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THE FUTURE OF SCHOOL DESEGREGATION

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The future ain't what it used to be.

—Yogi Berra¹

Better is the end of a thing than the beginning thereof.

—Ecclesiastes²

INTRODUCTION

Today, we commonly define the future of court-ordered school desegregation³ as a non-issue: either desegregation cases are dead or, at the very least, the death knell has sounded. Such an impression is entirely understandable. In the last ten years, courts have closed school desegregation cases for Buffalo,⁴ Denver,⁵ Savannah,⁶ Oklahoma City,⁷ and Wilmington.⁸ “Exit plans” govern the school districts in Dallas,⁹ Kansas City, Missouri,¹⁰

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¹ YOGI BERRA, THE YOGI BOOK: “I REALLY DIDN’T SAY EVERYTHING I SAID” 118-19 (1998).

² *Ecclesiastes* 7:8 (King James).

³ By court-ordered school desegregation, I mean school districts required by injunction or consent decree to desegregate. Omitted from this definition are school districts operating under voluntary school desegregation plans, *i.e.*, plans implemented outside of the judicial process, or under plans negotiated with the then-Department of Health, Education, and Welfare (HEW). See generally Paul S. Hoff, Note, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321 (1967) (detailing the role of HEW in remedying school segregation in the South). Also excluded is the desegregation of public colleges and universities.

⁴ See *Arthur v. Nyquist*, 904 F. Supp. 112, 115 (W.D.N.Y. 1995).

⁵ See *Keyes v. Congress of Hispanic Educators*, 902 F. Supp. 1274, 1308 (D. Colo. 1995).

⁶ See *Stell v. Board of Pub. Educ.*, 860 F. Supp. 1563, 1585 (S.D. Ga. 1994).

⁷ See *Dowell v. Board of Educ.*, 778 F. Supp. 1144, 1196 (W.D. Okla. 1991), *aff’d*, 8 F.3d 1501 (10th Cir. 1993).

⁸ See *Coalition to Save Our Children v. State Bd. of Educ.*, 901 F. Supp. 784, 785 (D. Del. 1995), *aff’d*, 90 F.3d 752 (3d Cir. 1996).

⁹ See *Tasby v. Woolery*, 869 F. Supp. 454, 477 (N.D. Tex. 1994).

¹⁰ See *Jenkins v. Missouri*, 959 F. Supp. 1151, 1169 (W.D. Mo.), *aff’d*, 122 F.3d 588 (8th Cir. 1997).

and Little Rock¹¹ so that these desegregation cases can be dismissed as well.¹² Newspapers and magazines are full of stories about the end of desegregation,¹³ as are law reviews.¹⁴

Five contemporary forces seem to signal the end to desegregation litigation:

- 1). The Supreme Court's recent school desegregation decisions have been deemed "reflexively hostile."¹⁵

¹¹ See *Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 131 F.3d 1255, 1257 (8th Cir. 1997); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371, 1394 (8th Cir. 1990).

¹² In other words, the courts have ordered remedial plans specifically designed to ensure the termination of the lawsuit.

¹³ In 1996, *Time Magazine*, for example, claimed on its cover that we are "Back to Segregation" and that "America has now given up on school integration." *TIME*, April 29, 1996. The title of the inside article and the article itself were equally pessimistic about the continued viability of school desegregation. See James S. Kunen, *The End of Integration: A Four-Decade Effort Is Being Abandoned, as Exhausted Courts and Frustrated Blacks Dust Off the Concept of "Separate but Equal,"* *TIME*, April 29, 1996, at 39, 40 (reporting that "[t]he combination of legal revisionism and residential segregation is effectively ending America's bold attempt to integrate the public schools"); see also, e.g., Jerelyn Eddings, *Second Thoughts About Integration: Black Ambivalence About Busing Has Less to Do with Ideology than with Results*, *U.S. NEWS & WORLD REPORT*, July 28, 1997, at 32 (reporting the high frustration of African-Americans with the results of bussing); Ruth Marcus, *Court Cuts Federal Desegregation Role: Schools' Anti-Bias Obligations Eased*, *WASH. POST*, April 1, 1992, at A1 (anticipating that "many of the several hundred school districts now operating under federal court orders [will] seek removal from court control"); Anjetta McQueen, *Deaths of Pivotal Figures in Brown Mark Passing of Desegregation Era*, *EDUC. WK.*, Oct. 21, 1998, at 14 (contending that "*Brown* stands as a legal monument, but desegregation itself is by and large being abandoned by the courts, by policymakers, and by Americans of all races"); Orlando Patterson, *What to Do When Busing Becomes Irrelevant*, *N.Y. TIMES*, July 18, 1999, at A17 (declaring "[b]using is dead"); Jeffrey Rosen, *Bus Stop: The Lost Promise of School Integration*, *N.Y. TIMES*, April 2, 2000, § 4 (Week in Review), at 1 (questioning whether "efforts" to achieve racially integrated public schools [are] legally and politically doomed"). For articles discussing the misleading effect of media coverage on litigation, see Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide*, 80 *JUDICATURE*, Sept.-Oct. 1996, at 64; Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 *U. PA. L. REV.* 1147, 1154-68 (1992).

¹⁴ See Davison M. Douglas, *The End of Busing*, 95 *MICH. L. REV.* 1715, 1728 (1997) (reviewing GARY ORFIELD & SUSAN E. EATON, *THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996)) (predicting that "in the next few years, lower courts are likely to find that many more school districts have achieved unitary status"); Michael Heise, *Assessing the Efficacy of School Desegregation*, 46 *SYRACUSE L. REV.* 1093, 1096 (1996) (noting that "much of the current school desegregation activity . . . focuses on when to cease judicial oversight"); Bradley W. Joondeph, *Skepticism and School Desegregation*, 76 *WASH. U. L.Q.* 161, 161 (1998) (describing a "curtain fall[ing] on court-ordered desegregation nationwide"); Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 *EMORY L.J.* 759, 759 (1993) (noting that "many school boards are considering filing unitary status motions"); James E. Ryan, *Schools, Race, and Money*, 109 *YALE L.J.* 249, 254 (1999) (characterizing school desegregation as "entering its twilight phase"); Dennis Schapiro, *Looking for Justice in All the Wrong Places: Reflections on the End of the School Desegregation Era*, 17 *HAMLIN J. PUB. L. & POL'Y* 323, 323 (1996) (noting an "end" of school desegregation and efforts to "force—or even entice—families to send their children to schools designed specifically to desegregate"); see also *infra* Section 1.B.4 (reviewing academic literature declaring an end to court-ordered desegregation).

¹⁵ Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Desegregation*, 71 *WASH. L. REV.* 597, 599 (1996); see also *infra* Section 1.B.4 (discussing in more de-

- 2). Lower court judges, presiding over cases entering their second or third decade, appear to suffer "simple exhaustion."¹⁶
- 3). More and more African-American leaders and parents are curtailing their support of desegregation litigation, on the grounds that the remedies are insulting, ineffective, or too burdensome.¹⁷
- 4). African-American, Asian-American, and white parents have successfully challenged race-conscious student assignment policies.¹⁸
- 5). Despite decades of school desegregation litigation (or perhaps because of it), the level of segregation in American schools has increased in the 1990s.¹⁹

As is true for many areas of the law, however, we lack the necessary empirical perspective to determine the impact of these five forces on school desegregation litigation. This Article provides that perspective to ascertain the accuracy of the declared death of court-ordered desegregation. Specifically, this Article considers the following three questions: "Are school districts seeking termination of their school desegregation lawsuits?"; "Are courts dismissing these cases?"; and "Has recent Supreme Court precedent²⁰ affected the answers to the two previous questions?"

To answer the three questions, I conducted two empirical studies covering the court-ordered desegregation of 192 school districts.²¹ The studies clearly disprove the perception that school desegregation litigation is coming to an end. Despite the five forces noted above, and the number of high profile cases dismissed, the vast majority of school desegregation litigation continues, with no hint of impending termination.²² In short, this Article challenges the widespread idea that court-ordered desegregation is non-existent, or almost nonexistent.

Far from suggesting that school districts are clamoring for dismissal in great numbers (the common perception), these studies reveal that only a

tail how academics have characterized the Supreme Court's recent school desegregation decisions). The Supreme Court's recent school desegregation opinions are analyzed *infra* Section I.B.

¹⁶ Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863, 868 (1993); see also Section I.C (exploring the role of lower courts in terminating school desegregation litigation).

¹⁷ See *infra* Section I.D (discussing recent attempts by African-Americans to limit school desegregation efforts).

¹⁸ See *infra* Section I.D (reviewing the recent efforts by parents to limit race conscious student assignment practices).

¹⁹ See *infra* Section I.E (noting the increasing segregation in public schools).

²⁰ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995) (*Jenkins III*); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991); *infra* Section I.B (analyzing the Supreme Court's recent school desegregation decisions).

²¹ See *infra* notes 205-17, 257-60 and accompanying text.

²² For example, only 24 of the 189 school districts have had their school desegregation litigation terminated, even though almost all of the cases were filed in the late 1960s or early 1970s. See *infra* note 308 and accompanying text.

small percentage of defendants request an end to their desegregation lawsuits. This is true both before and after the recent Supreme Court decisions. Instead, most cases suffer from extreme neglect—little activity will occur for years, if not decades, but the court-ordered remedies remain in place. The clear majority of school districts appear content with their outstanding court orders. Not seeking termination imposes only known costs, while dismissal proceedings would require additional resources and, more importantly, an examination of how the district treats minority school children.

Unfortunately, these languishing school desegregation decrees can be harmful. School districts may operate under educationally harmful or legally inadequate remedial plans.²³ The inertia excuses a school district from pursuing more effective, educationally sound remedies. Moreover, judicial inactivity also allows a school district to hide any shortcomings of its efforts, including outright noncompliance with remedial orders.

This Article explores the reasons defendants usually do not seek termination and argues that the party-driven mode of litigation is ineffective in school desegregation.²⁴ More active judicial intervention is warranted.²⁵ Contrary to the popular idea of judges acting as “super school boards” or “local superintendents,” judges have taken a remarkably minor, passive role in overseeing the implementation of remedial decrees. Accordingly, this Article proposes a model for more effective judicial involvement in desegregation cases.²⁶ Lastly, this Article contends that despite the forces indicating a desire to end or the futility of school desegregation litigation, desegregation cases still provide a strong vehicle for improving equality in our public schools.²⁷

In Section I, this Article analyzes the forces commonly identified as ending school desegregation litigation: the federal judiciary, lack of public support, and increasing resegregation of public schools. Section II describes the two empirical studies that demonstrate that the vast majority of school desegregation cases remain pending, with little attention to termination. Section III explains why school desegregation is still an effective tool

²³ See *infra* notes 347-48 and accompanying text (analyzing the potential harms of inactive school desegregation cases).

²⁴ See *infra* notes 322-30 and accompanying text (arguing that plaintiffs and defendants lack appropriate incentives to ensure effective implementation of school desegregation decrees and thus ultimate dismissal of the lawsuit).

²⁵ See generally Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475 (1999) (arguing that the Supreme Court has ceded too much remedial power to defendants in public law cases); see also *infra* notes 331-34 and accompanying text (documenting the passivity of most federal court judges).

²⁶ See *infra* Section III (proposing that the federal judiciary should be more active in overseeing school desegregation litigation).

²⁷ See *infra* notes 355-59 and accompanying text (arguing that despite the pro-defendant approach of the Supreme Court, school desegregation litigation overall provides a powerful tool to redress educational inequities).

for redressing inequities and argues that the judiciary must more actively supervise these desegregation suits, reorienting them toward providing an effective remedy and eventual dismissal.²⁸

I. "REPORTS OF MY DEATH HAVE BEEN GREATLY EXAGGERATED"²⁹

A. Unitary Status

"All litigation must come to an end."³⁰ As uncontroversial and obvious as this statement might sound, the full import of the statement is not so obvious for school desegregation. In most ordinary, private law litigation, the end of court involvement comes with the announcement of the remedy. True, a judgment may be no more than "a handsome piece of paper suitable for framing,"³¹ for the enforcement of the judgment is critical in all litigation and courts routinely become involved in enforcement issues. Nevertheless, the remedy typically signals the end of judicial involvement. But with school desegregation, as with some other areas of the law,³² the remedy is the true beginning of the lawsuit.³³

In the 1955 case *Brown v. Board of Education*,³⁴ the Supreme Court's first school desegregation remedial decision, the Court held that defendants and district courts were to devise a remedy with "all deliberate speed"³⁵—rather than "immediately," the time frame for most remedial decisions³⁶—

²⁸ This Article is followed by an Appendix that provides more detail on the empirical studies.

²⁹ Mark Twain is often inaccurately quoted as saying, "Reports of my death have been greatly exaggerated." THE OXFORD DICTIONARY OF QUOTATIONS 706 (1996). The correct quote is, "The report of my death was an exaggeration." *Id.*; see also BARTLETT'S FAMILIAR QUOTATIONS 528 (1992).

³⁰ *Lynch v. Sessions*, 942 F. Supp. 1419, 1427 (M.D. Ala. 1996) (three-judge court).

³¹ DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 711 (2d ed. 1994).

³² Most public law cases result in lengthy remedial processes. See, e.g., *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525 (11th Cir. 1994) (employment discrimination case in its 21st year); *Huertas v. East River Hous. Project*, 992 F.2d 1263 (2d Cir. 1993) (housing discrimination case marking its second decade); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325 (1st Cir. 1991) (mental health institution case lasting 23 years); *Keith v. Volpe*, 960 F. Supp. 1448 (C.D. Cal. 1997) (environmental protection and housing discrimination case marking a quarter century); *Inmates of the Allegheny County Jail v. Wecht*, 848 F. Supp. 52 (W.D. Pa. 1994) (prison conditions case lasting 21 years); *Wyatt v. King*, 803 F. Supp. 377 (M.D. Ala. 1992) (mental health institution case 25 years old). Likewise, some commercial cases (most notably antitrust) involve extended remedial proceedings. See, e.g., *United States v. Western Elec. Co.*, 1996 WL 255904 (D.D.C. 1996) (ending a 1982 remedy in the AT&T antitrust case after passage of the Telecommunications Act).

³³ See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298 (1976) (noting that the public law remedy "prolongs and depends, rather than terminates, the court's involvement with the dispute").

³⁴ 349 U.S. 294, 300 (1955) (*Brown II*).

³⁵ *Id.* at 301.

³⁶ Professor Paul Gewirtz makes an interesting argument that the delay in remedy may have been beneficial for the plaintiff class. See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 609-28 (1983); see also Mark Tushnet, *Public Law Litigation and the Ambiguities of Brown*, 61 FORDHAM L.

and that jurisdiction over the suit would remain after the remedy was ordered.³⁷ This approach guaranteed continued judicial involvement to ensure that defendants eliminated the legacy of “dual” school systems (one for white children and another for minority children) and converted to “unitary” school systems.³⁸ The Supreme Court left open the question of how and when jurisdiction would end.

Sixteen years later, at a time when many school desegregation lawsuits were just being filed, the Fifth Circuit devised ways to terminate these cases. In *Youngblood v. Board of Public Instruction*,³⁹ the Fifth Circuit identified the procedural steps for termination. *Youngblood* required the district court to retain jurisdiction over a case for three years after the court had declared the system “unitary” (meaning, under *Youngblood*, that the school district was operating under a court-approved plan designed to end the legacy of discrimination),⁴⁰ during which time the school board was to submit semi-annual reports to the court.⁴¹ At the end of the three-year period, the district court was required to provide notice and a hearing for the plaintiffs to show why dismissal of the case should be delayed.⁴² School desegregation litigation ended under these steps as early as 1971.⁴³ Ending court-ordered school desegregation became a prominent issue in the 1990s. During this decade, four forces seemed to indicate the end of school desegregation litigation: the Supreme Court, lower courts, parents, and segregated schools. Each is discussed in turn below.

B. The Supreme Court

In the 1990s, the Supreme Court decided three school desegregation cases, all of which concerned the termination of desegregation litigation.⁴⁴ In 1991, in *Board of Education v. Dowell*,⁴⁵ the Supreme Court explained

REV. 23, 27-28 (1992) (arguing the standard of “all deliberate speed” “encouraged the federal courts to see themselves as managers of programs of social transformation, programs embedded in what the courts understood to be the requirements of the Constitution”).

³⁷ See *Brown II*, 349 U.S. at 301.

³⁸ *Green v. County Sch. Bd.*, 391 U.S. 430, 435-36 (1968).

³⁹ 448 F.2d 770 (5th Cir. 1971).

⁴⁰ The meaning of the word “unitary” has been far from clear. See *infra* note 53 and accompanying text. The more common usage today of “unitary” is that the school district has completed the task of desegregation and the lawsuit should be dismissed. See *infra* note 59 and accompanying text.

⁴¹ See *Youngblood*, 448 F.2d at 771.

⁴² See *id.*

⁴³ In other words, some school districts were completely removed from judicial oversight and the suits dismissed. See, e.g., *Taylor v. Houston Mun. Separate Sch. Dist.*, 726 F.2d 262, 264-65 (5th Cir. 1984) (noting that the school district was subject to a court order for sixteen months, until 1971 when the suit was “finally dismissed and terminated”); *United States v. Corinth Mun. Separate Sch. Dist.*, 414 F. Supp. 1336, 1345-46 & n.14 (N.D. Miss. 1976) (terminating the lawsuit and dissolving all outstanding injunctions).

⁴⁴ These cases followed a remarkable 11-year silence on school desegregation issues. See Parker, *supra* note 25 at 508-09.

⁴⁵ 498 U.S. 237 (1991).

for the first time when a school desegregation case may end. It returned to the same issue the following year, when it decided *Freeman v. Pitts*.⁴⁶ Lastly, it considered a defendant's request for termination in 1995 in *Missouri v. Jenkins*.⁴⁷ Taken together, the three cases clearly indicate the Supreme Court's frustration with the long *pendency* of school desegregation litigation, but not with the *inefficacy* of court-ordered remedies.⁴⁸ I argue, however, that the opinions still allow for a searching inquiry into the efficacy of a remedy and for imposing, as needed, a more effective remedy.⁴⁹

1. *Dowell v. Board of Education*. In 1985, the Oklahoma City school board voted to end its 1972 court-ordered plan of cross-town bussing of first- through fourth-grade students and return to "neighborhood" schools.⁵⁰ A group of African-American parents and students challenged that decision in a school desegregation lawsuit pending against the school district.⁵¹ The school district defended its action, in part, on the ground that the school desegregation suit had been dismissed in 1977.⁵² The Supreme Court rejected this argument because the 1977 order was unclear in its use of the word "unitary," a term subject, at the time, to different usages.⁵³ Instead, to terminate the lawsuit, the Court held that a district court must be clear in its intention to dismiss and that defendant cannot claim dismissal based on a court's ambiguous statements.⁵⁴

To clarify the necessary procedures and proof for ending a school desegregation lawsuit, the Supreme Court developed a three-part test. The Court required that the defendant prove that it has:

- 1). "complied in good faith with the desegregation decree since it was entered";⁵⁵
- 2). eliminated "the vestiges of past discrimination . . . to the extent practicable";⁵⁶ and

⁴⁶ 503 U.S. 467 (1992).

⁴⁷ 515 U.S. 70 (1995) (*Jenkins III*).

⁴⁸ See *infra* notes 123-25 and accompanying text.

⁴⁹ See *infra* notes 132-45 and accompanying text.

⁵⁰ See *Dowell*, 498 U.S. at 242. For a more detailed discussion of this case, see Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 20-25 (1992).

⁵¹ See *Dowell*, 498 U.S. at 240.

⁵² See *id.* at 244.

⁵³ See *id.* at 245-46; see also *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1419 n.3 (11th Cir. 1992) (noting the continued confusion over the use of the term "unitary"); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1414 n.12 (11th Cir. 1985) (drawing a distinction between "unitary school district" and "unitary status").

⁵⁴ See *Dowell*, 498 U.S. at 246.

⁵⁵ *Id.* at 249-50.

⁵⁶ *Id.* at 250.

- 3). demonstrated its commitment to future compliance with the Fourteenth Amendment and “would [not] return to its former ways.”⁵⁷

Under *Dowell*, if a defendant proves all three elements, then a school district has completed its transition from a dual school system to a unitary school system,⁵⁸ and the district court should dismiss the lawsuit. Although the *Dowell* Court strongly cautioned against treating the term “unitary” as if [it] were actually found in the Constitution,” after *Dowell*, “unitary” and “unitary status” are commonly used to designate a school district that has completed the task of desegregation.⁵⁹ Once a school district has achieved unitary status, its lawsuit should be dismissed. Thus, this Article will use the term “unitary” to denote a school district that has completed the desegregation process and should no longer be subject to federal court jurisdiction.

By its terms, the *Dowell* test reflects little change in the law. The three factors are clearly based on prior case law and do not explicitly reject any fundamental principle of school desegregation.⁶⁰ School districts retain the burden of proving the success of the remedy, which is still defined in terms of redressing the elusive “vestiges”⁶¹ of discrimination—the lingering present day effects of past violations. Granted, the Supreme Court retreated from its prior language of requiring desegregation “to the *greatest* possible degree of actual desegregation”⁶² by requiring desegregation “to the extent practicable.”⁶³ Yet, the consequences of the change in *Dowell* are far from clear. In the post-*Dowell* case *Freeman v. Pitts*, the Court used the phrase “maximum practical desegregation.”⁶⁴ Furthermore, the standard of elimination of the vestiges of discrimination “to the extent practicable” is still an exacting standard, for it requires that *all* effects of the past illegality be eliminated to the extent *practicable*. Given that requiring the “greatest” or “maximum” deseg-

⁵⁷ *Id.* at 247.

⁵⁸ See *supra* notes 38–42 and accompanying text (discussing earlier uses of the term “unitary”).

⁵⁹ *Dowell*, 498 U.S. at 245.

⁶⁰ See *Parker*, *supra* note 25, at 523 (contending that the *Dowell* test is based on the longstanding principle that the scope of the violation determines the scope of the remedy).

⁶¹ “Vestiges” are present day effects of past, illegal discrimination. Commonly cited potential areas of vestiges are the six *Green* factors—student assignment, faculty assignment, staff assignment, facilities, transportation, and extracurricular activities. *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968). The Supreme Court has not defined vestiges more specifically, although it uses the term frequently. See *infra* note 72 and accompanying text.

⁶² *E.g.*, *Wright v. Council of City of Emporia*, 407 U.S. 451, 468 (1972) (emphasis added); *Davis v. Board of Sch. Comm’rs*, 402 U.S. 33, 37 (1972); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

⁶³ *Dowell*, 498 U.S. at 247.

⁶⁴ 503 U.S. 467, 480, 493 (1992).

regation could not demand the impractical,⁶⁵ the difference in the two standards may merely be in the choice of words rather than in the outcome.⁶⁶

In some important respects, however, the tone of the opinion is notably different from the Supreme Court's last round of school desegregation opinions, its 1979 decisions in *Dayton Board of Education v. Brinkman*⁶⁷ and *Columbus Board of Education v. Penick*.⁶⁸ In this pair of cases, the Court established powerful causation presumptions that greatly lessened the burden of proving intentional segregation (a prerequisite for judicial oversight) in northern school districts.⁶⁹ The presumptions facilitated and permitted judicial oversight of school districts not obligated by state or local law to segregate public school children.

The change in tone reflected by *Dowell* is due to the increased importance the Court has placed on local control, the idea that school districts are best run by local school boards. While in 1979 a majority of the Court emphasized the need for judicial involvement in desegregating schools, including northern schools, a majority of the Court in 1991 stressed a different need—the importance of local control over school districts, the opposite of a need for federal judicial involvement. In devising *Dowell*'s three-part test, the Supreme Court stressed the temporary nature of school desegregation remedies and the “allocation of powers within our federal system.”⁷⁰

Local control is a clear, easily achievable goal. To realize it, a court merely enters a one-line dismissal order, and local control returns to the school district. In fact, local control is the *only* determinative standard the Court gives lower courts in considering termination. Hence, the value of local control can easily become the deciding factor when courts consider motions to terminate. The three-part *Dowell* test for termination is far from clear or easily achievable (although the test asks the correct questions, as discussed later⁷¹). Determining whether a school district has complied with

⁶⁵ See LAYCOCK, *supra* note 31, at 395-97.

⁶⁶ Granted, the choice of wording may reveal the Supreme Court's belief that the time for termination is at hand. Yet, I believe that the different word choice will not, by itself, compel different results.

⁶⁷ 443 U.S. 526 (1979) (*Dayton II*).

⁶⁸ 443 U.S. 449 (1979) (*Columbus II*).

⁶⁹ First, systemwide discrimination is presumed, absent persuasive counterproof, from discrimination in a substantial part of the system. See *Columbus II*, 443 U.S. at 455-58 (“Proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board.”). Second, and more importantly in the later stages of litigation, once a violation is found, any current disparity is presumed to be caused by the defendant's unlawful actions, unless the defendant proves that its actions *in no way* contributed to the disparity. See *Dayton II*, 443 U.S. at 537 (holding the defendants responsible for current segregation if the segregation was “caused at least in part by [the defendants'] prior intentionally segregative official acts”). The causation presumptions are discussed in more detail *infra* notes 96-97 and accompanying text.

⁷⁰ 498 U.S. 237, 248 (1991) (Marshall, J., dissenting). Justice Marshall criticized the majority's approach to local control. He defined local control as relevant only as to “feasibility.” *Id.* at 267.

⁷¹ See *infra* notes 133-34 and accompanying text.

a set of remedial orders (the first element) is relatively straightforward, but how “vestiges” should be defined (the second element, which generally means the continuing, present day effects of the past violation) is largely unanswered, and probably unanswerable on its own terms.⁷² Identifying the current effects of defendant’s past illegality is complicated because of the multivariate origins of current disparities. To take just one example, consider the difficulties of proving a defendant’s responsibility for current segregation in a student population: to what extent should the past, intentional segregation be linked to today’s segregation?

Local control allows the Court to resolve the ambiguity of “vestiges”—the Court can emphasize the temporary nature of the intrusion on local school boards rather than emphasize an uncertain concept such as vestiges. The use of local control, in fact, is a way for the Court to impose its own “value choices,” primarily the permissibility of racial inequities and the need for termination of school desegregation litigation.⁷³ Justice Marshall, authoring his last school desegregation opinion in *Dowell*, criticized the majority for defining vestiges to promote local control. Specifically, he faulted the majority for not defining “the threatened reemergence of one-race schools as a relevant ‘vestige’ of *de jure* segregation.”⁷⁴ In Oklahoma

⁷² The difficulty of defining vestiges is largely linked to the complexities of proximate cause in school desegregation, an issue discussed in more detail *infra* notes 117-18 and accompanying text. Both Justices Marshall and Scalia have noted the ambiguity of “vestiges.” See *Freeman v. Pitts*, 503 U.S. 467, 501 (1992) (Scalia, J., concurring) (observing that “[w]e have never sought to describe how one identifies a condition as the effluent of a violation, or how a ‘vestige’ or ‘remnant’ of past discrimination is to be recognized”); *Dowell*, 498 U.S. at 260-61 (1991) (Marshall, J., dissenting) (recognizing that “the Court has never explicitly defined what constitutes a ‘vestige’ of state-enforced segregation”).

⁷³ See Erwin Chemerinsky, *The Supreme Court, 1988 Term Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 57, 73, 100 (1989) (arguing that “the Court . . . appear[s] to have avoided value choices by deferring to the political process, when in reality it has made a value choice in choosing such deference”). The Supreme Court earlier had required judicial restraint by lower court judges but also, “apparently without sense of paradox, over the same period the Court ha[d] wielded doctrine more and more innovatively to achieve desired substantive outcomes.” Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 5 (1984); see also William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 664 (1982) (arguing that “the Court has tried to reduce the role of discretion by its formulation or choice of legal rule, so that in those areas where it has been able effectively to eliminate or reduce remedial discretion the Court has been more willing to recognize constitutional rights than it might otherwise have been”); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 347 (1997) (after reviewing the Supreme Court’s treatment of claims of racial discrimination, concluding that “[e]very time there was a conflict between racial equality and some other identifiable value, the Court was quick to compromise the pursuit of racial equality”). The same is true with the meaningless concept of proximate cause articulated in *Freeman* and *Jenkins III*. See John Leubsdorf, *Remedies for Uncertainty*, 61 B.U. L. REV. 132, 154 (1981) (arguing that “by calling on the deciders to ‘find’ what is not there to be found, . . . ensures that judgments will be based almost entirely on personal values”); see also *infra* notes 116-17 and accompanying text.

⁷⁴ *Dowell*, 498 U.S. at 251 (Marshall, J., dissenting).

City, the school district's proposed alternative student assignment plan would severely segregate thirty-three of the sixty-four elementary schools.⁷⁵

In *Dowell*, the majority found no fault with segregation that would take place after termination and refused to define immediate resegregation as a "vestige." Frustration with the longevity of school desegregation cases and awareness of the value of local control explain the Court's acceptance of resegregation. In other words, local control answers the ambiguity resulting from the three-part test's reliance on vestiges: where there is ambiguity (of which there is much), defer to local control, even in the face of resegregation.

Despite its shift in tone, *Dowell* is not an easy ticket to termination. Notably, the Supreme Court rejected an argument long advocated by conservatives that school desegregation litigation should end upon proof of compliance with applicable court orders.⁷⁶ This standard would have limited the remedial process to compliance with particular terms, which may or may not be effective, rather than basing termination on the achievement of a particular outcome. It also would have greatly simplified defendants' requisite proof. Defendants would only have to prove compliance with outstanding remedial orders (the first element of the *Dowell* test) and not that the remedial orders were effective in eradicating the effects of the illegality (the second element of the *Dowell* test). In fact, the *Dowell* test imposes a high burden on defendants: proof of the elimination of vestiges to the extent practicable. This goal-oriented requirement can easily be dismissed by a narrow definition of "vestiges," but it can also be a powerful weapon in requiring actual results from school desegregation litigation with a comprehensive definition of "vestiges."

Moreover, the Supreme Court could have easily disposed of the case before it by holding that it had already been dismissed. In 1977, the district court had ruled in an "Order Terminating Case," made in response to a "Motion to Close Case," that "[j]urisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal."⁷⁷ Eight years passed with no activity,⁷⁸ until the plaintiffs filed a "Motion to Reopen the Case."⁷⁹ Defendants in fact, argued that the case

⁷⁵ See *id.* at 242 (recognizing that "11 of 64 elementary schools would be greater than 90% black, 22 would be greater than 90% white plus other minorities, and 31 would be racially mixed"); *id.* at 255 (Marshall, J., dissenting) (noting the same).

⁷⁶ For example, the Department of Justice, under Presidents Reagan and Bush, made similar arguments. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners at 10 n.5, *Freeman v. Pitts*, 503 U.S. 467 (1992) (No. 89-1290) (arguing that "a desegregation plan is a final judgment; . . . satisfactory implementation of a judgment normally should discharge a defendant from further obligations"); Brief for the United States as Amicus Curiae Supporting Petitions at 24, *Board of Educ. v. Dowell*, 498 U.S. 237 (1991) (No. 89-1080) (asserting "faithful, continuous compliance with such a well conceived plan . . . is compelling evidence that the school district has become unitary").

⁷⁷ *Dowell*, 498 U.S. 237, 241-42 (1991) (quoting district court order).

⁷⁸ See *Dowell v. Board of Educ.*, 606 F. Supp. 1548, 1551 (W.D. Okla. 1985), *rev'd on other grounds*, 795 F.2d 1516 (10th Cir. 1986).

⁷⁹ *Dowell*, 498 U.S. at 242.

had already been dismissed,⁸⁰ and the case history certainly provided support for their argument. The Supreme Court would have greatly facilitated the termination of school desegregation had it ruled that the case was dismissed as of the 1977 district court order. Court orders declaring "unitary status" in ambiguous ways were common before *Dowell*.⁸¹ By requiring "a rather precise statement"⁸² to terminate, the Court prevented easy dismissal of the numerous school desegregation lawsuits with orders ambiguously declaring "unitary status."

The same is true for the Court's treatment of the eight-year period of inactivity in the Oklahoma City case.⁸³ The inactivity could have been used as an excuse by suggesting that plaintiffs had somehow acceded to the operation of the school district and could not complain. Yet, the Court accepted the possibility of continued jurisdiction despite prolonged periods of inaction, which is quite common in school desegregation cases.⁸⁴ Otherwise, many school districts would have been entitled to dismissal.

In summary, *Dowell* clearly elevates the importance of actual termination of school desegregation lawsuits, but imposes a nebulous test that can be used to make termination easy or difficult, depending on a court's treatment of "vestiges." Furthermore, the Court prescribes no radical changes to existing school desegregation law and refuses to allow simple, more effective methods of termination.

2. *Freeman v. Pitts*. In 1986, DeKalb County (a suburban area of Atlanta, Georgia) sought dismissal of its school desegregation suit.⁸⁵ The issue of dismissal arose in 1983 when the district court, *sua sponte* and without notice, dismissed the suit on the grounds that unitary status had been achieved.⁸⁶ After the court of appeals reversed on due process grounds, the defendants formally requested unitary status and dismissal.⁸⁷ The Supreme Court considered the suit in *Freeman v. Pitts*,⁸⁸ when it returned to the question of when a school desegregation decree may be terminated, and re-affirmed the three-part test of *Dowell*.⁸⁹ The Court also examined the new question of whether courts can release active supervision

⁸⁰ See *id.* at 244.

⁸¹ See *supra* note 53 and accompanying text.

⁸² *Dowell*, 498 U.S. at 246.

⁸³ See *supra* note 79 and accompanying text.

⁸⁴ See *infra* notes 261-63 and accompanying text (summarizing results of empirical studies documenting the long periods of inactivity that plague most school desegregation cases).

⁸⁵ See *Freeman v. Pitts*, 503 U.S. 467, 471 (1992).

⁸⁶ See *Pitts v. Freeman*, 755 F.2d 1423, 1424 (11th Cir. 1985).

⁸⁷ See *Freeman*, 503 U.S. at 471.

⁸⁸ For a more detailed discussion of *Freeman v. Pitts*, see Brown, *supra* note 50, at 26-30.

⁸⁹ See *Freeman*, 503 U.S. at 491; see also *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (*Jenkins III*) (stating the three-part test from *Dowell*).

over one part of a school district that is unitary and retain jurisdiction over another part that is not unitary.⁹⁰

The Court answered that issue in the affirmative, holding that defendants may be released from judicial supervision in an incremental fashion, a concept called "partial" unitary status. Once a defendant has proven effective compliance over a particular part of a remedial decree, the court may release judicial supervision over that part.⁹¹ Partial unitary status greatly eases the burden on defendants because it allows piecemeal remedies over a set period of time; the remedy need not be complete in redressing the remedy the violation at one point in time.

In reaching this conclusion, the majority in *Freeman* again emphasized the importance of local control. The Court went so far as to define the "end purpose" and "ultimate objective" of the lawsuit as "return[ing] school districts to the control of local authorities."⁹²

As in *Dowell*, the Court accepted the existence of one-race schools, but here it went a step further. While in Oklahoma City immediate resegregation was expected upon termination, in DeKalb County, thirty-eight out of ninety-six schools had extreme (eighty percent or greater of one-race) segregation, even while operating under court order.⁹³ In a notable shift, the Supreme Court accepted this segregation through its treatment of proximate cause—the requirement that the current disparities to be redressed by the remedy be caused by the original violation.⁹⁴

⁹⁰ See *Freeman*, 503 U.S. at 490-91.

⁹¹ In considering partial unitary status, a district court should specifically consider:

whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

Id. at 491.

⁹² *Id.* at 489.

⁹³ During the 1986-87 school year, "of the 22 . . . high schools, five had student populations that were more than 90% black, while five other schools had student populations that were more than 80% white; and of the 74 elementary schools . . . , 18 are over 90% black, while 10 are over 90% white." *Id.* at 476-77. Justice Blackmun, concurring in the judgment, noted that in the 38 years since *Brown v. Board of Education*, 347 U.S. 483 (1954), "the students in DeKalb County, Ga., never have attended a desegregated school system even for one day. The majority of 'black' students never have attended a school that was not disproportionately black." *Id.* at 509 (Blackmun, J., concurring in the judgment).

⁹⁴ The Court in *Dowell* noted the possibility that proximate cause may limit the scope of school desegregation remedies. There the Court allowed in a footnote that "private decisionmaking and economics" may have caused current residential segregation, not the illegal activity that the district court had earlier held was the cause of past residential segregation. *Board of Educ. v. Dowell*, 498 U.S. 237, 250 n.2 (1991); see also *id.* at 264 (Marshall, J., dissenting) (criticizing the majority's "hint" that private actions, unaffected by state action, could be the sole cause of current racial housing segregation).

Before *Freeman*, proximate cause was of little importance.⁹⁵ In the 1970s, the Supreme Court had developed a series of causation presumptions favoring school desegregation plaintiffs. Under these presumptions, liability for an *entire* school district could be established (absent persuasive counterproof) by proof of unlawful segregation in *parts* of the school district.⁹⁶ Absent persuasive counterproof, current racial imbalances in any respects, from student assignment to student achievement, were also presumed to have been caused by the *de jure* segregation.⁹⁷ As a result of these presumptions, proximate cause played only a minimal role in school desegregation. Defendants were generally held responsible for all disparities, and little attention was paid to defining the precise effects caused by the violation. Critically, the presumptions reflected either a belief or perhaps a value that absent defendant's illegal actions, racial equality would exist in our public schools. Any racial disparity was presumed to have been caused by defendant, not by private forces.

In *Freeman*, the Supreme Court held that proof of demographic changes⁹⁸ following a brief period of desegregation⁹⁹ could preclude the defendant's responsibility for segregation.¹⁰⁰ In that situation, a defendant's violation would not be causally related to the disparity, and the defendant should not be legally responsible for redressing the segregation. Justice Scalia, concurring, deemed such proof as "extraordinarily rare"¹⁰¹ and

⁹⁵ In a subsequent school desegregation case, *Jenkins III*, the Court further explored proximate cause. See *infra* notes 114-19 and accompanying text.

⁹⁶ See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455-58 (1979) (*Columbus II*) (holding that "[p]roof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board"); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973) (ruling that "a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious"). But see *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (*Dayton I*) (holding that lower courts "must determine how much incremental segregative effects these violations had on the racial distribution . . . as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations").

⁹⁷ See *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979) (*Dayton II*) (holding the defendants responsible for current segregation if the segregation was "caused at least in part by [the defendants'] prior intentionally segregative official acts"); *Keyes*, 413 U.S. at 211 n.17 (holding that "the burden becomes the school authorities' to show that the current segregation is in no way the result of those past segregative actions").

⁹⁸ For example, the school district's African-American population rose from 5.6% in 1969 when the remedy was first ordered to 47% in 1986. See *Freeman*, 503 U.S. at 475. The increase in population was accompanied by continued housing segregation. See *id.* at 476.

⁹⁹ The school district apparently desegregated its student body for one year, in 1969. See *id.* at 477.

¹⁰⁰ Justice Souter authored a concurring opinion to explain when a school district could still be legally responsible for the demographic changes. See *id.* at 507-08 (Souter, J., concurring). Justice Blackmun, joined by Justices O'Connor and Stevens, also argued that school districts can cause or contribute to demographic changes. See *id.* at 512-18 (Blackmun, J., concurring in the judgment).

¹⁰¹ *Id.* at 500 (Scalia, J., concurring).

challenged the very utility of proximate cause.¹⁰² In theory, the Court in *Freeman* continued to accept the causation presumptions; it simply held that the demographic factors effectively rebutted the presumptions.¹⁰³ Yet, in practical effect, the Court also weakened the presumptions by placing two limits on them. Specifically, “with the passage of time” such presumptions may no longer apply.¹⁰⁴ The same is true if the defendants have demonstrated “good faith.”¹⁰⁵

The majority opinion in *Freeman* cannot be neatly classified as solely pro-plaintiff or pro-defendant, for its approach has both pro-plaintiff¹⁰⁶ and pro-defendant aspects.¹⁰⁷ The result in the case, after all, was unanimous. Nonetheless, the opinion as a whole represents an important shift in the treatment of proximate cause and foretells a potential limit on the reach of decades-old school desegregation litigation. The Court expressed doubt that present-day segregation could be charged to the defendants, and it accepted segregation as a natural consequence of private American behavior. This approach naturally limits the extent to which a court should require redress of racial disparities.

But the shift should not be overstated. As we shall see, the futility of proximate cause analysis limits to some degree (*i.e.*, to the degree the parties or lower courts desire) the availability of wholesale elimination of school desegregation.¹⁰⁸ In other words, proximate cause has little true meaning and can be manipulated to reach desired results. Also, the Court allowed examination of a non-*Green* factor, quality of education,¹⁰⁹ “to determine whether minority students were being disadvantaged in ways that

¹⁰² Justice Scalia deemed the determination of the degree of segregation due to a defendant’s actions, and not due to private or other forces, “guesswork.” *Id.* at 503 (Scalia, J., concurring). He further argued that the “allocation of the burden of proof foreordains the result in almost all of the ‘vestige of past discrimination’ cases.” *Id.* Moreover, “it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools.” *Id.* at 506. The difficulty of proximate cause is discussed *infra* notes 117-18 and accompanying text.

¹⁰³ *See id.* at 494 (“The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.”).

¹⁰⁴ *Id.* at 491-92 (commenting that “with the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish”).

¹⁰⁵ *Id.* at 496 (“The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.”); *see also id.* at 498 (“A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new *de jure* violation.”). Justices Blackmun, O’Connor, and Stevens strongly supported the causation presumptions. *See id.* at 511-13 (Blackmun, J., concurring in the judgment).

¹⁰⁶ For example, the Court emphasized the harm of segregation and a school district’s obligation to cure that harm, *see id.* at 485-86, and the appropriateness of additional relief when necessary, even in the second decade of the lawsuit and outside the *Green* factors. *See id.* at 492-93.

¹⁰⁷ Areas with a pro-defendant outcome include proximate cause, *see id.* at 494-96, local control, *see id.* at 489-90, and partial unitary status. *See id.* at 491.

¹⁰⁸ *See infra* notes 117-18 and accompanying text.

¹⁰⁹ *See supra* note 61 (listing the six *Green* factors).

required the formulation of new and greater remedies to ensure full compliance with the court's decree."¹¹⁰ This remarkable concession allows parties and courts to inquire into quality of education, a very expansive concept, and fashion new remedies even if the issue was not a part of the original decree and even if the remedy has already lasted decades. This flexibility increases opportunities to inquire into and cure any defects in the education afforded minority schoolchildren.

3. *Missouri v. Jenkins*. In 1995, the Supreme Court considered our country's most expensive¹¹¹ and expansive school desegregation remedy, *Missouri v. Jenkins*.¹¹² Before the Supreme Court, the State of Missouri challenged two remedies: salary increases for school district employees and the district court's denial of partial unitary status to the State in the area of student achievement.¹¹³ As in *Freeman*, the Court focused on proximate cause as a limit on a defendant's desegregation obligations. But the Court went even further. While in *Freeman* the Court recited the causation presumptions and noted their potential limits,¹¹⁴ in *Jenkins III*, the Court ignored the presumptions altogether and imposed a different approach to causation.

Specifically, while the causation presumptions held a defendant responsible for *any* current disparity, absent persuasive counterproof from the defendant, the Court's approach to proximate cause in *Jenkins III* required that a defendant only redress that *portion* of a disparity caused by the defendant's illegal actions.¹¹⁵ The Court thereby resurrected the "incremental effect" standard, which it had briefly used in the 1970s.¹¹⁶ Both the incremental effect standard and the presumptions allow a defendant to attempt to excuse current disparities by arguing that a disparity is not caused by the defendant, but by demographics, socioeconomic status, and similar factors. Under the

¹¹⁰ *Freeman*, 503 U.S. at 492.

¹¹¹ The remedy began in 1985, and by the end of 1998, the estimated costs of the remedy reached \$2 billion dollars. See Julie Blair, *Mo. Makes Final K.C. Desegregation Payment*, EDUC. WK., Dec. 16, 1998, at 20. This lawsuit is covered in more depth in Parker, *supra* note 25; see also Jose Felipe Anderson, *Perspectives on Missouri v. Jenkins: Abandoning the Unfinished Business of Public School Desegregation "With All Deliberate Speed,"* 39 HOW. L.J. 693 (1996); Richard A. Epstein, *The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CAL. L. REV. 1101 (1996); Joondeph, *supra* note 15; Theodore M. Shaw, *Missouri v. Jenkins: Are We Really a Desegregated Society?*, 61 FORDHAM L. REV. 57 (1992); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

¹¹² 515 U.S. 70 (1995) (*Jenkins III*). The Supreme Court considered the case on two previous occasions. See *Missouri v. Jenkins*, 495 U.S. 33 (1990) (*Jenkins II*) (examining the power of a federal court to order an increase in local taxes); *Missouri v. Jenkins*, 491 U.S. 274 (1989) (*Jenkins I*) (affirming award of attorneys' fees).

¹¹³ See *Jenkins III*, 515 U.S. at 73.

¹¹⁴ See *supra* notes 103-05 and accompanying text.

¹¹⁵ See 515 U.S. at 101-02. The Court fails to state who bears this burden of proof. Perhaps the burden is the plaintiff's, given that the issue of causation originally was part of the plaintiff's cause of action.

¹¹⁶ See *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (*Dayton I*).

incremental effect standard, a defendant may argue that current segregation is not caused by the defendant, but by private forces. Likewise, with the presumptions, a defendant may contend that the presumption that the defendant caused the current segregation is rebutted by its proof that private forces were, in fact, the legal cause. This standard makes it difficult to hold a defendant responsible for current disparities because defining the precise, current effects of a past illegality is exceedingly difficult, if not impossible.¹¹⁷

The two standards differ in the impact of the failure to prove by preponderance of the evidence what factor caused what portion of the segregation. Under the presumptions, if a *defendant* fails to rebut the presumption with persuasive counterproof that a nondefendant agent caused all or part of the segregation, then the defendant is responsible for the entire segregation. With the incremental effect standard, on the other hand, it appears that if a *plaintiff* fails to prove what portion of the disparity the defendant caused, then the defendant is responsible for *no* portion of the segregation. Because of the extreme difficulty of proximate cause, one can readily (and honestly) determine that the incremental effects of the defendant's illegality cannot be assessed. Then the defendant is excused from responsibility altogether. This result occurs not necessarily because the defendant's actions have no present day discriminatory effect, but because of the elusiveness of proximate cause.

Related to the incremental effects standard is the Court's continued acceptance of segregation. As in *Dowell* and *Freeman*, the Court's opinion in *Jenkins III* reflects a belief in a world of racial disparities caused entirely by nondefendant activities. The Court suggested this sentiment by finding that "numerous external factors beyond the control of [the defendants] affect minority student achievement."¹¹⁸ In other words, the Court no longer presumes an integrated, equal society absent state discrimination, the foundation of the causation presumptions.¹¹⁹

Again, however, the impact of *Jenkins III* is, in some important respects, limited. The State's challenges, as defined by the majority, had some intuitive appeal because of the gargantuan reach of the remedial plan and the nontraditional aspect of the two remedies before the court. The

¹¹⁷ See Gewirtz, *supra* note 36, at 785 (defining causation as "the most common problem in school desegregation cases"); Leubsdorf, *supra* note 73, at 135 (explaining that the remedial question of defining what the world would be absent the defendant's wrong "cannot be answered with any reliability except by those possessing a time machine"); Parker, *supra* note 25, at 519-21, 559-63 (detailing the futility of proximate cause in public law litigation in general and school desegregation in particular).

¹¹⁸ *Jenkins III*, 515 U.S. at 102.

¹¹⁹ See Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1387 (1997) (criticizing the Supreme Court's decision in *Jenkins III* as "part of the now typical narrative of the 'new segregation'" under which "the state must recognize the desire of its citizens to live and congregate in racially separate spheres," "[r]ather than attempt to create integrated institutions no one wants"); Selmi, *supra* note 73, at 350 (concluding that in recent race discrimination cases "the Court seems to be suggesting that the current state of racial equality is as good as we are likely to get, and that we can no longer rely on the court to encourage greater equality").

State appealed court-ordered pay increases for all but three employees of the school district, including pay increases for noninstructional staff such as custodians, food service personnel, and parking lot attendants.¹²⁰ The State also challenged an order characterized by the Supreme Court as requiring funding of programs because "student achievement levels were still 'at or below national norms at many grade levels.'"¹²¹ In other words, the State argued that the district court should not order the State to fund programs to raise student achievement until the school district's overall student achievement was at national norms. Such a standard would prevent school districts in the bottom half of student achievement tests from ever being released from the court order.

Given the intuitive appeal of the State's arguments, even more interesting than the reversal is that four Justices of the Court (Justices Breyer, Ginsburg, Souter, and Stevens) would have affirmed.¹²² In a way, the dissent is more interesting than the majority opinion, for it was entirely predictable that some check would be imposed. The dissent's firm commitment to expansive remedies may, in other words, act as a restriction on the majority's ability to limit the scope of school desegregation remedies.

4. *Perception of the Three Cases.* Legal academics generally (and rightly) understand the Supreme Court's recent school desegregation jurisprudence to reflect, on the whole, the "we've done enough theory."¹²³ Pro-

¹²⁰ See *Jenkins III*, 515 U.S. at 78; Brief for State of Missouri at 25, *Missouri v. Jenkins*, 512 U.S. 1287 (1994) (arguing that "there is no legal basis to assume that providing raises to parking lot attendants, custodians, cooks, and other similar noninstructional personnel will reverse the effects of the defendant's past *de jure* discrimination").

¹²¹ *Jenkins III*, 515 U.S. at 100. The dissent challenged this characterization of the district court's rulings. See *id.* at 148-50 (Souter, J., dissenting).

¹²² The dissent argued that the salary increase order was an appropriate exercise of the district court's equitable discretion to redress a reduction in achievement due to the original violation, which was an uncontested vestige. See *Jenkins III*, 515 U.S. at 154 (Souter, J., dissenting). The dissent would have also affirmed the denial of partial unitary status to the State on quality of education programs because the State failed to follow the procedures set forth in *Freeman* or to prove the three-part *Freeman* test. See *id.* at 151-52; see also *supra* notes 90-91 and accompanying text (describing the *Freeman* procedures and test).

¹²³ Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 767 (1996) (designating *Jenkins III* as the "we've done enough" theory, comparable to the Civil Rights Cases of 1883); see also, e.g., Patricia A. Brannan, *Missouri v. Jenkins: The Supreme Court Reconsiders School Desegregation in Kansas City, Criteria for Unitary Status, and Remedies Reaching Beyond School District Lines*, 39 HOW. L.J. 781, 781 (1996) (arguing that "[a]lthough *Jenkins III* does little to change prevailing school desegregation law, it suggests that a majority of the Supreme Court is increasingly skeptical of expansive and prolonged remedies in school desegregation cases"); Douglas, *supra* note 14, at 1736-37 (characterizing "the Court [as] poised to exit the school desegregation arena altogether"); Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 170 (1999) (reviewing GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996)) (explaining the recent cases as "clear hostility to the continuation of court ordered desegregation remedies"); Joondeph, *supra* note 15, at 681 (describing "the Court [as] ending this important chapter in our constitutional history subtly and without words"); Donald E. Lively, *Desegregation and the Supreme Court: The Fatal Attraction of Brown*, 20 HASTINGS CONST.

fessor Erwin Chemerinsky, for example, has argued that with *Dowell* and *Freeman*, “the Court is declaring victory over the problem of school inequality and simply giving up.”¹²⁴ Fundamental problems with Supreme Court jurisprudence in this area have long existed. In particular, Supreme Court desegregation decisions have not been a model of clarity.¹²⁵ The Court, however, is now crystal clear in its frustration with the longevity of school desegregation cases.

No unanimity exists on the future implications of the Court’s frustration. Professor Richard A. Epstein, for example, has suggested that “fatigue was the dominant impulse on the Court” in *Jenkins III*,¹²⁶ but still criticizes the Court for its “timid” response.¹²⁷ Professor Epstein recognizes the futility of identifying proximate cause,¹²⁸ among other problems,¹²⁹ and asks

L.Q. 649, 662 (1993) (contending that “[r]ecent decisions have effectively relegated desegregation to a historical episode which now is largely past”); John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 470 (1995) (concluding that “[i]n 1994, the dedication of the Justices of the Supreme Court to enforcing the *Brown* principle is not clear”); Charles J. Russo & Lawrence F. Rossow, *Missouri v. Jenkins Redux: The End of the Road for School Desegregation or Another Stop on an Endless Journey?*, 103 EDUC. LAW. REP. 1, 1-2 (1995) (presenting *Jenkins III* as “a further retrenchment in the struggle to end racial segregation in the schools”); Leland Ware, *Forward: School Desegregation, Civil Rights, and The Supreme Court’s 1994-1995 Term*, 15 ST. LOUIS U. PUB. L. REV. 1, 12 (1995) (reasoning that “[t]he Supreme Court has effectively directed the lower courts to get out of the business of supervising school desegregation”). *But see* Epstein, *supra* note 111, at 1104 (“Because the Supreme Court remains willing to tolerate such a loose connection between today’s remedy and yesterday’s remote wrong, its response in *Jenkins III* was too timid to curb the endless litigation and remedial excess that has arisen in the afterglow of *Brown*.”); David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo, and Freeman*, 20 HASTINGS CONST. L.Q. 579, 583 (1993) (describing *Dowell* and *Freeman* as “far from being disastrous for the proponents of court-ordered school desegregation”); Yoo, *supra* note 111, at 1135 (contending that “the Supreme Court’s decisions have given insufficient regard to the restraints on the federal judicial power that our federal structure requires”).

¹²⁴ Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1014 (1994).

¹²⁵ See Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1109 (1990) (noting that “[o]ne of the intractable problems of the Supreme Court’s jurisprudence in the area of *de jure* segregation has been its inability to articulate a coherent theory of the constitutional harm resulting from *de jure* segregation of public schools that justifies desegregation as the principal means to eliminate the harm”); Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1044 (1984) (describing the Supreme Court school desegregation cases as “puzzling” and ambiguous); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 72 LAW & CONTEMP. PROBS. 56, 87 (Autumn 1978) (explaining the “confusion” present in Supreme Court school desegregation precedent).

¹²⁶ Epstein, *supra* note 111, at 1108.

¹²⁷ *Id.* at 1104.

¹²⁸ See *id.* at 1101, 1117.

¹²⁹ See *id.* at 1111-13 (criticizing the application and appropriateness of the remedial standard of restoring the victims to the position they would have occupied but for the violation); *id.* at 1113-16 (noting the mismatch between the victims and wrongdoers and the beneficiaries of the remedy and those bearing the burden of the remedy).

“why countenance any continuing remedies at all?”¹³⁰ In other words, for Professor Epstein, the time has come for some bright line rule readily to eliminate school desegregation cases that are long past their prime.¹³¹

The Supreme Court’s recent approach to school desegregation is notable for its desire to limit the reach of school desegregation. But we should not allow the Court’s current disposition to obscure the fact that school desegregation litigation continues to be viable, even under the Supreme Court’s stated principles.

In two critical respects, the Court has continued to employ what Professor Paul Gewirtz has described as “Rights Maximizing.” Under Rights Maximizing, “the only question a court asks once it finds a violation is which remedy will be the most effective for the victims, where ‘effectiveness’ means success in eliminating the adverse consequences of violations suffered by victims.”¹³² This pro-plaintiff approach to remedies prevents nonplaintiff interests from limiting the reach of the remedy; the sole value taken into account in crafting the remedy is its effectiveness in eliminating the effects of the violation. The Court engages in Rights Maximizing when it requires that a defendant eliminate the vestiges of discrimination “to the extent practicable,” as it did in *Dowell*, *Freeman*, and *Jenkins III*.¹³³ This test explicitly requires that all effects of the defendant’s illegality be eliminated to the extent practicable—regardless of the impact of the remedy on the interests of the defendant or the public. Other than not requiring the impracticable (which by definition cannot be ordered according to fundamental remedies law¹³⁴), the standard compels that all effects caused by the defendant’s wrong be rectified.

Furthermore, the Court engaged in Rights Maximizing in *Freeman* when it recognized that a district court properly exercises its discretion when it inquires into new remedial areas to determine whether additional

¹³⁰ *Id.* at 1108. Continuing, he argues that “it is high time to call a halt to costly and unproductive judicial efforts to rectify remote injustices. Those efforts have failed by any measure that one could bring to bear on them. The time has come to focus solely on the future and to curb the remedial exuberance of the federal courts.” *Id.* He ends with even stronger language: “Forty-one years after *Brown* the Supreme Court should pull the plug on desegregation litigation and seek to do the best it can for present students. Some decisive measures should be taken to dampen the finger-pointing and harm-creation that inevitably arise once remedial action has been permitted on so intrusive a level It is time to ditch the courts in the desegregation cases and get on with the future.” *Id.* at 1118-20.

¹³¹ *See id.* at 1115 (arguing that “the Court’s position does not bring this lawsuit to an end: it only sends it back for yet another round of litigation below, where once again the wrong ends will be pursued by the wrong techniques”).

¹³² Gewirtz, *supra* note 36, at 591. Professor Gewirtz further explains that “[u]nder Rights Maximizing, an incompletely effective remedy is acceptable only if a more effective remedy for the victims is impossible to achieve.” *Id.* at 592.

¹³³ *See Jenkins III*, 515 U.S. at 71; *Freeman v. Pitts*, 503 U.S. 467, 492 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237, 250 (1991).

¹³⁴ *See supra* note 65.

redress is warranted.¹³⁵ This result allows courts and parties to focus on redressing all effects of the violation, even decades into the remedial process and even into new remedial areas. Parties are not limited to the original terms of the remedy, or even the areas addressed by the original decree. Rather, the primary concern is to provide plaintiffs with effective remedies.

While the Rights Maximizing approach is important, it cannot serve as an exclusive characterization of the Court's approach to school desegregation. In addition to Rights Maximizing, Professor Gewirtz's concept of "Interest Balancing" also captures the Supreme Court's current approach to school desegregation.¹³⁶ Under Interest Balancing, "remedial effectiveness for victims is only one of the factors in choosing a remedy; other social interests are also relevant and may justify some sacrifice of achievable remedial effectiveness."¹³⁷ This approach, in other words, recognizes that courts can properly take into account the interests of nonplaintiffs, even nonparties, in devising a remedy.

The Court identifies one value that, from the perspective of plaintiffs, limits the effectiveness of judicial remedies: local control. Specifically, the Court instructs in *Dowell*, *Freeman*, and *Jenkins III* that the value of local control must be recognized in crafting a remedy and judging its effectiveness.¹³⁸ In a related vein, the Court's perception of how a school district would look absent a defendant's violations further narrows the remedial process. The Court accepts racial segregation as a natural consequence of purely private behavior. In *Dowell*, for example, the Court found no fault in the possibility of immediate resegregation of the Oklahoma City elementary schools.¹³⁹ Similarly, in *Freeman*, the Court accepted the presence of segregation even in a school district operating under court order.¹⁴⁰ Finally, in *Jenkins III*, the Court presumed that private forces caused disparities in the achievement scores of African-American and white schoolchildren, and it accepted the disparities as a fact of American life.¹⁴¹ This acceptance of racial segregation and racial disparities calls into question the purpose of school desegregation remedies and their potential for actual integration.

The acceptability of segregation arises not through new legal concepts, but through the Court's reinvigoration of proximate cause, *i.e.*, what type of causal relationship between the original violation and the current inequities

¹³⁵ See *Freeman*, 503 U.S. at 492-93; *supra* note 110 and accompanying text. Further, the Court in *Freeman* allowed courts the discretion to award partial unitary status, rather than making the obligation to award partial unitary status mandatory, a more pro-defendant standard. See 503 U.S. at 491; Levine, *supra* note 123, at 616-17 n.229.

¹³⁶ See Gewirtz, *supra* note 36, at 591.

¹³⁷ *Id.*

¹³⁸ *Jenkins III*, 515 U.S. at 131; *Freeman*, 503 U.S. at 489-90; *Board of Educ. v. Dowell*, 498 U.S. 237, 248 (1991).

¹³⁹ *Dowell*, 498 U.S. at 244; *supra* notes 74-75 and accompanying text.

¹⁴⁰ *Freeman*, 503 U.S. at 476-77; *supra* notes 93-94 and accompanying text.

¹⁴¹ *Jenkins III*, 515 U.S. at 102; *supra* notes 118-19 and accompanying text.

must be proven. Beginning with the hints in *Dowell* of the possibility of proximate cause as an excuse for racial segregation,¹⁴² the Court has steadily increased the viability of proximate cause as a limit on the reach of school desegregation litigation by accepting racial segregation and disparities. In *Freeman*, the Court noted possible limits on the causation presumptions that have greatly limited the force of proximate cause.¹⁴³ In *Jenkins III*, it dispensed with the causation presumptions altogether.¹⁴⁴

Considering that local control is part of the remedial calculus and that proximate cause can be used to excuse racial disparities, one can readily conclude that the Supreme Court's three most recent school desegregation opinions impose little burden on defendants seeking unitary status. To be sure, school districts still must prove the absence of continuing vestiges of past discrimination. But the burden is greatly alleviated by the Court's focus on local control and its acceptance of continued or immediate segregation. Proximate cause can excuse any continued racial disparities because proximate cause as a concept has very little real meaning in school desegregation.¹⁴⁵ No one knows exactly what caused what in the context of school desegregation, so the concept of proximate cause can easily be used to excuse segregation if courts are willing and if defendants seek unitary status. The value of local control further validates excusing a defendant's responsibility. In other words, the need to end oversight over school districts is a reason to pardon or disregard remaining segregation.

Yet, many have failed to recognize the importance of what the Court chose not to prescribe: a simple mechanism for terminating jurisdiction. Instead, the Court imposed an ambiguous three-part test and provided one equally ambiguous concept, proximate cause, as a way to excuse defendants from having to redress continued racial disparities. The one clear concept is local control, for to achieve local control, a court need only dismiss the action. Yet the ambiguity in the remedial standard allows, in fact it requires, judicial choice. The Supreme Court's opinions permit courts to engage both in Rights Maximizing and in Interest Balancing, as the courts desire.

C. Lower Courts

From 1991 to 1995, the Supreme Court evidenced a desire for the end of long-running school desegregation cases. Yet, the Court's legal standards regarding termination are vague. A question arises as to how lower courts have reacted to the Court's three recent opinions. An individual judge's personal preferences can easily influence the outcome of a pliable test such as that in

¹⁴² *Dowell*, 498 U.S. at 638 n.2; *supra* note 94.

¹⁴³ *Freeman*, 503 U.S. at 491, 498; *supra* notes 98-105 and accompanying text.

¹⁴⁴ *Jenkins III*, 515 U.S. at 102; *supra* notes 115-16 and accompanying text.

¹⁴⁵ See *supra* notes 117-18 and accompanying text.

Dowell.¹⁴⁶ The standards can be manipulated to reach a desired result that logically follows from “application” of the *Dowell* test, thereby obscuring the role of a judge’s personal preference in reaching the desired result.

The lower court judges in *Dowell*, *Freeman*, and *Jenkins III* all understood the Court’s frustration with the longevity of their school desegregation cases. The district courts in *Dowell* and *Freeman* had, prior to the Supreme Court’s decisions, attempted to limit their jurisdiction over the school districts, but were reversed by their respective courts of appeals.¹⁴⁷ After the Supreme Court’s decisions, the district courts declared Oklahoma City and DeKalb County unitary and dismissed their suits.¹⁴⁸ In *Jenkins III*, the district court approved a three-year plan under which Kansas City, Missouri, would become unitary.¹⁴⁹ In all three cases, the court of appeals affirmed.¹⁵⁰

One reading the popular press¹⁵¹ or law reviews¹⁵² could also conclude that other lower courts have readily joined a bandwagon of dismissal, gladly granting unitary status.¹⁵³ Yet, no published study undertakes an analysis of the accuracy of this conclusion. Section II of this Article sum-

¹⁴⁶ See generally Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 44 (1998) (noting that for personal jurisdiction, “the malleable nature of the minimum contacts inquiry, coupled with the paucity of Supreme Court review, creates an environment for lower courts to have relatively free reign to apply personal jurisdiction doctrine”).

¹⁴⁷ See *Pitts v. Freeman*, 887 F.2d 1438, 1444 (11th Cir. 1989), *rev’d*, 503 U.S. 467 (1992); *Dowell v. Board of Educ.*, 677 F. Supp. 1503, 1525 (W.D. Okla. 1987), *rev’d*, 890 F.2d 1483 (10th Cir. 1989), *rev’d*, 498 U.S. 237 (1991).

¹⁴⁸ See *Mills v. Freeman*, 942 F. Supp. 1449, 1464 (N.D. Ga. 1996), *aff’d*, 118 F.3d 727 (11th Cir. 1997); *Dowell v. Board of Educ.*, 778 F. Supp. 1144, 1196 (W.D. Okla. 1991), *aff’d*, 8 F.3d 1501 (10th Cir. 1993). For a description of the way the district courts in *Dowell* and *Freeman* rejected evidence once accepted as proof of discrimination or of its effects, see Hansen, *supra* note 16, at 867-68.

¹⁴⁹ *Jenkins v. Missouri*, 959 F. Supp. 1151, 1169 (W.D. Mo.), *aff’d*, 122 F.3d 588 (8th Cir. 1997). The school district still failed, however, to achieve unitary status in three years. See *Jenkins v. Missouri*, 216 F.3d 720, 727 (8th Cir. 2000) (en banc) (reversing the district court’s *sua sponte* declaration of unitary status and dismissal of the case); see also Parker, *supra* note 25, at 504-05 (detailing the barriers to successful desegregation in Kansas City, Missouri).

¹⁵⁰ See *Jenkins v. Missouri*, 122 F.3d 588 (8th Cir. 1997); *Mills v. Freeman*, 118 F.3d 727 (11th Cir. 1997); *Dowell v. Board of Educ.*, 8 F.3d 1501 (10th Cir. 1993).

¹⁵¹ See *supra* note 13.

¹⁵² See, e.g., Kevin Brown, *The Implications of the Equal Protection Clause for the Mandatory Integration of Public School Students*, 29 CONN. L. REV. 999, 1000 (1997) (arguing that after *Dowell*, *Freeman*, and *Jenkins III*, “federal courts are increasingly withdrawing from their involvement in the desegregation of public schools and thereby closing an epic chapter in American legal history”); Douglas, *supra* note 14, at 1716 (describing courts as “weary from decades of school supervision”); Hansen, *supra* note 16, at 867 (arguing that the “ostensible focus on causation . . . reflects the unwillingness of the courts to find causation in situations where they previously would have found it”); Joondeph, *supra* note 14, at 166 (noting that “[m]any district courts have understood the Court’s implicit message, citing the Court’s recent opinions in declaring formerly *de jure* school districts ‘unitary’ and releasing them from judicial supervision”). For an example of lower court exhaustion, see *Gaines v. Dougherty County Bd. of Educ.*, 775 F.2d 1565, 1566 (11th Cir. 1985) (per curiam) (expressing the “hope[] [that] the end of a twenty-three-year saga” of the school desegregation case is “nearing”).

¹⁵³ See, e.g., cases cited *supra* at notes 4-11.

marizes the results of such a study and finds some empirical support for the notion that district courts are willing to dismiss school desegregation lawsuits.¹⁵⁴ Yet, lower courts have not dismissed school desegregation lawsuits wholesale, and the clear majority of litigation focuses on procedural and remedial issues instead of termination.¹⁵⁵ Interestingly, the Supreme Court's recent precedent has had little effect on the number of school districts requesting and achieving unitary status.¹⁵⁶

D. Parents

Photographs and newsreels of angry parents dominated the early days of school desegregation. White parents shouted obscenities at fifteen-year-old Elizabeth Eckford as she and the rest of the Little Rock Nine walked to school surrounded by federal marshals in Little Rock,¹⁵⁷ and at African-American children bussed into south Boston.¹⁵⁸

Today, parents challenging court-ordered school desegregation continue to have a high profile. Although the public obscenities are largely gone, the debate today is, in some respects, more powerful. More and more parents openly question the utility of school desegregation litigation. As a result, the continued viability of court-ordered school desegregation appears tenuous. Without parents as plaintiffs, or at least as witnesses, it is difficult to pursue desegregation cases actively.

The African-American community has never been united in a desire for integrated schools.¹⁵⁹ Increasingly, African-Americans are publicly challenging the value of desegregation litigation. Even the NAACP, the embodiment of the movement for integration, in 1997 questioned the con-

¹⁵⁴ See generally *infra* Section II.

¹⁵⁵ See generally *id.* But most school districts have not even sought dismissal. See *id.*

¹⁵⁶ See *infra* notes 325-30 and accompanying text.

¹⁵⁷ See Peter Baker, *40 Years Later, 9 Are Welcomed; Little Rock Marks Civil Rights Milestone*, WASH. POST, Sept. 26, 1997, at A1.

¹⁵⁸ See ANTHONY LUKAS, *COMMON GROUND* 255 (1985).

¹⁵⁹ The obvious example is Malcolm X: "So, what the integrationists, in my opinion, are saying, when they say that whites and blacks must go to school together, is that the whites are so much superior that just their presence in a black classroom balances it out. I can't go along with that." Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 764 (quoting MALCOLM X, *BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS AND A LETTER* 17 (George Breitman ed., 1970)). Another example is Stokely Carmichael, who argued that integration "has been based on complete acceptance of the fact that *in order to have* a decent . . . education, blacks must . . . send their children to a white school. This reinforces, among both black and white, the idea that 'white' is automatically better and 'black' is by definition inferior." Stokely Carmichael, *What We Want*, *THE NEW YORK REVIEW OF BOOKS* (1966), reprinted in *THE AGE OF PROTEST* 132 (Walt Anderson, ed., 1969) (quoted in Charles L. Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education, 1968-74*, 32 AKRON L. REV. 471, 475-76 (1999)). But even more mainstream African-Americans quickly challenged the necessity of integration, which in many communities meant the loss of the black high school (often the center of the community) and of black teachers and principals. See DAVISON M. DOUGLAS, *READING, WRITING AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS*, 89-99, 196-97 (1995).

tinued need for court-ordered desegregation.¹⁶⁰ Although the national organization reaffirmed its commitment,¹⁶¹ local chapters have stated their opposition.¹⁶² African-American mayors in Denver, Minneapolis, and Cleveland supported the end of the school desegregation suits in their communities.¹⁶³ Similarly, Atlanta, Detroit, Milwaukee, and New York City have established African-American immersion schools.¹⁶⁴ In North Carolina's charter school experiment,¹⁶⁵ the initial fear was all-white enclaves. In response, the legislature required desegregated charter schools.¹⁶⁶ When segregated schools were established, however, they were predominately maintained by the African-American community.¹⁶⁷ The community opposition to school desegregation is coupled with academic criticisms that question the theoretical underpinnings of desegregation.¹⁶⁸ Yet, some African-American communities still actively support school desegregation, even bussing.¹⁶⁹

¹⁶⁰ See Steven A. Holmes, *At NAACP, Talk of a Shift on Integration*, N.Y. TIMES, June 23, 1997, at A1 [hereinafter Holmes, *Talk of a Shift*]. See generally Steven A. Holmes, *Look Who's Saying Separate Is Equal*, N.Y. TIMES, Oct. 1, 1995, § 4 (Magazine) at 1. The NAACP's 1997 debate about the value of school desegregation followed a similar debate in 1991. See Peter Schmidt, *N.A.A.C.P. Board Stands Behind School Desegregation*, EDUC. WK., Sept. 4, 1991, at 5.

¹⁶¹ On the day of the *New York Times* article, see Holmes, *Talk of a Shift*, *supra* note 160, the NAACP issued a press release stating that the NAACP "still support[s] integrative policies while at the same time fighting to guarantee educational equality for students within our existing public schools." See NAACP Responds to New York Times Article (June 23, 1997) (press release on file with author).

¹⁶² For example, in Yonkers, New York, and Bergen County, New Jersey, the national NAACP removed the local NAACP presidents from office after the presidents stated their opposition to the remedies imposed in their respective local school desegregation lawsuits. See Caroline Hendrie, *NAACP Wrestles with Evolving Views on Desegregation*, EDUC. WK., Aug. 6, 1997, at 12.

¹⁶³ See ORFIELD & EATON, *supra* note 14, at 343.

¹⁶⁴ Such schools "take into account the social environment and culture of African-Americans." Kevin Brown, *After the Desegregation Era: The Legal Dilemma Posed by Race and Education*, 37 ST. LOUIS U. L.J. 897, 899 (1993). For an argument on the need for such schools, see generally Brown, *supra*; Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813 (1993); Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992); see also Mark Walsh, *Black Private Academies Are Held Up as Filling Void Seen as 'Response to Desperate Situation'*, EDUC. WK., Mar. 13, 1991, at 1. For a forthcoming article examining the constitutionality of these schools, see Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. (forthcoming 2001).

¹⁶⁵ See N.C. GEN. STAT. § 115C-238.29A-F (1998).

¹⁶⁶ See N.C. GEN. STAT. § 115C-238.29F(g)(5) (1998) (requiring that the student population of a charter school "shall reasonably reflect the racial and ethnic composition of the general population residing within the local school administrative unit").

¹⁶⁷ See Lynn Schnailberg, *Predominately Black Charters Focus of Debate in N.C.*, EDUC. WK., Aug. 5, 1998, at 22 (reporting that 12 of the 33 charter schools were 85% or more African-American); see also OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, U.S. DEPARTMENT OF EDUCATION, THE STATE OF CHARTER SCHOOLS 2000: NATIONAL STUDY OF CHARTER SCHOOLS FOURTH-YEAR REPORT 32 (2000) (identifying 14 states with charter schools that enroll more minority school children than public schools).

¹⁶⁸ Professor Kevin Brown, for example, has persuasively argued that the Supreme Court's approach to school desegregation from the beginning was premised on the inferiority of African-American children. See Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 53 (1992) (arguing that the Supreme Court "is proceeding from an ideological

At the same time, African-American, Asian-American, and white parents have challenged the race-conscious student assignment practices fundamental to school desegregation. School districts often use race-conscious transfer policies and magnet school enrollment programs to desegregate their student bodies. Parents have challenged the use of such race-based policies after their children were excluded from programs that used quotas or other devices designed to achieve an ethnically and racially balanced school system or program.¹⁷⁰ In fact, these challenges have resulted in coalitions of parents that cross racial lines.¹⁷¹ The attacks, which have been quite successful in changing race-conscious student assignment practices, further call into question the continued viability of court-ordered school desegregation plans producing integrated student bodies. Without some race-conscious remedies, it is exceedingly difficult to produce actual desegregation.

For example, African-American, Asian-American, and white parents have successfully challenged magnet school admissions policies.¹⁷² Parents

framework that accepts the notion that segregation retarded the cognitive psychological and emotional development of only African-Americans"); *see also* *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (*Jenkins III*) (Thomas, J., concurring) (commenting that "[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior"); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 112-13 (1987) (suggesting a better desegregation policy, one "not clogged with integrationist dreams" would have been to desegregate school funding and control instead of desegregating students); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1405 (1993) (contending that maintenance of historically black colleges is an appropriate measure for the rectification of unequal circumstances in light of the failure of the integration policies of the Supreme Court).

¹⁶⁹ *See, e.g.*, Orfield & Thronson, *supra* note 14, at 785 (arguing that "[o]ne of the least known facts of the Reagan-Bush era is that both minority and white support for busing increased significantly during twelve years of conservative critiques of the plans"); Cheryl Gamble, *Seattle Board to Vote on New Student-Assignment Proposal*, EDUC. WK., Oct. 9, 1996, at 8; Kerry A. White, *Protestors Derail Minneapolis Board Meeting*, EDUC. WK., June 3, 1998, at 3. An educator who is frequently an expert witness for school districts in desegregation cases, Christine Rossell, however, reviewed opinion data and concluded "some, if not most, blacks perceive busing as not in their self-interest." Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV. 613, 655 (1995).

¹⁷⁰ *See generally* Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 HARV. L. REV. 940 (1999) (arguing in favor of the constitutionality of race-conscious student assignment policies in public elementary and secondary schools); Caroline Hendrie, *New Magnet School Policies Sidestep an Old Issue: Race*, EDUC. WK., June 10, 1998, at 10 (reviewing recent challenges to race-conscious magnet admissions practices).

¹⁷¹ *See, e.g.*, Caroline Hendrie, *Without Court Orders, Schools Ponder How to Pursue Diversity*, EDUC. WK., April 30, 1997, at 1 [hereinafter Hendrie, *Without Court Orders*] (reporting that a group of both white and black parents challenged a controlled-choice system in Troup County, Georgia); *see also* Caroline Hendrie, *Houston Reaches for Diversity Without Quotas*, EDUC. WK., June 10, 1998, at 11 [hereinafter Hendrie, *Houston Reaches for Diversity*] (noting that white and Asian-American families challenge admission policies for magnet schools in Houston).

¹⁷² To date, at least one group of parents has failed in its quest to change race-conscious admissions programs. The basis of the challenge (that the school district was already unitary) was legally weak. *See United States v. Georgia, Meriwether County*, 171 F.3d 1344, 1347 (11th Cir. 1999) (reversing district court's grant of unitary status for Troup County, Georgia); Hendrie, *Without Court Orders, supra*

have forced school districts in Arlington, Virginia;¹⁷³ Boston;¹⁷⁴ Broward County (Fort Lauderdale), Florida;¹⁷⁵ Buffalo,¹⁷⁶ Houston,¹⁷⁷ Montgomery County, Maryland,¹⁷⁸ and San Francisco¹⁷⁹—some still subject to and others already released from school desegregation litigation—to change their race-conscious admission policies for magnet schools. In addition, African-American parents have challenged admission policies on at least two occasions after seats reserved for whites went empty while African-American students remained on waiting lists.¹⁸⁰ Finally, and more symbolically, a successful challenge to magnet school admissions policies occurred in what was generally regarded as a school desegregation success story: Charlotte-Mecklenburg, where the Supreme Court first approved bussing as an acceptable remedy.¹⁸¹

note 171, at 1 (reporting that a group of both white and black parents challenged a controlled-choice system in Troup County, Georgia, on the grounds that the school district was already unitary); *see also supra* notes 53-54 and accompanying text (explaining why claims that school districts were dismissed in earlier, ambiguous orders are weak in light of current Supreme Court precedent).

¹⁷³ *See Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (per curiam) (affirming preliminary injunction barring a “weighted” lottery to produce integration).

¹⁷⁴ *See Wessmann v. Gittens*, 160 F.3d 790, 808-09 (1st Cir. 1998) (holding unconstitutional admission policies to Boston’s examination schools that discriminated against a white student).

¹⁷⁵ *See Hendrie, supra* note 170, at 10 (reporting that Broward County changed its magnet school admission policies after the school district was declared unitary to avert a court challenge).

¹⁷⁶ *See Caroline Hendrie, Buffalo Seeks a Smooth Transition After Release from Court Oversight*, EDUC. WK., June 10, 1998, at 10 (noting that Buffalo, already declared a unitary school district, changed its admission policies for its gifted and talented schools after a lawsuit was filed).

¹⁷⁷ *See Hendrie, Houston Reaches for Diversity, supra* note 171, at 11 (reporting changes to magnet school admissions in Houston made in response to a lawsuit).

¹⁷⁸ *See Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999) (permitting white student’s transfer to a magnet school), *cert. denied*, 120 S. Ct. 1420 (2000).

¹⁷⁹ *See Peter Waldman, School-Desegregation Accord Stresses Pupils’ Socioeconomic Factors Over Race*, WALL ST. J., Feb. 18, 1999, at B13 (detailing a settlement reached in San Francisco’s pending school desegregation lawsuit concerning a challenge by Chinese-Americans to caps on enrollment and priorities in lottery admissions).

¹⁸⁰ *See Caroline Hendrie, Court Ends Oversight of Desegregation in Georgia District*, EDUC. WK., July 10, 1996, at 9 (reporting that Prince George’s County, Maryland decided to disobey court-imposed racial quotas after African-American parents complained that 500 white enrollment slots went unfilled as 4,000 African-American students remained on waiting lists); Kerry A. White, *Suit Challenges Integration Plan in Louisville*, EDUC. WK., May 6, 1998, at 3 (noting that 800 African-American applicants were rejected from a magnet program over three years even though seats reserved for whites went empty); *see also Hendrie, supra* note 170, at 10 (reporting that a black parent in New Orleans complained to the Department of Education that the academic-ability tests used as part of the entrance requirements for the district’s magnet programs penalized blacks).

¹⁸¹ *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-31 (1971) (approving the use of bussing); *Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 57 F. Supp. 2d 228 (W.D.N.C. 1999) (declaring unitary status and ruling race conscious magnet admissions policies unconstitutional); DOUGLAS, *supra* note 159, at 254 (concluding that “both political protest and judicial action” produced successful desegregation in Charlotte); BERNARD SCHWARTZ, *SWANN’S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT 192-93* (1986) (detailing why desegregation worked for Charlotte-Mecklenburg schools); Davison M. Douglas, *The Quest for Freedom in the Post-Brown South: Deseg-*

In addition to challenges to magnet school admission criteria, parents have also successfully challenged race-conscious student transfer policies. Lima, Ohio, ended its policy of limiting inter- and intra-district majority-to-minority transfers¹⁸² to African-American students in response to a complaint to the Department of Education.¹⁸³ District judges issued preliminary injunctions against similar policies in Akron, Ohio,¹⁸⁴ and Rochester, New York.¹⁸⁵ A settlement in Milwaukee permits interdistrict transfers for some white students.¹⁸⁶

Through these efforts, parents have successfully limited the ways in which school districts can achieve integrated student bodies. The challenges have precluded courts from requiring particular enrollment and transfer practices that were relatively commonplace both within and outside of school desegregation litigation. As a result, one common avenue for integration (race-conscious student assignment policies) has potentially narrowed.¹⁸⁷

E. School Resegregation

Court-ordered school desegregation also appears unimportant because of the increasing segregation and resegregation of our public schools. Court orders to desegregate student bodies seem doomed to failure. Many indicators of integration exist, but all agree that integration in student bodies started declining in the 1980s. To take one standard, the percentage of African-American students in majority white schools peaked in the early 1980s

regation and White Self-Interest, 70 CHI-KENT L. REV. 689, 690-91, 694 (1994) (noting that in 1957, Charlotte was one of the first southern cities to desegregate its schools, and that by "the late 1960s, Charlotte operated one of the most thoroughly integrated urban school systems").

¹⁸² A majority-to-minority ("M-to-M") transfer program permits students who are attending a school in which their race is in the majority to transfer to a school in which their race would be in the minority.

¹⁸³ See *District Drops Choice Policy*, EDUC. WK., Feb. 10, 1999, at 4. But see *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 69 (D. Mass. 2000) (refusing to issue a preliminary injunction to prohibit a race conscious transfer program).

¹⁸⁴ See *Equal Open Enrollment v. Board of Educ.*, 937 F. Supp. 700, 709-10 (N.D. Ohio 1996).

¹⁸⁵ See *Brewer v. West Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619, 635 (W.D.N.Y. 1999).

¹⁸⁶ See Kerry A. White, *Wis. Settlement Reached in Open-Enrollment Dispute*, EDUC. WK., Feb. 24, 1999, at 4 (detailing settlement).

¹⁸⁷ These challenges have led Professor Jeffrey Rosen to predict that "the hope of integrated public schools may soon be a distant memory." See Rosen, *supra* note 13, at 5. I share his concern that the successful challenges to race-conscious student assignment policies will limit the ability of courts to order remedies that effectively produce desegregated student bodies. See *infra* note 320. Even if race-conscious student assignment policies are limited, however, school desegregation cases still provide a potentially effective vehicle to improve the quality of education. See *infra* note 355 and accompanying text. School desegregation increasingly focuses on educational equity, a trend that began with widespread frustration with bussing. In other words, school desegregation for a long time has had little emphasis on desegregating student bodies. See *infra* notes 305-08 and accompanying text. To this extent, the limit on race-conscious student assignment policies may not have a large impact on current school desegregation litigation for the reason that desegregating student bodies is no longer the focus.

and had by 1997 declined to the levels of the 1960s.¹⁸⁸ In addition, the percentage of white students in schools attended by typical African-American students has declined in all states but four since 1980.¹⁸⁹ Latino students have fared even worse: they are more segregated now than in 1954.¹⁹⁰

Critics have long questioned whether litigation produces integrated school systems. Increasing segregation starting in the 1980s has further called into question the ability of court orders to produce integration. One response, however, for those advocating desegregation remedies as a tool for integration has been to point to the experience of the South.¹⁹¹ Until 1988, the level of integration in the South continually increased. In 1954, the year of *Brown v. Board of Education*,¹⁹² the percentage of African-American students in majority white schools was a mere .001%.¹⁹³ The percentage grew, however, to 45.3% by 1988, making the South the most integrated region in the country.¹⁹⁴

Yet, in 1988 (interestingly, before the Supreme Court's 1991 decision in *Board of Education v. Dowell*),¹⁹⁵ the percentage of African-American students in majority white schools began to drop and is now below the level achieved in 1972.¹⁹⁶ The region had the nation's largest increase in resegregation between 1991 and 1996.¹⁹⁷ The six states examined in the empirical studies, *infra*, have also experienced resegregation.¹⁹⁸ Since 1989, each

¹⁸⁸ See GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS 15 (1999) (examining the percentage of white students enrolled in a school attended by the average African-American student through a commonly used method called "index of exposure"); see also DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 172 (1995) (looking at "interracial exposure" in school districts with over 10,000 students and finding exposure of African-American to white students to be almost the same in 1989 as it was in 1968); Rossell, *supra* note 169, at 618 (concluding that "interracial exposure" had decreased in school districts with over 27,250 students). For a detailed explanation of how the index of exposure is calculated, see ARMOR, *supra*, at 164 n.15.

¹⁸⁹ See ORFIELD & YUN, *supra* note 188, at 22, tbl. 16. The four exceptions are Illinois, with an increase in integration of .08%; Indiana, 7.3%; Missouri, 3.6%; and Pennsylvania, 1.1%.

¹⁹⁰ See ORFIELD & YUN, *supra* note 188, at 16. In 1970, the average Latino was in a school with 56% nonwhite students. The average Latino was in a 70% nonwhite school by 1996. See *id.*; see also ARMOR, *supra* note 188, at 172-73 (concluding that the interracial exposure index has consistently declined for Hispanics since statistics were first compiled nationwide in 1968, dropping from 70% in 1968 to 51% by 1989).

¹⁹¹ When discussing the level of integration of the South in this section, I am using the term "South" as most education researchers use the term—to denote the 11 states of the Confederacy (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia).

¹⁹² 347 U.S. 483 (1954) (*Brown I*).

¹⁹³ See ORFIELD & YUN, *supra* note 188, at 14.

¹⁹⁴ See *id.*; James S. Liebman, *Desegregating Politics, "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1466 n.6 (1990).

¹⁹⁵ 498 U.S. 237 (1991). This case is discussed *supra* Section I.B.1.

¹⁹⁶ See ORFIELD & YUN, *supra* note 188, at 13-14. The level was 34.7% in 1996. See *id.*

¹⁹⁷ See *id.* at 21.

¹⁹⁸ See *infra* Section II. The six states are Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

of the six states has posted declines in the percentage of white students in schools attended by typical African-American students.¹⁹⁹

Remarkably, the South still remains the most integrated region, for a variety of reasons unrelated to litigation. The South has a substantial number of rural areas, which generally need only one or two elementary, middle, and high schools and which generally have little (if any) housing segregation. In the absence of race-based student assignment, all students usually attend the same school, so complicated bussing plans or practicality issues are exceedingly rare.²⁰⁰ Furthermore, the South often organizes school districts by county.²⁰¹ This decreases the opportunity for whites to flee a city school district for a suburban school district and dramatically increases chances for integration. Lastly, the level of housing segregation is less than in other regions.²⁰²

The interplay between integration and school desegregation litigation obviously is complicated. Experts have long disagreed about the relationship between white flight and judicial remedies and about the long-term effectiveness of court orders in producing integrated student bodies.²⁰³ A similar debate on the connection between integration and the termination of school desegregation remedies is also emerging.²⁰⁴ This Article leaves the debate to others and instead focuses on whether court-ordered school deseg-

¹⁹⁹ See ORFIELD & YUN, *supra* note 188, at 25. Florida posted the sharpest decline—from 50.6% in 1980 to 38.4% in 1996. See *id.*

²⁰⁰ See Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 841 (1996) (finding that “[a]lthough racial attitudes were most negative in the rural and small-town South, those areas achieved much higher levels of desegregation because their districts were likely to include both whites and blacks in the area”).

²⁰¹ See *id.* (stressing the importance of the South’s pattern of “county-wide school districts [that] contain[] enough of the local housing market and large enough white populations to make long-term and comprehensive desegregation much more viable”).

²⁰² See Samuel Cohn & Mark Fossett, *Why Racial Employment Is Greater in Northern Labor Markets: Regional Differences in White-Black Employment Differentials*, 74 SOCIAL FORCES 2, 511 (1995).

²⁰³ See, e.g., ARMOR, *supra* note 188, at 176 (reporting that 44 court-ordered, mandatory bussing plans resulted in white loss rates by three to five times that because of demographic processes); ORFIELD & EATON, *supra* note 14, at 94 (attributing decreasing white enrollment to birth rates, patterns of white suburbanization, and the spread of urban poor areas); Orfield, *supra* note 200, at 852-53 (noting that Atlanta, which ended its school desegregation suit in 1973, “has had one of the nation’s most dramatic declines in white enrollment, followed by a massive departure of the black middle class to a sector of suburbia”); Rossell, *supra* note 169, at 623-24 (arguing that Northern school districts had higher levels of integration in 1968 than after 25 years of desegregation activity and attributing white flight to desegregation, sunbelt migration, suburban flight, and birthrates); Ryan, *supra* note 14, at 282-83 (reviewing the literature on the link between white flight and desegregation).

²⁰⁴ See ARMOR, *supra* note 188, at 190 (reporting that case studies in Savannah and Norfolk show that declining white enrollment ceased after ending mandatory bussing plans); ORFIELD & EATON, *supra* note 14, at 94 (noting that DeKalb county had the fourth largest decrease among large districts in white enrollment after its school desegregation case ended); Orfield & Thronson, *supra* note 14, at 761, 770-74 (explaining that for systems dismantling bussing plans or released from court order, “[t]he hoped-for end of white flight and the return of white students have not materialized at all in some systems and have been far below predictions in others”).

regation is continuing, despite the legal standards adopted by the Supreme Court, the apparent exhaustion of lower courts, the frustration of parents, and the resegregation of public schools. When examining the reasons for the current perception that school desegregation is over, one must recognize, however, the reality of segregation.

II. THE CURRENT STATE OF SCHOOL DESEGREGATION IN THE SOUTH

Judicial decisions, parental attitudes, and the fact of school resegregation all seem to indicate that school desegregation litigation is already an anachronism, or fast becoming one. This section describes two empirical studies conducted to determine the reality of that perception. Specifically, I analyze whether defendants are seeking unitary status and termination of their lawsuits, whether courts are closing cases, and whether the Supreme Court's decision in *Dowell*²⁰⁵ has affected the answers to these first two questions. To perform this analysis, I conducted two empirical studies. One analyzed 126 written opinions covering 89 school districts, and the other examined docket sheets concerning court-ordered desegregation for 138 school districts in the Middle Districts of Alabama and Georgia and the Northern District of Mississippi. Together, and taking into account an overlap in coverage, the two studies cover 192 school districts.²⁰⁶

Specifically, these studies examine the status of federal, court-ordered school desegregation in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas, the six states comprising the Fifth and Eleventh Circuits.²⁰⁷ I focus on these two circuits for four primary reasons.²⁰⁸ First, analyzing the federal courts in the states covered by the Fifth and Eleventh Circuits covers the clear majority of school desegregation litigation.²⁰⁹ Second, the Fifth Circuit (which split into the Fifth and Eleventh Circuits in 1981-82) has had a prominent place in the desegregation of our schools. The Fifth Circuit, particularly through the judges called "The Four"²¹⁰ or the "unlikely

²⁰⁵ 498 U.S. 237 (1991); see *supra* Section I.B.1.

²⁰⁶ Thirty-five school districts were the subject of both written, published opinions and docket sheets.

²⁰⁷ The six states responded differently to *Brown*, but most engaged in active rebellion. Texas engaged in token integration; Florida, some resistance; and Alabama, Georgia, Louisiana, and Mississippi, total resistance. See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 Nw. U. L. REV. 92, 94 (1994).

²⁰⁸ Furthermore, school desegregation litigation on a widespread scale first began in southern states, as suits covering scores of school districts were filed between 1969 and 1971 throughout much of the South. If school desegregation litigation was ending—a perception this Article attempts to debunk—then it would likely be found first in the area where it began.

²⁰⁹ School desegregation litigation is most prominent in nine states: the six states of the Fifth and Eleventh Circuits (Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas) and the three states covered by the Fourth Circuit (North Carolina, South Carolina, and Virginia). By focusing on the Fifth and Eleventh Circuits, six of the nine states are included, as are the two most populous states (Florida and Texas).

²¹⁰ Judge Ben F. Cameron dubbed Judge John R. Brown of Texas, Judge Elbert Parr Tuttle of Georgia, Judge Richard T. Rives of Alabama, and Judge John Minor Wisdom of Louisiana "The Four," and the name came to symbolize the Fifth Circuit's strong commitment to civil rights. *Armstrong v. Board*

heroes,"²¹¹ developed a large body of school desegregation law and issued forceful desegregation mandates. The Fifth Circuit's unique role in school desegregation makes it a natural focus of inquiry. Third, the South's housing patterns, history of countywide school districts, and number of rural areas allow for meaningful school integration.²¹² Thus, the possibility of success is real in the South, in contrast to large urban areas surrounded by separate, suburban school districts, which are more prevalent in the North. As a result, the South has had substantially greater school integration than the North.²¹³ The chance for "success" in the South, if success is defined by actual integration of student bodies, makes the South a more interesting area to study. Lastly, the Fifth Circuit is now often identified as an appellate court willing to take strong action in curtailing the reach of rights and remedies available to minorities.²¹⁴ Thus, if the end of court-ordered school

of Educ., 323 F.2d 333, 353 n.1 (1963) (Cameron, J., dissenting from denial of petition for rehearing en banc). Judge Cameron used the term in criticizing the large role The Four had in shaping critical civil rights decisions and the assignment of judges to the three-judge district courts, of critical importance in civil rights litigation at the time. See *id.* at 353-59; see also Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 110-12 (1996) (describing the "stacking" of three-judge district courts in the early 1960s in the Fifth Circuit). An interesting side note: Judge Cameron apparently asked his son, who joined three African-Americans as plaintiffs in a suit to desegregate the Sewanee Divinity School (of which the judge was a trustee), to identify himself clearly as Ben F. Cameron, Jr. to avoid any confusion. See JACK BASS, UNLIKELY HEROES 232 (1981) (emphasis added). The Fifth Circuit was far from monolithic in its commitment to civil rights. For two cases in which Judge Cameron argued that the South should not enforce the Fourteenth Amendment, see *Bowman v. Birmingham Transit Co.*, 292 F.2d 4 (5th Cir. 1961) (Cameron, J., dissenting) and *United States v. Wood*, 295 F.2d 788 (5th Cir. 1961) (Cameron, J., dissenting).

²¹¹ See generally BASS, *supra* note 210, title page (describing itself as "[t]he dramatic story of the Southern Judges of the Fifth Circuit who translated the Supreme Court's *Brown* decision into a revolution for equality"); RICHARD KLUGER, SIMPLE JUSTICE (1975) (detailing the role of the Fifth Circuit in enforcing *Brown v. Board of Education* in the 1960s and 1970s); Frank T. Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 MERCER L. REV. 1149, 1155 (1981) (same). Judge Wisdom is often singled out for his contribution to school desegregation, particularly his opinion in *United States v. Jefferson County Board of Education*, 372 F.2d 836, 869 (5th Cir. 1966) (holding that "the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration"), *aff'd*, 380 F.2d 385 (5th Cir. 1967) (en banc), which is sometimes identified as the first "affirmative action" opinion. Judge Wisdom established his rebel status in Louisiana when he joined the Republican party while at Tulane Law School. See MARK WHITMAN, THE IRONY OF DESEGREGATION LAW 89 (1998); see also Alfred W. Blumrosen et al., *Vindicating the Promise of Brown*, 26 PAC. L.J. 772, 774 (1995) (quoting Judge Wisdom at a panel discussion as reporting that the post office regularly knew to route letters addressed to "Judge Ignorance" to his chambers). Yet, he remained a member of clubs excluding African-Americans and Jews until his death. See Jack Bass, *John Minor Wisdom, Appeals Court Judge Who Helped to End Segregation, Dies at 93*, N.Y. TIMES, May 16, 1999, at A45. Judge Wisdom explained his membership on the grounds that his fellow members, longtime friends, knew his position and would not change theirs based on his actions. See *id.*

²¹² See *supra* notes 200-02 and accompanying text (discussing the feasibility of integrated student bodies in the South).

²¹³ See *supra* notes 191-99 and accompanying text (examining the level of integrated student bodies in the South).

desegregation has occurred, one would expect that death to be reflected in the Fifth Circuit's decisions.

On the basis of these analyses, I conclude that while a large proportion of very large school districts have been released from judicial oversight, a far greater number of school desegregation lawsuits continue. Moreover, contrary to the overwhelming perception in the popular press and academic literature, few school districts have sought unitary status, and *Dowell* has had little, if any, effect on the number of school districts seeking and acquiring unitary status.

A. District Court and Appellate Court Written Decisions

To determine whether defendants are seeking unitary status and whether courts are terminating school desegregation cases, a natural beginning point is written opinions officially published or electronically available (hereinafter "written opinions").²¹⁵ This Article analyzes such decisions issued over a sixteen-year period, from January 15, 1983, to January 15, 1999. In the middle of this period, on January 15, 1991, the Supreme Court in *Dowell*²¹⁶ first articulated the importance of, and the test for, terminating school desegregation cases.²¹⁷ Thus, the sixteen-year period permits an examination of the effects of *Dowell* by comparing the first eight years of the period with the second eight years.

Over the sixteen years covered by the study, the federal courts in the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas (including district courts and courts of appeals) issued 126 school desegregation opinions concerning 89 school districts. A remarkably low number of school districts—twenty-eight—were involved in unitary status proceedings. Moreover, in six of the twenty-eight school districts, the district court (rather than the defendant) first raised the issue of termination.²¹⁸ Only

²¹⁴ See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir. 1996) (declaring unconstitutional the affirmative action admissions programs at the University of Texas School of Law by reasoning, in part, that "[t]he use of race, in and of itself, to choose students . . . is no more rational . . . than would be choices based upon . . . blood type of applicants"); Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 841 (1998) (detailing how the Fifth Circuit has limited civil rights).

²¹⁵ To obtain written school desegregation opinions, I conducted several searches on Westlaw. The searches were conducted for the Court of Appeals for the Fifth and Eleventh Circuits and the district courts in the two circuits and had a date restriction of January 15, 1983 to January 15, 1999. I used two terms and connectors queries—"school desegregation" and desegregation & school!—and one key number query—345k13 (the key number for separate schools). I included officially unpublished opinions available on Westlaw in the hopes of providing as complete a picture as possible of the status of school desegregation. In other words, I attempted to include as many reliable sources of information as available. For the limits on relying on written opinions, see *infra* notes 242-56.

²¹⁶ 498 U.S. 237 (1991); see *supra* Section I.B.1.

²¹⁷ *Dowell*, 498 U.S. at 249-50.

²¹⁸ See *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1420 (11th Cir. 1992) (reversing the district for dismissing three school districts without an evidentiary hearing); *Monteilh v. St. Landry Parish Sch.*

nineteen districts were granted unitary status. Fifteen of those districts were released from federal court jurisdiction,²¹⁹ and the other four districts²²⁰ were placed in the three-year *Youngblood* period.²²¹ For eight of the fifteen released from federal court jurisdiction, unitary status was uncontested; the parties either entered into a consent decree or the plaintiffs filed no objection to unitary status. Nine school districts were involved in unitary status proceedings, but were declared not unitary.²²² Interestingly, five of these nine school districts became involved in unitary status proceedings only after the district court *sua sponte* raised the issue.²²³

The vast majority of school districts, sixty-one, had no explicit attention to termination and focused exclusively on procedural and remedial issues.

Bd., 848 F.2d 625, 629 (5th Cir. 1988) (reversing the district court for *sua sponte* holding that dismissal achieved in 1971); *Pitts v. Freeman*, 755 F.2d 1423, 1450-51 (11th Cir. 1985) (reversing the district court for *sua sponte* dismissing the lawsuit without following the *Youngblood* procedures); *Manning v. School Bd.*, 24 F. Supp. 2d 1277, 1286-87 (M.D. Fla. 1998) (denying dismissal after the district court *sua sponte* raised issue of unitary status), *clarified on other grounds*, 28 F. Supp. 2d 1353 (M.D. Fla. 1998); *see also* *Flax v. Potts*, 915 F.2d 155, 157 (5th Cir. 1990) (noting that the district court *sua sponte* required that the parties reexamine the entire desegregation plan and that the defendant then requested dismissal).

²¹⁹ *See* *Lockett v. Board of Educ.*, 111 F.3d 839, 844 (11th Cir. 1997); *United States v. Lowndes County Bd. of Educ.*, 878 F.2d 1301, 1302 n.2 (11th Cir. 1989) (noting two school districts already dismissed); *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 752 (5th Cir. 1989); *United States v. Overton*, 834 F.2d 1171, 1173 (5th Cir. 1987); *United States v. Board of Educ.*, 794 F.2d 1541, 1543 (11th Cir. 1986) (affirming unitary status for two school districts); *United States v. Board of Pub. Instruction*, 977 F. Supp. 1202, 1205 (S.D. Fla. 1997); *Citizens Concerned About Our Children v. Broward County, Fla.*, 966 F. Supp. 1166, 1168 (S.D. Fla. 1997); *Mills v. Freeman*, 942 F. Supp. 1449, 1464 (N.D. Ga. 1996); *Young v. Montgomery County (Ala.) Bd. of Educ.*, 922 F. Supp. 544, 546 (M.D. Ala. 1996); *United States v. Board of Educ.*, 1995 WL 224537, *1 (S.D. Ga. 1995); *Stell v. Board of Pub. Educ.*, 860 F. Supp. 1563, 1585 (S.D. Ga. 1994); *Arvizu v. Waco Indep. Sch. Dist.*, 732 F. Supp. 721, 726 (W.D. Tex. 1989); *Lee v. Macon County Bd. of Educ. (Talladega)*, 1988 WL 288974, *1 (N.D. Ala. 1988).

²²⁰ *See* *Flax*, 915 F.2d at 163; *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 224 (5th Cir. 1983); *Tasby v. Wright*, 869 F. Supp. 454, 477 (N.D. Tex. 1994); *United States v. Texas Educ. Agency (Lubbock Indep. Sch. Dist.)*, 138 F.R.D. 503, 505 (N.D. Tex. 1991).

²²¹ Pursuant to *Youngblood v. Board of Public Instruction*, 448 F.2d 770 (5th Cir. 1971), courts would retain jurisdiction for three years after declaring the school district unitary. During the monitoring period, school districts would file semi-annual reports documenting their continued compliance with their desegregation obligations. *See id.* at 771; *see also supra* notes 39-43 and accompanying text (discussing *Youngblood*). After *Dowell*, the practice became less frequent.

²²² *See* *Lee*, 963 F.2d at 1420 (reversing the district court's grant of unitary status for three school districts); *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 883 F.2d 945, 952 (11th Cir. 1989) (reversing the district court's grant of unitary status); *Lowndes County*, 878 F.2d at 1302 (noting that the defendant retreated from its request for unitary status); *Monteilh*, 848 F.2d at 627 (reversing the district court's holding that dismissal had been granted in 1971); *United States v. Lawrence County Sch. Dist.*, 799 F.2d 1031, 1038 (5th Cir. 1986) (affirming the district court's denial of unitary status); *Manning*, 24 F. Supp. 2d at 1335 (ruling that defendants are not unitary, but "have a short road to travel" to achieve dismissal); *United States v. Mississippi (Choctaw County Sch. Dist.)*, 725 F. Supp. 307, 313 (N.D. Miss. 1989) (denying the defendant's claim of unitary status granted in 1978).

²²³ *See* *Lee*, 963 F.2d at 1419-20 (reversing the district court's *sua sponte* grant of unitary status for three school districts); *Monteilh*, 848 F.2d at 628-29 (reversing the district court for *sua sponte* granting unitary status); *Manning*, 24 F. Supp. 2d at 1335 (denying unitary status although the district court *sua sponte* initiated unitary proceedings).

Furthermore, an overwhelming number of opinions (97 out of 126) addressed procedural and remedial issues. Unitary status and termination, in other words, received a small proportion of the courts' and parties' efforts.

The following table²²⁴ provides a more detailed overview of the 126 opinions.

TABLE A

SCHOOL DESEGREGATION WRITTEN OPINIONS JANUARY 14, 1983 TO JANUARY 15, 1999		
Category of Opinions	Opinions ²²⁵ Percentage (Raw Number)	School Districts ²²⁶ Percentage (Raw Number)
All	100% (126)	100% (90)
Unitary Status Granted & Suit Dismissed	10% (13)	17% (15)
Three-Year <i>Youngblood</i> Period Imposed ²²⁷	4% (5)	4% (4)
Partial Unitary Status Granted & School District Not Subsequently Granted Full Unitary Status ²²⁸	0% (0)	0% (0)
Unitary Status Denied & School District Not Subsequently Granted Partial or Full Unitary Status	6% (8)	10% (9)
Procedural/Remedial ²²⁹	77% (97)	81% (73) ²³⁰
Liability ²³¹	8% (10)	7% (6)

²²⁴ More detailed tables appear *infra* in Appendix A.

²²⁵ School desegregation opinions often cover more than one issue. If unitary status is denied, for example, additional relief may be ordered. Because opinions cannot be neatly categorized into only one relevant category, the total number of opinions is less than the sum of the opinions for each category.

²²⁶ School desegregation opinions sometimes address more than one school district. Therefore, the number of opinions is different from the number of school districts involved.

²²⁷ The category of "Three-year *Youngblood* Period Imposed" refers to school districts declared unitary subject to the district court retaining jurisdiction for a three-year monitoring period. For more on the requirements of *Youngblood*, see *supra* notes 39-43 and accompanying text.

²²⁸ The category of "Unitary Status Denied" covers cases in which unitary status was denied during the relevant time period, even if the court's decision or defendant's argument was premised on pre-1983 events. Not included in this category are unitary status requests or rulings before or after the relevant time period.

²²⁹ The category of "Procedural/Remedial" covers school desegregation issues raised in pending cases. The most common procedural issue raised is a motion to intervene. Remedial decisions usually include modifications to outstanding remedial issues.

²³⁰ Sixty-one of the seventy-four school districts were involved exclusively in remedial and procedural issues and not in any substantive unitary status proceedings.

As Tables B and C show, the Supreme Court's decision in *Dowell* has had little discernible effect on a defendant's decision to seek or a court's ruling to grant unitary status.²³² In the eight years preceding *Dowell*, the courts issued sixty-six opinions concerning fifty-three school districts. Seventeen school districts sought dismissal on their own motion, and one district court *sua sponte* raised the issue. Eleven school districts were granted unitary status, meaning the suits were either dismissed outright²³³ or placed in the three-year *Youngblood* period.²³⁴ Seven school districts were denied unitary status altogether, although two of the seven were eventually dismissed after *Dowell*.²³⁵

After *Dowell*, the courts covered forty-eight school districts in sixty opinions. Eight school districts requested dismissal, and district courts raised the issue *sua sponte* for four districts. The number of school districts granted unitary status and the suits dismissed or placed in the three-year *Youngblood* period decreased from eleven to eight.²³⁶ Yet, the number of

²³¹ The category "Liability" includes school desegregation issues in cases where liability is not yet established. Thus, school desegregation challenges made after dismissal would be included in this category.

²³² For example, for the eight school districts dismissed with the consent of the plaintiffs, three occurred after *Dowell* and five before *Dowell*. See *supra* note 221-22 and accompanying text. It appears, however, that *Dowell* increased the attention district courts *sua sponte* paid to unitary status. For the six cases in which the district court first initiated unitary status issues, two occurred before *Dowell* and four after *Dowell*. See *supra* note 218.

²³³ See *United States v. Lowndes County Bd. of Educ.*, 878 F.2d 1301, 1302 n.2 (11th Cir. 1989) (noting that two school districts were already dismissed); *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 752 (5th Cir. 1989); *United States v. Overton*, 834 F.2d 1171, 1177 (5th Cir. 1987); *United States v. Board of Educ.*, 794 F.2d 1541, 1543 (11th Cir. 1986) (affirming unitary status for two school districts); *Arvizu v. Waco Indep. Sch. Dist.*, 732 F. Supp. 721, 726 (W.D. Tex. 1989); *Lee v. Macon County Bd. of Educ. (Talladega)*, 1988 WL 288974, * 1 (N.D. Ala. 1988).

²³⁴ See *Flax v. Potts*, 915 F.2d 155, 163 (5th Cir. 1990); *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 225 (5th Cir. 1983); *United States v. Texas Educ. Agency (Lubbock Indep. Sch. Dist.)*, 138 F.R.D. 503, 505 (N.D. Tex. 1991).

²³⁵ See *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 883 F.2d 945, 952 (11th Cir. 1989) (reversing the district court's grant of unitary status); *United States v. Lowndes County Bd. of Educ.*, 878 F.2d 1301, 1302 (11th Cir. 1989) (noting that the defendant retreated from its request for unitary status); *Monteilh v. St. Landry Parish Sch. Bd.*, 848 F.2d 625, 627 (5th Cir. 1988) (reversing the district court's holding that dismissal had been granted in 1971); *United States v. Lawrence County Sch. Dist.*, 799 F.2d 1031, 1038 (5th Cir. 1986) (affirming the district court's denial of unitary status); *United States v. Mississippi (Choctaw County Sch. Dist.)*, 725 F. Supp. 307, 313 (N.D. Miss. 1989) (denying the defendant's claim that unitary status was granted in 1978). Two school districts were denied unitary status before *Dowell*, but granted unitary status after *Dowell*. See *Pitts v. Freeman*, 887 F.2d 1438, 1441 (11th Cir. 1989) (denying unitary status); *Mills v. Freeman*, 942 F. Supp. 1449, 1464 (N.D. Ga. 1996) (granting unitary status); *Tasby v. Woolery*, 869 F. Supp. 454, 477 (N.D. Tex. 1994) (granting unitary status); *Tasby v. Edwards*, 1989 WL 206484, *1 (N.D. Tex. 1989) (denying unitary status).

²³⁶ See *Lockett v. Board of Educ.*, 111 F.3d 839, 844 (11th Cir. 1997); *United States v. Board of Pub. Instruction*, 977 F. Supp. 1202, 1205 (S.D. Fla. 1997); *Citizens Concerned About Our Children v. Broward County, Fla.*, 966 F. Supp. 1166, 1168 (S.D. Fla. 1997); *Mills*, 942 F. Supp. at 1464; *Young v. Montgomery County (Ala.) Bd. of Educ.*, 922 F. Supp. 544, 546 (M.D. Ala. 1996); *United States v. Board of Educ.*, 1995 WL 224537, *1 (S.D. Ga. 1995); *Woolery*, 869 F. Supp. at 477; *Stell v. Board of Pub. Educ.*, 860 F. Supp. 1563, 1585 (S.D. Ga. 1994).

school districts unsuccessfully seeking unitary status decreased from seven school districts to four.²³⁷

Although on the issue of termination, differences before and after *Dowell* exist, the numbers are too small to support sweeping conclusions. It should be noted, however, that one would have expected the number of school districts granted unitary status after *Dowell* to increase. This assumption proved to be false. Furthermore, the biggest difference between the pre-*Dowell* period and the post-*Dowell* period was the number of school districts requesting dismissal on their own motion. Before *Dowell*, seventeen districts sought termination, but after *Dowell* that number dropped to eight. On the other hand, the reduction in the school districts unsuccessfully seeking unitary status (from seven to four) is more consistent with popular perceptions about the impact of *Dowell*.

Instead of termination dominating the written opinions, the courts and parties focused heavily on procedural and remedial issues. Before *Dowell*, thirty-five school districts (out of fifty-three school districts subject to written opinions) focused exclusively on procedural and remedial issues, with no explicit attention to termination. The numbers are similar after *Dowell*. Of the forty-eight school districts involved in a written school desegregation opinion, thirty-six were involved exclusively in procedural and remedial litigation.

Finally, the option of partial unitary status provided in *Freeman*²³⁸ has had almost no impact on termination proceedings. After *Freeman*, only one school district was held to have achieved partial unitary status,²³⁹ and even this decision was quickly followed by a grant of full unitary status.²⁴⁰

The following tables provide more detail on the opinions issued before and after *Dowell*.

TABLE B

PRE-DOWELL WRITTEN OPINIONS		
Category of Opinions	Opinions Percentage (Raw Number)	School Districts Percentage (Raw Number)
All	100% (66)	100% (53)
Unitary Status Granted & Suit Dismissed	9% (6)	15% (8)
Three-year <i>Youngblood</i>	6% (4)	6% (3)

²³⁷ See *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1420 (11th Cir. 1992) (reversing the district court's grant of unitary status for three school districts); *Manning v. School Bd.*, 24 F. Supp. 2d 1277, 1335 (M.D. Fla. 1998) (ruling that defendants are not unitary, but "have a short road to travel" to achieve dismissal), *clarified on other grounds*, 28 F. Supp. 2d 1353 (M.D. Fla. 1998).

²³⁸ *Freeman v. Pitts*, 503 U.S. 467 (1992); see *supra* Section I.B.2.

²³⁹ See *Lockett v. Board of Educ.*, 92 F.3d 1092, 1101-02 (11th Cir. 1996).

²⁴⁰ See *Lockett*, 111 F.3d at 840.

Period Imposed		
Unitary Status Denied & School District Not Subsequently Granted Partial or Full Unitary Status	15% (10)	13% (7)
Partial Unitary Status Granted & School District Not Subsequently Granted Full Unitary Status	0% (0)	0% (0)
Procedural/Remedial	77% (51)	81% (43)
Liability	6% (4)	6% (3)

TABLE C

POST-DOWELL WRITTEN OPINIONS		
<i>Category of Opinions</i>	<i>Opinions Percentage (Raw Number)</i>	<i>School Districts Percentage (Raw Number)</i>
All	100% (60)	100% (48)
Unitary Status Granted & Suit Dismissed	12% (7)	15% (7)
Three-year <i>Youngblood</i> Period Imposed	2% (1)	2% (1)
Unitary Status Denied & School District Not Subsequently Granted Partial or Full Unitary Status	3% (2)	8% (4)
Partial Unitary Status Granted & School District Not Subsequently Granted Full Unitary Status	0% (0)	0% (0)
Procedural/Remedial	77% (46)	81% (39)
Liability	10% (6)	10% (5)

In summary, *Dowell* has *not* led to an increase in the number of school districts seeking or granted unitary status. Rather, the overall numbers actually dropped. Nor has *Freeman* resulted in many school districts attaining partial unitary status. Furthermore, the vast majority of the written opinions, even after *Dowell*, addressed implementation and procedural issues. The study also detected little significant difference between outcomes in the states covered by the Fifth Circuit and the states covered by the Eleventh Circuit, with the exception of the frequency of post-*Dowell* unitary status proceedings. Interestingly, given the Fifth Circuit's reputation for conser-

vatism, the Fifth Circuit states were involved in far fewer unitary status cases than the Eleventh Circuit states.²⁴¹

Limitations on this study certainly exist. Published written opinions (whether published in an official reporter or published electronically) cannot provide a complete picture of the status of school desegregation because they reveal only part of a case's history.²⁴² Moreover, not all school desegregation opinions are published.²⁴³ School districts may seek and receive unitary status without any published opinion; the same is true for procedural and implementation issues.

Yet, the written opinion study warrants attention for several reasons. First, courts and electronic information services such as Westlaw are more

²⁴¹ In Appendix A, the figures are listed by circuit. Post-*Dowell*, Louisiana, Mississippi, and Texas (the states comprising the Fifth Circuit) had only one case—the Dallas school desegregation lawsuit—involved in unitary status proceedings. See *Tasby v. Woolery*, 869 F. Supp. 454 (N.D. Tex. 1994). In Alabama, Florida, and Georgia, on the other hand, seven school districts were declared unitary and four school districts (at the initiation of the district courts) were denied unitary status. See *supra* notes 222, 235, 236 and accompanying text. One would not expect the difference unless the Fifth Circuit had already granted more dismissals before *Dowell* (thereby decreasing the available pool of school districts to dismiss), a possibility which is not reflected in the data.

²⁴² For this reason, I attempted to supplement the written opinion database with articles from *Education Week*, a publication that closely reports school desegregation litigation. I analyzed articles covering the same 16-year period as that for the written opinion database, January 15, 1983 to January 15, 1999, to gain any additional information on school districts seeking or awarded unitary status. Through this approach, I hoped to gain a fuller picture of unitary status litigation. Although the sample was large (I identified well over one hundred articles on school desegregation litigation in the six states) and relatively representative (the articles covered rural and urban areas and small, medium, and large school districts), information gleaned on unitary status was minimal. In addition to the written opinions regarding unitary status, I discovered only three school districts that were declared unitary and dismissed from suit, all post-*Dowell* (Corpus Christi, Texas; Lowndes County, Alabama; and Mobile, Alabama), and one school district awarded partial unitary status (Monroe City, Louisiana). See *District News Roundup*, EDUC. WK., Mar. 27, 1991, at 2; *News in Brief: A National Roundup—Desegregation Case Retired*, EDUC. WK., Apr. 9, 1997, at 2; Peter Schmidt, *Court Says Ga. Obligated to Share Desegregation Costs*, EDUC. WK., Sept. 9, 1992, at 13; Peter Schmidt, *N.J. School Board Can Merge Districts, Court Rules*, EDUC. WK., Aug. 5, 1992, at 10 [hereinafter Schmidt, *N.J. School Board*]. *Education Week* also reported that four school districts were involved in some fashion with unitary status arguments (Caddo Parish, Louisiana; Dade County, Florida; Pinellas County, Florida; and Troup County, Georgia). See *District News Roundup*, EDUC. WK., May 16, 1990, at 2; Hendrie, *Without Court Orders*, *supra* note 171, at 1; *New Bias Suit Is Filed Against District in La.*, EDUC. WK., Mar. 7, 1990, at 8; Schmidt, *N.J. School Board*, *supra*, at 10.

The *Education Week* articles are consistent with the conclusions drawn from the two empirical studies. The vast majority of articles covered implementation issues in ongoing school desegregation litigation. Therefore, the articles support the conclusion that most school desegregation litigation focuses on remedial issues rather than termination. See *supra* Section II.A. The articles are also consistent with the determination that medium to very large school districts are much more likely to seek unitary status; six of the eight school districts granted unitary status would be classified as very large. See *infra* Table E and accompanying text.

²⁴³ For discussion of and citation to key scholarship on selective publication practices and policies, see Solimine, *supra* note 146, at 40-41 & nn.165-74; cf., e.g., Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 502-04 (1989); Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133, 1133-34 (1990).

likely to publish opinions in complex litigation such as school desegregation litigation.²⁴⁴ Second, opinions that dispose of litigation, as occurs with the declaration of unitary status, are more likely to be published.²⁴⁵ In fact, the study probably understates the amount of pending litigation that remains because motions denying unitary status are more likely to be unpublished than motions granting unitary status. Third, because the sample is large and covers a wide range of school districts the results are important even if not wholly complete.

Furthermore, the other commonly cited problem with studies based on published opinions—what Professor Theodore Eisenberg labels the “expectations theory”—has limited applicability.²⁴⁶ Under the expectationist model, court opinions reflect “a biased sample of all disputes,” and conclusions drawn from contested proceedings and published opinions are therefore questionable.²⁴⁷ Specifically, starting with George Priest and Benjamin Klein, scholars have argued that parties are rational and select to litigate to trial only disputes unclear in outcome, matters in the “gray zone.”²⁴⁸ As a result, one would expect the outcomes of trial to favor neither the defendant nor the plaintiff and to be evenly split between plaintiff victories and defendant victories, or converge on a 50/50 outcome as the law becomes clear and known.²⁴⁹ Thus, the expectationist model would predict that the number of school districts granted unitary status would equal the number of school districts denied unitary status, or would converge on equal results. Parties would only select close unitary status petitions for litigation, settling the more obvious requests.

For a variety of reasons, the expectationist theory has limited relevance to the written opinion study. The model questions conclusions drawn from trial success rates and published opinions. To the extent that the analysis examines a purely procedural question, for instance, whether defendants are

²⁴⁴ See Eisenberg & Schwab, *supra* note 243, at 538 (noting that judges are more likely “to feel more pressure to publish opinions in cases involving higher stakes than in less monetarily important cases”).

²⁴⁵ See *id.* at 508; Marc A. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 797, 799 n.11; Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 464; Solimine, *supra* note 146, at 41.

²⁴⁶ Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588 (1998). For citations to key scholarship, see *id.* at 588 n.21. For discussion of and citation to the accuracy of the expectation theory in general and the predictability of the theory for personal jurisdiction, see Solimine, *supra* note 146, at 45-47 & nn.190-200.

²⁴⁷ Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1568 (1989); see also Solimine, *supra* note 146, at 11-12 (describing the expectations model).

²⁴⁸ Eisenberg, *supra* note 247, at 1571; see also Solimine, *supra* note 146, at 12. See generally Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

²⁴⁹ See Eisenberg, *supra* note 247, at 1572.

seeking unitary status, the expectationist model has less applicability. The expectationist model also fails to describe school desegregation litigation because most are class actions and settlements are common. In those circumstances, courts are required to hold fairness hearings even if the parties agree on the desired outcome, and so an opinion is more likely to be written and therefore more likely to be published.²⁵⁰ This discounts greatly the case selection effect because the cases by their nature are selected for hearings and written opinions, even for cases outside the gray zone. As demonstrated by the written opinion study, for example, of the fifteen school districts released from court supervision, eight dismissals occurred with no plaintiff opposition and were still the subject of a written opinion.²⁵¹

Finally, what Professor Eisenberg describes as the “non-expectation” approach²⁵² more clearly describes school desegregation litigation and unitary status proceedings. This approach “assumes no selection effect”²⁵³ and allows that the same factors that influence the decision to take a matter to trial also affect the decision to file a lawsuit.²⁵⁴ The outcome in such a case would depend on a variety of factors, and success rates on particular issues would have a broad range.²⁵⁵ Thus, the outcomes from trials and published opinions would not automatically be 50/50 and would reveal information about the state of the law and the litigation strategies of parties. This model best approximates school desegregation litigation because the rationality presumed by the expectation model is not always present, and perhaps may *never* be present.²⁵⁶ Plaintiffs litigate for non-economic reasons, and school boards are subject to constituencies with non-economic agendas as well. The underpinnings of school desegregation are highly emotional and often preclude “rational” settlements. Thus, parties are less likely to select only cases in the “gray area” for litigation.

B. Docket Sheets from Middle Districts of Alabama and Georgia and Northern District of Mississippi.

Although the written opinion study merits attention because it reveals much about the status of school desegregation, I supplemented that analysis with a second empirical study of docket sheets. This second analysis covers 138 school districts involved in desegregation suits filed in the Middle Dis-

²⁵⁰ See FED. R. CIV. P. 23(e).

²⁵¹ See *supra* note 221-22 and accompanying text.

²⁵² Eisenberg, *supra* note 247, at 1572-74.

²⁵³ *Id.* at 1572.

²⁵⁴ See *id.* at 1572-73; see also Solimine, *supra* note 146, at 11.

²⁵⁵ See Eisenberg, *supra* note 247, at 1575.

²⁵⁶ See generally Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 767-70 (1988).

tricts of Alabama and Georgia and the Northern District of Mississippi.²⁵⁷ The Georgia and Mississippi districts were randomly chosen, but the Middle District of Alabama was specifically included because of the unique approach of the judges in this district to managing their school desegregation dockets.²⁵⁸ Whereas the written opinion study was restricted to a sixteen-year period, the docket sheet analysis covers the period from January 28, 1963 (the date of the first complaint filed in the three districts²⁵⁹) to January 15, 1999. This allowed a more complete picture of school desegregation to emerge. The empirical study of the docket sheets sought answers to the same questions posed in the first study: are school districts seeking and achieving dismissal, and has *Dowell*²⁶⁰ had an effect on the requesting and granting of unitary status?

The docket sheets complement the information gathered from written opinion databases in two ways. First, the docket sheets provide a complete picture of the status of litigation in a select number of cases, for the docket sheets include *all* pleadings and *all* court orders. The docket sheets also cover the majority of school districts in the judicial districts. Thus, the docket sheets permit firm conclusions about how frequently defendants actually seek unitary status and whether termination is in fact occurring in the three judicial districts chosen. Second, the docket sheets cover smaller school districts, which are possibly less likely to be the subject of a published opinion.

As we will see, the empirical study of docket sheets confirms the conclusions drawn from the written opinion study: (1) desegregation litigation continues to focus on procedural and remedial issues; (2) few defendants request dismissal of their lawsuits; and (3) the Supreme Court's decision in *Dowell* has had little impact on the number of defendants seeking or the number of

²⁵⁷ Appendix B lists the school desegregation lawsuits for which docket sheets were obtained. The list of school desegregation lawsuits for each district was compiled from three sources. First, the United States Department of Justice, Civil Rights Division, Educational Opportunities Litigation Section (EOLS) maintains a list of cases in which the United States is a party. This list (a copy of which is on file with the author) provided a high number of cases per district because the Department of Justice filed scores of lawsuits throughout the three districts studied. Second, the EOLS list was supplemented by a Westlaw search for any mention of school desegregation lawsuits in the three districts—whether the reference was in an actual school desegregation lawsuit or in another lawsuit. Third, a search of two secondary sources that closely tracked school desegregation litigation from 1956 to 1972 revealed a few additional school desegregation lawsuits in the three judicial districts. See *generally* RACE RELATIONS LAW REPORTER (published from 1956 to 1967); RACE RELATIONS LAW SURVEY (published from 1969 to 1972). From these three sources, a list of cases for each district was devised. No one source included all cases, and I acknowledge the possibility that some cases are omitted from the survey. For a few cases, the clerk's office was unable to locate the docket sheet for the lawsuit. Nonetheless, the docket survey is still quite comprehensive in numbers—134 school districts—and the omission of a few school desegregation cases should not affect the conclusions drawn from the survey. In fact, the inability of the clerk's office to locate even the docket sheet for the school desegregation litigation further suggests the extreme inattention and dormancy of the litigation. See *infra* Table E and accompanying text (summarizing the inactivity in school desegregation cases).

²⁵⁸ See *infra* notes 297-307 and accompanying text.

²⁵⁹ See *Lee v. Macon County Bd. of Educ.*, 221 F. Supp. 297 (M.D. Ala. 1963) (No. 604-E).

²⁶⁰ 498 U.S. 237 (1991); see *supra* Section I.B.1.

courts granting unitary status.²⁶¹ The docket sheets also uncovered a new element not revealed in the written opinion analysis: extreme dormancy. Most cases languished for at least one ten-year period with little substantive activity. In the Middle District of Georgia, for example, only three school districts out of fifty-seven have had substantive activity in the last five years.

The following table summarizes the information obtained from the docket sheet study, which is explained in more detail below:

TABLE D

SCHOOL DESEGREGATION LITIGATION IN NORTHERN DISTRICT OF MISSISSIPPI AND MIDDLE DISTRICTS OF ALABAMA AND GEORGIA				
	N.D. Miss.	M.D. Ga.	M.D. Ala.	Total
Number of School Districts (Percentage)	41 (100%)	57 (100%)	40 (100%)	138 (100%)
Number Declared Unitary (Percentage)	5 (12%)	1 (2%)	2 (5%)	8 (6%)
Number Declared Partially Unitary (Percentage)	0 (0%)	0 ²⁶² (0%)	16 (40%)	16 (12%)
Number of Court Initiated Unitary Proceedings (Percentage)	0 (0%)	0 (0%)	32 (80%)	32 (23%)
Number of Defendant-Initiated Unitary Proceedings (Percentage)	8 (20%)	1 ²⁶³ (2%)	5 (13%)	14 (10%)

²⁶¹ The Court's opinion in *Freeman*, however, has had a large impact in the Middle District of Alabama, where almost half of the pending school desegregation cases have a ruling of partial unitary status. See *infra* notes 299, 304 and accompanying text.

²⁶² One school district was declared partially unitary, but this was quickly followed by a grant of full unitary status and dismissal. See *Lockett v. Board of Educ.*, 111 F.3d 839, 840 (11th Cir. 1997) (affirming grant of unitary status); *Lockett v. Board of Educ.*, 92 F.3d 1092, 1101-02 (11th Cir. 1996) (affirming unitary status in limited areas and reversing grant of full unitary status).

²⁶³ The United States as plaintiff sought unitary status on behalf of nine school districts in *United States v. Georgia*, 702 F. Supp. 1577, 1578 (M.D. Ga. 1989). As discussed *infra* notes 281-82 and accompanying text, the school districts first joined the United States, but subsequently opposed dismissal.

Number of Cases With No Activity Within Last 5 Years If Case Pending in 1999 ²⁶⁴ (Percentage)	30 (73%)	54 (95%)	0 (0%)	84 (61%)
Number of Cases With No Activity for a 10-Year Period (Percentage)	32 (78%)	55 (96%)	31 (78%)	118 (86%)

1. *Northern District of Mississippi.* The State of Mississippi once vigorously opposed the enrollment of African-Americans in public schools. In 1962, on two occasions then-Mississippi Governor Ross Barnett personally met James Meredith at the schoolhouse door to deny Mr. Meredith admission to the University of Mississippi.²⁶⁵ Not to be outdone by the Governor, the state legislature declared *Brown* unconstitutional.²⁶⁶ The current status of school desegregation in the Northern District of Mississippi could not be more different. The vast majority of school districts appear content with being subject to court order, and school desegregation litigation is now marked with extreme inactivity rather than passionate debate.

The Northern District of Mississippi database covers thirty-four cases concerning forty-one school districts. No judge initiated unitary status proceedings, and only a small number of school districts, eight out of forty-one, sought unitary status. Five school districts were declared unitary and their respective lawsuits were dismissed.²⁶⁷ All but one dismissal occurred before *Dowell*. Three other school districts unsuccessfully sought dismissal, all pre-*Dowell*. Two eventually withdrew their requests,²⁶⁸ and one was denied.²⁶⁹ Nor has the Supreme Court's decision in *Dowell* led to an increase in requests for dismissal. Of the eight school districts that sought

²⁶⁴ In "activity," I include all filings or orders regarding liability, procedure, remedy, implementation, and termination. Excluded are the following: the routine filing of annual reports of compliance with outstanding remedial orders, a common feature of school desegregation decrees; withdrawals of attorneys of record; clerk notations closing the file; and return of appeal bond monies.

²⁶⁵ See BASS, *supra* note 210, at 184-86.

²⁶⁶ See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 156-57 (1974).

²⁶⁷ See *Edwards v. Greenville Mun. Separate Sch. Dist.*, No. 70-8 (N.D. Miss.) (dismissed July 2, 1992); *Quarles v. Oxford Mun. Separate Sch. Dist.*, No. 69-62 (N.D. Miss.) (dismissed June 2, 1988); *Cunningham v. Grenada Mun. Separate Sch. Dist.*, No. 66-33 (N.D. Miss.) (dismissed Jan. 3, 1986); *United States v. Corinth Mun. Separate Sch. Dist.*, No. 66-80 (N.D. Miss.) (dismissed May 20, 1976); *Taylor v. Houston Mun. Separate Sch. Dist.*, No. 70-6 (N.D. Miss.) (dismissed Dec. 20, 1971).

²⁶⁸ See *United States v. Benton County Bd. of Educ.*, No. 65-13 (N.D. Miss.) (request withdrawn Aug. 11, 1989); *United States v. Mississippi (Choctaw County School District)*, No. 70-36 (N.D. Miss.) (defendants never requested completion of unitary hearing begun July 24, 1985).

²⁶⁹ See *Henry v. Clarksdale Mun. Separate Sch. Dist.*, No. 64-28 (N.D. Miss.) (dismissal denied July 19, 1979).

unitary status, seven came *before Dowell*.²⁷⁰ No school district sought partial unitary status. Thus, the Court's recent desegregation opinions have decidedly not increased unitary status proceedings in the Northern District of Mississippi. Rather, the quest for dismissal has slowed, and thirty-six school districts continue to operate under court-ordered remedial plans.

Also notable is the extreme lack of activity in the majority of cases. In 1999, thirty-six districts were parties to pending school desegregation litigation in the Northern District of Mississippi. Excluding the routine filing of annual reports, notices of appearances, and similar activities,²⁷¹ thirty have had no activity in the last five years. Examining all forty-one school districts, thirty-two had at least one ten-year period with no meaningful activity. More than twenty-five percent of the school districts—twelve districts—have had no more than one issue raised in the litigation since 1974.²⁷²

2. *Middle District of Georgia.* The Middle District of Georgia analysis includes fifty-seven school districts involved in court-ordered desegregation.²⁷³ Like the cases filed in the Northern District of Mississippi, the vast majority of the cases have had long periods of inactivity. Only *four* of the districts have had any significant activity since 1990.²⁷⁴

The quest for a declaration of unitary status and dismissal has had a unique history in the Middle District of Georgia. Only one school district has requested unitary status (after *Dowell*), which was granted.²⁷⁵ But in *United States v. Georgia*,²⁷⁶ a pre-*Dowell* case, the United States, in its role as *plaintiff*, sought unitary status on behalf of nine school districts. *United*

²⁷⁰ The one coming after *Dowell* was granted. See *Edwards v. Greenville Mun. Separate Sch. Dist.*, No. 70-8 (N.D. Miss.) (dismissed July 2, 1992).

²⁷¹ See *supra* note 264.

²⁷² See *United States v. Mississippi (Attala County Sch. Dist.)*, No. 70-36 (N.D. Miss. July 9, 1970); *United States v. Mississippi (Webster County Sch. Dist.)*, No. 70-36 (N.D. Miss. July 9, 1970); *United States v. Coffeeville Consolidated Sch. Dist.*, No. 69-57 (N.D. Miss. July 10, 1969); *United States v. Nettleton Line Consol. Sch. Dist.*, No. 69-63 (N.D. Miss. June 8, 1969); *United States v. Pontotoc County Sch. Dist.*, No. 67-35 (N.D. Miss. Sept. 14, 1967); *United States v. Montgomery County Sch. Dist.*, No. 67-20 (N.D. Miss. June 7, 1967); *United States v. Humphreys County Sch. Dist.*, No. 66-37 (N.D. Miss. Sept. 2, 1966); *United States v. North Tippah Consol. Sch. Dist. & South Tippah Consol. Sch. Dist.*, No. 66-41 (N.D. Miss. Sept. 2, 1966); *United States v. Louisville Mun. Separate Sch. Dist.*, No. 66-68 (N.D. Miss. Aug. 19, 1966); *United States v. Calhoun County Bd. of Educ.*, No. 66-37 (N.D. Miss. Aug. 12, 1966); *United States v. Carroll County Bd. of Educ.*, No. 65-41 (N.D. Miss. Aug. 26, 1965).

²⁷³ One lawsuit, *United States v. Board of Education of Talbot County*, No. 1372 (M.D. Ga. Sept. 8, 1969) was dismissed without prejudice in 1972 after the United States failed to appear at the preliminary injunction hearing in 1969. This suit was not included in the study.

²⁷⁴ See *United States v. Board of Educ. of Valdosta County, Georgia*, No. 861 (M.D. Ga. Nov. 30, 1970); *United States v. Board of Educ. of Decatur County, Ga.*, No. 800 (M.D. Ga. May 29, 1967); *Lockett v. Board of Educ. of Muscogee County Sch. Dist.*, No. 64-991 (M.D. Ga. Jan. 13, 1964); *Bivins v. Board of Educ. of Bibb County, Ga.*, No. 1926 (M.D. Ga. Aug. 14, 1963).

²⁷⁵ See *Lockett v. Board of Educ.*, 111 F.3d 839, 840 (11th Cir. 1997).

²⁷⁶ 691 F. Supp. 1440, 1443 (M.D. Ga. 1988).

States v. Georgia requires the desegregation of forty-seven school districts in the Middle District of Georgia. Specific remedial orders were replaced with “general permanent injunctions” in 1974.²⁷⁷ While these injunctions declared that the school districts were operating unitary school districts,²⁷⁸ the injunctions also imposed the duty to desegregate all *Green* factors except extracurricular activities.²⁷⁹

In the late 1980s, acting through the Reagan Justice Department, the United States sought dismissal against nine of the forty-seven school districts covered by *Georgia*—a controversial move for a plaintiff statutorily charged with ensuring desegregation.²⁸⁰ The school districts, which described the United States’s effort as coming “‘from out of the blue,’”²⁸¹ initially joined the United States’s motions, but eventually stated their preference for continued jurisdiction.²⁸²

Part of the concern was the legal fees involved. The private plaintiffs had filed discovery to ascertain the current status of the school districts, which preferred not to pay for discovery and other unitary status proceedings.²⁸³ But the trepidation involved more than money. Even when the district court ruled that the United States must assume responsibility for the school district’s litigation expenses,²⁸⁴ the school districts continued to refuse to pursue unitary status. In fact, an Eleventh Circuit dismissal of an appeal in 1989 was the last action in the lawsuit,²⁸⁵ and no party has subsequently sought unitary status. After the election of President George Bush, the Justice Department dropped its controversial dismissal request.

Another remarkable feature of desegregation litigation in Georgia is the remedial orders for three school districts. It appears that at least one school district is currently operating under a freedom of choice plan, a remedy the Supreme Court ruled legally inadequate in 1968.²⁸⁶ In two other

²⁷⁷ *Id.* at 1442.

²⁷⁸ The Eleventh Circuit recently held that the general permanent injunctions are not dismissal orders under *Dowell*. See *United States v. Georgia, Meriwether County*, 171 F.3d 1344, 1347-48 (11th Cir. 1999); see *supra* notes 52-54 and accompanying text (discussing the Supreme Court’s requirement in *Dowell* that a district court must be clear in its intention to dismiss an action before the case should be considered terminated).

²⁷⁹ See *id.* at 1442-43.

²⁸⁰ See *Georgia*, 691 F. Supp. at 1443.

²⁸¹ William Snider, *Justice Officials Seek to End Many U.S. Integration Suits*, EDUC. WK., March 16, 1988, at 1 (quoting a school district lawyer).

²⁸² See *United States v. Georgia*, 702 F. Supp. 1577, 1578 (M.D. Ga. 1989).

²⁸³ See *Georgia*, 691 F. Supp. at 1444.

²⁸⁴ See *Georgia*, 702 F. Supp. at 1580.

²⁸⁵ See *United States v. Georgia*, 890 F.2d 1166, tbl. (11th Cir. 1989).

²⁸⁶ See *United States v. Board of Educ. of Ben Hill County, No. 642* (M.D. Ga.) (entering remedial order in 1967, which was modified on defendant’s motion in 1969 to grant more time to implement the remedy; the modification was the last activity in the lawsuit). The Supreme Court ruled that freedom of choice

cases, the most recent remedial orders were issued before 1971 when the Supreme Court's ruling in *Swann*²⁸⁷ greatly increased the remedial burden on defendants and made bussing an available remedial tool.²⁸⁸ All three cases, in other words, apparently have remedial plans that are legally inadequate. This further suggests the extreme lack of attention paid to these school desegregation suits.

3. *Middle District of Alabama.* In Alabama, desegregation began in earnest with *Lee v. Macon County Board of Education*.²⁸⁹ The suit, filed in 1963 by African-American students and parents, sought to desegregate Macon County, a rural county in eastern Alabama.²⁹⁰ The suit quickly drew the attention of Governor George Wallace, who closed a white school that was slated to be desegregated,²⁹¹ called out the Alabama State Troopers,²⁹² and established with state funds the all-white Macon Academy.²⁹³ Six African-American students, the entire enrollment of a Macon County high school, finished the 1963-64 school year in "makeshift classrooms" after arsonists burned down the high school.²⁹⁴

The suit eventually grew to cover scores of Alabama school districts. In 1970, the three-judge district court overseeing *Lee v. Macon County Board of Education* ordered that each of the school districts involved be transferred to its respective judicial district and division and be given an individual docket number.²⁹⁵ Pursuant to this order, cases concerning thirty-five school districts were docketed in the Middle District of Alabama.²⁹⁶ In addition, five other school desegregation lawsuits for individual school dis-

plans (under which school children choose which school to attend)—the predominant remedial approach at the time—were legally inadequate in *Green v. County School Board*, 391 U.S. 430, 441-42 (1968).

²⁸⁷ 402 U.S. 1 (1971).

²⁸⁸ See *United States v. Board of Educ. of Baldwin County*, No. 2329 (M.D. Ga.) (issuing the last remedial plan in 1970); *United States v. Board of Educ. of Lowndes County*, No. 785 (M.D. Ga.) (entering the remedial order in 1969).

²⁸⁹ 231 F. Supp. 743 (M.D. Ala. 1964).

²⁹⁰ See *id.* at 744.

²⁹¹ See *id.* at 745.

²⁹² See *id.*

²⁹³ See *id.* at 747-48.

²⁹⁴ See *Lee v. Macon County Bd. of Educ.*, 970 F.2d 767 (11th Cir. 1992), *opinion vacated on other grounds*, 987 F.2d 1521 (11th Cir. 1993) (en banc). Ironically, the high school eventually became the county's only integrated school. See *id.* at 768-69. Macon County's other three schools are almost 100% African-American. The school district unsuccessfully sought to close the school to consolidate it with other schools. See *Lee*, 987 F.2d at 1521 (affirming, by an equally divided vote, the district court's denial of the school district's motion).

²⁹⁵ See *Lee v. Lee County Bd. of Educ.*, 963 F. Supp. 1122, 1127 (M.D. Ala. 1997).

²⁹⁶ At least two of the school districts subsequently consolidated into one school district. For the sake of simplicity, I counted separately the school districts consolidated with another school district after the filing of *Lee v. Macon*. Thus, although *Floral City Board of Education* was consolidated with *Covington City Board of Education*, I counted *Floral* as a separate school district in compiling the data.

tricts were filed in the Middle District of Alabama. Thus, in the Middle District of Alabama, forty school districts are the subject of school desegregation litigation.

Today, with the exception of Randolph County (with its principal who canceled the prom rather than allow "mixed race" couples to attend²⁹⁷), the school districts have received little national attention since the days of Governor Wallace. Like the school districts in Georgia and Mississippi, thirty-one of the forty districts in Alabama had no meaningful litigation activity for at least one ten-year period. Yet, the Middle District of Alabama is highly notable and worthy of extended study because of the district's two district court judges, Judge W. Harold Albritton, III, and Judge Myron H. Thompson. Both of these judges have taken active control over their respective school desegregation dockets, particularly in the last three years. As a result, all pending cases are involved in active litigation.

Regarding unitary status proceedings during the time period examined, two school districts were declared unitary on defendants' motion (filed before *Dowell*) and with plaintiffs' consent (given after *Dowell*).²⁹⁸ Four other school districts sought unitary status after *Dowell*. Three of these districts settled with the plaintiffs for partial unitary status,²⁹⁹ and one request for unitary status was pending at the end of the period examined.³⁰⁰ In total, six school districts requested unitary status on their own motions. With the plaintiff's agreement, two were declared fully unitary

²⁹⁷ See Ronald Smothers, *Principal Causes Furor on Mixed-Race Couples*, N.Y. TIMES, March 16, 1994, at A16. Mr. Humphries was relieved of his duties as principal after summoning juniors and seniors to a meeting in the auditorium to cancel the prom because many students planned to bring dates of different races. See AP, *Comments on Race Split Alabama Prom*, N.Y. TIMES, April 25, 1994, at A12. Mr. Humphries called Revonda Bowen, who was president of the junior class and who has one African-American and one white parent, a "mistake" he wanted to prevent others from making. Sue Anne Pressley, *Alabama Hamlet's Wounds from Racial Controversy Slow to Heal*, WASH. POST, April 7, 1996, at A3. Despite a federal court order barring Mr. Humphries from school grounds, the former principal was subsequently elected superintendent for Randolph County. See Malcomb Daniels, *Humphries Should Take Office, Government Says*, THE MONTGOMERY ADVISOR, Nov. 20, 1996, at 1B; see also *Controversial Chief to Retire*, EDUC. WK., Dec. 8, 1999 (reporting that Mr. Humphries intended to retire).

²⁹⁸ See *Carr v. Montgomery County Bd. of Educ.*, No. 2072 (M.D. Ala.) (dismissed May 28, 1993); *United States v. Lowndes County Bd. of Educ.*, No. 2328 (M.D. Ala.) (dismissed Mar. 13, 1991).

²⁹⁹ See *Lee v. Ozark City Bd. of Educ.*, No. 70-1063 (M.D. Ala.) (partial unitary status for transportation and facilities awarded under Sept. 26, 1997 Consent Decree); *Lee v. Autauga County Bd. of Educ.*, No. 70-3098 (M.D. Ala.) (partial unitary status for transportation, facilities, discipline, and salary supplements granted in Sept. 18, 1997 Consent Decree); *Harris v. Bullock County Bd. of Educ.*, No. 2073 (M.D. Ala.) (partial unitary status for three *Green* factors pursuant to June 14, 1993 Consent Decree).

³⁰⁰ See *Lee v. Chambers County Bd. of Educ.*, No. 70-844-E (M.D. Ala.). In *Lee v. Chambers*, the Lanett City Board of Education first filed a petition for unitary status on February 6, 1997, which was dismissed after the defendant requested a continuance. On May 11, 1999, Lanett City Board of Education filed a second motion for unitary status.

and three others were declared partially unitary, and the sixth district's request was still pending.

That left thirty-four school districts not subject to any unitary status proceedings. The district court judges actively supervised these cases rather than allow them to languish. Judge Albritton in July 1995 and July 1998 and Judge Thompson in February 1997 issued orders reaching thirty of the remaining thirty-four districts. The orders required that the parties show cause why the school districts should not be declared unitary and the cases dismissed. For example, Judge Thompson's order required that "the parties should now move toward 'unitary status' for the school systems in these cases and for the termination of the litigation in these cases."³⁰¹ The remaining four school districts have all been the subject of very recent remedial proceedings.³⁰²

Finally, one school had previously been subject to unitary status proceedings.³⁰³ Judge Albritton also issued a show cause order for that school district as well. This brings to thirty-one the total of school districts subject to show cause orders.

By the end of the period studied (January 15, 1999), fourteen of the thirty-one school districts had resolved show cause orders through consent decrees. Thirteen districts were declared partially unitary and given three-year plans to redress continuing inequities. The fourteenth school district was declared not unitary, but was also subject to a similar three-year plan. The remaining seventeen school districts were then involved in active discovery and negotiations to resolve the show cause orders. The number of pending show cause orders was not surprising—for sixteen districts, the show cause order came a mere five months before the end of the period studied. Thus, it appears that the show cause orders are being resolved fairly quickly and with remarkable agreement.³⁰⁴

Also notable are the settlements reached by fourteen of the school districts. All fourteen consent decrees included comprehensive plans to be implemented over a three-year period. The stated intention of the plans was to bring the school districts into compliance with their constitutional obligations, and school districts could file for unitary status and dismissal after three years. For example, in *Lee v. Roanoke City Board of Education*,³⁰⁵ the parties agreed to unitary status determination for three *Green*

³⁰¹ *Lee v. Lee County Bd. of Educ.*, 963 F. Supp. 1122, 1124 (M.D. Ala. 1997) (quoting from Order dated Feb. 12, 1997).

³⁰² See *Franklin v. Barbour County Bd. of Educ.*, No. 2458 (M.D. Ala.); *Lee v. Chambers County Bd. of Educ.*, No. 844-E (M.D. Ala.); *Lee v. Macon County Bd. of Educ.*, No. 846-E (M.D. Ala.); *Lee v. Randolph County Bd. of Educ.*, No. 847-E (M.D. Ala.).

³⁰³ See *Harris v. Bullock County Bd. of Educ.*, No. 2073 (M.D. Ala.).

³⁰⁴ In fact, all but one school district were subject to a consent decree resolving the show cause order by the 2000-01 school year.

³⁰⁵ No. 855-E (M.D. Ala.).

factors:³⁰⁶ student assignment, facilities, and transportation. The three-year plan still covered a wide range of issues: faculty hiring and assignment; student assignment and instruction within schools, including participation in special programs such as gifted and talented programs and special education; extracurricular activities; student discipline; and graduation rates.³⁰⁷ By its express terms, the plan was intended to produce a fully unitary school district in three years. The other thirteen school districts agreed to plans similar in tone.

That the parties settled all the cases resolved to date is quite interesting, for it suggests that minimal court time is needed to manage the cases and that the parties have reached agreement on the necessary steps toward effective remediation and eventual unitary status. Moreover, the comprehensive plans strongly indicate that school desegregation litigation can reach into *quality* of education issues. While *Brown* began as a suit to challenge racially discriminatory barriers to public school admission, school desegregation litigation in the Middle District of Alabama reaches issues of educational quality—namely, how school children are treated once they enroll in a school. All fourteen consent decrees resolving the show cause orders addressed quality of education issues. Notably, student assignment issues were of minor importance.³⁰⁸ The shift to quality of education issues may foster greater inter-party cooperation. Plaintiffs and defendants may disagree on responsibility for outcomes in achievement and the like, but the parties still often share common goals in fostering quality of education. This common interest may alleviate the contentiousness prevalent in the school desegregation disputes of the past.

C. Conclusions from Empirical Studies

The written opinions and the docket sheets together cover 192 school districts involved in court-ordered desegregation. From the two studies, three startling conclusions emerge. The vast majority of school desegregation cases are still pending. Dismissal is remarkably infrequent. In fact, school districts exhibit great reluctance to even request dismissal. The Supreme Court's recent school desegregation cases have decidedly *not* led to increased requests for unitary status and orders of dismissal. In fact, the overall numbers have *declined*.

³⁰⁶ See *supra* note 61 (listing the *Green* factors).

³⁰⁷ See *Roanoke City Bd. of Educ.*, No. 855-E (M.D. Ala.) (June 15, 1998 Consent Decree).

³⁰⁸ Only four of the fourteen addressed student assignment to school buildings. See *Lee v. Phenix City Bd. of Educ.*, No. 70-854 (M.D. Ala.) (Sept. 16, 1998 Consent Decree); *Lee v. Lee County Bd. of Educ.*, No. 70-845-E (M.D. Ala.) (Aug. 14, 1998 Consent Decree); *Lee v. Tallapoosa County Bd. of Educ.*, No. 849-E (M.D. Ala.) (July 22, 1998 Consent Decree); *Lee v. Ozark City Bd. of Educ.*, No. 70-1063 (M.D. Ala.) (Sept. 26, 1997 Consent Decree). Two other consent decrees addressed student transfer policies to assure that the policies were not used to impede desegregation. See *Lee v. Russell County Bd. of Educ.*, No. 848-E (M.D. Ala.) (June 15, 1998 Consent Decree); *Lee v. Geneva County Bd. of Educ.*, No. 70-1056 (M.D. Ala.) (May 22, 1997 Consent Decree).

1. *School Desegregation Litigation Is Not Dead.* School desegregation litigation continues in surprisingly large numbers. Only 24 out of 192 school districts (13%) have had their school desegregation lawsuits dismissed.³⁰⁹ Instead of dismissal proceedings, most cases concern remedial and procedural issues (as reflected in the written opinion and docket sheets studies) or have witnessed no significant activity (as demonstrated by the docket sheet analysis). Even those districts granted partial unitary status in the Middle District of Alabama continue to address remedial concerns. The continued pendency and the minor attention paid to termination issues seriously calls into question the conclusion drawn by many that school desegregation litigation is dead.

Nor would I equate the inactivity of litigation with the death of desegregation cases. The inactivity documented was that pertaining to procedural or substantive litigation disputes. But routine activity continued. For example, notices of appearances were filed. School districts in many suits defined as "inactive" are still filing annual reports with the court documenting the current status of implementation or providing statistical information on the district.³¹⁰ Most critically, court orders are still outstanding. In other words, even in cases defined as inactive, the school district continues to be subject to judicial remedies. The lawsuits are still pending.

2. *School Districts Are Not Seeking Unitary Status.* School districts have proven remarkably unwilling to seek unitary status. Unitary status is not an automatic, spontaneous event. Either a party must request unitary status, or a court must *sua sponte* raise the issue. Defendants must establish a record of the three-part *Dowell* test. Of the 192 school districts examined, only 32 (17%) sought unitary status. The reluctance of school districts to petition for dismissal led then-Governor of Arizona Fife Symington to advocate legislation requiring school districts under court order to seek unitary status.³¹¹

The nine school districts subjected to unitary status proceedings in *United States v. Georgia* provide an interesting study of why school districts might not seek unitary status. As discussed earlier, the United States, acting through the Reagan Justice Department, sought unitary status on be-

³⁰⁹ Included are school districts placed in the three-year *Youngblood* period. See *supra* notes 39-43, 234 and accompanying text. Other public law litigation continues in great numbers. For example, many prison condition cases are still pending. See Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2032-33 (1999) (book review); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 641-42 (1993).

³¹⁰ See, e.g., *United States v. Aberdeen Mun. Separate Sch. Dist.*, No. 65-64 (N.D. Miss.) (from 1988 to 1999 only filings are semi-annual reports); *United States v. Calhoun County Bd. of Educ.*, No. 66-37 (N.D. Miss.) (from 1971 to 1999 only filings are semi-annual reports).

³¹¹ See Jonathan Sidener, *Courts, Schools Targeted Desegregation Plans Draw Governor's Fire*, THE ARIZONA REPUBLIC, Aug. 26, 1995, at A1.

half of nine Georgia school districts.³¹² The districts originally joined the United States. The defendants, however, soon stated their support for continuing the outstanding remedial decrees,³¹³ even after the district court held that the United States must pay the school districts' litigation expenses associated with the dismissal proceedings.³¹⁴ The matter was eventually dropped without a resolution of the United States's unitary status motions. The school districts never sought unitary status on their own, and the United States took no further action, presumably because of the election of President George Bush.³¹⁵

The school districts certainly opposed the unitary status proceedings because of the costs of the proceedings, but this concern became moot after the United States agreed to cover the expenses. But the other reason—as the district court judge termed it, the “if it ain't broke, don't fix it”³¹⁶ approach—was that school districts believed dismissal would not benefit them in any way.³¹⁷ The outstanding remedial orders imposed little burden on the districts, particularly when compared with the burden and risk of litigation. Simply put, the status quo imposed few costs, while moving forward was time consuming and, through the unitary status proceedings, could expose inequalities that would need redress. The defendants appeared to recognize that they must pay a price to request an end their lawsuits, and they preferred to do nothing. Furthermore, for obvious reasons plaintiffs typically elected not to release school districts from judicial oversight.

United States v. Georgia reveals why some school districts never file a petition for unitary status. A related question is which school districts *seek* unitary status. As reflected in the figures in Table E below, very large school districts request dismissal in greater numbers and in greater proportion than smaller school districts. Table E organizes the thirty-two school districts requesting unitary status according to their student enrollment. The number of small school districts (less than 5,000 pupils) greatly outnumbers the total number of medium, large, and very large school districts. To dem-

³¹² See *United States v. Georgia*, 691 F. Supp. 1440, 1443 (M.D. Ga. 1988); see *supra* notes 276-85 and accompanying text.

³¹³ See *id.* at 1443-44.

³¹⁴ The United States agreed to pay for part of the litigation expenses. See *United States v. Georgia*, 702 F. Supp. 1577, 1581 (M.D. Ga. 1989), *appeal dismissed*, 890 F.2d 1166 (11th Cir. 1989).

³¹⁵ See *supra* note 285 and accompanying text.

³¹⁶ *Georgia*, 691 F. Supp. at 1444.

³¹⁷ For example, the lawyer for Macon County stated that dismissal “is not going to help anybody, but it's not going to hurt anybody either.” See Snider, *supra* note 281, at 1; see also William Snider, *Justice Dept. Will Press to End Desegregation Suits*, EDUC. WK., Aug. 3, 1988, at 8 (reporting that “several of the nine districts have said in interviews that they would prefer to remain under judicial supervision, which they said has not proved burdensome”); William Snider, *Justice Desegregation Plan Hits Snag*, EDUC. WK., May 4, 1988, at 9 (quoting one school district superintendent, whose school district was eventually dropped from the proceeding, as saying “it was in our best interest not to devote time, effort, and money to respond to [discovery]”); *id.* (quoting the Jasper County superintendent as preferring “just . . . to let it lie”).

onstrate more accurately which school districts are more likely to seek unitary status, the table also includes the percentage of school districts requesting unitary status by size.

TABLE E

32 SCHOOL DISTRICTS REQUESTING UNITARY STATUS			
<i>Size of School District</i> ³¹⁸	<i>Number Requesting Unitary Status</i>	<i>Total Number of School Districts in Six States</i>	<i>Percentage of School Districts Requesting Unitary Status</i>
Very Large (over 27,000 students)	15	132	11.4%
Large (10,000 to 27,000)	2	110	1.8%
Medium (5,000 to 10,000)	3	166	1.8%
Small (less than 5,000)	12	1,265	0.9%

As Table E shows, of the thirty-two school districts requesting unitary status, fifteen were very large. Given that only 132 very large school districts exist in the 6 states, 11.4% of the very large school districts in the 6 states sought unitary status. On the other hand, 12 small districts out of 1,265 requested dismissal, 1%.

Why would very large school districts be more likely than small school districts to seek unitary status? First, these school districts are usually represented regularly by legal counsel. Thus, they have the money and legal resources to engage in unitary status litigation. Moreover, such school districts may face greater demographic obstacles to producing an integrated student body, allowing them to offer plausible excuses or rationales for a segregated student body. Finally, the larger districts are more likely to be subject to unpopular bussing plans. Although parts of the community may disagree with the desire to end bussing, a school board's decision to seek an end to bussing generally receives the support of a majority of the community, giving the school board political cover for its request for dismissal.

³¹⁸ The classifications are those used by David Armor, a frequent expert for school districts in school desegregation litigation. *See* ARMOR, *supra* note 188, at 166. The school district enrollment figures for the districts seeking and achieving unitary status come from one of following two sources: U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 1998 (1998); NATIONAL CENTER FOR EDUCATION STATISTICS AND THE MESA GROUP, SCHOOL DISTRICT DATA BOOK (1995).

3. *Recent Supreme Court Decisions Have Not Led to More Dismissed Cases.* The written opinion and docket sheet studies both reveal that the Supreme Court's recent school desegregation opinions have *not* led to greater numbers of defendants requesting dismissal, or of courts granting termination more frequently. In fact, the numbers have actually *declined*. Considering both studies and taking into account their overlap in coverage, a total of twenty-four school districts were declared unitary: fourteen before *Dowell*, ten after. Again subject to the same qualification, a total of thirty-two school districts requested dismissal. Twenty requests were made before *Dowell*, twelve after. In short, the studies clearly indicate the inaccuracy of the perception that *Dowell* and subsequent Supreme Court opinions have led to an increase in school districts seeking and attaining dismissal. Instead, the quest for and attainment of dismissal have slowed.

III. THE NEED FOR GREATER JUDICIAL INVOLVEMENT

Given the continued pendency of school desegregation litigation, two obvious questions arise: should the judiciary respond, and if so, how? One's answers to these questions will depend in part on the value one places on desegregation cases—whether one considers school desegregation a failed experiment or a worthwhile endeavor.

This Article generally avoids adding to the substantial scholarship, conducted from both legal and educational policy perspectives, on the virtues and vices of school desegregation as a concept. Rather, I approach the pendency of the litigation from a new perspective. Specifically, I challenge the viability of a party-driven concept of litigation in school desegregation and argue that the judiciary should take a more active role in these cases. In making this argument, I build upon an earlier article in which I argue that defendants hold too much remedial power in public law cases and that the widespread perception that federal district court judges run local institutions is incorrect.³¹⁹ The analysis applies whether one protests or advocates desegregation cases because the party-driven concept of litigation is a significant obstacle to ending the litigation or using the cases as a tool for social change. My argument is not, however, relevant to support those who advocate that desegregation litigation before today's federal judiciary is a wasted effort for plaintiffs.³²⁰ If this were so, then in a desegregation case any plaintiff's ef-

³¹⁹ See generally Parker, *supra* note 25.

³²⁰ Moreover, the argument is harmful for those who believe that school desegregation remedies have utility even after desegregation to the extent practicable (*i.e.*, unitary status) has been achieved. Under this approach, continued jurisdiction should be maintained after a school district should be, under *Dowell*, declared unitary and the case dismissed. In other words, this view maintains that the Supreme Court erred in *Dowell* by holding that dismissal occurs when unitary status is achieved because the remedial decree should operate in perpetuity or, less drastically, should continue for some specified time. The continued usefulness of a remedial decree post-unitary status would most likely occur either (1) when a school district is using race-conscious policies that may be unconstitutional if not necessary to redress past discrimination or (2) when a school district can only maintain magnet schools or other spe-

fort would be foolish. At the end of this Section, I rebut this contention by arguing that school desegregation litigation can be useful for plaintiffs.³²¹

A. *Why School Desegregation Lawsuits Languish*

The time has come for our judiciary to stop relying on plaintiffs to ensure effective remediation and on defendants to seek the ultimate dismissal of school desegregation litigation. Both sides in the litigation have proven generally unable or unwilling to raise the necessary issues. Even though statutory attorneys' fees are available for plaintiffs' counsel, very few attorneys exclusively practice school desegregation litigation. Because attorneys' fees are not guaranteed, an attorney risks making no return on what will often amount to hundreds of attorney hours.³²² Furthermore, other civil rights issues receive more attention today from traditional civil rights organizations, which lack the resources to tackle the enormous task of overseeing implementation of the hundreds of pending suits.³²³ Because plaintiffs may prefer the security of a known order, they may avoid active litigation that could result in dismissal. Either the court or defendants might respond to plaintiffs' motions to enforce or for supplemental relief by raising the issue of unitary status. Finally, given the ambivalence among mi-

cial desegregation measures if it receives state or federal monies awarded because of the pending decree. My model of a more active judiciary could possibly prevent continued jurisdiction in these situations when integration is only possible with pending court orders. I am very sympathetic to this argument for I agree that termination can harm a school district's efforts to maintain integrated school systems. Yet, the situations are possibly few. Even a school district not yet unitary may be precluded from using race-conscious student assignment policies, as occurred in the settlement in the pending San Francisco school desegregation lawsuit. See David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant Observer*, 16 HARV. BLACKLETTER J. 39, 99-116 (2000); Peter Waldman, *School-Desegregation Accord Stresses Pupils' Socioeconomic Factors Over Race*, WALL ST. J., Feb. 18, 1999, at B13. Further, federal magnet grant money is available to school districts not under court order. See Magnet Schools Assistance Program, 34 C.F.R. § 280.1-41 (1999). Finally, extra state monies may still be available, even after dismissal. See, e.g., Caroline Hendrie, *Taxes, Transfer Program On the Table in St. Louis Desegregation Settlement*, EDUC. WK., Aug. 5, 1998, at 8 (reporting that the State would still provide extra monies for Kansas City, Missouri even though the State had been dismissed from the school desegregation lawsuit). This issue is discussed further *infra* section III.B.3.

³²¹ See *infra* notes 355-59 and accompanying text.

³²² See generally Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 199-200, 262 (1997) (identifying "obstacles to enforcement of civil rights legislation" in the law of attorneys' fees); Sturm, *supra* note 309, at 644 & n.17 (noting that the Supreme Court has limited the availability of attorneys' fees).

³²³ The limited resources of civil rights organizations have prevented active evaluation of implementation issues. See FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 129-30 (1991) (quoting Judge Justice, who oversaw the state-wide school desegregation suit in Texas, as finding that the monitoring actions of civil rights groups "have been sporadic"); Sturm, *supra* note 309, at 643-44 (noting the decrease in funding from private foundations and the government for public interest organizations). Furthermore, starting in 1975 Congress has restricted legal services from participating in school desegregation litigation. See 42 U.S.C. § 2996f(b)(9) (1994) (Legal Services Act of 1974).

nority groups over the value of continued school desegregation efforts,³²⁴ one cannot depend on community groups to press attorneys to investigate and litigate desegregation issues.

Likewise, school district defendants have proven largely unwilling to seek unitary status, much less to bring to a court's attention the inadequacy of their desegregation efforts.³²⁵ Given the pro-defendant tilt of the Supreme Court in these cases, one may ask why so few school districts seek unitary status. Litigation expenses may explain part of their unwillingness.³²⁶ For some school districts, the desegregation orders may compel little that the school district finds adverse, as demonstrated in *United States v. Georgia*,³²⁷ or the desegregation orders may even be easily ignored. If this is so, the school district likely has better uses for its money than the expense of ridding itself of a "harmless" court order. Furthermore, the divisiveness of school desegregation issues may make school districts hesitant to seek unitary status. Because the resurrection of dormant desegregation issues might lead to community unrest, a school district may appreciate the political cover provided by outstanding remedial orders.³²⁸ Court orders may provide school districts with additional funding if the state is held responsible for desegregation costs (although this is a rare situation)³²⁹ or the district may receive federal funds for magnet schools required by a remedial order.³³⁰ Lastly, even with the benefit of the pro-defendant stance of the Su-

³²⁴ See *supra* Section I.D.

³²⁵ See *supra* note 218 and accompanying text.

³²⁶ The attorney representing the DeKalb County school district in *Freeman v. Pitts*, 503 U.S. 467 (1992), estimated that the quest for unitary status cost the school district more than one million dollars in litigation expenses. See Orfield & Thronson, *supra* note 14, at 769.

³²⁷ See *supra* notes 276-85 and accompanying text.

³²⁸ See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 102 (1991) (arguing that "courts, by ordering action, allow officials to do what they believe needs to be done without their taking full responsibility for it"); see also *United States v. City of Miami*, 2 F.3d 1497, 1505 (11th Cir. 1993) ("[O]ur experience teaches us that on some occasions public employers prefer the supervision of a federal court to confronting directly its employees and the public."); Levine, *supra* note 320, at 124 (arguing that unitary status is "the last thing the school district wants" in the San Francisco school desegregation suit); Alan Efron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796, 1806 (1988) (contending that settlements allow state agencies to evade political accountability for actions).

³²⁹ Compare *DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 682 (11th Cir. 1997) (per curiam) (rejecting the State of Georgia's financial responsibility for desegregating DeKalb County School District), and *United States v. Texas Educ. Agency (Lubbock Indep. Sch. Dist.)*, 790 F.2d 1262, 1262-63 (5th Cir. 1986) (affirming denial of state payment of desegregation costs), with *Board of Pub. Educ. v. Georgia*, 1992 WL 322299 (S.D. Ga. 1992) (imposing 15% of desegregation costs for the Savannah-Chatham County School District on the State of Georgia); see also Ryan, *supra* note 14, at 262-64 (providing overview of cases in which school districts seek state responsibility and funding for school desegregation). Remarkably, Arizona state law allows school districts under court order to fund desegregation expenses by exceeding state funding limits and by, without voter consent, raising property taxes. See ARIZ. REV. STAT. § 15-910(G) - (K) (Supp. 1999).

³³⁰ See Magnet Schools Assistance Program, 34 C.F.R. § 280.1-41 (1999).

preme Court, the outcome of any unitary status petition is still uncertain. School districts may prefer the known condition (*i.e.*, the outstanding remedial order) to the unknown outcome of unitary status proceedings, which could impose new obligations or lead to closer judicial supervision.

Interestingly, with the exception of the Middle District of Alabama and a few other courts,³³¹ judges are not active participants in the litigation. Most judicial action is taken in response to defendants' motions for modification of an outstanding remedial order, which are usually granted.³³² This is directly contrary to Professor Abram Chayes's description of the judge in public law litigation as "the dominant figure in organizing and guiding the case."³³³ Instead, judges appear to rely on parties to bring issues to their attention, and they are willing to accept inactivity and lack of responsibility for active oversight. District court judges in the states covered by the Fifth and Eleventh Circuits have taken such a passive posture even though the 1971 *Youngblood* decision specifically required that three years after implementation of the remedial plan, "the District Court should again consider whether the cause should be dismissed."³³⁴

B. The Role of the Judiciary

1. *A Model for Judicial Participation in School Desegregation Litigation.* To counteract the inactivity of litigation, district courts should set their pending, but dormant,³³⁵ school desegregation docket for show cause

³³¹ See *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1419 (11th Cir. 1992) (district court issuing show cause orders on its own motion for three Alabama school districts); *Flax v. Potts*, 915 F.2d 155, 157 (5th Cir. 1990) (district court *sua sponte* ordering the parties to the Ft. Worth school desegregation to re-examine the entire school desegregation plan); *Freeman v. Pitts*, 755 F.2d 1423, 1424 (11th Cir. 1985) (reversing the district court for granting unitary status on its own initiative for DeKalb County, Georgia); *Manning v. School Bd.*, 24 F. Supp. 2d 1277, 1286-87 (M.D. Fla. 1998) (district court *sua sponte* raising the issue of unitary status), *clarified on other grounds*, 28 F. Supp. 2d 1353 (M.D. Fla. 1998).

³³² See generally *Parker*, *supra* note 25, at 534-39 (arguing that defendants receive deference in motions for modification).

³³³ Chayes, *supra* note 33, at 1284. This extreme judicial inactivity also calls into question the role Professor Owen M. Fiss envisioned for judges in structural reform cases: "The task of the judge is to give meaning to constitutional values." Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979); see also Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 761 (describing the judge as the "ultimate supervisor in implementing structural consent decrees"); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46, 77 (1979) (defining the judge as a "political powerbroker," "at once central and peripheral, umpire and spectator").

³³⁴ *Youngblood v. Board of Pub. Instruction*, 448 F.2d 770, 771 (5th Cir. 1971); see also *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that precedent in the former Fifth Circuit is binding on the newly created Eleventh Circuit).

³³⁵ A judge, of course, has the authority to set a show cause hearing for a case in active litigation to determine whether continued jurisdiction is appropriate. My model, however, excludes such cases because in this instance parties are represented by counsel and an affirmative choice regarding continued supervision has been made. In other words, my proposal is concerned solely with languishing cases because here the inactivity may hide noncompliance or require an ineffective remedy.

hearings to determine whether desegregation has been achieved and the suit should therefore be dismissed. Before the hearing, the parties would file a status report detailing what issues need resolution and what discovery is necessary. Defendants would bear the burden of proving the *Dowell* factors,³³⁶ if they decided that termination was warranted. If defendants choose not to seek dismissal, they should state what steps are needed to meet their desegregation duty. Plaintiffs would need to decide whether to contest any request for dismissal and whether to seek additional relief. Thus, the setting of show cause hearings would require the parties to determine why continued judicial jurisdiction is or is not needed. This analysis necessarily requires that the parties evaluate school districts' current treatment of minority children. Under this approach, magistrate judges could be used for discovery disputes and perhaps even for taking evidence and writing reports and recommendations.³³⁷ Furthermore, this model accepts the desirability of settlement.³³⁸

The process should be geared toward a very basic but important question: has desegregation occurred? If the school district has yet to meet its constitutional duty to desegregate its schools to the extent practicable, the school district will be forced to explain its failure. More importantly, if unitary status has not been achieved, then a plan to desegregate should be formulated and implemented. School children should finally be afforded what is long overdue—a desegregated school system. As this proposal suggests, the most effective approach to dormant desegregation litigation is that of the judges in the Middle District of Alabama.³³⁹ There, Judge Albritton and Judge Thompson used magistrate judges to manage litigation,³⁴⁰ but also actively supervised their cases and used their powers of persuasion to encourage settlement. Most importantly, their approach has been successful. Plaintiffs and defendants have evaluated the progress made through efforts at desegregation, determined what vestiges of discrimination remain, and devised means of eliminating these vestiges. The parties are focusing on the big picture of unitary status rather than minor implementation issues. Remarkably, the parties themselves have been able to reach

³³⁶ See *Board of Educ. v. Dowell*, 498 U.S. 237, 247-50 (1991); see *supra* Section I.B.1.

³³⁷ See 28 U.S.C. § 636 (1994). The Alabama judges used magistrate judges to manage discovery and settlement, but also actively encouraged settlement themselves.

³³⁸ See generally Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011, 1012-13 (1993); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

³³⁹ See *supra* notes 301-02 and accompanying text.

³⁴⁰ Magistrate Judge Charles S. Coody has played a significant role in the Alabama cases. See Letter from Judge W. Harold Albritton to Wendy Parker I (Jan. 31, 2000) (on file with author) (writing that "I cannot overemphasize the benefit of having a seasoned and talented magistrate judge, such as Judge Coody, take a proactive role in dealing with the nuts and bolts of working out consent decrees after the district judge initially sets the agenda and the tone for working on it.").

agreement on continuing problem areas and on areas in which the grant of partial unitary status was justified.³⁴¹

2. *The Need for "Active Oversight."* The setting of show cause hearings raises several questions. For instance, given that the parties have "let sleeping dogs lie" and have not actively pursued implementation or unitary status, should that choice be respected by the judiciary? In other words, should judges allow desegregation cases to remain on their dockets until parties decide to challenge the status quo? Given the American legal system's emphasis on party-initiated and party-controlled litigation, deference to litigants would appear perfectly reasonable. For if the parties are satisfied, why should the court interfere? Nonetheless, courts should actively oversee school desegregation litigation for a variety of reasons. One non-normative reason is that Supreme Court precedent, although not emphasized by the Court in its three most recent cases, has imposed on lower courts the affirmative obligation to ensure an effective school desegregation remedy.³⁴² While it is true that the Court relied primarily on defendants to devise and implement the remedy, the Court also made the judiciary responsible for ensuring the effectiveness of defendants' efforts.

More normative reasons exist. First, our judicial system has obviously never been entirely party-driven. Federal courts have the authority to consider *sua sponte* not only jurisdictional matters but also procedural matters. For example, a court, on its own motion and given appropriate procedures, can impose Rule 11 sanctions,³⁴³ grant summary judgment,³⁴⁴ dismiss for failure to state a claim,³⁴⁵ or involuntarily dismiss an action for want of prosecution.³⁴⁶ Judges also have the obligation to manage their dockets effectively, and it seems entirely reasonable to impose an obligation to inquire into the continued pendency of school desegregation cases. The proposal in large respects is procedural, a case management device. Judges would require parties to show cause why continued jurisdiction is needed and not pursue a particular agenda, take discovery, or become involved in other litigation matters traditionally left to parties. Show cause hearings would be most akin to jurisdictional hearings—that is, hearings to determine whether continued jurisdiction is appropriate—a matter over which judges are entitled to exercise a great deal of control.

³⁴¹ See *supra* notes 304-08 and accompanying text.

³⁴² See, e.g., *Wright v. Council of Emporia*, 407 U.S. 451, 468 (1972) (imposing the responsibility on district court judges "to provide an effective remedy"); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (noting that when defendants fail to propose an adequate remedy, "a district court has broad power to fashion a remedy that will assure a unitary school system").

³⁴³ See FED. R. CIV. P. 11(c)(1)(B).

³⁴⁴ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

³⁴⁵ See *Pugh v. Parish of St. Tammany*, 875 F.2d 436, 438 (5th Cir. 1989).

³⁴⁶ See *Clofer v. Perego*, 106 F.3d 678, 679 (5th Cir. 1997).

Second, school desegregation litigation should not be allowed to languish for decades on a court's docket. The inactivity in many cases may allow defendants to hide noncompliance with remedial orders. If no one evaluates implementation or even reads a school district's annual reports,³⁴⁷ then defendants are essentially free to ignore court orders. The dormancy also permits an ineffective remedy, or perhaps an educationally unsound remedy. A remedy can be ineffective for both plaintiffs and defendants. For example, an order can require outmoded or even harmful educational programs, be based on outdated facts or law, or be ineffective in outcomes.³⁴⁸ An inactive case may require compliance with an ineffective remedial order, and a conscientious school district may continue to implement what it knows to be an ineffective or harmful remedial order rather than seek modification or dismissal. In these situations, examination of the progress in remediation could benefit both plaintiffs and defendants by facilitating the design of more appropriate remedies.³⁴⁹

In some instances, a defendant's refusal to seek unitary status may create similar problems. The *Dowell* test requires some sort of inquiry into the status of the school district—a searching inquiry if the court requires or if the parties so initiate themselves, or a sketchy inquiry if the court permits. An opportunity exists, in other words, to analyze how minority school children are actually treated. By not pursuing a legal proceeding that could result in a declaration of unitary status and therefore an end to the court-ordered decree, some school districts opt out of a thorough examination of their policies—a choice not made by accident. Inactivity allows defendants to conceal the inadequacies of their efforts.

A third reason for active oversight of school desegregation litigation is that such an approach may create a forum for the examination of ongoing,

³⁴⁷ Many remedial orders require that school districts file annual reports documenting their compliance with outstanding court orders and providing relevant statistical information. See, e.g., *United States v. Board of Pub. Instruction*, 977 F. Supp. 1202, 1227 (S.D. Fla. 1997); *Tasby v. Woolery*, 869 F. Supp. 454, 473 (N.D. Tex. 1994).

³⁴⁸ See Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1104 (1986) (noting that “[t]he future tricks the court; the injunction, the court’s now outdated prediction, plods off into irrelevancy, leaving the beneficiary bereft of protection or the obligor subject to oppression”).

³⁴⁹ In 1998, Judge Albritton explained why he set a show cause hearing in a case with no activity since 1987:

This court is of the firm opinion that, with a new century rapidly approaching, it is time for this board, as well as others throughout the state which have not yet done so, to either have their systems declared unitary or to promptly take steps as may be necessary to allow such a declaration. If this system has achieved unitary status, as it should have after all these years, it is time for that status to be declared and for this federal court to terminate its supervision of the system. If unitary status has not been achieved, it is time for the Defendant to achieve it so that the former dual system will finally be dismantled and full control of the school system can be returned to local authority, where it belongs. The federal court will then be out of the business of supervising the local schools, barring, of course, any new federal violations.

Lee v. Troy City Bd. of Educ., No. 310-N (Order dated July 22, 1998).

community concerns about desegregation. Hearings will serve as a forum for considering existing concerns that touch upon school desegregation. The *process* of examining the issues may prove helpful for the community. While the raising of school desegregation issues can bring discord into a community, the conflict does not arise merely because the school desegregation suit is reactivated. These issues are already present. Setting a show cause hearing will not cause dissension.

To summarize, courts should require that parties make some sort of choice—*i.e.*, inform the court as to why continued jurisdiction is or is not needed and, if continued jurisdiction is needed, identify the steps necessary to fulfill the defendant's remedial obligations.

3. *Implementation of the "Active Oversight" Model.* The model for an increasingly active judiciary in school desegregation cases also raises some implementation issues. In cases characterized by extreme inactivity, it may be that no practicing attorney now represents the original named plaintiffs, who have, in all likelihood, already graduated from high school and who continue only as nominal parties to the litigation. How should a court locate plaintiffs' counsel, and how can plaintiffs' counsel represent a class formed decades ago?

In most cases, locating plaintiffs' counsel should be a relatively simple task. Many school desegregation lawsuits were filed by the NAACP Legal Defense Fund (LDF). Although the attorney originally representing the class may no longer be affiliated with LDF, other lawyers will have taken her place. In the *Lee v. Macon* cases,³⁵⁰ for example, LDF attorneys represented the private plaintiffs alongside local attorneys.³⁵¹ Naturally, counsel for the other common plaintiff, the United States, will also be easy to find. In cases where the original organization or firm representing the plaintiffs no longer exists, courts can seek the participation of the United States as litigating amicus, as courts have done in the past.³⁵² As litigating amicus, the United States would be permitted to litigate issues even though it is not a formal party. Finally, once a lawsuit is set for a show cause hearing, the community will almost always become aware of it. Interested parent groups can secure local counsel or representation from a civil rights group to litigate their interests in the proceedings by becoming named plaintiffs or plaintiff-intervenors. Once legal representation is obtained, the lawyer can seek persons to substitute as class representatives.

³⁵⁰ See *supra* notes 289-96 and accompanying text.

³⁵¹ In fact, Fred D. Gray, who filed the original complaint in *Lee v. Macon*, has returned to the litigation to represent private plaintiffs in the Alabama cases.

³⁵² See, e.g., *Smiley v. Blevins*, 514 F. Supp. 1248, 1250, 1253 (S.D. Tex. 1981) (school desegregation case for Galveston Independent School District).

This model clearly imposes costs on the defendants—their own litigation expenses and perhaps also the plaintiffs' attorneys' fees.³⁵³ By streamlining discovery and encouraging settlement, the model attempts, however, to limit litigation expenses. I recognize, however, that show cause hearings will impose costs on defendants. This proposal accepts the imposition of increased costs on defendants because they are the original wrongdoers and because the value of engaging in show cause hearings is very great.

The argument for a more active judiciary presumes that show cause hearings provide potential benefits to both plaintiffs and defendants. Plaintiffs may receive a more successful remedy, and defendants may be released from ineffective or legally unnecessary orders. This begs the question of why plaintiffs would want to risk opening up the issue of unitary status given the climate of the federal judiciary. The biggest risk that show cause hearings impose on plaintiffs is that unitary status might be declared prematurely. Terminating a remedial order will be a loss for the plaintiffs if three conditions are met: the defendant would otherwise voluntarily comply with the remedial order; the remedial order has real value for the plaintiffs; and if declared unitary, the defendant would devise a less effective plan to replace the remedial order. But the presence of all three factors is in all likelihood relatively rare. Suffering a loss from premature unitary status depends upon a defendant *voluntarily* complying with a meaningful remedial order, for if a district court judge prematurely declares unitary status, she is very unlikely to grant a motion to enforce a remedial order. In this situation, the judiciary probably would not act like a sword hanging over the defendant's head. Rather, the court would already be pro-defendant and of little value for the plaintiffs in any sort of enforcement proceeding.³⁵⁴ Furthermore, the loss would only occur when the defendant also replaced the court order with a less desirable plan.

Premature *partial* unitary status is another risk for plaintiffs. A court might declare partial unitary status in an area for which additional remedies are needed, and a defendant might then create new practices and policies that are harmful to the plaintiffs. This situation would likely create fewer problems for plaintiffs than would premature full unitary status. As was true of premature declarations of full unitary status, however, continued judicial oversight would provide little assistance to plaintiffs seeking to enforce implementation of remedial orders in the areas declared partially unitary, the judge has already indicated a belief that the remedy is complete.

Moreover, the show cause hearings certainly risk the prohibition of race conscious relief, and this is perhaps the greatest cause for concern for plaintiffs. Such relief is already legally tenuous, and this model for more active judicial involvement may certainly cause courts to invalidate race

³⁵³ See 42 U.S.C. § 1988(b) (1994).

³⁵⁴ Continued jurisdiction, however, would provide an incentive for compliance for a school district that was unaware that the court would be unlikely to enforce an outstanding remedial order.

conscious remedies. This is particularly true in the area of student assignment, where race conscious bussing and admission practices are frequent. Yet, school desegregation principles today readily excuse segregated student attendance patterns. Given that segregation is already often allowed in student assignment, the loss of race conscious relief will be significant in only limited circumstances. Nor is desegregated student bodies a crucial issue for many parents. A more critical issue is quality of education, where race conscious relief is of little importance, and where the show cause hearings can have a positive impact.

4. *Benefits Created by Show Cause Hearings.* Despite these risks, show cause hearings may prove to be beneficial for plaintiffs. First, unless a court significantly curtails discovery, plaintiffs can learn a great deal about a school district's treatment of minority students. This information can be useful both inside and outside the litigation framework for identifying problems and forcing school districts to address them.

Second, as demonstrated in the Middle District of Alabama, show cause orders can result in additional remedial orders. Now that school desegregation cases commonly focus on quality of education issues (*i.e.*, achievement, discipline, and special education), the opportunity arises for courts to issue consent decrees or injunctions to address these concerns, which are often absent in earlier remedial orders. To the extent that defendants agree, the parties can devise a consent decree that redresses continuing disparities, a positive benefit for the plaintiffs. Even if the defendants will not enter into such a consent decree, the possibility still remains that the judge will order one.³⁵⁵ As the empirical studies demonstrated, judges have not dismissed school desegregation lawsuits as a routine matter.³⁵⁶

Third, although the Supreme Court has a decidedly pro-defendant tilt, as we saw in Part I, the Court's legal framework still allows quite a bit of movement toward effective remediation from the standpoint of the plaintiff.³⁵⁷ The *Dowell* three-part test, for example, requires the elimination of vestiges of discrimination to the extent practicable, a decidedly pro-plaintiff standard. Furthermore, although the necessary showing of proximate cause can limit the reach of this requirement, proximate cause is a malleable concept in school desegregation and still permits a Rights Maximizing approach. For instance, Court in *Freeman* also allowed an inquiry into quality of education and an order of additional remedies even as it decreased defendants' evidentiary burdens. A flexible understanding of proximate cause

³⁵⁵ Because I believe that a clear majority of courts defer to defendants, I recognize that the possibility of a court ordering additional remedial measures opposed by the defendants is slim. See Parker, *supra* note 25, at 534-39.

³⁵⁶ See generally Section II, *supra*.

³⁵⁷ See *supra* notes 132-45 and accompanying text.

will allow the parties to a school desegregation lawsuit to focus on quality of education issues, even decades into the lawsuit.

Fourth, by requiring show cause hearings, plaintiffs would benefit from seeking modification or enforcement of remedial orders sooner rather than later. Requiring a showing of proximate cause to establish a causal connection between a past violation and a current disparity can limit a defendant's responsibility.³⁵⁸ The longer plaintiffs wait to modify or enforce an existing remedy, the more difficult it will be to establish proximate cause, unless the request is based on a new violation. In short, to the extent that a court requires a showing of proximate cause, plaintiffs benefit from a closer temporal relationship between the violation and the motion. The longer plaintiffs wait, the greater chance of proximate cause being used as a limit on defendants' liability.

Fifth, plaintiffs in pending school desegregation cases have a lower standard of proof than plaintiffs who file new lawsuits.³⁵⁹ In a new lawsuit relying on the Fourteenth Amendment or Section 1983, a plaintiff would have to prove discriminatory intent. By contrast, in a pending school desegregation lawsuit liability has already been established and the question is what must be done to redress that violation. No discriminatory intent need be shown—only a causal connection between the violation and the remedy requested, which would also have to be proven in a new lawsuit. Furthermore, under *Dowell*, in a pending school desegregation case the defendants have the burden of proving the absence of vestiges of discrimination. In a new lawsuit, the plaintiffs would have to prove the connection between discriminatory intent and the area sought to be redressed.

In summary, pending school desegregation litigation offers the possibility of providing meaningful remedies today, but that possibility wanes with the passage of time. For this reason, if plaintiffs are to use school desegregation litigation as a tool to redress educational inequities, the time to is now. If plaintiffs wait, proximate cause will prove increasingly difficult to establish. Show cause orders can facilitate the beginning of the process of redressing continuing wrongs.

³⁵⁸ See *supra* notes 117-18 and accompanying text.

³⁵⁹ Rather than take the judicial route, an aggrieved individual also has the option of filing a complaint with the Department of Education, Office for Civil Rights (OCR). See 34 C.F.R. 100.7(b) (1999). While administrative proceedings before OCR may be an effective avenue in some situations, I would not advocate abandoning the judiciary all together. OCR's enforcement powers are generally limited to conciliation, and the complaint process focuses typically on an individual situation, rather than the systemwide focus of school desegregation litigation. See *id.* at 100.7(d). Compliance reviews, which reach systemwide issues, are few in number. See U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT TO CONGRESS (1998) (estimating that for the over 20,000 covered institutions, the OCR performed 100 compliance reviews for the fiscal 1998 year in the areas of age, disability, gender, and race discrimination). Further, the judiciary's unique institutional characteristics prove helpful in certain situations. See generally Chayes, *supra* note 33; Fiss, *supra* note 333.

IV. CONCLUSION

While aspects of the Supreme Court's recent school desegregation opinions, the attitudes of lower court judges, the opposition of parents, and the resegregation of our public schools may indicate that the era of school desegregation litigation is over, in reality a great deal of court-ordered desegregation remains. The true problem with the future of these cases is that we have allowed them to languish as dust continues to gather on the files and possibly legally inadequate remedies remain in place. Today, school desegregation litigation is largely characterized by disregard and neglect. Plaintiffs have suffered from courts' failure to pay attention to the efficacy of court-ordered remedies, while defendants may comply with senseless remedial orders.

To combat the dormancy of school desegregation litigation, which has been caused, in large measure, by the ineffectiveness of a party-driven concept of case management, district courts should reactivate the inert school desegregation cases that remain pending on their dockets and determine the current status of the litigation. Desegregation cases should not be allowed to languish without end. Rather, courts and parties should focus on determining why jurisdiction is needed and on redressing current educational inequities.

APPENDIX A

SCHOOL DESEGREGATION OPINIONS IN FIFTH CIRCUIT JANUARY 14, 1983 TO JANUARY 15, 1999		
<i>Category of Opinions</i>	<i>Number of Opinions</i>	<i>Number of School Districts</i>
All	62	33
Unitary Status Granted & Suit Dismissed	3	3
Three-Year <i>Youngblood</i> Period Imposed	5	4
Partial Unitary Status Granted & School District Not Subsequently Granted Full Unitary Status	0	0
Unitary Status Denied & School District Not Subsequently Granted Partial or Full Unitary Status	4	3
Procedural/Remedial	48	29
Liability	3	1

SCHOOL DESEGREGATION OPINIONS IN ELEVENTH CIRCUIT JANUARY 14, 1983 TO JANUARY 15, 1999		
<i>Category of Opinions</i>	<i>Number of Opinions</i>	<i>Number of School Districts</i>
All	64	56
Unitary Status Granted & Suit Dismissed	10	12
Three-Year <i>Youngblood</i> Period Imposed	0	0
Partial Unitary Status Granted & School District Not Subsequently Granted Full Unitary Status	0	0
Unitary Status Denied & School District Not Subsequently Granted Partial or Full Unitary Status	4	6
Procedural/Remedial	49	45
Liability	7	6

PRE-DOWELL OPINIONS IN FIFTH CIRCUIT		
<i>Category of Opinions</i>	<i>Number of Opinions</i>	<i>Number of School Districts</i>
All	44	26
Unitary Status Granted & Suit Dismissed	3	3
Three-Year <i>Young-blood</i> Period Imposed	4	3
Partial Unitary Status Granted & School District Not Subsequently Granted Full Unitary Status	0	0
Unitary Status Denied & School District Not Subsequently Granted Partial or Full Unitary Status	6	4
Procedural/Remedial	32	22
Liability	2	1

PRE-DOWELL OPINIONS IN ELEVENTH CIRCUIT		
<i>Category of Opinions</i>	<i>Number of Opinions</i>	<i>Number of School Districts</i>
All	22	27
Unitary Status Granted and Suit Dismissed	3	5
Three-Year <i>Young-blood</i> Period Imposed	0	0
Partial Unitary Status Granted & School District Not Subsequently Granted Full Unitary Status	0	0
Unitary Status Denied & School District Not Subsequently Granted Partial or Full Unitary Status	4	3
Procedural/Remedial	19	21
Liability	2	2

POST-DOWELL OPINIONS IN FIFTH CIRCUIT		
<i>Category of Opinions</i>	<i>Number of Opinions</i>	<i>Number of School Districts</i>
All	18	13
Unitary Status Granted & Suit Dismissed	0	0
Three-Year <i>Young-blood</i> Period Imposed	1	1
Partial Unitary Status Granted & School District Not Subsequently Granted Full Unitary Status	0	0
Unitary Status Denied & School District Not Subsequently Granted Partial or Full Unitary Status	0	0
Procedural/Remedial	16	12
Liability	1	1

POST-DOWELL OPINIONS IN ELEVENTH CIRCUIT		
<i>Category of Opinions</i>	<i>Number of Opinions</i>	<i>Number of School Districts</i>
All	42	35
Unitary Status Granted & Suit Dismissed	7	7
Three-Year <i>Young-blood</i> Period Imposed	0	0
Partial Unitary Status Granted & School District Not Subsequently Granted Full Unitary Status	0	0
Unitary Status Denied & School District Not Subsequently Granted Partial or Full Unitary Status	2	4
Procedural/Remedial	30	27
Liability	5	4

APPENDIX B**DOCKET SHEETS FOR THE MIDDLE DISTRICT OF ALABAMA**

Alexander City Board of Education, Lee v.
Andalusia Board of Education, Lee v.
Auburn City Board of Education, Lee v.
Autauga County Board of Education, Lee v.
Barbour County Board of Education, Franklin v.
Bullock County Board of Education, Harris v.
Butler County Board of Education, Lee v.
Chambers County Board of Education, Lee v.
Chilton County Board of Education, Lee v.
Coffee County Board of Education, Lee v.
Coosa County Board of Education, Lee v.
Covington City Board of Education, Lee v.
Crenshaw County Board of Education, Harris v.
Dale County Board of Education, Lee v.
Daleville City Board of Education, Lee v.
Dothan City Board of Education, Lee v.
Elba City Board of Education, Lee v.
Elmore County Board of Education, Lee v.
Enterprise City Board of Education, Lee v.
Eufaula City Board of Education, Lee v.
Floral City Board of Education, Lee v.
Geneva County Board of Education, Lee v.
Henry County Board of Education, Lee v.
Houston County Board of Education, Lee v.
Lanett City Board of Education, Lee v.
Lee County Board of Education, Lee v.
Lowndes County Board of Education, United States v.
Macon County Board of Education, Lee v.
Montgomery County Board of Education, Carr v.
Opelika City Board of Education, Lee v.
Opp City Board of Education, Lee v.
Ozark City Board of Education, Lee v.
Phenix City Board of Education, Lee v.
Pike County Board of Education, Lee v.
Randolph County Board of Education, Lee v.
Roanoke City Board of Education, Lee v.
Russell County Board of Education, Lee v.
Tallapoosa County Board of Education, Lee v.

Tallassee City Board of Education, Lee v.
Troy City Board of Education, Lee v.

DOCKET SHEETS FOR THE MIDDLE DISTRICT OF GEORGIA

Board of Education of Baldwin County, United States v.
Board of Education of Ben Hill County, United States v.
Board of Education of Bibb County, Bivins v.
Board of Education of Clinch County, United States v.
Board of Education of Decatur County, United States v.
Board of Education of Muscogee County School District, Lockett v.
Board of Education of Lowndes County, United States v.
Board of Education of Valdosta County, United States v.
Board of Education of Webster County, United States v.
Georgia,³⁶⁰ United States v.
Ouzts, Hilson v. (Board of Education of Washington County)

DOCKET SHEETS FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Aberdeen Municipal Separate School District, United States v.
Benton County Board of Education, Baird v.
Bolivar County Board of Education, Cowan v.
Calhoun County Board of Education, United States v.
Carroll County Board of Education, United States v.
Clarksdale Municipal Separate School District, Henry v.
Coahoma County School District, Taylor v.
Coffeeville Consolidated School District, United States v.
Columbus Municipal Separate School District & Lowndes County School District, United States v.
Corinth Municipal Separate School District, United States v.
Greenville Municipal Separate School District, Edwards v.
Greenwood Municipal Separate School District, United States v.
Grenada Municipal Separate School District, Cunningham v.
Houston Separate School District, Taylor v.

³⁶⁰ This lawsuit involves school districts in the following counties: Americus City, Baker County, Bleckley County, Brooks County, Butts County, Calhoun County, Chattahoochie County, Clay County, Cook County, Crawford County, Dooly County, Early County, Echols County, Elbert County, Grady County, Hancock County, Hart County, Harris County, Irwin County, Jasper County, Jones County, Lamar County, Lee County, Macon County, Marion County, Miller County, Mitchell County, Monroe County, Morgan County, Peach County, Pelham City, Pulaski County, Putnam County, Quitman County, Randolph County, Schley County, Seminole County, Sumter County, Taylor County, Terrell County, Thomas County, Turner County, Twiggs County, Wilcox City, Wilkinson County, Worth County, and Wilkes County.

Humphreys County School District, United States v.
Indianaola Municipal Separate School District, United States v.
Iuka Special Municipal Separate School District, United States v.
Leflore County School District, United States v.
Louisville Municipal Separate School District, United States v.
Marshall County Board of Education, Anthony v. (concerns both Holly Springs Municipal Separate School District and Marshall County District)
Mississippi, United States v. (covers Attala County, Choctaw County, East Tallahatchie Consolidated, Kosciusko Municipal Separate, Webster County, and West Tallahatchie Consolidated school districts)
Montgomery County School District, United States v.
Nettleton Line Consolidated School District, United States v.
North Tippah Consolidated School District, United States v. (also concerns South Tippah Consolidated School District)
Okolona Municipal Separate School District, Pickens v.
Oktibbeha County School District, Bell v.
Oxford Municipal Separate School District, Quarles v.
Pontotoc County School District, United States v.
Quitman County Board of Education, Franklin v.
Starkville Municipal Separate School District, Montgomery v.
Sunflower County School District, United States v.
Tunica County School District, United States v.
West Point Municipal Separate School District, Bell v.
Western Line Consolidated School District, Ayers v.

