding this issue," but most likely describes the view of Justice Scalia himself: that free choice of schools is all that the Constitution requires. The obstacles to implementation described by the Court, however, related to the systemic nature of school segregation and could hardly have justified delay if all *Brown* required was the admission of a few black students to white schools. *Brown II*’s most important positive contribution was its reliance on equitable doctrine as an adjunct to constitutional law. Although its conclusion that equity justified delay may have been deeply flawed, the decision laid the foundation for the later insight that equitable relief would have to address the systemic violation with a systemic remedy.

Between 1955 and 1968, the Court was repeatedly called upon to address foot-dragging and even defiance by school authorities, but as long as the primary issue was whether and when *Brown* would be implemented, the content of *Brown*’s nondiscrimination principle was scarcely addressed. In 1968, the Court began defining the school authorities' obligations in *Green v. County School Board*, in which the Court disapproved a formerly de jure segregated school system’s freedom of choice plan that had left the schools substantially segregated. The Court held that the sufficiency of a school desegregation plan is to be measured by its effectiveness. School segregation is a systemic practice, deeply rooted in what the

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* Id. at 301.
* Justice Scalia has noted isolated phrases which might be read to validate free choice as all that *Brown* required. See id. at 1452 n.1 (citing Cooper v. Aaron, 358 U.S. 1 (1958) and Goss v. Board of Educ., 373 U.S. 683 (1963)). Note that neither case involved free choice and neither of the phrases quoted by Justice Scalia purports to decide anything about free choice.
Court termed a "dual system, part 'white' and part 'Negro.'" Building on Brown II's reference to the "transition to a racially nondiscriminatory school system," the Court reasoned that "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end . . . ."

During the 1970s, the Court refined Green in Swann v. Charlotte-Mecklenburg Board of Education, Davis v. Board of School Commissioners, and other cases. As I have shown elsewhere, these cases establish a set of dichotomies regarding the appropriate school desegregation remedy. First, the tailoring doctrine requires that systemic violations be systemically remedied but allows more limited violations to receive more limited remedies. Second, while unexplained racial isolation in formerly dual school systems must be eliminated, racial balance is not required. Third, while all practicable means must be employed to eliminate the unexplained racial isolation, no more need be done than the practicalities allow. Fourth, the courts may not intervene where the school systems are in compliance, but must intervene in case of default by the school authorities.

Green and Swann reflected the Court's growing impatience with the snail's pace of school desegregation. Not only did the Court begin to emphasize the need for results; it insisted that the results be immediate, not at some indefinite future time. The desegregation process must have some end, and neither deliberate speed nor freedom of choice promised any closure of this chapter. Thus, the Court rejected freedom of choice in favor of more effective tools; it abandoned all deliberate speed and required imme-

24 Id. at 435.
26 Green, 391 U.S. at 435-36. For a criticism of this reasoning, see Kull, supra note 18, at 179-81, 194-95. Professor Kull identifies Judge Wisdom's opinion in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), as laying the foundation for Green and argues that "[t]he opinion in Jefferson County identifies not only the moment at which the color-blind ideal was jettisoned by its former proponents but also the theory by which this abandonment of principle was rationalized." Kull, supra note 18, at 181.
29 Retrogression Plan, supra note 1, at 802-07.
30 The Court combined these two doctrines in reversing interdistrict busing relief in the Detroit school desegregation case. The district court found it impossible to desegregate the city schools without involving the surrounding school systems. The Supreme Court, however, held that racial balance was not required and "absent an interdistrict violation, there is no basis for an interdistrict remedy . . . ." Milliken v. Bradley, 418 U.S. 717, 752 (1974).
diates desegregation. Built into the case law of change, however, was the notion of closure. The last dichotomy of the cases required continuing judicial supervision of the desegregation process, but contemplated that once a school system became unitary, further judicial intervention would not ordinarily be necessary. It is that notion, of course, that is coming to fruition in the 1990s, with *Board of Education v. Dowell* and *Freeman v. Pitts*,31 which are discussed below.

A fateful moment came in *Keyes v. School District No. 1*,32 where the Court rejected Justice Powell’s effort to impose on multi-ethnic school systems a continuing obligation to seek desegregation.33 Justice Powell’s approach would have required a dynamic, rather than a static effort to solve racial imbalance problems. *Keyes* also underscored dicta in *Swann* that racial imbalance caused by discrimination outside the schools need not be remedied by the schools. School systems need only remedy the effects of their own intentional discrimination.34 The net result of the case law of this period was to create two classes of racially imbalanced school systems: those with a duty to remedy the imbalance and those with no such duty. School systems in the duty class could escape to the non-duty class by discharging their duty and avoiding further intentional segregative action.

*Brown* wrought a revolution in constitutional law. As one of its critics observed, the decision enabled the Court “to move from its historic role as

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31 See *Bell*, supra note 10, at 592-93; Note, *Public School Desegregation—Withdrawal of Judicial Control*, 106 Harv. L. Rev. 249, 256 (1992) (“The Court’s onetime frustration at the slow pace of desegregation has given way to frustration at continued efforts to desegregate.”).


33 Justice Powell wrote that “where segregated public schools exist within a school district to a substantial degree, there is a prima facie case that the [school authorities] . . . are sufficiently responsible to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system.” *Id.* at 225 (Powell, J., concurring) (footnote omitted); see also *id.* at 216 (Douglas, J., concurring). Although Justice Powell coupled this substantive rule with an attack on mandatory cross-town transportation and a defense of neighborhood schools, the Court could have embraced the substantive rule without also adopting these features of his opinion.

34 Professor Kevin Brown has argued that “[e]stablishing invidious intent is tantamount to proving that the meaning attached to the separation of blacks and whites in schools was a belief in the inferiority of African-Americans.” Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 Cornell L. Rev. 1, 14 (1992). That is one possible interpretation; more likely, the intent requirement is necessary to determine whether the state is classifying based on race or on some racially neutral basis. *See Washington v. Davis*, 426 U.S. 229 (1976).
a brake on social change to a very different role as the primary engine of such change.” The generative power of Brown, however, in the realm of equal educational opportunity, has been limited primarily to its ban on racial segregation. Even there, the refusal in Keyes to extend the ban to de facto segregation and the refusal in Milliken to extend it to interdistrict racial imbalance further confined Brown’s reach.

### III. The Recent Supreme Court Cases Regarding School Desegregation

The Supreme Court has decided four school desegregation cases since William H. Rehnquist became Chief Justice. While these decisions formally embrace the Green-Swann line of cases, the question is whether they undermine the reasoning of those cases. I will briefly describe them before undertaking a broader analysis of themes from recent Supreme Court caselaw and their possible significance for the future.

In Missouri v. Jenkins, the Court unanimously reversed a district court order imposing a property tax increase on Kansas City property owners to help fund a school desegregation remedy. Justice White, for the Court, concluded that “the tax increase contravened the principles of comity that must govern the exercise of the District Court’s equitable discretion in this area.” Justice White said that the “proper respect for the integrity and function of local government institutions” and the availability of a less intrusive remedy precluded direct imposition of a tax increase. The district court, however, could order the school board to levy such taxes as were needed to fund the remedy, and state laws imposing tax limits could not “hinder the process by preventing a local government from implementing that remedy.” Justice White declined to review the validity of the underlying remedy because the Court had denied certiorari on that question.

Justice Kennedy concurred in part and concurred in the judgment. He took strong issue with the Court’s conclusion that the district court could

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60 Id. at 50.
61 Id. at 51.
62 Id. at 57-58 (citing North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971)).
do indirectly what it could not do directly. Justice Kennedy argued that prudence required rejection of the taxation order which the majority apparently approved. He perceived a taxation order as inconsistent with the judicial function. He supported this conclusion by arguing that the underlying remedial order, even if constitutionally permissible, was not constitutionally required; other possible remedies might cost less and thus not necessitate increased taxation. Where several possible remedies exist, the district court is obliged to choose the one which is least intrusive on local governance. Justice Kennedy believed that the denial of certiorari on the validity of the desegregation remedy did not foreclose the Court from considering this argument. Both the majority and concurring opinions in *Jenkins* remain true to the heart of *Swann*, which requires school authorities to adopt systemic remedies for systemic violations.

In 1991, the Court decided *Board of Education v. Dowell* by a 5-3 margin. The Oklahoma City schools were desegregated pursuant to a federal court order in 1972 and operated under the desegregation plan until 1985, when the schools reverted to a neighborhood school system of student assignment. The new system caused eleven integrated schools to become virtually all black. The plaintiffs' challenge to the new plan ultimately led to a court of appeals decision that the school board had failed to justify abandoning the prior court order. The court of appeals applied the standard of an old antitrust case, *United States v. Swift & Co.*, which held that an antitrust decree should not be dissolved unless it results in "grievous wrong evoked by new and unforeseen conditions... ."

The Supreme Court unanimously disapproved the court of appeals' standard for dissolving a school desegregation decree, citing prior school desegregation cases which held that desegregation decrees were temporary measures. Again, the Court considered judicial respect for local governance of school systems an important value. The majority, echoing the amicus brief

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40 Id. at 78 (Kennedy, J., concurring). Justice Kennedy did not discuss *North Carolina State Board of Education v. Swann*.

41 In *Milliken v. Bradley*, 433 U.S. 267 (1977), the Court had observed that "discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination." Id. at 283. Therefore, the lower court properly applied the tailoring doctrine when it ordered the defendants to fund remedial and compensatory education programs to help remedy those inequalities.


43 286 U.S. 106 (1932).

44 Id. at 119.
of the United States, failed to give clear guidance as to the standard to be applied on remand. The Court took the unusual step of reversing the decision of the court of appeals, but remanding the case directly to the district court, ordering it to "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." If so, the injunction should be dissolved and the new student assignment plan judged by "appropriate equal protection principles." The Court did hint that to the extent that present residential segregation is a vestige of former school segregation, continuation of the desegregation plan might be required.

The Court did not address the issue of whether the location and capacity of schools might be considered an effect of past discrimination. Nor did it address the dissent's argument that the stigma which attaches to one-race schools is a cognizable effect of past discrimination. The dissent would have affirmed, stating that racially identifiable schools are vestiges of past discrimination which perpetuate "the message of racial inferiority inherent in the policy of state-sponsored segregation." The Court's approach in Dowell was a new tack, reflecting recognition that after more than a decade of desegregation it becomes difficult to identify concrete effects of past discrimination. Justice Marshall maintained that the Court should assume that racial stigma attached to one-race schools is a continuing effect of the prior segregated system.

Freeman v. Pitts involved a narrow issue: whether a district court may relinquish remedial control of unitary aspects of a school system while other aspects remain to be brought into full compliance. Formally, the case did not address the extent of the school authorities' obligations to desegregate. All the Justices agreed that the Eleventh Circuit had erred in

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46 Dowell, 498 U.S. at 249-50. Compare id. with Brief for the United States as Amicus Curiae at 14, Dowell (arguing that the Court should ask "(1) whether the district has continuously complied with the desegregation decree in good faith; (2) whether the school district has abandoned any and all acts of intentional discrimination; and (3) whether the school district has eliminated, as far as practicable, the 'vestiges' of prior discriminatory conduct").
47 Id. at 250.
48 Id. at 250 n.2.
49 Id. at 257-58 (Marshall, J., dissenting) (noting that "[r]emedying and avoiding the recurrence of this stigmatizing injury have been guiding objectives" of the Court's desegregation jurisprudence).
50 Id. at 268.
adopting an absolute rule requiring retention of “full remedial authority” until the school system achieved “unitary status in six categories at the same time for several years.” However, the Justices voiced a variety of views as to what should happen on remand when the lower courts once again confronted the question of whether to relinquish supervision over the student assignment aspect of the case. Justice Kennedy’s opinion for the majority reiterated fidelity to Green and Swann. In his view, the school system need not permanently ensure racial balance in student assignments in order to remedy “demographic changes in DeKalb County [which] are unrelated to the prior violation,” but might be required to do so “to correct other fundamental inequities that were themselves caused by the constitutional violation.” The opinion also implied that relinquishment of jurisdiction would depend in part on the school authorities showing “good faith commitment to the entirety of a desegregation plan so that parents, students and the public have assurance against further injuries or stigma.”

Although Justice Scalia joined the Court’s opinion, he would have reconsidered the continuing legitimacy and usefulness of the Green-Swann doctrine. Justice Souter’s concurrence emphasized continuity with that doctrine and argued that several possible causal relationships which might explain future changes in student assignment patterns would require continuing judicial supervision. Justice Blackmun, joined by Justices Stevens and O’Connor, concurred in the judgment, but would have required the court of appeals to employ principles similar to those suggested by Justice Souter in reviewing the district court’s finding that the school authorities had shown that the racial imbalance was not the result of past segregative action. Justice Thomas did not participate in Freeman, but his opinion in United States v. Fordice suggests that he, for different reasons, might also look skeptically at any policy that “remains in force, without adequate justification and despite tainted roots and segregative effect . . . .” The failure of the Court, in both Dowell and Freeman, to provide clear definition to the notion of vestiges of past discrimination could stem from

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51 Id. at 1436.
52 Id. at 1448.
53 Id. at 1449.
54 Id.
56 Id. at 2745 (Thomas, J., concurring). See infra note 101 and accompanying text.
the procedural posture of the cases or from the uncertainty or inability of the Justices to agree.

*United States v. Fordice* is one of the few recent cases to consider issues of initial remedy. Although *Fordice* involves higher education, it provides many clues as to the Court's current approach to remedial issues. The lower courts had held that by removing explicit racial barriers to admission to public colleges and universities, Mississippi had complied with the Equal Protection Clause. The Supreme Court vacated and remanded, holding that "[t]o the extent that the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution. . . ." The state had argued that *Green*’s rejection of free choice student assignment systems where they fail to bring about desegregation should not be transported to higher education. Justice Scalia, in partial dissent, agreed; indeed, implicit in his opinion was the view that *Green* itself had been wrongly decided.

The Court, while agreeing that there were obvious and important differences between elementary and secondary school systems and systems of public higher education, applied to Mississippi's public colleges and universities a standard which flows from the reasoning of *Green*. It held that "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational policies."

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58 *Id.* at 2743.
59 Justice Scalia characterized the *Green* standard as "amorphous," as placing on the State an "ordinarily unsustainable burden," and as encouraging school systems "to assure racial proportionality in the schools." *Id.* at 2748 (Scalia, J., concurring in part and dissenting in part.).
60 First, the very decision to go to college is voluntary. Second, there is no tradition of mandatory state assignment of students to particular colleges. Third, institutions of higher education are not fungible. *Id.* at 2736.
61 *Id.* The concurring Justices disagreed as to what this standard meant. Justice O'Connor emphasized that the burden remained on Mississippi and that "the circumstances in which a State may maintain a policy or practice traceable to *de jure* segregation that has segregative effects are narrow." *Id.* at 2743 (O'Connor, J., concurring). In contrast, Justice Thomas seemed to support the majority formulation only because he believed the burden of justification would impose "a far narrower, more manageable task than that imposed under *Green*." *Id.* at 2745 (Thomas, J., concurring). He believed the Court's standard to be implicitly consistent with an intent requirement: "[I]f a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent." *Id.* Finally, Justice Thomas believed that the state could legitimately maintain "historically black colleges as such." *Id.* at 2746. Justice Scalia, pointing to this disagreement as evidence of confu-
The caselaw from *Brown* to *Fordice* leaves us with uncertainty as to which of several models of desegregation law should govern in the future: present invidious intent, stigma, vestiges of past invidious intent, or some combination of all three. Certainly proof of present invidious intent will be a sufficient showing, but will it be a necessary condition of relief? Would proof of stigma in de facto segregated schools show a denial of equal protection? Would proof that de jure segregated schools did not impart stigma show that there is no denial of equal protection? Will the Court continue to require elimination of the vestiges of past discrimination or will it establish some time limit on the remedial obligation of school authorities?

IV. THEMES FROM THE RECENT SUPREME COURT CASELAW

A. RULES VERSUS STANDARDS

Professor Kathleen Sullivan places the "fault line" of the Rehnquist Court at the point of separation of rules from standards. The education decisions of the Rehnquist Court can be viewed as reflecting that fault line. On the "rules" side of the line are two camps: (1) those Justices espousing narrowing rules of federal and judicial restraint and absolute race neutrality and (2) those Justices who would find an overriding duty to combat racial stigma. On the "standards" side are those Justices who take a pragmatic, balancing approach. Proponents of rules believe they can locate definite and binding norms in the Constitution. The proponents of standards are much more cautious, basing their decisions on normative arguments grounded in custom and precedent. They move slowly and incrementally. They are deferential to the legislature.

Professor Sanford Levinson has pointed out that the division as to rules versus standards leads to varying degrees of deference to lower court fact-finding. Application of standards may be much more fact-dependent than application of rules. In the 1960s, the Fifth Circuit, fed up with the footdragging of local school boards and district courts, fashioned detailed

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*sion engendered by the Court’s opinion, concluded that “essentially, the Court has adopted Green.” Id. at 2753 (Scalia, J., concurring in part and dissenting in part).


‡ Sanford Levinson, Remarks at the American Association of Law Schools Mini-Workshop on The New Supreme Court (Jan. 6, 1993).
rules to govern every school desegregation case.\textsuperscript{64} Indeed, the Supreme Court itself based its ruling in \textit{Swann} on "the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty.\ldots\textsuperscript{65} In the 1990s, some lower courts have fashioned rules which tend to lead mechanically to the approval of retrogression plans.\textsuperscript{66} Changes in the federal bench could render the degree of deference more significant than at present, when both the Supreme Court and the lower courts are filled with Reagan-Bush appointees. The personnel of one level could become dominated with Clinton appointees while the other could remain dominated by Reagan-Bush appointees. Adherence to the rule of \textit{Pullman-Standard v. Swint}\textsuperscript{67} would leave many equal opportunity cases in the hands of the district courts, while treating issues in these cases as questions of law would place the Supreme Court as their primary arbiter.

The \textit{Jenkins} case declines to adopt the absolute rule, proposed by the State of Missouri, of noninterference with local tax schemes.\textsuperscript{68} Instead, the opinions of Justices White and Kennedy adopt a standard which requires assessment of need and alternatives.\textsuperscript{69} \textit{Dowell} can be read as rejecting a per se rule ascribing talismanic power to a finding of unitariness; it clearly rejects a virtually per se rule against lifting or modifying injunc-

\textsuperscript{64} \textit{See}, e.g., \textit{United States v. Jefferson County Bd. of Educ.}, 372 F.2d 836 (5th Cir. 1966), \textit{modified}, 380 F.2d 385 (5th Cir.) (en banc), \textit{cert. denied}, 389 U.S. 840 (1967); \textit{Singleton v. Jackson Mun. Sch. Dist.}, 348 F.2d 729 (5th Cir. 1965).

\textsuperscript{65} \textit{Swann v. Charlotte-Mecklenberg Bd. of Educ.}, 402 U.S. 1, 26 (1971).

\textsuperscript{66} \textit{See}, e.g., \textit{Riddick v. School Bd.}, 784 F.2d 521 (4th Cir.), \textit{cert. denied}, 479 U.S. 938 (1986).

\textsuperscript{67} 456 U.S. 273 (1982) (holding that discrimination is a factual determination which an appellate court may reverse only if the finding is clearly erroneous). Thus, the Court upheld a finding of discrimination as not clearly erroneous in \textit{Rogers v. Lodge}, 458 U.S. 613 (1982), and upheld a finding of no discrimination as not clearly erroneous in \textit{Hernandez v. New York}, 111 S. Ct. 1859 (1991).


\textsuperscript{69} \textit{True, Jenkins} does purport to narrow somewhat the district court's discretion, limiting that court to the remedy which least restricts local autonomy. \textit{Spallone v. United States}, 493 U.S. 265 (1990), required a court to use the "least possible power adequate to the end proposed" to enforce a structural injunction designed to overcome past housing discrimination by the City of Yonkers. \textit{Id. at 280} (quoting \textit{Shillitani v. United States}, 384 U.S. 364, 371 (1966)). The Court appears to have narrowed district court discretion in cases such as \textit{Jenkins} and \textit{Spallone}, in which the exercise of broad discretion disadvantaged the governmental defendant, while broadening district court discretion in cases such as \textit{Freeman}, where the defendant benefits from the broadened discretion. The rule of \textit{Freeman}, however, could work to the advantage of either party, depending on how the district court exercises its discretion.
tions. Freeman\textsuperscript{70} and Fordice, too, adopt a standard calling for careful assessment of vestiges of past discrimination. The resort to standards in Dowell, Freeman, and Fordice elicits objections from Justice Scalia, who complains that “[w]e have never sought to describe how one identifies a condition as the effluent of a violation, or how a ‘vestige’ or a ‘remnant’ of past discrimination is to be recognized.”\textsuperscript{71} At the other end of the spectrum, Justice Marshall, too, would prefer a concrete rule. He argues that racial identifiability of schools that could be desegregated is a per se vestige of past discrimination and therefore must be eliminated.\textsuperscript{72}

### B. Stigma

The Court assumed in Plessy v. Ferguson that if “the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is . . . solely because the colored race chooses to put that construction upon it.”\textsuperscript{73} Brown’s rejection of that position relied in part on facts showing that stigmatic injury arises from state-enforced segregation. Brown seemed to follow Plessy in focusing on the feelings of the victim rather than on the motives of the perpetrator of segregation. The Court quickly turned to a less fact-dependent theory in subsequent cases, however, stressing the suspect nature of racial classifications.\textsuperscript{74} That suspect

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\textsuperscript{70} See Note, supra note 31, at 259 (suggesting that Freeman is “part of a recent trend . . . of increased deference to district courts”).

\textsuperscript{71} Freeman v. Pitts, 112 S. Ct. 1430, 1451 (1992) (Scalia, J., concurring). That criticism was valid prior to Freeman. See Retrogression Plan, supra note 1, at 819 (suggesting, however, that one could infer “that three types of lingering effects are especially relevant: (a) racial identifiability of schools; (b) effects of school placement and capacity; and (c) effects of school segregation on housing patterns”). In fact, the majority opinion by Justice Kennedy in Freeman provides examples of legally significant vestiges of past discrimination. See 112 S. Ct. at 1448. Justice Scalia levies the same criticism in Fordice: “[T]he Court is essentially applying to universities the amorphous standard adopted for primary and secondary schools in Green . . . .” United States v. Fordice, 112 S. Ct. 2727, 2748 (1992).


\textsuperscript{73} 163 U.S. 537, 551 (1896).

\textsuperscript{74} References to stigma appear in occasional opinions, but generally not as central points. Justice Douglas’ dissent in DeFunis v. Odegaard, 416 U.S. 312 (1974), did rely in part on the argument that a “segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom.” Id. at 343 (Douglas, J., dissenting). Swann justified majority-to-minority transfers as “lessen[ing] the impact on [transferring students] of the state-imposed stigma of segregation.” Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 26 (1971). In another opinion, the Court noted that secession of a white city from a desegregating school system would cause “the same adverse psychological effect” as the segregation in Brown. Wright v. Council of Emporia, 407 U.S. 451, 466.
nature flows from the general irrationality of race as a proxy for merit. Two opinions in *Regents of the University of California v. Bakke* did wage a mini-debate on the importance of stigma. The opinion of Justices Brennan, White, Marshall, and Blackmun argued that the affirmative action program at issue in *Bakke* should be upheld because it pursued a sufficiently important state interest and did not operate to stigmatize any group. Justice Powell’s opinion, announcing the judgment of the Court, rejected reliance on “the pliable notion of ‘stigma,’” a word with “no clearly defined constitutional meaning.” He objected that stigma “reflects a subjective judgment that is standardless.”

Of late, some Justices have increasingly reverted to references to stigma in race discrimination cases; the term has become a double-edged sword. Thus, the Court applied strict scrutiny to a race-based set-aside program because “[c]lassifications based on race carry a danger of stigmatic harm.” On the other hand, Justice Marshall, dissenting in *Dowell*, would have required continued race-based busing because he believed that “[o]ur pointed focus in *Brown I* upon the stigmatic injury caused by segregated schools explains our unflagging insistence that formerly *de jure*
segregated school districts extinguish all vestiges of school segregation.”

His opinion continues with repeated references to stigma, which he identifies as one of the vestiges of segregation which must be extinguished. Thus, he concludes, the concept of vestige “extends to any condition that is likely to convey the message of inferiority implicit in a policy of segregation” and the “racial identifiability of a district’s schools is such a condition.” This language was partially adopted by the Court in *Free­man*, which explained that vestiges of the dual system must be eliminated “in order to insure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present.” The Court, however, did not agree that racial identifiability of schools alone caused stigmatic injury. Finally, in *Fordice*, Justice Scalia maintained that to insist that all-black schools “not be permitted to endure perpetuates the very stigma of black inferiority that *Brown I* sought to destroy.”

The double-edged nature of stigma is forcefully revealed by comparing Justice Marshall’s *Dowell* approach with Justice Scalia’s *Fordice* opinion. Note that although stigma is a fact-based concept, neither opinion refers to any facts in the record regarding stigma. *Plessy* resolved the factual dispute in favor of separate but equal, based not on facts but on assumptions by the Justices. *Brown* resolved the dispute against separate but equal based on lower court findings of fact and on the writings of social scientists. Justices Marshall and Scalia reach opposing results based on conflicting assumptions about the stigma which comes from either tolerating or repudiating one-race schools. While seemingly recognizing some role for stigma, a majority of the Court appears to be uncertain as to the

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80 Id. at 260-61.
81 Id. at 268.
82 Freeman v. Pitts, 112 S. Ct. 1430, 1443 (1992); see also id. at 1449 (The school district must show good faith, to provide “assurance against further injuries or stigma . . .”).
83 United States v. Fordice, 112 S. Ct. 2727, 2752 (1992) (Scalia, J., concurring in part and dissenting in part); see also id. at 2743 (O’Connor, J., concurring) (referring to “stigmatic harms caused by discriminatory educational systems”). In Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), however, Chief Justice Rehnquist, joined by Justice Scalia, argued in dissent that “[t]he rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial.” Id. at 2865 (Rehnquist, C.J., dissenting). This articulation seems to downgrade the significance of stigma in *Brown*. 
boundaries of that role.

A recent attempt to refashion the stigma rationale into a coherent theory provides a sophisticated critique which could help explain how reliance on stigma could lead Justices Marshall and Scalia to opposite results. Professor Kevin Brown argues that the Court believes, on the one hand, that "the harm of de jure segregation is inculcating the notion of black inferiority to public school children. Yet, on the other hand, the reason that remedies are necessary is because segregation actually retarded the development of African-Americans, thus making them inferior to Caucasians." Justice Marshall finds the racial insult in the maintenance of one-race schools; Justice Scalia finds it in the assumption that one-race schools are unacceptable. Professor Brown suggests a different approach, which views the harm of racial discrimination in education "as distorting the value inculcating process of public schools." He believes that the Court's approach in Brown v. Board of Education viewed segregated schools as making African-American children inferior, so that the remedial task was to remedy the inferiority of those children. While his argument is provocative, it fails to account for other, more plausible, explanations of the Court's reasoning: that the reliance on stigma is necessary to rebut Plessy and to eliminate possible state justifications of segregation; that the Court views stigma as resting on prejudice, not reality; and that the school desegregation cases rest primarily on the general presumption against racial classifications, which in turn can be traced both to the original purposes of the Fourteenth Amendment and to American notions of merit and equal opportunity. Those explanations recognize that racial segregation in education harms both white and black children, though the

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84 Brown, supra note 34, at 6; see also Louis Michael Seidman, Brown & Miranda, 80 Cal. L. Rev. 673, 712-13 (1992) ("Symbolically, the assertion that black facilities were inherently unequal, that they could not be made equal regardless of the resources devoted to them, and that it did not matter how well students performed in them, implied that the mere nonexposure to whites deprived blacks of their rights."). Professor Seidman cites Malcolm X and Derrick Bell as making similar points. Id. at 712-13 nn. 124-25.

86 See Palmore v. Sidoti, 466 U.S. 429 (1984), where the Court overturned a state court decision divesting a white mother of custody of her child because she had married a black man. The state court had been concerned that the child would "suffer from the social stigmatization that is sure to come." Id. at 431 (quoting Petition for Cert. app. at 26-27). The Court ruled, however, that "the law cannot, directly or indirectly, give [private prejudices] effect." Id. at 433.
latter have generally been the target of segregation laws.\textsuperscript{87} They recognize the continuing existence of racial prejudice, without in any way implying that one race is inferior.

C. \textit{Stare Decisis}

A number of recent decisions have grappled with the role of \textit{stare decisis} in constitutional cases. Unlike statutory cases, where Congress may legislatively correct judicial error, the political branches must attempt to amend the Constitution if they wish to correct an erroneous Supreme Court interpretation of the Constitution. Accordingly, some Justices espouse an activist role of reaching out to overrule constitutional error\textsuperscript{88} while others take a more cautious approach, attempting to define circumstances when the Court should correct constitutional error.\textsuperscript{89} The opinion of the Court in \textit{Planned Parenthood v. Casey}\textsuperscript{90} reveals an approach to \textit{stare decisis} which may bear on the future vitality of \textit{Green} and \textit{Swann}, as well as \textit{Brown} itself. The Court mentioned several factors bearing on the deference to be accorded prior decisions construing the Constitution: workability, judicial competence, reliance, evolution of legal principles, and changed factual hypotheses. The Court applied these factors in deciding not to overrule the essential, central holding of \textit{Roe v. Wade}.\textsuperscript{91} Some of these same factors, however, formed the basis for the opinions of the three Justices abandoning \textit{Roe}'s trimester framework.\textsuperscript{92} It thus appears that the \textit{stare decisis} factors may dictate adherence to core principles while allowing reconsideration of "framework" issues. I will return to this question below, in asking whether either \textit{Brown} or \textit{Green} and \textit{Swann} are in danger.

\textsuperscript{87} See also \textit{Bell, supra} note 10, at 585 ("We can guarantee that black and white children receive the same education by educating them together.").

\textsuperscript{88} See, \textit{e.g.}, \textit{Webster v. Reproductive Health Servs.}, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

\textsuperscript{89} \textit{E.g.}, \textit{Payne v. Tennessee}, 111 S. Ct. 2597, 2618 (1991) (Souter, J., concurring).

\textsuperscript{90} \textit{112 S. Ct. 2791} (1992).

\textsuperscript{91} \textit{410 U.S. 113} (1973).

\textsuperscript{92} \textit{Planned Parenthood}, \textit{112 S. Ct. at 2818} (opinion of Justices O'Connor, Kennedy & Souter).
D. The Substructure of Antidiscrimination Law

As I noted in Race and the Rehnquist Court, antidiscrimination law has come to rest on assumptions regarding behavior and race and on remedial principles regarding effects of past discrimination and insurance against future discrimination. Erosion of these assumptions and principles would undermine this structure.

1. Race Neutrality and Assumptions Regarding Behavior and Race

How do we explain uncomfortable phenomena: that some schools are predominantly white, while others are virtually all African-American? Or that predominantly white schools often receive more local resources than African-American schools? Or the disparate output of the two sets of schools? Undoubtedly a variety of explanations might be offered, ranging from intentional discrimination by school authorities to chance. Between these two poles lie such factors as economic status, past discrimination by society reaching back to the days of slavery, cultural differences among groups, and voluntary choices as to place of residence. If plaintiffs prove disparity, should we assume the disparity arises from chance or from intentional discrimination, or from other factors? The Court holds that only intentional discrimination violates the Equal Protection Clause. Swann and Keyes established that, to prove intentional discrimination, plaintiffs must show more than racial imbalance in the schools; once intentional discrimination has been found, however, the school authorities have the burden of proving that racial imbalance was not the product of that discrimination.

Some recent decisions outside the school desegregation arena have reflected disagreement among the Justices as to the conclusions to be drawn from proof of racial disparities. Their views are internally inconsistent:

The Brennan wing assumes that, all else being equal, persons of one race will be just as qualified as persons of another race; yet, the same Justices assume that race brings unique qualifications to the electronic media. The Rehnquist wing assumes that formal equal opportunity has led (or can lead) to a society in which the race of

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83 Race and the Rehnquist Court, supra note 1, at 1300-09.
others does not affect our treatment of them, but may well affect their own conduct.\textsuperscript{85}

The recent school desegregation decisions reflect this tension. \textit{Green} and \textit{Swann} created a presumption that one-race schools were the result of the prior dual school system. Unless a school system could show that the racial imbalance stemmed from factors beyond the control of the school authorities, it would have to correct the imbalance. Justice Scalia’s opinions in \textit{Freeman} and \textit{Fordice} suggest an abandonment of that burden. Justice Kennedy’s opinion for the Court in \textit{Freeman} formally retains the burden while adding the wild card of proximate cause to the formulation.\textsuperscript{96} Both Justices believe that the likely explanation for the new racial imbalance in the schools lies in the freely-made choices of residence rather than in discriminatory practices that have long since been remedied. Other Justices, however, are not ready to abandon the presumption against one-race schools in formerly dual school systems.\textsuperscript{97}

Closely allied with these conflicting assumptions regarding race are conflicting views regarding racial neutrality. Busing is a race-based remedy. One view, the benign use approach, holds that at times, “to get beyond racism, we must first take account of race.”\textsuperscript{98} Another view—the colorblind approach—holds that race-conscious remedies are almost never appropriate.\textsuperscript{99} Both views lead to instrumental approaches to legal norms. Supporters of benign use tend to accept norms which benefit minorities. Proponents of absolute racial neutrality are suspicious of norms which

\textsuperscript{85} Race and the Rehnquist Court, supra note 1, at 1302.

\textsuperscript{86} Freeman v. Pitts, 112 S. Ct. 1430, 1447 (1992) ("The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.") (emphasis added).

\textsuperscript{97} Justice Souter seemingly placed on school authorities the burden to show that “there is no immediate threat of unremedied \textit{Green}-type factors causing population or student enrollment changes that in turn may imbalance student composition.” \textit{Id.} at 1455 (Souter, J., concurring). Justice Blackmun would require the district court to retain jurisdiction “until the school board demonstrates full compliance.” \textit{Id.} at 1456 (Blackmun, J., dissenting).


\textsuperscript{99} For example, Justice Scalia has stated: The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a nation such as ours—to classify and judge men and women on the basis of ... the color of their skin.

permit, require, or encourage breaches of neutrality.\textsuperscript{100} Justice Thomas’ opinion in Fordice may suggest yet a third approach. He argues that a state may operate colleges “with established traditions and programs that might disproportionately appeal to one race or another.”\textsuperscript{101} Thus, he assumes that cultural differences between the races might lead members of each race to prefer differing traditions and programs. Moreover, Justice Thomas would hold that maintenance of such traditions and programs with full knowledge of their racial impact does not constitute invidious race discrimination. His logic would lead to a distinction between racial identification of institutions, which results from benign reasons and is therefore permissible, and racial identification, which results from invidious reasons and is therefore impermissible. Justice Thomas’ formulation could bridge the gap between the benign use approach and the racial neutrality approach.

2. Effects of Past Discrimination

Does the basic principle that the perpetrators of unlawful discrimination must not only stop discriminating but must take affirmative steps to eliminate the effects of that discrimination remain vital? The disagreement between the benign use and racial neutrality theories is one cause of the mixed signals emanating from the Court on this question. On the one hand, it has subordinated that principle to values of racial neutrality and local governance.\textsuperscript{102} Several Justices have expressed concern over any standard which “effectively assures that race will always be relevant in American life . . . .”\textsuperscript{103} On the other hand, both Freeman and Fordice, as well as United States v. Paradise,\textsuperscript{104} insist that the reparative principle is of overriding importance. Dowell left unanswered the question whether a formerly dual school system that has become unitary is free to adopt a retrogression plan without scrutiny of possible reinstitution of effects of

\textsuperscript{100} See Race and the Rehnquist Court, supra note 1, at 1310-17.

\textsuperscript{101} United States v. Fordice, 112 S. Ct. 2727, 2746 (1992) (Thomas, J., concurring).


\textsuperscript{104} 480 U.S. 149 (1987) (upholding a federal court order to use racial criteria to overcome past history of race discrimination in employment practices).
past discrimination. If the Court were ultimately to answer affirmatively, Green and Swann would lose their logical moorings. Those cases depend on a duty to eliminate the effects of past discrimination. If a school system is free to reinstitute those effects, the initial duty to eliminate such effects would appear to be worse than futile, when one considers the disruption flowing from instituting and then rescinding a busing plan. Ironically, the path to destruction of this reparative doctrine would begin with reviving stigma as the evil addressed by Brown. If students do not experience stigma by attending a de facto one-race school, then the fact that twenty years ago the school had been de jure segregated would hardly seem to affect the perception of this generation of elementary school students. The effect of the past discrimination is not stigma, but segregation.

V. Application to Equal Educational Opportunity Issues

A. Desegregation of Elementary and Secondary Schools

1. Voluntary Desegregation

A dictum in Swann upheld the right of school authorities to take voluntary race-conscious steps to desegregate the public schools. One purpose of voluntary busing could be to avoid litigation claiming de jure segregation. Other purposes might include a desire, for educational reasons, to provide ethnic diversity in every school or a simple wish to avoid even de facto segregation because it is deemed harmful to children of all races. Given the modern Court’s general antipathy to some forms of race-conscious action, one might have wondered whether the Swann dictum was in jeopardy. The Court seems unlikely to bar voluntarily adopted busing plans. Several reasons support this conclusion. First, the Court’s decision in Washington v. Seattle School District No. 1 held unconstitutional a state anti-busing initiative that prohibited local school systems from adopting racial busing plans not constitutionally required. Second, the Court seems to treat public schools within a school district (or even within a state) as fungible; that is, differences among schools normally do not rise to a constitutionally significant level. That is the import of San Antonio


Independent School District v. Rodriguez,\textsuperscript{107} which upholds the Texas system of school finance notwithstanding marked disparities among school systems. And the Court has said as much in United States v. Fordice, when it distinguished elementary and secondary education from higher education, partly on the ground that “like public universities throughout the country, Mississippi's institutions of higher learning are not fungible ...”\textsuperscript{108} Thus, school assignments do not pose the zero sum problems that race-based employment and contracting practices pose. If this is true, neither race is disadvantaged by busing. Finally, voluntarily adopted busing plans are a well-embedded fixture in many school systems today. The pragmatism and Burkean traditionalism of Justices O'Connor, Kennedy, and Souter\textsuperscript{109} would lead to reluctance to disrupt school systems that have made that choice.

Busing arguably imposes stigmatic injury on African-American students. As Justice Scalia's opinion in Fordice argues, “[T]he insistence ... that [one-race] institutions not be permitted to endure perpetuates the very stigma of black inferiority that Brown I sought to destroy.”\textsuperscript{110} The Rehnquist wing has tended to assume “that race-conscious affirmative action stigmatizes the minority persons whom it is designed to help.”\textsuperscript{111} At least the moderate members of that wing, however, now seem unlikely to challenge a legislative determination by a local school board that a busing plan would help, not hurt, minorities.

2. Proof of Initial Violation

The Justices are firmly united in agreement on the core principle of Brown and in repudiating Plessy. But the Brown umbrella is broad enough to shelter conflicting views as to when the core principle has been breached.

\textsuperscript{107} 411 U.S. 1 (1973).
\textsuperscript{108} 112 S. Ct. 2727, 2736 (1992).
\textsuperscript{110} Fordice, 112 S. Ct. at 2752 (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{111} Race and the Rehnquist Court, supra note 1, at 1323.
Some Justices would hold that strong statistical evidence of racial disparity should shift the burden of explanation to the alleged discriminator. The logic of their position would lead to the conclusion that adoption of a student assignment system, having the natural and foreseeable consequence of racial imbalance, should shift to the school authorities the burden of showing a lack of discriminatory intent. Other Justices assume that racial disparities may well stem from factors other than discrimination by the school authorities. This assumption imposes on plaintiffs the difficult burden of proving intentional discrimination by school systems in states that did not require segregation at the time Brown was decided. The difficulty in meeting this burden has been clear since the time of Washington v. Davis and Village of Arlington Heights v. Metropolitan Housing Development Corp. Plaintiffs have successfully litigated few northern school desegregation cases. Those cases have required thorough and expensive development of facts. While the Supreme Court has lost none of its commitment to ending intentional racial discrimination, the Arlington Heights standards tend to delegate to the district courts discretion in weighing evidence of discrimination. Moreover, the application of the clearly erroneous rule to the finding of whether a defendant discriminated greatly enhances the power of the district courts.

3. Remedy

a. Initial Remedy

Outside the school desegregation arena, the Court has grown increasingly dubious about race-based remedies. Some Justices maintain that the Constitution is colorblind and worry that requiring or approving race-based remedies might, at worst, be constitutionally suspect or, at best, encourage voluntary race-based actions inconsistent with a general duty of racial neutrality. Those concerns may combine with doubt as to the efficacy of busing to lead the Court to uphold remedies that do not fully desegregate the schools. In the past, the Court has not been consistent on this point. In Davis v. Board of School Commissioners, the Court re-

versed a lower court ruling that failed to bring about the greatest degree of desegregation consistent with the practicalities, but the Court declined to hear other cases, leaving some one-race schools which arguably could have been desegregated. The regime of Green and Swann provides great discretion as to how desegregation is to be achieved; in that sense those cases establish standards rather than rules. Read literally, they establish a strict rule requiring one-race schools to be desegregated, however it is accomplished. The exceptions to that rule—that one-race schools need not be desegregated if the school authorities show that they do not result from past discrimination or that desegregation is simply impracticable—were in practice normally treated as very narrow. The reliance on effectiveness and practicalities in Green and Swann, however, sows seeds of self-destruction. Busing has not fared well in the public relations arena, despite its effectiveness in dismantling segregation in much of the South. If the Court sees it as an ineffective and impractical remedy, the "practicalities of the situation" would seem to dictate its abandonment. All these factors may, in combination with the growing tendency of the Court to prefer standards over rules, erode Green and Swann.

Another possibility, signaled perhaps by Missouri v. Jenkins, may be a growing preference for remedies short of busing. This could mean the use of non-coercive incentives, such as magnet schools. Such remedies are already permissible where they operate effectively to substantially reduce the racial imbalance in a school system. But how much racial imbalance will the Court tolerate in future magnet school plans? In Milliken II, the Court approved educational remedies for students in one-race schools where full desegregation was not feasible. Will the Court go further and allow educational remedies as a substitute for even feasible desegregation?

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117 Justice Powell later plaintively characterized Swann as "having laid down a broad rule of reason under which desegregation remedies must remain flexible and other values and interests be considered." Keyes v. School Dist. No. 1, 413 U.S. 189, 238 (1973).


b. Plaintiff Requests for Additional Relief

Swann held, and Freeman confirms, that desegregation orders are to remain in effect for some period of time to assure that the objectives of those orders—ending discrimination and curing its lingering effects—are actually achieved. Thus, one of the Court’s reasons for approving withdrawal of judicial supervision from areas where it was no longer needed was to allow the district court to “concentrate both its own resources and those of the school district on the areas where the effects of de jure discrimination have not been eliminated and further action is necessary in order to provide real and tangible relief to minority students.”\(^{120}\) While the plaintiffs are not entitled to yearly adjustments to ensure racial balance,\(^ {121}\) they are entitled to further relief if the plan does not eliminate the effects of past discrimination, or where the school authorities fail to comply in good faith. Indeed, Freeman found a duty of the school district to display “an affirmative commitment to comply in good faith with the entirety of a desegregation plan . . . .”\(^ {122}\)

c. Third Party Attacks on Relief

Some fear has been expressed that the recent decision in Martin v. Wilks\(^ {123}\) could undermine existing remedial orders of federal district courts in discrimination cases.\(^ {124}\) Whatever the basis of that fear in fair employment cases, attacks by non-parties challenging school desegregation relief as impairing the rights of white students have uniformly failed for two reasons, which appear to remain valid.\(^ {125}\) First, white students have no litigable interest in attending a one-race school or in avoiding busing.

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\(^{120}\) Freeman v. Pitts, 112 S. Ct. 1430, 1447 (1992).


\(^{122}\) 112 S. Ct. at 1450.


\(^{124}\) Owen Fiss has argued that Martin v. Wilks exposes the structural injunction to attack by non-parties and threatens the finality of the injunction. Owen Fiss, Address to American Association of Law Schools, Section on Remedies (Jan. 9, 1993). But see Joel L. Selig, Affirmative Action in Employment After Croson and Martin: The Legacy Remains Intact, 63 Temp. L. Rev. 1 (1990).

\(^{125}\) See, e.g., Bradley v. Pinellas County Sch. Bd., 961 F.2d 1554 (11th Cir. 1992) (recognizing a right to intervene to assert an interest in a desegregated school system). Bradley reviews the prior Eleventh Circuit cases, which deny intervention where the challenge to a desegregation plan is based on policy rather than constitutional reasons. See also Hoots v. Pennsylvania, 672 F.2d 1133 (3d Cir. 1982); Spangler v. Pasadena City Bd. of Educ., 427 F.2d 1352 (9th Cir. 1970).
Second, their generalized interest in not being subjected to an ill-conceived desegregation plan will almost always be adequately represented by the school authorities. Thus, Martin seems unlikely to pose a threat to desegregation orders. 126

d. Dissolution of Decree

Green said that "whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." 127 This implicit suggestion that a court should relinquish jurisdiction at some point is supported by Swann, which noted: "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by . . . Green . . . ." 128 The Court added that

once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system . . . [and] in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. 129

Thus, successful compliance with the busing injunction should lead at some point to some form of absolution. Typically, in the lower courts, this has taken the form of a declaration of unitariness followed by dissolution of the injunction. 130

As I have argued, 131 the declaration of unitariness is not a talismanic event. 132 The dissolution of the injunction is, however, of greater signifi-

126 But see People Who Care v. Rockford Bd. of Educ., 961 F.2d 1335 (7th Cir. 1992) (holding that other parties to a school desegregation suit may not alter a collective bargaining agreement over the objections of an intervening teachers union in absence of a finding of intentional racial discrimination).
129 Id. at 32.
130 See Retrogression Plan, supra note 1, at 811-13.
131 Id.
cance, since it may effectively signal the end of the district court’s supervision of the school district. *Freeman* now provides further guidance as to the rules governing dissolution.

*Freeman* could signal a gradual shift from the systemic approach of *Green* to the “atomistic” analysis that has marked the Rehnquist wing’s approach to race discrimination cases.\(^{138}\) *Green* and its urban cousin, *Swann*, recognized that the segregation laws created dual school systems—one set of schools for whites and one for blacks. All aspects of the system worked together in creating and perpetuating segregation and all such aspects must be eradicated. *Freeman* erodes this systematic approach while formally adhering to it. On the other hand, *Freeman* can be viewed as a very limited holding, affecting the status of DeKalb County schools in the courts, but not affecting their obligation to adhere to the Equal Protection Clause.

The DeKalb County School System had endured over twenty years of “judicial supervision,” a phrase fraught with negative implications. One consequence of its historical embrace of segregation had been a presumption that all of its schools, which enrolled students of one race in 1969, were de jure segregated and must become desegregated. Although the closing of black schools was a common desegregative technique in the late 1960s and early 1970s, DeKalb County’s experience is probably atypical. It closed all of its black schools and assigned their students to formerly white schools. Over time, the black population grew, and several formerly white schools became virtually all-black. Tracing the racial imbalance to past racial segregation would be difficult, at best. The district court found the school system had not caused the racial imbalance, which it characterized as “inevitable.”\(^{134}\) Thus, the case’s holding could be read as very narrow, inapplicable to the more common scenario of the retrogression plan represented by *Riddick* and *Dowell*. This is not a case where the Supreme Court assumed that racial segregation simply arose from natural, non-discriminatory causes. Rather, the Court relied on detailed dis-

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\(^{138}\) See Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 Mich. L. Rev. 1729, 1761 (1989). But see Justice Scalia’s complaint in *Fordice* that the Court had failed to apply an atomistic analysis: “It appears ... that even if a particular practice does not, in isolation, rise to the minimal level of fostering segregation, it can be aggregated with other ones, and the composite condemned.” United States v. *Fordice*, 112 S. Ct. 2727, 2747-48 (1992) (Scalia, J., concurring in part and dissenting in part) (emphasis in original).

\(^{134}\) See *Freeman*, 112 S. Ct. at 1440.
The district court findings that blockbusting (which by 1969 was illegal) was one cause, and that other, possibly more innocent causes, also contributed.\(^\text{135}\)

The district court in *Freeman* found a lack of unitariness with respect to assignment of faculty and staff and with respect to quality of education. The DeKalb County School System had failed to maintain racial balance of faculty and staff as required by *Singleton v. Jackson Municipal Separate School District*.\(^\text{136}\) DeKalb’s inputs, in terms of per pupil expenditures and teacher qualifications and experience, were lower for predominantly black schools than for predominantly white schools. The Supreme Court had no occasion to review these findings; however, it seems apparent that issues such as these may be the next to be brought to the Court. If school systems are not required to maintain racial balance of students once desegregation has been achieved, will the Court uphold a requirement that they maintain racial balance of faculty and staff? If disparate inputs alone fail to show a Fourteenth Amendment violation, will the requirement of equal inputs survive? If so, a kind of de facto separate but equal doctrine will apply to districts like the DeKalb County School System.\(^\text{137}\)

The broad holding of *Freeman*—that a district court has “the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations,”\(^\text{138}\)—rejects a rigid rule and embraces standards. The court of appeals had held that “a school system achieves unitary status only after it has satisfied all six factors at the same time for several years.”\(^\text{139}\) The Supreme Court stated, however, that “[t]he term ‘unitary’ does not confine the discretion and authority of the District Court in a way that departs from traditional equitable principles.”\(^\text{140}\)

This is a double-edged statement. It favors the school board because the

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\(^\text{135}\) Here, the Court mentioned racially disparate birth rates, growing job opportunities for blacks in DeKalb County, and easier freeway access to Atlanta jobs. *Id.*

\(^\text{136}\) 419 F.2d 1211 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970).

\(^\text{137}\) Professor Kevin Brown suggests that the Court should not relinquish jurisdiction so long as “the educational quality of schools attended by African-Americans is inferior to that of schools attended by whites,” because such disparities inculcate what he labels “the invidious value.” Brown, supra note 34, at 39. The invidious value is defined as the opposite of the value of racial equality, “and public schools cannot attempt to instill [such] a contrary belief.” *Id.* at 20.


\(^\text{139}\) *Id.* at 1442 (quoting *Pitts v. Freeman*, 887 F.2d 1438, 1446 (11th Cir. 1989)).

\(^\text{140}\) *Id.* at 1444.
district court had exercised its discretion to relieve the school system of some of the obligations of the prior decree. The opinion implies, however, that the district court could have properly exercised its discretion so as to maintain all prior obligations. The touchstone of this section of the opinion seems to be equitable discretion. Had the Court ruled for the plaintiffs, it would have followed that unitariness, and not discretion, would have been the touchstone of the decision. Instead of relying on a fixed legal construct such as unitariness, however, the Court instead asks whether the “district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution.”141 The Court recognizes that discrimination “may emerge in new and subtle forms after the effects of de jure desegregation have been eliminated.”142

Swann contained language to please both sides, and the same may be said of Freeman. Freeman probably would be read with Dowell to allow liberal dissolution of decrees without dissolving the underlying duty to ensure that racial imbalance in student assignments not be traceable to constitutional violations. The Court, however, has inserted an ambiguous and therefore potentially troublesome modifier, referring to imbalance not traceable “in a proximate way” to constitutional violations.143 The term proximate, of course, calls for the court to make policy choices and allows the court to determine that although a logical nexus exists, it is too far removed to be considered proximate. As Justice Scalia’s concurrence accurately points out, the Court has articulated the rule at a high level of generality, without giving detailed guidance to the lower courts. Justice Scalia apparently would place the burden of proving proximate relation-

141 Id. at 1445. The district courts are not, however, given untrammeled discretion. See, e.g., Lee v. Etowah County Bd. of Educ., 963 F.2d 1416 (11th Cir. 1992) (reversing summary judgment dissolving desegregation decrees where plaintiffs had proffered evidence of violations of the decrees).

142 Freeman, 112 S. Ct. at 1445. Professor Kevin Brown has argued that both Dowell and Freeman, in emphasizing good faith and assurance that the school system will not return to its former discriminatory ways, are focusing on the school system’s “attitude towards African-Americans. . . . In other words, the district must prove that it is no longer acting under an assumption that African-Americans are inferior when it formulates its policies and programs.” Brown, supra note 34, at 31. This argument stretches those cases considerably. Initial relief in those cases did not depend on proof that the school authorities treated African-Americans as inferior; why, then, should dissolution of the decree depend on such proof? Of course, if such proof were adduced, it would be pertinent to the question of dissolution. The cases, however, simply apply normal equitable principles in holding that the threat of recurrence of the original harm precludes dissolution of an injunction.

143 Freeman, 112 S. Ct. at 1446.
ship on the plaintiff, while Justices Souter, Blackmun, O'Connor, and Stevens would place the burden of proving lack of proximate relationship on the school authorities. As Justice Scalia also correctly observes, the party with the burden is most likely to lose because of the difficulty of proving what residential patterns would have been like absent the past discrimination.¹⁴⁴

4. Post-Dissolution Retrogression Plans

As long as a school system is subject to court supervision it is clear that it may not adopt a retrogression plan—a plan which increases racial isolation in the schools. This is so because such systems retain an affirmative duty to promote desegregation, a duty which other school systems are spared. What remains unclear is what standards should apply to a formerly dual system which has earned release from the court’s supervision and been declared unitary. Dowell reviewed such a plan but provided limited guidance because the opinion focused on the court of appeals’ error in applying the Swift & Co. standard¹⁴⁶ rather than on the general issue of the retrogression plan. Freeman provides more help. The Court required that a school system seeking release from the desegregation decree not only have implemented a plan which eradicates the vestiges of past discrimination, but also that the district have “an affirmative commitment to comply in good faith with the entirety of a desegregation plan.”¹⁴⁶ The language seems to infer that a school district manifesting an intent to adopt a retrogression plan, if freed from court supervision, will not be declared unitary. It would not be a far leap to conclude that a district adopting such a plan after the declaration of unitariness would thereby have committed a new violation. This approach, supported by other language in Freeman, constantly emphasizes the obligation to avoid segregation traceable to the past discrimination.¹⁴⁷

¹⁴⁴ See id. at 1452 (Scalia, J., concurring); see also Retrogression Plan, supra note 1, at 809.
¹⁴⁵ See supra notes 43-44 and accompanying text.
¹⁴⁶ Freeman, 112 S. Ct. at 1450. The Court also listed as a factor for the district court to consider “whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court’s decree . . . .” Id. at 1446.
¹⁴⁷ The Tenth Circuit, speaking of the related question of a plaintiff’s request for further relief, said that under Freeman, “what matters is whether current racial identifiability is a vestige of a school system’s de jure past, or only a product of demographic changes outside the school district’s
If a formerly segregated school system desegregated for a period of years may adopt a retrogression plan without scrutiny of possible reinstitution of effects of past discrimination, then Swann itself will have lost its underpinnings. On the other hand, Justice Marshall’s stigma approach would lead to a virtually permanent ban on one-race schools. Preserving the tailoring and reparative doctrines should be possible without unduly impairing the ability of local school systems to structure student assignments and without imposing some permanent racial balance formula. The Court could achieve this result by allowing school systems, declared unitary, to freely adopt new assignment systems, subject to challenge that the system either acted with discriminatory intent or reinstated effects of past discrimination. The case will then be like an initial violation case, with one important exception. Not only would proof of present discriminatory intent establish a violation, but so would a link with the discriminatory intent of the past dual system. The question would become who should bear the burden of proof.

Of course, the initial burden belongs to the plaintiff challenging school board action. Thus, the plaintiff should have the burden, at a minimum, of showing that the district has adopted a retrogression plan. At this point the burden should shift to the school district to show that, as Freeman puts it, the “racial imbalance is not traceable, in a proximate way, to constitutional violations.” That burden would be difficult to sustain where the retrogression plan returns particular schools or neighborhoods to their pre-desegregation condition. As Justice Thomas noted in his concurring opinion in Fordice, “if a policy remains in force, without ade-

control.” Brown v. Board of Educ., 978 F.2d 585, 591 (10th Cir. 1992). The court added that the good faith that would justify a federal court’s relinquishment of jurisdiction does not exist where a strong “possibility of immediate resegregation following a declaration of unitariness” exists. Id. at 592. Finally, even after a court relinquishes control over student assignments, a court with retained jurisdiction over other facets should disapprove the re-emergence of student segregation where “linked to a vestige of the past system.” Id. at 593.

Another possible question is whether the claim could be raised in the dismissed case or in a new action. Logically, it could not be raised in the dismissed case, because dismissal ended that case’s very existence. See Lee v. Talladega County Bd. of Educ., 963 F.2d 1426 (11th Cir. 1992), cert. denied, 113 S. Ct. 1257 (1993); see also Dowell v. Board of Educ., 782 F. Supp. 574, 579 (W.D. Okla. 1992) (“For any [post-dissolution] developments that Plaintiffs believe are discriminatory, they must bring a new action alleging a new constitutional violation . . . .”).
quate justification and despite tainted roots and segregative effect, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent." In other cases, the school system may seek to rely on a preference for neighborhood schools or magnet schools, justifying the retrogression. Dowell suggests that practicability might provide a justification. In other cases, the school system may seek to rely on a preference for neighborhood schools or magnet schools, justifying the retrogression. Freeman does not provide guidance as to whether such a showing would suffice. It does suggest that remoteness in time might be a factor but it is not clear why that should be the case where the plaintiffs have proved retrogression. Adoption of a retrogression plan need not be motivated by present discriminatory intent in order to offend the Fourteenth Amendment. If the plan reinstitutes the vestiges of the dual system, it is based on past discriminatory intent and the rule which should apply is the same as in the case of an initial violation: "[A]fter past intentional actions resulting in segregation have been established . . . . the burden becomes the school authorities' to show that the current segregation is in no way the result of those past segregative actions."

This approach is arguably unfair to school systems because it effectively makes it impossible for a school system in the duty class to join the non-duty class. Thus, formerly de jure segregated school systems which had successfully completed the transition to non-discriminatory unitary status

162 United States v. Fordice, 112 S. Ct. 2727, 2745 (1992) (Thomas, J., concurring). Justice Thomas' point is slightly different than mine; he is looking for present discriminatory intent while my suggested test looks to practices which restate the effects of past discriminatory intent.


164 Educational preference would not be enough to justify racially imbalanced neighborhood or magnet schools in a school district attempting to fulfill its initial duty to effectively desegregate a former dual system.

165 Keys v. School Dist. No. 1, 413 U.S. 189, 211 n.17 (1973). The Fifth Circuit, in a pre-Freeman case, ruled that plaintiffs challenging a retrogression plan bear the burden of proving that the school authorities adopted the plan with discriminatory intent. Price v. Austin Indep. Sch. Dist., 945 F.2d 1387 (5th Cir. 1991). The court agreed that the holding of a prior school desegregation case which had found and remedied a dual system in Austin was binding on the school authorities, but disagreed with the plaintiffs' contention that they reflected present discriminatory intent. The plaintiffs apparently did not argue, and the court did not address, the possible reinstallation of the effects of the past discrimination. Judge Wisdom, however, said that "retrogression [which] does not appear to have resulted from demographic changes" points "to the necessity for further desegregative efforts." Id. at 1322 (Wisdom, J., concurring). The Dowell district court on remand also required proof of present discriminatory intent but did not consider whether retrogression linked to vestiges of the prior dual system would constitute a fresh deprivation of equal protection of the laws. Dowell v. Board of Educ., 778 F. Supp. 1144 (W.D. Okla. 1991).
would retain a vestigial duty which other school systems would not have to bear. Therefore, similarly situated school systems would hold disparate legal obligations. This is a flawed argument, grounded on a wrong premise. In fact, the school systems are not similarly situated. The former dual system could reinstate vestiges of dualism by adopting a retrogression plan; the system which was never dual could not reinstate vestiges of a dualism that never existed. I would argue that the approach I have suggested recognizes both the value of local control and the mandate of avoiding the vestiges of past discrimination. The suggested scheme frees the school system from judicial supervision in all but two circumstances: present discriminatory intent and reinstatement of vestiges of past discriminatory acts. It lowers the stakes in proceedings to declare the school system unitary and dissolve the desegregation decree and therefore is likely to result in diminishing the number of school systems under active court supervision.

B. Alternative Systems of Education

Dissatisfaction with the public schools has led to proposals for radical change to our system of elementary and secondary education. While details of the proposals may differ, their core purportedly relies on the marketplace, rather than government regulation to ensure educational quality. Parents would choose schools and the state would subsidize those choices. Choice is sold as a cure for what ails American education, whether it be spotty quality, decreasing enrollments, or lessened public support. Various systems could accommodate choice. The freedom of choice plans, which Green effectively disapproved, were flawed because they offered a choice between black schools and white schools; the Court’s plea for “just schools” suggests that choice among schools not tainted by state discrimination might be approved. Efforts to provide such a choice include magnet school programs, so-called charter schools, and opportunities for attendance in neighboring school systems. One variant proposes providing some schools with an “Afrocentric curriculum” which would be intended to raise the self-esteem and educational achievement of black students. A

186 See, e.g., CAL. EDUC. CODE § 47805(a)-(g) (West 1992).
187 See Sonia R. Jarvis, Brown and the Afrocentric Curriculum, 101 YALE L.J. 1285 (1992). A variant on this would exclude white students (and even black females) from proposed all-male academies. The Constitutional difficulties with such a proposal are outlined in Drew S. Days III, Brown
more radical type of proposal would extend choice to a "private" school as well as a "public" one. The adjectives are enclosed in quotation marks because the nature of the program would render differentiating the public schools from the private ones more difficult. The state would likely refuse subsidies to any school which discriminates on account of race, but it is not clear how the state would identify such schools. Indeed, federal law forbids schools, both public and private, from engaging in racial discrimination against prospective or enrolled students.

If adoption of a subsidy plan leads to increased racial isolation, would the plan violate the Equal Protection Clause? This question might be asked first with respect to a school system with no history of past unlawful racial segregation and second as to a formerly dual school system. Let us suppose that a large city school system has not discriminated in the past. It adopts a choice plan or the state adopts a voucher plan which extends to all schools in the state. Through parental choice, some public schools become racially isolated; some private schools remain racially isolated. Under present caselaw, the Court would uphold such a plan unless challengers showed it was adopted with intent to bring about the segregation. Moreover, prior school board or legislative knowledge that the subsidy plan would likely increase racial isolation would not, standing alone, provide sufficient proof of such intent. Possibly some of the private schools formerly had racially restrictive admission policies or were established to provide white students with a haven from integrated public schools. Perhaps the vestiges of past discrimination doctrine would bar subsidizing those schools.

In most school systems, however, such "segregation academies" would be rare. Some schools may screen students who apply for admission. For example, a college preparatory school may require a high score on a stan-

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One issue associated with such subsidies is the Establishment Clause of the First Amendment, since many of the schools which would benefit from the state subsidies would be church-affiliated. This issue is beyond the scope of this Article.


See 42 U.S.C. § 1981(b) (1991), which legislatively repudiates the rule of Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Patterson would have withheld statutory protection against conduct occurring after the formation of the contract. While it was an employment case, Patterson's logic would have allowed racial discrimination by private schools in which minority students were enrolled. See Theodore Eisenberg, Civil Rights Legislation 594-95 (3d ed. 1991).
Standardized achievement test. Minority students may be disproportionately rejected from such a school. Another school might stress a bilingual, bicultural curriculum and reject students who speak only English; such a school would enroll a disproportionate number of minority students. A plan which thus increased racial isolation would threaten equal educational opportunity, as that phrase is conceived by many. Nevertheless, the Court insists on proof of invidious intent and assumes that racially disparate choices can be explained by factors other than racial discrimination. This would lead the Court to reject heightened scrutiny in an equal protection challenge to such a plan. The question would then be whether the standards which lead to rejection of minority students are rational. The change from fungible schools to schools that are designedly not fungible could lead the courts to apply more bite to that inquiry, since exclusion from distinctive schools is a greater deprivation than reassignments between like schools.

The analysis in a formerly dual school system may well lead to a more searching scrutiny. First, private schools in such a district are more likely to have been founded as segregation academies, so that racial disparities in them would be a vestige of past discrimination. Second, the subsidy plans are in essence freedom of choice plans which, according to Green, may be allowed only if they do not lead to racial isolation. Justice Scalia believes that freedom of choice removes all forbidden aspects of the dual system, but no other Justice has joined him on that point.

Formerly dual school systems, as we have seen above, can be divided into two groups: those declared unitary and released from federal judicial review and those still subject to a structural injunction. The former would claim that they should be treated identically to school systems with no history of discrimination. Dowell does not answer that question. The latter would have the burden of showing that the subsidy plan is consistent with an affirmative duty to promote desegregation.

VI. Conclusion

Brown and Swann were compromise opinions, papering over many differences of approach. Inevitably, those differences have now resurfaced and will have to be worked out as the courts’ attention shifts from issues of initial remedy in former de jure segregated school systems to issues of duration of remedy, duties of systems freed from the remedy, and the le-
gality of innovations in the educational system. The unanimous and wholehearted homage which all Justices pay to the holding of Brown does not translate into agreement as to Brown’s rationale. The wavering and splintered nature of the support for Green and Swann springs from at least two sources. First, those who read Brown to command colorblindness may find race-conscious remedies in conflict with that command. Second, those who read Green and Swann as no more than pragmatic responses to the period of massive resistance to school desegregation may conclude that the doctrine of those cases has served its purpose and may now be relegated to honorable retirement. Those cases stem in part from the Justices’ reaction to the intransigent failure of the deep South to comply with Brown. Not only is official resistance to Brown seen as ended, but most of today’s Justices joined the Court after Green and Swann. If the Court instead reads those cases as fulfilling a core constitutional mandate flowing directly from Brown, however, they will survive.  

To the extent that Swann is based on the systemic nature of school segregation and on the deeply rooted effects of dual school systems, it does fulfill Brown’s core mandate. To the extent that it flows from the exigencies of the moment, it is peripheral to that mandate.  

Brown recognized the constitutional right of the black plaintiffs. Except for a few failed attempts to expand the constitutional right to equal educational opportunity, most of the caselaw since Brown has concerned remedies. We may be entering the last phase of the remedial issue. Undoubtedly, many school systems will be released from federal court supervision in the next few years. It is too soon to predict whether we will see a resurgence of efforts to discover new ways of mounting federal constitu-

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161 No Justice remains from the Court that decided Green. Justice Blackmun is the sole survivor of Swann. See Exodus 1:8 (“There arose in Egypt a new pharaoh who knew not Joseph.”).

162 The “all deliberate speed” doctrine of Brown II arguably “disconnected the right violated from the remedy.” Mark Tushnet, Public Law Litigation and the Ambiguities of Brown, 61 Fordham L. Rev. 23, 27 (1992). If so, Green and Swann reconnected the right and remedy by articulating the principle that the scope of the violation determines the nature of the remedy.

tional challenges to denials of equal educational opportunity.\textsuperscript{164} Such efforts will have to face up to the Court’s incremental approach to change, its reluctance to turn its back on precedent, its distaste for structural remedies, and its general deference to local educational decision-making. They might attempt to build on the possible return to balancing, which would occur if the Justices of standards prevail over those of rules. What is missing at the moment is a new and persuasive theoretical framework to account for all these factors.

The shift from rules to standards may place more power in the hands of federal district judges. It marks a change from the era when the lower courts almost automatically imposed busing plans for fear of being overruled on appeal. If all a district court needs to find in order to dissolve the desegregation order in a case is good faith compliance and suppression of “proximate” vestiges of past discrimination, most school systems will soon be eligible for release. Their release will then bring forward the issue not resolved by Dowell: will a school district’s progress from the duty class to the non-duty class leave it with no further obligations with respect to neutralized but not eradicated effects of past discrimination?\textsuperscript{165} As noted above, an affirmative answer to that question destroys the foundations of Green and Swann.\textsuperscript{166} A negative answer would require the Court to define more precisely those effects and the continuing role, if any, of stigma.

Green and Swann did not explicitly depend on stigma or on notions of value inculcation. They addressed physical manifestations of the racially dual system, such as students, teachers, transportation, school construction, and extracurricular activities. The Freeman Court added a potentially significant factor: “the more ineffable category of quality of education.”\textsuperscript{167} If the Court returns to reliance on stigma in school cases, it will have to choose among several modes of analysis. Should stigma be inferred or proved? More particularly, should the Court infer stigma from one-race schools as Justice Marshall suggests or from the refusal to allow one-


\textsuperscript{165} See Shaw, supra note 119, at 60 (arguing that “[s]chool desegregation remedies have not eliminated the vestiges of segregation; at best, they may have neutralized or circumvented the effects of segregative actions”).

\textsuperscript{166} See supra p. 843.

\textsuperscript{167} Freeman v. Pitts, 112 S. Ct. 1430, 1441 (1992).
race schools as Justice Scalia suggests? If stigma must be proved, what proves it: intent to stigmatize or the victim's feeling of stigmatization?

Parties to cases involving equal educational opportunity should pay attention to the themes that animate the current Court's rulings. Bald efforts to overturn core Warren or Burger Court rulings seem doomed, at least in the short run. Prayers for structural relief such as busing, interdistrict remedial measures, or extra money for educational programs should emphasize the extent to which these have become entrenched in the American educational system and the disruptive effects of change in doctrine. Paul Dimond has persuasively suggested, however, that plaintiffs in future litigation might benefit from a restrained approach to remedy. A remedy which is forged in the political process is more likely to succeed, and the courts may be more willing to see the facts that constitute a violation if they are aware that massive structural relief is not the only proper remedial response. Mr. Dimond is also correct in suggesting that plaintiffs should return to broad and deep proof of racial discrimination, because a no-fault approach is supported neither by law nor by the American public. Where discrimination is shown, however, remedy is likely to follow.

What is the future of equal educational opportunity in the courts? As I suggested at the outset, the answer depends on what one means by the

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188 Another factor to consider is the extent to which the federal government influences judicial decision-making regarding equal educational opportunity. Brown followed the approach of the Solicitor General. After passage of the 1964 Civil Rights Act, the Departments of Justice and Health, Education and Welfare (and its successor, the Department of Education) took active roles in formulating policy. The Solicitor General proposed, in the Government's brief in Green, that desegregation plans should be judged by their effectiveness. Memorandum for the United States as Amicus Curiae at 3, Green v. County Sch. Bd., 391 U.S. 430 (1968). During the past 12 years, the government has gravitated toward less activism in promoting minority rights, while at the same time becoming more visible in resisting affirmative action, busing, and judicial supervision of school systems. The Department of Justice and Solicitor General under President Clinton can be expected to revise the Department's priorities, if not its legal positions.

189 See Joel L. Selig, Race in America: The Unfinished Business, 28 LAND & WATER L. REV. 345, 364 (1993) (arguing that recent cases have "not yet undermined the basic structure of school desegregation law," but that the retrogression plan presents "the most likely area of danger").

170 Professor Cass Sunstein has argued that the emerging Court is a Burkean traditionalist Court which is antagonistic to demagogic government, social engineering, and anything not honored by time. Such a view values stability as an independent good and fears that the unleashing of forces not tested by the past may lead to unanticipated results. Professor Cass Sunstein, Address to American Association of Law Schools Mini-Workshop on the Supreme Court (Jan. 6, 1993).

question. If equal opportunity means the end of racial isolation and the achievement of equal funding or outputs, the Court long ago gave a negative answer and nothing in current doctrine suggests that it is rethinking that answer. If equal opportunity means freedom from present intentional racial discrimination in the public schools, its future is secure. If it also means freedom from the lingering effects of past discrimination, its future hangs in the balance. If it has some other meaning, as yet undefined, prediction must await another day.