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Forty years after the Supreme Court's landmark decision in *Brown v. Board of Education*,[2] Americans remain unclear about what this famous case stood for and whether its promise has been or ever will be achieved. *Brown* held that "separate but equal is inherently unequal in the field of public education."[3] While the de jure regimes at first were allowed to act "with all deliberate speed," the decision did put an end to racially segregated schools, i.e. de jure segregation.[4] Some constitutional scholars, however, such as David Strauss, argue that *Brown* mandated school integration, or the eradication of de facto segregation, as the only means of achieving equal educational opportunity.[5] Strauss claims that the Supreme Court backed off from the more ambitious goal in 1972, when it articulated the "purposeful discrimination" standard for Fourteenth Amendment Equal Protection Clause cases, and thereby produced a "taming' of *Brown*."[6] The newspaper editorials of the *Wall Street Journal* and the *New York Times*, on the occasion of the fortieth anniversary of *Brown*, reflect these two different opinions about how the case should be understood. Shortly before that anniversary, in 1991 and 1992, the Supreme Court decided three important school desegregation cases. What can we learn by comparing the editorial division with the judicial decisions and the different opinions of the Justices? For one thing, we can learn how non-expert opinion makers simplify complex constitutional issues. For another, we can learn how our understanding of the *Brown* mandate affects our assessment of where we stand today in the matter of implementation. Finally, we can then determine where to go from here. I think the evidence will show that our current challenges have more to do with educational quality than school desegregation. This is because judicial enforcement of the Constitution, with the help of the Congress and the Executive Branch, as well as state boards of education, has eliminated, or is in the process of eliminating, de jure segregation. Further insistence on racial balance in the public schools, where there is no political support for the policy, will not work.

A recent book about *Brown* provides striking evidence of the limits of judicial action in matters concerning American public policy. While most commentators celebrate the *Brown* decision for burying Jim Crow,[7] Gerald Rosenberg has argued that "nothing changed in the first decade after *Brown*."[8] Moreover, "[b]y stiffening resistance and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights."[9] After demonstrating the importance of involving Congress and the executive branch in the school desegregation effort,[10] Rosenberg, while conceding that much progress has been made, suggests that more work needs to be done, because "it is also incontrovertible that racial discrimination still exists in the United States."[11] This remark takes us back to the first question. Does satisfying the *Brown* mandate require the eradication of racial discrimination in the United States, as both Rosenberg and Strauss imply? Or is the mandate limited to ending racially dual school systems, de jure segregation? Let us begin by looking at the views of the editorial writers.

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[2] 347 U.S. 483 (1954).

[3] *Id.*

[4] *Brown v. Board of Education* (*Brown* II), 349 U.S. 294 (1955).

[5] *See* David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. Law Rev. 935, 1015 (1989).

[6] *Id.* Strauss identifies this approach with the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976).

[7] *See* Mark Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court 1936-1961, 301 (1994) ("From a lawyer's point of view *Brown* doomed all Jim Crow legislation"); *See also* Richard Kluger, SIMPLE JUSTICE, 896 (1975) ("*Brown v. Board of Education*, for all of its economy, represented nothing short of a reconsecration of American ideals").

[8] *See* The Hollow Hope: Can Courts Bring About Social Change?, 93 (Chicago 1991).

[9] *Id.* at 120.

[10] *Id.*

[11] *Id.* at 40 n. 20.

I. TWO DIFFERENT PERSEPECTIVES ON THE FORTIETH ANNIVERSARY OF *BROWN*

A. The *Wall Street Journal* May 17, 1994

The *Wall Street Journal*'s (*Journal*) editorial emphasizes the greatness of *Brown* and the infamy of *Plessy v. Ferguson*,[12] the decision *Brown* overturned. The editorial writer celebrates *Brown* for having "commenced the creation of a United States true to the words of its Declaration that God creates all men equal was to the Founders 'self evident'. . . . Come 1954, the Court concurred."[13] *Plessy* should be taught, the writer says, in order to appreciate "the illogic and the parochialism" of "the judicial activists of 1896."[14] The editorial discusses the absurdity of apartheid at some length, quoting with approval dissenting Justice Harlan Sr.'s position on the "colorblind" Constitution.[15] The writer uses Justice Harlan's position to criticize current affirmative action programs and then to explain how the courts have gone too far in implementing *Brown*.[16] Rather than stopping with *Brown*, "lower court judges were willing to expand a wide range of claims by overleaping legislatures, and . . . this routine short-circuiting of any political consensus . . . lies at the heart of many current social tensions."[17]

According to the writer, *Brown*, necessitated by an inactive Congress, "freed the political system to respond to claims being made by . . . the civil rights movement."[18] While "that cause was just," the legislative process is not always swift, and "the great, often volatile arguments today are between those who seek social solutions from courts and those who want these matters exposed to the politics of legislating."[19] The writer closes by hailing *Brown* as "one of the greatest landmarks in this continuing American experiment."[20]

Forty years after *Brown*, the most prominent American journal of conservative opinion celebrates the controversial desegregation decision. This constitutes a significant shift for the *Journal*. In 1964, a columnist described the "warm applause and bitter criticism" of the decision this way: "The ruling has been praised as a meaningful advance to American democracy, as a long step toward lifting, for colored children, the supposed stigma of inferiority imposed by separation along racial lines."[21] As the stigma was "supposed," so the civil rights organizations were "so-called," and they were "demanding more than the Supreme Court has recognized as their legal due,"[22] specifically that lower courts require school boards "to correct racial unbalance in schools. . . . To try to change this situation by busing large numbers of Negro children into white areas and white children into Negro areas is a foolish and mistaken idea."[23] There is no reference to the debate over the Civil Rights Act or to the question of overcoming the effects of previously segregated schools.[24] Now, the *Journal*'s editorial acknowledges the legitimacy of the Civil Rights movement. But it continues to suggest that all that has to be done has been done, just as the columnist did in 1964, prior to the Civil Rights Act's taking effect and before there was any substantial desegregation. The *Journal*'s position is more defensible now than it was in 1964, but its account fails to acknowledge the difficult and controversial issue of determining when the effects of a dual, or previously segregated, school system are overcome.

B. The *New York Times* May 18, 1994

The *New York Times*' (*Times*) editorial calls the fortieth anniversary of *Brown* "an occasion both for national pride and for national shame."[25] The writer praises *Brown* for having "liberated the nation from centuries of racial apartheid" but then says "it seems the national consciousness has changed but the re-

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[12] 163 U.S. 537 (1896).

[13] *Review and Outlook*, Wall Street Journal, May 17. 1994, A20. This statement mistakenly equates freedom with citizenship. For example, the issue in the famous Lincoln-Douglas debates of 1858 concerned whether self government allowed a majority to vote on the issue of slavery or freedom in the territories. Lincoln, who opposed slavery extension on moral grounds, proposed compensated emancipation and colonization until 1864, when it became apparent that the newly freed race would have to be given citizenship as well.

[14] *Id.* This is an interesting description of judicial activism, since the Court upheld the Louisiana law requiring "equal but separate" intrastate rail facilities.

[15] *Plessy*, 163 U.S. at 554. "The Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." *Id.*

[16] *Review and Outlook*, at A20.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] William Henry Chamberlin, *Schools & Race: A Decade Passes*, Wall Street Journal, May 15, 1964, editorial page.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Forty Years and Still Struggling*, The New York Times, May 18, 1994, 25.

ality lags far behind."[26] That is because "an unacceptable number of minority students still attend all-minority or nearly all-minority schools."[27] In place of legally sanctioned segregation, "suburbanization, white flight, industrial decay and political ennui" combine "to keep minority students in poorer districts, in schools with lower expectations for their students' achievement, in communities that are nurseries for failure."[28] The writer then describes the Supreme Court's claim, in *Plessy*, that enforced segregation had nothing to do with stamping one race as inferior as "bogus sociology" that had to be rejected before "America could . . . move forward."[29] This was a covert rejoinder to the criticism that followed the *Brown* Court's reliance on Kenneth Clark's sociological study of children's doll preferences to show the harmful effects of segregation.[30]

Efforts at implementation, the writer continues, are met with resistance in the South and more subtle non-compliance in the North.[31] Whites fled the cities so their children did not have to go to school with blacks, thus producing the imbalance in the city school district.[32] After referring to the gains attained by the Voting Rights Act of 1965, the writer describes the anniversary's "blend of satisfaction and frustration" by referring to the lawsuits challenging inequities in funding of school districts by property taxes and district lines, which allow residential segregation.[33] The final paragraph refers to the *Brown* decision as revolutionary and warns that if we do not live up to its promise in ten more years, "the price will be high."[34] The reader is not told what these final words mean.

In contrast to the *Journal*'s editorial, the *Times'* editorial indicates a keen appreciation of the limits of mere elimination of de jure school segregation. To what extent does the *Times'* editorial think the overriding challenge is adequate funding for schools, and to what extent does it suggest that the challenge continues to be actual racial integration or racial balance, in the public schools? The editorial seems to favor cross-district busing plans for metropolitan areas, even though there is neither political support nor public funds for such programs. Such plans are not likely to succeed even if they were tried because parents (regardless of their race) who are interested in the education of their children can, and do, send their children to private schools when the public schools fail.

II. THE SUPREME COURT'S RECENT SCHOOL DESEGREGATION DECISIONS

A. *Brown* and the Implementation Decisions

The editorial writers' divergent positions on *Brown* draw on and reflect, in part, the divergent positions that Justices of the Supreme Court have taken in recent school desegregation decisions. The issues raised in actual cases, however, are not as clear cut as either editorial writer suggests they are. In the most recent cases, the Court confronts questions concerning the test for determining when a school district has satisfied a judicial desegregation order. In the first case, the question concerns a district whose action is challenged as having a "segregative effect," but which is no longer subject to judicial enforcement. What is the test for this alleged violation?[35] In the second case, the question concerns whether a district can gain partial relief from judicial supervision or whether it must satisfy the supervising court in all respects to gain its autonomy.[36] And the third case concerns the application of the requirements for eliminating a formerly dual school system to a state's post secondary school system.[37] A brief review of *Brown* and the Supreme Court's most important early implementation decisions is necessary to understand these cases.

The original *Brown* decision concerned government enforced, or de jure, segregation, although part of the opinion cast doubt upon the adequacy of the de facto/de jure distinction. The question considered was, "Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities?"[38] The Court unanimously held that it does, stating that:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Board of Education of Oklahoma City Public Schools v. Dowell*, 111 S.Ct. 630 (1991).
[36] *Freeman v. Pitts*, 112 S.Ct. 1430 (1992).
[37] *United States v. Fordice*, 112 S.Ct. 2727 (1992).
[38] *Brown*, 347 U.S. at 494.

effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[39]

The Court has never abolished the de jure/de facto distinction. This has not always been clear, however, for two reasons. First, the opinion's emphasis on equal educational opportunity[40] and its implicit endorsement of the view that racial separation is harmful to the minority even without the sanction of law, allow one to argue that the constitutional mandate must be integrated public schools. Second, the Court's subsequent consideration and approval of appropriate remedies for overcoming the effects of a dual school system resemble a racial balance requirement. On the other hand, these approved remedies, which included busing, were always predicated upon a determination that the school system was "dual," and that the effects of that tainted system had to be eliminated. At first this meant that a freedom of choice plan for individual students was not a sufficient remedy for a previously segregated system, because it put too much of a burden on the individual black families who sought an integrated education. In *Green v. County School Board*,[41] decided in 1968, the Supreme Court ordered the school board to draw and adhere to compact district lines in order to achieve a "racially nondiscriminatory school system."[42] Since there was no significant residential segregation, however, the order did not require massive busing.[43] But the Supreme Court did require such busing three years later, in *Swann v. Charlotte-Mecklenburg*,[44] Chief Justice Burger wrote the unanimous opinion affirming that "once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad."[45] The opinion also indicated that once there was full compliance, which means the system is "unitary," then the racial balance requirement would not obtain.[46]

These two controversial but unanimous Supreme Court decisions laid out the constitutional requirements for school desegregation. When school desegregation cases arose in northern metropolitan areas, the Court's decisions ceased to be unanimous, but its approach remained the same. In Denver, which had not been a previously dual school system, a segregative act was found and as a result system wide desegregation orders were upheld.[47] In Detroit, however, a cross-district metropolitan remedy to a finding of segregation in the city's school system was overturned, because "it must be shown that racially discriminatory acts of either the state or local school districts, or of a single school district, have been a substantial cause of inter-district segregation."[48] Then in 1979, the Supreme Court, in two cases arising in Ohio, extended the full force of the "unitary school system" requirement to the North by asserting that school systems without laws which directly required segregated schools were still subject to judicially ordered remedies on the grounds that the schools were effectively segregated in 1954.[49] And in 1982, the Supreme Court decided two cases in which the state action was designed to curb mandatory busing which was aimed at overcoming the effects of de facto segregation.[50] The de facto/de jure distinction was once again maintained, although the Justices disagreed over what consti-

[39] *Id.* The opinion is sometimes referred to as *Brown* I, to distinguish it from the implementation decision of 1955. In that decision, the Court directed district courts "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." *Brown*, 349 U.S. at 300.

[40] A different approach was taken in the companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), which involved segregated schools in Washington D.C. and hence was treated under the Fifth Amendment's Due Process Clause. There racial classifications were held to be "suspect," and hence subject to "strict scrutiny."

[41] 391 U.S. 430 (1968).

[42] *Id.*

[43] *Id.*

[44] 402 U.S. 1 (1971).

[45] *Id.* at 15.

[46] *Id.* at 32.

[47] *Keyes v. School District*, 413 U.S. 189 (1973).

[48] *Milliken v. Bradley*, 418 U.S. 717, 745 (1974).

[49] *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *See also Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979).

[50] *Washington v. Seattle School District No. 1*, 458 U.S. 457, 468 (1982); *See also Crawford v. Board of Education*,

tuted government neutrality towards de facto segregation.[51]

B. The Supreme Court's Interpretation of *Brown* in the 1990s

The Supreme Court's treatment of school desegregation decisions reveals the importance and complex character of the distinction between government enforced or sponsored racial segregation (de jure) on the one hand, and the racial segregation, or imbalance, which results from the different reasons why people choose to live and hence go to school where they do on the other hand (de facto).[52] The first two recent cases involve primary and secondary school (K-12) systems; in each case, demographic changes in the school population affected the racial composition of the schools.

Board of Education of Oklahoma City Public Schools v. Dowell,[53] decided in 1991, illustrates the significance of the judiciary's control over remedies for constitutional violations in matters of school desegregation. A federal court, exercising its remedial power, can require or prohibit action by a school board on the basis of the projected effect on the racial distribution of students in the schools. A school board that is not under judicial control can act as it thinks appropriate, subject only to the Constitution's Equal Protection Clause requirement, which prohibits purposeful (de jure) discrimination.[54]

Oklahoma City operated a segregated school system at the time of *Brown*.[55] In 1963, the district court ordered it to dismantle the system.[56] There was no substantial progress until the district court ordered a system-wide busing scheme in 1972.[57] In 1977 the district court ended its jurisdiction, saying that the Board had operated the Plan properly and it did not foresee any dismantling of that Plan.[58] Due to demographic changes that had "led to greater burdens on young black children," in 1984 the school board reintroduced a neighborhood school system for grades K-4, along with a majority to minority transfer plan.[59] Petitioners, anticipating that the new plan would lead to less actual integration, filed a motion to reopen the case.[60] The district court denied the motion.[61] The court of appeals reversed, holding that the 1972 decree remained in force and imposed "an affirmative duty . . . not to take any action that would impede the process of disestablishing the dual system and its effects."[62] The Supreme Court, in a six-three decision, reversed the Tenth Circuit.[63] Writing for the Court, Chief Justice Rehnquist emphasized that "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination."[64] The Court then remanded the case to the district court to determine whether the school board had acted in good faith compliance as of 1985.[65] If so, a school board's subsequent actions, such as introducing the K-4 neighborhood school plan, would be subject only to the Equal Protection Clause, which protects against purposeful discrimination.

In an opinion joined by Justices Blackmun and Stevens, Justice Marshall dissented:

> [I] believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown* I persist and there remain feasible methods of eliminating such conditions . . . .[66] By focusing heavily on present and future compliance with the Equal Protection Clause, the majority's standard ignores how the stigmatic harm identified in *Brown* I can persist even after the State ceases actively to enforce segregation . . . .[67] [O]ur school-desegregation jurisprudence establishes that the *effects* of past discrimination remain

458 U.S. 527 (1982). In the Seattle case, a state initiative overturned the school district's integration plan. *Washington*, 458 U.S. at 457. In the Los Angeles case, a state constitutional amendment limited the state courts' power in school desegregation cases to the federal standard, i.e. overcoming the effects of de jure segregation. *Crawford*, 458 U.S. at 458. The Court held the Seattle effort unconstitutional 5-4, while it upheld the Los Angeles effort 8-1.

[51] Four Justices regarded the Seattle action as constitutionally impermissible because the political process was said to have been restructured in a "non-neutral way."

[52] *See* Daniel A. Farber, *Poverty and Discrimination: Notes on American Apartheid*, 11 Constitutional Commentary 455, 461 (Winter 1994-1995).

[53] 111 S.Ct. at 630.

[54] *Washington v. Davis*, 426 U.S. 229 (1976).

[55] *Dowell*, 111 S.Ct. at 632.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 633-634.

[59] *Id.* Under such a plan, which is common in desegregation efforts, black students may transfer from a school in which they are in the racial majority to a majority white school.

[60] *Id.* at 634.

[61] *Id.*

[62] *Id.* at 634-635.

[63] *Id.* at 637.

[64] *Id.*

[65] *Id.* at 638.

[66] *Id.* at 639 (Marshall, J. dissenting).

[67] *Id.* at 644 (Marshall, J. dissenting).

> chargeable to the school district regardless of its lack of continued enforcement of segregation, and the remedial decree is required until those effects have been finally eliminated . . . .[68] [O]ur cases have imposed on school districts an unconditional duty to eliminate any condition that perpetuates the message of racial inferiority inherent n the policy of state sponsored segregation . . . .[69] The racial identification of a district's schools is such a condition. [In] a district with a history of state-sponsored school segregation, racial separation, in my view, *remains* inherently unequal.[70]

As Justice Marshall sees it, as long as there are any racially identifiable schools in a school system that was once segregated, judicially enforced maximum racial balancing should apply. Why? Against the background of de jure segregation, Justice Marshall writes, "the persistence of racially identifiable schools perpetuates the message of racial inferiority associated with segregation. Therefore, such schools must be eliminated whenever feasible."[71] Under Justice Marshall's approach, very few school systems ever found to have been segregated will be able to gain relief from judicially enforced racial balancing. Do racially imbalanced schools in the 1990s "perpetuate[] the message of racial inferiority," as long as those schools were segregated in the past? If, as the district court had found, all vestiges of the prior de jure system had been eliminated, how does such a racially imbalanced school system send a message different from the one sent by any other racially imbalanced school system in the country? Perhaps Justice Marshall, who retired from the High Court on June 27, 1991, would urge the elimination of those imbalances also. Then the Court would have broken with the de jure/de facto distinction and mandated integrated public schools. As we turn to the 1992 cases, it will be worth keeping Justice Marshall's perspective in mind, as it helps to explain the diversity of opinion regarding the *Brown* mandate.

Our second case is *Freeman v. Pitts*.[72] In it, the Supreme Court reviewed the desegregation progress made in the DeKalb County Georgia School System (DCSS).[73] Following the Supreme Court's *Green* mandate, in 1969, a federal district court ordered DCSS to dismantle all vestiges of its dual school system.[74] The initial plan called for the elimination of all black schools and the implementation of a neighborhood school system.[75] In 1976 DCSS was ordered to expand its minority to majority student transfer program, to establish a biracial committee to oversee the transfer program, and to assign white and black teachers to schools to obtain a similar racial balance to that of the student population.[76] In 1986 DCSS went into court seeking a declaration that it had satisfied the duty to desegregate and was therefore free of judicial supervision.[77] The district court praised DCSS as "an innovative school system that has traveled the often long road to unitary status almost to its end," and found that the system was "a unitary system with respect to student assignments, transportation, physical facilities, and extracurricular activities."[78] It also found that "vestiges of a dual system remain in the areas of teacher and principal assignments, resource allocation, and quality of education," and thus ordered DCSS "to take measures to address the remaining problems."[79] The court of appeals reversed on two points: it held that DCSS had to become a unitary school system in order to lift judicial supervision; and it held that student assignments were not yet "unitary."[80]

Demographic shifts in the school district account for the disagreement on the second point. In 1969, it was relatively easy to integrate DeKalb County's schools, since there was no substantial residential segregation; the desegregation decree put a neighborhood school plan in place.[81] From 1969 to 1986, however, while the school population remained approximately 70,000, the black student population went from 5.6% to forty-seven percent.[82] The district court found that the racial imbalance was due to this demographic shift, not to the former

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[68] *Id.*
[69] *Id.* at 648 (Marshall, J. dissenting).
[70] *Id.*
[71] *Dowell*, 111 S.Ct. at 648.
[72] 112 S.Ct. 1430 (1992).
[73] *Id.*
[74] *Id.*
[75] *Id.* at 1436.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1437-1438.
[81] *Id.* at 1437.
[82] *Id.* at 1435. Between 1975 and 1980, some 64,000 blacks moved into southern DeKalb County, largely from Atlanta, and 37,000 whites moved out of southern DeKalb to surrounding counties.

de jure system.[83] After noting the steps DCSS had taken to alleviate the effects of the demographic changes,[84] the district court concluded that "absent massive busing, which is not considered a viable option by either [sic] the parties or this court," the magnet school and transfer programs "are the most effective ways to deal with the effects on student attendance of the residential segregation existing in DeKalb county at this time."[85] The court of appeals held that the racial imbalance was a vestige of the prior dual school system and that DCSS could have done more to achieve racial balancing.[86]

The Supreme Court, in a majority opinion handed down by Justice Kennedy, held that "federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations."[87] As for student assignments, the Court's position was: "Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors."[88]

While there were no dissents in this case,[89] Justices Scalia, Souter and Blackmun wrote separate concurrences, and the opinions highlight different concerns. Justice Scalia wrote that "the constitutional right is [to] equal racial access to schools not access to racially equal schools."[90] Therefore, he wanted the burden of proof to rest with the plaintiffs to demonstrate an equal protection violation.[91] For Justice Scalia, the extraordinary remedies that resistance to *Brown* necessitated are no longer necessary and hence no longer constitutionally required. Justice Souter wrote to suggest that the dual school system might itself be the cause of demographic shifts and that other *Green* factors, such as faculty assignments, might cause student imbalance in the future.[92] Likewise, Justice Blackmun, who only concurred in the judgment, and with whom Justices Stevens and O'Connor concurred, wrote to emphasize two points: first, the district court retains jurisdiction while it relinquishes "supervision and control" over parts of the system; second, on the matter of racial balance, DCSS "must prove that its own policies did not contribute" to the demographic changes.[93]

What accounts for this unanimous decision reversing the court of appeals and modifying the rules for judicial supervision of school districts which are in the process of becoming "unitary"? The decisive consideration for the Court seems to have been the good faith effort by the school system, in the face of the dramatic shift in the racial composition of the school population, and the resulting residential segregation. Since this demographic change occurred after a judicially accepted desegregation plan was implemented, the DeKalb case may be of limited significance for other school desegregation cases. This prospect may have pleased some Justices (Souter, Blackmun, Stevens and O'Connor) while it displeased another (Scalia). Still, the decision may signal a new stage in the judicial approach to desegregation. In this new era, courts are likely to give more weight to good faith efforts by school boards, at desegregation and quality education, than to arguments for continued judicial enforcement of racial balance, where the existing imbalance is not clearly connected to a segregative act.

In *United States v. Fordice*,[94] the Supreme Court applied its approach to school desegregation to Mississippi's post-secondary school system. In 1950, Mississippi had five schools for whites and three for blacks.[95] Despite the *Brown* decision, Mississippi's post secondary school system remained segregated by law until James Meredith was admitted, by court order, to the University of Mississippi in 1962.[96] The lawsuit that led to this decision was initiated in 1975. The case went to trial in 1987 after twelve years of failed negotiations.[97] The State argued "that the mere continued existence of racially identifiable universities was not unlawful given the freedom of stu-

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[83] *Id.* at 1434.

[84] *Id.* at 1434-1440. These steps included review of boundary lines and the majority to minority transfer program. In addition, magnet school programs were located in the middle of the county, in order to attract blacks from the southern and whites from the northern part.

[85] *Id.* at 1440-1441.

[86] *Id.* at 1442.

[87] *Id.* at 1445.

[88] *Id.* at 1447 (citing *Swann*, 402 U.S. at 31-32).

[89] Justice Thomas, who was recently sworn in, did not participate in this decision.

[90] *Freeman*, 112 S.Ct. at 1452.

[91] *Id.*

[92] *Id.* at 1454-1455.

[93] *Id.* at 1456, 1457-1460.

[94] 112 S.Ct. 2727 (1992).

[95] *Id.* at 2732. The schools for whites were: University of Mississippi, Mississippi State University., Mississippi University for Women, University of Southern Mississippi, and Delta State University. The schools for blacks were: Alcorn State University, Jackson State University, and Mississippi Valley State University. For a further discussion see also *United States v. Fordice*, 112 S.Ct. 2727 (1992), 1 REAL Digest 39.

[96] *Fordice*, 112 S.Ct. at 2732.

[97] *Id.* at 2733.

dents to choose which institution to attend and the varying objectives and features of the State's universities."[98] The district court agreed. First, it ruled that in the higher education context "greater emphasis should . . . be placed on current state higher education policies and practices in order to insure that [they] are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiability of individual institutions."[99] It concluded that "the defendants are fulfilling their affirmative obligation to disestablish the former de jure segregated system of higher education."[100] The court of appeals affirmed, holding that the State's "race neutral policies" give students "real freedom of choice to attend the college or university they wish. . . ."[101] The Supreme Court unanimously reversed, although not without some interesting concurring opinions.

Writing for the Court, Justice White denied that "race neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system."[102] He identified four policies of the present university system that were constitutionally suspect: "admissions standards, program duplication, institutional mission assignments, and continued operation of all eight public universities."[103] The admissions requirements were slightly higher for the historically all-white schools than for the historically all-black schools.[104] Given the previous dual school system and the likely effect of these different standards, the Court was unanimous in holding this provision unconstitutional.[105]

Justice White's discussion of program duplication, the mission statements, and the continued operation of all eight institutions suggested an approach to a previous dual school system that might eliminate single race institutions of higher education. This might happen no matter how much black students wanted that option. Justice Thomas, who concurred in the decision, took pains to emphasize that the standard to be used "is far different from the one adopted to govern the grade-school context in *Green* . . . . In particular, because it does not compel the elimination of all observed racial imbalance, it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions."[106] Justice Thomas's opinion is aimed at demonstrating the legitimacy of institutions of higher education "open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another."[107] This was in reply to Justice White's statement that the State may not publicly finance "exclusively black enclaves" simply because that is what the private petitioners want. "It would be ironic, to say the least," Justice Thomas concludes, "if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."[108] Justice O'Connor's brief concurring opinion emphasized the extent to which the State's history of discrimination in education justifies using the *Green* approach to desegregation in higher education.[109] She does not discuss the likely effects on all black educational institutions.[110]

Justice Scalia concurred in the judgment because of the different admissions requirements, but he dissented otherwise. The Court's approach, he wrote, resembles the *Green* approach which "has no proper application in the context of higher education, provides no genuine guidance to States and lower courts, and is as likely to subvert as to promote the interests of those citizens on whose behalf the present suit was brought."[111] Combining schools or making mission statements uniform will reduce, not increase, choice, and requiring the State to prove that racially identifiable schools are not the result of past de jure segregation "will imperil virtually any practice or program plaintiffs decide to challenge—just as *Green* has—as long as racial imbalance remains."[112] In Jus-

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[98] *Id.*

[99] *Id.* at 2735. The District Court relied on *Bazemore v. Friday*, 478 U.S. 385, 407 (1986) (holding that 4-H and Homemaker Clubs affiliated with states agricultural service, which were segregated prior to 1965, and which discontinued the policy afterwards, did not have to overcome any existing racial imbalance, as that was held to be "the result of wholly voluntary and unfettered choice of private individuals").

[100] *Id.* at 2735.

[101] *Id.*

[102] *Id.* at 2736-2737. Justice White found *Bazemore*, upon which the lower courts had relied, inapplicable because there, unlike here, the District Court had concluded that any existing racial imbalance was the result of "the wholly voluntary and unfettered choice of private individuals" (citing *Bazemore*, 106 S.Ct. at 3012).

[103] *Id.* at 2738.

[104] *Id.* at 2738-2739.

[105] *Id.* at 2739.

[106] *Id.* at 2744.

[107] *Id.* at 2746.

[108] *Id.*

[109] *Id.* at 2743.

[110] *Id.*

[111] *Id.* at 2752.

[112] *Id.*

tice Scalia's view, once discriminatory admissions standards are eliminated, and here the burden is on the formerly de jure system to demonstrate this, then the State should be free to govern itself, subject to the "discriminatory intent and discriminatory causation test of the Constitution's Equal Protection Clause.[113] Furthermore, he thinks the current test "is designed to achieve . . . the elimination of historically black institutions."[114]

III. CONCLUSION

In *Brown v. Board of Education*, the Supreme Court unanimously outlawed racial segregation in public schools. While it took over a decade and the support of the legislative and executive branches of the federal government, that monumental decision abolished de jure segregation in this country. But the opinion spoke about equal educational opportunity and the effects of separation were described in such a way as to imply that actual integration might be necessary to provide that opportunity. The Court has insisted on two things over the years: that a finding of de jure segregation must be made; and that, where it has been made, the burden remains with the school system to eradicate the effects of the prior de jure, or dual school system. The *Wall Street Journal's* editorial focuses on the limits of the first point without appreciating the significance of the second. The *New York Times'* editorial, on the other hand, well aware of the extensiveness of the requirements of disestablishing de jure segregation, tends to assume that the *Brown* mandate calls for actual racial integration, i.e. racial balance.

The most recent cases, the three from the 1990s, reveal the importance of releasing school districts from judicial control where they have demonstrated a good faith effort at overcoming the effects of a previous de jure system. They also reveal the difficulty of clearly accounting for the causes of current racial imbalance. That last point is especially important in the *Fordice* case, where the context is post-secondary education. Not only are there no attendance zones, as attendance is not required, but "racial imbalance" may, assuming no purposeful discrimination in the present, simply reflect the choices of some African-Americans to attend predominantly black institutions. The Supreme Court has recognized the significance of the difference between primary and secondary schools and post secondary schools in the context of aid to parochial schools.[115] It should be done in this context as well, for the reasons Justice Thomas gives in his *Fordice* opinion. In addition, if the Court can go out of its way to protect all-women's colleges and universities, even as it upholds a man's right to attend the nursing school of his choice, it should do no less for historically black colleges and universities.[116]

The *Dowell* and *Pitts* cases attest to the Court's increasing willingness to allow school boards to regain control over their school systems, in whole or in part, where they have persuaded district courts that they have made a good faith effort at desegregation. This is sound constitutional law because the causes of racial imbalance are increasingly distant from the de jure regimes which *Brown* held unconstitutional and the presumed benefits of judicially enforced racial balance are doubtful. Let the focus be on educational quality and let good faith efforts at that end be permitted. Otherwise, more and more children, white and black, will simply flee the public school system for private schools.

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[113] *Id.*

[114] *Id.* at 2753.

[115] *See Tilton v. Richardson*, 403 U.S. 672 (1971); *Roemer v. Maryland Public Works*, 426 U.S. 736 (1976); *Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481 (1986)

[116] While Justice O'Connor made no reference to all black schools in her *Fordice* concurrence, she went out of her way to limit the reach of her court opinion in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). *Fordice*, 112 S.Ct. at 2743. In that case, the court decided in favor of a male's challenge to the single sex status of the nursing school, but Justice O'Connor insisted that the ruling applied only to the nursing school, not to other single sex schools and departments.