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FROM *FREEMAN* TO *BROWN* AND BACK AGAIN: PRINCIPLE, PRAGMATISM, AND PROXIMATE CAUSE IN THE SCHOOL DESEGREGATION DECISIONS

David Crump*

Abstract: A court deciding a constitutional case should announce a clear principle, one that the people can easily understand and follow. At the same time, such a decision should be pragmatic, in that it should effectively accomplish its goals while treating all affected persons fairly. The simultaneous fulfillment of these two criteria, however, can sometimes be extraordinarily difficult. In this article, Professor Crump considers how well the school desegregation remedies ordered by the Supreme Court fit the tests of principle and pragmatism. He concludes that the early decisions, as well as many of the later ones, do not achieve both goals, but there is hopeful prospect that the recent termination-of-supervision decisions may fulfill them better.

In *Freeman v. Pitts*,[1] the Supreme Court recognized that a district court could be permitted to stop supervising pupil assignments in a school system that once was unconstitutionally segregated. The Court reached this result even though the school system in question (which was in DeKalb County, Georgia) had never become "integrated."[2] In fact, it was arguable that the system had never even been "desegregated" in student composition; for this reason, the Court's opinion included a demonstration that the concept of a "unitary" school system had no fixed meaning.[3] Furthermore, the Court held that the supervision of pupil assignments might be withdrawn even though effects of unconstitutional segregation still persisted in certain other aspects of the school system, including funding, educational quality, and faculty assignments.[4]

Freeman is the most recent in a trilogy of cases in which the Court has allowed the possibility of retreat from intrusive school desegregation decrees. The other two cases are *Pasadena City Board of Education v. Spangler*[5] and *Board of Education v. Dowell*.[6] *Freeman* is by far the

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1. 112 S. Ct. 1430 (1992).

2. The law does not require "integration" as such; instead, it requires elimination of vestiges of de jure segregation. *See infra* parts II(A)–(B). At times, however, the distinctions have become blurred. *See infra* part II.

3. *See infra* part IV(A).

4. *See infra* part IV(A).

5. 427 U.S. 424 (1976).

6. 498 U.S. 237 (1991).

deepest and most searchingly philosophical of the three. It is an opinion that, in places, shows a Court whose heart is at war with its head. In fact, many of the Court's members see two contradictory truths in the facts underlying *Freeman v. Pitts.*

On the one hand, the *Freeman* case could be an occasion for genuine rejoicing, or at least for more-than-mild enthusiasm, because of the hard-won accomplishments and real hope for the future that it showcases. The Court upheld fact findings, which on the record seem debatable but defensible, that the school system had achieved unitary status in pupil assignments by its efforts over the years.[7] The potential removal of court supervision in this area enabled the Court to include in its opinion a soaring, almost romantic description of reliance on democracy and the virtues of political accountability in an era of race neutrality.[8] More concretely, the results of the school board's efforts included measurable and significant educational gains for African-American children.[9]

On the other hand, there is an unpleasant side to *Freeman.* Three justices pointed out without contradiction that during the thirty-eight years after *Brown v. Board of Education,*[10] the children of DeKalb County "never have attended a desegregated school system even for one day."[11] The schools remained, at the very least, racially "unbalanced": in the eyes of the same three justices, they had a "glaring dual character . . . part 'white' and part 'black.'"[12] The district court's findings that this condition resulted from private migration decisions, which had produced segregated housing patterns, did not remove the cloud from the district court's decision.[13] Indeed, the opinion of the Supreme Court remanded the case for further findings because the Court remained concerned that these private decisions may have been tainted by public actions maintaining a de jure segregated school system.[14] The court of appeals had seen the record so differently that it had ordered consideration of drastic remedies.[15] These remedies, it admitted, would require school district actions that "may be administratively awkward, inconvenient,

7. Freeman v. Pitts, 112 S. Ct. 1430, 1438–41 (1992) [hereinafter *Freeman*].

8. *See id.* at 1445.

9. *Id.* at 1441–42.

10. 347 U.S. 483 (1954) [hereinafter *Brown I*].

11. *Freeman,* 112 S. Ct. at 1455 (opinion of Blackmun, J., Stevens & O'Connor, JJ., concurring).

12. *Id.*

13. *Id.* at 1447.

14. *Id.* at 1447–50.

15. *Id.* at 1442 (citing Pitts v. Freeman, 887 F.2d 1438, 1448 (11th Cir. 1989)).

and even bizarre in some situations."[16] This rhetoric—which the Supreme Court rejected[17]—conjured up depressing memories of black and white children transported long distances from nearby schools, against resistance by worried parents.

The *Freeman* decision thus prompts a hard look at the entire history of school desegregation remedies in America. That retrospective is the purpose of this essay. For selected issues, this analysis travels the road from *Brown* to *Freeman* and back again. It begins where desegregation remedies themselves began, with the second decision in *Brown v. Board of Education,*[18] with its concept of "all deliberate speed" that contrasted so sharply with the Court's later insistence on "a plan that promises . . . to work *now*" in *Green v. County School Board*[19] and its authorization of large-scale satellite busing in *Swann v. Charlotte-Mecklenburg Board of Education.*[20] The author's conclusion is that *Brown II,* unlike *Brown I,*[21] was a poorly conceived decision because although it bent over backwards to seem pragmatically workable, it was not sufficiently anchored in comprehensible principles.[22] It led inevitably to an era of judicially-imposed plans that perhaps reflected the best the Court could do with what it had created—but the defects in the decisions of this era defeated much of the purpose.[23]

Next, this essay considers the Court's decisions in *Keyes v. School District No. 1,*[24] *Columbus Board of Education v. Penick*[25] and *Dayton Board of Education v. Brinkman,*[26] which established "presumptions" about the extent of constitutional violations and about causation. Here, the author's conclusion is that these controversial rules, although clear and principled, were in some respects so unfair and lacking in pragmatism, and engendered such disrespect, that they cost more than

16. *Id.* (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971)).

17. *Id.* at 1447–49 (stating that the court of appeals was "mistaken"; "[t]he law is not so formalistic"; calling for a "feasible" remedy instead).

18. 349 U.S. 294, 301 (1955) [hereinafter *Brown II*].

19. 391 U.S. 430, 439 (1968).

20. 402 U.S. 1, 30 (1971) [hereinafter *Swann*].

21. 347 U.S. 483 (1954).

22. *See infra* part I.

23. *See infra* part II.

24. 413 U.S. 189 (1973).

25. 443 U.S. 449 (1979) [hereinafter *Columbus*].

26. 443 U.S. 526 (1979) [hereinafter *Dayton II*].

they remedied in the long run.[27] They reflected, in other words, the opposite defect from that exhibited in *Brown II.*

Then, the essay considers the decisions on termination of court supervision: *Spangler, Dowell,* and *Freeman.* These cases depend heavily on questions of causation—that is, on whether racial variations in schools are legally attributable to discriminatory decisions by public officials or to migration decisions by private individuals.[28] In its hardest form, such a question resembles an inquiry about whether eggs "cause" chickens, or perhaps more aptly, whether exposure to a single novel factor among the myriad in the universe has "caused" a particular case of cancer in an identifiable individual.[29] "Cause" is such an indefinite concept that scientists tend to avoid it.[30] It often disguises a leap of logic to the policy conclusion ordained by the decision maker's social values.[31] Yet the courts cannot avoid such inquiries, and actually, the termination-of-supervision decisions combine principle and pragmatism in a way that is more satisfying than many other decisions along the road from *Brown* to *Freeman.*[32] But then, perhaps this is faint praise: one might expect that it would be easier to make the decision whether to continue

27. *See infra* part III.

28. *See infra* part IV(B).

29. *See generally* Marvin Legator, *Toxicology, Part One: An Overview of the Discipline, in* UNIVERSITY OF HOUSTON, ENVIRONMENTAL LAW AND ENVIRONMENTAL SCIENCE FOR LAWYERS, A-1 to A-13 (David Crump & Sanford Gaines eds., 1992) (discussing difficulty of inferring causation from alleged carcinogens from experimental or epidemiological data).

30. Instead, scientists generally describe the concept in terms of the "association" of two events, or their "correlation," without identifying either one (or a third event) as the cause of the other. For example, *Freeman,* 112 S. Ct. 1430, 1448 (1992) (citing Franklin D. Wilson & Karl E. Taeuber, *Residential and School Segregation: Some Tests of Their Association, in* THE DEMOGRAPHY OF RACIAL AND ETHNIC GROUPS 51, 57–58 (Franklin D. Bean & W. Parker Frisbie eds., 1978)), describes scientific literature showing a "high correlation" between residential segregation and school segregation. This correlation between observations of residential segregation and school segregation can be definitively measured (such as by a chi-square test, which determines the statistical significance of the correlation, or in other words the improbability of its random occurrence). The correlation can be compared to other correlations by this measure. Inferences of "causation," however, cannot be similarly measured or compared except on a totality-of-the-circumstances judgment—which is to say that they cannot be subjected to the comparison or repeatability tests that are essential to science.

31. *See generally* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS ch. 7 (5th ed. 1984) (dealing with proximate causation, cause-in-fact, and policy considerations that underlie them).

32. *See infra* part IV(C).

supervision of a complex equitable remedy[33] than to create it in the first place[34] or to enforce it against resistance.[35]

Why study these questions? The problems of school desegregation that our country struggled with from 1954 to 1992 are unlikely to repeat themselves in the twenty-first century, at least not in exactly the same way. The answer, of course, is that although the precise problems of the post-*Brown* era may not recur, the courts have faced and will continue to face other situations calling for unpopular and difficult institutional remedies.[36] One hopes that painful lessons, once learned, can be used to lessen the pain in analogous circumstances.

After looking from *Brown* to *Freeman* and back again, one learns at least two things about equitable remedies for complex constitutional violations. First, these remedies must be pragmatic.[37] They must take adequate account of human institutions and their failings. The second lesson, however, is that such remedies must also be principled.[38] They must not express excessive tolerance for human failings, lest they encourage them.

The trouble is, the second lesson contradicts the first. And so the courts in these kinds of cases always will resemble the navigator between Scylla and Charybdis. To be principled without pragmatism is to justify resistance and rebellion, because people subject to the decree rightly will recognize as intolerable the injustices that inevitably flow from anti-democratic inflexibility. On the other hand, to be pragmatic without principle is to invite contemptuous noncompliance, as those subject to the decree recognize that a lack of protection for minority rights encourages the majority to ignore them. Perhaps this dilemma is the origin of the two contradictory currents that one sees in the *Freeman* opinions. At times the courts in desegregation cases have foundered on one side of these rocky shores, and at times on the other.[39]

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33. *See Freeman*, 112 S. Ct. 1430.

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

35. *See, e.g., Swann*, 402 U.S. 1 (1971); *Dayton II*, 443 U.S. 526 (1979).

36. For example, the federal courts have decided numerous cases involving allegations of unconstitutional conditions in prisons, and many of these cases include institutional supervision by retention of jurisdiction over many years. *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980); *rev'd in part*, 679 F.2d 1115 (5th Cir. 1982).

37. *See, e.g., infra* part IV(C).

38. *See, e.g., infra* part IV(C).

39. *Compare, e.g., infra* part I *with infra* part II.

I. *BROWN II:* THE LONG JOURNEY BEGINS

A. Brown II *Contrasted to* Brown I: *Not with a Bang, but a Whimper*

After its bold and definitive opinion in *Brown I,* the Supreme Court did not remand promptly, as it usually does. Instead, it ordered new briefs and arguments.[40] The result was a new controversy that took another year to decide. The Court carved out a related question and made it distinct: now that the Court had found that many of the nation's public schools were unconstitutionally segregated, what should the Court do about it?[41] The answer, in *Brown II,* was a decision whose mushiness was as disappointing as the solidity of *Brown I* was satisfying.

The *Brown II* Court emphasized, "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[42] But the rest of the opinion reads as though the Court was intimidated by precisely that disagreement. It is easy to see why. The judiciary, as Alexander Hamilton wrote, is the "least dangerous" branch of government.[43] "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."[44] The Court had gone out on a limb in the first place by its overruling of *Plessy v. Ferguson,*[45] which had been repeatedly reacknowledged for sixty years[46] and was firmly ingrained in many parts of the nation's social structure—however wrong it may have been. The judgment to overrule *Plessy* was one thing. Its enforcement was another.

It is difficult to imagine the conditions of resistance that the Court faced from some quarters, or the intimidating effect that these conditions must have had. Some slight appreciation of those effects can be gained from a reading of *Cooper v. Aaron.*[47] The people of Arkansas actually amended their state constitution to direct the Arkansas legislature to

40. *Brown I,* 347 U.S. 483, 495–96 (1954).

41. *Id.*

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

43. THE FEDERALIST NO. 78, at 227 (Alexander Hamilton) (Roy P. Fairfield ed., 1981).

44. *Id.*

45. 163 U.S. 537 (1896).

46. *See, e.g.,* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

47. 358 U.S. 1 (1958).

oppose "in every Constitutional manner the Un-constitutional desegregation decisions . . . of the United States Supreme Court."[48] Arkansas even set up a sovereignty commission for that purpose.[49] The day before the opening of Central High School in Little Rock, the governor of Arkansas dispatched units of the Arkansas National Guard to enforce "the law"; this meant, however, enforcing the pre-*Brown* "law" that permitted segregation.[50] The national guard actually placed the school off-limits to black students.[51] Thereafter, at the request of the Little Rock School Board, the federal district court charged with implementing the *Brown* decrees granted a two-and-one-half year suspension of the school board's court-approved desegregation program.[52] In response to this effort by Arkansas to resurrect the theories of interposition and nullification, the Supreme Court found it necessary to address the most elementary propositions of constitutional law. "Article VI of the Constitution makes the Constitution the 'supreme Law of the Land,'" the *Cooper v. Aaron* Court wrote.[53] "It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . . ."[54]

Ultimately, President Eisenhower ordered troops under the authority of the United States to carry out the enforcement of desegregation orders in Arkansas.[55] The point, however, is that the justices of the Supreme Court could not have held absolute confidence that this would be the outcome. To quote Alexander Hamilton again, the courts "have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of [their] judgments."[56] What if the president, acting within his authority as commander-in-chief[57] and arguably performing his constitutional duty, had declined to enforce the Court's decree on the ground that the commitment of troops would be militarily unsound, or that it would likely result in a high number of civilian casualties, or even that the resulting deprivation of political freedom to the Arkansas voting majority

48. *Id.* at 8–9.

49. *Id.* at 9.

50. *Id.*

51. *Id.*

52. *Id.* at 13.

53. *Id.* at 18.

54. *Id.*

55. DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 49 (1989).

56. THE FEDERALIST NO.78, *supra* note 43, at 227.

57. U.S. CONST. art. II.

would be counterproductive?[58] The result would have been a constitutional crisis to rival the *Dred Scott*[59] decision. Undoubtedly that is why the justices, in *Cooper v. Aaron*,[60] took the unprecedented step of signing all nine of their names to the opinion of the Court, rather than assigning one justice to draft it.

The *Brown II* opinion is full of responses to anticipated pressures of this kind, notwithstanding its disclaimer of intimidation. In the first place, the Court authorized no specific kind of remedy, because, as it put the matter, implementation "may require [a] solution of varied local school problems."[61] For this reason, the Court placed upon local "[s]chool authorities" the "primary responsibility for elucidating, assessing, and solving these problems."[62] The counterintuitive notion of leaving it to the defendants to fashion relief to remedy their own violations of law was reinforced by the conclusion that the lower courts "will have to consider whether the action of school authorities constitutes good faith implementation."[63]

The main consideration that was to go into the fashioning of any resulting court decrees was that the lower courts "will be guided by equitable principles."[64] The next sentence, however accurate as a historical statement,[65] embodied the timidity of the entire decision: "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[66] This indeterminate balancing of interests obviously would go far to mollify the "disagreement" (that is, resistance) that the Court denounced but clearly expected; it also would make enforcement less practical, and disobedience more probable, by its very uncertainty. In fact, since *Brown II* never defined what it meant by "full compliance" with the Constitution, these soothing words did more than weaken the

58. *Cf.* CRUMP ET AL., *supra* note 55, at 49–50 (discussing factors that might have constrained the president).

59. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

60. 358 U.S. 1, 4 (1958).

61. *Brown II*, 349 U.S. 294, 299 (1955).

62. *Id.*

63. *Id.*

64. *Id.* at 300.

65. *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE § 14.03 (2d ed. 1992).

66. *Brown II*, 349 U.S. at 300 (1955).

remedy; they undermined the right that had been declared in such ringing language in *Brown I*.[67]

The rest of the Court's rhetoric explained this principle of indeterminate balancing. All that was required in the short run was that "the defendants make a prompt and reasonable start."[68] "Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner."[69] The courts could consider problems related to various aspects of the school system, from administration to revision of local laws and regulations.[70] The core of this responsibility was that the courts "will also consider the adequacy of any plans that the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system."[71] But as for the targeted level of "adequacy" of these "plans," the opinion was monumentally non-specific. It ended with instructions to the lower courts to enter "such orders and decrees" as would be necessary to admit students on a racially nondiscriminatory basis, "with all deliberate speed."[72]

Thus did the decision that began with a bang in *Brown I* end with a whimper in *Brown II*. The denunciation of resistance, apparently, was so much whistling in the dark. Having stuck its neck out, the Court partially withdrew it, which was the worst thing the Court could have done short of retreat. In fact, the *Freeman* majority implicitly admits the Court's mistake thirty-seven years later, by saying that "Interpreting 'all deliberate speed' as giving latitude to delay," was an "all too familiar [response]" to *Brown II*.[73] Thus, with the benefit of historical hindsight, the observer from the vantage point provided by *Freeman* can see that several problems were predictable, indeed inevitable, results of the timid and confusing opinion in *Brown II*.

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67. *E.g., Brown I*, 347 U.S. 483, 494–95 (1954) (reasoning that separation on racial grounds generates stigma that diminishes motivation to learn; concluding that separate but equal "is not equal").

68. *Brown II*, 349 U.S. at 300.

69. *Id.*

70. *Id.*

71. *Id.* at 301.

72. *Id.*

73. *Freeman*, 112 S. Ct. 1430, 1436 (1992).

B. Pragmatic Flexibility Without Principle: Four Defects in Brown II

In the first place, the Court had put the defendants in charge of the remedy.[74] Usually, courts do not place the fox in charge of bringing the hen house into compliance with law. Perhaps some justification for this aspect of the decision can be found in that the defendants' officials all were public servants, subject to oaths to uphold the Constitution, and after all, they best would know how to achieve the desired result with the least interference with other objectives.[75] Nevertheless, this aspect of the decision (backed up by potential court supervision, but with no mandate as to remedy or result) was far from "traditional,"[76] even under principles of equity.

At the same time, the Supreme Court's approach disadvantaged the honest politician who sincerely desired to achieve compliance, while rewarding the unscrupulous one. If elected public officials must enforce an unpopular decision, let it at least be clear what they are required to do. That way, they can point to written rules that they are required to follow, and they can call upon the population to conform to the rule of law. At the very least, they can blame it all upon the court—while doing what they are supposed to do.[77]

Instead, the Supreme Court in *Brown II* left the honest public servant twisting slowly in the wind. Especially in issuing to elected officials orders that contradict the majority vote, a court should bear in mind that these officials remain accountable to the democracy for all of their actions, including those effectuating compliance with the Constitution.[78]

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74. *See supra* notes 61–63 and accompanying text.

75. Thus, by minimizing the interference with other legitimate objectives such as fiscal integrity, educational excellence, and proximity to extracurricular activities, this approach arguably carried out the flexible balancing that is characteristic of equity. *See supra* notes 64–67 and accompanying text.

76. Historically, most equitable remedies have involved a defined performance by the defendant rather than an obligation upon the defendant to generate plans by which to achieve the objective of compliance, although modern institutional litigation tends to depart from the historical pattern. *Cf.* CRUMP ET AL., *supra* note 65 §§ 14.03–.04.

77. The Supreme Court made this point in its 1992 abortion decision, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2815–16 (1992). There, the Court's conclusion (paraphrased) was that if the Court muddled the law by overruling a decision that the people had followed despite strong contrary emotions, it would be acting particularly unfairly toward those who had overcome disagreement with the law in order to follow it. In that context—the overruling of a past decision—the point is controversial because it is vulnerable to the argument that the decision should nevertheless be overruled if it is incorrect. In the present context, however, the point more clearly is valid: An unpopular decision is harder for elected officials to get people to follow if it is muddled.

78. *Cf. Freeman*, 112 S. Ct. 1430, 1445 (1992) (stating: "When school [officials] . . . make decisions in the absence of judicial supervision, they can be held accountable to the citizenry . . . ."). This accountability is desirable unless the courts have determined that its result is unconstitutional,

The pragmatism of the *Brown II* decision, however, concealed a lack of principle that placed the conscientious public official with the choice between following the law or accommodating majority preferences, without even a fig leaf of protection if he chose the former. Thus, *Brown II* contained the seeds of its own destruction because its effectuation depended upon the willingness of elected officials to commit political suicide.

The second problem with *Brown II* was that it did not tell district judges what they were to do if the defendants did not remedy official segregation. The Court referred to numerous factors that a district judge should "consider," including "the adequacy of any plans the defendant may propose."[79] The Supreme Court's willingness to downplay the difficulty of the task is shown by its statement of the reason for this formless remand: "Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal."[80] Thus did hopeful phraseology keep the justices from describing more than a "possible"[81] need for further hearings on this cataclysmic issue. And instead of imposing remedies with a hard edge to them, the judges would perform only an "appraisal" of school districts' plans. As for the "district judges' proximity to local conditions," although that might be a blessing in some cases, in this situation it also was a curse. The district judges were a part of the community for which they were to order this counter-democratic remedy, and indeed almost by definition they were part of the majoritarian body politic that had produced the unconstitutional conditions in the first place.[82] They thus shared some of the characteristics of elected school trustees. The judges too needed the fig leaf of a principled basis for their unpopular orders.[83]

Instead of a remedy governed by principles, however, the district judges were required to "consider the adequacy of . . . plans" for

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in which event intervention that leaves the same accountability in place cannot be expected to remedy the unconstitutional condition.

79. *See supra* notes 70–71 and accompanying text.

80. *Brown II*, 349 U.S. 294, 299 (1955).

81. *See id.*

82. By definition, they all were nominated by the president and confirmed by the Senate, after recommendation by the senior senators of the president's political party from their respective states. The process of their appointments thus assured majoritarian input.

83. *See supra* text accompanying notes 77–78.

desegregation devised by the defendants.[84] This concept not only was poorly defined, it also fit poorly with the judicial competence. Legislatures perhaps can be expected to get from point A to point B by tacking and weaving, and reacting in a time sequence with shifting approaches—but courts, whose expertise is in sticking to principles once decided, could be expected to be less adept at finding the path.[85] Worse yet, the Supreme Court tempered even this amorphous charge with an invitation for delay: "The burden rests upon the defendants to establish that [additional] time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date."[86] All that was required immediately was "a prompt and reasonable start," followed by a "period of transition" during which "the courts will retain jurisdiction."[87] Instead of issuing a writ of execution or an injunction enforceable by contempt, the district judges were required to wrestle with a tar baby.

Third, the Court's decision did not require anything to be done now, or even in the near future. An incidental, and yet important, aspect of the *Brown II* opinion is that the Court's remedial order provided no meaningful relief to the winning plaintiffs before it.[88] The famous phrase that the Court used to describe the agenda—"all deliberate speed"—was itself a grandiloquent oxymoron. The requirement of compliance expressed in such phrases as "prompt" and "earliest practicable date" was contradicted by authorizations of "additional time" and the emphasis of a "deliberate" pace.[89] When the result was to happen was left as confused as what the result was to be.

Finally, the Court's very vacillation was itself an invitation to defiance. Even the condemnation of disagreement as an excuse for noncompliance seemed to invite noncompliance.[90] It may be that the Court correctly perceived that resistance was inevitable and that its

84. *Brown II*, 349 U.S. at 300; *see supra* text accompanying note 71.

85. This principle underlies many of the Court's doctrines for deference to the legislative branch, including the political question doctrine, *e.g.*, Baker v. Carr, 369 U.S. 186 (1962); the current commerce power jurisprudence, *e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981); and the rational basis test, *e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978).

86. *Brown II*, 349 U.S. at 300.

87. *Id.* at 301; *see supra* text accompanying note 68.

88. They would get no relief unless their districts voluntarily complied or unless the lower courts supervising their districts entered further orders requiring compliance—and did so before the plaintiffs graduated.

89. *See Brown II*, 349 U.S. at 300–01; *see also supra* text accompanying notes 68–69.

90. *See supra* notes 42–46 and accompanying text.

ability to carry out its decree was in doubt.[91] That circumstance, however, should have prompted the court to act with firmness rather than vacillation.[92] There exists, of course, the possibility that the Court would have been unable to muster a firm consensus, or perhaps even a majority, in favor of specific and hard-edged remedies; in any event, fairness to the Court compels the admission that these criticisms are more easily made from a vantage point forty years removed.

The results of these flaws in *Brown II* were not long in coming. In 1958, the Court found it necessary to issue its strange opinion in *Cooper v. Aaron.*[93] Although the defiance was immediate, it did not immediately dissipate. So-called freedom of choice plans allowed free transfers by students. In *Goss v. Board of Education,*[94] the Court found it necessary to decide that minority-to-majority transfers could not be permitted under such a plan because they tended to perpetuate segregation. In *Rogers v. Paul,*[95] the school district had adopted a grade-a-year plan, which meant that upper grades remained segregated by law, and the Court reversed a lower court decision rejecting a challenge to this plan and indicated that delays no longer were tolerable. Finally, in *Griffin v. County School Board,*[96] the Court found itself required to hold that the closing of the public schools wholesale in a given county was a denial of equal protection to black students.

C. *What Should Have Been Done Instead?: A View of* Brown II *from the Perspective of* Freeman

What should the Court have done instead? One suggestion that has been offered, particularly by the provocative work of Professor Graglia, is that the Court could and should have required assignment of children on a nonracial basis to their neighborhood schools.[97] The Court could

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91. *See supra* notes 47–54 and accompanying text.

92. *Cf.* note 60 and accompanying text (discussing the fact that all nine justices in *Cooper v. Aaron* signed the opinion to communicate firmness in a climate in which enforcement otherwise was doubtful).

93. 358 U.S. 1 (1958); *see supra* notes 47–54 and accompanying text.

94. 373 U.S. 683 (1963).

95. 382 U.S. 198 (1965).

96. 377 U.S. 218 (1964).

97. LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT'S DECISIONS ON RACE AND THE SCHOOLS 33–45 (1976). *See also* Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork,* 44 STAN. L. REV. 1019, 1037–43 (1992) (justifying *Brown* in originalist theory).

have set out such a requirement as a matter of unambiguous principle.[98] Elected officials could have invoked acceptance of the rule of law in implementing it, because it would have been clear that they had no room to bend the requirements even in deference to majoritarian sentiments.[99] Thus, they could have "blamed the Court" if they needed to, while doing their duty.

The neighborhood school remedy also would not have required the development of complex "plans" that extended judges beyond the judicial competence.[100] This remedy could have been carried out so as to have granted relief promptly to existing plaintiffs as well as to future students.[101] Presumably, it could have been implemented for the coming school year in the vast majority of districts. In fact, many school districts in which resistance was lower achieved substantial desegregation in the first year after *Brown II* by using precisely this method.[102] Finally, such a plan could have been put forth without internal contradiction or vacillation.[103]

The opposing view, supported by many other commentators, is that neighborhood school assignment is insufficient.[104] After all, it would fail to remedy instances of school segregation resulting from residential housing patterns. These commentators reason that private housing decisions presumably were affected at least to some extent by existing segregation in the schools or other official actions affecting housing or transportation. This housing-induced segregation, they argue, is to that extent de jure and unconstitutional.[105] This argument is substantial. In

98. In other words, the Court could have simply required assignment to the school that was the shortest distance from the child's residence. The rule could not be quite so unambiguous, because it would require exceptions for hardship cases and special needs, and it would be important to limit these exceptions so that they did not swallow the rule; but this endeavor would resemble the traditional role of the courts.

99. *See supra* notes 77–78 and accompanying text.

100. *See supra* notes 84–85 and accompanying text.

101. *See supra* note 88 and accompanying text.

102. For example, the DeKalb district accomplished substantial desegregation by a neighborhood plan when faced with the implementation of *Green*. *Freeman*, 112 S. Ct. 1430, 1436–37 (1992).

103. *See supra* notes 42–54, 90–91 and accompanying text.

104. *See, e.g.*, Drew S. Days, *School Desegregation in the 1980's: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737 (1986) (discussing the need to remedy the results, in schools, of segregation in housing).

105. *See id.*

fact, the opinions in *Freeman* validate the view that neighborhood school assignments alone may not be enough.[106]

Perhaps the assignment of students to neighborhood schools could have been ordered with the understanding that it was only a first step, with further remedies to include dismantling of other manifestations of the dual system. For example, the courts could (as they ultimately did) enjoin new construction that would maximize segregation, and in necessary cases it could pair or cluster schools or even engage in the more drastic remedies that the Court later authorized.[107] The point is that there were principled alternatives to the mushiness of *Brown II,* and irrespective of whether they were sufficient, irrespective of whether the Court should have gone further, it is unfortunate that it did not order them. Neighborhood schools would not have worked everywhere, and they would not have done the whole job in other locations; this reasoning, however, is not an argument against their use as a beginning.

The *Freeman* opinion supports these conclusions. When the DeKalb County School System finally got down to business after the "do-it-*now*" mandate of *Green,* its principal remedy was an agreed order that "abolished the freedom of choice plan and adopted a neighborhood school attendance plan. . . ."[108] That single change apparently was the backbone of a transformation to pupil assignments that "impressed" the district court with the system's "successes," improved the quality of education for African-American children, and led to a finding of unitary status at least for student distribution.[109]

Of course, that neighborhood plan was not all of the remedy. DeKalb also closed all of its former de jure black schools, and it instituted a number of other programs that could be expected to counteract the effect of segregation in housing patterns, most notably majority-to-minority transfers and magnet schools.[110] In any event, a look back from the vantage point of *Freeman* justifies both the supporters of neighborhood

106. *Freeman,* 112 S. Ct. at 1438–40 (majority opinion by Justice Kennedy); *see id.* at 1454 (concurring opinion of Justice Souter); *id.* at 1549 (concurring opinion of Justice Blackmun). *See also Swann,* 402 U.S. 1, 20–21 (1971) (stating, "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools thus may influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.").

107. *See infra* part III (discussing *Columbus,* 443 U.S. 449 (1979); *Dayton II,* 443 U.S. 526 (1979); *Swann,* 402 U.S. 1).

108. *Freeman,* 112 S. Ct. at 1436.

109. *Id.* at 1437.

110. *Id.* at 1440.

school plans and their critics: it may well be that additional remedies would have been necessary because of de jure effects upon housing segregation, but the Court in *Brown II* should have started with a principled decree rather than with mushy pragmatism—and it could have done so by requiring neighborhood school assignment as an immediate beginning even if it did not end there.

The author's own experience while growing up in the Houston Independent School District and attending Lamar High School furnishes a particularly compelling example. Lamar High School then served the River Oaks area, among others; in fact, it is located at the intersection of River Oaks Boulevard and Westheimer Road. At that time, there also was an area in which African-Americans resided within a few short blocks of the school. My home was more distant, and I often traveled past this black area on the way to school. Under the regime of that era, however, not a single African-American child attended Lamar; the school was still all white at the time of my graduation in 1962, eight years after *Brown I.*

This unfortunate (and illegal) state of affairs would have ended shortly after *Brown II* if the Supreme Court, then and there, had ordered neighborhood schools as a first step. It is probably also true that more would have been necessary in Houston to prevent future acts of official segregation and to address housing discrimination, but some degree of timely relief could at least have been obtained. In concrete terms, the African-American children whose homes I passed on the way to school would no longer have suffered from their discriminatory school assignments, which presumably were accomplished by sending them longer distances to all-black schools. And the members of the all-white Lamar class of 1962, including the author, would likewise have been spared the less immediately apparent but nevertheless obviously harmful effects of their own segregated—and therefore inferior—educations.

II. *GREEN, ALEXANDER,* AND *SWANN:* THE ERA OF COURT-IMPOSED DESEGREGATION PLANS

A. The Fallout from Brown: *Desegregation "Now"*

In 1968, thirteen years after *Brown II,* the Supreme Court obviously was frustrated by the conditions it confronted in *Green v. County School*

Board.[111] In one sense, the frustration was justified. The district court in *Green* had found that "[t]he School Board operates one white combined elementary and high school . . . and one negro combined elementary and high school . . . . There are no attendance zones. Each school serves the entire county."[112] School buses traveled overlapping routes throughout the county to serve a school district whose schools were perfectly segregated.[113] Factually, *Green* was *Brown* all over again. The freedom-of-choice plan adopted by the school district had caused no change from the unconstitutional conditions that had existed under *Plessy v. Ferguson.* As the Court put it, "The pattern of separate 'white' and '[n]egro' schools in the New Kent County school system . . . is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed . . . ."[114]

But in another sense, the Court's frustration was unwarranted because it had itself as well as school officials to blame. The sorry record of the New Kent County School Board was a consequence of political effectuation of majoritarian preferences that were carried out precisely because the Court in *Brown II* had failed to order a remedy with any timetable, any method, any principle, or any defined result. Now, really for the first time, the Court was ready to say what it meant in *Brown II:* the "thrust" of that decision "was a call for the dismantling of well-entrenched dual systems."[115] In other words, school districts with de jure segregation at the time of *Brown I* had not merely an obligation to cease unconstitutional operations, but also an "affirmative duty" to desegregate.[116] Furthermore, the Court had a new timetable: "The time for mere 'deliberate speed' has run out . . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*"[117] Finally, the Court was ready to specify more drastic methods: the school board must be required to formulate a new plan and, "in light of other courses which appear open to the [b]oard, such as zoning, fashion steps which promise realistically

111. 391 U.S. 430 (1968) [hereinafter *Green*].

112. *Id.* at 432.

113. *Id.*

114. *Id.* at 435.

115. *Id.* at 437.

116. *Id.* at 437–38.

117. *Id.* at 438–39 (emphasis added).

to convert promptly to a system without a 'white' school and a 'negro' school, but just schools."[118]

A year later, the Court reconsidered these questions. In *Alexander v. Holmes County Board of Education,*[119] it held that "every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."[120] There was an increasing urgency to the Court's rhetoric, but the decision in *Alexander* also reflected a substantive tightening of the requirement. Deliberate speed, or even "a plan that promises to work now," was no longer enough; instead, the requirement was termination of dual schools "at once" and immediate commencement of operation of only "unitary" schools.

Unfortunately, even this statement was inadequate, and in *Swann*[121] a unanimous Court made *Brown II* concrete by affirming drastic remedies. In the process, if the Court did not "draw pictures" for resistant districts and restrained district courts, it at least gave illustrations and drew lines. The *Swann* opinion established four basic principles. First, it upheld a "racial balance requirement . . . on individual schools," at least when such a mathematical ratio "was no more than a starting point . . . rather than an inflexible requirement."[122] Second, the Court held that "one-race" schools (defined as a school whose students were all or "predominantly" of one race, even if in a part of the city where "minority groups are . . . found concentrated") triggered a heightened level of scrutiny that the school board could satisfy only by carrying the burden of demonstrating "that their racial composition is not the result of present or past discriminatory action on their part."[123]

Third, the *Swann* opinion authorized the district courts to alter attendance zones as a remedy. The Supreme Court had approved this concept in earlier cases (for example, *Green*),[124] but in *Swann* the Court took it farther: the Court approved "a frank—and sometimes drastic—gerrymandering of . . . attendance zones," as well as "pairing, 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer" of African-American students

118. *Id.* at 442.

119. 396 U.S. 19 (1969).

120. *Id.* at 20.

121. 402 U.S. 1 (1971).

122. *Id.* at 22–25.

123. *Id.* at 26–27.

124. *See supra* note 118 and accompanying text.

out of segregated schools and white students into them.[125] More importantly, the Court approved what opponents would denounce as massive cross town busing. "More often than not," the Court wrote, "these zones are neither compact nor contiguous; indeed they may be on opposite ends of the city"—but "this cannot be said to be beyond the broad remedial powers of a court" as an "interim corrective measure."[126] Fourth and finally, the limits of remedies involving transportation were reached when the time or distance of travel was so great "as to either risk the health of the children or significantly impinge on the educational process."[127]

The decisions in *Green*, *Alexander*, and *Swann* were the result of the weaknesses in *Brown II*.[128] As acknowledgments of the rule of law, they were preferable to that decision. Rather than invite defiance by accommodation, these decisions instead straightforwardly ordered compliance with the law.[129] At the same time, however, these decisions produced unfortunate, and in some respects ironic, results.

B. The Defects in Green, Alexander, *and* Swann

One defect that persisted through *Swann* was that the Court still did not understand the political position of school board officials. It bemoaned the fact that "the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own" on at least three occasions.[130] Because of this "total failure of the school board," the Supreme Court wrote that the district court was obliged "to do what the board should have done."[131] This rhetoric indicates that the Court still was not able or willing to see its mistake in *Brown II*. The Court should have expected that its earlier mushiness would produce this inaction on the theory that the desired result would not be achieved if it depended primarily upon the willingness of elected officials to countermand the strongly felt wishes of a majority of the electorate.[132] Such an approach would only encourage democratic (if illegal) resistance

125. *Swann*, 402 U.S. at 27–29.

126. *Id.*

127. *Id.* at 29–31.

128. *See supra* part I(B).

129. *Cf. supra* part I(B) (discussing vacillation in *Brown II*).

130. *Swann*, 402 U.S. at 24.

131. *Id.*

132. *See supra* notes 77–78 and accompanying text.

by the majority of the voting public, place elected public officials in the untenable position of choosing between majoritarian sentiments or adherence to principles of law that at best were unclear, and place district judges in the untenable position of negotiating with the elected officials in an atmosphere of inflamed public sentiment.[133] In summary, the need for a court-ordered plan based upon elected officials' default in *Swann* was a predictable result of the fallout from *Brown II.*

Moreover, these decrees were not merely anti-democratic or destructive of important private interests. A second flaw is that they were discriminatory, at least in their results. The *Swann* opinion obviously contemplated busing African-American children long distances to attend majority-white schools.[134] A larger percentage of these children inevitably would be bused, and to desegregate the most difficult all-white schools they would have to be bused greater distances than whites, who could be moved from nearer locations.[135] But if an African-American child was ordered bused forty-five minutes per day each way to attend a school that white children attended in their neighborhood, could it be said that the black child had been afforded equal protection of the laws?[136] Such a result could occur from nondiscriminatory motives: the fact that whites were overall in the majority simply meant that a smaller percentage would be bused, and for lesser distances. Doctrinally, perhaps that result could be defended on the theory that it did not reflect purposeful or intentional discrimination against the African-American child but only the disparate impact of a systemwide plan. In other words, one might reason that the discriminatory impact against the black child had resulted "in spite of" and not "because of" the intent that motivated the government conduct. Such decisions as *Personnel Administrator of Massachusetts v. Feeney*[137]

133. *See supra* part I(B) (discussing defects in *Brown II*).

134. *See supra* notes 125–27 and accompanying text.

135. This consequence flowed from the Court's focus on one-race schools, coupled with the minority status of African-American children.

136. The busing times for children in *Swann* were shorter, *see* 402 U.S. 1, 29–31 (1971); however, since the limits on bus trips were defined only by health and educational concerns, *id.*, there was no assurance in *Swann* that trips would always or even typically be so short.

137. 429 U.S. 66 (1976) (holding that a state's hiring preference, afforded to veterans, was not unconstitutional merely on account of disparate impact in which overwhelmingly more males were helped than females where the policy was not the result of intentional discrimination and was adopted in spite of, and not because of, the disparate impact).

and *McCleskey v. Kemp*[138] would uphold the result. But even if this analysis could answer the criticism doctrinally, it could not eliminate the undesirable effects of this solution.

A third and deeper problem arose from this discriminatory impact. Is the concern of the equal protection clause that each *individual* shall be treated with equality before the law, or that major *classes* of people shall be treated without class discrimination?[139] If the concern is limited to remedying discrimination against a group or class, adverse impacts upon some individuals within the class may be the unavoidable result. This effect is shown by the example of the bused African-American child. Which model, then—that of individual or group—most accurately reflects the purpose of the equal protection clause? Perhaps it is possible to make a synthesis: elimination of group or class discrimination can be carried out so long as it does not have excessive effects on individuals. Perhaps, in other words, it can be argued that the elimination of effects from illegal segregation is a value that is likely to enhance the interests of all individuals and, therefore, although equal treatment of individuals is a primary focus of the equal protection clause, it cannot be achieved without recognition of group rights. Even if this theory is true, however, it still did not eliminate the discriminatory impact upon individuals, or the public perception that the law was unequally applied. The distinction between action that avoids ill effects on classes, and action that avoids harm to individuals within those classes, is of a scope that is beyond this article; in any event, even if a philosophical accommodation of the tension can be reached, it may not prevent resistance by individuals harmed in the purpose of protecting classes. And if the resistance is sufficient, it may frustrate the ultimate purpose.

These issues were related to a fourth defect in the *Green-Alexander-Swann* line of cases: they failed to define the three distinct concepts of nonsegregation, desegregation, and integration.[140] In fact, these decisions blurred the distinctions. At the time of *Brown II,* some observers may have thought that the elimination of segregative practices was enough.[141]

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138. 481 U.S. 279 (1987) (holding that differential racial impacts in the criminal justice system did not render sentencing unconstitutional because the impacts were not intentional and occurred in spite of official policy, not because of it).

139. The justices of the Supreme Court have differed sharply over the individual-or-group-protection issue. *Cf.* Regents of University of California v. Bakke, 438 U.S. 265 (1978) (opinion of Powell, J., emphasizes individual protection; opinion of Marshall. J., emphasizes group protection).

140. *Cf. supra* notes 2–3 and accompanying text.

141. This impression could have arisen because *Brown II* left undefined the compliance with the Constitution that it required. *See supra* notes 68–72 and accompanying text.

But *Green* introduced the "affirmative duty" to "desegregate," which meant the elimination of all vestiges of de jure segregation.[142] Then, *Swann* translated this concept of desegregation into a mathematical "norm" of "racial balance."[143] Even though the Court elsewhere emphasized that the norm could be only a "starting point," that it "does not mean that every school in every community must always reflect the racial composition of the school system as a whole," and that if faced with a judgment ordering "any particular degree of racial balance or mixing . . . we would be obliged to reverse,"[144] *Swann* blurred the distinction between desegregation and integration.

And in a manner of speaking, it was the confusing nature of the underlying concept that blurred the distinction, not the Court. The requirement was not one of racial balance, at least not ultimately;[145] instead, the real issue was one of remedies for past violations, by which the Court had required all remnants of the dual school system eliminated to the extent that it was practical to do so.[146] But the principal test of desegregation was a "norm" of "racial balance," or integration.[147] "How can we know the dancer from the dance?" asked William Butler Yeats.[148] The distinction between the measurement and the measure through which it is perceived is easily confused. In short, the requirement was desegregation, not integration, but the starting point for determining the degree of desegregation was the degree of integration—and although this fine distinction ultimately was logical to people who studied it carefully, it was pragmatically difficult to maintain.

This difficulty raised the problem of intent and impact. The Court continued to require proof of intent. Perhaps it could have fashioned a different approach, one that focused ultimately upon how segregated the schools were, rather than on how they got that way. Such an impact-centered approach would have required solutions to several difficulties, including avoidance of mistreatment to individuals or school districts who behaved lawfully and in good faith. Nevertheless, perhaps it could have been done. Instead, the Court's confusion of intent and impact

142. *See Green*, 391 U.S. 430, 437–38 (1968).

143. *See Swann*, 402 U.S. 1, 23–24 (1971).

144. *Id.* at 24–25.

145. The Court even said that a requirement of "any particular degree of racial balance" would be reversible error. *Id.* at 24.

146. *Id.* at 15–16.

147. *See supra* note 122 and accompanying text.

148. William Butler Yeats, *Among School Children*, *in* HAZELTON SPENCER ET AL., BRITISH LITERATURE: FROM BLAKE TO THE PRESENT DAY 905–06 (1952).

created a regime in which the outcome could depend more upon the predilections of the district judge—which president appointed him or her—than upon the facts and law. Mushiness, in this context, created an appearance of politics-rather-than-law, which was undesirable in a situation so dependent upon majority-voter compliance.

Perhaps, after what it had done in *Brown II* and its progeny,[149] the Court had no choice. Thirteen years later, with a tradition of negotiations between courts and schools firmly established,[150] the Court could not go back to what it should have done in that earlier line of cases. The perspective of *Freeman* allows us, however, to see that the confusing role given to norms of racial balance had pernicious effects.[151] As the *Swann* Court recognized, communities "will [not] remain demographically stable," and school authorities are not required to "make year-by-year adjustments."[152] As early as 1964, Alexander Bickel had written that the "likely—and anticlimactic—outcome of all the litigating and all the striving" after *Brown* was that "a number of [n]egro children are admitted to white schools. Some few white children go to [n]egro schools; most flee to other homes, or out of the public school system altogether."[153] The Court was about to encounter a hydraulic counterpressure, because the defects and ironies were not lost on individual parents even if the Supreme Court could explain them with confusing doctrine.

149. *See supra* notes 42–54, 90–96 and accompanying text.

150. *See supra* notes 69, 72, 84–87 and accompanying text (discussing the amorphous nature of a district court's duty, goals, and timing, which led to intransigence and established the pattern here described as negotiation).

151. Thus, for example, the Court found it necessary to explain that "unitary" status did not imply any "fixed" meaning. *See Freeman*, 112 S. Ct. 1430, 1443 (1992).

152. *Swann*, 402 U.S. 1, 31–32 (1971).

153. Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 214 (1964).

III. *KEYES, COLUMBUS,* AND *DAYTON:* "PRESUMPTIONS" OF CAUSATION

*A. Plaintiffs Obtain Powerful Tools: A Presumption That Even Very Limited Proof of Pre-*Brown *Segregation "Caused" Racial Imbalances Years Later; The Foreseeable Effects Doctrine*

One of the first cases outside the south to reach the Court was *Keyes v. School District No. 1,*[154] which involved the Denver school system. The record contained proof of purposeful administrative action creating segregation in a substantial portion of the school district.[155] The Court reaffirmed its earlier statements that purposeful discrimination, and not merely impact, was required.[156] However, it gave plaintiffs an important tool for proving discriminatory purpose because it held that discriminatory purpose in a substantial part of the district shifted to the defendant the burden of disproving segregative intent in all other parts of the district.[157] A major issue in the case concerned central city schools, which were heavily black, but as to which little other evidence of segregative purpose existed.[158]

Thus, the effect of *Keyes* was not to retain the requirement of proof of discriminatory purpose, but to create a presumption—the "*Keyes* presumption"—that made it much easier to supply. The Court also foreshadowed two other causation principles that were to surface again in later decisions involving the Columbus and Dayton school systems.[159] *Keyes* thus became a significant weapon in school plaintiffs' arsenals.

Six years later, in *Columbus,*[160] the Court took the *Keyes* decision a step farther. There was no question that the public schools of Columbus, Ohio, were highly segregated by race; half of them were more than 90 percent black or white.[161] The district court's findings of causation from intentional official action had been affirmed by the court of appeals and arguably supported the comprehensive and draconian decree that the district court had entered (at least under the holdings of *Green, Swann,*

154. 413 U.S. 189 (1973) [hereinafter *Keyes*].

155. *Id.* at 206.

156. *See id.* at 207.

157. *Id.* at 208–11.

158. *Id.* at 191–95.

159. *See infra* notes 160–85 and accompanying text.

160. 443 U.S. 449 (1979).

161. *Id.* at 452.

and *Keyes*).[162] But the Supreme Court did not affirm on this basis alone. It held that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."[163] Thus, although disparate results were not sufficient by themselves, and discriminatory intent was required, disparate impact could supply proof of discriminatory intent.[164] The Court cited *Personnel Administrator v. Feeney,* in which it had held that even a dramatically disparate impact was insufficient if it resulted "in spite of" and not "because of" official intentions.[165]

Upon careful reading, the theoretical distinction emerges from *Columbus:* the "foreseeable effects standard," as the Court called it,[166] could be used as some evidence of discrimination and in some cases might furnish enough proof to support or even compel a finding of purposeful discrimination, but it would not always support or compel such a result. In real-life school systems, with long histories and with a number of stubbornly persistent all-black schools, however, the distinction was blurred. To put the matter bluntly, every school district in the country had different distributions of black and white children. Every one was overwhelmingly likely to have taken *some* action either before or after *Brown* that could be argued to have altered this distribution so as to increase racial concentration, whether officials were aware of this consequence or not. In any event, if the effect was deemed "foreseeable" in hindsight, it was evidence of purposeful discrimination. Supporters could rightly point out that this "foreseeable effects" doctrine supplied only some evidence of intent, and not absolute proof. When carefully and theoretically examined, it could be squared with other discrimination doctrines.[167] On the other hand, detractors also could argue that application to multiple decades of school district actions enabled any motivated fact-finder to see discriminatory purpose anywhere, as a sort of "heads I win, tails you lose" proposition.[168]

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162. *Cf. id.* at 461 (predicating liability in part on finding that the school board "never actively set out to dismantle [the] dual system").

163. *Id.* at 464.

164. This holding could be traced to earlier decisions, including Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that disparate impact upon "subjects of China" was "so exclusive" that it justified inference of discriminatory intent against them).

165. *See Columbus,* 443 U.S. at 465 (citing Personnel Admin. v. Feeney, 442 U.S. 256 (1979)).

166. *Id.* at 464–65.

167. Such as those set out in *Yick Wo* and *Feeney. See supra* notes 164–65 and accompanying text.

168. This was the gist of Justice Rehnquist's dissent in *Columbus* and *Dayton II. See infra* notes 183–84 and accompanying text.

Then came *Dayton II.*[169] Fifty-one of the sixty-nine schools in the Dayton system were virtually all white or all black.[170] In an earlier decision known as *Dayton I,* the Court had remanded for a determination of "how much incremental segregative effect [past] violations had [had] on the racial distribution of the Dayton school population as presently constituted, when that distribution [was] compared to what it would have been in the absence of such constitutional violations."[171] This determination would in turn determine the remedy, which "must be designed to redress that difference."[172] Faced with the requirement of finding not just the amount of segregation but the "incremental segregative effect" of certain factors as distinguished from others, the district court dismissed the complaint.[173] Not surprisingly, the court of appeals reversed.[174]

In affirming the reversal, the Supreme Court in *Dayton II* extended the *Keyes* presumption and the *Columbus* foreseeable effects doctrine to recognize a broad presumption of causation.[175] The Court reasoned that the initial constitutional requirement was that school officials operate without intentional segregation.[176] Once that duty was violated by intentional segregation, however, there arose an official duty—an affirmative duty—to liquidate the dual system.[177] And the test of that duty was the effectiveness, not the purpose, of the actions taken to decrease or increase the segregation caused by the dual system.[178] Thus, a failure to desegregate allowed the lower courts "to trace the current, systemwide segregation back to the purposefully dual system of the 1950's and to [other] acts of intentional discrimination."[179] Since proof of failure to desegregate was supplied by deviations from racial balance such as one-race schools, this factor, together with proof of pre-*Brown* de jure segregation, created the inference that existing imbalances were

169. 443 U.S. 526 (1979).

170. *Id.* at 529–30.

171. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) [hereinafter *Dayton I*].

172. *Id.*

173. *Dayton II,* 443 U.S. at 532.

174. *Id.* at 534.

175. *Id.* at 537. *See Keyes,* 413 U.S. 189, 208, 211 (1973); *see also supra* note 163 and accompanying text (discussing the *Columbus* foreseeable effects standard).

176. *Dayton II,* 443 U.S. at 534–36 (citing *Brown I*).

177. *Id.* at 537–40.

178. *Id.* at 538. This principle traces to *Green,* 391 U.S. 430, 437–38 (1968).

179. *Dayton II,* 443 U.S. at 541.

connected to the pre-*Brown* regime.[180] Thus the logical effect of existing principles, according to the Court, was a presumption of causation.[181] When school desegregation plaintiffs were able to demonstrate current racial imbalances and past de jure segregation, the inference arose that there was a causal "connection" between the two.

Justice Rehnquist dissented in all three cases, and he was joined in *Columbus* and *Dayton II* by Justice Powell. In *Keyes*, Justice Rehnquist concluded that the Court had gone beyond requiring disestablishment of a genuinely dual system and had required consideration of race to achieve "racial mixing" instead of mere desegregation.[182] He criticized both *Columbus* and *Dayton II* as "opinions so Delphic that lower courts will be hard pressed to fathom their implications for school desegregation litigation."[183] Justice Rehnquist "could not subscribe to the affirmative duty, the foreseeability test, the cavalier treatment of causality, and the false hope of . . . rebuttal."[184]

B. *The Defect in* Keyes, Columbus, *and* Dayton: *Principle Without Pragmatism*

The *Keyes, Columbus,* and *Dayton* decisions gave plaintiffs tools for proof of liability, that is, for proof of violation and causation. More importantly, a district court's handling of these presumptions determined the shape of the remedy, because *Dayton I* called upon district judges to determine the "incremental segregative effect [of] violations" and to design remedies "to redress that difference."[185] In short, *Keyes, Columbus,* and *Dayton II* said as much about school desegregation remedies as they did about proof of violations. Proof of present-imbalance-plus-past-violation not only sufficed to prove liability, it also furnished justification for redrawing zone lines.

As inferences, the presumptions were defensible. That is to say, they might rest upon evidence that, depending upon its strength and combination with other evidence, could persuade a reasonable person of intent or causation.[186] But in a practical world, Justice Rehnquist's

180. *See id.* at 537.

181. *Id.*

182. *Keyes,* 413 U.S. 189, 254–65 (1973). Powell, J., dissented in part. *Id.* at 217–253.

183. *Columbus,* 443 U.S. 449, 491 (1979).

184. *Dayton II,* 443 U.S. at 542.

185. *Dayton I,* 433 U.S. 406, 420 (1977); *see supra* notes 171–72 and accompanying text.

186. *See generally* JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE 580–82 (4th ed. 1992) (stating reasons for creation of presumptions). Whether the inference is strong enough to

criticism of the Court's treatment of these inferences as "Delphic"[187] was understandable.

To see why, one might imagine a pre-*Brown* school board that intentionally spent more funds per pupil on a virtually all-white suburban school than on its black counterpart in the central city. Twenty years later, soon after *Dayton,* and *Columbus,* a district judge might be faced with the decision whether racial imbalances in a vastly larger and differently shaped metropolitan area were now violations traceable to the constitutional violation inherent in that deliberate but long-past act of discriminatory funding. The truth is that the twenty years would be filled with varied and disparate factors contributing to the circumstances. These factors might or might not include other acts of official segregation; community customs formed partly by official and partly by private sources; influences of the media; job markets; private migration patterns; cultural preferences in neighborhoods; and even parental choices of out-migration or private education as a reaction to perceived debasement of public school quality. To trace the effects of constitutional violations, one would need to separate them from neutral or private actions. But the *Keyes* presumption, the *Columbus* foreseeable effects doctrine, and the *Dayton II* presumption of causation combined to focus the inquiry away from other factors.[188] These decisions channeled it instead into questions that emphasized evidence supporting both the violation and the remedy by minimizing private and neutral factors.

For example, the hypothetical pre-*Brown* board's decision to fund certain schools over others for discriminatory reasons was extended, through the *Keyes* presumption, to the entire district. Although the shape and size of the district may have been altered beyond recognition, *Keyes* did not direct a district judge to take that factor into account. Furthermore, differential funding certainly had the "foreseeable effect" of perpetuating segregation. For that matter, if the school district had adopted egalitarian funding patterns immediately after *Brown,* even that neutral decision would have had the foreseeable effect of maintaining

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justify a standardized rule shifting the burden of proof (which is what a presumption is), however, is a more open question. This issue is made more doubtful by the difficulty of proving a negative, which is the burden placed on the school district. *See Freeman,* 112 S. Ct. 1430, 1452 (1992) (Scalia, J., concurring).

187. *Columbus,* 443 U.S. at 491 (Rehnquist, J., dissenting).

188. *See supra* notes 175–81 and accompanying text.

segregation.[189] For such a district, few actions short of racially remedial assignment as in *Swann* would have passed the foreseeable effects standard.[190] Finally, *Dayton II* would connect all significant racial imbalances existing twenty years later to the pre-*Brown* violations, creating proof of causation.[191]

These decisions would not have prevented a court from finding—as indeed the Supreme Court did in *Freeman*[192]—that a given instance of racial imbalance was not attributable to past acts of de jure segregation. The school district would bear the burden of rebutting the presumption. It could do so by affirmatively proving that the same racial distribution would have occurred anyway owing to private migration.[193] But none of the decisions told the district courts how to take such a consideration into account, except for the defendant's hope of being able to rebut the presumption. The result of this logic, then, was likely to be a finding of systemwide discrimination traceable to constitutional violations, requiring a commensurate—and therefore draconian—decree.[194]

Again, the Court's distinction between intent and impact was at the heart of the concern. Again, it is possible that the Court could have fashioned a test centered on impact, and that the Court could have focused on the degree of racial division in the schools rather than upon how the schools got that way. Again, such a test would require the solution of very difficult problems, such as the prevention of disadvantages to individuals or districts whose intent was proper and lawful. But the confusion of intent and impact brought about by *Keyes, Columbus,* and *Dayton* prevented the Court from confronting and solving such problems. Furthermore, it left majority-race members free to avoid compliance by fleeing the district, and worse yet, it gave the district few

189. The school district's "affirmative duty" in this circumstance was not merely to avoid further segregative acts, but rather to dismantle the dual system. *See supra* note 116 and accompanying text.

190. This conclusion follows because all other actions would have had the foreseeable effect of maintaining segregation.

191. *See supra* notes 175–81 and accompanying text.

192. *See* 112 S. Ct. 1430, 1447–48 (1992).

193. *See id.*

194. The causation presumption meant that "the plaintiffs will almost always win." *Id.* at 1452 (Scalia, J., concurring). The absence of such a presumption, however, also would be vulnerable to criticism, because it would make proof difficult for plaintiffs. *See id.* (Scalia, J., observing that if plaintiffs are required to meet an ordinary burden of proof, "the plaintiffs will almost always lose"). Justice Scalia elsewhere points out that if plaintiffs fail for lack of proof, this result follows from the erosion of the inference by the passage of time, and he argues that the Court "should consider laying aside the extraordinary, and increasingly counterfactual, presumption of [causation]." *Id.* at 1453–54.

tools to answer this problem—or to avoid further liability, for having happen to it that which it was powerless to prevent.

These decisions were salutary in that they were based upon clear principles. Furthermore, the principles vindicated the law and redressed constitutional violations. The treatment of causation to which they conduced, however, and the remedies that they implicated, lacked flexibility to accommodate other factors.[195] The defect in the *Keyes-Columbus-Dayton II* line of decisions thus was opposite from that in *Brown II.* These decisions were principled in the sense that they provided clear vindication of the law, but they lacked pragmatism.[196] They were widely, and understandably, perceived simply as unfair, however much abstract logic their supporters might have been able to

195. They did not tell the district court, for example, how to treat a case in which the current school board was acting in good faith or in which the events triggering the presumption were remote in time. *Cf. infra* part IV(A) (describing *Freeman* decision, including its recognition of these two factors). Furthermore, the causation-presumption decisions required a decree commensurate with the violation, without telling the lower courts how to take account of parental reactions to a draconian decree—even if the result was a population flight from the district that undermined the decree. *See infra* note 196 and accompanying text.

196. Perhaps it can be argued that the Court simply did not go far enough with the principle, as the plaintiffs argued in Milliken v. Bradley, 418 U.S. 717 (1974) [hereinafter *Milliken I*] and Milliken v. Bradley, 433 U.S. 267 (1977) [hereinafter *Milliken II*]. There, the plaintiffs sought metropolitan consolidation to counteract the segregative effects of migration across school district lines. The majority denied relief. Dissenters in *Milliken I* argued that failure to dissolve school districts and reconstitute them as consolidated would mean that "deliberate acts of segregation and their consequences [would] go unremedied." 418 U.S. at 763 (White, J., dissenting, joined by Douglas, Brennan, and Marshall, JJ.).

The difficulty with this approach, however, is that it would have required more drastic gerrymandering of attendance zones and transportation of children over greater distances. The limits contemplated by the *Swann* decision presumably would have stopped the extension of these remedies at a point short of complete desegregation even if the courts had ordered consolidation across school district borders. *See supra* note 127 and accompanying text. Furthermore, the argument for consolidation depended upon the assumption that courts had power to remedy migration undertaken by individual parents, whose actions would not ordinarily be remediable under the Constitution. *Cf. infra* part IV(A) (discussing *Spangler* case). It could be argued that this migration was influenced or caused by court decrees that were themselves made necessary by past unconstitutional segregation; this argument, however, overlooked the fact that the decrees were entered "in spite of and not because of" the resulting migration, as were the past segregative acts, and therefore the Court's decisions confining the Constitution to intentional discrimination might prevent a remedy. *Cf. supra* notes 137–38 and accompanying text (discussing *Feeney* and *McCleskey* cases).

Finally, if the Court had been perceived as engaging in a "scorched earth" approach in which it was prepared to subordinate all other considerations to the single goal of remedying all vestiges of unconstitutional segregation, the Court probably would have precipitated a constitutional crisis. *Cf. supra* notes 55–60 (discussing aftermath of *Cooper v. Aaron*). Even if the plaintiffs' positions in the *Milliken* cases did not necessarily implicate such a scorched-earth remedy, the danger of a crisis based upon perceptions may have been sufficiently real to have been a consideration against the consolidation the plaintiffs there sought.

muster to defend them. The result was a flight of parents from school districts in which they had lost confidence and in which local autonomy was gone.[197] Although the factor of local autonomy was what had prompted some districts to resist desegregation in the first place, it also was what forged parents' identity with and interest in their schools. It was important to their perceptions of educational quality. Their consequent actions sometimes have been referred to as white flight,[198] and perhaps that label sometimes has been fair; enough motivation for such migration, however, could often come from a loss of confidence that was not based on color or prejudice. In either event, the result often was resegregation. These principled-but-not-pragmatic decisions contained the seeds of their own defeat, just as the pragmatic-but-not-principled ones did.

Furthermore, the *Keyes, Columbus,* and *Dayton* decisions must be viewed in the context of *Milliken v. Bradley,*[199] in which the Court generally disapproved metropolitan consolidation as a remedy. The Court excepted cases in which discriminatory intent had prompted the initial creation of district lines. This condition, however, rarely could be demonstrated; instead, the plaintiff's concern (and that of adversely affected school districts) usually was that district lines originally set up for other purposes were facilitating white flight.

It is possible that a different decision in *Milliken* would have made little difference in practical results, because disgruntled parents might have used private schools, moved to wholly different metropolitan areas, or migrated to schools so far distant by bus from the central city that satelliting was impractical. On the other hand, it is possible that the opposite result in *Milliken* could have had a substantial impact, although at great economic and social cost—since flight could not be achieved just across the district border. No certainty in this area can ever be established, although the likelihood seems overwhelming that an opposite holding in *Milliken* would have made *some* difference in the incentive to leave affected districts. To that extent, *Milliken* encouraged flight; and to that extent, it can be argued that it aggravated the lack of pragmatism in *Keyes, Columbus,* and *Dayton.*

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197. *Cf. Milliken I,* 418 U.S. 717 (1974) (refusing to order interdistrict consolidation as a remedy to such migration; discussed *supra* note 196).

198. *E.g., Freeman,* 112 S. Ct. 1430, 1453 (1992) (Scalia, J., concurring).

199. *Milliken II,* 433 U.S. 267 (1977); *Milliken I,* 418 U.S. 717 (1974). *See generally supra* note 196 (expanding upon the *Milliken* cases).

IV. *SPANGLER, DOWELL,* AND *FREEMAN:* TERMINATING SUPERVISION

After years or even decades of effort, some school districts began producing conditions that could support arguments for terminating court supervision. These arguments resulted in a series of cases from 1976 to 1992 that defined the conditions under which termination lawfully could occur. The resulting decisions, like the earlier opinions following *Brown II,* combine varying elements of principle and pragmatism.

A. The Spangler, Dowell, *and* Freeman *Decisions*

The Pasadena School Board, after a finding against it of official segregation, was subjected to a remedial order that required it to insure each year that there would be no school "with a majority of any minority students."[200] The school district achieved that condition, and, in 1974, filed a motion with the district court to remove the "no-majority" requirement.[201] The district court denied the motion and stated that the no-majority requirement was an inflexible one to be applied anew each school year, even if changes in the racial mix in the schools were caused by factors for which the school district was not responsible.[202] In *Pasadena City Board of Education v. Spangler,* the Supreme Court, per Justice Rehnquist, held that the district court must modify the decree to eliminate the no-majority requirement.[203]

In some respects, *Spangler* was a relatively simple decision: the Supreme Court rejected a "substantive constitutional right [to a] particular degree of racial balance or mixing," which the Court in *Swann* expressly had held.[204] To both the majority and the dissent, however, the case was not quite that simple. Race-specific migration had changed the effects of the remedial decree, and the real issue in the case concerned what to do about that fact. To the majority, it was dispositive that there was "no showing" that the changes in racial composition "were in any manner caused by segregative actions chargeable to the defendants."[205] Since, instead, the "quite normal pattern of human migration resulted in

200. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 428 (1976).

201. *Id.* at 428–29.

202. *Id.* at 431, 435.

203. *Id.* at 431–32.

204. *Id.* at 434 (citing *Swann,* 402 U.S. 1, 24 (1971)).

205. *Id.* at 435.

some changes in the demographics," and since unitary status had earlier been achieved, the resulting racial imbalances were not de jure segregation.[206] To the dissent, this reasoning begged the question: the school district's procedures for hiring and promotion, or other aspects of school quality, might informally mark schools as black or white. Thus, these factors might still result in de jure segregation of school attendance. As the dissent saw it, it was important "that the system may not have achieved 'unitary' status in all other respects," although that consideration was "irrelevant" to the majority.[207]

The *Dowell* case concerned a district court's dissolution of a 1972 decree on the grounds that it no longer was working and that the school board had complied in good faith for more than a decade. The plaintiffs argued that the court should have applied a far more stringent standard. They pointed to language in previous decisions holding that such a modification generally requires a showing of "grievous wrong evoked by new and unforeseen conditions."[208] Further, the plaintiffs attacked the school board's recent student reassignment plan, which reduced busing burdens but increased the number of one-race schools.

The Supreme Court, in an opinion by Chief Justice Rehnquist, emphasized that school desegregation decrees differ from most kinds of final judgments in that they "are not intended to operate in perpetuity."[209] Past compliance "is obviously relevant,"[210] as is the question whether "vestiges of discrimination" have been "eliminated to the extent practicable."[211] This two-part inquiry, and not the more stringent standard for other kinds of final judgments, was to guide the district court upon remand in considering whether to dissolve the decree.[212] Three dissenters, led by Justice Marshall, argued that the decree could not be lifted even if the two-part inquiry were to be answered positively, because "feasible steps [still] could be taken to avoid one-race schools."[213]

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206. *Id.* at 436.

207. *Id.* at 442 (Marshall, J., dissenting).

208. Board of Educ. v. Dowell, 111 S. Ct. 630, 632 (1991) (quoting United States v. Swift & Co., 286 U.S. 106, 119 (1932)).

209. *Id.* at 637 (rejecting as precedent United States v. Swift & Co., 286 U.S. 106 (1932)).

210. *Id.*

211. *Id.* at 638.

212. *Id.*

213. *Id.* at 639 (Marshall, J., dissenting).

Then came *Freeman.*[214] In some respects, *Freeman* was similar to *Spangler* and *Dowell;* in other respects, however, it was radically different. Most importantly, resegregation in *Freeman* was dramatic: "The District Court found that '[a]s the result of these demographic shifts, the population of the northern half of DeKalb County is now predominantly white and the southern half of DeKalb County is predominantly black.'"[215] Fifty percent of African-American students attended schools that were over ninety percent black. Of twenty-two high schools, "five had student populations that were more than ninety percent black, while five other schools had student populations that were more than eighty percent white," and the pattern was similar in elementary schools.[216]

Nevertheless, the district court found that its 1969 order had "'effectively desegregated [the school district] for a period of time' with respect to student assignment."[217] The Court had to leap several hurdles to reach this conclusion. First, two schools were virtually all-black even after the 1969 order.[218] Rapid black migration from Atlanta had caused the imbalance in a very short period of time.[219] The Supreme Court stated that this phenomenon was "illustrative of the problems" inherent in the effort to "integrat[e] the whole district."[220] Furthermore, the district court found that several aspects of the school district, factors identified as important in *Green,* remained tainted with vestiges of de jure segregation.[221] Most importantly, faculty assignments and per pupil expenditures were still unconstitutionally unequal.[222] Finally, the district court considered a less tangible, non-*Green* factor—the quality of education offered to white and black student populations—and found that it was still infected with constitutional inequalities.[223]

These issues raised, again, the issue of causation—an issue that had been central in *Keyes, Columbus,* and *Dayton II*—as well as the somewhat different, but closely related issue whether a school district

214. 112 S. Ct. 1430 (1992).
215. *Id.* at 1438.
216. *Id.*
217. *Id.* at 1439.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 1441.
222. *Id.* at 1441–42.
223. *Id.* at 1442.

was "unitary." The Supreme Court recognized that these terms were ambiguous.[224] They also were value-laden. "[T]he term 'unitary,'" said the Court, "is not a precise concept;" what it really signifies is "a school system which has been brought into compliance with the command of the Constitution."[225] Perhaps more importantly, the Court relaxed the concept of causation that had been treated more rigidly in *Dayton II*. "In one sense of the term, vestiges of past segregation by state decrees do remain in our society and in our schools," wrote the Court.[226] Past wrongs were "a stubborn fact of history;" but though the nation could not escape its history, "neither must we overstate its consequences in fixing legal responsibilities."[227] Thus, vestiges of segregation remained a concern of the law even if "subtle and intangible," but nonetheless, for plaintiffs to justify legal intervention, "they must be so real that they have a causal link to the de jure violation being remedied."[228]

The key to the Court's reasoning in this regard was contained in two sentences that gave significance to time remoteness and to good faith. As to the first factor, time, "[a]s the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system."[229] Second, as to good faith, "[t]he causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith."[230] It was on the basis of these twin factors that the Court hinged its distinction of *Columbus* and *Dayton II*.

B. The Elusive Inference of Causation

Causation, then, is at the heart of the *Spangler, Dowell,* and *Freeman* cases, and the key to understanding them is to recognize that they reflect a more flexible view of causality than the decisions that preceded them. In fact, the concept of causation is an exceedingly awkward one. "Cause" is not a scientific or absolute concept; it instead is a legal conclusion, based upon multiple and sometimes conflicting factors, about

224. *Id.* at 1443–44.

225. *Id.* (quoting in part Board of Educ. v. Dowell, 111 S. Ct. 630, 636 (1991)).

226. *Id.* at 1448.

227. *Id.*

228. *Id.* (emphasis omitted).

229. *Id.* (emphasis omitted).

230. *Id.*

fixing responsibility or blame.[231] After *Dayton II,* the test for fixing legal responsibility was so severe that it could have ensnared people and school districts whose conduct was only remotely related to the conditions at issue.[232] Whether *Freeman* strikes the right balance is a more difficult philosophical question.

Scientists tend to avoid the nebulous concept of "cause."[233] As a matter of strict logic, the inference of causation is inductive rather than deductive, and it always is subject to imperfection.[234] Worse, it usually is based upon the maxim of post hoc ergo propter hoc.[235] We may observe, for example, that individuals who regularly eat breakfast tend to live longer; a scientist would express this concept cautiously, saying that this regular habit was "correlated" with longevity. If an individual who never ate breakfast died prematurely, the scientist would consider it not only erroneous but largely meaningless to conclude that he had died "because" of this factor. The treacherous nature of this reasoning is demonstrated by the hypothetical inference that, because every individual who has died drank water at some point in his or her life, the fact that a given person drank water "caused" his or her death.[236]

Inferences about the relationship between racial imbalances in metropolitan schools and long-past acts of de jure segregation may not be as glaringly counterintuitive as these examples. The quality of the inference is improved by the experience upon which it is based as well as our understanding of a plausible causal mechanism. Nevertheless, it is important to remember that such inferences of causation, even with a long history and a credible mechanism, still are treacherous. A metropolitan school district is a fluid, dynamic entity.[237] Migration is influenced by changing neighborhood patterns, employment locations, and private preferences concerning the ethnicity of one's surroundings, as well as by vestiges of de jure segregation.[238] In addition, it is shaped

231. *See supra* note 30 and authority therein cited.

232. *Cf. supra* note 194 and accompanying text (discussing the argument that the causation presumption meant "the plaintiffs will almost always win").

233. *See supra* note 30.

234. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 74–78 (1988) (discussing the criticisms of inductive reasoning asserted by David Hume, John Brennan, and Bertrand Russell).

235. *Id.*

236. For other critiques of this reasoning, see *id.*

237. Justice Scalia gave the description most focused on this issue in *Freeman,* 112 S. Ct. 1430, 1451 (1992).

238. *Id.*

by parental perceptions of school conditions, including negative perceptions that are induced by drastic court-ordered remedies for de jure segregation.

One can easily hypothesize a situation in which a court enters a serious and thorough remedy for vestiges of de jure segregation, involving zoning, pairing, clustering, and noncontiguous (or "satellite") zoning of the kind authorized in *Swann*.[239] Such a remedy would probably entail increased incidence and duration of bus transportation, and it would also entail the disadvantage of lack of parental identification with the neighborhood school. Parents might be expected to react negatively to such a decree. Their reactions might be based upon perceptions of lowered educational quality, or upon distaste for their children being placed in schools in which they are racially in the minority, or even upon outright racial hostility; in any event, the Court's decisions indicate that this individual decision is not redressable under the Constitution.[240] Neither is the aggregative effect of such decisions by many parents unless it can be related to de jure segregation. It is possible that these parental decisions, in the aggregate, may undermine the effect of a desegregation decree to such an extent that the school district is as segregated as, or more segregated than, it was before.[241]

In such circumstances, has the resegregation been "caused" by the original de jure segregation? In one sense, the answer is no, because it is more immediately "caused" by private decisions that are not cognizable under the Constitution. In another sense, however, such resegregation is indeed caused by the original de jure segregation, because without such official racial discrimination, the remedial decree would never be necessary, and by hypothesis, most of the resegregative effect is the product of the remedial decree. It appears that *Freeman* rejects this latter reasoning by its insistence upon not overvaluing the effect of undeniable historical wrongs.[242] The two factors, good faith and lapse of time, at some point would cut off the claim that de jure segregation was the legal cause.[243]

Tort law has evolved the concept of "proximate" causation, rather than simply "causation," to take account of these difficulties. As a

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239. *See supra* notes 125–26 and accompanying text.

240. *Cf. supra* notes 137–38 and accompanying text (commenting that the absence of causation by official segregation negates constitutional violation).

241. *See supra* notes 152–53 and accompanying text.

242. *See supra* notes 226–28 and accompanying text.

243. *See supra* notes 229–30 and accompanying text.

general proposition, proximate causation implies three elements.[244] The first is "but for" causation, or the inference that an event would not have happened but for the liability-producing conduct. The second is a requirement of direct and continuous sequence, or the concept of a chain of causation that can be broken by intervening factors or by remoteness in time and space. The third factor is foreseeability.

Arguably, the line of cases culminating in *Freeman* tends toward this concept of proximate causation, rather than but-for causation: the idea of time remoteness tends to rebut the existence of a direct and continuous sequence, and the good faith of the school board tends to rebut the foreseeability of causation. The *Freeman* opinion even refers to the relevant causation principle as linking the cause to the prior violation "in a proximate way."[245]

C. *Causation, Remedies, Principle, and Pragmatism*

Ultimately, the question of causation is bound up with another issue: what are our objectives in ordering a remedy? If our objective is to eliminate the effects of de jure segregation in the individual school district at issue, we might favor one kind of decree.[246] If our objective is to "send a message" to other school districts so that they will avoid unconstitutional conduct, we might favor a different kind of decree altogether.[247] If we want to vindicate the court's authority, we might favor yet another kind of decree.[248] Finally, if we are attempting to achieve *all* of these objectives while at the same time preserving other values (such as local political autonomy and equal treatment of all students subject to the decree), we might favor a still different kind of decree.

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244. *See generally* W. PAGE KEETON ET AL., *supra* note 31, §§ 41–45, at 263–361 (discussing proximate causation).

245. 112 S. Ct. 1430, 1447 (1992).

246. Such a decree might, for example, emphasize pragmatic workability rather than clear and consistent articulation of principle.

247. Such a decree might emphasize principle at the expense of pragmatic workability. *Cf. supra* note 246 and accompanying text. In fact, if the decree places unattainable burdens and unworkable duties on a school board, it may communicate the disastrous result to others with greater clarity, although it then may become unfairly onerous and incapable of causing sound results in the immediate case.

248. One example is by adopting rigid and "formalistic" requirements and insisting on their fulfillment irrespective of the ultimate objective. *Cf. Freeman*, 112 S. Ct. at 1449–50 (implicitly rejecting such "formalism").

In concrete terms, if we were trying to remedy official segregation, we would make an effort to separate the unofficial from the official segregation and remedy only those effects "caused" by the latter.[249] The reason we would do so is because we would have to recognize that over-remediation would carry the seeds of its own destruction: it would threaten the values of those subject to the decree, and it would prompt them to act so as to undermine the intended effect.[250] On the other hand, if our intent is to "send a message," we could afford to be more loose about causation. In fact, we could best convey to other school districts that we are serious about getting results by being punitive—i.e., by interpreting past misconduct presumptively as causally related to present effects.[251] If we are overinclusive, we might think that the only consequence is that we can send a stronger message. This latter reasoning emerges from some of the rhetoric in the *Columbus* and *Dayton* cases, particularly.[252]

The reality, however, is that most institutional remedies are designed to fulfill both of these functions—that is, both to remedy the individual case and to send a message—in greater or lesser measures. Rarely does a court attempt to craft a decree purely for the purpose of deterring antisocial conduct by others, without caring whether it will do justice in the case before it. Likewise, a court makes a mistake if it does individual justice by reasoning that is indifferent to the message (or lack of a message) that it sends to others. A remedial decree (and hence our concept of causation) must do some of both if it is to be successful in the long run: it must send a clear message, and it must work to achieve the just result in the immediate case.[253]

All of which is to say that an institutional remedy must be both principled and pragmatic. When additional values such as local autonomy and equality of impact are added, the picture becomes even more complex. We must adjust both the message and the result in the immediate case to take account of these factors. Then we must go back to consider whether the tinkering leaves the principle intact and the pragmatism still working.

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249. *Cf. id.* at 1449 (stating: "A proper rule must be based on the necessity to find a feasible remedy that insures systemwide compliance with the court decree and that is directed to curing the effects of the specific violation.").

250. *See supra* notes 153, 241 and accompanying text.

251. *See supra* note 247 and accompanying text.

252. *See supra* part III(B).

253. *Cf. supra* note 249 (quoting statement in *Freeman* explaining purposes of remedy).

When measured against these criteria, the *Spangler, Dowell,* and *Freeman* decisions offer hope for a better aftermath than has followed most of the Court's earlier desegregation cases. These termination-of-supervision decisions mark a retreat from the Court's most far-reaching reasoning about causation, particularly that in *Dayton II.*[254] They are more pragmatic. They try, at least, to shrink the desegregation decree where it is least needed,[255] and where it is most important to recognize other values.[256] They can be expected to lead to less resistance and avoidance. Thus one can hope that they will produce results in the long run (maybe the very long run) in which both the political system and private decisions will be minimally affected by official racial discrimination.

Yet at the very same time, these decisions preserve clear principles. They require that, before it can shrink the desegregation decree, the district court must inquire whether de jure segregation still has vestiges in the schools.[257] This inquiry, in turn, is governed for the most part by clear questions, such as whether the existence of one-race schools is explainable by private rather than public decisions.[258] Before the district court can lift the desegregation decree, it must have a concrete basis for the hope that it will not thereby disadvantage future generations of children.

D. *The Remaining Problem: "Private" Decisions Tainted by Official Encouragement*

The *Freeman* opinion does, however, leave one important question undefined. The Court's opinion, as well as some of the concurring opinions, emphasize the need to determine whether private migration patterns are causally linked to official segregation.[259] If private housing patterns can be said to have "caused" racial imbalances in the schools,

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254. *See supra* part III(B).

For an alternative view, in fable form, see Derrick Bell, *The Racial Preference Licensing Act: A Fable About the Politics of Hate,* A.B.A. J. at 50, 53 (Sept. 1992) (asserting, "Today, whites have concluded, as they did a century ago, that the country has done enough for black people despite the flood of evidence to the contrary."). Professor Bell's concerns in this article center upon other issues but are broad enough to include school desegregation.

255. That is, in pupil assignments, which represent one of the most significant areas in which school decrees have intruded into democratic choices—by requiring long-distance busing.

256. For example, in faculty assignments, in which official causation is clearer.

257. *E.g., Freeman,* 112 S. Ct. 1430, 1449 (1992).

258. *E.g., id.* at 1440.

259. *Id.* at 1448.

but de jure segregation earlier "caused" those private housing patterns, then it can be argued that the initial de jure segregation "caused" the current imbalances, irrespective of the fact that private decisions not redressable under the Constitution were a mediating factor.

On the one hand, this inquiry has a certain logic to it. If our task is to eliminate vestiges of official segregation "root and branch,"[260] this indirect effect through official encouragement of racial housing choices sounds like one of the branches that is required to be eliminated. There is support in past decisions (for example, *Reitman v. Mulkey*)[261] for finding state action in private decisions that are encouraged by official approbation. One can also imagine clear cases of official encouragement that should not go unremedied. For example, the school district can blatantly or subtly designate schools as black or white. A school district that adopted a resolution encouraging black parents to decide in favor of one school, and whites in favor of another, should not be beyond the remedial power of a court having jurisdiction over a desegregation decree. Neither should a district that names its schools after George Wallace, George Washington Carver, and Benito Juarez as a slightly more subtle means of marking which are black, white, and brown. In fact, the Court decided an analogous case in *United States v. Fordice,*[262] the Mississippi higher education case, during the same term as *Freeman.* Consistency of principle demands that the mediating effect of private decisions should not stay the remedy in such a case.

On the other hand, such clear cases will be rare. The more common question will be the one now faced by the lower courts, upon remand, in *Freeman:* of the muddled mix of factors that *could* have brought about the current racial mixture over the last three or four decades, which actually *is* the cause?[263] This question, however clumsy, is the inquiry that the Court's holding requires. In many instances, it will be a question without meaningful, humanly discernible answers, much as is the question whether exposure to one among many risk factors has "caused" an individual cancer.[264] Furthermore, far-reaching state action cases such

260. *See supra* part II(A) (discussing *Green* and its progeny).

261. 387 U.S. 369 (1967). *But cf. infra* note 265 and accompanying text (discussing the arguable effect of later cases in undermining *Reitman* holding).

262. 112 S. Ct. 2727 (1992) (finding causation by official segregation despite ostensible desegregation where historical events effected designation of dual systems).

263. *See supra* notes 237–38 and accompanying text.

264. *Cf. supra* notes 233–36 and accompanying text.

as *Reitman v. Mulkey* are not typical of the Supreme Court's state action decisions, and they are hard to reconcile with other cases.[265]

In most instances, de jure segregation will have caused a court decree to issue, which in turn will have caused official reaction. That effect, in turn, will have caused a wide variety of individual parental decisions, which, in their aggregate, will have caused further action by the school board, or further decrees by the court. This cycle will have caused another cycle of official action-decree-private decision, which in turn will have caused yet another, throughout the history of the school district from *Brown* to the present. All of these cycles will have occurred while the metropolitan area has been buffeted by a myriad of other economic, geographical, political, and social changes, so that now it has a completely different size, shape and set of demographics than it did when the duty to desegregate was established. In this context, it is difficult to make meaningful determinations of causation.[266] If the Supreme Court means that an exacting inquiry is to be undertaken along these lines, the lower courts face an unenviable task—indeed, an impossible one.

There are indications, however, that the *Freeman* Court does not intend for the law to weave a net so fine as to include causes disclosed by such a diffuse, multiple-cycle analysis. First, *Freeman* takes pains to point out that although history may have influenced current events, that fact alone does not amount to proof of causation.[267] Second, *Freeman* allows the school district to rebut causation by showing that the violation was distant in time.[268] Third, good faith now matters, and presumably it cannot be overcome by mere racial imbalances linked to distant violations only by a presumption.[269] Finally, the Court's concerns seem to be targeted at relatively recent segregative actions of a kind that "designate" or "mark" a school as black or white in a way that would naturally provide strong encouragement to current segregation in housing

265. *Compare Reitman,* 387 U.S. 369, *with e.g.,* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (holding that private foreclosure of lien without due process is not state action despite authorization by statute); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (holding that privately owned utility is not engaged in state action despite monopoly status conferred by state or other state involvement). It should be added, however, that racial discrimination appears to prompt the Court to lower the threshold for finding state action. *E.g.,* Georgia v. McCollum, 112 S. Ct. 2348 (1992) (holding that private criminal defendant's exercise of peremptory challenges is state action, so that racial discrimination is unlawful).

266. *See supra* notes 237–38 and accompanying text.

267. 112 S. Ct. 1430, 1448 (1992).

268. *Id.*

269. *Id.*

patterns, such as by racially discernible funding or faculty composition.[270]

If the causation inquiry is guided by these considerations, it should be workable. In particular, a court should not presume lightly that private housing decisions have been "caused" by official segregation. That approach would exalt principle excessively over pragmatism. It would sweep school officials who act in good faith with the same overinclusive broom as those (few, it is to be hoped, today) who actually encourage private decisions as a surrogate for other kinds of official segregation.

E. Racial Determinants in Private Housing Decisions: The Nub of the Problem

There is an additional reason, contained in *Freeman,* for this conclusion. The evidence before the district court included survey results that showed the racial component of private housing decisions. If this evidence was to be credited, African-Americans as individuals tend to prefer residential areas to be 50 percent black and 50 percent white, but whites as individuals tend to prefer a decidedly more imbalanced neighborhood—one that is 80 percent white and 20 percent black.[271] The implications of this evidence (if it is true) are significant: they mean that the aggregate of migration by persons of all races would consistently defeat any effort at racial balancing by court decree, even if that were the objective.[272] Stated in a way that is more to the point, this evidence leads to the conclusion that private migration in response to private preferences would produce a degree of racial imbalance that conceivably could

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270. *Id.* at 1447 (quoting Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 31–32 (1971) to the effect that judicial intervention "should not be necessary" unless the state has attempted to influence demographic patterns for the purpose of segregating schools). *See id.* at 1454–55 (Souter, J., concurring) (discussing racially "identifiable" schools); *id.* at 1458 (Blackmun, J., concurring) (discussing "earmarking" of schools).

271. *Id.* at 1448.

For a striking example of this phenomenon in a different context, see Barbara Kantrowitz & Susan Miller, *Still Separate after 20 Years: Segregated Reunions for an Integrated Class,* NEWSWEEK, Sept. 7, 1992, at 62. This article reports upon school populations that were desegregated under the law during their educations—but that acted through individuals, decades later, to conduct *segregated* reunions. One African-American woman, whose group refused an invitation to join white classmates in a desegregated reunion, explained: "People feel comfortable with their own." *Id.* There certainly is room to regret the factors that produce this impulse. The questions whether, and how, the law could or should remedy these phenomena are far more difficult.

272. This is especially so given the frequency of migration in our society; in one recent year, 17.6 percent of the entire national population changed households. *Freeman,* 112 S. Ct. at 1447–48.

account for the racially divided demographics of many school systems whether they once were de jure segregated or not.

Further efforts by a court to remedy this kind of racial imbalance could be expected to be defeated by the homeostatic mechanism of private migration that is driven by racially influenced, but private, preferences.[273] It might be argued that this conclusion particularly follows in light of the Court's holding in *Milliken I*[274] and *Milliken II*.[275] Class and wealth differences presumably would increase the division. Since perfect 50-50 or 80-20 neighborhoods would not uniformly appear, and since statistical variations could be expected, imbalances of more than 90-10 could be expected to exist as well. Irrespective of the merits of these private preferences, they provide an explanation for racial imbalances that should reinforce a reluctance to presume that imbalanced housing patterns are the result of official encouragement. At the same time, they show why neighborhood school assignment should have been the most immediate remedy—way back in 1955, in *Brown II*[276]—to be supplemented by other remedies as necessary.

F. Another View: The Relevance of Racial Division and Continued Vestiges of the Dual System

The opinions in *Freeman* thus are capable of a workable interpretation, one based upon a concept of cause analogous to the tort law of proximate causation, interpreted through the two factors of good faith and time remoteness. One must remember, however, that the Court remanded the case for reconsideration. As previous sections of this Article have shown, the justices saw two contradictory sides to the story, one involving a school district that had made great strides toward unitary status through good faith and hard work, and the other a district that remained largely divided by race and in which faculty assignments, funding, and educational quality were still affected by official segregation.

The question therefore remains, what significance should be afforded to these other factors which make up the unpleasant side of *Freeman*? Does the pragmatic workability of the test modeled upon proximate causation outweigh them, and is that test better targeted without them?

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273. *See supra* note 153 and accompanying text.

274. 418 U.S. 717 (1974); *see supra* note 196 for a discussion of this case.

275. 433 U.S. 267 (1977); *see supra* note 196 for a discussion of *Milliken I* and *Milliken II*.

276. 349 U.S. 294 (1955).

The answer is that the district courts will need to continue considering all vestiges of the dual system, in addition to the degree of racial division in pupil assignments. The Court's good faith test implicitly requires this analysis. The degree of racial division that remains in the system is relevant to, even if not solely determinant of, good faith, just as racial impact is relevant to the issue of intent. Considerations of inequitable funding, discrimination in faculty assignments, and uneven educational quality are also relevant. By placing the burden of proof on the defendant district, the Court has ensured that the district will have difficulty in emerging from supervision of pupil assignments if it remains dramatically divided by race, or if other vestiges of the dual system remain.

It was for this reason, presumably, that the Court traced so carefully the neutral, migration-based explanations underlying DeKalb County's one-race schools. Likewise, it was because of the remaining vestiges of segregation in faculty assignments, funding and quality, that the Court remanded for consideration of the causal relationship of these factors to racial divisions. The opinion does not point the way to an easy path for a still-divided school district to terminate supervision, and perhaps this is as it should be.

V. CONCLUSION

The lessons of the journey from *Brown* to *Freeman* have been painful ones. In particular, *Brown II* and some of its progeny show how *not* to write a decision about institutional reform. It is important for such a decree to be principled, so that it will send a clear message that can and will be followed by those subject to it. But it is also important that the decree be pragmatic, in the sense of doing workable justice over the range of situations to which it will be applied. It is difficult to achieve both of these conditions, and in fact they often point in different directions.

A principled decree helps elected officials to follow the law without offending democratic values. It also enables lower courts to ensure compliance. It motivates others to comply. And it increases the likelihood of justice in the individual case. The *Brown II* decision was deficient in all of these respects. It would have been better if the Court had begun by laying down a simple principle such as assignment to neighborhood schools, even if there remained many cases in which more extensive decrees might have been necessary. As it was, in many school

districts, *Brown II* did not accomplish results that even could approach the probable effect of a neighborhood schools decree.

An institutional reform decree must also be pragmatic. One of the unfortunate aspects of *Brown II* is that it led to a need for future decisions, after the swing of the pendulum, that exalted principle to the exclusion of pragmatism. Thus *Dayton II,* with its combination of the *Keyes* presumption, the foreseeable effects doctrine, and the presumption of causation, particularly when added to the degree-of-racial-imbalance starting point of *Swann,* led to a regime in which the instances of individual injustice were too many and too great. A decree that lacks pragmatism, in this way, may lead to resistance and evasion so pervasive that they undermine its purpose. The absence of flexibility may foster a perception that the law costs too much in terms of democracy and autonomy. The people subject to the decree, particularly if they are numerous and diffuse, find ways to frustrate its objectives.

There is room for hope that the termination-of-supervision decisions have struck the right balance. The six *Green* factors point the lower courts adequately to standards that they can coherently apply.[277] The *Freeman* decision thus is principled; it requires termination when the standard is met but preserves court supervision when it is not met. At the same time, the new regime is more pragmatic than the logic of presumed causation and treatment of unitary status that came from *Dayton II.*

But the *Freeman* Court did leave the lower courts with one concept that could be as bad a guide as the nonstandard of *Brown II* if it is handled wrong. The justices required the lower courts to ascertain whether racially imbalanced housing patterns were tainted by official encouragement of private decisions. The Court was right to consider this possibility, since official segregation could be perpetuated by this means, and in some cases it will be detectable. At the same time, it will be important for the lower courts to treat this causation inquiry pragmatically, since the myriad of potential influences upon the demographics of a metropolitan center over decades are not subject to precise measurement. There is some danger that this unanswerable inquiry will prompt judges to find illegal causes by overly long inferences. The Supreme Court was right to preserve this principle, but the lower courts will be wrong if they do not treat it pragmatically.

A pragmatic concept of causation, with some of the features of the tort concept of "proximate" cause, is called for in the application of this

277. *See supra* notes 220–23 and accompanying text (showing how the *Freeman* Court applied the *Green* factors).

indirect encouragement principle.[278] The *Freeman* opinion indicates the Court majority does not wish to encourage the inference of causation from distant sources upon diffuse and dubious evidence. Yet the impact of past segregative practices will still be a paramount issue, since to consider good faith, a district court must evaluate the present vestiges of the past—including funding, educational quality, and the remaining degree of racial division. If they follow *Freeman* in this manner, the lower courts may be able to shrink the desegregation decree in the proper cases—and avoid shrinking the kids.

278. *See supra* part IV(B).