SCHOOL DESEGREGATION REMEDIES AND THE FAIR GOVERNANCE OF SCHOOLS

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INTRODUCTION

No Supreme Court decision is better known than *Brown v. Board of Education*¹ [*Brown I*], and none has had a more conflicting legacy. On one hand, *Brown I*'s declaration that intentional racial segregation in public schools is unconstitutional now commands overwhelming popular acceptance.² In this respect, *Brown I* may be the Court's proudest demonstration of the judiciary's capacity to catalyze social progress. On the other hand, *Brown v. Board of Education*³ [*Brown II*], the follow-up decision rendered a year later, was the progenitor of an unabating controversy concerning the proper remedies for unlawful racial segregation in the public schools. The debate has focused on busing,⁴ the most widely publicized judicial tool against unlawful segregation, and has spawned vigorous congressional attempts to withdraw the power of fed-

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The author would like to express his gratitude to the many teachers, colleagues, students, and other friends whose support and suggestions have been so valuable to this project. Special thanks go to Ron Allen, William Buss, Martha Chamallas, Robert Clinton, and Martha Minow for their insightful critiques of earlier drafts; to Jerry R. Parkinson, Iowa '85, for his exceptionally fine research assistance; and to the University of Iowa for an Old Gold Summer Fellowship.

¹ 347 U.S. 483 (1954).

² According to a February-April 1982 poll conducted by the National Opinion Research Center, 91% of white Americans polled and 95% of black Americans polled believe that black and white students should attend the same schools. *Opinion Roundup*, PUB. OPINION, Oct.-Nov. 1982, at 28. The trend in public opinion polls towards *increasing* public support for integration and *decreasing* support for affirmative desegregation remedies is reviewed in G. ORFIELD, *MUST WE BUS?* 108-18 (1978).

³ *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

⁴ The familiar use of the short-hand term "busing" to refer to racial balance remedies involving student reassignment is misleading in two respects. First, student reassignments for purposes of racial balance need not involve, in every case, additional requirements for public transportation. See *infra* note 65. Further, although a majority of school children in the United States use some form of public transportation to attend school, only three to five percent of the nation's school children are involved in desegregation-related busing. W. HAWLEY, R. CRAIN, C. ROSSELL, M. SMYLLIE, R. FERNÁNDEZ, J. SCHOFIELD, R. TOMPKINS, W. TRENT & M. ZLOTNIK, *STRATEGIES FOR EFFECTIVE DESEGREGATION* 8 (1983) [hereinafter cited as W. HAWLEY].

eral courts and administrative agencies to impose that remedy.⁵ Far from evoking public consensus on the Court's position, *Brown II* and its remedial progeny have embroiled the Court in a profound battle over the legitimacy of the federal courts' equitable powers.

The debate over the Supreme Court's endorsement of extensive busing remedies has encompassed a variety of complex issues, including the constitutional authority of courts to mandate the restructuring of public school systems,⁶ judicial competence to implement sensible busing remedies,⁷ the efficacy of busing to accomplish effective desegregation,⁸ and the degree of support within the minority community itself for remedies focused on busing, rather than on educational quality per se.⁹ Despite the breadth of this debate, the writings of supporters and critics of the Supreme Court's approach to remedies exhibit two complementary shortcomings. Supporters of busing often downplay the degree to which busing imposes significant burdens on the minority students for whose benefit it is implemented.¹⁰ For example, to the extent that mandatory busing accelerates white flight from formerly segregated school systems,¹¹ busing in such cases may only increase logistical burdens on minority students, without providing the benefits of genuinely integrated schooling. Conversely, critics of busing underplay the injury that minority students suffer from intentionally segregated public schools. For example, a conception of school desegregation remedies that focuses only on particularized aspects of educational quality for

⁵ In the 97th Congress, the Senate approved one antibusing jurisdictional proposal, S. 951, 97th Cong., 2d Sess. § 2, 128 CONG. REC. S1336-37 (daily ed. Mar. 2, 1982), but the bill died in House committee.

Busing opponents have succeeded, however, in curtailing federal administrative efforts to promote busing. On the history of congressional restrictions on the use of administrative enforcement procedures under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976 & Supp. V 1981), see *Brown v. Califano*, 627 F.2d 1221, 1226 n.26 (D.C. Cir. 1980).

On the unsuccessful efforts in 1982 to restrict the use of appropriations by the Department of Justice for bringing legal action to compel busing, see 38 CONG. Q. ALMANAC 385-86 (1982).

⁶ See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 117-33 (1977).

⁷ The criticisms of judicial competence are reviewed briefly in M. REBELL & A. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* 11-15 (1982).

⁸ See, e.g., L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 277-81 (1976).

⁹ See, e.g., Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 490-92 (1976).

¹⁰ On the relevance of remedial costs to the design of school desegregation decrees, see Fiss, *The Jurisprudence of Busing*, 39 LAW & CONTEMP. PROBS., Winter 1975, at 194, 195-97.

¹¹ See *infra* note 211.

black students, such as the dollar value of resources expended for their schooling, fails to take account of the intangible harms of segregated schooling.

Whether these weaknesses in the public debate over busing are attributable to the rhetoric of the Supreme Court's opinions is a question that defies satisfactory answer.¹² There is, however, little in the Supreme Court's jurisprudence to counteract either tendency. The Court has never stated precisely the benefits that busing or other remedies are supposed to yield in school desegregation cases or the harms that desegregation remedies are intended to relieve.¹³ For supporters of busing, the cases articulate no general standard for remedial success against which the relative costs and benefits of remedies other than busing can be assessed. For critics of busing, there is no explicit statement of remedial purpose as a reminder that institutionally modest remedies may be insufficient to implement the insight into racial inequality embodied in the holding of *Brown I*.

The central purpose of this Article is to fill this vacuum in the Supreme Court's remedial jurisprudence by fashioning a remedial theory against which the utility and legitimacy of busing, and of school desegregation remedies generally, can be assessed. The essential thesis may be stated as follows: Whatever the Supreme Court's original rationale, the Court's conclusion in *Brown I*—that racially separate schooling is inherently unequal—is correct because segregation imposes a system of unfair governance on minority students and parents. By "unfair governance," this Article refers to the systematic vulnerability of minority students in segregated school districts to discriminatory treatment by public school authorities. Where minority students are systematically vulnerable to hostile or insensitive treatment, the racial separation of schools effectively subjugates minority students in the competition for educational resources and deprives them of any basis for reasonable confidence in the evenhanded administration of their schools. Recognition of unfair governance as among the evils prohibited by the Constitution justifies both the Supreme Court's broad imposition of liability for remedying racial segregation in the public schools and its approval of institutionally burdensome remedies when such liability has been imposed.

¹² Professor Yudof emphatically faults the Court for inadequacies in public dialogue over racial justice in the schools. See Yudof, *Nondiscrimination and Beyond: The Search for Principle in Supreme Court Desegregation Decisions*, in *SCHOOL DESEGREGATION* 97, 115 (W. Stephan & J. Feagin eds. 1980).

¹³ The ambiguity in the theory of right and remedy underlying the school desegregation cases has not gone unnoticed. For a brief critical review of attempts to re-explain the cases, see generally Yudof, *supra* note 12.

Explicit recognition of the harm of unfair governance highlights, however, the Supreme Court's recurring ambivalence in weighing educational equality against state and local autonomy in political decision-making. Actual integration is so preferable a remedial goal under a fair governance conception of the harms of segregated schooling that it justifies busing across school district lines. The Supreme Court's disapproval of interdistrict desegregation remedies in *Milliken v. Bradley*¹⁴ [*Milliken I*], even when such a remedy was necessary to achieve actual integration, is thus at odds with the fair governance theory. Assuming *Milliken I* will not be repudiated, a critical judicial task is to fashion intradistrict desegregation remedies that respond to the harm of unfair governance as effectively as does the remedy of integration. The penultimate section of this Article considers what such remedies might be.

At this point in the history of public school desegregation, an inquiry into the justification for school desegregation remedies is likely to be motivated by something more than a desire to understand the debate over remedies more fully in the abstract. Further debate may yield consensus that busing is educationally or politically inappropriate, or Congress may, in any event, prohibit courts from ordering busing. Some choice will then need to be made among other remedial approaches unless judicial attempts to end racial segregation in the public schools are to be abandoned altogether. The fair governance conception of school desegregation offers such an underlying remedial theory upon which more fully reasoned court decisions may be fashioned.

I. THE SUPREME COURT'S PUZZLING REMEDIAL JURISPRUDENCE

A theory of remedial design should identify the harms that a judicial remedy is to rectify. Yet Supreme Court school desegregation opinions rarely discuss the harms of segregated schooling and almost never relate remedies the Court has approved to specific harms. Before articulating, in part II, a conception of the harms of segregated schooling not explicit in the cases, it is helpful to explore the limits of the Court's identification of the harms of segregated schooling.

A. *The Ambiguity of the Supreme Court's General Remedial Strategy*

The choice among conceivable school desegregation remedies should depend upon what such remedies are intended to accomplish. Familiar broad goals for legal remedies include retribution, compensa-

¹⁴ 418 U.S. 717 (1974).

tion, and deterrence. That is, the primary thrust of a particular remedy may be to punish a wrongdoer, to make the victim whole, or to prevent future wrongdoing by the particular wrongdoer (specific deterrence) or by potential wrongdoers in general (general deterrence). Although such goals are by no means mutually exclusive,¹⁵ the choice among them will certainly influence the remedial tools employed, both in kind and degree.

By negative implication, the Court eschewed punishment as a central remedial goal in *Brown II*,¹⁶ and school boards since have never labored under the threat of punitive damages for intentional segregative acts. Avoiding a punitive approach was appropriate for several reasons: the dubiousness of obtaining jury verdicts for punitive damages,¹⁷ the

¹⁵ Punitive and compensatory remedies both are typically expected to have deterrent value. In a loose sense, even the goals of punishment and compensation may seem to merge. Thus, the incarceration of a criminal may "compensate" the victim for mental anguish, and a victim, if compensated with damages, may believe the wrongdoer involved has been "punished." It is typical, however, not to view incarceration as primarily compensatory because it does not represent the performance of a duty owed to a victim personally. Likewise, we typically do not label as "punitive" a damages remedy in which the measure of damages is the compensation of the victim.

¹⁶ *Brown v. Board of Educ.*, 349 U.S. 294 (1955). The nonpunitive nature of the remedies sanctioned by the Court in *Brown II* is implicit in three elements of that decision. First, the Court approved equitable remedies, which ordinarily are not retributive in nature. *See id.* at 300. Second, the measure of the appropriate remedy articulated in *Brown II* is not a generalized social interest, but a "personal interest" of the plaintiffs in nondiscriminatory admission to public schools. *Id.* Finally, the Court instructed lower courts initially to rely on the good faith efforts of the school boards for the implementation of desegregation remedies. *See id.* at 299. Leaving school boards that had been adjudged guilty of purposeful discrimination with the "primary responsibility for elucidating, assessing, and solving" the problems of accomplishing school desegregation effectively, *id.*, is not a policy choice easily reconciled with any notion of punishing those authorities.

Of course, certain punitive tools, such as the enactment of criminal statutes, would have been beyond the Court's power in any event. Others may simply not have been requested by any plaintiff. The remedial aim of the plaintiffs in the cases consolidated in the first *Brown* decision, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), was not damages, but securing the admission of black children to formerly all-white schools, *see generally* R. KLUGER, *SIMPLE JUSTICE* (1976), and the questions assigned for reargument in *Brown II* involved the pace and logistics of such a remedy. *Brown II*, 349 U.S. at 298 n.2.

The availability of damage actions against government officials in their individual capacity for violating the constitutional rights of individuals was not clear until *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁷ If the preferred remedy for unlawful segregation had been damages, implementation would have depended on jury verdicts because the Constitution guarantees a jury trial in federal suits for damages amounting to more than \$20. U.S. CONST. amend. VII. Although, in theory, southern juries in federal courts might have responded to the Supreme Court's lead more willingly than other southern institutions, the history subsequent to *Brown II* of tenacious public and private resistance to desegregation demonstrates the wisdom implicit in the 1955 decision not to rely on juries to put teeth into the constitutional guarantee of equal protection. *See Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Griffin v. County School Bd.*, 377 U.S. 218 (1964);

Court's past approval of segregated schooling,¹⁸ and the greater resistance punitive remedies might have precipitated to implementation of the *Brown I* holding.¹⁹

Beyond avoiding retribution as a remedial goal, however, the Supreme Court's direction has been ambiguous. It opted for equitable relief, rather than compensatory damages, undoubtedly for the same

Cooper v. Aaron, 358 U.S. 1 (1958); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967); Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961). See generally J. WILKINSON, FROM *Brown* TO *Bakke* 78-127 (1979).

Even assuming cooperative juries, however, punitive damages could have posed intractable problems concerning the number of potential claimants and defendants. The magnitude of liability that might have been imposed on behalf of all minority children enrolled in public schools in the South in 1954 alone—putting aside, for the moment, potential suits by all then-living black graduates of such schools who could, with equal justice, have filed damages claims—would have been staggering and staggeringly difficult to manage. If states attempted to indemnify defendant school officials, for example, one can imagine the justifiable damages claims of minority students exhausting many state treasuries.

Additionally, if the Court had approved punitive remedies in school desegregation cases, the universe of potential offenders, that is, public school authorities and other government officials who had contributed to the establishment and maintenance of such systems, would have been vast. Indeed, we may be thankful that the Court did not endorse punitive damages because the specter of individual liability in school desegregation cases might have prompted the Court to be less vigorous in finding various forms of segregated schooling unlawful in the first place. The doctrinal extension of the first *Brown* decision, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), to the schools of the North and West might have been more problematic if such an extension had resulted in drastic remedies against particular school officials in their individual capacities.

¹⁸ The Court could reasonably have thought it unwise to sanction punitive remedies against school boards because of the degree to which its own past decisions had legitimated segregated public schooling. Although *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which the Court proffered its endorsement of the "separate, but equal" formula for fourteenth amendment analysis, was not a schooling case, the Court supported its use of the separate but equal standard for interstate public rail transportation by reference to the purportedly acceptable use of that standard to justify segregated schooling in Massachusetts, *id.* at 544-45, and the District of Columbia, *id.* at 545, 550-51.

The origins of the separate but equal formulation appear to lie in *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1850), a case upholding the segregation of Boston schools. In *Brown I*, the Court noted both the decision in *Roberts* and its reversal by state legislation in 1855. See *Brown v. Board of Educ.*, 347 U.S. 483, 491 n.6 (1954). On the dispute over segregated schooling in 19th century Boston, see L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 109-17 (1957); *SCHOOL REFORM: PAST AND PRESENT* 178-96 (M. Katz ed. 1971). On the continuing litigation over the desegregation of Boston schools, see *infra* note 215.

¹⁹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Effective implementation of the result in *Brown I* meant a drastic rearrangement of a social institution affecting the lives of millions of people and requiring, at a minimum, the "specific performance" by thousands of public officials of new constitutional duties. Without such a positive and, in some sense, cooperative undertaking by state and local officials, no amount of retribution could correct the core grievance presented in *Brown I*.

practical reasons it avoided the endorsement of punitive damages.²⁰ The Court has not clearly indicated, however, the aims of such relief. Only in recent years has the Court articulated a broad restorative purpose for school desegregation remedies: to restore the victims of discrimination to the position they would otherwise have enjoyed but for the occurrence of discrimination.²¹ This formulation fails to identify, however, the harms such remedies are intended to rectify.

To understand better the nature of the problem faced by courts deciding school cases, one might consider an example more trivial than school desegregation. Imagine two friends, one of whom breaks a treasured heirloom of the other's family.²² Imagine that an arbitrator of the victim's grievance determines that the remedy should be one that restores the victim to the position she would otherwise have enjoyed but for the breakage. Under one approach, the arbitrator may consider as the only relevant loss the destruction of the physical object. Restoration may thus be limited to the repair or replacement of the object or payment in compensatory damages. This would be the most narrow remedial approach because it would focus only on the loss most obviously embodied in an "objective" phenomenon, the breaking of a solid thing.

From the victim's perspective, however, such a remedy would not restore the victim to the position she would have occupied but for the accident. The victim's family has suffered grief, for which only an apology may be adequate relief. The victim may also have suffered mental distress, for which psychological counseling would provide a remedy. A remedy recognizing these additional factors would be restorative in that it aims chiefly to restore the victim's status quo ante. Such a remedy would be expansive, however, because of the wider scope of legally cognizable injuries it addresses.

Thus, in any given situation, a court's identification of losses or injuries might logically proceed along dramatically divergent lines with equally divergent implications for the proper design of remedies.²³ In

²⁰ Beyond the problems of manageability and enforceability discussed above with reference to punitive damages, compensatory damages would have presented the additional troublesome problem of measuring the losses inflicted by segregation on individual black plaintiffs.

²¹ See *Milliken v. Bradley*, 433 U.S. 267, 280 (1977).

²² Priceless heirlooms often provide useful illustrations of more broadly applicable legal points. For a telling use of the priceless heirloom example to demonstrate the disutility of foreseeability as a standard to establish the scope of a tortfeasor's liability in damages for particular harms, see Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1405-09 (1961).

²³ Professor Paul Gewirtz has recently elaborated a distinction between "Rights Maximizing" and "Interest Balancing" approaches to the evaluation of remedies that largely corresponds to the distinction drawn in this Article. See Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588-89, 591, 598-99 (1983). For a critical review of

the face of Supreme Court silence as to whether a narrow or expansive restorative approach is appropriate in desegregation cases, lower courts are unlikely to produce consistent remedial opinions.

The treasured heirloom example illustrates three critical ways in which the decisionmaker's conception of the cognizable harms will affect remedial design. First, the expansive approach is likely to include a greater variety of remedial tools. Some harms, for example, can be rectified through monetary compensation. Others are less amenable to compensation and require more imaginative relief.

Second, the narrow approach is less likely to reflect the victim's subjective perception of the harms suffered. It is more likely to relieve only those harms that are the most objectively measurable. This might be either because of the decisionmaker's lesser sensitivity to the less measurable, subjective harms the victim has suffered or because of institutional concerns (such as difficulties of proof) that the decisionmaker weighs more heavily than the victim's losses.

Third, a broader perspective on harms is likely to lead the decisionmaker to take a more expansive view of the role of deterrence in remedial design. Taking the heirloom incident again as an example, the arbitrator might award a memorial rather than a mere apology as relief if the aim is not only to restore the victim's immediate sense of well-being, but to assure a sense of well-being that will extend into the future. That the victim's status quo ante included no precisely equivalent honor would be less significant in the choice of remedies once the arbitrator's priority shifts to protecting the victim against a future recurrence of the sense of loss.

The Supreme Court's remedial formula says nothing specific about the importance of deterrence in school desegregation cases. This silence may reflect the Court's determination that deterrence is not a primary remedial goal in these cases. Alternatively, the Court may be assuming implicitly that deterrence is a primary aim, but one that is accomplished by restorative relief. For example, the Court may contemplate that, even if deterrence of future discrimination is a primary remedial goal, an injunction ending proven racially discriminatory practices in the public schools will be a sufficient deterrent.

Because the Court's remedial formula gives no clear direction on deterrence, the question arises whether lower courts should limit prospective injunctions to prohibiting only those discriminatory practices

modern developments in antidiscrimination law that plumbs the possible ideological significance of choosing a "victim perspective" or "perpetrator perspective" in legal disputes, see Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 96 (D. Kairys ed. 1982).

for which the plaintiffs have proved school authorities culpable. As the heirloom example illustrates, to the extent the Court's perspective moves closer to the victim's perspective on the appropriate protection of her interests in the future, such limited remedies will become less likely.

The critical ambiguity in the Supreme Court's decisions on school desegregation remedies is whether its remedial rationale is intended to be narrow or expansive in its recognition of and protection against the harms inflicted on minority students by segregated schooling. The Court briefly discusses these harms only in *Brown I*,²⁴ but this discussion does not link a theory of harms to specific guidance for remedial design. Several aspects of the Court's remedial decisions subsequent to *Brown II* imply that the harm to be rectified in school desegregation cases is only the state-wrought distortion in the intradistrict attendance pattern of formerly segregated schools. These aspects of the Court's remedial doctrine, however, are inconsistent with the expansive results of the post-*Brown II* cases. The Supreme Court has produced a body of cases that sanction substantial judicial interference in the policymaking of local school districts but which do not explicitly attempt to justify such broad intervention.

B. *Brown I and Ambiguities in the Supreme Court's Conception of the Harms of Segregated Schooling*

The ambiguity in the Supreme Court's conception of the harms to be remedied in school desegregation cases is rooted in *Brown I* itself, which contains the only extended Supreme Court discussion of the harms of racially segregated schooling. The decision did not discuss remedies but reached only the threshold conclusion that state-required or state-authorized racial segregation in public schools is unconstitutional and results in liability for *some* form of relief. *Brown I* is still the logical starting point for identifying the harms of segregated schooling that school desegregation remedies should attempt to rectify; the harms to be targeted by those remedies should be the harms that justify the conviction that segregated schooling is a violation of constitutional rights in the first place. Otherwise, it would be hard to justify as a legal matter the judicial imposition of those burdens that desegregation remedies create for defendants and, indeed, for plaintiffs as well.²⁵

The uncertainties of *Brown I* have been discussed at length else-

²⁴ 347 U.S. at 493-94.

²⁵ Cf. Fiss, *supra* note 10, at 194 (remedial orders should be based on determinations that discriminatory practices are sufficiently harmful to justify costs of remedies).

where, in numerous attempts to identify and assess the various propositions for which *Brown I* can stand. My interest in tracing out here the various conceptions of harm that have been frequently associated with *Brown I* will be limited to two points. First, none of these conceptions correlates very comfortably with the remedial strategies the Supreme Court has endorsed since the *Brown* decisions. Second, and more important, none of these conceptions entirely explains the central factual assertion of *Brown I*: "Separate educational facilities are inherently unequal."²⁶ I will argue that this assertion is true. The conceptions of harm typically associated with *Brown I* do not satisfactorily explain the assertion, in part because the conceptions are incomplete and in part because, over the thirty years since *Brown I*, our perceptions of the nature and significance of the harms of segregated schools have changed. A current remedial theory would have to regard the catalogue of harms cited in *Brown I* only as a starting point for analysis and take account also of subsequent research into the nature of racial inequality.²⁷

The harms often attributed to racially segregated schooling that are typically regarded as explicit or implicit in the *Brown I* decision include (1) interference with minority students' freedom of association, (2) the impact of segregated schooling on minority students' academic performance, (3) the impact of segregated schooling on the subsequent adult status and income of black students, (4) the harm of racial isolation, (5) the damaging psychological effect of segregation on black chil-

²⁶ *Brown I*, 347 U.S. at 495.

²⁷ *Brown I* could not, in any event, be expected to be as definitive or precise a statement of the harms rendering segregated schooling unequal as the search for sound remedial theory currently requires. First, it is a reasonable surmise that the harms of segregated schooling at issue in *Brown I* were so egregious and notorious that a mincing analysis in 1954 of what exactly made segregated schooling unequal might well have seemed superfluous and belittling of the enormous injury the Court finally saw fit to redress. Professor Black has persuasively written that the discriminatory purpose and impact of segregation in the southern regional culture were "matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world." Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960).

Further, *Brown I* was a political document. The Court was commanding a restructuring of social institutions more dramatic than had ever before been ordered by the courts. As author of the opinion, Chief Justice Warren was deeply concerned with articulating the Court's judgment in such terms and in such a tone as to win his colleagues' unanimous endorsement. See R. KLUGER, *SIMPLE JUSTICE* 679-99 (1976). It thus should not be surprising if, today, a comprehensive explanation of the constitutional rule in *Brown I* requires resort to certain factors not made explicit in the opinion. The sensitivity of the Court's decision may have counseled something less than a candid statement of the evils of segregation that led the Court to its constitutional judgment.

For a similar analysis of *Brown II*, see Gewirtz, *supra* note 23, at 611-12, 615.

dren, and (6) the objective insult to blacks that segregation represents. These harms are distinguishable from such "tangible" harms of resource inequality as may be present in individual cases, but on which the Supreme Court did not rest in reaching its *Brown I* judgment.²⁸

There is little doubt that the Supreme Court regarded the interference of segregated schooling with minority students' freedom of association as a significant harm. This is evident in a passage in *Brown I* referring to the value to black students of contact with white students²⁹ and is perhaps also implicit in the reference in *Brown II* to the necessity of guaranteeing the "admission [of black children] to public schools as soon as practicable on a nondiscriminatory basis."³⁰ It is clear, however, first, that the Court's post-*Brown II* endorsement of busing goes beyond rectifying this particular harm and second, that this harm is not a complete explanation for the "inherent inequality" of segregated schooling.

That the Supreme Court has gone beyond enabling blacks to attend schools of their choosing is evident in the Court's rejection, in *Green v. County School Board*,³¹ of so-called "freedom-of-choice" plans as adequate school desegregation remedies. Under such plans, school children were typically assigned to the schools they had previously attended, but they could transfer at will. The usual result was that a few black students in a formerly segregated district opted to attend previously all-white schools, but no white students opted to attend previously all-black schools.³² Although laws requiring or authorizing separate white and black schools were eliminated, public schools remained iden-

²⁸ The Court in *Brown I*, in explaining the unconstitutionality of segregation, did not rely on any inequality in the tangible resources that white public school authorities might afford to black and white schools. The Court articulated the issue before it as turning on "intangible" inequalities: "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." *Brown I*, 347 U.S. at 493.

Any resource inequality that might be present in an individual case would be a fact readily susceptible to particularized adjudication and would not explain the Court's conclusion in *Brown I* that separate educational facilities are "inherently" unequal. It is just as unlikely that case-by-case resource inequalities would persuasively justify the Court's expansive post-*Brown II* remedial results, given that such inequalities could seemingly be remedied through narrowly tailored injunctions requiring the equalization of specific resources.

²⁹ See *Brown I*, 347 U.S. at 493.

³⁰ *Brown II*, 349 U.S. at 300.

³¹ 391 U.S. 430 (1968).

³² See U.S. COMM'N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 45-69 (1969); U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-66, at 30-42, 51-52 (1966).

tifiably black or white.

It may be that social circumstances partly resulting from past segregation prevented blacks under freedom-of-choice plans from freely choosing to attend the schools they most preferred. Mandatory student reassignment might then have been necessary to guarantee the right of black students to a genuinely free choice. The Supreme Court in *Green*, however, refused to adopt or reject findings of fact that would have supported this possibility.³³ In at least one lower court case, *Norwalk CORE v. Norwalk Board of Education*,³⁴ black parents have been unsuccessful in asserting their children's right to attend neighborhood schools of choice in the face of an integration plan that school authorities voluntarily adopted and that required the busing of black children out of their neighborhood. The district court³⁵ and court of appeals³⁶ in that case correctly interpreted Supreme Court desegregation decisions as vindicating something other than free choice per se.

Aside from the inadequacy of a freedom-of-choice conception to explain the Supreme Court's post-*Brown II* decisions, the impact of segregation on blacks' freedom of association is not, when viewed in isolation, the most compelling possible explanation of the inherent inequality of racially separate schooling. As Herbert Wechsler has pointed out,³⁷ it is difficult in the abstract to identify a constitutional principle for choosing between a claim to free association by those who would have it and a claim to deny free association by those who would wish to avoid it.³⁸ The choice is difficult, that is, unless that fact of exclusion is assessed in a specific cultural setting that renders exclusion harmful for reasons beyond the fact of nonassociation itself.³⁹ If racial exclusion is unconstitutional, however, because of the particular impact of exclusion in a racist society, then there must be additional harms associated with racial exclusion that segregation imposes in such a society. These harms, in addition to exclusion per se, are then part of what renders segregated schooling inherently unequal.

In explaining its opinion in *Brown I*, the Court identified, at least

³³ 391 U.S. at 440 n.5.

³⁴ 298 F. Supp. 213 (D. Conn. 1969), *aff'd*, 423 F.2d 121 (2d Cir. 1970).

³⁵ See *Norwalk CORE*, 298 F. Supp. at 224-26.

³⁶ See *Norwalk CORE*, 423 F.2d at 124.

³⁷ Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

³⁸ *Id.* at 34.

³⁹ See Black, *supra* note 27, at 424-28; Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24-31 (1959). For an especially trenchant later critique of Wechsler, see Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 178-97 (1968).

implicitly, several harms beyond the impact on free association that segregated schooling inflicts on black children. These harms are the detrimental impact of segregated schooling on the academic performance and subsequent adult status and income of black students,⁴⁰ the harm of racial isolation,⁴¹ and the damaging psychological effect of segregation on black children.⁴²

The extent to which these harms may be traced directly to segregated schooling has been much debated since *Brown I* was decided. It is unlikely, however, that racially segregated schooling has not affected significant numbers of black children in these particular ways. Notwithstanding the social science controversies, public perception and disapproval of such injuries to minority students undoubtedly accounts for much of the consensus behind *Brown I*.⁴³ For purposes of our analysis, however, it is important again to make two points. First, a remedial

⁴⁰ The Court stated in *Brown I* that public education "is a principal instrument in . . . preparing [children] for later professional training In these days it is doubtful that any child may reasonably be expected to succeed in life if . . . denied the opportunity of an education." *Brown I*, 347 U.S. at 493.

⁴¹ In addition to asserting a relationship between public education and adult professional success, the Court cited the importance of public education in acclimating students to the mainstream culture. According to the Court, education "is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, . . . and in helping him to adjust normally to his environment." *Brown I*, 347 U.S. at 493. The Court went on to cite its opinions in *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), holding segregation unlawful in public higher education in part because students in higher education, in order to have a full education, must "engage in discussions and exchange views with other students." *Brown I*, 347 U.S. at 493 (quoting *McLaurin*, 339 U.S. at 641). These observations imply that, apart from its impact on future income or social status, racial isolation in public schools so depreciates the schooling experience as to render such isolation unconstitutional.

⁴² "To separate [minority students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494. The Court based this finding on the "modern authority" of a number of social science articles, *see id.* at 494 n.11, that have since been subjected to scholarly challenge. *See infra* notes 51-52 and accompanying text.

It is important to sort out two notions of what "stigma" might mean in the school desegregation context: first, the "subjective" internalization of insult; that is, the kind of psychological harm to which *Brown I* refers explicitly; second, the "objective" insult that intentional segregation represents irrespective of its psychological impact on the victim. *See infra* text accompanying notes 57-60. The opinion in *Brown I* articulates only the former conception.

⁴³ *See supra* note 2. Professor Dworkin has argued, however, that, even if such injuries to black students are prevalent, such a theory would not fully explain the constitutional command to desegregate because individual students should still be able to prove under a "harm theory" that segregated education provides them, in particular, with a more effective educational opportunity. *See Dworkin, Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, in *EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS* 20, 26 (R. Rist & R. Anson eds. 1977).

theory based exclusively on any of these harms does not fit comfortably with the Supreme Court's post-*Brown II* doctrine.⁴⁴ Second, none of these harms captures the full force of the assertion that segregated schooling is inherently unequal.

Doctrinally, the threshold difficulty with reconciling a remedial theory based on this list of harms with later Supreme Court decisions is that such a theory would not account for the Court's adherence to the de jure/de facto distinction as a key element in its constitutional analysis. One reason for this difficulty may be that the Court, although dealing with intentionally segregated schools in *Brown I*, did not consider whether the intentionality of racial segregation was of constitutional significance. The opinion condemned "separate educational facilities" without reference to the causes of the racial separation. Nevertheless, the *Brown I* opinion implicitly confirms at least that the Court was not thinking about the application of its holding in de facto settings,⁴⁵ and more recently, the Court explicitly has stressed intent as the touchstone of legal liability. Despite the urgings of Justices Douglas and Powell⁴⁶ and scholarly invitations to abandon the distinction,⁴⁷ the Court retains the doctrine that intentional segregation is unlawful but that adventitious racial separation in public schools is not.⁴⁸

⁴⁴ *Id.* at 25-26.

⁴⁵ The facts of the cases consolidated for decision in *Brown I* made resolution of this point unnecessary. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3, 3-4 (1974). A footnote to the Court's opinion implies, however, that an 1855 Massachusetts act outlawing segregated schooling in the state accomplished for segregated Boston what *Brown I* was intended a century later to accomplish for the South. The footnote suggests that the Court was thinking of *Brown I* as dealing with de jure segregation only. See *Brown I*, 347 U.S. at 491 n.6.

⁴⁶ See *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 214-16 (1973) (Douglas, J., concurring); *id.* at 219-25 (Powell, J., concurring in part and dissenting in part).

⁴⁷ The abandonment has been urged not only because racial imbalance may be equally harmful in all settings, see Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W. RES. L. REV. 502, 503-12 (1965), but also, it is argued, because responsibility for the fact of imbalance can justly be attributed to the government in every case, *id.* at 512-15; Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 583-88 (1965); Comment, *School Desegregation After Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421, 440-47 (1972). Professor Fiss notes, however, that such an attribution involves a "nonaccusatory theory," which, unlike the Court's current rhetoric, does not attempt to predicate liability on the "wrongfulness" of the state's acts. See Fiss, *supra* note 45, at 29-31.

⁴⁸ The de facto/de jure distinction is not compelled by the constitutional interpretation that limits the reach of the fourteenth amendment to "state action." The Civil Rights Cases, 109 U.S. 3 (1883). Justice Douglas has argued that a state's control and support of its system of public education brings that system wholly within the purview of the fourteenth amendment. See *Milliken v. Bradley*, 418 U.S. 717, 758-59, 761 (1974) (Douglas, J., dissenting). Implementation of the distinction does, however, advance one of the goals that the state action doctrine serves, namely, preserving a realm

Putting aside the social science debate concerning whether racially separate schooling has a significant adverse impact on the academic performance of black students or on their adult income and status, it is unlikely that these detrimental impacts of segregated schooling would depend upon the intentionality of the segregation. Likewise, whatever harm is wrought by racial separateness per se would not seem to depend in any degree on the purposefulness of segregation. If racial isolation injures black students by depriving them of contact with the majority culture or of the opportunity to interact with people of a different racial background, such injuries occur whatever the cause of their isolation.

It may be that intentional segregation works a more detrimental harm than does de facto segregation in terms of damaging the personality development of black children because purposeful segregation is a more powerful and therefore more readily internalized white statement of black inferiority. Even if the statutory enactment of segregation in the South could simply be assumed to have had a greater psychological effect on black children than de facto segregation, however, it is not plausible to suggest that the tacit, subtle manipulation of attendance patterns that the Court has condemned in cases outside the South inflicts damage on the personalities of minority children that de facto racial segregation does not. If internalized psychological harm were truly the crux of the Court's conclusions, it would be difficult to understand the Court's continued adherence to the de jure/de facto distinction in school desegregation cases.⁴⁹

A remedial theory addressing only these putative injuries not only fails to account for the de jure/de facto distinction, but like the freedom-of-choice conception, it inadequately explains the inherent ine-

of private activity that need not conform to constitutional norms. For example, the Court's unwillingness to sanction school board acquiescence in private choices to live in racially separate neighborhoods undoubtedly makes it more likely that school boards will not act to counter those choices.

⁴⁹ One response to these observations is that the Court's adherence to the de facto/de jure distinction is unrelated to the theory of harms underlying *Brown I* and should be understood instead as serving the purpose of conserving judicial resources. Any judicial economy rationale, however, turns out to be flimsy or irrational in practice. For example, at the remedial stage, cases of intentional segregation are not more manageable from a judicial standpoint than de facto cases would be, and they surely are less manageable as a matter of proof at the stage of establishing the constitutional violation. Nor is there reason to think that abandonment of the distinction would open the proverbial floodgates to greater numbers of desegregation cases than may now be legitimately filed under the current rules for proving intentional segregation. The de jure/de facto distinction is thus not defensible on grounds of judicial economy. The distinction would be most compelling if *Brown I* were explainable at least partly with reference to a harm from intentional segregation associated with the purposefulness of government discrimination.

quality of racially separate schooling. There exist both empirical uncertainties regarding the harmful effects of racially separate schooling in each of these respects and normative problems raised by asserting that single-race schools are harmful per se.

As an empirical matter, for example, no consensus exists as to a correlation between segregated schooling and student achievement or adult "life chances." There is only inconclusive support for theories that desegregation improves minority children's cognitive skills or those noncognitive work characteristics valuable in adult life.⁵⁰ The weakness

⁵⁰ Most of the research on the effects of desegregation has focused on the impact of desegregation on the academic achievement of minority students as measured by performance on standardized tests. It has been estimated that, as of 1978, there were already as many as 200 such studies "[e]ven after the inadequate studies and those that duplicate other reports are eliminated." Crain & Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW & CONTEMP. PROBS., Summer 1978, at 17, 23.

Although the substantive and methodological issues raised by these studies defy easy summary, it is helpful to note the general conclusions reached by some major reviewers of the literature. Nancy St. John reviewed 68 studies on academic achievement and found a relatively small number of studies of sufficient methodological soundness to warrant serious consideration. She also concluded that the results of the well-designed studies were so mixed that there was insufficient evidence from which to draw any reliable conclusions about the effects of desegregation on minority students' academic achievement. See St. John, *The Effects of School Desegregation on Children: A New Look at the Research Evidence*, in RACE AND SCHOOLING IN THE CITY 84, 87-88 (A. Yarmolinsky, L. Liebman & C. Schelling eds. 1981); see also Edmonds, *Effective Education For Minority Pupils: Brown Confounded or Confirmed?*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 109 (D. Bell ed. 1980) (arguing, in light of the same conclusion St. John reaches, that desegregation planners should focus not on racial balance per se, but on establishing those school characteristics that have been proven effective in improving all pupil performance).

Others have drawn a different picture based on the same material. Weinberg, after a review of essentially the same studies as those analyzed by St. John, concluded that, even though a significant number of studies found no effect or a mixed effect of desegregation on minority student achievement, "overall, desegregation does indeed have a positive effect on minority achievement levels." See Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 LAW & CONTEMP. PROBS., Spring 1975, at 241, 268. Weinberg qualified his conclusion, however, by noting reservations about methodological problems inherent in many of the studies, and concedes that some of the studies' results may be attributable to factors other than racial desegregation, such as the students' socioeconomic backgrounds, which may affect academic achievement. *Id.* at 243, 268.

Crain and Mahard reviewed 93 studies of the effect of desegregation on minority achievement and concluded, "[D]esegregation is indeed beneficial, although it must begin in the earliest grades." Crain & Mahard, *Minority Achievement: Policy Implications of Research*, in EFFECTIVE SCHOOL DESEGREGATION 55, 76 (W. Hawley ed. 1981). Despite serious methodological problems that the authors recognized in much of the research, Crain and Mahard concluded that the "methodologically strongest" studies, especially those made of students "desegregated at either kindergarten or first grade," showed consistent positive results. See *id.* at 63. Crain and Mahard would not assert, however, that the available evidence supports the conclusion that desegregation beyond "the early primary grades" has positive effects on achievement. *Id.* at 76.

Even more controversial than the relationship between desegregation and minority

in the data may, of course, reflect the limitations of social science, rather than the actual relationship between segregated schooling and adult income or status. If the aspiration of our inquiry, however, is to identify a firm basis for the result in *Brown I* and for a consequent remedial theory, reliance on an educational performance or "life chance" hypothesis cannot fulfill this aspiration. Similarly, the data on the impact of segregation on personality are inconclusive.⁶¹ Such data

test scores is the assertion of any significant relationship between improvement in test scores and the "adult life chances" of minority students. It appears that the effect test scores have upon a person's eventual income and occupational attainments is nominal at best. See Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 39 LAW & CONTEMP. PROBS., Spring 1975, at 217, 227-29. Levin's review of the studies of the relationship between test scores and income and occupational attainments indicates that "at most only about 10 per cent of the differences in income can be explained by test scores, leaving 90 per cent or more to be explained by other factors," and test scores explain at most "about 25 per cent of the variance" in occupational status. See *id.* at 229.

There are a variety of possible explanations for the lack of relationship between test performance and adult success. First, notwithstanding that studies of cognitive development tend to focus on standardized tests, there are "serious questions about whether the standardized achievement test is the correct measure of cognitive outcomes." Crain & Mahard, *Desegregation and Black Achievement*, *supra*, at 25. Levin further surmises that "nongognitive educational outcomes" such as "dependability, subordination to authority, respect for rules, and internalization of work norms" may have more of an influence on adult success than cognitive outcomes of schooling. Levin, *supra*, at 229-30. There is virtually no research, however, on the impact of desegregation on such nongognitive characteristics.

A key reason why no sufficient evidence exists from which reliable conclusions may be drawn concerning the relationship of desegregation to the life chances of minority students is the paucity of research on the long-term impacts of desegregation. *Id.* at 218-21; McPartland, *Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary and Secondary Schools?*, 42 LAW & CONTEMP. PROBS., Summer 1978, at 108, 109. McPartland states that the studies of such long-term consequences that do exist are generally "derived either from very small . . . or unrepresentative samples, or from data that are out of date," and concludes that "major new data collections will probably be needed to make real progress" on this issue. See *id.* at 132; see also McPartland & Braddock, *Going to College and Getting a Good Job: The Impact of Desegregation*, in EFFECTIVE SCHOOL DESEGREGATION 141, 152 (W. Hawley ed. 1981).

⁶¹ In *Brown I*, the Court attributes its finding as to the impact of segregated schooling on personality to seven books and articles, see *Brown I*, 347 U.S. at 494 n.11, all but one of which were brought to the Court's attention by the appendix to the black appellants' briefs filed in *Brown I* and reprinted in *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427 (1953) [hereinafter cited as *Effects*] (reprint of appendix to appellant's briefs to *Brown I*). The additional source, a chapter of a report edited by Witmer and Kotinsky, PERSONALITY IN THE MAKING ch. VI (H. Witmer & R. Kotinsky eds. 1952), is, according to Dr. Kenneth Clark, largely a summary of Clark's White House Conference manuscript on the personality effects of prejudice and discrimination, to which the appellants' appendix referred. See Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224, 227 (1959-60).

Although Dr. Clark, among others, has vigorously defended the potential role of social scientists in school desegregation cases against criticisms based on *Brown I*, see

afford only a weak justification for regarding segregated schooling as inherently unequal. Moreover, it is doubtful that racial isolation deprives black students of sufficient knowledge of the majority culture to acquire healthy notions of citizenship, proper moral development, normal environmental adjustment, or adequate preparation for adulthood, even in a racially mixed society. Even on the prejudiced assumption that exposure to majority values is somehow necessary to achieve these ends, there is no reason to suppose that minority students educated in segregated schools are not educated in majority values. Indeed, it might

id., apparently no social scientist now argues that the studies cited in *Brown I* provide an adequate empirical basis for an assessment of the impact of segregated schooling on personality development. Indeed, the White House Conference report published by Witmer and Kotinsky stated in 1950 that there did not then exist "thoroughly satisfactory methods of determining the effects of prejudice and discrimination [generally] on health of personality." PERSONALITY IN THE MAKING, *supra*, at 139.

The studies cited in *Brown I* have been challenged both for inadequacy in experimental design, *e.g.*, Gregor, *The Law, Social Science, and School Segregation: An Assessment*, 14 W. RES. L. REV. 621, 622-23, 626 (1963), and for a failure even to attempt to isolate segregated schooling as the causal factor for any personality developments identified. "The main theme of that evidence was that Negro children, from a very young age, are sensitive to and strongly affected by prejudice and discrimination generally. None of the empirical studies brought to the Court's attention . . . even purported to isolate the effects of public school segregation *per se* . . ." Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 279 (1972).

The research since the early 1960's concerning the effects of *desegregation* on personality development is also inadequate in determining the impact of segregated schooling on personality health. One reviewer of the literature concludes, "[I]t is virtually impossible to determine with certainty whether or not desegregation has short-term or long-term beneficial or harmful effects on minority students' self-esteem, aspirations, or motivation." Epps, *Minority Children: Desegregation, Self-Evaluation, and Achievement Orientation*, in EFFECTIVE SCHOOL DESEGREGATION 85, 95 (W. Hawley ed. 1981). See also Cook, *Social Science and School Desegregation: Did We Mislead the Supreme Court?*, 5 PERSONALITY & SOC. PSYCHOLOGY BULL. 420, 423-26 (1979); St. John, *supra* note 50, at 90-92; Stephan, *School Desegregation: An Evaluation of Predictions Made in Brown v. Board of Education*, 85 PSYCHOLOGICAL BULL. 217, 226-28 (1978).

In any event, the relative emphasis on stigma in *Brown I* may well reflect something other than the Court's determination that psychological harm really was the wrong at issue in *Brown I*. An obvious aspect of the rhetoric in *Brown I* is the Court's attempt formally to cast that decision as comfortably as possible in the doctrinal mold of earlier cases. The Court does not, for example, overrule the separate but equal rule of *Plessy v. Ferguson*, 163 U.S. 537 (1896), but finds instead, in the context of public schooling, that separate education is inherently unequal. To cast its argument in this mold, however, the Court had to deal with the *Plessy* Court's rejection of the argument that segregated train transportation was unequal because of the stigma imposed on black passengers. The relevant passage from *Plessy* (163 U.S. at 551-52) is among the most ignominious in the Court's history; but rather than dismissing it, the Court chose instead to deal with *Plessy* by explaining that "psychological knowledge" as to stigma had changed since the 1890's. See *Brown I*, 347 U.S. at 494. How critical this response to *Plessy* was to the result in *Brown I* may, however, be doubted, especially given the weakness of the data cited in *Brown I*. See Goodman, *supra*, at 278-83.

be supposed that segregated schooling was implemented in part precisely to inculcate black students with majority cultural values hostile to them. Finally, there is no strong support for the hypothesis that desegregation produces racial interactions that promote adult friendship or reduce adult racial conflict; thus, the absence of such contacts in childhood may not be firmly regarded as harmful on these bases.⁵² In short, the proposition that racial isolation is inherently harmful is very much unproven by empirical evidence.

There are also philosophical objections to the proposition that all-black schools are inherently harmful. Black educators and political leaders have voiced opposition to the implications of the suggestion that black children will be better off if integrated with white students in school.⁵³ Several predominantly black schools have been noted for

⁵² The paucity of useful research on the relationship between desegregation and race relations is widely noted. "Reading this literature leaves one impressed with how little is known and how much additional research . . . is needed." McConahay, *The Effects of School Desegregation Upon Students' Racial Attitudes and Behavior: A Critical Review of the Literature and a Prolegomenon to Future Research*, 42 LAW & CONTEMP. PROBS., Summer 1978, at 77, 100. See also Cohen, *The Effects of Desegregation on Race Relations*, 39 LAW & CONTEMP. PROBS., Spring 1975, at 271, 297-98; Cook, *supra* note 51, at 430-31; St. John, *supra* note 50, at 93. In addition, the reviewers of the literature in this area decry the methodological weaknesses in the research that is available. E.g., McConahay, *Reducing Racial Prejudice in Desegregated Schools*, in EFFECTIVE SCHOOL DESEGREGATION 35, 36 (W. Hawley ed. 1981) ("[T]he literature is a methodological cesspool.").

Some authors have offered broad—and conflicting—generalizations on the issue. See, e.g., McConahay, *supra*, at 36 ("[W]hile desegregation [has] not produced a situation in which race is irrelevant, there [are] more amicable interracial contacts and friendships than one could have expected under segregation."); Stephen, *supra* note 51, at 217 ("[D]esegregation generally does not reduce the prejudices of whites toward blacks" and "desegregation leads to increases in black prejudice toward whites about as frequently as it leads to decreases."). Despite such statements, the general consensus among the reviewers is that it is "impossible to draw any firm conclusions" from the available research. *Id.* at 224. In addition, it is apparent that there are simply no reliable studies of the long-term impact of desegregation on racial attitudes and behaviors, so even the tentative conclusions drawn by some of the authors "apply, at best, to the short-term effects of desegregation." *Id.* at 234.

One author's statement, made in 1975, about the state of the available evidence is still true today:

In some instances desegregation of the schools appears to have improved the self-images of racial minorities and racial attitudes of both majority and minority students; in other cases there seem to have been no effects, or even negative ones. One of the basic problems that pervades this research is the questionable reliability and stability of any measure of human attitudes.

Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 39 LAW & CONTEMP. PROBS., Spring 1975, at 217, 231 (footnotes omitted).

⁵³ See, e.g., Bell, *A Model Alternative Desegregation Plan*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 125, 125-27 (D. Bell ed. 1980); Day, *The Case for All-Black Schools*, in EQUAL EDUC. OPPORTUNITY 205 (Harv. Educ. Rev. ed. 1969).

achieving exceptional student performance.⁵⁴ At least one commentator asserts that the sense of self-esteem and confidence that may proceed from an ethnocentric public education under black community control will facilitate successful interracial contacts in adult life and prepare students to assume roles of power in their own communities.⁵⁵ The assertion that racial isolation is "bad," therefore, erroneously implies that black political autonomy has no positive value.⁵⁶

In sum, segregated schooling may well be harmful to personality development and adult life chances, and it may be harmful in terms of racial isolation per se. Empirical and, in one respect, normative doubts about the scope of these harms, however, in addition to the difficulty of reconciling a theory of *Brown I* based on these harms with the de jure/de facto distinction in later cases, prompt further inquiry toward a more compelling conception of the inherent harms of segregated schooling.

In part because it is difficult to maintain a theory of current desegregation remedies based on any causal hypothesis linking segregation to a measurable harm, it might be suggested that *Brown I* rests on an abstract conception of stigmatic harm distinct from any observable impact on black students. Such a view rests not on a correlation of segregation and harm, but on shared understandings of the meaning of segregation in contemporary American society; that is, on an "objective" conception of stigma. According to the objective stigma theory of harm, an intentionally segregative act might result in an unjustified inequality because the act imposes solely on the minority race a label of inferiority or undesirability that is objectively insulting and degrading to the minority group.⁵⁷

⁵⁴See, e.g., Sowell, *Patterns of Black Excellence*, 43 PUB. INTEREST 26 (Spring 1976); Sowell, *Black Excellence—The Case of Dunbar High School*, 35 PUB. INTEREST 3 (1974).

⁵⁵Maynard, *Black Nationalism and Community Schools*, in COMMUNITY CONTROL OF SCHOOLS 100 (H. Levin ed. 1970).

⁵⁶See generally Hamilton, *Race and Education: A Search for Legitimacy*, 38 HARV. EDUC. REV. 669 (1968).

⁵⁷The use of the word objective, derived from its common use in tort law, to describe this theory of harm may seem problematic. The identified harm is intangible and is not associated with a verifiable impact on any victim. The injury, as a consequence, is a matter of normative, not sensory perceptions. This notion of stigma is objective, however, in the sense that it relies on the legitimacy, in contemporary American society, of law imputing to the "reasonable person" the normative view that labels of racial inferiority are wrong. As a consequence, courts may regard segregation as universally injurious without regard to the views of particular individuals whose normative perceptions actually differ from the view that the law treats as shared by all.

That the Court's condemnation of segregation represents an interpretive judgment that segregation is unjustifiable, rather than a causal judgment relating the phenomenon of segregation to particularized injuries to blacks, is suggested by the Court's use of

The objective stigma theory is compatible with the doctrine of *Brown I* and the accompanying opinion, *Bolling v. Sharpe*,⁵⁸ which overturned segregation in District of Columbia schools. The objective insult arises from state misfeasance, not from state acquiescence in de facto segregation, presumably because meanings other than official endorsement of the undesirability of interracial contact can reasonably be attributed to state inattention to de facto segregation. The theory also explains why separate educational facilities are inherently unequal; the insult is directed only at blacks. Because the label of racial inferiority is untenable, this inequality can never be justified.

Grounding a remedial theory in so noninstrumental a conception of the harms of segregation is problematic, however, because it imputes a harm from segregation independent of any objectifiable injury to the victim class; it is thus difficult to link it nonarbitrarily with any particular remedial prescription.⁵⁹ If intentional segregation imposes no inherent harm other than the dissemination of an official statement that blacks are inferior or that interracial contact is undesirable, the only impact of the statement that needs to be redressed by a remedy is the statement itself. Retraction of the insult, for example, by repeal of a statute requiring segregation or the cessation of intentionally segregative administrative practices, might be fully sufficient.⁶⁰ As will be seen,

per curiam orders to invalidate segregation in a variety of public facilities other than schools. See, e.g., *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54, *aff'g* 252 F.2d 122 (5th Cir. 1958) (parks); *Gayle v. Browder*, 352 U.S. 903, *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879, *rev'g* 223 F.2d 93 (5th Cir. 1955) (golf courses); *Mayor of Baltimore City v. Dawson*, 350 U.S. 877, *aff'g* 220 F.2d 386 (4th Cir. 1955) (beaches).

⁵⁸ 347 U.S. 497 (1954). When *Brown I* and *Bolling* were decided, the Court had not yet settled on the now-familiar two-step constitutional inquiry into justification for explicitly discriminatory government acts—an inquiry first into the level of justification public authorities must proffer for such discrimination, and a second inquiry whether such justification appears in the particular case. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982). In *Bolling*, however, the Court made its position on justification clear: "Segregation in public education is not reasonably related to any proper governmental objective . . ." 347 U.S. at 500. Thus, just as *Brown I* forecloses case-by-case adjudications whether proven intentional segregation results in inequality, *Bolling* forecloses relitigation of the question whether such inequality is ever justified under the strict scrutiny the Court employs for explicit racial classifications.

⁵⁹ See Fiss, *supra* note 10, at 194-95.

⁶⁰ Reflecting this approach, a federal district court, in 1955, interpreted *Brown I* as follows: "The Constitution . . . does not require integration. It merely forbids discrimination." *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C.), *on remand from Brown v. Board of Educ.*, 349 U.S. 294 (1955). The great majority of southern school boards undertaking any voluntary desegregation relied on such reasoning to avoid affirmative integration prior to the Supreme Court's 1968 decision in *Green v. County School Bd.*, 391 U.S. 430 (1968). Under so-called "freedom-of-choice" plans, such school boards purported to comply with *Brown II* simply by permitting those minority students who chose to transfer to move from all-black schools to majority-white

however, the Supreme Court's post-*Brown II* decisions cannot be reconciled with so modest a remedial approach.⁶¹

An understanding of the harms of segregation on which a remedial theory can be based must identify some harm caused by intentional segregation that provides a useful measure of the scope of appropriate remedies. If the harm at the heart of segregation is only the departure of state authorities from a constitutionally prescribed normative position without any necessarily corresponding tangible effects, it becomes difficult to justify any affirmative relief as reflecting more than the Court's *ex cathedra* judgment as to what constitutes natural justice. To accept objective stigma alone as the crux of *Brown I* would render any attempt to ground a remedial theory in the harms of segregation merely an exercise in mystifying the arbitrary value judgment that remedial design entails.

This discussion does not deny that segregation imposes harms, which, although not providing a useful gauge for appropriate remedies, nevertheless exist. The degradation of all races and wasted human energy and talent are among those harms resulting from racism. Recognizing such harms, which do not suggest particular remedial strategies, underscores the importance of identifying remedial approaches that will address those harms of segregation the law is capable of relieving.

C. *Narrow Conception of Harm and Expansive Results in Post-Brown II Remedial Cases*

None of the Supreme Court's decisions after *Brown I* deals with the problems just catalogued of relating a particular conception of the harms of segregated schooling to the Court's insight into the inherent inequality that segregation imposes. *Brown II* did not relate remedy to harm because it did not, in fact, specify the preferred form of remedy. Instead, it left the process of remedial design to lower courts and to be governed by "equitable principles."⁶² The Supreme Court returned to

schools—an option that often led to little integration. Under its 1965 guidelines, the then Department of Health, Education, and Welfare listed "freedom of choice" as an adequate desegregation technique under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976 & Supp. V 1981), but a year later, the guidelines were revised to include detailed procedural requirements for freedom-of-choice plans, the acceptability of which was conditioned henceforth on their effectiveness in furthering desegregation. Goodman, *supra* note 51, at 288 & nn.57-58.

⁶¹ The "objective stigma" conception of the harm of segregation is limited in its usefulness largely because of its abstract, isolated character. The richer and more useful understanding, proffered in this Article, of this harm is not, however, entirely dissimilar to an "objective stigma" approach.

⁶² *Brown II*, 349 U.S. at 300.

the problem of remedial design only after a lapse of thirteen years, to reject, in *Green*, a freedom-of-choice plan that failed to undo the racial identifiability of schools in a formerly segregated district.⁶³

Since *Green*, the overriding issue in the Supreme Court's major decisions has been the appropriate impact of a school desegregation remedy on the racial composition of the schools in such a district. The issue, in other words, is how much racial balance is required to undo segregation. This concern with the racial composition of the schools is best justified as a proxy for other concerns; that is, the Court, albeit tacitly, has deemed an alteration in the racial composition of the schools to be a remedy for ills other than the distortion per se in racial attendance patterns that intentional segregation creates.

These cases, however, emit conflicting signals in this respect. They leave unclear whether the process of remediation should be broadly or narrowly conceived. The rhetoric of several of the Court's decisions and the result in *Milliken v. Bradley*⁶⁴ [*Milliken I*], the Detroit metropolitan desegregation case, imply that the harm to be relieved by school desegregation remedies is only the distortion of intradistrict attendance patterns. Although we cannot know what would have been the "natural" pattern of school attendance without discrimination, the Court has spoken in these cases as if the remedial goal is to restore blacks to an ascertainable attendance pattern they would have enjoyed but for the fact of intentional segregation. On the other hand, the actual results of all the post-*Brown II* cases are compatible with, and often only with, a far less mechanical theory of remedial strategy.

It would be strange in principle to regard distortion in school attendance patterns as the constitutional evil of intentional segregation. Even more than legal exclusion, racial imbalance, when viewed in isolation from other phenomena we associate historically with racially segregated school systems, seems to be of uncertain significance. The goal of racial balance does not seem worth the burdens entailed by desegregation orders unless we can attach some value to it other than the creation of an attendance pattern that would have existed but for a history of educational discrimination. Once we recognize some additional value to racial balance, however, we are implicitly identifying some harm other than the distortion of natural attendance patterns that we associate with racial separation. Such additional harm must be regarded as part of what our remedy is trying to relieve.

Although the rhetoric of the Court's *Green* decision in 1968 was

⁶³ *Green*, 391 U.S. at 441-42.

⁶⁴ 418 U.S. 717 (1974).

expansive in describing the aims of desegregation, the implications of the case for permissible remedies were unclear because of the unusual facts of the case.⁶⁵ The Supreme Court's formulations of the proper

⁶⁵ In *Green*, the Supreme Court's first major opinion on school desegregation remedies after *Brown II*, the Court overturned a so-called "freedom of choice" desegregation plan that a small rural school district in New Kent County, Virginia, had adopted 11 years after *Brown I* to avoid losing federal financial aid eligibility. See *Green*, 391 U.S. at 433. Under "freedom-of-choice," first and eighth graders were to choose their preferred schools and all other students would be assigned to the schools they had previously attended, unless the students requested otherwise. The district, however, comprised only two schools for all grades, which, notwithstanding *Brown II*, were operated as separate black and white schools until 1965. Despite "freedom-of-choice," by 1967 the black school was still entirely black, and only 15% of the black school children had elected to attend the formerly all-white school. Likewise, the complete segregation of black and white faculty continued to attest to the racial identity of the two schools.

The Court in *Green* concluded that the "freedom-of-choice" plan provided an "intolerable" lack of "meaningful assurance of prompt and effective disestablishment of [the] dual [school] system." *Id.* at 438. The Court used the phrase "dual system" to refer to a school system segregated under state compulsion in which racial segregation and other forms of discrimination had not been eradicated. In contrast, the Court characterized as a "unitary, nonracial system," *id.* at 436, one "in which racial discrimination would be eliminated root and branch," *id.* at 438. Having evaded its responsibility for 11 years after *Brown I* to effect any transition whatsoever from a dual to a unitary system, the school board in New Kent County was required "to come forward with a plan that promises realistically to work, and promises realistically to work now." *Id.* at 439.

The language of *Green* suggested a broad conception of desegregation remedies. Securing the nondiscriminatory admission of black students to formerly all-white schools, as commanded in *Brown II*, was characterized as "only the first step" in the remedy. "[T]he ultimate end to be brought about" was the "transition to a unitary, nonracial system of public education." *Id.* at 436. *Brown II*, the Court stated, "clearly charged" school boards operating dual systems "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38 (emphasis added). Toward this end, federal courts were declared to have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 438 n.4 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). The Court approvingly cited the formulation of one court of appeals judge, who described the "constitutionally required end" of school desegregation to be "the abolition of the system of segregation and its effects." *Green*, 391 U.S. at 440 (emphasis added) (quoting *Bowman v. County School Bd.*, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)). This meant that school authorities must "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Green*, 391 U.S. at 442. Although each of these formulations can be read to require no more, with respect to students, than the restoration of a pattern of attendance that intentional segregation had disrupted, the Court's rhetoric does not, in its tone or phrasing, invite so crabbed a view.

Confined to its facts, however, *Green* could be reconciled with the narrow conception of remedial compensation later articulated by Justice Rehnquist in *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977). New Kent County was a residentially integrated rural school district in which racial segregation had been maintainable only through the actions of the school authorities in busing black and white children to racially designated schools. In this context, the judicial command of total integration—the elimination of "racial discrimination root and branch"—thus required no

objectives of school desegregation remedies were vague in *Green* and continued to be vague⁶⁶ prior to the Court's first opinion in the Dayton school desegregation case, *Dayton Board of Education v. Brinkman*⁶⁷ [*Dayton I*], rendered in 1977. Not until *Dayton I* did the Court focus expressly on the incremental distortion of the intradistrict pattern of student attendance as the measure of harm to which desegregation remedies should be tailored.

The Burger Court's first major school desegregation decision, its unanimous 1971 opinion in *Swann v. Charlotte-Mecklenburg Board of Education*,⁶⁸ seemed to augur a broad conception of school desegregation remedies. In *Swann*, following a complex series of lower court proceedings, the Court approved the district court's imposition of a desegregation plan that required extensive busing in the Charlotte-Mecklenburg school system. Under the approved plan, all of the city's junior and senior high schools were desegregated, chiefly through zoning and consequent student reassignments, and the district's elementary schools were desegregated through "zoning, pairing, and grouping techniques."⁶⁹ The lower court imposed the plan, notwithstanding the school board's objections and its submission of an alternative plan promising significant improvement in racial balance but omitting a number of the district's schools from substantial involvement in the desegregation order.⁷⁰

The lower court plan, which the Supreme Court approved, clearly did more than restore the pattern of school attendance that would have prevailed but for the school authorities' racially segregative acts. In 1968-1969, Charlotte-Mecklenburg was the forty-third largest school district in the country, with 107 schools spread over 550 square miles.⁷¹ Although the school board's school site location decisions undoubtedly

more than that the board abandon its actions to preserve segregation. As the Court noted, either geographic zoning—sending each child to the school closer to his or her home—or grade consolidation—making one school an elementary school and the other a junior-senior high school—would accomplish complete desegregation without any additional administrative burden for the local school authorities. See *Green*, 391 U.S. at 442 n.6.

⁶⁶ The remedy should eliminate racial discrimination in schooling "root and branch," *Green*, 391 U.S. at 438; the ultimate end of a remedy is "[t]he transition to a unitary, nonracial system of public education," *id.* at 436; "the nature of the violation determines the scope of the remedy," *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Although the Burger Court gave these formulations a narrower cast than had the Warren Court, each of these guidelines, in context, might be given a relatively narrow or expansive interpretation.

⁶⁷ 433 U.S. 406 (1977).

⁶⁸ 402 U.S. 1 (1971).

⁶⁹ *Id.* at 6-11.

⁷⁰ See *id.* at 8-10.

⁷¹ *Id.* at 6.

exacerbated the perpetuation of racial imbalance in the public schools after 1954, Charlotte-Mecklenburg was an urban school district with significant residential segregation that neither the district court nor the court of appeals attributed entirely to school board action.⁷² Although the precise contribution of state-required segregation to the pattern of school attendance in 1971 might have been impossible to prove, it is unlikely that the schools would all have been racially balanced, even without official segregation.

Nor did Chief Justice Burger's opinion state that the precise restoration of an attendance pattern that would have existed but for the state's segregative acts was the sole remedial goal in *Swann*. Lower courts, he declared, have sufficiently broad authority "to eliminate from the public schools *all vestiges* of state-imposed segregation."⁷³ Remedial assignment plans should "counteract the continuing effects of past school segregation,"⁷⁴ and district judges and school authorities "should make every effort to achieve *the greatest possible degree of actual desegregation*."⁷⁵ Today, these formulations might be interpreted narrowly in light of *Dayton I*,⁷⁶ but in 1971, the Court's evident concern in *Swann* was not just with the physical restoration of a natural attendance pattern, but with the maximum possible disestablishment of a pattern of segregated schooling that had been approved by state law.⁷⁷

Between 1971 and 1977, however, aspects of three Supreme Court decisions indicated that the goal of school desegregation remedies was to be more narrowly conceived. In 1973, in *Keyes v. School District No. 1, Denver, Colo.*,⁷⁸ the Court's first opinion focusing on a segregated school district outside the South, the Court equated the question whether a desegregation remedy should encompass each school in the district with the question whether petitioners could demonstrate that the attendance pattern of a substantial portion of the district schools had been affected by intentional segregation.⁷⁹ Although the evidentiary

⁷² *Id.* at 7.

⁷³ *Id.* at 15 (emphasis added).

⁷⁴ *Id.* at 28.

⁷⁵ *Id.* at 26 (emphasis added).

⁷⁶ See *infra* text accompanying note 83.

⁷⁷ Chief Justice Burger did, however, characterize the judicial role in desegregation cases as a limited one: "We are concerned . . . with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds." *Swann*, 402 U.S. at 22. "[J]udicial powers," he reminded, "may be exercised only on the basis of a constitutional violation," and in a school case, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16.

⁷⁸ 413 U.S. 189 (1973).

⁷⁹ *Id.* at 203-04. The Court noted that the district court finding of intentional segregation with respect to 37.69% of Denver's total black school population was not

rules the Court developed were extremely generous to the petitioners, it is striking that so mechanical a measure of a school's involvement in a plan of intentional segregation was adopted to justify the inclusion of every school in the district's remedial obligation.

In 1974, the Supreme Court, in *Milliken v. Bradley*⁸⁰ [*Milliken I*], reversed a lower court decision to involve suburban school districts in the desegregation of the Detroit public schools. The Court reasoned that the Detroit plaintiffs had not shown any constitutional violation in the suburban school districts that had produced a "significant segregative effect" in Detroit.⁸¹ The plaintiffs argued, without avail, that no intradistrict remedy in Detroit could accomplish any significant integration: that inclusion of additional districts in the remedy was equitable because state authorities had contributed to the segregation of Detroit and that school district lines were no more than artifacts of state law. The Court majority, however, viewed the minority students' remedial entitlement narrowly: "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district."⁸²

The 1977 Dayton case was the third case of the decade to indicate that school desegregation remedies were to be narrowly construed. Writing for eight of the nine Justices in a unanimous opinion, Justice Rehnquist articulated a remedial methodology in specific and narrow terms. After explaining the insufficiency of the factfinding used by the district court to justify the systemwide remedy it had imposed on the Dayton Board of Education, Rehnquist wrote that, if intentional racial discrimination is found on remand,

the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.⁸³

Thus, Justice Rehnquist finally formulated a narrow conception of the

"insubstantial or trivial." *Id.* at 199.

⁸⁰ 418 U.S. 717 (1974).

⁸¹ *Id.* at 744-45.

⁸² *Id.* at 746.

⁸³ *Dayton I*, 433 U.S. at 420.

Court's remedial rationale: remedies should restore minority students to the racial pattern of school attendance within the school district's confines that would have existed but for the school authorities' intentionally segregative acts.

Yet, the important point is that, while the doctrinal developments just described pointed in the direction of a narrow, restorative conception of school desegregation remedies, the actual results of the post-1971 cases other than *Milliken I* and *Dayton I* pointed toward an expansive view of these remedies, equally compatible with *Green* and more compatible with the result in *Swann*.

The Court's decision in *Keyes*, despite its formal equation between the permissible scope of remedies and the number of schools in which actual taint by segregation could be proved, in fact requires integration more broadly. Justice Brennan's opinion for five members of the Court attempted to fit the remedial holding of *Keyes* into a narrow doctrinal rendition of the holdings of prior cases. Separate concurring opinions, reflecting very different policy perspectives, by Justices Douglas and Powell, however, indicated that the doctrinal mold was breaking. While agreeing with Justice Brennan that a basis existed for a remand to determine whether Denver school authorities were liable for the imposition of a systemwide school desegregation remedy, Douglas and Powell argued that the case put an end to the legal distinction between de facto and de jure segregation.⁸⁴ In Powell's view, the case required a reconception of the constitutional right at stake in school desegregation cases.⁸⁵

The issue in *Keyes* was whether the principles of the *Brown* decisions had been correctly applied in a suit brought by black parents against the Denver school system. The Court held that, contrary to the different analyses of the lower courts,⁸⁶ districtwide desegregation *might* be the appropriate remedy in Denver given the record presented.⁸⁷

⁸⁴ *Keyes*, 413 U.S. at 214-16 (Douglas, J., concurring); *id.* at 219-25 (Powell, J., concurring in part and dissenting in part).

⁸⁵ *Id.* at 225-26 (Powell, J., concurring in part and dissenting in part).

⁸⁶ *Keyes v. School Dist. No. 1, Denver, Colo.*, 313 F. Supp. 61 and 313 F. Supp. 90 (D. Colo. 1970), *modified*, 445 F.2d 990 (10th Cir. 1971), *cert. denied*, 413 U.S. 921 (1973).

⁸⁷ See *Keyes*, 413 U.S. at 200. In June 1969, parents of Denver school children sued for preliminary injunctive relief to prevent the Denver school board from implementing a decision to rescind three resolutions adopted by the board's previous membership. *Id.* at 191-92. These resolutions would have brought about the desegregation of a portion of Denver called Park Hill, *id.* at 192, which was served by eight, *id.* at 192 n.3., of the city's 119 schools, *id.* at 191 & n.2. After winning a preliminary injunction, the parents sued for permanent relief and added demands for desegregation in all schools throughout Denver. See *Keyes v. School Dist. No. 1, Denver, Colo.*, 313 F. Supp. 61, 63 (D. Colo. 1970), *modified*, 445 F.2d 996 (10th Cir. 1971), *cert. denied*,

Though the plaintiffs could not prove that intentional segregation existed throughout Denver, they had proved that intentional segregation affected a "substantial portion" of the school district, called Park Hill.⁸⁸ That being so, the Court said, the plaintiffs had established a *prima facie* case that intentional segregation affected the entire school district—a case that the school board shouldered the burden to rebut.⁸⁹

Through this shift in the burden of proof, Justice Brennan purported to cast the *Keyes* facts into the *Brown I* mold.⁹⁰ If evidence from Park Hill gave rise to an un rebutted inference that no segregation in

413 U.S. 921 (1973). The latter demand was based on allegations that the school board had manipulated student attendance zones and located new schools so as to insure that the general student population would in fact be segregated by race.

The federal district court in Denver held that the school board's rescission of the desegregation resolutions constituted an intentional act of segregation within the meaning of *Brown I*. See *Keyes v. School Dist. No. 1, Denver, Colo.*, 303 F. Supp. 279, 286-88 (D. Colo. 1969) (preliminary injunction); *Keyes*, 313 F. Supp. at 64-69 (permanent injunction). On that basis the court ordered the desegregation of the Park Hill zone. As for other schools in Denver, the court did not find intentional segregation. See *Keyes*, 313 F. Supp. at 73, 77.

The school board had, since World War II, made various zoning and school site location decisions that had led to increased public school segregation. The court found, however, that educational considerations lay behind some of the decisions. See *id.* at 75-76. In addition, the black population in Denver had been small when the decisions were made and was of relatively little concern to the school board at those times. *Id.* at 75. So little attention had been paid to the problems of racial separation before the civil rights movement of the 1960's that the district court found itself unable to conclude that the Denver school board had intended to segregate schools outside Park Hill. See *id.* at 73, 77. It concluded that the segregation that had resulted from the school board's policies prior to 1960 proceeded from the segregation of housing in Denver, which had developed slowly and without the intervention of school authorities over a period of decades. See *id.* at 75.

The court's findings as to intent, however, did not end the question of relief. The court found that Denver's predominantly black schools outside Park Hill were inferior to white schools in the quality of educational experience they offered. See *id.* at 77-83. The court held that such inequality violated the separate but equal rule of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which *Brown I* had not overruled in this respect. See *Keyes*, 313 F. Supp. at 83. In order to remedy such inequality, the district court concluded that both material improvements in the schools' programs and some degree of desegregation throughout the city were required in relief. See *id.* at 97-99. The court said that the establishment of educational equality in Denver necessitated the implementation of "compensatory education in an integrated environment." *Id.* at 96.

The Court of Appeals for the Tenth Circuit affirmed the grant of relief with respect to Park Hill but reversed both the educational improvement and desegregation measures ordered with respect to the rest of Denver. See *Keyes*, 445 F.2d at 1007. The court of appeals held that the district court's finding of no intentional segregation beyond Park Hill should have ended the judicial inquiry. See *id.* at 1005.

⁸⁸ *Keyes*, 413 U.S. at 201.

⁸⁹ *Id.* at 211, 213-14.

⁹⁰ *Id.* at 208-09. Rhetorically, the Court may have wanted to exert the same moral pressure to desegregate in *Keyes* as is now commonly associated with the *Brown I*-type case. See Fiss, *supra* note 45, at 37-38.

Denver was "adventitious,"⁹¹ then the results of intentional segregation might be viewed as being as extensive in Denver as they were in any southern school district. Because the school board's intended segregation would thus reach the entire district, the obligation of districtwide racial balance would follow in *Keyes*⁹² even under a narrow conception of the remedial command of *Brown II*, *Green*, and *Swann*. That is, school authorities who practice intentional segregation must cease their segregative practices and undo the segregation they created. Under the evidentiary rules of *Keyes*, such segregation would be deemed to have pervaded the Denver school system.⁹³

The Supreme Court's use of a presumption of intentional segregation to draw the analogy between the facts of *Keyes* and of *Brown I* would have been unremarkable except that, if accuracy in factfinding was the Court's sole concern, the findings of the two courts below belied the fairness of the presumption.⁹⁴ The Supreme Court reasoned that, if a school board intentionally segregates a "substantial portion" of a district, it may be causing the segregation of other schools in the district by virtue of a spillover effect.⁹⁵ Thus, the Court said, in the absence of evidence to the contrary, the intentional segregation of one portion of a school system that is racially imbalanced might make the entire district a "dual system."

The Supreme Court's analysis ignored, however, that a pattern of racial imbalance may occur over time. The district court found, as Justice Rehnquist pointed out,⁹⁶ that the pattern of segregation in schools beyond Park Hill antedated by at least ten years the purposeful segregation of Park Hill itself.⁹⁷ On such a record, and in light of the pattern of racial segregation that characterized housing in Denver, the school board had proved that the segregation of Park Hill did not cre-

⁹¹ *Keyes*, 413 U.S. at 208.

⁹² *Id.* at 213-14.

⁹³ On remand, the district court found that there existed a dual system, see *Keyes v. School Dist. No. 1, Denver, Colo.*, 368 F. Supp. 207 (D. Colo. 1973), *cert. denied*, 423 U.S. 1066 (1976), and ordered districtwide desegregation, see *Keyes v. School Dist. No. 1, Denver, Colo.*, 380 F. Supp. 673 (D. Colo. 1974), *modified*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

⁹⁴ Fiss, *supra* note 10, at 207, says,

[I]n order to make the issues [of past racial assignment and its relationship to current segregation] triable or capable of ever producing relief, the Supreme Court had to create a set of presumptions in favor of the existence of these linkages and those presumptions, especially when viewed as a set, do not seem supported by natural probabilities.

⁹⁵ *Keyes*, 413 U.S. at 201-04.

⁹⁶ *Id.* at 259-60 (Rehnquist, J., dissenting).

⁹⁷ *Keyes v. School Dist. No. 1, Denver, Colo.*, 303 F. Supp. 279, 282 (D. Colo. 1969).

ate the pattern of segregation in the "core city." Although some black enrollment in the core city may have represented Park Hill spillover, the spillover effect of eight Park Hill schools on the 111 other Denver schools was likely to be small.

The effect of shifting the burden of persuasion to school authorities to demonstrate that the racial segregation in other schools is not the result of intentional segregative acts by the school board is likely in every case to render an urban school board liable for more segregation than it caused in any mechanical sense.⁹⁸ If a school board such as Denver's could never show precisely which schools were tainted by the spillover effects of the board's segregative actions in a distinct portion of a city,⁹⁹ it follows that a district court might impose a districtwide remedy on that board even in the face of evidence that the school board did not independently generate all, or even most, of the segregation found to exist. This renders suspect any implication from the *Keyes* opinion suggesting that the remedy in a *Keyes*-type case ought to seek to achieve a pattern of attendance that would have existed but for the school board's segregative acts.¹⁰⁰ The *Keyes* opinion allows courts to require school boards to do more than undo only the segregation they themselves create or actively promote.

This view of *Keyes* is confirmed by the 1979 decision in *Columbus Board of Education v. Penick*¹⁰¹ and the subsequent history of *Dayton I*. In *Columbus*, the Sixth Circuit upheld a district court judgment imposing a systemwide remedy in Columbus, Ohio because (1) the Columbus public schools were "openly and intentionally" segregated on the basis of race in 1954, and (2) after *Brown I*, the Columbus Board

⁹⁸ This is not to say that there is no legal conception of cause under which responsibility for segregation could reasonably be linked to school board action. Even if a school board uses only geographic criteria to assign students to schools, its assignments may facilitate or encourage housing segregation, with the result that racially neutral school assignments lead to racial imbalance. The school board may thus be a joint tortfeasor with other public and private agencies, whose collective action causes the pattern of racial imbalance. See Fiss, *supra* note 47, at 583-88; Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 705-07 (1971). The observation in the text about the *Keyes* presumption challenges only the implication that the Court was imposing liability on the Denver school board based on the kind of immediate causal connection between racial assignment and segregated schools that existed in *Brown I*. See Fiss, *supra* note 45, at 26.

⁹⁹ The likelihood of any defendant's overcoming the *Keyes* presumption is further reduced by the Court's description of the stringent showing necessary for the defendant to prevail. See *Keyes*, 413 U.S. at 213-14.

¹⁰⁰ Professor Fiss asserts that the Court's methodology entails institutional costs: "The use of presumptions involves the court in fictionalizing and thereby impairing its credibility." Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 145 (1976).

¹⁰¹ 443 U.S. 449 (1979).

of Education "never actively set out to dismantle this dual system."¹⁰² The lower courts reached the first conclusion after applying the *Keyes* presumption¹⁰³ to the finding that, in 1954, the school board had maintained "an enclave of separate, black schools on the near east side of Columbus."¹⁰⁴ The segregation found to exist in 1954 was deemed to have a current systemwide impact because *Brown II* imposed on Columbus a constitutional duty to desegregate, which the Columbus Board never performed.¹⁰⁵ Therefore, each instance of racial imbalance in 1979 could be treated as the unlawfully neglected artifact of systemwide segregation existing twenty-five years earlier, thus justifying current systemwide desegregation relief.

The Supreme Court, by endorsing the "affirmative duty" theory, took a major step forward in expanding school board liability for the desegregation of schools. Its approval of the Sixth Circuit's approach meant that a school board's post-*Brown II* policies in a school desegregation case could now be viewed in an unanticipated light. As expressed in the accompanying decision in *Dayton Board of Education v. Brinkman*¹⁰⁶ [*Dayton II*], "[T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system" is now to be "the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."¹⁰⁷ That is, if intentional segregation sufficient to trigger the *Keyes* shift in burden of proof ever occurred in a particular school district, local authorities are responsible for desegregating the entire district unless, after 1955, the school board's policies had the effect of undoing the results of the intentional segregation.

However justifiable the results of this shift in focus from the purpose to the effects of a school board's post-1955 policies may be, the Court's statement is remarkable. Although the Court, in *Columbus* and *Dayton II*, dramatically increased the number of school boards against

¹⁰² *Id.* at 452 (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 260 (S.D. Ohio 1977), *aff'd*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979)).

¹⁰³ See *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 260 (S.D. Ohio 1977), *aff'd*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979).

¹⁰⁴ 443 U.S. at 455-56 (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 236 (S.D. Ohio 1977), *aff'd*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979)).

¹⁰⁵ See *Columbus*, 443 U.S. at 458-59; *Penick v. Columbus Bd. of Educ.*, 583 F.2d 787, 799 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979).

¹⁰⁶ 443 U.S. 526 (1979).

¹⁰⁷ *Id.* at 538 (citations omitted). The Court's reference in *Dayton II* to "the post-*Brown I* conduct of a school board" betrays some carelessness since, as explained in *Columbus*, the "affirmative duty" to disestablish dual school systems arose after *Brown II*, a year later than *Brown I*. *Columbus*, 443 U.S. at 458-59.

which successful desegregation suits may be brought,¹⁰⁸ it again neglected to explain the harms at stake in desegregation cases that would justify such an expansion of potential liability. Even assuming that what is at stake in desegregation cases is attendance patterns, the reach of the *Columbus-Dayton II* rule is extraordinary given the obvious uncertainties attending any attempt to repair distortions of attendance patterns occurring more than three decades ago.¹⁰⁹

Indeed, the facts of *Columbus* show, as compellingly as those of *Keyes*, that the defendant board of education was being held liable for a greater degree of racial separation than could have been closely linked to school board action alone.¹¹⁰ *Dayton II*, however, illustrates this con-

¹⁰⁸ It may be that school districts otherwise vulnerable to liability under *Columbus* and *Dayton II* can shield themselves by invoking principles of collateral estoppel based on pre-*Columbus* judgments favorable to the school authorities. See *Bronson v. Board of Educ.*, 687 F.2d 836 (6th Cir. 1982) (Cincinnati); *Bell v. Board of Educ.*, 683 F.2d 963 (6th Cir. 1982) (Akron).

¹⁰⁹ The Court's statement is also remarkable because no one reading any Supreme Court decision prior to *Green*, decided 13 years after *Brown II*, could have discovered that *Brown II* imposed on school boards the "affirmative duty" to which *Columbus* and *Dayton II* refer. See *Columbus*, 443 U.S. at 494-95 (Rehnquist, J., dissenting).

¹¹⁰ The Supreme Court accepted the district court's finding of intentional systemwide segregation based on the school board's pre-1954 use of gerrymandering, *Columbus*, 443 U.S. at 506, to preserve an enclave of five black schools in the predominantly black near east side of Columbus, *id.* at 467, 505-06. This act of intentional segregation in a "meaningful" portion of the district shifted the burden to the school board, under *Keyes*, to show that racial imbalance elsewhere in the district was not the product of intentional segregation. The lower courts held this burden had not been met, although the Columbus school system, at the time suit was filed, included 172 schools, *id.* at 452, the racial imbalance of most of which could not be traced entirely to the pre-1954 gerrymandering.

The lower courts did identify various post-1954 acts demonstrating the Board's abdication of its legal duty to dismantle the dual system existing in 1954 and, in a more limited way, its continuing intention actually to segregate the schools. The post-1954 acts that were intentionally segregative, however, may have affected even fewer students relative to the whole system than the pre-1954 gerrymandering. For example, the school board created "optional attendance zones" to allow whites living close to an all-black school to attend a white school instead. See *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 243-47 (S.D. Ohio 1977), *aff'd*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979). The district court reported specific data on the number of students affected for only one of these zones; this optional zone, in 1972, apparently included 27 public school students. *Id.* at 245. Similarly, in the 1960's, the school board transported 70 students past an allegedly overcrowded black school to a predominantly white school farther away. *Id.* at 247.

Although several other examples of actions preserving predominantly black or white schools are cited in *Columbus*, see 443 U.S. at 461-62 & nn.8-11, 515-18, the lower courts apparently made no specific findings as to their continuing segregative effects. Thus, however justified systemwide relief in Columbus may have been, it cannot reasonably be supposed that the degree of racial imbalance proved as of 1976 was attributable to the spillover effect of the proven intentional segregation. About 70% of Columbus's public school students attended schools in 1976 that were at least 80% black or 80% white, and half of the schools in Columbus were over 90% black or 90% white, *id.* at 452. The court of appeals recognized that, even under *Keyes*, the post-1954

clusion even more dramatically. On remand and after conducting an evidentiary hearing, the district court dismissed the complaint because, under *Dayton I*, the plaintiffs "failed to prove that acts of intentional segregation over twenty years old had any current incremental segregative effects."¹¹¹ The Sixth Circuit reversed, declaring some of the trial court's findings of fact clearly erroneous and reinterpreting the record under its new theory of affirmative duty.¹¹²

The Supreme Court upheld the Sixth Circuit and distinguished *Dayton I*:

On the facts found by the District Court and affirmed by the Court of Appeals at the time *Dayton* first came before us, there were only isolated instances of intentional segregation, which were insufficient to give rise to an inference of systemwide institutional purpose and which did not add up to a facially substantial systemwide impact.¹¹³

It may be that a Supreme Court majority viewed the records in *Dayton I* and *Dayton II* as significantly different. The instances of segregation on which the court of appeals relied, however, in imposing liability in *Dayton II* amounted to little more than the "isolated instances of intentional segregation" held by the Supreme Court in *Dayton I* to be an insufficient basis for systemwide liability.¹¹⁴ The factual record had not

"isolated" segregative acts alone could not have supported systemwide relief. *Id.* at 502 n.11 (Rehnquist, J., dissenting).

¹¹¹ *Dayton II*, 443 U.S. at 532.

¹¹² *Brinkman v. Gilligan*, 583 F.2d 243, 247 (6th Cir. 1978), *aff'd*, 443 U.S. 526 (1979).

¹¹³ *Columbus*, 443 U.S. at 458 n.7.

¹¹⁴ In *Dayton I*, the Supreme Court regarded the three factual findings on which the lower court imposed systemwide relief as insufficient. These were, first, the school board's 1972 rescission of school board resolutions passed earlier, which "acknowledged a role played by the Board in the creation of segregative racial patterns and had called for various types of remedial measures"; second, the pervasiveness of racial imbalance in the school system; and third, the use of "optional attendance zones" to increase racial separation. *Dayton I*, 433 U.S. at 412-13. By contrast, the Court in *Dayton II* approved the Sixth Circuit's conclusion as to districtwide liability based on the earlier record and four additional factual considerations identified by the Supreme Court in its opinion: the creation and maintenance of Dunbar High School as an all-black school, the establishment of the Garfield school as an all-black elementary school, the intentional districtwide segregation of faculty, and the use of enrollment and transfer policies to maintain two all-black elementary schools beginning in the 1930's. *Dayton II*, 443 U.S. at 534-35.

The district court in *Dayton I*, however, had already recited the facts regarding Dunbar High School, the Garfield School, and faculty segregation. See *Brinkman v. Gilligan*, 446 F. Supp. 1232, 1254-55 (S.D. Ohio 1977) (appendix A, findings of fact and memorandum of law reprinting the district court's *Dayton I* opinion). The district court failed only to base its legal conclusions expressly on those facts. Thus, of the four "new" factors that the Supreme Court stressed in *Dayton II*, the only ones discussed by

significantly changed; only the Court's liability rules were in flux.¹¹⁵ Assuming the unanimous Court was correct in *Dayton I* that the record in the case could not justify a systemwide remedy under a narrow conception of the remedial goal, the change in liability rules in *Dayton II* necessarily sanctioned a conception of school desegregation remedies broader than the mechanical restoration of a natural attendance pattern that *Dayton I* had approved.

The results in *Keyes*, *Dayton II*, and *Columbus* thus point to a remedial theory that, although never clearly articulated, is broader than the narrow conception expressed in *Dayton I*¹¹⁶ and implied by some of the rhetoric of *Keyes*¹¹⁷ and by *Milliken I*.¹¹⁸ Implicitly, plaintiffs in school cases are being granted relief for the protection of interests other than an attendance pattern untainted by intentional segregation and its consequences.¹¹⁹

the Sixth Circuit that had not been specifically elaborated in the district court's *Dayton I* opinion—and not discussed in its opinion on remand—involved the use of enrollment and transfer policies to segregate the Wogamon and Willard elementary schools starting in the 1930's. *Brinkman v. Gilligan*, 583 F.2d 243, 250-51 (6th Cir. 1978), *aff'd*, 443 U.S. 526 (1979). (In 1972, when the *Dayton* case was first tried, Wogamon was still all-black, *Brinkman*, 446 F. Supp. at 1260 (appendix A), and Willard had been closed for 10 years, *id.* at 1239.)

In sum, the Sixth Circuit opinion upheld in *Dayton II* fails to recite significant facts not before the Supreme Court in *Dayton I* but re-explains, under the Sixth Circuit's "affirmative duty" theory, the legal significance of facts found earlier.

¹¹⁵ Such was the district court's conclusion on remand, albeit with a result different from the judgment finally approved by the Supreme Court in *Dayton II*. See *Brinkman v. Gilligan*, 446 F. Supp. 1232, 1253 (S.D. Ohio 1977).

¹¹⁶ See *supra* text accompanying note 83.

¹¹⁷ See *supra* text accompanying note 79.

¹¹⁸ See *supra* text accompanying note 82.

¹¹⁹ Further buttressing the implication that its conception of school desegregation remedies should not be too narrowly understood was the Supreme Court's decision affirming the judgment on remand in the Detroit desegregation case, *Milliken v. Bradley*, 433 U.S. 267 (1977) [*Milliken II*]. After the Court in *Milliken I* disapproved the metropolitan integration remedy that the district court had imposed and the Sixth Circuit had affirmed, the district court designed an intradistrict racial balance remedy combined with a variety of "educational components," including remedial education requirements, curricular changes, in-service training requirements, provisions for new guidance and counseling programs, and revisions in Detroit's testing procedures. *Id.* at 272 & n.5. The Supreme Court, in *Milliken II*, approved the implementation of four of these measures, which were challenged on certiorari by the state defendants.

In describing the remedial purposes that underlay the educational components of the revised order below, the Court adopted a rationale going beyond the repair of attendance patterns, but which nonetheless has uncertain implications for remedial design. The district court had concluded, and the Sixth Circuit had agreed, that the educational components were necessary to assure the success of desegregation and to remove all vestigial effects of past segregation. *Bradley v. Milliken*, 540 F.2d 229, 241 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977). The latter purpose, as implied by the required educational components, facially encompassed more than the vestigial attendance distortion resulting from past segregation. The Supreme Court expressly approved this rationale. *Milliken II*, 433 U.S. at 282.

It could be argued that the apparent tension in the cases has been overstated. Perhaps the narrow conception articulated in *Dayton I* is the Court's actual conception of proper remedial design, and the other decisions, to the extent they sanction broader remedies, do so only because of the difficulties involved in implementing precisely the pattern of attendance that would have existed but for the history of intentional segregation. Equity may simply require that the Court indulge a certain remedial expansiveness to assure, given the difficulties of proving which schools in an urban district are tainted by intentional segregation, that all such tainted schools are actually desegregated. Such practicality on the Court's part does not necessarily belie the Court's underlying conception of proper remedies, which is no more than the narrow conception of restoring a natural pattern of school attendance.

Such an argument, however, provides only weak justification for the Supreme Court's school decisions for two reasons. First, characterizing the breadth of the remedy in *Keyes*, *Dayton II*, or *Columbus* as a prophylactic measure to insure that the few schools actually tainted by intentional segregation are mandatorily desegregated trivializes the extent of the "prophylaxis." Given the relatively small spillover effect that the *proven* segregation in Denver, Dayton, and Columbus could possibly have caused in fact, the expansiveness of the remedies sanctioned by the Court undermines any argument that the crux of the remedy is the vindication of an historically based pattern of student assignments.

Second, the Court's rhetorical appeal to a mechanical conception of remedies to justify costly systemwide relief leaves the district courts that render such decrees vulnerable to a public perception that the courts are unrealistic in their goals and unjustifiably interventionist in

Milliken II, on its face, however, did not offer a strong indication of how much should be made of its seeming remedial expansiveness. First, although the educational components addressed problems other than attendance, the Court described the educational components in narrow, historically based terms: "These . . . remedies . . . were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education" had they been able to attend a nondiscriminatory school system free of de jure segregation. *Id.* Second, nearly all the educational components were suggested by the defendant school district, and the only truly contested issue on appeal was the appropriateness of the lower court's requirement that the state defendants fund these components. *Id.* at 293 (Powell, J., concurring). Because the interests of the plaintiffs and the school board were aligned, *Milliken II* could be regarded as a weak precedent for sanctioning broad remedies unrelated to racial balance in cases in which those remedies are opposed by the defendant school authorities and represent an incursion into their ordinary policymaking discretion.

It should be noted that *Milliken II* is consistent with the expansive fair governance remedial theory explained below insofar as its approval of remedies other than those aimed at racial balance has important precedential significance.

local school systems. If we consider that the lower courts are the local agencies charged by the Supreme Court with implementing the constitutional mandate of desegregation, the Supreme Court serves these agencies poorly by articulating only a weak, and seemingly artificial, rationale for the kind of intervention in local school systems that the Court has required.¹²⁰ The Supreme Court has failed to provide the lower courts with a firm and specific statement of remedial principle with which to resolve in a justifiable way the competing interests of the parties before them.

In sum, it is possible to understand the Supreme Court's remedial results as compatible with a narrow demographic conception of the harm that school desegregation remedies should relieve only if one ignores the absence of factual support for treating the degree of racial balance ordered in these cases as having an historical demographic basis. The fact is that culpable school authorities in all successful urban school desegregation cases have been required to do more than "fix" the "broken" pattern of school attendance. It is at best an unhelpful fiction to regard the pattern of attendance resulting from an urban school desegregation decree as "redressing" no more than "the incremental segregative effect" of constitutional violations, calculated by comparing the school district's current attendance pattern with the distribution of students that would have occurred "in the absence of such constitutional violations."¹²¹ This realization does not mean that the results of the school cases are unjustified, only that the Supreme Court's proffered justification, to the extent it is explicit at all, is very weak when compared to the massive remedial undertaking that the cases entail. This weakness, like the ambiguities of *Brown I*, turns our attention again to the problem of identifying more cogently those harms that school desegregation remedies should address.

II. FAIR GOVERNANCE AS THE PROTECTED INTEREST IN SCHOOL DESEGREGATION CASES

A. *Segregated Schooling and the Harm of Unfair Governance*

Surveying those harms of segregated schooling to which the Supreme Court's opinions are most often thought to refer has not yielded a conception of harm that is both a compelling explanation for the inherent inequality of segregated schooling and a useful guide to remedial

¹²⁰ The political process may exercise an analogous effect on administrative agencies that are granted broad, standardless authority by Congress. See Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1188-91 (1973).

¹²¹ *Dayton I*, 433 U.S. at 420.

design. The perspective of the analysis thus far, however, has been limited. We have evaluated various harms as isolated, discrete phenomena, attempting to determine whether each is objectively hurtful in the abstract or whether empirical evidence exists that clearly links the particular harm to segregated schooling. This approach has not made any particular effort to reflect the experience of segregation as perceived by its victims, rather than by a detached decisionmaker.

Although the impact of exclusion may be indeterminate in the abstract, blacks do not experience segregation in the abstract. Exclusion derives its meaning for its victims from its historical association with a hostile white power structure, unequal opportunities in every realm of social activity, and schooling for black children that ordinarily was inferior, and markedly so, to the schooling reserved for whites. Although social science may not have proved that segregated schooling inexorably injures black children in specified, measurable ways, neither has it disproved such harm. Any risk that segregation does hurt educational achievement, adult life chances, or personality adjustment falls solely on black children, and there is no evidence that white school authorities are unwilling to have black children shoulder that risk.¹²²

An extended conception of the injury from intentionally segregated schooling may be inferred when the aforementioned harms are considered as a totality, rather than separately. It derives from a recognition that the intentional racial segregation of public school students renders minority children systematically and continuously vulnerable to a variety of harms that may be inflicted solely on them by hostile public authorities. For example, there can be no doubt that racial segregation in public schools in the South was established and maintained primarily for the purpose of perpetuating an inferior educational system for blacks. This was but a part of a deeply rooted cultural system that was hostile to black dignity and advancement.¹²³ Likewise, although the role of segregated schooling in a system intent on gross discrimination against blacks was not broadcast as blatantly by the laws of the North and West, it is reasonable to infer from the history and sociology of blacks in those states that intentional segregation outside the South was

¹²² Notwithstanding the degree of controversy concerning the effects of desegregation on minority academic achievement, *see supra* note 50, it is widely accepted that desegregation has no adverse impact on the academic achievement of whites. Crain & Mahard, *How Desegregation Orders May Improve Minority Academic Achievement*, 16 HARV. C.R.-C.L. L. REV. 693, 696 (1982). Thus, whatever the aspirations of segregationists, segregation apparently does not secure for white students higher absolute levels of academic achievement.

¹²³ *See Black, supra* note 27, at 424-28.

just as pervasive and invidious.¹²⁴

This systematic vulnerability of black children to discriminatory treatment in public schools has an additional, objectifiable impact on black students and parents that contributes to the inherent inequality of segregated education.¹²⁵ For black students and parents, intentional segregation justifiably creates a lack of confidence that invidious racial discrimination does not or will not operate as a factor in public school administration. This justifiable lack of confidence in school authorities reflects the infringement of a constitutional entitlement to fair educational governance.

There is no Supreme Court decision that rests equal protection doctrine on this theory of injury or that establishes fair governance as

¹²⁴ See generally REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS chs. 4-9 (1968) (report of commission formed by President Johnson to investigate the Summer 1967 racial riots in Newark and Detroit).

¹²⁵ In a brief essay written in 1977, Professor Ronald Dworkin suggests a conception of the minority interest at stake in the school desegregation cases, which, except for one facet, is very close to the fair governance conception. See Dworkin, *supra* note 43. The difference lies in Professor Dworkin's contention that a proper identification of the harm of segregated schooling does not rest essentially on a "causal judgment" asserting a relationship between "independent and specifiable phenomena," *id.* at 21-22, presumably, between segregation and harm. Rather, it rests on an "interpretive judgment" that nonempirically specifies the meaning of segregation "within the society in which it occurs," *id.* Thus, Professor Dworkin states,

We know that *de jure* segregation is an insult, rather than the product of equal concern [for blacks and whites], in the same way we know that a rain dance is religious and not technological, although we [would] have more confidence in the former than in the latter judgment, because the community it judges is our own.

Id. at 29.

Contrary to Professor Dworkin's implication, however, society's judgment that segregation is wrong is justified in part by "causal judgments" based on the observable correlations between segregated schooling and a variety of adverse impacts on black students and parents, including the objectively reasonable adverse impact of segregation on their confidence in impartial school administration. Even if such judgments do not rely on a precise mechanical model linking segregation to its various harms, relational judgments linking segregation to harm must play a role in remedial efforts in order to minimize the arbitrariness in judicial intervention to protect constitutional rights. Neither the informality nor the incompleteness of the Court's empirical inquiries into the relationship between segregation and harm renders this inquiry essentially intuitive or unusual in the law. See Fiss, *supra* note 47, at 595-96.

Notwithstanding this point of difference, this Article shares Professor Dworkin's essential perception of the kind of government decisionmaking that produces segregated schools. Dworkin argues that segregated schooling violates the equal protection clause because of the "high antecedent probability" that a "political judgment" to segregate schools does not "fairly reflect the kind of preferences that rightly make up the general welfare, but . . . [gives] influential expression to preferences based on prejudice." Dworkin, *supra* note 43, at 29. Such a decision represents a "corruption" of the political process, *id.*, because the Constitution requires that government, when it makes political decisions, "must treat each individual, as an individual, with equal concern and respect." *Id.* at 28. See *infra* note 128.

the core concern of equal protection. There is thus no single opinion to demonstrate the authoritativeness of the fair governance theory. In the one post-*Brown* opinion to attempt an express reconceptualization of the purposes of school desegregation remedies, however, Justice Powell isolated a justifiable lack of confidence in nondiscriminatory decision-making as the basis for a redefinition of the right at stake in school desegregation cases in both de jure and de facto settings:

I would now define [the right derived from *Brown I*] as the right, derived from the Equal Protection Clause, to expect that once the State has assumed responsibility for education, local school boards will operate *integrated school systems* within their respective districts. . . .

[In] an *integrated school system* . . . all citizens and pupils may justifiably be confident that racial discrimination is neither practiced nor tolerated.¹²⁶

Powell's use of the term "integrated school system" to describe a system that is reliably nondiscriminatory is confusing because it does not necessarily rest on any requirement for a particular pattern of student attendance, which is part of what the word "integration" typically implies.¹²⁷ Thus, although the following discussion rests on a conceptual approach similar to Justice Powell's, it uses the phrase "unfair governance" to describe the harm caused when the administration of a school system is such as to instill in the minority a reasonable lack of confidence in the public authorities' commitment to nondiscrimination and "fair governance" to describe the condition to be restored in a system where unfair governance has prevailed.

Beyond Justice Powell's discussion, the implication that the equal protection clause guarantees citizens a form of governance sufficiently sensitive to all persons' interests to justify reasonable confidence in nondiscriminatory decisionmaking resonates in the Supreme Court's constitutional equal protection jurisprudence generally.¹²⁸ It is implicit both

¹²⁶ *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 225-26 (1973) (Powell, J., concurring in part and dissenting in part).

¹²⁷ Indeed, notwithstanding his recommended abandonment of the de facto/de jure distinction, Justice Powell has strongly criticized the degree to which the Court has permitted the value of racial balance to interfere with local policies of neighborhood schooling. *See id.* at 242-53; *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437, 445-52 (1980) (Powell, J., dissenting from dismissal of certiorari).

¹²⁸ Justice Stone's well-known footnote number four in *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), is the seminal suggestion in fourteenth amendment jurisprudence that heightened judicial scrutiny should be undertaken when ordinary political processes may not be relied upon to protect minorities. On the footnote's impli-

in the notion of guardianship that the words "equal protection" evoke and in equal protection doctrine as elaborated by the Court. That doctrine not only requires government to proffer reasons for distributing goods differently to different constituencies, but requires substantial or even compelling reasons to justify discrimination against historically victimized groups. The judicial demand for such justifications is a safeguard on behalf of disadvantaged groups to ensure that they are not being handicapped by majoritarian prejudice and exclusion.

The elaboration of overarching constitutional philosophy is, of course, not the Court's traditional task. Given the Court's historic reserve in deciding constitutional questions,¹²⁹ there is no single opinion setting forth a comprehensive philosophy of equal protection. This may be why the fair governance conception of equal protection is most fully articulated in dicta in *Steele v. Louisville & Nashville Railroad*,¹³⁰ a pre-*Brown I*¹³¹ case involving statutory interpretation. *Steele* held that, under the Railway Labor Act,¹³² a railroad union charged with the representation of black non-union railroad employees may not discrimi-

cations for *Brown I*, see generally Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982). One noted commentator has argued that the legitimate role of judicial review under the equal protection clause is solely to police the mechanisms of representation, and not to impose on state governments any substantive conception of equality. See J. ELY, *DEMOCRACY AND DISTRUST* 135-79 (1980).

A more substantive version of a representation-reinforcing conception of equal protection, which is more closely akin to the theory of this Article, suggests that the equal protection clause prohibits governmental resource and opportunity allocations that are based on prejudice. Dworkin, *supra* note 43, at 28-31. Governmental decisions tainted by prejudice are "unprincipled" because they cannot be defended on the basis of validly determined "public values." Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 128.

It is hoped that this Article offers fruitful lines of thought for broad inquiries (my own and others') into the nature of the equal protection guarantee, *see infra* note 267, and the role of fairness in governance generally. It should be noted, however, that this Article does not attempt to address these broad inquiries systematically, in large part because the utility of the fair governance approach to desegregation does not depend on their outcome.

Bolstering the effectiveness of representation in our republican form of government is not a goal that is confined to equal protection cases or to cases decided under clauses of the Constitution explicitly regulating governmental procedures. On "representation enforcement" in dormant commerce clause cases and in cases decided under the privileges and immunities clause, U.S. CONST. art. IV, § 2, cl. 1, see generally, Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

¹²⁹*Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (setting forth seven categories of cases in which the Court has had jurisdiction but has avoided passing on constitutional questions).

¹³⁰ 323 U.S. 192 (1944).

¹³¹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹³² 45 U.S.C. §§ 151-64 (1976 & Supp. V 1981).

nate against the black workers in collective bargaining.¹³³ The terms in which the Court describes the statutory bargaining obligation of union representatives to minority workers express the notion of fair governance as described above:

[T]he [union] representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. . . .

[I]t is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

We think that the Railway Labor Act imposes . . . at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty . . . to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.¹³⁴

The Court went on to say that fair union representation does not require that all union decisions favor all workers equally all the time.¹³⁵ Any given decision may advance the common good, even though not advancing each individual's interest. The union's duty rather is "to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."¹³⁶

Steele imposes a statutory duty of fair governance that should be constitutionally required of legislatures. Using power derived from the consent of the governed, and acting as the exclusive providers of public

¹³³ *Steele*, 323 U.S. at 204.

¹³⁴ *Id.* at 198, 202-03 (citation omitted).

¹³⁵ *See id.* at 203.

¹³⁶ *Id.* at 204.

education, state authorities should be deemed to have fiduciary responsibilities to parents and students. Given such a duty, it is possible to characterize the violation involved in *Brown I* as the failure to represent minority students "without hostile discrimination, fairly, impartially, and in good faith." The remedy, in turn, should instill fair governance as a means of protecting the minority's expectation interest in a system of government that will administer the schools nondiscriminatorily and that thus reasonably deserves the minority's confidence.

By "hostile discrimination," it should be understood that the Court is condemning an unfair form of decisionmaking whether or not based on actual animus. The collective bargaining agreement challenged in *Steele* disadvantaged black railroad firemen explicitly, but the Supreme Court did not indicate that it regarded the agreement as evidence of subjective hostility or proof of such motivation as relevant. From the victims' perspective, it is critical that hostile discrimination be interpreted to encompass not only discrimination deriving from animus, but also discrimination based on the systematic insensitivity of power holders to the victims' needs and preferences. Such an interpretation reflects the famous insight of John Stuart Mill:

We need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves: it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns.¹³⁷

Focusing on the harm of unfair governance fully justifies the statement in *Brown I* that separate educational facilities are inherently unequal,¹³⁸ even though not all separate educational facilities stand as insults to racial minorities. Blacks and other minorities have, indeed, experimented with minority-only education programs designed to respond to particular cultural traditions.¹³⁹ Such experiments are not

¹³⁷ Mill, *Considerations on Representative Government*, in *THREE ESSAYS* 187-88 (1975).

¹³⁸ *Brown I*, 347 U.S. at 495.

¹³⁹ See, e.g., Comment, *Alternative Schools for Minority Students: The Constitution, The Civil Rights Act and the Berkeley Experiment*, 61 CALIF. L. REV. 858 (1973); see also sources cited *supra* note 54.

Recognizing that the cultural value of black institutions results from black participation in their inception and management raises a central issue regarding the fair governance approach to school desegregation remedies: Is judicial intervention intended to create reasonable minority confidence in fair governance as legitimate once black voters succeed through the political process in securing black participation on school boards

stigmatizing because the institutions were created by minorities, even though the existence of such institutions may testify to a past history of racial discrimination. They were established, designed, and maintained to serve minority needs and to foster minority progress.

The value of these institutions for those they serve stems from participation in their inception and maintenance. Indeed, it seems apparent that minority participation in such institutions is the key to their value. By contrast, the heart of the injury in state-compelled racially segregated schooling is the element of involuntariness or powerlessness in the subjection of blacks to a discriminatory school system over which they have no effective influence and that expresses a racial hierarchy.

If unfair governance is recognized as the key to inequality in *Brown I*, other elements of the Court's broad discussion take on additional meaning. Blacks suffer not from separation from the majority culture per se, but from a forced and degrading estrangement from it.¹⁴⁰ Black students are taught their inferior status not only through racial separateness or the application to blacks of a label of inferiority, but also through the state's active intervention to create artificial separation. Segregation is an insult not so much because black children would be better off going to school with whites; the objective insult lies largely in the minority's powerlessness to partake of an educational program that is not hostile to the minority.

Closely connected to the pervasive element of involuntariness in the establishment of segregation is the majority's use of racial separate-

and in state legislatures? In the near term, the answer is affirmative. Even if, in some cities, blacks control the school board or mayor's office, black-dominated political agencies are still subject to the control of white-dominated political agencies at the state and national level and to the influence of extrapolitical powers, such as banks and industry, which make it impossible to translate numerical power immediately into substantive political changes. Fiss, *supra* note 100, at 152-53. The Supreme Court has thus been unwilling to limit judicial solicitude for the protection of minority rights even when the "governing majority" in a particular jurisdiction consists of members of the "minority" group. See *Castaneda v. Partida*, 430 U.S. 482, 499-500 (1977).

Over time, of course, one hopes that an ongoing history of government that is routinely sensitive to black interests will allow relaxed judicial scrutiny of political decisions that affect blacks adversely. At that time, the scope of a school board's legal obligations may change to reflect the new egalitarian society.

¹⁴⁰ The claim that separateness is forced on a particular group is central to the debate over the "inherent inequality" of separateness in other contexts as well. Compare Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 ILL. L. REV. 1 (low status and pay imposed on "women's work" renders sex-segregated work "inherently unequal") with Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1050-54 (1981) (defending federal support of Indian reservation development as contributing to Native American autonomy in part because the residential segregation of Native Americans is not compulsory).

ness to facilitate the disparate treatment of blacks. The institutional separation of whites and blacks not only instills in blacks a knowledge of the majority's belief in their inferiority, it also enables white authorities more easily to provide black students with less qualified teachers, poorer facilities, insufficient transportation, and inadequate programs. Such material inequality in schooling may, in turn, help to legitimate inequality in all aspects of life, thus extending the harm of unfair governance beyond the specific context of education. Blacks also suffer under segregated schooling from a sustained subjugation to political decisionmaking processes intent on ensuring that their resources remain inferior. Thus, their powerlessness is a double burden: it both transforms racial separateness into an insult and attests to the continuing vulnerability of the segregated minority to government discrimination facilitated by separateness.

Although the lack of fair governance is a profound harm in itself, judicial concentration on remedying the harm of unfair governance is likely to provide remedies for other harms of segregated schooling as well. After all, the crucial measure of the utility of any possible fair governance remedy¹⁴¹ will be its probable effectiveness in promoting official sensitivity to the educational interests of all persons in the community. In choosing among possible procedural or structural norms for fair governance, courts should therefore focus on measures that appear most likely to avoid any of the substantive harms that are suspected to result from segregated schooling. It is the supposed connection between norms of fair process or structure and the achievement of substantive fairness that makes fair governance an appropriate remedy for the lack of black confidence in educational decisionmaking by school authorities in segregated districts.

Recognizing that fair governance may achieve other desirable goals does not mean that courts, instead of striving for fair governance, should shift their remedial focus to more substantively defined goals, such as equal educational achievement or equal resource "inputs." It is difficult to articulate specific substantive criteria for equality in formerly segregated school systems that both command broad support and are capable of implementation through mechanisms more direct than a fair governance approach.¹⁴² Unlike the elaboration of substantive cri-

¹⁴¹ On the design of fair governance remedies, see *infra* sections IIC and IIIA-IIIID.

¹⁴² It is sometimes urged that courts enforce a substantive right to equal education for minorities, either as the proper implementation of *Brown I*, see Bell, *Civil Rights Commitment and the Challenge of Changing Conditions in Urban School Cases*, in *RACE AND SCHOOLING IN THE CITY* 194, 201 (A. Yarmolinsky, L. Liebman & C. Schelling eds. 1981) (urging remedial stress on effective school leadership, close paren-

teria for equality, however, it is a manageable task for courts to specify procedural and structural norms for the governance of school systems that would facilitate policy decisions untainted by prejudice and, thus, would be generally acceptable to blacks in the long run on substantive grounds as well.

Focusing on unfair governance as the inherent harm of segregated schooling may seem akin to explaining *Brown I* in terms of the objective stigma of intentional segregation. Conceptualizing the inherent harm of intentional segregation as unfair governance rather than as objective stigma, however, may yield two significant advantages for the elaboration of a remedial theory.

First, recognizing the harm as unfair governance may better direct attention to the problem that needs redress in the school cases: the continuing vulnerability of minority children to policymaking that is hostile or otherwise insensitive to minority interests. Although no single remedy suggests itself as the one logically compelled means of correcting unfair governance, the goal of fair governance may provide more guidance for determining the appropriate scope of a remedy than does the goal of "counteracting insult."

Second, to understand a desegregation remedy as an attempt to

tal involvement, and "accountable teachers"); Chang, *The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process*, 63 B.U.L. REV. 1, 58 (1983) (interpreting *Brown I* as creating a right that government "ensure that average minority educational performance equals average white educational performance in essential curricular areas"), or as a right distinct from the right to nonsegregated education, see Kutner, *Keyes v. School District Number One: A Constitutional Right to Equal Educational Opportunity?*, 8 J.L. & EDUC. 1 (1979) (urging judicial scrutiny of arbitrary disparities in educational inputs for minorities). The difficulties that would attend an attempt to formulate and implement any criterion of substantive educational equality are addressed at length in Cohen, *Defining Racial Equality in Education*, 16 UCLA L. REV. 255 (1969); see also Kirp, *Community Control, Public Policy, and the Limits of Law*, 68 MICH. L. REV. 1355, 1367 (1970).

Intriguingly, two prolific writers on desegregation and minority academic achievement have recently written that the one remedy courts are competent to implement and that is likely to promote minority educational achievement, is the implementation of desegregation monitoring provisions that will make data publicly available on the quality of education in the system's schools. See Crain & Mahard, *How Desegregation Orders May Improve Minority Academic Achievement*, 16 HARV. C.R.-C.L. L. REV. 693 (1982). This remedy, and its proponents' rationale, *id.* at 714-33, are consistent with a fair governance orientation to desegregation remedies. See *infra* text accompanying notes 241-42.

As this Article discusses, however, see *infra* text accompanying notes 232-38, even a remedial approach focused broadly on fair governance may have to include substantive policy requirements. This is either because certain substantive steps may be needed to help assure the effectiveness of the more process-oriented elements of a fair governance order or because, given the facts of a particular case, there are no process-oriented remedies available that are sufficient to generate reasonable confidence that nondiscriminatory policies will be followed by school authorities.

instill fair governance and, thereby, to redress black students' and parents' reasonable lack of confidence in nondiscriminatory school administration is to conceive of that remedy as an attempt to redress an objectifiable adverse impact on the injured parties. This is likely to invite a more narrowly channeled and, therefore, more acceptable judicial role than is an attempt to decree arbitrarily the measure of official endorsement for racial integration that adequately counteracts what the court construes as the insult inherent in an intentionally segregative act.

Spelling out the implications of fair governance as the interest to be protected in school desegregation cases sheds new light on the justifiability of the Supreme Court's decisions and may help explain the Court's rhetoric. The theory does more, however, than illuminate the possible logic of results that the Supreme Court has justified with other rationales. The fair governance theory provides a basis for exposing deficiencies in the Court's guidance on remedial design. It provides, in particular, a basis for criticizing the Court's treatment of metropolitan desegregation, and it suggests legitimate desegregation remedies that are not yet employed. To put these points in proper perspective, I will pursue the implications of the fair governance theory for five major issues in school desegregation litigation: (1) the requirement of proof of some intentional segregation before the imposition of liability; (2) the rules for proving the existence of a dual system; (3) the role of actual integration as a desegregation remedy; (4) the appropriate geographic scope of desegregation remedies; and (5) the choice of desegregation tools in cases where intradistrict integration is impracticable and interdistrict remedies are legally barred.

B. *Fair Governance and the De Facto/De Jure Distinction*

I have urged that a minority group's expectation interest in the fair governance of schools is the interest to be protected through desegregation decrees, and the measure of appropriate protection is the reasonable restoration of minority confidence in nondiscriminatory school administration. Should relief then be limited to cases in which acts of intentional segregation can be proven, or should the *de facto/de jure* distinction be abandoned as irrelevant to the issue of fair governance? Would the difficulty in reconciling a theory of remedial design based on the harms cited in *Brown I* with the *de facto/de jure* distinction pose an equal doctrinal obstacle to the Supreme Court's acceptance of fair governance as the interest to be protected in school desegregation cases? To answer these questions, it is necessary to decide whose perspective will be used to determine whether a violation of constitutional right has occurred. Assuming that the Court has several relevant perspectives

before it, it becomes critical to decide the manner in which these viewpoints are to be reconciled.

If the Court were to adjudicate rights entirely according to the victims' perspective, the right to fair governance in schooling would imply more than a right to be free from intentional segregation. At the extreme, one could imagine victims of discrimination advocating a rule of law that any person is entitled to some judicial relief if that person demonstrates a sincere lack of confidence in the fairness of educational decisionmaking. It is easy to see, however, that such a rule of law would soon undermine the presumed authority of elected officials to make educational policy. Because every government act can be viewed as disadvantaging some persons, every such act may prompt someone's sincere lack of confidence in government. Allowing one person's sincere lack of confidence to trigger judicial relief against any government decision would impede stable decisionmaking.

A less extreme rule, however, would be to grant judicial relief to any person who could point to a particular event as justifying a reasonable lack of confidence, not only on the plaintiff's part, but on the part of all members of an identifiable protected class. Courts would not grant relief solely upon demonstrations of personal distress, but would grant relief based on the proof of events that are widely known to have a high probability of manifesting unfair governmental decisionmaking. Once an event, such as intentionally created segregated schooling, was regarded as having such a high probability of taint, subsequent plaintiffs would not need to reprove that probability, but would only need to show the existence of the suspicious event in each case.

The Supreme Court's current doctrine embodies just such a rule. From the victim's perspective, however, the requirement that intentional segregation be proved as the event manifesting likely government unfairness erects an unjustified barrier to relief. Justice Powell argued in *Keyes v. School District No. 1, Denver, Colo.*¹⁴³ for the abandonment of the requirement of proof of intentional segregation because difficulties of proof might lead to inconsistent results in different regions of the country, which would not be justified given the uniform interests of minority plaintiffs. It could be urged even more directly that black plaintiffs can reasonably doubt the fair governance of schools as an historical matter based on indicia far easier to prove than intentional segregation. Given this country's racial history, black parents might reasonably doubt the fairness of educational administration in any racially

¹⁴³ 413 U.S. 189, 223-36 (1973) (Powell, J., concurring in part and dissenting in part).

imbalanced school system that is or ever was under predominantly white control. If reasonable confidence in fair governance is to be the measure of appropriate desegregation relief and if that measure is to be gauged solely from the perspective of the victims of segregation, it should be enough to establish liability that the attendance pattern in a school district is racially imbalanced and that the school system was subject to white control at some point during the existence of such imbalance.

Reasons exist, however, why the Court is unlikely to adopt this perspective as the governing perspective from which the scope of constitutional rights is to be determined in school desegregation cases. Aside from factors of personal ideology and political climate that would make such a result unlikely,¹⁴⁴ this victims' perspective fundamentally challenges the model of intentional tort litigation most familiar to the Justices. The rhetoric of the Court's desegregation opinions may be interpreted as attempting to confine an expansive view of victims' rights within a tort framework involving particular injured parties, charging certain named wrongdoers with particularized injuries that are attributable to those wrongdoers through a discernible causal chain.¹⁴⁵ Each aspect of this familiar framework may now have only an attenuated relationship to the form and substance of most current desegregation cases.¹⁴⁶ The points of attenuation, however, may have been less clear to the Court when it first adopted the tort model, and, in any event, a full-fledged victims' perspective would not fit easily within any other traditional model of litigation.¹⁴⁷

Even if the victims' perspective did fit more comfortably within familiar forms of litigation, there may be reasons why it should not be the sole perspective from which the measure of constitutional rights should be gauged. Under our constitutional system, it is impossible to ignore the presumptive authority of democratically elected officials in government decisionmaking. One means for respecting majoritarianism

¹⁴⁴ See generally Freeman, *supra* note 23.

¹⁴⁵ See Fiss, *supra* note 45, at 35.

¹⁴⁶ See generally Kirp, *Legalism and Politics in School Desegregation*, 1981 WIS. L. REV. 924.

¹⁴⁷ This point originated with Professor Martha Minow. Tort law has, of course, developed strict liability as a model for litigation that escapes problems of correlating particular injuries with particular blameworthy wrongdoers. The strict liability goal of spreading losses to those most able to bear them, however, seems inapposite to the desegregation context, in which the victims bear much of the remedial burden. A thoughtful attempt to reconceptualize public law litigation that takes account of the implicit departures of the desegregation cases from the traditional model of civil litigation is Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

without unduly compromising constitutional values of equality is to make the threshold for liability either a particularized showing of majority unfairness or the existence of some event that a majority recognizes as manifesting a high probability of unfairness. Intentional segregation, although not racial imbalance per se, is now understood by an overwhelming majority of Americans as manifesting virtually a certainty of antecedent prejudice, and proof of such segregation is therefore a defensible requirement for the imposition of liability in school desegregation cases.

Adhering to the *de facto/de jure* distinction increases, however, the risk that some unfair governance of schools will not be remedied. Cases of unfair governance may exist in which no intentional segregation can be proved, and the Court has not yet approved any alternative standard for proving *prima facie* unfairness.¹⁴⁸ For this reason, the fair governance theory might seem to require us to reject the *de facto/de jure* distinction. The difficulties are much the same as with theories of remedy based on harms to black children's educational achievements, adult life chances, and personality development. Under any of these theories, proof of government inaction in the face of a high degree of even adventitious segregation might seem a more appropriate factual trigger for government liability.

The possibility that the *de facto/de jure* distinction may erect too high a barrier to government liability prompts two comments about the utility of the fair governance theory, even if the distinction survives. The first pertains to the theory's usefulness in shaping the rhetoric of judicial decisions in school desegregation cases. For those who criticize the *de facto/de jure* distinction, judicial acceptance of the fair governance theory might shift the doctrinal debate to more fruitful territory for analysis. Under the fair governance theory, judicial observance of the *de facto/de jure* distinction would be given a specific, and therefore debatable, justification; namely, that intentional segregation is an appropriate signal that government conduct has been tainted by prejudice. Supreme Court adoption of the fair governance theory would invite continuing judicial attention to the question whether other phenomena are equally demonstrative of government unfairness. In contrast, the conception of the remedial process manifested in *Dayton Board of Education v. Brinkman*¹⁴⁹ [*Dayton I*] submerges the question of what harm is to be remedied in school desegregation cases and thus obscures the

¹⁴⁸ It is also conceivable, though it seems far less likely, that cases exist of past segregation in school districts that, without judicial intervention, are now administered with the utmost sensitivity to black students.

¹⁴⁹ 433 U.S. 406 (1977).

question whether the Court's liability rules are justified.

The second point relates to the practical significance of the de facto/de jure distinction, which depends on the rules for proving intentional segregation. The applicable evidentiary rules could either make the right to fair governance extremely easy or else virtually impossible to enforce. One way to characterize the developments from *Keyes* through *Dayton Board of Education v. Brinkman*¹⁵⁰ [*Dayton II*] is to view the evolving doctrine as a preservation of the de facto/de jure distinction that is nonetheless sensitive to the dangers of leaving government unfairness unremedied because of difficulties of proof. The fair governance theory is helpful in reconciling the *Brown I* liability doctrine with the remedial consequences of the Court's post-*Brown II*¹⁵¹ decisions by providing a more persuasive justification for the rules of *Keyes* and *Dayton II* than the narrow *Dayton I* conception of school desegregation remedies based on incremental distortions in patterns of attendance.

When intentional segregation occurs, it may be regarded generally as probative of a lack of fair governance. Specifically, it implies official intent to use racial separation, even adventitious racial separation, to facilitate the disparate treatment of black students.¹⁵² Given our nation's racial history, any significant intentional racial segregation is a reasonable ground for losing confidence in nondiscriminatory policymaking by school authorities. Indeed, given our historical experience, it is difficult to understand why white school authorities would try to create racial separation at all if the officials' objective were truly to provide equal educational opportunity for black students.

It is, therefore, a reasonable inference that, whenever school authorities intentionally segregate a substantial portion of a school district, all racially separate schools in that district reinforce the condition of unfair governance. If school authorities act intentionally to create racially separate schools to facilitate disparate treatment, the minority community can reasonably expect the authorities to rely on even adventitious racial imbalance to accomplish the same discriminatory purposes. Absent compelling proof that racial imbalance in some schools is neither the product nor the instrument of unfair discrimination, it is justifiable when some significant intentional segregation is proven to

¹⁵⁰ 433 U.S. 526 (1979).

¹⁵¹ *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

¹⁵² On remand in *Keyes*, the district court stated, "The affirmative evidence is . . . that defendants' actions in Park Hill are reflective of its attitude toward the school system generally." *Keyes v. School Dist. No. 1*, 368 F. Supp. 207, 210 (D. Colo. 1973), *cert. denied*, 423 U.S. 1066 (1976).

include all of a district's racially imbalanced schools in a *Keyes*-type remedy. Only by removing the condition that the authorities have indicated they will use to effect discrimination can a system of fair governance be achieved.

Correspondingly, our historical experience may be such that, once significant intentional segregation occurs, black students and parents can legitimately doubt the good faith of school authorities until those authorities affirmatively undo the system by which black students have been made vulnerable to discriminatory treatment. That is, the skepticism of minority parents about the uses of racial separation in any district that has ever been subject to significant intentional segregation may be so justified that school authorities should now be liable to provide a fair governance remedy even if the most significant segregative acts antedated *Brown I*.

These justifications for the results in *Keyes* and *Columbus Board of Education v. Penick*¹⁵³ are not beyond debate, but at least the debate they might raise would focus on what truly is at stake in those cases—the implementation of public school governance that reasonably deserves the confidence of all persons subject to it. Unlike the narrow conception of remedies articulated in *Dayton I*, the fair governance approach should not appear artificial or inattentive to the facts or competing interests that those cases present.

C. *Fair Governance and the Remedial Importance of Integration*

Although the fair governance theory can be reconciled with the Supreme Court's decisions on the scope of school board liability for desegregation relief, the theory goes beyond the Court's decisions in terms of the remedial tools it suggests. Most important, a strong case can be made that, under the fair governance theory, integration should be the remedial tool of first resort for redressing systematic discrimination against black students.

For purposes of clarity in explaining this point, it is necessary to provide definitions for two recurring terms—"racial balance" and "integration"—that may misleadingly be regarded as interchangeable. "Racial balance," the Supreme Court's preferred remedial strategy, means the reassignment of students throughout a public school district to prevent, to whatever degree possible, the concentration of minority students residing within the district in racially identifiable schools. Thus, if a district is seventy percent white and thirty percent black, the

¹⁵³ 443 U.S. 449 (1979).

goal of racial balance would be the rough approximation of that ratio in as many schools as possible. It is critical to note, however, that racial balance need not imply significant interracial education unless the racial composition within the district could permit it. That is, if a school district is ninety percent black, racial balance cannot afford most black pupils the opportunity for interracial education.¹⁵⁴ "Integration," in the following discussion, means something different from mere racial balance; it means the assignment of majority and minority pupils in such a way as to assure substantial interracial contact in each school. Therefore, for example, the lower courts' rationale for the necessity of a metropolitan remedy in *Milliken v. Bradley*¹⁵⁵ [*Milliken I*] can be rephrased as follows: racial balance in Detroit would not produce integration in Detroit because Detroit had become a nearly all-black school district.

Integration fosters the goal of fair governance both as a form of restoration and as a deterrent. As a restorative measure, integration is designed to undo much of the intended discrimination that went hand-in-hand with the establishment of segregation. To the extent intentional segregation instilled in blacks feelings of inferiority, integration restores the dignity of the minority. To the extent intentional segregation prevented blacks from associating with white students, integration vindicates freedom of association. To the extent intentional and de facto segregation facilitated inequalities in the availability of material resources, integration prevents white school authorities from distributing resources to different races in a conspicuously unequal manner.

Integration, however, has an equally critical prophylactic aspect. First, by dispersing white students throughout a school system, it offers some guarantee of improved official treatment for blacks. If blacks and

¹⁵⁴ Precisely how many districts would face difficulty generating substantial interracial enrollments throughout their schools apparently is not known. For the 1974-75 school year, the then Department of Health, Education, and Welfare identified 19 large school districts in which metropolitan desegregation would be needed to place all minority children in predominantly white schools. G. ORFIELD, *MUST WE BUS?* 68-69 (1978). Assuming relative demographic stability, however, intradistrict integration might still be a realistic goal in a number of these "majority minority" communities because schools need not be predominantly white to be substantially integrated. A major source of concern, however, is that demographic trends point to an increasing concentration of minority public school enrollment in central cities. Rossell & Hawley, *Understanding White Flight and Doing Something About It*, in *EFFECTIVE SCHOOL DESEGREGATION* 157, 157-63 (W. Hawley ed. 1981). As of 1980, 57.2% of all blacks in the United States lived in central cities as compared to 24.6% of all whites. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83*, at 21 (103d ed. 1982). This concentration may indicate increasing difficulty in affording substantial integration in some urban school districts.

¹⁵⁵ 418 U.S. 717 (1974).

whites attend the same schools, there is a structural incentive for school authorities intent on benefitting white students to afford distributional equality to all students attending each school.¹⁵⁶ Second, by creating a minority presence in each school, integration restructures a school system so as to help assure that blacks have some decisionmaking influence throughout the formerly segregated district and generates increased confidence that official decisions will take minority interests into account.

A significant analytical advantage of the fair governance approach over the Rehnquist approach in *Dayton I*¹⁵⁷ is that it clarifies the need for prophylactic relief to protect plaintiffs' expectations of educational fairness. The fair governance theory recognizes the pervasiveness of the constitutional evil to be redressed, but it also admits the impossibility of recreating the precise school system that would have been but for the unlawful discriminatory acts of school authorities. It follows that the most appropriate means for achieving reasonable confidence in nondiscriminatory school administration is to fashion a system of governance in which discrimination will be substantially deterred. Thus, under a fair governance conception of remedies, the goals of restoration and prophylaxis merge. The remedial goal of a fair governance decree is primarily restorative in that the remedy aims to encourage conditions that would reasonably justify the confidence of minorities in nondiscriminatory school administration. The remedial tools used, however, are intended to foster fair governance now and in the future.

The merger of a restorative remedial rationale with prophylactic remedial tools is especially justified in a school desegregation case. Given the history and pervasiveness of racial discrimination in the United States, minority communities cannot reasonably be expected to have faith in school authorities ordered to do nothing more than mechanically undo particular acts of past injustice. To a large degree, the opportunity to atone for the past losses suffered by students and parents has long passed. To compensate the current minority community, the historical slate must, in a more emphatic way, be wiped clean. Formerly segregated communities should seek a structure of school governance that promises a new pattern of educational decisionmaking.¹⁵⁸

¹⁵⁶ School-by-school integration may be insufficient to generate equal treatment and distributional equality in the schools. The landmark case on intraschool inequalities is *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968), which condemned the District of Columbia "track" system. On other potential sources of intraschool discrimination, see W. HAWLEY, *supra* note 4, at 97-135.

¹⁵⁷ See *supra* text accompanying note 83.

¹⁵⁸ One might object that such an approach would go beyond Supreme Court pre-

These justifications for integration as a fair governance tool highlight the critical distinction between integration and the conventional goal of racial balance that may appear in particular cases. If racial balance does not entail integration, then the restorative and prophylactic purposes of the desegregation remedy under a fair governance theory will be largely undermined. That is, because the remedial goal of fair governance is not merely the repair of an artificially distorted pattern of school attendance, it is not a sufficient remedial strategy to redistribute temporarily a small percentage of white students in a school district throughout the system. To assure fair governance, integration must proffer some hope of sustained interracial education throughout the school system. Hence, integration will be a sufficient remedy only if there is substantial representation of both white and black student groups in each school and if the pattern of integrated attendance has some chance of lasting.¹⁵⁹

cedent in affording the right of minority students to particular results in education, rather than to an undoing of a particular history of unconstitutional conduct. It could be argued that the purpose of the de facto/de jure distinction is precisely to confine the conception of rights in school desegregation cases to an historically-based principle. See generally Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 673-79 (1982) (noting the Court's reluctance to choose between historical and end-result principles for determining whether a constitutional violation has occurred).

Such an objection, however, would misconstrue the utility of the distinction between "historical principles" and "end-result principles," R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 153-55 (1974), in analyzing desegregation remedies. Because only the unconstitutional conduct of public school authorities triggers the prospect of the kind of fair governance decree being considered here, the fair governance approach is historically based. To reach the question of remedial design, however, it is necessary to depart from the historical focus of the suit to recognize the impracticality of establishing fair governance by attempting to refashion a school system merely by undoing certain historical acts of discrimination. The resulting remedial emphasis on deterrence need not, however, undermine the historical basis of the remedy. Even if the fair governance approach requires courts to assess the adequacy of remedies according to their likely success in achieving a broadly conceived "end-result" of fair educational governance in the future, the degree of protection against discrimination may still be determined according to the school authorities' past performance. See *infra* text accompanying notes 212-19. That is, the more frequent and pervasive the proven acts of discrimination in a given school system, the more a court will be justified in intervening to prevent future unfair governance. Thus, the fair governance approach to remedial design is reconcilable with the historical focus of the post-*Brown I* cases.

¹⁵⁹ Cf. Gewirtz, *supra* note 23, at 641 & n.145. This Article refers recurrently to problems of black students and parents and relies chiefly on this country's history of race relations to justify its emphasis on fair governance. As the Supreme Court recognized in *Keyes*, however, Hispanics are also an identifiable class for purposes of equal protection analysis, and the history of educational inequity common to both blacks and Hispanics justifies *Keyes*-type relief for segregated Hispanics as well. See *Keyes*, 413 U.S. at 197-98. Concentration on the experience of blacks to justify the fair governance theory in this Article should not be read to imply that the approach is less useful when other groups are victims of intentional segregation.

Integration should be the remedy of first resort not only because of its utility, but also because of its legitimacy in principle. A remedy is both a response to particular parties' injuries and also a judicial instrument imposed on public school authorities and on a complex social institution—the public school system. For this reason, there are considerations of institutional legitimacy with which remedial design must also be concerned. The problem of legitimacy is implicated in the remedial process, for example, because any judicial desegregation decree represents the intervention of an unelected and nonexpert agency into the policymaking realm of persons normally vested with educational decisionmaking power on behalf of a particular community.

From this perspective, however, integration becomes especially attractive as a principled compromise among the various viewpoints on legitimacy that are most likely to surface in a desegregation case. In order to accommodate the value of majoritarianism, integration eschews direct and detailed interference into the substance of educational decisionmaking by defendant school boards. Given the remedy's ambitious task, this represents a profound concession to local autonomy. Although integration appeared to be a radical form of intervention in the South in the 1950's and 1960's, it most directly alters only the structure of governance. In terms of dictating particular educational policy outcomes, it is a highly restrained measure.

On the other hand, integration forcefully accommodates what is likely to be the victim class's prime criterion for legitimacy: the guarantee of a fair educational process for minority students. If it were possible to specify with precision and to implement any prevailing substantive standard for what equal education should mean for each student, the remedial focus on government process might seem too modest.¹⁶⁰ Absent such a standard, however, integration vindicates minority educational interests in powerful ways. It erects a pattern of school attendance that does not reflect an antecedent pattern of prejudice, deprives school authorities of a primary mechanism for dealing with minority students in bad faith, helps assure that black students will benefit from distributional decisions that benefit white students, and eliminates other risks of harm inherent in racial imbalance per se. In sum, integration vindicates legitimate concerns of both plaintiffs and defendants.

Given the apparent legitimacy of integration, it is not surprising that at least racial balance, typically implemented through busing, has been the federal courts' remedy of first resort. Indeed, the Supreme Court's desegregation opinions in *Keyes*, *Columbus*, and *Dayton II* can

¹⁶⁰ See *supra* note 142.

be reinterpreted as relying on racial balance as a two-edged approach to relieve state-imposed segregation. On one hand, the Court implicitly makes an effort to undo discriminatory systems of school governance in which blacks were subjected to school authorities intent on treating them unequally. On the other hand, the Court's choice of racial balance as a remedial technique indicates a desire to inculcate new norms of institutional behavior in school systems without seeming to take over the governance of formerly segregated schools.

There are two differences, then, between the fair governance orientation and the Supreme Court's approach to busing. First, the fair governance theory offers a different and more persuasive explanation for the utility and legitimacy of student reassignment remedies. Second, if student reassignment is to be the primary remedy in a particular case, the fair governance theory stresses the importance of establishing integration, not merely racial balance.

D. *Milliken v. Bradley: The Conflict of the Goal of Fair Governance and the Value of Local Autonomy*

The importance of integration as a remedial tool to achieve fair governance supports the use of interdistrict integration to remedy segregation in a district in which intradistrict integration is not possible. The desirability of that remedy, in turn, raises what the Court has treated as a key problem of remedial legitimacy: the conflict between judicial intervention in public school systems so as to protect constitutional rights and the legitimate autonomy of local school boards to govern their own school systems.¹⁶¹

In the Detroit desegregation litigation the conflicting values of fair governance and deference to local authority collided. An assessment of the consequences of *Milliken I* for the implementation of fair governance standards in school districts outside the South, and in large cities generally, requires a review of the facts of the case.

On April 7, 1970, the Detroit Board of Education voluntarily adopted a racial balance plan for twelve of the twenty-one high schools in Detroit. Under the plan, the high schools would have been desegregated grade-by-grade over a three-year period.¹⁶² At that time, De-

¹⁶¹ Stephen B. Kanner has argued that the Court's very articulation of a narrowly compensatory or restorative purpose for school desegregation remedies represents an appropriate compromise between competing values of remedial efficacy and local autonomy. See Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 Nw. U.L. REV. 382, 385 (1977).

¹⁶² *Bradley v. Milliken*, 540 F.2d 229, 232-33 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

troit's public school enrollment overall was 63.6% black.¹⁶³ On July 7, 1970, however, Michigan's governor, William G. Milliken, signed into law legislation that blocked implementation of all local attendance provisions adopted by boards of education for the 1970-71 school year, pending the advent of new "first class school district" boards of education.¹⁶⁴ A first class school district was defined as a district with over 100,000 students.¹⁶⁵ Detroit was the only such district in the state.¹⁶⁶

Before the new school year, a recall election removed from Detroit's Board of Education the four-member majority that had adopted the racial balance plan. Governor Milliken appointed four replacements who, together with the incumbents, rescinded the plan.¹⁶⁷ In August 1970, the Detroit NAACP, together with individual parents and students, filed a class action to declare the 1970 act unconstitutional and to secure desegregation under the terms of the board's plan. Litigation began and interlocutory questions went before the court of appeals. In late September 1971, the district court found that the Detroit schools were unconstitutionally segregated under policies adopted and implemented by state and local officials.¹⁶⁸

Hearings on appropriate relief were conducted from March 28 through April 14 of 1972. On June 14, 1972, the district court appointed a panel to design an integration plan for Detroit and for fifty-three of its neighboring school districts on the ground that intradistrict busing would not accomplish effective desegregation. The court of appeals affirmed on June 12, 1973, over three years after the Detroit Board of Education had originally voted to adopt racial balance in the high schools voluntarily.¹⁶⁹

In July 1974, the Supreme Court voted five to four to overturn the court of appeals decision and to remand for the design of intradistrict relief only.¹⁷⁰ The Court held that the neighboring districts could not be incorporated into the plan absent a finding that each district had perpetrated a constitutional violation that produced "a significant segre-

¹⁶³ *Id.* at 233. The district court incorrectly reported that black enrollment was 63.8%. See *Bradley v. Milliken*, 338 F. Supp. 582, 586 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

¹⁶⁴ 1970 Mich. Pub. Acts 48, reprinted in *Bradley v. Milliken*, 433 F.2d 897, 905-09 (6th Cir. 1970). The occasion of state interference with voluntary local desegregation is not limited to Michigan. See, e.g., *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982).

¹⁶⁵ *Bradley v. Milliken*, 433 F.2d 897, 905 (6th Cir. 1970).

¹⁶⁶ *Id.* at 900.

¹⁶⁷ *Bradley v. Milliken*, 540 F.2d 229, 233 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

¹⁶⁸ *Milliken I*, 418 U.S. at 722-24.

¹⁶⁹ *Id.* at 733-35.

¹⁷⁰ *Milliken I*, 418 U.S. 717 (1974).

gative effect" in Detroit.¹⁷¹ In doing so, the Court, in its desire to respect the integrity of local authority and governmental structure, fully overcame any value that earlier cases had implicitly placed on the ideal of fair governance.

The starting point of the majority's analysis was the uncontested fact that no suburban school district was guilty of any proven wrongdoing.¹⁷² The Court then deduced that the only reason for joining the suburban districts in the remedy was the lower courts' aim to "produce the racial balance which they perceived as desirable."¹⁷³ This aim, the majority said, misconstrued the nature of the plaintiffs' right, which "does not require any particular racial balance in each 'school, grade or classroom.'"¹⁷⁴ The plaintiffs' right, the majority said, was to attend a "unitary school system" within the school district in which they resided.¹⁷⁵ Consequently, the initial premise—that no wrongdoing was proved against any other district—along with the fact that no proven intentional discrimination underlay the initial drawing of the district lines, led the Court to its conclusion: no district other than Detroit could be joined to vindicate the rights of plaintiffs living in Detroit.

The majority's analysis appears to be syllogistic, but its first deduction from its factual premise is fundamentally wrong. The analysis rests on the deduction that the inclusion of the suburban districts could be justified only by positing that plaintiffs have a right to a particular racial balance in the school they attend. The existence of such a right need not have been assumed by the plaintiffs, by the district court, or by the court of appeals, in order to justify interdistrict relief. A sufficient assumption is that plaintiffs have the right to a racial balance remedy that includes a sufficient degree of racial integration to guarantee that black children will, in the future, be treated as well as white children by the governing state and local school authorities. Unless racial balance accomplishes substantial integration, black children are likely to remain as isolated and as susceptible to discrimination as before.

Nondiscrimination, not a particular ratio of whites and blacks, was, in fact, the district court's overriding goal.¹⁷⁶ Although the Su-

¹⁷¹ *Id.* at 744-46.

¹⁷² *Id.* at 745.

¹⁷³ *Id.* at 740.

¹⁷⁴ *Id.* at 740-41 (quoting *Bradley v. Milliken*, 345 F. Supp. 914, 918 (1972)).

¹⁷⁵ *Id.* at 746.

¹⁷⁶ [I]nsofar as pupil assignments are concerned, the system of public schooling in every state must be operated in a racially non-discriminatory, unified fashion; until that objective is met, the very system of public schooling constitutes an invidious racial classification. The adoption of an

preme Court in *Milliken I* said, "The target of the *Brown* holding was . . . the elimination of state-mandated or deliberately maintained dual school systems,"¹⁷⁷ it again failed to consider the constitutional rationale for the abolition of those systems. If the rationale is deemed to be the vindication of the plaintiffs' right to fair or nondiscriminatory governance, that rationale supplies convincing justification for the lower courts' approach.

The justification for including suburban school districts in a remedy for Detroit is twofold. First, as explained above, racial balance must entail sufficient racial integration to assure fair governance by school authorities. The steady egress of white students from the Detroit public schools to the suburbs indicated to the lower courts that any student reassignment plan confined to Detroit would produce only a small improvement in the degree of racial mixture in Detroit schools and classrooms. Consequently, to achieve effective integration, the district court broadened its remedy.¹⁷⁸

Second, and just as important, convincing evidence persuaded both lower courts that state discrimination also required relief.¹⁷⁹ The July 1970 legislation, which accomplished nothing more than the prevention of the voluntary desegregation of Detroit's public schools, evidenced the state's desire to maintain separation between whites and blacks. The maintenance of segregation was surreptitious but certainly probative of the state's intent to use racial separation to facilitate the disparate treatment of blacks—an inference that justifies the expansive liability approved in *Keyes*.¹⁸⁰ The inference of discriminatory intent was but-

education theory having the effect of maintaining a pattern of de jure segregation is therefore clearly impermissible.

Bradley v. Milliken, 345 F. Supp. 914, 921-22 n.1 (E.D. Mich. 1972), *modified*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

¹⁷⁷ *Milliken I*, 418 U.S. at 737.

¹⁷⁸ Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973), *rev'd* 418 U.S. 717 (1974).

¹⁷⁹ *Id.* at 238-41.

¹⁸⁰ See *supra* notes 93-95 and accompanying text. Indeed, the Court could have justified state liability for metropolitan desegregation in *Milliken I* on the same basis as it imposed districtwide liability in *Keyes* on school boards responsible for intentional segregation in a significant portion of a school district. See *Keyes*, 413 U.S. at 207-11. That is, since local authorities, whose power derives from the state, have been found liable for intentional intradistrict segregation, the burden should shift to the state to show that interdistrict racial imbalance is neither the product nor the instrument of unfair discrimination. The evidentiary gap linking past state discriminatory practices to interdistrict racial imbalance can be handled through a presumption no less easily than the evidentiary gap handled by a presumption in *Keyes*. See Fiss, *supra* note 45, at 29 n.25.

The second *Milliken* opinion, *Milliken v. Bradley*, 433 U.S. 267 (1977), suggests that the Court might be more willing to impute such remedial responsibility to the state where the remedies do not entail interdistrict transportation. See *id.* at 287-90; *supra*

tressed by evidence that educational resources in predominantly white suburban districts throughout Michigan were superior to those available in the predominantly black city district.¹⁸¹ Thus, including suburban districts in a remedy for Detroit could be justified on the ground that interdistrict racial integration was needed to guarantee local non-discrimination and on the complementary ground that metropolitan integration was needed to discourage racial discrimination by the state of Michigan.

The Supreme Court made only passing mention of the state's influence in derailing voluntary desegregation in Detroit. The Court's observation that the plan it sidetracked "had no causal connection with the distribution of pupils by race between Detroit" and the suburban school districts¹⁸² was true, but, in the light of the fair governance analysis, inapposite.

The *Milliken I* opinion suggests two countervailing rationales for the Court's devaluation of the remedial importance of integration. The first is deference to local autonomy—the traditional practice in many states of giving local communities extensive decisionmaking power over schools within a limited geographical area.¹⁸³ The tradition of local autonomy may reflect both a state's desire to maximize parental input in school governance and the desire of parents to have children attend schools close to home. The second rationale appears to be deference to state-imposed structures of school administration. The Court's concern in *Milliken I* was that metropolitan relief might impose administrative changes on Michigan that would, in turn, "disrupt and alter the structure of public education in Michigan."¹⁸⁴

Neither of the localist values described above finds any more support in the Constitution than do specific prescriptions for school desegregation relief. *Milliken II* describes *Milliken I* as articulating only "appropriate limits of federal equitable authority,"¹⁸⁵ not as implementing a specific constitutional mandate. Subsequent commentary has identified such guidelines for the exercise of judicial discretion in the design of traditional equitable relief as "extra-constitutional" or "sub-

note 119. *But cf.* *United States v. Board of School Comm'rs*, 677 F.2d 1185 (7th Cir.) (where state is solely responsible for unconstitutional interdistrict segregation, state must pay entire cost of interdistrict remedy, including the cost of transportation for integration of extracurricular programs), *cert. denied*, 103 S. Ct. 568 (1982).

¹⁸¹ For example, Michigan excluded Detroit from state funding for intradistrict student transportation, which the state provided to nonurban Michigan school districts. *Bradley v. Milliken*, 484 F.2d 215, 238 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

¹⁸² *Milliken I*, 418 U.S. at 750.

¹⁸³ *Id.* at 741-42.

¹⁸⁴ *Id.* at 742-43.

¹⁸⁵ *Milliken v. Bradley*, 433 U.S. 267, 270 (1977).

constitutional" rules.¹⁸⁶ Whatever the sources of these guidelines, however, it may be that the Court's reliance on either or both of them will be crucial in determining whether desegregation relief in the future will vindicate the right of fair governance implicit in the pre-*Milliken I* and post-*Dayton I* cases.

If the Court relies on the first rationale, espousing popular traditions of local autonomy, a possibility still exists that courts faced with racial discrimination and unable to secure actual integration within a local school district might yet design a wide range of intradistrict remedies to effectuate the right to fair governance. If the Court relies, however, on values implicit in deference to state-imposed administrative structures, implementation of the right of fair governance may be much more difficult where integration is not feasible. Lower courts may be forbidden both to attempt integration through interdistrict desegregation and to interfere in other significant ways with the governance structures of local school systems to secure reasonable confidence in nondiscrimination.

The argument that *Milliken I* is concerned chiefly with local autonomy springs from the greater support in case law for the relevance of such a value. Justice Powell, who voted with the majority in *Milliken I*, wrote the Court's opinion in *San Antonio Independent School District v. Rodriguez*,¹⁸⁷ cited in *Milliken I*¹⁸⁸ as support for judicial deference to local control of schools.¹⁸⁹ Powell's separate concurrence in *Keyes*, in which he argues for a conception of plaintiffs' rights in school desegregation cases broader than that made explicit in *Brown I*,¹⁹⁰ dis-

¹⁸⁶ On the impact of "subconstitutional values"—the traditional "equitable principles" referred to in *Brown II*—on values expressed in constitutional norms, see Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 44-45 (1975). Monaghan argues that the development of a body of "subconstitutional" law in connection with the general guarantees of due process and equal protection would lead to the judicial creation of liberties without "constitutional reference points." *Id.* at 45. It is equally possible, as in *Milliken I*, that "subconstitutional rules" will be used to circumscribe the enforcement of equal protection. See *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976) (referring to *Milliken I* as implementing "fundamental," but textually unstated, "limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities"). But cf. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975), *appeal dismissed*, 429 U.S. 973 (1976) (upholding the metropolitan desegregation of Wilmington, Del., as consistent with *Milliken I*).

¹⁸⁷ 411 U.S. 1 (1973).

¹⁸⁸ 418 U.S. at 742.

¹⁸⁹ Justice Powell's allegiance to the value of local political control over schooling may reflect his experience as chairman of the public school board of Richmond, Virginia, from 1952 to 1961. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN* 161 (1979).

¹⁹⁰ *Keyes*, 413 U.S. at 217-53 (Powell, J., concurring in part and dissenting in part).

cusses at length the danger of geographically expansive remedies that disrupt values of home, family, and neighborhood that he believes are deeply ingrained in our national tradition.¹⁹¹

On the other hand, the facts of *Milliken I* imply that the Court opposes more specifically any judicially imposed structural change to accomplish desegregation.¹⁹² If attaining a nondiscriminatory system of local administration is the proper goal, then Michigan's involvement in stymying voluntary desegregation in Detroit appears to have been a valid basis for ordering interdistrict relief.¹⁹³ One would have thought that the state's blockage of even modest voluntary desegregation in Detroit would have made *Milliken I* the paradigmatic case in which the value of fair governance would outweigh deference to the state's choice of administrative structure.

If *Milliken I* rests on a theory of the inviolable integrity of state administrative structures, the prospects for implementing the fair governance standard appear dimmer in districts where intradistrict racial balance will not secure sufficient integration to produce a system responsive to minority interests. Lower courts seeking to accomplish fair governance by imposing even intradistrict remedies that require changes in administrative structure will find little direct case support for such relief. *Milliken I* may restrain such lower courts completely, forbidding them either to reach beyond district lines to secure integration or to tamper with state administrative structures within district lines.

If *Milliken I* rests, however, on community concern for local control over schooling, the prospects for implementation of the fair governance standard are greater. Though the desegregation cases do not discuss the prospect of structural changes within districts to secure fair governance, they can, if this Article proves persuasive, be read to imply that fair governance is the proper remedial goal. Therefore, courts seeking guidance in the design of remedies to secure fair governance may look beyond racial balance cases to those school cases that have considered structural changes and to other equal protection cases in

¹⁹¹ *Id.* at 237-52.

¹⁹² The Court's implicit solicitude in *Milliken I* for the structural inviolability of local governmental entities was articulated in dicta in *Milliken II*. See 433 U.S. at 291 (Court orders should "not jeopardize the integrity of the structure or functions of state and local government").

¹⁹³ See Gewirtz, *supra* note 23, at 648; cf. *Hills v. Gautreaux*, 425 U.S. 284, 296-300 (1976) (relief against HUD for its unlawful financial support of racially discriminatory activities of the Chicago Housing Authority, which affected public housing options in Chicago, appropriately extended beyond Chicago city limits to include the entire metropolitan housing market).

which structural remedies have been imposed.¹⁹⁴

If courts are not innovative in shaping remedies, the achievement of racial balance, where it cannot secure integration, will not provide fully satisfactory relief. It offers little promise in such circumstances of securing an affirmative right to fair governance and, as discussed below, presents a significant likelihood in many districts of reimposing the same harms it was designed to relieve. As for Detroit, the court of appeals opinion on remand rings with frustration at the court's inability to provide genuine relief through racial balance.¹⁹⁵

III. INTRADISTRICT REMEDIES IN PURSUIT OF FAIR GOVERNANCE

Part II of this Article considered some of the general problems that any theory of school desegregation remedies will have to address. This part concerns the more specific characteristics of desegregation decrees that are framed in accordance with the fair governance theory. First, the overall structure of such decrees is reviewed; second, specific steps

¹⁹⁴ See *infra* part III, especially sections C and D.

¹⁹⁵ By 1975, when the district court entered its remedial judgment on remand, the school system had become over 75% black, as compared to 63.6% five years earlier. *Bradley v. Milliken*, 540 F.2d 229, 233, 236 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977). The court of appeals, in affirming the district court, wrote,

When this school desegregation case was filed in August 1970, Ronald Bradley, one of the black plaintiffs, had been assigned to enter the kindergarten of a Detroit school whose enrollment was 97 per cent black.

In September 1976 Ronald Bradley is scheduled to enter the sixth grade of the Clinton School, which now is more than 99 per cent black. The decisions of the District Court which we now review do nothing to correct the racial composition of the Clinton School. They grant no relief to Ronald Bradley nor to the majority of the class of black students he represents.

Nevertheless, this court finds itself in the frustrating position of having to leave standing the results reached by the District Judge on the issue of assignment of students, although we disagree with parts of his opinions and orders. Our affirmance is found to be necessary for the simple reason that reversal would be an exercise in futility under the situation now existing in the Detroit school system and the law of this case as established by the Supreme Court in *Milliken v. Bradley*.

Id. at 232 (footnote omitted).

The Court-imposed limitation on remedies decreed in *Milliken I* is unfortunate, not only because it may perpetuate racially imbalanced school systems, but because *Milliken I* insulates suburban school districts from the social burden of integration and may actually cause more logistically burdensome intradistrict remedies in some districts. See Fiss, *supra* note 45, at 33-34. For vigorous statements in support of creating metropolitan school districts to achieve educational equality generally, see Chemerinsky, *Ending the Dual System of American Public Education: The Urgent Need for Legislative Action*, 32 DE PAUL L. REV. 77 (1983); Pettigrew, *The Case for Metropolitan Approaches to Public-School Desegregation*, in RACE AND SCHOOLING IN THE CITY 163 (A. Yarmolinsky, L. Liebman & C. Schelling eds. 1981).

that directly address the governance structure of a school district are examined.

A. *The General Structure of a Fair Governance Remedy*

What remedial tools are appropriate in pursuing fair governance? Where *Milliken v. Bradley*¹⁹⁶ [*Milliken I*] does not permit interdistrict integration, what form is a fair governance decree to take in a district where meaningful intradistrict integration is impracticable?

No general prescription, of course, can precisely answer the myriad remedial questions that a given case will pose. As familiar a scholarly sidestep as it may be, only case-by-case development can yield a detailed system of remedial guidelines for courts to follow. It is possible, however, to outline at least a preliminary approach to the design of fair governance remedies. For this purpose, the fair governance theory is useful in two ways. First, it sheds new light on the utility of, and justifications for, racial balance and ancillary remedies now implemented under conventional court orders. Second, it suggests desegregation remedies that are not now employed but that would be justified responses to the problem of unfair governance.

One foreseeable policy objection to a fair governance orientation may be addressed immediately. Each of the remedial steps explored below is based on some supposition of which administrative practices may generate confidence in the nondiscriminatory administration of public schools. Each step entails either a change in procedure or structure designed to facilitate fair educational administration or a change in substantive educational policy aimed at advancing more effectively the interests of minority students. None of these measures provides an absolute guarantee of fair governance; each is at best a significant step toward that guarantee. One might thus protest that a fair governance approach is less effective than a conventional racial balance remedy because its goal is open-ended and its remedial tools are but gross proxies for the ultimate remedial aim.

In responding, it is not denied that the fit between the remedial tools suggested below and any detailed conception of fair governance will be imperfect. The point, however, is that the remedial approach takes aim at the pervasive inequalities of racially separate schools.¹⁹⁷

¹⁹⁶ 418 U.S. 717 (1974).

¹⁹⁷ The impossibility of vindicating a right of fair governance perfectly does not invalidate fair governance as a conception of right. The expression of a constitutional right is, in part, the expression of a constitutional ideal, and "it is meaningful . . . to preserve [a right] as an aspiration that may be vindicated" not only by courts, but by political processes as well. Gewirtz, *supra* note 23, at 606; see also *id.* at 672-73.

The narrower aim of achieving an historically natural attendance pattern, which seems to underlie the conventional racial balance approach, is more metaphorical than actual.¹⁹⁸ More important, the racial balance approach fails to target the pervasive harm that segregated schooling inflicts.

The apparent open-endedness of the fair governance remedy might also raise questions as to the theory's manageability.¹⁹⁹ Three such concerns include the amenability of the proffered standard to orderly and principled implementation,²⁰⁰ the competence of courts to make the pol-

¹⁹⁸ See Kanner, *supra* note 161, at 393-94 & n.53.

¹⁹⁹ On the legitimacy and manageability of structural injunctions generally, see P. SCHUCK, *SUING GOVERNMENT* 150-81 (1983), and sources cited therein. Detailed accounts of the implementation phases of specific desegregation cases appear in R. DENTLER & M. SCOTT, *SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE* (1981); D. KIRP, *JUST SCHOOLS* (1982); E. WOLF, *TRIAL AND ERROR: THE DETROIT SCHOOL SEGREGATION CASE* (1981); *LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION* (H. Kalodner & J. Fishman eds. 1978). For a study of school reform through judicial intervention on issues other than desegregation, see M. REBELL & A. BLOCK, *supra* note 7.

²⁰⁰ Under a fair governance approach, judicial discretion as to which remedial tools to use, and to what degree to use them, will be less bounded than under a conventional racial balance theory. Implementing remedies under a fair governance ideal, however, involves no more judicial inventiveness or breadth of discretion than judicial implementation of institutional remedies in other contexts involving broad constitutional standards. Besides schools, the public institutions most frequently subject to "structural injunction"-type litigation are legislatures involved in reapportionment, *see, e.g.*, *Karcher v. Daggett*, 103 S. Ct. 2653 (1983), and cases cited therein; prisons, under the eighth amendment ban on cruel and unusual punishments, *see* cases cited in Fletcher, *supra* note 158, at 684 n.152; and mental institutions, under a due process-based "right to treatment" theory, *id.* at 688-91. *But cf.* *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 16 n.12 (1981) (reserving the issue whether the fourteenth amendment creates a "right to treatment" for the "involuntarily . . . , much less the voluntarily committed"). In assessing the legitimacy of judicial latitude in remedial design in such cases, one must weigh against the cost of discretion the cost of denying effective constitutional relief through overinsistence on inflexible rules of decision. *See* Fiss, *supra* note 10, at 215-16.

As with all institutional remedies, the fair governance elaboration of general guidelines as to how much of what kind of remedy is appropriate, so that similar cases may be dealt with similarly, will depend on case-by-case judicial experience. In this respect, the open-endedness of the fair governance approach should not be overstated. This Article does not recommend that courts implement remedies and then try to measure, in some empirical way, whether fair governance prevails; that would be a more complex inquiry than whether racial balance exists. Instead, this Article sets forth a variety of measures—such as student reassignment, changes in the structure of school governance, affirmative action, and the implementation of fair educational policies—which, as a matter of law, may be regarded as appropriate measures for achieving the fair governance goal. Once the appropriateness of these measures is assumed, a court need only determine the proper mix in an individual case; once implementation is ordered, the court need not then inquire empirically whether reasonable confidence in fair governance has been created. It can more simply determine whether the measures ordered have actually been implemented. These inquiries are no more problematic as an empirical matter than is the verification of the existence of racial balance.

icy decisions necessary to implement the remedy,²⁰¹ and the ability of courts to recognize when the remedy has been effected such that jurisdiction over the case may cease.²⁰² Even if fair governance remedies achieve their goals only imperfectly, they are, nevertheless, compelling goals for which to strive.

The remedial steps a fair governance decree comprises may be categorized in five complementary components. Two of these components should be identical to measures taken under any conception of appro-

²⁰¹ The charge that courts are unsuited to make the kinds of factual or policy judgments that fair governance "judicial activism" requires is subject to challenge. See Fiss, *supra* note 10, at 209, 211-16. A recent study by Michael Rebell and Arthur Block on judicial intervention in educational policymaking "largely rebut[s] the criticism that the judiciary lacks the resources, expertise, or comprehensive perspective needed to implement educational reform successfully." M. REBELL & A. BLOCK, *supra* note 7, at 210. In particular, Rebell and Block find little reason to conclude that courts are inferior to legislative or executive decisionmakers in terms of anticipating implementation problems. See *id.* at 211.

Rebell and Block state that the suits they investigated were generally less confrontational than desegregation cases, in that the parties involved were not as deeply committed to antagonistic moral and legal positions. See *id.* at 212-13. Perhaps because of institutional problems resulting from the confrontational character of desegregation suits, researchers have had doubts as to the remedial competence of courts deciding such cases. A fair governance approach to school desegregation cases may, however, actually bolster judicial competence in such cases by mitigating the degree of the opposing parties' antagonistic commitment to deeply held policy views.

This possibility has three sources. First, the fair governance approach is grounded in values embodied in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), about which consensus is more likely. Second, and of more concrete importance, the fair governance approach sanctions a wider variety of remedies than does the racial balance approach. Therefore, the possibility of judicial reconciliation of competing interests is greater. Third, by counseling nonintervention into the substantive authority of school boards undertaking leadership roles in the implementation of integration, the fair governance approach may promote the kind of cooperation under which judicial competence appears greatest.

²⁰² The racial balance approach ensures against excessive judicial intervention by forbidding courts from requiring school authorities to revise their remedial plans as population shifts or other conditions undermine the effectiveness of the remedies initially ordered. See, e.g., *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976). Thus, for example, once a school board implements a racially neutral attendance pattern under a racial balance order, it will be deemed to have fulfilled its obligation under conventional remedial principles.

It should not be significantly more difficult for courts under a fair governance approach to identify the appropriate point at which to terminate jurisdiction. Jurisdiction would exist as long as necessary to implement fully the variety of remedial measures that fair governance requires, including, for example, integration, affirmative action hiring, or raising academic standards in minority schools. Presumably, the court will adopt a schedule for remedial implementation. If, during implementation, problems arise that significantly undermine that strategy, courts may employ other remedial options and continue to exercise jurisdiction as long as necessary to assure implementation. Once the district court, however, has "fully performed its function of providing the appropriate remedy," *id.* at 437, jurisdiction may cease. Cf., e.g., *Tasby v. Wright*, 559 F. Supp. 9 (N.D. Tex. 1982) (tri-ethnic committee disbanded once designated roles no longer needed or adequately performed by others).

priate school desegregation relief. First, any reasonable school desegregation decree must contain a *prescriptive antidiscrimination component*, that is, an injunction against future racial discrimination generally and against those kinds of racial discrimination particularly identified in the individual case. Second, any reasonable decree must contain an *historically-based affirmative action component*, aimed specifically at the undoing of particular unconstitutional acts.²⁰³ Thus, if school authorities have discriminated in the hiring and assignment of teachers and other staff, affirmative action will be required to redress such discrimination. If school authorities have discriminated in neighborhood school siting decisions, they will be required to give special consideration to under-served neighborhoods in any subsequent school construction or closing decisions. Such particularized measures should help to foster confidence in the restoration of nondiscriminatory educational administration. Such a remedial decree, however, narrowly tailored to individualized acts of discrimination, would insufficiently redress persistent and systematic discrimination.

It remains to be considered what affirmative remedial measures are sufficient for the establishment of fair educational governance in a formerly segregated school system. Because of the advantages that integration offers in terms of utility and legitimacy,²⁰⁴ the remedy must contain an *integration component*, the scope of which will depend upon the prospects for its effective implementation. If integration is not possible, the remaining avenues for reform entail judicial intervention more directly into the structure of governance or into the substance of educational policymaking. Thus, the remaining categories of a fair governance decree will be a *structural nondiscrimination component* and an *educational policy component*.

B. Implementing Integration

The critical issue posed under a fair governance theory after *Milliken I* is how to pursue integration within the confines of a single school district. Few major urban school districts are at the point where substantial representation of more than one racial or ethnic group in each school is unattainable,²⁰⁵ although, as the Detroit case indicates,²⁰⁶ the

²⁰³ These two components were contained, for example, in the Fifth Circuit's first model desegregation decree that bound all district courts in the deep South. See *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 896-900 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

²⁰⁴ See *supra* part IIC.

²⁰⁵ See *supra* note 154.

²⁰⁶ See *supra* note 195.

possibility exists that demographics alone will make an effective intradistrict remedy impossible. A more troubling issue in relying on intradistrict integration alone is whether such integration can be expected to endure.

Prospects for successful and enduring integration depend on four factors: the availability of integration options, the availability of resistance options, the leadership role of the responsible school authorities, and the existence of incentives for desegregation.

Integration Options. The first index of likely success in the integration of a given school district is the extensiveness of the measures that would have to be taken to attain this goal. In some districts, progress may be achieved through the cessation of the school board's current segregative acts and through voluntary integration measures. That is, courts may find that schools are segregated solely because local authorities transport students past schools close to their homes in order that they may attend racially identifiable schools perhaps even farther away.²⁰⁷ The termination of such practices would entail no added logistical burdens for students or parents and might thus encounter little resistance. Similarly, the creation of "magnet schools" or other voluntary programs that would successfully attract integrated participation from a variety of neighborhoods might help to yield a stable integrated system and perhaps would even attract whites back from suburban schools.²⁰⁸

For most big city districts, however, this combination of measures will not be sufficient to yield systemwide integration.²⁰⁹ This is partly because school siting decisions by local school boards are likely to have reinforced racial patterns produced by residential segregation. It will thus become necessary to determine how integration can be accomplished through measures that, although inconvenient, are least burdensome for students and parents. Resistance may be somewhat diminished if options are available that involve little added transportation time for most students and afford the opportunity of attending schools whose programs are especially attractive. Where such options are available, enduring integration is a realistic goal.

Resistance Options. Any judicial assessment of the likely stability

²⁰⁷ See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 462 n.9 (1979); *Morgan v. Hennigan*, 379 F. Supp. 410, 426 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (Boston).

²⁰⁸ See Coleman, *The Role of Incentives in School Desegregation*, in *RACE AND SCHOOLING IN THE CITY* 182, 191-92 (A. Yarmolinsky, L. Liebman & C. Schelling eds. 1981); see also W. HAWLEY, *supra* note 4, at 25-59 (comparing desegregation strategies involving student assignments).

²⁰⁹ See W. HAWLEY, *supra* note 4, at 27-34.

of an integration plan must include a consideration of the available avenues for avoiding the plan. That is, the success of a given integration plan will largely depend upon the costs involved in leaving the school district. If there are parochial schools²¹⁰ or nearby suburban public school systems available to white students, it will be easier for them to resist participating in an integrated system. If integrated schooling is available more conveniently and more cheaply than nonintegrated schooling, integrated schooling may be an attractive option even to persons predisposed to resist integration.²¹¹

Courts trying to decide the degree to which they can rely on integration as the centerpiece of a remedial decree should thus be expected to make a threshold judgment as to integration's likely durability. If there exist attractive integration options and little incentive or opportunity for resistance, the courts may rely with greater confidence on integration as the basis for a fair governance decree. If integration options are nonexistent, or if the options co-exist with possibilities for resistance that may be attractive to white parents, a court's judgment must be guided by additional factors. It may be possible, as discussed below, to build into the decree other support for integration that would justify relying on it as the core remedy, even in the face of genuine resistance possibilities. Alternatively, a court may conclude that the likelihood of resistance or the demographic impossibility of integration make additional tools necessary to effect fair governance.

Leadership of School Authorities. In any school system where the durability of integration is problematic, a key factor for judicial consideration will be the degree of cooperation and leadership the court can

²¹⁰ Parental resort to parochial schools, even if animated by resistance to integration, is a constitutionally protected educational choice. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

²¹¹ The degree to which desegregation accelerates white flight from urban school districts is a hotly debated issue, particularly since sociologist James Coleman delivered a paper in 1975 concluding that school desegregation in some cases was a significant cause of declining white public school enrollments (J. COLEMAN, S. KELLY & J. MORE, *TRENDS IN SCHOOL SEGREGATION*, 1968-73 (1975)).

The extent and significance of this phenomenon, however, is a source of continuing disagreement. See *The 14th Amendment and School Busing: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 16-136, 276-377 (1981) (testimony and submissions of David J. Armor and Gary Orfield); G. ORFIELD, *MUST WE BUS?* 99-101 (1978); *SCHOOL DESEGREGATION: THE CONTINUING CHALLENGE* (Harv. Educ. Rev. ed. 1976) (articles by Pettigrew & Green, and Coleman); Armor, *White Flight and the Future of School Desegregation*, in *SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE* 187 (W. Stephan & J. Feagin eds. 1980); Gewirtz, *supra* note 23, at 629-30 n.114; Rossell & Hawley, *supra* note 154. For a criticism of public misreporting of the Coleman conclusions and white flight research generally, see Orfield, *Research, Politics and the Antibusing Debate*, 42 LAW & CONTEMP. PROBS., Autumn 1978, at 141.

secure from defendant school authorities.²¹² Studies of desegregated communities show that actual integration occurs through racial balance more easily when school and community officials, through enthusiastic and cooperative leadership, assure the white community that integration will proceed smoothly and will improve the overall quality of schooling.²¹³ Correspondingly, black students and parents can reasonably be expected to have greater confidence in the educational administration of such school authorities. Thus, if school authorities willingly proffer a "leadership plan" for encouraging popular support for integration, a court may rely more confidently on integration as the central school desegregation remedy, even where exit options exist for white parents.²¹⁴

Boston is perhaps the most dramatic northern example in which the absence of positive leadership might have counseled the court to intervene more emphatically at the earliest remedial stages in order to effectuate fair governance.²¹⁵ For ten years prior to the first Boston

²¹² The necessity of invoking judicial intervention to secure local desegregation does not itself invariably indicate that local authorities will prove uncooperative in implementing a remedy. As *Milliken v. Bradley*, 433 U.S. 267 (1977), illustrates, cases may arise in which a local school board will resist desegregation, partly in the hope that an eventual lawsuit will result in the state sharing the obligation to fund the desegregative effort.

²¹³ U.S. COMM'N ON CIVIL RIGHTS, *DESEGREGATING THE BOSTON PUBLIC SCHOOLS: A CRISIS IN CIVIC RESPONSIBILITY* 1-7 (1975); Gewirtz, *supra* note 23, at 652 n.183.

²¹⁴ The judicial preference for implementing desegregation plans devised by defendants reflects, in part, the supposition that defendant school authorities will support such plans more vigorously, thus helping to insure more effective implementation. See, e.g., *Davis v. East Baton Rouge Parish School Bd.*, 541 F. Supp. 1048, 1052 (M.D. La. 1982).

²¹⁵ In chronological order, the reported decisions in the Boston case include *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974) (finding that defendants had intentionally maintained Boston public schools as an illegally segregated dual school system), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Morgan v. Kerrigan*, 509 F.2d 599 (1st Cir. 1975) (affirming district court orders regarding hiring and transfer of faculty); *Morgan v. Kerrigan*, 509 F.2d 618 (1st Cir. 1975) (denying motion to stay sanctions imposed by civil contempt order for failure of school committee to submit desegregation plan); *Morgan v. Kerrigan*, 388 F. Supp. 581 (D. Mass. 1975) (ordering hiring of black and white faculty on one-to-one basis until 20% black faculty goal reached; affirmative recruitment program to be maintained until 25% black faculty attained), *aff'd*, 530 F.2d 431 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975) (district court's basic remedial order, including creation of community school districts, citywide magnet schools, closing of schools, etc.), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); *Morgan v. Kerrigan*, 401 F. Supp. 270 (D. Mass. 1975) (denying motion for stay of order directing school committee to pay masters for their services); *Morgan v. Kerrigan*, 409 F. Supp. 1141 (D. Mass. 1975) (placing South Boston High School (SBHS) under temporary receivership); *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976) (affirming district court orders regarding temporary receivership and transfer of staff at SBHS), *cert. denied*, 429 U.S. 1042

decision, the school committee had steadfastly opposed all state and federal efforts to secure any school integration in Boston, even challenging the constitutionality of the Massachusetts Racial Imbalance Act.²¹⁶

After the committee's liability for desegregation was determined, the committee still took no initiative—either in assisting the court or in implementing relief—and refused to take steps beyond adherence to the literal meaning of even the most modest court order.²¹⁷ For example, the committee's resistance included a refusal to submit voluntarily a timely proposal for the final grant of relief.²¹⁸ The committee's public opposition to integration before and during the lawsuit was truculent and unremitting.²¹⁹ Members and former members, after the court's first decision, helped to organize mass rallies in opposition to integration and to lobby Congress to prohibit busing through a constitutional amendment.

Using the nature of school leadership as an indicator of prospective white resistance affords at best an imperfect index of the viability

(1977); *Morgan v. McDonough*, 548 F.2d 28 (1st Cir. 1977) (affirming district court orders relating to repairs to SBHS and appointment of school administrators named by court); *Morgan v. McDonough*, 456 F. Supp. 1113 (D. Mass. 1978) (terminating temporary receivership of SBHS under certain terms and conditions); *Morgan v. McDonough*, 511 F. Supp. 408 (D. Mass. 1981) (holding that intervenors, counsel for Hispanic students in Boston public schools and their parents, were entitled to attorney's fees and costs even in absence of explicit judicial determination that school defendants intentionally discriminated against Hispanic students), *aff'd*, 689 F.2d 265 (1st Cir. 1982); *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir.) (affirming district court orders to maintain percentage of black teachers and administrators in the event of layoffs), *cert. denied*, 103 S. Ct. 62 (1982); *Morgan v. O'Bryant*, 687 F.2d 510 (1st Cir. 1982) (affirming district court order insulating from layoffs faculty at SBHS even during budget crisis); *Morgan v. McDonough*, 689 F.2d 265 (1st Cir. 1982) (affirming various district court orders regarding closing of schools and court's rejection of defendants' student assignment plan and "linkage" and "beacon schools" proposals; affirming denial of motion that court terminate altogether its jurisdiction over student assignments); *Morgan v. McDonough*, 554 F. Supp. 169 (D. Mass. 1982) (first step in court's "transitional course of disengagement"—various orders defining continuing roles of parties, implementing a dispute resolution process, and providing for monitoring of defendants' desegregation progress by State Board of Education) *Morgan v. McDonough*, 726 F.2d 11 (1st Cir. 1984) (upholding dismissal of voluntary parent organization as intervening party); *Morgan v. McKeigue*, 726 F.2d 33 (1st Cir. 1984) (vacating for further finding, lower court order specifying funding levels for parents councils). For an account of the Boston case written by two court-appointed experts, see R. DENTLER & M. SCOTT, *supra* note 199.

²¹⁶ See *School Comm. of Boston v. Board of Educ.*, 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968). The Racial Imbalance Act required school committees to take affirmative action to eliminate "racial imbalance" in schools where nonwhites constituted more than 50% of the student population. *Id.*

²¹⁷ *Morgan v. Kerrigan*, 409 F. Supp. 1141, 1151 (D. Mass. 1975).

²¹⁸ *Morgan v. Kerrigan*, 509 F.2d 618, 619-20 (1st Cir. 1975).

²¹⁹ On the belligerent attitude of former Boston School Committee members, see U.S. COMM'N ON CIVIL RIGHTS, *FULFILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS* 27-32 (1976).

of integration as a desegregation remedy. It is a sensible indicator, however, because school authorities have significant access to parents through public media and private channels. A school board's capacity to set the tone of public response to integration is likely to be great. School authorities may also be able to mobilize other community agencies—businesses, civic groups, and parent organizations—to encourage white participation in an integrated school system.

Further, under a fair governance approach, the use of an index of official cooperation to help measure the need for relief makes sense given the school authorities' incentives to cooperate. Enthusiasm in administering integration may justifiably be deemed probative of the kind of governance that will prevail in an integrated system without further court intervention. More drastic intervention, to the extent of curtailing the powers of the school board, may be justified where racial balance alone will not assure integration and fair governance. If school authorities are aware of the possibility of losing governance powers, even reluctant school boards may be induced to cooperate in the implementation of integration. Any resistance of school authorities in the face of possible reprisals might indicate the likely reaction of other members of the community who perceive their interests to be threatened by integration. Such resistance would justify a more interventionist intradistrict role for a court trying to secure nondiscriminatory schooling for minority plaintiffs.

Incentives for Desegregation. In deciding how much to rely on the prospect of stable integration as a remedy, a court should also consider what additional strategies might be implemented to enhance the success of an integration plan. One promising suggestion, for example, concerns the establishment of incentives for housing desegregation. The more integrated housing is, the easier it becomes to establish integrated schooling without burdensome transportation requirements. If desegregation plans exempt residually integrated neighborhoods from cross-district busing, while providing that reassignments will be ordered if schools in those neighborhoods become segregated, courts can provide incentives for integrated neighborhoods to remain integrated and for segregated neighborhoods to integrate.²²⁰ Such incentives are preferable to integration-maintenance plans, employed by some communities, that maintain racial balance in housing by limiting black entry into integrated neighborhoods at a certain "tipping point."²²¹

²²⁰ See G. ORFIELD, TOWARD A STRATEGY FOR URBAN INTEGRATION 71-72 (1981).

²²¹ See generally Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs That Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J.

A second range of possibilities for enhancing the desirability of desegregation involves improvements in the schools that would respond to parental interests in stable, disciplined, and educationally effective school environments. Some parents may now resist integration not because of hostility towards blacks but because of apprehension that a desegregation effort will absorb resources that would otherwise go towards instruction or generate discipline problems that would detract from teaching and learning.²²² To forestall such resistance, courts may order measures to help bolster the educational effectiveness of all integrated schools. These could include not only instructional enhancement measures but also orders to involve black and white parents and students in cooperative efforts to develop codes of acceptable school behavior and understandings regarding fair and effective discipline.²²³

After evaluating these four factors, a court should be able to make a threshold judgment as to the amount of integration possible and its likely durability. If reasonable promise exists for obtaining substantial and stable representation of both majority and minority student groups in each school, then the court can confidently pursue integration as the key to its fair governance remedy. Its selection of remedial tools from the other categories of affirmative orders outlined below should be based only on the need to buttress the success of integration.

If, however, integration is demographically impossible or stable integration cannot reasonably be expected, then the court should exercise its discretion to implement other affirmative remedial tools that intervene more substantially in educational administration than would integration. Such remedies would be necessary to assure reasonable confidence in the nondiscriminatory administration of the schools.

Another important difference between the fair governance orientation to integration and the conventional racial balance approach becomes clear at this point. As stated above, courts following a fair governance orientation would find it legitimate to invoke non-racial balance remedies if stable integration is unlikely because of community resistance; under the conventional approach, many courts have acted as

891. On the general undesirability of racial ceilings in desegregation decrees, see Gewirtz, *supra* note 23, at 643-44, 659-65. Some of the potential harms Professor Gewirtz identifies with regard to school desegregation remedies that leave some one-race schools intact, *id.* at 668-70, may be ameliorated by those nonintegration remedies associated with fair governance that would enhance the power of the racial minority in an imperfectly integrated district. See *infra* part III, sections C and D.

²²² Interview with Hon. Alvin B. Rubin, Court of Appeals for the Fifth Circuit, in Iowa City, Iowa (Nov. 3, 1983).

²²³ See W. HAWLEY, *supra* note 4, at 124-25 (1983). See generally Gewirtz, *supra* note 23, at 652-56.

if only the demographic impossibility of actual desegregation could legitimately sanction the use of alternative remedies.²²⁴ This is because, under the conventional approach, judicial willingness to calculate the possibility of white flight in designing an appropriate remedy might seem to reward resistance to the restoration of a nondiscriminatory attendance pattern.²²⁵ It would thus be viewed as illegitimate per se and discounted in order to avoid perpetuating the segregated pattern of schooling it is the court's aim to undo.²²⁶

The problem with the conventional analysis, which may be based on *Cooper v. Aaron*,²²⁷ is that failing to account for the prospect of

²²⁴ See Levin, *School Desegregation Remedies and the Role of Social Science Research*, 42 LAW & CONTEMP. PROBS., Autumn 1978, at 1, 9-15, and cases cited therein. A few instances do exist in which courts have considered evidence of white flight in the remedial design process. *Id.* at 15-21.

For an elaborate defense of the necessary legal relevance of white flight, see Gewirtz, *supra* note 23, at 635-43.

²²⁵ In *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976), the federal district court in Boston analyzed the problem as follows:

Some of the parties have urged that the court limit the extent of actual desegregation lest children from middle class white families leave the public school system and to prevent racial turmoil and violence in Boston's schools and communities. . . . These prophecies of "white flight" and racial turmoil, like opposition itself, are not "practicalities" that can be weighed against the rights of the plaintiffs. . . . Expression of that opposition constitutes a problem, of course, which the desegregation plan must confront in its implementation. But it does not constitute one of the "practicalities" to which the plan itself properly can make an accommodation.

Id. at 233-34 (citations omitted). One might argue that desegregation should not accommodate the prospect of white flight because predictions of white flight cannot be verified and that any "accommodation" would be a sacrifice of relief for only speculative purposes. It is important to note, however, that this is *not* the argument that the district court makes. The court does not rest on the unpredictability of white flight, but rather on what accommodation to prospective white flight represents, namely "to trade away the constitutional rights of children to receive a desegregated education The rule of law must prevail." *Id.* at 234. As the court puts it, a deliberate failure to acknowledge prospective white flight in planning racial balance is a matter of principle, not practicality.

²²⁶ But cf. *Clark v. Board of Educ.*, 705 F.2d 265 (8th Cir. 1983) (White flight and subsequent resegregation can be taken into account in devising alternative plans to promote integration. The school board was allowed to create four virtually all-black schools as long as all white children attended integrated schools and substantial measures were taken to improve education in the all-black schools.); Levin, *supra* note 224, at 19-21 (discussing California's consideration of the effects of white flight in its devising of alternative desegregation plans in response to the affirmative duty placed on school officials to correct de facto racial imbalance as well as de jure segregation).

²²⁷ 358 U.S. 1 (1958). *Cooper* is, on its facts, not directly apposite to cases involving problems of accommodating local white resistance to desegregation relief. In *Cooper*, local school authorities cooperated in implementing the federal decree, and the local citizenry "reluctantly accepted" the desegregation plan. Official resistance in Little Rock manifested itself through the intervention of the state governor. *Id.* at 7-11; see Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U.

white flight in remedial design threatens even the narrow remedial conception on which the conventional racial balance order is based. If the remedial objective in a desegregation case is to achieve the restoration of a natural pattern of attendance, it must be relevant whether white exit from the public school system in response to a desegregation plan will make such a pattern unattainable.

More practically, the conventional attitude is insensitive to the reality that white flight tends to isolate black students in the desegregated system, to shift the tax base to the suburbs, and to reimpose the harms initially associated with segregated schooling. Black students may remain isolated, stigmatized, and vulnerable to systematic discrimination against minority interests, albeit by state-level school authorities who may favor all-white suburban districts over predominantly black urban school systems.²²⁸ Ironically, if a court order produces such results, the consequent injuries may continue to appear to blacks as the artifacts of an affirmative government policy, thereby perpetuating their lack of confidence in fair governance.

In sum, if the conception of school desegregation remedies expressed in *Dayton Board of Education v. Brinkman*²²⁹ [*Dayton I*] is the sole remedial principle on which lower courts may rely, these courts are caught in a dilemma. They cannot secure the proper remedial objective—a genuinely desegregated pattern of attendance—unless they bus. At the same time, their very reliance on busing may accelerate white flight, thus eliminating the possibility of creating the desired attendance pattern. In contrast, the fair governance orientation would legitimate—and, indeed, mandate—the greater use of nonbusing remedies whenever stable integration is genuinely unlikely.

One issue such an approach will pose for courts will be the grounds on which they can legitimately predict the impracticability of

ILL. L. REV. 387, 391-93. On its facts, *Cooper* neither bars a court from considering the likely default of local leadership, nor prevents it from weighing the probable consequences of that default for integration. *But cf.* *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 491 (1972) (White flight cannot "be accepted as a reason for achieving anything less than complete uprooting of the dual public school system."); *Monroe v. Board of Comm'rs*, 391 U.S. 450, 459 (1968).

²²⁸ Disenchantment with such continuing harms, even under court-ordered desegregation, prompted a group of black parents in Boston, in February 1982, to advocate replacing the court plan with a student assignment plan based on parental choice and increased black staffing of predominantly black schools. As in Detroit, the progress of effective intradistrict desegregation may have been hampered after the initial decree by a statewide political initiative, a 1980 property tax cap measure that resulted in a \$30 million reduction in Boston's annual school appropriations over a three-year period. *School Assignments in Boston: Black Parents Want Control*, CENTER FOR LAW AND EDUC. NEWSNOTES 6-7 (Aug.-Sept. 1982).

²²⁹ 433 U.S. 406 (1977).

integration. For reasons of manageability and legitimacy, a court would likely be uncomfortable imposing remedies on local school authorities that do not presume their good faith in the implementation of the remedial order.²³⁰ The point, however, is that extreme cases may well exist in which the grounds for presuming the impracticability of integration counsel against reliance on busing as an effective remedy. Indeed, there may be cases in which the minority plaintiffs and defendant school authorities agree that other remedies will be more effective in vindicating minority interests without compromising interests the local system is trying to protect, such as neighborhood schooling.²³¹ If the remedial possibilities are viewed as a range of tools, each of which can be used to secure the overall goal of a fairly governed educational system, courts will have at least a framework within which to respond to the competing interests at stake in school desegregation suits.

C. *Fair Governance and Nonintegration Remedies*

There are only two categories of options other than integration for restoring what should be a minority community's reasonable confidence in the fair administration of schools. The first involves structural reforms that hold reasonable promise of deterring discrimination and promoting fair representation of minority interests. The second entails court-ordered measures to improve the educational effectiveness of the schools that minority children attend. Rather than focusing on process or structural norms of fair governance directly, these latter measures aim at inducing those substantive policy changes that a fair decision-making process might yield. Although it may be more difficult to implement substantive educational policy measures rather than structural changes, courts may, in some cases, prefer to focus directly on altering the educational policies of the school district in order to make the system more effective for minority students. Such courts may doubt whether structural remedies other than integration will produce fair

²³⁰ Aside from any independent principled justifications for such a presumption of good faith, a fair governance approach to remedies might well buttress the reasonableness of such a presumption. The threat of judges imposing alternatives to busing that would more drastically undercut the authority of local officials over their school system could encourage the official support of integration that courts would wish to presume.

²³¹ The controversial desegregation settlement approved for Atlanta involved decelerating racial balance in exchange for more black staffing and administrative control. See *Calhoun v. Cook*, 362 F. Supp. 1249 (N.D. Ga.), *remanded*, 487 F.2d 680 (5th Cir. 1973); *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975). For an analysis of this remedy, see Bell, *supra* note 9, at 485-87; Jackson, *Urban School Desegregation from a Black Perspective*, in *RACE AND SCHOOLING IN THE CITY* 204, 209-14 (A. Yarmolinsky, L. Liebman & C. Schelling eds. 1981).

educational administration unless they are combined with requirements for substantive policy change as well. One element of an "educational policy component" of a desegregation decree might require that predominantly minority schools be at least as well funded as are those schools serving predominantly nonminority students.²³² Such a decree might also contain measures calculated to bring the academic standards in such schools up to the level achieved in predominantly white schools.²³³

In *Milliken v. Bradley*²³⁴ [*Milliken II*], the Supreme Court has already sanctioned a variety of particularized educational remedies as tools "to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education" had educational services "been provided in a nondiscriminatory manner in a school system free from pervasive de jure racial segregation."²³⁵ The Court is comfortable with such remedies, in part because such programs do not represent an attempt "to restructure local governmental entities nor to mandate a particular method or structure of state or local financing."²³⁶

The main difference between *Milliken II* and the fair governance rationale for desegregation relief, therefore, lies in the justification the latter proffers for educational remedies. Under the fair governance approach, educational remedies are legitimate even absent a showing that the resulting educational program would restore minority students to the educational position they would have enjoyed absent discrimination.²³⁷ Indeed, the district court's rationale for the educational remedies ordered in Detroit involved not only remedying effects of past segregation but also "assur[ing] a successful desegregative effort and . . .

²³² See Bell, *supra* note 53, at 130.

²³³ *Id.* But cf. *supra* note 142 (providing sources discussing the feasibility of attempting to provide substantive educational equality).

²³⁴ 433 U.S. 267 (1977).

²³⁵ *Id.* at 282. On the particular remedies approved, see *supra* note 119.

²³⁶ *Milliken II*, 433 U.S. at 291.

²³⁷ What the educational status of minority students in a segregated district would have been but for the history of race discrimination is at least as immeasurable and unknowable as is the pattern of racial attendance that a history of nondiscriminatory assignments would have yielded. It may be that the school authorities in a formerly segregated district, had they never segregated the schools or discriminated against minority students, would have appropriated the same number of dollars for the district but distributed those dollars more fairly. A nondiscriminatory school board might have thus provided an education of lesser quality for all students rather than bringing the quality of minority education up to the level of that afforded to nonminority students in the segregated system. It would thus not be entirely persuasive for courts to order that minority schooling quality be raised to the level of that now afforded white students based entirely on a narrowly restorative remedial conception. The point of such remedies should be to provide minority students with an education commensurate with the education provided current to nonminority students.

minimiz[ing] the possibility of resegregation."²³⁸ This rationale is clearly more expansive than a narrow restorative view of desegregation relief.

The aim of structural remedies other than integration is to enhance the effectiveness of the minority voice in reaching educational decisions. Integration, by itself, does not change the cast of persons in authority; rather, it hampers the ability of persons in authority to treat minority students differently. The alternative reforms suggested below as parts of a "structural nondiscrimination component" of a desegregation order attempt to increase representation of minority interests by providing minorities with some direct authority to govern the school system.

Under conventional remedial rationales, courts have implemented three structural remedies. As to these three remedies, the essential contribution of a fair governance theory is the insight it offers into their utility and legitimacy.

The most obvious means of increasing minority input into educational decisionmaking is to guarantee the hiring and placement of a significant number of minority administrators in a school system.²³⁹ Such a measure may be useful to buttress integration even if it proves less than adequate as a complete alternative to integration.²⁴⁰ Whether or not evidence of past employment discrimination exists, increasing the number of minority educators in positions of authority can be justified as a means of bolstering the system's administrative sensitivity to minority interests.

The second technique for increasing minority power in school governance, which may or may not involve changes in the command structure within a school system, is to establish community boards, on either a neighborhood or school basis, to oversee the progress of desegregation.²⁴¹ If integration is the core of the desegregation order, such boards may be confined to overseeing, advising, and disseminating information. On the other hand, if community review is employed, in some measure, as a substitute for integration, the boards should be given actual policymaking functions or veto powers over existing school authorities.²⁴²

²³⁸ *Bradley v. Milliken*, 402 F. Supp. 1096, 1118 (E.D. Mich. 1975), *modified*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

²³⁹ On the adoption of such a plan for Atlanta, see *supra* note 231.

²⁴⁰ See *supra* note 139.

²⁴¹ A variety of such mechanisms are discussed in W. HAWLEY, *supra* note 4, at 73-88, and sources cited therein.

²⁴² Under the latter scheme, a school committee might be required to negotiate with each community panel an initial agenda for school reform that would then have to be approved by the school board itself. Additional procedures might be ordered under

A third way of dealing with school authorities who are antagonistic or insensitive to minority interests is to place all or part of the school system in receivership.²⁴³ The receiver might be the court or, in appropriate cases, state authorities likely to be more responsive than local authorities to minority interests.²⁴⁴ This technique, however, has obvious disadvantages. It assures nondiscriminatory schooling only so long as a court is willing to administer the schools, and it has the potential for straining federal-local relations to a great degree. State receivership may also be an unsatisfactory alternative because of justified local objections that statewide authorities cannot be as sensitive to legitimate local interests as would be locally elected authorities or even the local federal court.

A compromise position would invoke judicial receivership until such change in local leadership as would promise greater responsiveness to minority interests; in such an event, the court might appoint a local official, from within or without the school system, to be the receiver.²⁴⁵ The court would thus remain as a lever for increased minority input into educational decisionmaking but could extricate itself from the details of day-to-day educational administration.

D. *Restructuring the Governance of Formerly Segregated Districts*

In addition to justifying the three structural remedies that have been employed under different rationales, the fair governance theory suggests a fourth major structural approach to remedies not yet taken

which the community panels would retain effective influence over future decisions affecting local schools. It should be noted that such panels could pose problems by requiring courts to determine the respective roles to be played by the panels and the already constituted school authorities. *See, e.g.,* *Tasby v. Wright*, 559 F. Supp. 9, 10-12 (N.D. Tex. 1982) (difficulties in defining role for tri-ethnic committee led to committee's relative inactivity and disbandment). Without clearly defined powers, review committees must depend more on their members' individual resourcefulness and on recourse to the courts to be effective checks on the exercise of an existing institution's power. *Cf. Note, The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1353-64 (1975) (analyzing role of Human Rights Committee in overseeing the implementation of injunctive relief against a state hospital for the mentally impaired in Alabama).

²⁴³ *See, e.g.,* *Morgan v. Kerrigan*, 409 F. Supp. 1141 (D. Mass. 1975); *Turner v. Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1966). *See generally* Comment, *An Outlook on the Use of Receivers in the Implementation of Institutional Reform: Perez v. Boston Housing Authority*, 21 URB. L. ANN. 255 (1981).

²⁴⁴ *Cf. Newman v. Alabama*, 466 F. Supp. 628, 635-39 (M.D. Ala. 1979) (Alabama prison case in which, after over six years of litigation, the district court appointed a new governor as receiver for the prison system).

²⁴⁵ In Boston, for example, the district court appointed the school superintendent as receiver on the recommendation of special experts. R. DENTLER & M. SCOTT, *supra* note 199, at 178.

in school desegregation cases—the complete political restructuring of a district's governance system. While political restructuring has not been employed as a school desegregation remedy, it has been litigated in the context of voting rights.²⁴⁶ Because both issues concern the effectiveness of the minority voice in governance decisions, however, political restructuring seems as reasonable a remedy for desegregation as for voting rights, even if justified only in cases of extreme official intransigence.

One form of political restructuring would involve the dismantling of a centrally-elected school board²⁴⁷ and replacing it with a school board elected by different wards within the school district. A second form would divide the district itself into subdistricts, each under the power of a local board, which might be subject to some central coordinating agency. The central agency under the latter plan might be a separately elected board, a board elected from the local boards, or some executive officer or agency connected to the office of the mayor.

The premise of either plan is that the closer the school board is to its constituents, the more responsible it will be to those constituents.²⁴⁸ Because integration is most problematic in residentially segregated school districts, blacks in such districts would be assured under these plans of either some representation on the central school board or control of a local board catering to minority interests.

Each plan suffers from some disadvantages. Under the first plan,

²⁴⁶ See, e.g., *Brown v. Board of School Comm'rs*, 706 F.2d 1103 (11th Cir. 1983); *NAACP v. Gadsden County School Bd.*, 691 F.2d 978 (11th Cir. 1982); *Black Voters v. McDonough*, 565 F.2d 1 (1st Cir. 1977); *Brantley v. Brown*, 550 F. Supp. 490 (S.D. Ga. 1982); *United States v. Dallas County Comm'n*, 548 F. Supp. 794 (S.D. Ala. 1982). In addition to challenging at-large systems as unconstitutional, plaintiffs can challenge changes in school board selection systems in some states as violating section 5 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973c (1976). See, e.g., *United States v. Louisville Mun. Separate School Dist. Bd.*, 557 F. Supp. 1168 (N.D. Miss. 1983).

²⁴⁷ The capacity of at-large voting systems to dilute minority voting strength unfairly is well-recognized in the case law. See, e.g., *White v. Regester*, 412 U.S. 755, 765-70 (1973); *Wallace v. House*, 377 F. Supp. 1192 (W.D. La. 1974), *aff'd in part, rev'd in part*, 515 F.2d 619 (5th Cir. 1975), *vacated*, 425 U.S. 947, *on remand*, 538 F.2d 1138 (5th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977). One consequence has been for the Supreme Court to instruct lower courts, where possible, to prefer single-member districts in reapportionment cases. See, e.g., *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 639 (1976); *Connor v. Johnson*, 402 U.S. 690, 692 (1971). Policy arguments favoring decentralized school boards are set forth in Lyke, *Representation and Urban School Boards*, in *COMMUNITY CONTROL OF SCHOOLS* 138 (H. Levin ed. 1970).

²⁴⁸ The ability of at-large representatives to ignore the political agenda of even a substantial constituent group is traced in *Wallace v. House*, 377 F. Supp. 1192, 1196-99 (W.D. La. 1974), *aff'd in part, rev'd in part*, 515 F.2d 619 (5th Cir. 1975), *vacated*, 425 U.S. 947, *on remand*, 538 F.2d 1138 (5th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

in which the creation of a minority district would assure minority membership on a central board, such minority presence might not adequately deter discriminatory policies if the majority of the electorate is always antagonistic to minority interests. On the other hand, one cost of the latter plan is the increased logistical problem of coordinating city-wide programs and establishing citywide standards of equality in a decentralized district.

Minority parents in a growing number of cities have been seeking such remedies, often unsuccessfully, as relief for voting dilution.²⁴⁹ Plaintiffs in such cases have sought to overturn centrally elected school boards on the ground that such governance systems were adopted or are operated for the purpose of furthering racial discrimination. Such particularized showings of intent, however, are extremely difficult to prove.

Even if a case of purposeful voting dilution cannot be established, however, the Boston litigation indicates that attempts to overturn at-large elections of school boards may make good sense as desegregation remedies. Black voters in Boston were denied the relief they sought in part because they could not show that the choice of a centrally elected school committee was made for the purpose of disempowering black students and parents in educational decisionmaking.²⁵⁰ Such a showing could not be made, however, because the system had been adopted through state legislation in 1905 for the purpose of limiting Democratic and working-class Catholic influence in school politics.²⁵¹ That blacks fell victim to the system only as black migration to Boston became demographically significant does not lessen the role that the school committee structure has played in subordinating minority interests to the interests of the white majority. Had the court thought genuine integration impracticable, it would have been rational to conclude that, in Boston,

²⁴⁹ See *supra* note 246. Notwithstanding the increasing concentration of minority students in urban school systems, blacks typically do not constitute a majority of the voting population in such districts. For example, although black students represented 45.8% of the Boston public school enrollment in 1979-80, R. DENTLER & M. SCOTT, *supra* note 199, at 12, the black population of Boston is 22% of the total population and accounted for only 18% of the vote in 1982. N.Y. Times, July 31, 1983, § 1, at 30, cols. 1, 4.

²⁵⁰ See *Black Voters v. McDonough*, 421 F. Supp. 165, 192 (D. Mass. 1976), *aff'd*, 565 F.2d 1 (1st Cir. 1977). The district court also found that, under the standards set forth in *White v. Regester*, 412 U.S. 755 (1971) and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Boston at-large system did not have an impermissible effect of denying black voters access to the political process. 421 F. Supp. at 189-92. The First Circuit upheld this finding tentatively: "We cannot quite say on the present record that plaintiffs have demonstrated . . . an exclusionary effect. But our decision is close . . ." 565 F.2d at 7.

²⁵¹ See P. Shane, *The Origins of Educational Control: Class, Ethnicity, and School Reform in Boston 1875-1920* at 219-53 (March 1974) (unpublished undergraduate honors thesis available at Widener Library, Harvard University).

the implementation of community control or a ward-elected school committee should be part of an effective alternative to busing.²⁵² The court, indeed, would not have had to choose an alternative structure itself but could have permitted the city to conduct a referendum on all alternatives supported by enough signatures to get an initiative on the ballot in a Boston election.²⁵³

In sum, a fair governance decree, in addition to prohibiting future discrimination and redressing particularized showings of past discrimination, should seek to establish a system of school governance that reasonably guarantees nondiscriminatory educational administration in the future. The preferable remedy is actual integration coupled with such other structural or substantive educational changes as are needed to ensure the stability of integration. If integration is impracticable or impossible, courts should resort to alternative structural forms and substantive educational changes necessary to accomplish fair governance.

E. *The Efficacy of Fair Governance Remedies*

One concern in evaluating the fair governance orientation towards remedies is whether such remedies would effectively protect the relevant interests of minority students and redress the harms imposed by unlawful segregation. Doubts as to the efficacy of fair governance remedies in this respect may be articulated from different points of view.²⁵⁴ It may be argued that sanctioning alternatives to integration where integration is even hypothetically possible is to give up on the promise of actual desegregation, "caving in," as it were, to unjustified white resis-

²⁵² Indeed, the First Circuit stated, "Court control of the schools [as undertaken in the Boston desegregation case] is a more drastic remedy than taking whatever steps, if any, may be proper to ensure full and equal participation in the political process by all groups." *Black Voters v. McDonough*, 565 F.2d 1, 7 (1st Cir. 1977).

²⁵³ In June 1974, a variety of reform plans to restructure the school system and incorporate some element of community control were defeated in a citywide referendum. *Black Voters v. McDonough*, 421 F. Supp. 165, 183-84 (D. Mass. 1976), *aff'd*, 565 F.2d 1 (1st Cir. 1977).

²⁵⁴ One weak argument, perhaps implicit in the dicta of *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-23 (1971), is that the fair governance theory promises more than can be achieved, while racial balance remedies focus on more realistic goals. It is true that the less ambitious a set of remedial goals, the more effective a remedial order can be expected to be in meeting them. The relevant issue, however, is what set of harms a school desegregation remedy ought to redress. If the pervasive evils of segregation include the systematic subordination of minority interests by school authorities hostile towards those interests, the effectiveness of a conventional racial balance remedy in adjusting student attendance patterns is not a meaningful objection to setting the court's sights higher. If unfair governance is an evil that causes our legal system to regard racial segregation as unconstitutional in the first place, courts can legitimately view themselves as duty-bound to try, however imperfectly, to relieve minority students of unfair racial domination in the governance of schools.

tance to integration. Alternatively, it can be argued by even critics of the conventional racial balance approach that the goal of school desegregation remedies should be the educational effectiveness of minority schools rather than fair governance; that is, minority plaintiffs should view desegregation suits as levers for improving education, not for more elusive goals of fair representation.

The appropriate response to the first concern is three-fold. First, the fair governance theory gives remedial priority to integration where reasonably practicable. Second, proponents of any form of desegregation must be concerned about remedies that substantially reimpose the harms on black children that desegregation is supposed to relieve. Busing that promises only questionable gains for minority pupils is not a sensible policy, especially because alternatives exist.

Finally, the development of alternative legal strategies to achieve equal protection cannot justly be blamed for forestalling otherwise unachievable integration. Under the fair governance approach, local school boards would have incentives to accept integration as the minimum level of interference necessary to effect constitutional standards of fair governance. Where officials forego those incentives and entrench themselves against change, no court order can secure integrated schooling. Boston and Detroit are two painful examples; others may exist. Where community leaders are dedicated to maintaining a segregated system, only a reallocation of political power can begin to set the stage for integration. Moreover, it is likely that one would find as much integrated classroom experience in the long run in a public school system administered under a fair governance order as in an antagonistic, residentially segregated community subject to a conventional racial balance decree. The results in cities like Boston²⁵⁵ suggest that, in some cases, blacks would be giving up little in actual integration under a fair governance decree while receiving increased leverage over the operation of the schools their children attend.²⁵⁶

²⁵⁵ See *supra* note 228.

²⁵⁶ The tradeoff between integration and local control is implicated in a related question that litigants may face—whether, if intradistrict integration is not possible, to pursue a fair governance intradistrict decree or a metropolitan decree to achieve integration. Notwithstanding the reasons argued above for favoring integration as the desegregation remedy of first resort, *see supra* section II C, from the perspective of the black community there are two possible objections to metropolitan desegregation. First, metropolitanization may place the overwhelming burden of integration on blacks, decreasing the value of whatever integrated classroom experience does occur. Second, the dispersion of black students may dissipate the political influence of blacks within their school system.

These objections to metropolitan remedies raise issues that can probably be resolved only within the context of a particular case. The desirability of metropolitan integration will depend on at least two factors: first, on the support among metropolitan

An alternative concern for the effectiveness of fair governance remedies comes from the opposite direction, challenging not the theory's doubts about conventional pursuits of racial balance but the emphasis still placed on integration as a remedy of first resort. Dean Derrick Bell is perhaps the best known current advocate for concentrating on educational effectiveness and not racial balance as the judicial goal for minority education. He argues,

[B]lack parents are increasingly disenchanted with remedies that have increased their educational burden without improving the quality of schooling provided their children. Alternative remedies [should] seek to translate the desire of black parents for educationally effective schools into school policies that can gain judicial approval. They [can] provide a vehicle for continuing the Supreme Court's and the country's commitment to the equal educational opportunity mandate of *Brown*.²⁵⁷

Unlike the writings of critics that argue that busing be abandoned and that remedies be targeted at particularized educational interests of black students,²⁵⁸ Dean Bell's theoretical critique of the principles underlying conventional racial balance incorporates an expansive view of the harms of segregation. In a case in which a court regards integration as impossible or impracticable, the fair governance orientation is, in fact, likely to lead to a remedial mix perhaps identical to Dean Bell's prescription for making minority schools more effective and giving black parents more political power in school systems.²⁵⁹

communities and educators for a transition to integrated education in their schools, see generally La Pierre, *Voluntary Metropolitan School Desegregation in St. Louis—An Opportunity Lost or a Second Chance?*, 2 ST. LOUIS U. PUB. L. FORUM 69 (1982); and second, the importance of undoing state discrimination by eliminating the prospect of systematic racial discrimination along city-suburb lines. It is important to note, however, that, to some extent, the importance of localism as an issue may be determined by black parents themselves; black plaintiffs in each case in which metropolitan relief is possible must make an initial judgment as to what reforms they expect will achieve the fairest treatment for black children.

²⁵⁷ Bell, *supra* note 53, at 138-39.

²⁵⁸ See, e.g., *The 14th Amendment and School Busing: Hearings Before the Subcomm. on the Constitution of the Senate Comm'n on the Judiciary*, 97th Cong., 1st Sess. 16-40 (1981) (statements and testimony of David J. Armor, Senior Social Scientist, Rand Corp.); *id.* at 136-43 (statement and testimony of Nathan Glazer, professor of education, Harvard University); *cf. id.* at 312-15 (article by John G. Bunzel); L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 258-83 (1976); Coleman, *The Role of Incentives in School Desegregation*, in *RACE AND SCHOOLING IN THE CITY* 182 (A. Yarmolinsky, L. Liebman & C. Schelling eds. 1981).

²⁵⁹ Bell, *supra* note 53, at 128-33.

The significant difference between the fair governance theory and the Bell approach to remedies is that implicit in Dean Bell's writings is a warning against devoting any judicial energy to "futile adherence to racial balance remedies that are increasingly hard to obtain."²⁶⁰ So persuaded is Dean Bell of the counterproductivity of pursuing racial balance that he challenges the propriety of giving any priority to integration as a remedial tool for segregated schooling. This difference between Dean Bell's perspective and the fair governance theory may thus depend more on political judgment than on overriding principle. The Bell thesis is less a challenge to the importance of integration than to predictions of its achievability.²⁶¹

Because of the importance of integration, it is essential, however, for substantial districtwide interracial education to remain the remedy of first resort. The only long-term hope of maintaining an official commitment to effective minority education is to change the system of schooling in a way that requires official sensitivity to the educational concerns of the minority community. This is not to say that quality education cannot be obtained in predominantly black schools; it can.²⁶² The point is that meaningful educational equality for all racial and ethnic groups cannot be expected if such groups attend separate educational institutions governed by school authorities representing the racial or ethnic majority.²⁶³ Although one may hope that a demonstration of the educational effectiveness of minority schools will encourage integration, it may be more realistic to hope that stable integration will encourage a long-term public commitment to equal educational opportunity.²⁶⁴

²⁶⁰ *Id.* at 138.

²⁶¹ Dean Bell bases his pessimism for the achievability of integration remedies on what he identifies as an increasingly powerful conviction among whites that integration is not in the interest of whites. See Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 91 (D. Bell ed. 1980).

²⁶² Several examples are noted in Bell, *supra* note 53, at 126-27.

²⁶³ See *supra* note 139.

²⁶⁴ Proponents of more effective public education for minority students must recognize also the importance of social integration to maintenance of any long-term social commitment to any form of public education. In American society, public schooling may be regarded not only as a good to be distributed fairly, but also as a form of coercion, depriving parents of the opportunity and, in large part, the resources to educate their children in more individualized ways. *But cf.* *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (State may not "standardize its children by forcing them to accept instruction from public teachers only."). It is true, of course, that the government's incursion into child raising may be justified by a host of beneficial services that public schools render. As one scans the list of such services, however, the most compelling reason for permitting government to require children to spend large parts of their early lives in predominantly government-run institutions may be the critical importance of

Whether or not fair governance decrees prove as effective in promoting fair governance as racial balance orders are at guaranteeing student reassignment, the goals of fair governance decrees are broader and more critical than are those of racial balance and are therefore worth pursuing. In addition, by focusing judicial attention on actual integration as the remedy of first resort, the fair governance theory offers hope of accomplishing integration wherever possible without sacrificing minority interests quixotically in districts in which only alternative remedies can hope to protect those interests effectively.

CONCLUSION

The unfair governance of intentionally segregated school districts renders racially separate schools in those districts inherently unequal. School desegregation remedies should attack what was the systematic and continuous vulnerability of minority children in those districts to a variety of harms inflicted upon them by hostile public school authorities. That vulnerability, which deprives minority students and their parents of objectively reasonable confidence in the nondiscriminatory educational administration to which they are entitled, is the crux of unfair governance.

Focusing on fair governance as a central issue in the school desegregation cases has three major advantages over the approach taken by the Supreme Court in *Dayton Board of Education v. Brinkman*²⁶⁵ [*Dayton I*], which articulates only a narrow remedial conception aimed at achieving some natural pattern of racially balanced student assignment as the key desegregative aim. First, the fair governance focus provides a standard against which to assess the utility of busing as a remedial tool and against which it is possible to suggest and assess alternatives to busing in school districts in which busing cannot and will not promote actual integration. Second, it justifies the Court's imposition of stringent liability rules on culpable school authorities. Third, the fair governance focus helps reconcile the Court's allegiance

schooling to social integration. See *Stephens v. Bongart*, 15 N.J. Misc. 80, 189 A. 131 (Juv. & Dom. Rel. Ct. 1937); cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state cannot demonstrate that its interest in compulsory schooling until age 16 is compromised by exempting 14- and 15-year-old Amish children, in light of evidence that Amish are effectively socializing their children in a separate agrarian community based on religious faith, which has proven economically self-sufficient and politically and socially responsible). If schools admittedly give up on that function, it is a reasonable prediction that long-term support for any high-quality public education would be eroded in favor of private forms of schooling that might serve minority interests even less well. This is surely a result to be avoided.

²⁶⁵ 433 U.S. 406 (1977).

to a de jure/de facto distinction in the school cases, with its unwillingness to permit case-by-case litigation of the question whether racially separate schooling is equal or ever justified.

In terms of remedial design, the fair governance orientation to remedies differs from the conventional racial balance approach in that:

1. The success of busing under a fair governance approach depends on the likelihood of achieving significant actual and stable integration in all schools;

2. Alternatives to busing are permissible under the fair governance approach even if the impracticability of integration results from community resistance rather than demographic impossibility;

3. The fair governance approach would regard as legitimate, in extreme cases, the restructuring of educational agencies to accomplish fair governance; and

4. The fair governance approach would permit improving the educational effectiveness of minority schools even if no showing could be made that the current educational deficiencies of those schools are directly traceable to particular instances of past discrimination.

The fair governance theory of the school desegregation cases cannot, however, be fully squared with *Milliken v. Bradley*²⁶⁶ [*Milliken I*]. The Court's preference in that decision for the value of local autonomy over the value of actual integration reflects a balancing of competing interests that either tacitly incorporates a narrower conception of the minority interests at stake than the fair governance theory suggests, or weighs those interests far less heavily. *Milliken I* does not, however, necessarily proscribe a fair governance approach to intradistrict remedies. Of key importance in this respect is the degree to which the Court, notwithstanding *Milliken I*, would tolerate judicial requirements for structural and policy changes within school districts, so long as the integrity of school district boundaries is respected. There is reason to expect that, if adopted, such intradistrict remedies would be manageable and effective. Such remedies would also have the distinct advantage over conventional orders of explicitly targeting the pervasive evils at issue in the school desegregation cases, thus warranting the expenditure of resources they require.

The fair governance theory, despite its invitation to courts to focus on the process of educational administration, is fully compatible with a substantive view of the equal protection clause, which regards that clause as protecting a normative view of equal educational opportu-

²⁶⁶ 418 U.S. 717 (1974).

nity.²⁸⁷ Even under a substantive view of equal protection, however, the central problem for school desegregation remedial design is securing a long-term commitment from public authorities to provide minority children with education as effective as that received by white children. In part because any substantive view of equality may be hard to prescribe in specific terms, it seems reasonable to give priority to securing for minority students a structure of governance in which school authorities cannot succeed in being administratively insensitive to their interests while working to serve effectively the interests of nonminority students.

Although some sacrifice of local autonomy would be a reasonable price to pay for meaningful school desegregation, the enforcement of the fair governance norm need not require extensive intervention into the command structure and substantive policymaking of a public school system. Integration, if it can actually be accomplished, is a desirable compromise between the egalitarian and majoritarian values at stake in the desegregation cases. When those values conflict, however, inequality should not prevail.

²⁸⁷ Much current writing on equal protection and judicial review addresses whether the equal protection clause signifies particular substantive values for judicial protection or whether the proper function of "noninterpretive" judicial review is, instead, policing the processes of democratic representation. The latter view is set forth most systematically in J. ELY, *DEMOCRACY AND DISTRUST* (1980). Instructive critical responses include M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); and several portions of *Symposium: Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981). The debate has been given a further dimension of complexity by Professor Westen, who has argued that, however "significant and enduring" the "legal and moral substance" of the equal protection clause, this substance cannot be derived from the idea of equality per se. See Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 565 (1982). His view of equality likewise has been criticized from a variety of perspectives. See Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); D'Amato, *Comment: Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983); Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247-50 (1983).

For present purposes, recognizing these scholarly disputes prompts only the observation that the legitimacy of a fair governance theory of school desegregation remedies does not depend on their resolution. The focus of the fair governance theory makes it obviously compatible with a process-oriented conception of equal protection. As the text elaborates, however, fair governance may also be part of the substantive ideals of equal educational opportunity and distributional fairness.