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I. Introduction

The jurisprudence of the Warren Court was inherently political,[1] and its legacy, which endures today, is also inherently political. The very term "the Warren Court" is synonymous with notions of progressive values and a long string of decisions that were courageous in their time for interpreting the Constitution expansively. But one cannot view this one legacy of the Warren Court in a vacuum. The Burger Court, and the Rehnquist Court after it, have systematically undermined the legacy of the Warren Court. Often, they did not clearly and directly overrule Warren Court decisions. Rather, those later

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1. *See generally* ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT (1973) (discussing interaction of politics and Constitution during Warren Court); PHILIP B. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT (1970) (surveying politics of Warren Court after appointment of Chief Justice Burger).

Courts systematically weakened the legacy of the Warren Court through decisions cloaked in the language of federalism and separation of powers.

This dynamic is clear throughout all aspects of the Warren Court's legacy that this Symposium explores, from criminal procedure, to apportionment, to civil liberties. *Brown v. Board of Education*[2] is the heart and soul of the Warren Court's progressive legacy, and *Brown* provides a compelling illustration of the evolving legacy of the Warren Court.[3]

My comments about the Warren Court's legacy and the institutional role of the federal courts focus on *Brown* and the implementation decisions that followed it. *Brown*, of course, acts as the centerpiece of the Warren Court's progressive jurisprudence, standing for the proposition that racial segregation in education is inherently unequal. In theory, *Brown* illustrates the Warren Court's progressive legacy as a champion for civil rights. However, the Burger and Rehnquist Courts narrowed the meaning of *Brown* by constraining the ability of federal courts to remediate the harms caused by racial segregation. As I will demonstrate, these courts grounded their articulated rationales in the concept of federalism: to "protect" the states and localities against the purported overarching power of the federal government and thus to delineate the appropriate boundaries between state and federal power. The Burger and Rehnquist Courts achieved this "protection" by imposing an overly rigid causation requirement in situations in which the school district arguably was not responsible for racially identifiable schools.[4] Viewing the *Brown* implementation decisions as a whole, we see that the imposition of a rigid causation requirement has placed extraordinary constraints on the power of the federal courts to protect the rights of minority group members. Accordingly, the rigid causation requirement has largely prevented those courts from providing appropriate relief in many school segregation cases.[5]

Ultimately, the *Brown* implementation decisions are important for more than what they tell us about education, race, and equality. I argue that these decisions illustrate the accordion-like relationship between placing limits on federal remedial power and contracting the underlying substantive right.

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

3. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 286 (1993) ("Instead, *Brown v. Board of Education* stands at the head of the cases decided by the Warren Court. In many ways, *Brown* was the watershed constitutional case of this century . . . . When *Brown* struck down school segregation, it signaled the beginning of effective enforcement of civil rights in American law.").

4. *See infra* Part II (discussing standards used by Burger and Rehnquist Courts in determining causation in desegregation cases).

5. *See infra* Part IV (describing impact of rigid causation requirements on relief provided by courts).

Brown's progeny demonstrate how efforts to limit the lower federal courts' remedial power in the name of protecting state and local interests have overridden, and thus redefined, the *substantive* vision of equality advanced by the Warren Court. At base, the Supreme Court has placed curbs on the lower federal courts' ability to issue meaningful remedies for violation of the desegregation mandate, on the theory that the use of the federal judicial power in those cases was excessive, and that state and local interests needed protection against an overarching federal judiciary bent on aggrandizement.

I maintain that the implementation decisions issued many years after *Brown I* by successive Supreme Courts have changed what *Brown* actually means. Over time, the federal judiciary grappled with the question of crafting appropriate remedies, both in cases involving a harm caused by a confluence of public and private discriminatory actions, and in cases in which significant racial integration would require restructuring school districts and perhaps entire metropolitan areas. This created conflict within the judiciary, as an increasingly conservative Supreme Court wrestled with the application of *Brown* and its progeny.

The paradigmatic example is, of course, *Milliken v. Bradley*.[6] In *Milliken*, the Supreme Court said that the core problem was federalism – for a federal court simply could not engage in a "complete restructuring of the laws [of a state] relating to school districts"[7] in the absence of a constitutional violation of sufficient scope necessary to support such a remedy. What constitutional violation could provide this basis? In order to sustain such a far-reaching remedy, "it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial *cause* of interdistrict segregation."[8] Plaintiffs could rarely meet this burden and, as a result, *Milliken* made it "all but impossible to achieve racial integration within predominantly minority school districts."[9] This Article explores how this change in meaning occurred and argues that the methodology embedded within the *Brown* implementation cases is important for understanding subsequent Supreme Courts' responses to the progressive possibilities raised by the Warren Court more generally.

The *Brown* implementation decisions are also important because the patterns within them are present in at least two other areas of constitutional law: standing doctrine and municipal liability. In those areas, the Burger and Rehnquist Courts also express a purported commitment to an important

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6. 418 U.S. 717 (1974).

7. Milliken v. Bradley, 418 U.S. 717, 743 (1974).

8. *Id.* at 745 (emphasis added).

9. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION 144 (1996).

structural principle (such as federalism or separation of powers) that supposedly restrains a federal court's power to hear a case, hold an entity liable, or issue appropriate relief. In each of these areas, the Court resorts to an overly rigid causation analysis to reach foregone conclusions. Thus, in the standing analysis, the Court focuses on the lack of a direct causal relationship between the injury and the conduct sufficient to create a judicially cognizable claim.[10] Similarly, in the municipal liability context, the Court emphasizes the need for a direct causal link between the municipal action and the alleged deprivation to protect local autonomy and guard against federalizing hiring standards.[11]

The Burger and Rehnquist Courts have cast the Court as a champion of seemingly "neutral" constructs such as federalism and separation of powers, while simultaneously undermining the progressive reforms championed by the Warren Court.[12] This response, fealty to structural principles through a methodology that applies causation requirements strictly, represents at least one "jurisprudential legacy" of the Warren Court. This Article concludes by examining the imposition of rigid causation constraints in the affirmative action area and asking if the same federalism and separation of powers concerns that animated the imposition of such constraints in other areas are also present there. As it turns out, the Court has applied strict notions of causation in the affirmative action area in a manner that undermines the ability of governmental actors to justify affirmative action plans. In each of these areas, standing doctrine, municipal liability, and affirmation action, a reliance on rigidly-applied causation has resulted in rulings that frustrate the progressive aims of the Warren Court.

II. The Brown *Implementation Decisions: The Right and the Remedy*

At the core of *Brown v. Board of Education* was a potentially revolutionary and redemptive statement: the Court's admonition that "separate educational facilities are inherently unequal."[13] The ramifications of this ruling were so clearly incendiary that the Court itself retreated from them a year later by issuing a weak and oft-criticized implementation decision[14] that provided

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10. *See infra* Part III.A (describing changes in standing doctrine between Warren Court and subsequent Supreme Courts).

11. *See infra* Part III.B (describing limitations on imposing constitutional claims for liability on municipalities).

12. *See, e.g.*, Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1309-10 (1999) ("Experience with federalism doctrine in particular similarly demonstrates that judges invoke the doctrine selectively to promote policy objectives.").

13. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

14. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

a roadmap for future recalcitrance.[15] In 1958, the Court in *Cooper v. Aaron*[16] used the crisis at Little Rock as an opportunity to further assert its authority to "say what the law is,"[17] but it did not provide any additional guidance as to what *exactly* the desegregation mandate actually required.

Indeed, the Court did not return to the question of implementation of its *Brown* mandate with any specificity until nearly the end of the Warren Court era in 1968. That case, *Green v. County School Board of New Kent County*,[18] presented the Court with a desegregation question, but in perhaps the easiest possible factual milieu: a rural Southern county, formerly *de jure* segregated, with little residential integration.[19] In *Green*, the Court took the opportunity to say that its patience had finally run out and that delay was no longer tolerable.[20] Thus, the Court issued its famous admonition that school boards had an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[21] But in enunciating this broad mandate, the Court did not provide specificity with respect to what was required of school districts except in the most uncomplicated of circumstances.[22]

Nevertheless, the transformative potential of *Brown I* remained as the Warren Court era came to a close, and so a Supreme Court dominated by increasingly conservative majorities came to determine what the desegregation mandate really required. In 1971, the Court issued its much heralded *Swann v. Charlotte-Mecklenburg Board of Education*[23] decision, which formulated guidelines for school districts and district courts to consider in managing the transition to "unitary" school systems.[24] In enunciating the responsibilities of local school districts and the outlines of the federal courts' power to issue appropriate remedies, the Supreme Court took cognizance of a transcendent

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15. *See* DONALD E. LIVELY, THE CONSTITUTION AND RACE 112-15 (1992) (describing aftermath of *Brown v. Board of Education*).

16. 358 U.S. 1 (1958).

17. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

18. 391 U.S. 430 (1968).

19. *See* Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 432 (1968) (explaining that "[t]here is no residential segregation in the county").

20. *Id.* at 438.

21. *Id.* at 437-38.

22. Indeed, the Court clarified what would not meet *Brown*'s mandate by stating that freedom of choice plans used alone in a manner that does not indicate "real promise of aiding a desegregation program" were insufficient. *Id.* at 440-41.

23. 402 U.S. 1 (1971).

24. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971) (discussing lower courts' need for guidelines in implementing *Brown*'s mandate).

social reality, the "housing-schools nexus"[25] by stating that "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods."[26]

That the Court understood the importance of this core reality was deeply encouraging; that it was prepared to endorse the lower federal court's use of its remedial power to disestablish this reality was even more stunning.[27] But this epiphany was one that the Court regrettably was soon to forget. As the press of the desegregation mandate moved North, the Supreme Court's willingness to engage in the ongoing and difficult endeavor of desegregating northern schools, which had never been the subject of *de jure* segregation requirements, flagged.[28]

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25. *See* CHARLES E. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT 595-600 (3d ed. 1999) (describing judicial responses to relationship between housing conditions and educational opportunity).

26. *Swann*, 402 U.S. at 20- 21.

27. *Id.* The Court's discussion of the gravity of the housing-schools nexus was full-throated and comprehensive. The Court continued:

> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

Id. at 21.

28. *See, e.g.*, LIVELY, *supra* note 15, at 120-26. In retrospect, the transitional case is clearly *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973), which held that, in the absence of *de jure* segregation, that plaintiffs must prove that the segregated conditions resulted from the "School Board's deliberate racial segregation policy." *Id.* at 204. As Donald Lively has aptly observed, in reality the *de jure/de facto* distinction meant that when segregation "could be attributed to other factors other than what the Court would consider purposeful state action, no duty to desegregate would exist." LIVELY, *supra* note 15, at 120. The majority tempered this holding somewhat by ruling that plaintiffs would not be required to make a fresh showing of segregative intent with respect to each portion of the city in which they sought relief. *Keyes*, 413 U.S. at 208. The majority opinion in *Keyes* sparked a sharp dissent from then Justice Rehnquist that probed the appropriate indicia of proof necessary to sustain a showing of a constitutional violation in a school district that had not formerly been segregated by law. *Id.* at 254

The flashpoint of the Court's resistance focused on the housing-schools nexus specifically, and on demographic change more generally. The Court ultimately would decide the question of *Brown*'s essential meaning (that is, what did the *Brown* plaintiffs really win?) by balancing the relative powers of two institutional players: the states and their localities (described by reference to the importance of protecting concepts of federalism) and the federal courts (described by reference to those courts' power to grant on-going injunctive relief in the form of desegregation decrees).

Milliken v. Bradley,[29] which the Burger Court decided in 1974, was the watershed. *Milliken* concerned a suit that had been brought against the City of Detroit, the Michigan Board of Education, and a variety of other state and local governmental defendants alleging, *inter alia*, that the Detroit public school system was segregated on the basis of race.[30] The district court held that because "[g]overnmental actions and inaction at all levels . . . have combined, with those of private organizations . . . to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area,"[31] a metropolitan, multidistrict remedy was appropriate. This ruling was based on the district court's belief that "relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographic limits of the city."[32] School district attendance zones were based on residence: white children largely attended suburban schools because they lived in suburban areas.[33] Thus, the district court sought to include fifty-three suburban school districts in an interdistrict desegregation remedy.[34] The lower courts ruled that this method was the only way to achieve actual desegregation.[35]

The Burger Court disagreed and ruled that the district court exceeded the scope of its remedial authority by granting interdistrict relief in the absence

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(Rehnquist, J., dissenting). Rehnquist's view was that the majority had erred because it had taken a "long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in a district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did so require." *Id.* at 265 (Rehnquist, J., dissenting).

29. 418 U.S. 717 (1974).

30. *See* Milliken v. Bradley, 418 U.S. 717, 723 (1974) (describing allegations that Detroit's schools were radically segregated).

31. *Id.* at 724.

32. *Id.* at 765-66 (White, J., dissenting).

33. *See id.* at 771 n.5 (White, J., dissenting) (describing movement of white children to predominantly white schools near city borders during optional attendance program).

34. *Id.* at 733.

35. *Id.* at 752.

of a finding of an interdistrict constitutional violation.[36] The Court resorted to the maxim of equity jurisprudence that "the scope of the remedy is determined by the nature and extent of the constitutional violation."[37] In practice, this ruling required plaintiffs to show that the state or the suburban school districts were a "substantial cause" of the racial segregation present within the school district seeking a multidistrict remedy.[38] Conveniently ignoring findings below of state culpability,[39] the Court grafted a strong causation constraint into its interpretation of the lower federal courts' equity powers.

By imposing this causation requirement, the Court prevented the use of the suburban school districts as an integrative resource, notwithstanding the fact that a Detroit-only plan would have left the Detroit public schools "75 to 90 percent black and that the district would become progressively more black as whites left the city."[40] *Milliken* severely undercut *Brown* as a vehicle for providing racially integrated education. Imposition of a rigid causation requirement constrained the extent of the federal courts' power to provide such a remedy because neither the state nor the suburbs *caused* the injury. The practical result, of course, was that the causation requirement significantly affected the nature and quality of the right at issue. As the Court of Appeals for the Sixth Circuit had so eloquently stated below, to conclude that a Detroit-only remedy would be appropriate was to return to the "haunting memories of the now long overruled and discredited 'separate but equal doctrine' of *Plessy v. Ferguson*," thus "nullify[ing] *Brown v. Board of Education* which overruled *Plessy* . . . ."[41]

The Supreme Court's desegregation implementation jurisprudence since that time has followed *Milliken's* lead. Decided just a few years later, *Pasadena City Board of Education v. Spangler*[42] was entirely consistent with *Milliken's* approach to defining the scope of the federal courts' remedial powers.[43] To *Milliken's* admonition that right and remedy must be casually related, *Pasadena* added that the presence of a "normal pattern of human

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36. *Id.* at 744-45.

37. *Id.* at 744.

38. *See id.* at 745 ("Specifically, it must be shown that racially discriminatory acts of the . . . school districts . . . have been a substantial cause of interdistrict segregation.").

39. *See id.* at 770-73 (White, J., dissenting) (describing lower court's finding of state culpability).

40. *Id.* at 767 (White, J., dissenting).

41. Bradley v. Milliken, 484 F.2d 215, 249 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

42. 427 U.S. 424 (1976).

43. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976) (cautioning that courts have limited power to dismantle dual school systems).

migration"[44] – meaning the movement of whites out of certain residential areas, frustrating the aims of desegregation – would not support the federal courts' ability to compel school districts to alter school attendance zones that could take account of those changes.[45]

As in *Milliken*, the Burger Court recognized the "schools/housing nexus" in that it appreciated that any change in Pasadena's residential patterns would have an impact on the racial composition of its public schools.[46] But, again mirroring the *Milliken* case, the Court largely ignored the import of that connection. Instead, the Court again framed the constraint on the district court's remedial powers in the language of causation. The Court clearly stated that the district court never had the authority to impose an ongoing requirement that no school within the Pasadena system have a majority of minority students because "subsequent changes in the racial mix . . . might be caused by factors for which the defendants could not be considered responsible."[47] The Court thus framed the federal court's remedial jurisdiction in terms of its limits, which were enforced and maintained by a tightly defined causation requirement.[48]

Flash forward a few years to the Rehnquist Court. The question becomes: when can courts release school districts that have been subject to desegregation decrees from federal judicial oversight? In *Board of Education of Oklahoma City v. Dowell*,[49] the Rehnquist Court answered this question and thereby placed its indelible stamp on the *Brown* desegregation mandate and implementation jurisprudence.[50] Like the Burger Court, the Rehnquist Court resorted to causation as the tool to constrain the ability of the lower federal courts to structure remedies. This limitation on the ability to structure remedies had the practical effect of actually constraining the underlying right.

In *Dowell*, the question was: when may a court dissolve a desegregation decree? The Court of Appeals for the Tenth Circuit had held that the Oklahoma Board of Education could only be relieved of federal judicial

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44. *Id.* at 436.

45. *See id.* at 436-37 (stating district court fully performed its function of providing remedy after implementing racially neutral attendance pattern and that district court could not require rearranging attendance zones annually to preserve desired racial mix).

46. *See id.* at 436 (stating that "normal human migration" will result in shifts of racial mix at some schools).

47. *Id.* at 434.

48. *See id.* ("These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation . . . .").

49. 498 U.S. 237 (1991).

50. *See* Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237, 250 (1991) (reasoning that school district released from desegregation injunction no longer required court supervision).

oversight, and the desegregation decree dissolved, upon a showing of "dramatic changes in conditions unforeseen at the time of the decree that . . . impose extreme and unexpectedly oppressive hardships on the obligor."[51] The problem from the Tenth Circuit's perspective was that, despite a prior finding of unitary status, several of Oklahoma's schools would revert to being predominantly black even under the outstanding desegregation plan.[52] Thus, the Tenth Circuit refused to lift the injunction because "circumstances . . . had not changed enough to justify modification of the decree."[53]

The Rehnquist Court ruled that this standard was too high. Desegregation decrees were not intended to operate into perpetuity; the goal was a return to local control over decision-making affecting the schools.[54] What counted in determining whether a court could terminate an injunction was the school board's "good faith" and whether the vestiges of the past discriminatory action had been "eliminated to the extent practicable."[55] This forward-looking standard asked whether the school district was currently engaging in *de jure* segregative conduct; it was far less concerned with the ongoing vestiges of past discriminatory conduct.[56] This relaxed standard essentially invited withdrawal of federal judicial oversight and allowed school districts to revert to local control in a manner that ignored, in Justice Marshall's words, the "unique harm associated with a system of racially identifiable schools."[57] In this manner, as before, constraint on the ability to order ongoing relief operated to limit and redefine the underlying substantive right.

Justice Marshall's dissent in *Dowell* explicitly examined the housing-schools nexus and the related question of causation. As Justice Marshall accurately indicated, the majority opinion adopted a relaxed standard for ordering the dissolution of a desegregation decree in the teeth of prior judicial findings that the school board had "destroyed some integrated neighborhoods and schools" and had "preserved and augmented existing residential segregation."[58] The majority opinion seized on a more recent district court opinion

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51. *Id.* at 244.

52. *See id.* (stating that number of schools would return to being primarily one-race under existing plan).

53. *Id.*

54. *See id.* at 248 (noting that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination").

55. *Id.* at 249-50.

56. *See id.* 250-51 ("If the Board was entitled to have the decree terminated as of 1985, the District Court should then evaluate the Board's decision to implement the SRP under appropriate equal protection principles.").

57. *Id.* at 257 (Marshall, J., dissenting).

58. *Id.* at 254 (Marshall, J., dissenting).

which found that present residential segregation was the result of "private decisionmaking and economics" and thus could not be charged to the school board.[59] The problem was that the record contained other, more ominous findings suggesting that the school board helped to create residential segregation which, in turn, created segregated schools.[60]

As in *Milliken*, the Court in *Dowell* paid "insufficient attention to the roles of the State, local officials, and the Board in creating what are now self-perpetuating patterns of residential segregation."[61] The Court was all too willing to accept a narrative which presumed that the school district did not cause residential segregation and that the cause or causes of such segregation were due to "personal preferences," safely outside the purview of constitutional requirements and federal judicial authority. This narrative foreshortened the federal courts' oversight even as it further redefined the nature of the right articulated in *Brown I*.[62]

More recently, the Rehnquist Court has evoked *Milliken* to constrain the excessive use of federal power in implementing desegregation decrees and to ensure that state and local governments are not stripped of their "existence as

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59. *See id.* at 243 (stating that present residential segregation was "too attenuated to be a vestige of former school segregation" and attributing present residential segregation to private decision-making and economics).

60. As Justice Marshall argued:

> The record in this case amply demonstrates this form of complicity in residential segregation on the part of the Board. The District Court found as early as 1965 that the Board's use of neighborhood schools "serve[d] to . . . exten[d] areas of all Negro housing, destroying in the process already integrated neighborhoods and thereby increasing the number of segregated schools." It was because of the School Board's responsibility for residential segregation that the District Court refused to permit the Board to superimpose a neighborhood plan over the racially isolated northeast quadrant.

Id. at 264-65 (Marshall, J., dissenting) (citations omitted).

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

62. Decided the following year, *Freeman v. Pitts*, 503 U.S. 467 (1992), also concerned the question of when a court may release a school district from federal judicial oversight. In *Freeman*, the Court held that federal judicial oversight of a school district's desegregation plan may be released incrementally. *Id.* at 490-91. Thus, a school district may be released from supervision in areas in which it has achieved compliance even though it has not complied with the desegregation order in its entirety. *Id.* at 491. *Freeman* was consistent with *Dowell* in that it reaffirmed the notion of a restricted role for the federal courts in providing a remedy for segregative actions. As Laurence Tribe has suggested with respect to *Freeman*: "[T]he case stands for the proposition that a district court is to be concerned primarily with remedying specific violations of the law, not with remedying social problems, such as racially segregated residential housing patterns, allegedly caused by phenomena triggered by, but not quite directly and demonstrably traceable to, specific governmental actions taken in violation of federal law." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 606 (3d ed. 2000).

independent governmental entities."[63] In *Missouri v. Jenkins*,[64] the Court reviewed certain elements of a wide-ranging desegregation plan covering the Kansas City, Missouri metropolitan school district (KCMSD).[65] In 1985, the district court found the State of Kansas and the KCMSD liable for creating an *intradistrict* violation in that they operated "a segregated school system within the KCMSD."[66] Because of *Milliken*, the district court was constrained in its ability to use white students located in suburban areas outside of the KCMSD as an integrative resource.[67] Recognizing this constraint, the district court ordered, *inter alia*, significant capital improvements for schools within the KCMSD, including an expensive magnet program and significant salary increases for school staff.[68] The explicit rationale for these improvements and the salary order was "desegregative attractiveness;"[69] that is, to "draw non-minority students from the private schools who have abandoned or avoided KCMSD, and draw in additional non-minority students from the suburbs."[70]

In assessing the state's challenge to the district court's order, the Court began with the familiar equity maxim that it had applied with devastating effect in *Milliken*: the scope of the violation determines the scope of the appropriate relief.[71] Because the district court had not found an *interdistrict* constitutional violation, the district court was outside of its remedial authority in ordering a remedial plan that sought the *interdistrict* goal of "desegregative attractiveness."[72] In *Jenkins*, the Court reaffirmed its ruling in *Milliken* that had turned on causation: "A district court seeking to remedy an intradistrict violation that has not 'directly caused' significant interdistrict effects, exceeds its remedial authority if it orders a remedy with an interdistrict purpose."[73] The task of the district court was to remedy the violation to the "'extent practicable.'"[74] Thus, the Court had moved to an understanding of an appropriate

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63. Missouri v. Jenkins, 515 U.S. 70, 131 (1995).

64. 515 U.S. 70 (1995).

65. *Jenkins*, 515 U.S. at 131.

66. *Id.* at 74.

67. *See id.* at 76 (refusing to allow interdistrict redistribution without interdistrict violation).

68. *See id.* at 76-78 (discussing district court's comprehensive improvement plan).

69. *See id.* at 94 (finding that district court's "pursuit of 'desegregative attractiveness' is beyond the scope of its broad remedial authority" (citing Milliken v. Bradley, 433 U.S. 267, 280 (1977))).

70. *Id.* at 77 (quoting district court opinion of same case).

71. *Id.* at 88 (relying on "principle that the nature and scope of the remedy are to be determined by the violation" (quoting *Milliken*, 433 U.S. at 281-82)).

72. *Id.* at 94.

73. *Id.* at 97 (citation omitted).

74. *Id.* at 89 (quoting Freeman v. Pitts, 503 U.S. 467, 492 (1992)).

remedy that saw the harm from a position of constraint. That is, through the *Jenkins* decision, right and remedy now had an accordion-like relationship, each contracting together. As the Court had constrained the ability of the lower federal courts to enter wide-ranging relief, so too had it diminished the nature of the right.

By reviewing *Brown I* and its progeny, the Warren Court's legacy and the way that subsequent Courts have shaped and molded that legacy becomes apparent. The Warren Court in *Brown I* proclaimed that separate educational facilities were inherently unequal.[75] This ruling was critically important in declaring an incredibly significant constitutional principle. However, later Courts shouldered the burden of implementing that principle in real life. Those later Courts used the language of federalism as a sword, effectively cutting away much of the lower courts' ability to implement *Brown I* in any meaningful way.

III. Standing and Municipal Liability

The pattern illustrated in *Brown* and its progeny is readily apparent in two other areas of constitutional law: standing and municipal liability. In both of these areas, the Warren Court created a legacy that cannot be reviewed without looking at the decisions of later Courts. Therefore, in each of these areas, I highlight one "signature" case that typifies the use of a rigid causation requirement to frustrate progressive aims, to further "neutral" notions of constitutionalism, and to enforce certain structural principles, such as federalism and separation of powers.

A. The Law of Standing: Separation of Powers Concerns

"Standing," or the question of "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy,"[76] is part and parcel of the Article III, Section 2 requirement that federal courts decide "Cases" or "Controversies."[77] So as not to exceed its power under Article III, a federal court may only entertain an action in which the party before it has a constitutionally sufficient claim.[78] The standing requirement has both constitutional and prudential elements.[79] This Article will focus on the constitutional elements of injury in fact, causation, and

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75. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (concluding that doctrine of "separate but equal" has no place in modern jurisprudence).

76. Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

77. U.S. CONST. art. III, § 2.

78. TRIBE, *supra* note 62, at 387-88.

79. *Id.* at 386-87.

redressability,[80] and then analyze the causation and redressability elements more specifically. The causation element requires the injury to be "'fairly traceable' to the actions of the defendant."[81] The redressability component requires that the injury "will likely be redressed by a favorable decision."[82] The two elements share related qualities in that they both serve as corollaries to the injury in fact requirement,[83] insuring that the relationship between party, claim, and potential relief are sufficiently close to warrant the intervention of an Article III court.

As Professor Laurence Tribe has suggested, during the Warren Court era, the standing inquiry was primarily concerned with insuring that a party with the appropriate stake in the outcome of the litigation was before the federal court.[84] The presence of such a party ensured that the case contained the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[85] Thus, the Warren Court did not view the standing question as one grounded in separation of powers concerns. Instead, the Court believed that problems arose when a litigant lacked a sufficiently concrete stake in the litigation, creating the possibility that the federal courts would issue advisory opinions.[86]

By the end of the Burger Court period, however, the Court viewed the standing doctrine as grounded in separation of powers concerns; that is, that the doctrine should reaffirm the "properly limited role of the courts in democratic society."[87] Justice Scalia was an early champion of this view, which emphasized the narrowness of federal court jurisdiction and the inappropriateness of courts undertaking either executive or legislative tasks.[88] In standing doctrine cases, the Burger Court applied rigid causation requirements in an

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80. *Id.*

81. Bennett v. Spear, 520 U.S. 154, 162 (1997) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

82. *Id.*

83. *See* TRIBE, *supra* note 62, at 424 ("The Supreme Court has emphasized that the injury-in-fact requirement includes as a corollary a requirement that a litigant show that the challenged government action *caused* the litigant's injury – or, in what the Court has sometimes deemed an equivalent formulation, that ending or reversing that challenged action would end or repair the injury.").

84. *See id.* at 388 (stating that personal stake was primary factor).

85. *Id.* (citing Flast v. Cohen, 392 U.S. 83, 99 (1968)).

86. *Id.*

87. Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

88. TRIBE, *supra* note 62, at 388-89 (citing Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983)).

effort to prevent federal courts from usurping power from the legislative and executive branches. At the same time, the Burger Court's imposition of a narrow causation requirement resulted in the undermining of progressive goals.

Allen v. Wright[89] illustrates this result particularly well. In *Allen*, parents of black children challenged the Internal Revenue Service's (IRS) procedures for denying tax exempt status to racially discriminatory private schools.[90] They argued that the failure of the IRS to deny tax exempt status to private schools in desegregation areas amounted to a subsidy to segregated schools, which "foster[ed] and encourage[d] the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts,"[91] thereby interfering with governmental desegregation efforts. The plaintiffs claimed that the segregated schools' tax exempt status amounted to financial aid for segregated schools, which in turn allowed those schools to expand and prosper.[92] This result motivated white parents to send their children to these schools and placed a federal imprimatur on segregated educational facilities.[93] These actions frustrated the aims of a variety of governmental entities that were working assiduously to desegregate the public schools in the area.[94]

The issue before the Supreme Court was whether the plaintiffs had standing to pursue this "desegregation claim" in the federal courts.[95] Writing for the Court, Justice O'Connor began by conceding that the plaintiff had met the injury in fact requirement because, if proven, the assertion that a child's right to attend an integrated school had been denied or diminished was judicially cognizable.[96] From the Court's perspective, the problem was causation: "[T]he injury alleged is not fairly traceable to the Governmental conduct

89. 468 U.S. 737 (1984).

90. Allen v. Wright, 468 U.S. 737, 739 (1984).

91. *Id.* at 745.

92. *See id.* at 745-46 (explaining allegations of complaint).

93. *See id.* at 773 (Brennan, J., dissenting) (quoting plaintiffs' allegations from complaint); *id.* at 788 (Stevens, J., dissenting) (same).

94. *See id.* at 773-74 (Brennan, J., dissenting) (quoting plaintiffs' allegations from complaint).

95. *Id.* at 740. Plaintiffs had also pressed a second claim: that they were injured in fact by virtue of direct governmental aid to discriminatory private schools. *Id.* at 752. Ultimately, the Supreme Court determined that the plaintiffs lacked standing to assert this claim in the federal court. *Id.* at 753-56. However, my discussion will focus exclusively on the claim described in the text (the "desegregation claim").

96. *See id.* at 756 (stating that such right is judicially cognizable beyond all doubt (citing Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Brown v. Bd. of Educ., 347 U.S. 483 (1954))).

respondents challenge as unlawful."[97] Why was this the case? For the Court, the "line of causation" between the conduct (the IRS's failure to deny tax exemptions) and the injury (frustration of the public school desegregation process) was "attenuated at best."[98] Here, the Court was describing the need for a direct and unimpeded causal relationship between injury and conduct.

In other words, the Court's concern was that the relationship was indirect and attenuated as opposed to clear, uncompromised, and unbroken. The plaintiffs could not prove that segregated private schools receiving a tax exemption resulted in an "appreciable difference in public school integration."[99] The Court found too many other factors that could explain why so few white students were present in the public school system. To create the direct chain of causation that the Court required, far too much "speculation" would be necessary. The Court's language is instructive:

> It is, first, uncertain how many racially discriminatory private schools are in fact receiving tax exemptions. Moreover, it is entirely speculative, as respondents themselves conceded in the Court of Appeals, whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.[100]

The Court refused to make any assumptions about the relationship between private, segregated schools and public schools undergoing the process of desegregation in the same locale because those assumptions would have required assessments about the actions of third parties, such as white parents and private school officials.[101] Rather than "pure speculation" as the Court charged, those assumptions were simply logical intuitive steps typically allowed in the early pleading stages of a lawsuit.[102] The Court reacted as if

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97. *Id.* at 757.

98. *Id.*

99. *Id.* at 758.

100. *Id.* (citations omitted).

101. *See id.* at 759 (finding that existence of numerous third parties prevented assumption of causality).

102. *Id.* at 767-68 n.1 (Brennan, J., dissenting) (noting that courts take all material allegations of complaint as true when deciding motions to dismiss) (quoting Galdstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 109 (1979)).

the two processes were occurring in different worlds, in independent parallel universes, each completely unaffected and untouched by the other. But to assume no connection between the two was to ignore reality. Indeed, the Court's supposition was not only completely nonsensical, but was inconsistent with its earlier concession that the "diminished ability to receive an education in a racially integrated school [is] . . . one of the most serious injuries recognized in our legal system."[103]

Why was this narrow construction of causation required? What animated its imposition? The answer for the Court was the need to protect the underlying goal of the standing analysis: separation of powers.[104] A rigid causation requirement was necessary to maintain the proper role of the federal courts and disallow suits that challenged agency action generally, as opposed to "identifiable Government violations of law."[105] A strict construction of the "fairly traceable" requirement would confine the Article III courts "to their traditional role of protecting individuals against impositions by the majority rather than interfering with the manner in which the politically accountable branches serve the interests of the majority."[106] Thus, the Court's repetition of the pattern from the *Brown* implementation cases is manifest. In those cases, the Court's articulated underlying goal was to protect the proper distribution of power between the states and the federal government.[107] To achieve that goal, the Court imposed a narrow causation requirement. Here, the Court's articulated goal was to affirm a structural principle intended to support, rather than to subvert, democratic norms.[108] Thus, the Court's position was that unelected judges with life tenure should not adjudicate cases in which resolution of the essential dispute was assigned to another, democratically elected branch.[109]

The majority opinion in *Allen* was problematic on several fronts. First, as Justice Brennan explained in dissent, the Court had previously found

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103. *Id.* at 756. As Justice Brennan noted in dissent: "Common sense alone would recognize that the elimination of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools." *Id.* at 774 (Brennan, J., dissenting).

104. *See id.* at 761 n.26 (disagreeing with Justice Stevens's position that separation of powers principles merely underlie justiciability requirement).

105. *Id.* at 759.

106. TRIBE, *supra* note 62, at 389 (citing Scalia, *supra* note 88, at 894-95).

107. *See supra* Part II (summarizing objectives of *Brown* and its progeny).

108. *See* Allen v. Wright, 468 U.S. 737, 759-60 (1984) (recognizing that separation of powers notion dictates proper role of federal courts).

109. *See id.* at 761 (explaining that separation of powers prevents courts from recognizing standing in cases seeking to restructure system created by executive branch).

standing in a very similar factual setting in *Norwood v. Harrison*.[110] In *Norwood*, plaintiffs alleged that a state program that provided textbooks to students attending either public or private schools, regardless of the school's racially discriminatory policies, had infringed their right to attend a racially integrated public school system.[111] One issue in *Norwood* involved the sufficiency of the causal relationship between the plaintiffs' alleged injuries and the conduct of the state.[112] Assumptions about the behavior of third parties did not trouble the *Norwood* Court:

> [T]he Constitution does not permit the State to aid discrimination even when there is no precise casual relationship between state financial aid to private schools and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.[113]

Second, the majority's reliance on the separation of powers rationale was problematic. As Justice Stevens noted, resort to separation of powers principles did not answer the question of whether the plaintiffs had standing to pursue their claims before an Article III court.[114] He aptly pointed out that imposing a rigid causal requirement because of purported separation of powers concerns "confuses the standing doctrine with the justiciability of the issues that [the] respondents seek to raise."[115] Instead, the Court should center the standing inquiry on whether the "party has a sufficient *stake* in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[116] Rather than raising separation of powers principles at this stage, the more appropriate question was whether the plaintiff had a personal stake in the outcome.[117] The mixture of the two issues did more than generate confu-

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110. *See id.* at 776-78 (Brennan, J., dissenting) (comparing case to *Norwood v. Harrison*, 413 U.S. 455 (1973)).

111. *Norwood*, 413 U.S. at 455.

112. *See id.* at 465-66 (discussing whether providing free textbooks to private schools is determinative factor affecting enrollment).

113. *Id.*

114. *See* Allen v. Wright, 468 U.S. 737, 789-95 (1984) (Stevens, J., dissenting) (examining three possible meanings of the Court's use of separation of powers and finding that none refuse standing to plaintiffs).

115. *Allen*, 468 U.S. at 790 (Stevens, J., dissenting).

116. TRIBE, *supra* note 62, at 385 (emphasis added) (quoting Sierra Club v. Morton, 405 U.S. 727, 731 (1972)).

117. *See Allen*, 468 U.S. at 791 (Stevens, J., dissenting) ("The strength of the plaintiff's interest in the outcome has nothing to do with whether the relief it seeks would intrude upon the prerogatives of other branches of government; the possibility that the relief might be

sion. Worse, it allowed the Court to "encourage undisciplined, ad hoc litigation."[118] The effect was to allow lower courts to actually reach the merits and dispose of the lawsuit without allowing the plaintiffs the opportunity to prove their case.[119] Therefore, *Allen* illustrates how the use of rigid notions of causation, purportedly to serve articulated structural principles, can ultimately frustrate progressive and minority group interests.

B. Municipal Liability: Federalism Again

"A primary function of the federal courts is to provide relief against governments and government officers for their violations of the Constitution and the laws of the United States."[120] However, the Supreme Court has also used rigid notions of causation to frustrate plaintiffs' abilities to hold municipalities liable for constitutional violations. A recent Supreme Court case, *Board of the County Commissioners v. Brown*,[121] exemplifies this trend.

Some background is in order. 42 U.S.C. § 1983 creates a cause of action against any person acting "under color of law" who deprives any other person of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[122] Prior to the seminal Warren Court decision in *Monroe v. Pape*,[123] plaintiffs rarely invoked the statute.[124] Issued in 1961, *Monroe* breathed new vigor into § 1983 by interpreting the meaning of "under color of law" broadly.[125] In *Monroe*, the Court ruled that an individual officer's actions taken in her official capacity, even if unauthorized or illegal, were nonetheless actions taken "under color of law" for the purposes of § 1983 liability.[126]

But while the Warren Court essentially reinvented § 1983 jurisprudence by allowing cases to go forward against individual officers, it was far less complacent about suits against municipal entities. In *Monroe*, the Court

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inappropriate does not lessen the plaintiff's stake in obtaining that relief.").

118. *Id.* at 791-92 (Stevens, J., dissenting).

119. *Id.* at 766 (Brennan, J., dissenting).

120. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 448 (3d ed. 1999).

121. 520 U.S. 397 (1997).

122. 42 U.S.C. § 1983 (1994).

123. 365 U.S. 167 (1961).

124. *See* CHEMERINSKY, *supra* note 120, at 455 (identifying historical reasons for scarce use of § 1983).

125. *Id.* at 459; *see also* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 62 (2001) (describing *Monroe v. Pape* as a product of "judicial dynamism").

126. *See* Monroe v. Pape, 365 U.S. 167, 183-84 (1961) (construing predecessor statute 42 U.S.C. § 1979 (1871)), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

concluded that municipal governments were not "persons" for the purposes of § 1983 liability and thereby created a disjunction between the treatment of individual officers and municipalities under the statute.[127] The Court based its ruling on a reading of § 1983's legislative history; specifically, congressional rejection of the Sherman Amendment, which "would have imposed strict liability on cities for specified violent acts, even though the city and its officials did not participate and were not directly responsible."[128] The Court interpreted the rejection of the Sherman Amendment as meaning that "Congress did not undertake to bring municipal corporations within the ambit of" § 1983.[129]

In 1978, the Burger Court corrected this disjunction in *Monell v. Department of Social Services*[130] and overruled *Monroe* to the extent that it held that municipalities were not subject to § 1983 liability.[131] Looking at the same legislative history that the Warren Court had interpreted seventeen years before to prohibit municipal liability, the Burger Court reached the opposite conclusion. In *Monell*, the Court found that Congress rejected the Sherman Amendment because it would have made municipalities liable for the wrongdoing of others almost as an insurer; however, nothing said in the debate "on the Sherman amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its *own violations* of the Fourteenth Amendment."[132]

At the same time that the Burger Court promoted a more expansive reading of § 1983 than the Warren Court, the *Monell* Court placed a significant limitation on the ability to hold municipalities liable under § 1983: no respondeat superior liability existed under that section.[133] Municipalities would be liable only for their own violations of the Constitution and laws; that is, by virtue of the entity's actions which "may fairly be said to represent official policy."[134] Thus, *Monell* required that plaintiffs seeking to hold municipalities liable under § 1983 show that an official policy or custom caused the deprivation at issue.[135] As the Court stated: "[T]he language of

127. *See id.* at 187 (construing predecessor statute 42 U.S.C. § 1979 (1871)).

128. CHEMERINSKY, *supra* note 120, at 474.

129. *See Monroe*, 365 U.S. at 187 (construing predecessor statute 42 U.S.C. § 1979 (1871)).

130. 436 U.S. 658 (1978).

131. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 688-89 (1978) (finding municipal corporations within plain meaning of Civil Rights Act).

132. *Id.* at 683 (emphasis added).

133. *See id.* at 691 (concluding that municipalities cannot be held liable solely through employment of tortfeasor).

134. *Id.* at 694.

135. *Id.* at 691.

§ 1983 read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature *caused* a constitutional tort."[136]

As has been argued, the imposition of a causation requirement to delineate the line between conduct for which a municipality might be liable under § 1983 is best viewed as reflective of certain policy choices rather than as fidelity to any revised understanding of legislative history.[137] Thus, *Monell* can be understood as simultaneously curing the disjunction that had previously existed while protecting municipalities from large damage awards that might "seriously undermine municipal autonomy."[138]

Monell has spawned a complex body of law elucidating the question of when an official municipal policy exists for the purposes of assigning § 1983 liability.[139] I focus on one narrow aspect of that doctrine, the question of when negligent hiring or inadequate training or supervision amounts to an official policy, and on a recent case examining that question: *Board of County Commissioners of Bryan County v. Brown*.[140]

Bryan County concerned an allegation of excessive use of force by Stacy Burns, a sheriff's deputy, who injured the plaintiff while attempting to remove her from her car after a high speed chase.[141] Plaintiff argued that a court could hold the county liable for the deputy's alleged use of excessive force because Sheriff Robert Morrison, a "final decision maker"[142] for the county, had failed to review Deputy Burns' record adequately.[143] Prior to assuming his position,

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136. *Id.* (emphasis added).

137. *See* Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under § 1983*, 62 S. CAL. L. REV. 539, 542-43 (1989) ("As a limitation on § 1983 municipal liability, *Monell*'s policy or custom requirement strikes a fundamental balance between (1) making municipalities accountable in federal court for their constitutional violations and (2) accommodating federalism concerns – including broad concerns about the traditional roles of states and their political subdivisions in 'our constitutional universe' and particular concerns about the increased power of federal courts to interfere with municipal autonomy."). *See generally* Jack M. Beerman, *A Critical Approach to § 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989).

138. Gerhardt, *supra* note 137, at 542.

139. *See* CHEMERINSKY, *supra* note 120, at 478-90 (discussing *Monell* decision and its aftermath).

140. 520 U.S. 397 (1997).

141. Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 400-01 (1997).

142. *See* LEWIS & NORMAN, *supra* note 125, at 173 ("[P]olicy can be established not only through conduct formally adopted by the entity or enshrined in settled custom but also through decisions of a final policy-making official who commits the federal law violation herself or ratifies the unlawful act of a delegate.").

143. *Bryan County*, 520 U.S. at 401.

Burns (who was related to Morrison) had pleaded guilty to, *inter alia*, assault and battery, resisting arrest, and public drunkenness.[144] Sheriff Morrison testified that he did not "closely review" Burns' record prior to extending him a position.[145]

The question was whether the county's decision to hire Burns was "so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff."[146] Courts have developed the deliberate indifference standard to determine whether a "policy" exists for the purposes of assigning § 1983 liability to a municipality in situations involving omission or inaction that is fairly traceable to the municipality. Such inactions or omissions include failing to train or to supervise adequately an employee or failing to review adequately an applicant's prior record.[147]

Writing for the majority, Justice O'Connor perceived the question at hand as presenting difficult issues of fault and causation.[148] In situations in which the plaintiff asserts that the municipality essentially "caused" the employee to deprive the plaintiff of her constitutionally protected rights, she must "demonstrate a direct casual link between the municipal action and the deprivation of federal rights."[149] The need to protect the "no respondeat superior" rule inherited from *Monell* justified the requirement that plaintiff show such a "direct causal link":

> Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of the employee.[150]

To be sure, prior to *Bryan County*, the Supreme Court had insisted on a "clear causal link between an unconstitutional omission and harm suffered by the plaintiff"[151] in "failure to train" and "failure to supervise" cases. For instance, in *City of Canton v. Harris*,[152] a "failure to train" case, the Court ruled that the

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144. *Id.*

145. *Id.*

146. *Id.* at 402 (quoting Appendix 135 of district court opinion).

147. *See* LEWIS & NORMAN, *supra* note 125, at 183 (describing omissions or inactions traceable to municipality).

148. *See* Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 405 (1997) (distinguishing claims that municipality directly inflicted injury from those in which injury resulted from indirect actions).

149. *Id.* at 404.

150. *Id.* at 405.

151. LEWIS & NORMAN, *supra* note 125, at 184.

152. 489 U.S. 378 (1989).

failure to train must be the result of a deliberate or conscious choice on the part of the municipality.[153]

But *Bryan County* went further by making it "significantly more difficult to prove municipal policy based on deliberate indifference."[154] In *Bryan County*, the Court tightened the causation analysis considerably, creating a new and higher threshold for determining when deliberate indifference exists.[155] Thus, a deprivation of the plaintiff's constitutional rights must be a "plainly obvious consequence" of the hiring decision for the official's failure to screen the applicant's record adequately to be considered deliberate indifference for § 1983 municipal liability.[156] This standard significantly decreases a plaintiff's chance of prevailing in a § 1983 municipal liability screening case.[157]

From the Court's perspective, why was such a tightening necessary? The answer was federalism. In *Bryan County*, a fear of "federalizing" hiring standards necessitated the imposition of an enhanced causation requirement in screening cases. As the Court stated: "A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose."[158] The rationale for the application of a heightened causation standard, then, was the need to protect the states from an overarching federal government. The Court achieved its goal of preserving federalism by using causation and constraining the ability of the federal courts to provide more adequate relief to plaintiffs alleging constitutional violations.

Bryan County did not disturb the law governing individual defendants in their individual capacities. However, even when plaintiffs prevail against individual officers, the officers are often judgment proof, necessitating the inclusion of an entity defendant to adequately compensate plaintiffs and, moreover, to deter municipalities from violating constitutionally protected rights.[159] As Erwin Chemerinsky has explained, *Bryan County* was problem-

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153. *See* City of Canton v. Harris, 489 U.S. 378, 389 (1989) (holding that "only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983").

154. CHEMERINSKY, *supra* note 120, at 485.

155. *See* Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 422 (1997) (Souter, J., dissenting) (noting that Court's formulation of deliberate indifference represented new standard).

156. *Id.* at 411.

157. CHEMERINSKY, *supra* note 120, at 486.

158. *Bryan County*, 520 U.S. at 415.

159. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808, 843-44 (1985) (Stevens, J.,

atic because the jury found that "the Sheriff's deliberate indifference in hiring caused the injuries to Brown," a finding that the record supported.[160] Yet, the holding in *Bryan County* frustrated the plaintiff's ability to be made whole from that municipality. Just as with the standing doctrine and the desegregation implementation decisions, the imposition of rigid causation requirements frustrated more progressive aims.

IV. Affirmative Action: The Same or Different?

The final way in which the Court has used rigid notions of causation to frustrate progressive aims comes from the affirmative action area. How might we think of the affirmative action cases in connection with the desegregation mandate, standing doctrine, and municipal liability cases – does any relationship among them exist? I want to suggest that one does. I argued previously that a close examination of the desegregation implementation decisions revealed a pattern that was present in other areas of the Supreme Court's constitutional jurisprudence. Those cases revealed successive and more conservative Supreme Courts attempting to undermine *Brown I* through the application of increasingly constrained notions of causation. Rigid, constricted notions of causation changed the underlying meaning of *Brown I*, not in a forthright fashion, but in a manner that dissipated criticism by constant reference to the need to protect an important constitutional principle: federalism.

This Part of the Article focuses on *City of Richmond v. J.A. Croson Co.*,[161] a familiar and very important affirmative action case, but one not normally examined for its analysis of causation. However, causation played a large role in the case. In order to fully appreciate the causation analysis embedded within *Croson*, we must first consider how the Court has analyzed the question of "societal discrimination" in the affirmative action context.

The United States Supreme Court has not definitively stated when the relationship between state action and private discriminatory conduct justifies a governmental affirmative action plan.[162] Instead, the Court's interpretative approach has left an open window that is framed on one side by action that clearly cannot justify an affirmative action plan ("societal discrimination")[163]

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dissenting) (describing policy interests in providing fair compensation for victim and deterring future violations).

160. CHEMERINSKY, *supra* note 120, at 486.

161. 488 U.S. 469 (1989).

162. *See* Adarand v. Slater, 228 F.3d 1147, 1167 (10th Cir. 2000) (discussing ambiguity surrounding Supreme Court's decision in *Croson* regarding strength of evidence necessary to justify municipality's affirmative action plan).

163. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

and on the other by action that can (when the state actor becomes a "'passive participant' in a system of [private] racial exclusion").[164]

The Burger Court's first discussion of "societal discrimination" in the context of an evaluation of an affirmative action program came in *Wygant v. Jackson Board of Education*.[165] At issue was an affirmative action plan contained in a collective bargaining agreement that provided a retention preference for minority teachers in the event of a layoff.[166] The Court of Appeals for the Sixth Circuit upheld the retention preference on the theory that additional minority teachers would serve as "role models" for minority students, thereby alleviating the effects of "societal discrimination."[167] In the absence of any finding of discrimination against the Board of Education,[168] this was a theory of discrimination unconnected to any particular perpetrator; a definition of discrimination that could include actions taken by private actors, public actors not before the court, or some combination of the two. The Sixth Circuit essentially proceeded on an underrepresentation theory that compared the number of minority teachers to the number of minority students, found a disparity, and concluded that minority students had been deprived of effective role models as a result.[169]

Writing for the plurality in *Wygant*, Justice Powell rejected this approach, stating in plain and unqualified language that: This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.[170] For Justice Powell, "societal discrimination," as employed by the lower courts as a justification for a racial classification, was infirm because of the term's amorphousness.[171] This was the problem of the indeterminate perpetrator. Generalized discrimination, of an unknown origin and by an unknown force, could not justify a racial classification, especially because there could be "numerous explanations for a disparity."[172] Thus, societal discrimination was an over-inclusive category

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164. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (plurality opinion).
165. 476 U.S. 267 (1986).
166. *Wygant*, 476 U.S. at 273.
167. *See id.* at 274 (describing court of appeal's reasoning).
168. Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1155 (6th Cir. 1984).
169. *Id.* at 1156.
170. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).
171. *Id.* at 276.
172. *Id.*

of harm, an empty and insufficient vessel upon which to base an affirmative action plan.[173]

In contrast to the desire to remedy mere societal discrimination, however, the plurality held that an affirmative action plan that attempted to remedy the present effects of past discriminatory conduct or present discrimination itself could be supported by "some showing of prior discrimination by the governmental unit involved."[174] Justice O'Connor immediately refined this position in her concurring opinion, which stated that, while a finding of discriminatory conduct against the public entity was not required prior to the creation of an affirmative action plan, a "firm basis for concluding that remedial action was appropriate" was necessary.[175] Taken as a whole, the *Wygant* opinion was binary in its approach: societal discrimination was juxtaposed against public actor discrimination and the opinion recognized no other possibilities. Thus, *Wygant* did not comprehend a situation in which a public entity might justify its affirmative action plan because of private discrimination that it somehow had aided, abetted, supported, or otherwise condoned, as distinct from societal discrimination more generally.

This situation changed dramatically three years later, when the Rehnquist Court evaluated an affirmative action requirement in a local governmental procurement scheme in *City of Richmond v. J. A. Croson Co.*[176] Richmond's Minority Business Utilization Plan required prime contractors working on city contracts to subcontract thirty percent of the contract amount to at least one "minority business enterprise" (MBE).[177] The plan was intended to address the racial disparity in the city's contracting practices.[178] Thus, the City Council intended the plan to remediate the "present effects of past discrimination in the construction industry."[179]

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173. *See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) (plurality opinion) (rejecting desire to "counter[] the effects of societal discrimination" as adequate justification for medical school admissions plan that set aside sixteen seats of one hundred in incoming class for minority group members).

174. *Wygant*, 476 U.S. at 274; *see also* Johnson v. Trans. Agency, 480 U.S. 616, 650 (1987) (O'Connor, J., concurring in the judgment) ("In *Wygant*, the Court was in agreement that remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant the remedial use of a carefully constructed affirmative action plan.").

175. *Wygant*, 476 U.S. at 289-93 (O'Connor, J., concurring in part and concurring in the judgment).

176. 488 U.S. 469 (1989).

177. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 477 (1989).

178. *See id.* at 479-80 (describing purpose of city's Minority Business Utilization Plan).

179. *See id.* at 498 (quoting Supplemental Appendix 163).

Speaking through Justice O'Connor, the Court ruled that Richmond's plan violated the Equal Protection Clause.[180] The problem was that the plan lacked the necessary specificity and the appropriate factual predicate required to justify race-conscious action.[181] Instead, the Court viewed the plan as an attempt to redress mere "societal discrimination" because Richmond had made only a "generalized assertion" about "past discrimination in an entire industry" in an effort to defend its plan.[182] Upon closer analysis, the role that rigid notions of causation played in *Croson* becomes evident.

The Richmond plan was remedial in nature in that it attempted to "remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry."[183] The plan pursued this goal through use of a race-conscious set-aside. The difficulty from the Court's perspective was that a disconnect existed between the goal (remedying past discrimination in the construction industry) and the method used to achieve that goal (a race-conscious set aside). The disconnect arose from the lack of an appropriate "factual predicate."[184] For the Court, the appropriate factual predicate would have included specific information suggesting that discrimination in the construction industry yesterday *caused* the lack of minority contractors eligible to compete for contracts in Richmond today. Indeed, that was the import of the Court's language admonishing the City Council for basing its plan on "generalized assertions" of past discrimination in the construction industry:

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia....
>
> It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.[185]

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180. *Id.* at 511.

181. *See id.* at 489-90 (plurality opinion) (describing deficiencies in city's plan).

182. *Id.* at 498.

183. *Id.*

184. *Id.*

185. *Id.* at 499.

The Court's incantation of "sheer speculation" here reinforced its argument that the Richmond plan lacked the appropriate factual predicate, that is, that the City Council lacked a "strong basis in evidence" for concluding that race-conscious action was necessary.[186] According to the Court, sufficient evidence simply did not exist in the legislative record "tying" the need for the MBE set-aside to the injury that the City Council sought to ameliorate to justify race-conscious relief.[187] Instead, the City Council needed to produce evidence of identified discrimination in the Richmond construction industry sufficient to raise an inference of "discriminatory exclusion."[188] One interpretation of this reasoning is that the City Council had not shown the appropriate causal relationship between past discrimination in the construction industry and the dearth of minority contractors to justify its affirmative action plan. Without such a clear and defined relationship, the lack of minority contractors was open to any number of other, competing explanations that could be untethered from discriminatory action on the part of either the construction industry or the city.[189]

At first blush, this approach appears to track the application of rigid notions of causation in the standing and municipal liability areas closely. In these areas, important constitutional principles necessitated a strong defense. Federalism and separation of powers concerns were thought to be so significant as to trump the interests of the plaintiffs. From this perspective, the Court achieved the greater good and avoided damage to our constitutional system when it either dismissed the case or refused to enter relief. Under this view, the application of rigid, constricted notions of causation in those cases served to protect and defend larger constitutional principles.

A similar argument could also be made in the affirmative action context. In *Croson*, four Justices justified the decision to strike down Richmond's affirmative action plan on the grounds that the Equal Protection Clause protects "personal" as opposed to group rights and that racial classifications carry the danger of imposing significant stigmatic harm.[190] According to this plurality, the threat posed by preferential race-based programs was so great that it trumped the ability of the state and its entities to make determinations

186. *Id.* at 500.

187. *See id.* at 499 (explaining why race-conscious plan was inappropriate).

188. *See id.* at 503-05 (explaining requirements for appropriate race-conscious plan).

189. *See id.* at 503 ("There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.").

190. *See id.* at 493 (plurality opinion) (explaining why Court should strike down plan).

with respect to their contracting programs.[191] The Justices were right to be skeptical of the state and its political subdivisions in situations in which the state was legislating about race, as the framers of the Fourteenth Amendment had placed "clear limits on the States' use of race as a criterion for legislative action, and [intended] to have the federal courts enforce those limitations."[192] From this perspective, the Court was playing its rightful role as protector of individual rights against oppression by the majority.[193] While the cost of striking down the Richmond plan might be significant in the sense that it was a worthy attempt to address the "sorry history" of racial discrimination,[194] the inherent perniciousness of racial categories and the importance of protecting individual rights justified that cost.

However, in the separation of powers and federalism areas, the Court was arguably playing an important umpiring role – under the standing doctrine, refereeing the appropriate allocation of power among co-equal branches, and in the desegregation implementation and municipal liability cases, finding the appropriate balance of power between the federal government and the states. In both situations, if the price of resolution of those thorny "institutional" problems was a constraint on the power of the federal courts to order relief to otherwise deserving plaintiffs, so be it. Arguably, the desegregation implementation decisions, the standing doctrine cases, and the municipal liability proceedings all counseled toward notions of judicial restraint, particularly when another governmental actor existed that was better situated to make the appropriate determination. Thus, the argument is that the Court should not maintain judicial control over a school district, hear a case in which the plaintiff lacks the constitutional requirements of standing, or risk ordering relief, when doing so might lead to the constitutionalization of employee screening requirements. From this perspective, the causation analysis at the heart of those decisions ensured the appropriate amount of judicial restraint.

However, this line of argument does not support the result in *Croson*. In *Croson*, the Court trumped the power of the state and its entities to attempt to ameliorate the present effects of past discriminatory conduct.[195] *Croson* is hardly a decision that defends notions of federalism or judicial restraint. Arguably, the Richmond City Council was in a much better position to deter-

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191. *See id.* (plurality opinion) (noting danger of stigmatic harm that accompanies race-based classifications).

192. *Id.* at 490-91 (plurality opinion).

193. *See* TRIBE, *supra* note 62, at 389 (describing article, Scalia, *supra* note 88, stressing role of Article III courts in protecting individuals against impositions by majority).

194. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

195. *See id.* at 500 (striking down city's MBE plan).

mine the appropriate way to redress generations of racial discrimination in its construction industry. It was making law "on the ground" – Justice O'Connor's allusions to legislative capture notwithstanding.[196] The use of rigid notions of causation allowed the Court in *Croson* to engage in judicial activism and strike down the will of the majority.

V. Conclusion

What are we to make of all of this? One possibility is simply that the Court was correct in each of these situations that I have examined, with the use of narrow notions of causation allowing it to reach appropriate determinations more effectively. But I subscribe to another, far more ominous possibility. One can also see the use of rigid notions of causation as a free-floating judicial tool allowing the Court to reach certain outcomes. From that perspective, the desegregation implementation decisions, the standing doctrine, municipal liability, and affirmative action are all harmonized as bound by the Court's use of narrow and prescribed notions of causation to reach particular outcomes that tend to frustrate progressive ideals. Thus, decisions in the standing, municipal liability, and affirmative action areas demonstrate an exceedingly effective use of this technique.

The *Brown* implementation cases thus form a thematic bridge between the progressive Warren Court and later eras dominated by far more conservative, if not reactionary, Supreme Courts. I stated at the outset that the Warren Court's jurisprudence, and therefore its legacy, was political. Because our Supreme Court jurisprudence is evolutionary, we must consider not only the Warren Court's decisions in their time, but also the ways in which those decisions have developed into legacy. Later Supreme Courts, dominated by more conservative Justices, have limited the progressive reach of the Warren Court under the guise of federalism and separation of powers concerns.

196. *Id.* at 490-92 (plurality opinion). The persuasiveness of this argument was effectively nullified in *Adarand v. Pena*, 515 U.S. 200, 252-53 (1995), in which the Court extended its holding to the federal government. One can hardly argue that minority group members have effectively captured both houses of the United States Congress.