

**MAY IT PLEASE THE COURT: FEDERAL COURTS AND SCHOOL  
DESEGREGATION POST-PARENTS INVOLVED**

*The Honorable George B. Daniels\**  
*Rachel Pereira \*\**

One of the most remarkable outcomes of the American Civil Rights movement of the twentieth century was the highly prominent role played by the federal judiciary. The federal judiciary, which stands as the ultimate symbol of American power, values, justice, and prestige, was tasked with the privilege of unifying the disjointed groups of people who comprised the United States.<sup>1</sup> Through the desegregation cases, the federal judiciary ushered in the use of the civil rights injunction in the American legal system. In courts of equity, an injunction is a remedy that requires a party to a case to cease or perform a specific act, or face criminal or civil penalties for failing to cooperate.<sup>2</sup> Through the highly lauded *Brown v. Board of Education*<sup>3</sup> (“*Brown I*”) case and its progeny, the federal courts used such equitable principles as the guide to shape school desegregation decrees.

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\* Judge of the United States District Court for the Southern District of New York; J.D., University of California, Berkeley Boalt Hall School of Law; B.A., Yale University. He began his formal education in a segregated elementary school in South Carolina. Additionally, as a law student, he was instrumental in submitting an amicus brief to the United States Supreme Court on behalf of the Black Law Student Association at Berkeley in support of the University’s diversity plan in *Regents of the University of California v. Bakke*. The author would like to recognize the extraordinary administrative support provided by Elizabeth Vega.

\*\* Assistant District Attorney, Office of the Philadelphia District Attorney; J.D., University of Pennsylvania Law School; Ed. D., Rutgers University; M. Ed., Rutgers University; B.A., City University of New York, Hunter College. The author is grateful for the administrative assistance of Cassandre Alexis and Anannya Tripathy, the technical support provided by Phillip Boncy and the friendship of Sandra Taylor. The author would also like to thank Professors Regina Austin and Catherine Lugg for their thoughtful comments on earlier drafts of this Article. Lastly, the author would like to recognize the constant support and love of her parents Alix and Jackie Pereira, siblings Alix Jr. and Brittany Pereira, and the excitement of learning as seen through Maggie’s eyes, which never ceases to inspire.

1 J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978*, at 4 (1979).

2 See JACK BASS, *UNLIKELY HEROES* 21 (1981) (“The injunctive process concentrates power in judges because they can decide without a jury whether to grant relief, and they possess contempt powers to enforce their orders. This allows them to act by whatever legal means are necessary.”).

3 347 U.S. 483 (1954).

With these developments to the federal bench, the Due Process Clause of the Fourteenth Amendment<sup>4</sup> became the primary instrument the federal judiciary used to reform and reshape American society.

*Brown I* is one of the most highly celebrated opinions in American jurisprudence. We recognize today the sixtieth anniversary of the decision that heralded the promise of equality in educational opportunities that would serve to dismantle the system of oppression and legally sanctioned apartheid in this country. It was believed that through the holding, which guaranteed access to high quality education to all on equal terms, free of the stigma of racial identification, that the harms done to the hearts and minds of children subjected to such systems would not only secure their position in American society, but would also elevate all Americans.

However, in spite of the celebration of the power of the federal judiciary to attempt to advance the charge of equality among all men guaranteed by the Declaration of Independence, the reality of the impact of the desegregation cases is starkly grim.<sup>5</sup> Sixty years after striking down the legal precedent of racially separate but equal facilities and accommodations, American public schools have remained racially polarized and woefully unequal.

The Supreme Court's decision in *Brown v. Board of Education of Topeka* ("*Brown II*"), which was intended to be a remedial counterpart to *Brown I*, allowed the defendant school districts, who were the identified wrongdoers, the unique authority to provide their own solutions to the issue of school desegregation.<sup>6</sup> Rather than ordering a decree of a national standard of school integration, the Court ordered local school boards to devise the remedies that would redress the harms inflicted upon the plaintiffs. "School authorities have the primary responsibility for elucidating, assessing, and solving these [school desegregation] problems . . . ." <sup>7</sup> The Supreme Court also charged lower

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<sup>4</sup> U.S. CONST. amend. XIV § 1 (stating that no State shall "deprive any person of life, liberty, or property, without due process of law.")

<sup>5</sup> The terms "integration" and "desegregation" will be used interchangeably throughout this Article. For a more thorough discussion on the legal differences and social implications of the two terms, see generally Erica Frankenberg, *School Segregation, Desegregation, and Integration: What Do These Terms Mean in a Post-Parents Involved in Community Schools, Racially Transitioning Society?*, 6 SEATTLE J. SOC. JUST. 533 (2007).

<sup>6</sup> See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1403 (1998) (discussing that when civil rights litigants must depend on the government actor wrongdoers for relief, the government becomes the primary enforcement vehicle for civil rights, "[a]nd yet, for a variety of reasons, the government has failed to play a strong role as an enforcement agency" for civil rights).

<sup>7</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955).

federal district courts with the responsibility to determine whether the defendants fulfilled their duties toward integration based on local community standards: “[C]ourts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. 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.”<sup>8</sup>

The federal judiciary experienced great difficulty with the enforcement of desegregation orders. Therefore, by 1991, the Supreme Court determined that school desegregation lawsuits were not to be maintained by lower courts indefinitely. As a consequence of the Supreme Court’s urgings to eliminate desegregation orders as soon as possible, federal district courts have declared many districts “unitary” and have returned the schools to local control. A study conducted of federal district court opinions and the appeals of those decisions found that in the decade from 1992 to 2002 all but one request to the court for unitary status was granted.<sup>9</sup>

Concurrent with school districts’ attempts to integrate schools through judicial orders, many districts, recognizing the value of students attending desegregated schools, chose to pursue voluntary integration methods.<sup>10</sup> However, in 2007, the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1* struck down voluntary integration plans in effect by Seattle, Washington and Jefferson County, Kentucky public schools.<sup>11</sup> While districts under court order to desegregate were not directly affected by this legal ruling, several districts ceased their voluntary integration plans as a result. The question remains: What are the academic consequences to children as a result of the Supreme Court’s further insistence on the abolition of desegregation efforts?

Although there have been numerous studies conducted to determine the resegregation levels of districts that have been declared uni-

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<sup>8</sup> *Id.*

<sup>9</sup> See Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1623 (2003) (examining and analyzing all federal district court opinions concerning school desegregation from June 1, 1992 to June 1, 2002); *id.* at 1633 (noting a case in which a school district in Pennsylvania was declared only partially unitary, despite its request for full unitary status).

<sup>10</sup> See, e.g., FREDERICK M. WIRT, *SCHOOL DESEGREGATION IN THE NORTH: THE CHALLENGE AND THE EXPERIENCE* 116-28 (1967) (describing various voluntary desegregation efforts).

<sup>11</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 747-748 (2007).

tary,<sup>12</sup> there exists a paucity of data that considers the academic achievement of students who attend schools in these “unitary” districts. This Article considers the high school graduation rates among students in school districts in which federal courts have decided unitary status cases since 2007.

Part I considers the impact of the *Parents Involved* case on voluntary efforts toward school integration. Part II considers how *Brown I* and its progeny evolved into the jurisprudence followed by the modern judiciary. Parts III and IV consider all of the cases that have been before the federal bench since 2007 with motions for unitary status consideration, and the district wide graduation rates of students in those districts. Part V concludes with outcomes that federal judges should consider when making unitary status determinations, and the educational and societal impacts of their decisions.

# I. PARENTS MAY BE INVOLVED, BUT SCHOOL DISTRICTS MAY NOT VOLUNTARILY BE INVOLVED

MR. RANKIN [on behalf of the United States]: And the whole concept of constitutional law is that those rights that are defined and set out in the Constitution are not to be subject to the political form which changes from time to time, but are to be preserved under the holdings of this Court over many, many years by the orders of this Court granting the relief prayed for.<sup>13</sup>

School desegregation and its validity, while debated vociferously with regard to our modern-day school configurations, has been the subject of judicial and legislative scrutiny for over a century.<sup>14</sup> The

<sup>12</sup> See e.g., Jennifer B. Ayscue et al., *Segregation Again: North Carolina's Transition from Leading Desegregation Then to Accepting Segregation Now*, THE CIVIL RIGHTS PROJECT, REPORT NO. 6 (2014), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/segregation-again-north-carolina2019s-transition-from-leading-desegregation-then-to-accepting-segregation-now/Ayscue-Woodward-Segregation-Again-2014.pdf> (investigating trends in school segregation in North Carolina over the past two decades).

<sup>13</sup> Transcript of Oral Argument, *Briggs v. Elliot*, 342 U.S. 350 (1952), quoted in *BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT* 244 (Leon Friedman ed., 2004).

<sup>14</sup> Between 1850 and 1883, several high courts in northern states addressed the validity of school segregation against state and federal constitutional attack. See, e.g., *Ward v. Flood*, 48 Cal. 36, 37 (1874) (holding that black children may be excluded from schools established for white children, provided that a separate school of equal facilities has been established for black children); *Cory v. Carter*, 48 Ind. 327, 356–57 (1874) (holding that a classification of students based on race is constitutional as long as it does not exclude a particular race from equal school advantages); *Roberts v. City of Boston*, 59 Mass. 198, 198 (5 Cush. 1849) (holding that the general school committee of Boston had the power to make provision for the instruction of colored children in separate schools); *State ex rel.*

storied history behind the attempts at racial integration of children in schools in the United States is one that tells the tale of the interplay between legislative, social, and judicial confluences, in a country where ideological agreement is rarely found among the three branches.<sup>15</sup> The result of the convergence has led to periods of time

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*Stoutmeyer v. Duffy*, 7 Nev. 342, 348 (1872) (holding that the Nevada Constitution requires that all resident children between the ages of six and eighteen, regardless of race, be granted admission to Nevada public schools, but that it is entirely within the power of the school trustees “to send all blacks to one school, and all whites to another . . .”); *People ex rel. King v. Gallagher*, 93 N.Y. 438, 451 (1883) (holding that where the right to secure equal educational advantages is afforded by the school authorities, an individual “cannot justly claim that his educational privileges have been abridged” merely because he does not receive his education where he most desires to receive it); *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 202 (1871) (holding that an Act authorizing separate-but-equal public schools for black schoolchildren did not violate the Equal Protection Clause or the Privileges and Immunities Clause of the Fourteenth Amendment, nor did the Act contravene the Ohio Constitution). Four courts invalidated segregation under state law. See *Chase v. Stephenson*, 71 Ill. 383, 385 (1874) (holding that all children within a school district, regardless of race or color, shall have the equal right to participate in the benefits of the public schools and school directors have no power to discriminate between students on account of their color, race, or social position); *Clark v. Bd. of Dirs.*, 24 Iowa 266, 267 (1868) (holding that the state constitutional provision providing “for the education of all the youths of the State” through a system of common schools precludes the school board from denying admission to an otherwise eligible student on the basis of race and precludes the board from compelling a black student to attend a separate school for black children); *Bd. of Educ. v. Tinnon*, 26 Kan. 1, 18 (1881) (holding that the ultimate question of whether states have the power to impose school segregation can only be decided by the Supreme Court and that, even if such power exists, the Kansas legislature has not clearly conferred it to the state school boards); *People ex rel. Workman v. Bd. of Educ. of Detroit*, 18 Mich. 400, 409–10 (1869) (holding that a state act providing that “[a]ll residents of any district shall have an equal right to attend any school therein” is applicable to the city of Detroit and prohibits the school board from excluding a resident from any of its schools on account of color). In 1871, the District of Columbia Committee of the United States Senate proposed a bill to eliminate racial segregation in public schools within the District of Columbia. Proponents of the bill insisted that this was required by the equality principle of the Fourteenth Amendment. While the opponents of the bill did not argue the alternative, the bill never passed to a vote before the Senate. This resulted in Congress’ continued funding of a segregated school system. See CONG. GLOBE, 41st Cong., 3d. Sess. 1054 (1871); ROBERT HARRISON, *WASHINGTON DURING CIVIL WAR AND RECONSTRUCTION: RACE AND RADICALISM* 138–40 (2011) (describing the controversial impact of Senator Charles Sumner’s insistence on school integration in Congress and indicating, most notably, that despite Congressional inaction, Senator Sumner introduced a school integration bill every year from 1871 until his death in 1874).

- <sup>15</sup> Compare *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 (1982) (invalidating a statute under the Equal Protection Clause, enacted by a majority of the state of Washington’s citizens, that prohibited racially integrative busing as a means to integrate schools), with Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1056 (2005) (“*Brown* was not a revolutionary decision. Rather, it is the definitive example that the interest of blacks in achieving racial justice is accommodated only when and for so long as policymakers find that the interest of blacks converges with the political and economic interests of whites.”).

where racial integration was sought, and periods where such an ideal has been considered veritably impossible.<sup>16</sup> Yet, sixty years after the Supreme Court unanimously<sup>17</sup> decided the seminal case of the twentieth century, decrying the adverse impact of racially separate schools on the future health of our nation,<sup>18</sup> American public schools remain grossly unequal and woefully separate.<sup>19</sup> In spite of ongoing public recognition<sup>20</sup> of the significance of the decision to the judiciary, legis-

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- 16 *Compare* *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439–40 (1968) (holding that racially segregated schools within a school system do not necessarily violate the Constitution, but that a school district’s “freedom of choice” plan was not enough in itself to achieve desegregation), *with* *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 233–34 (1964) (holding that the closure of schools to avoid desegregation was in violation of the Fourteenth Amendment).
- 17 See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 696 (1976) (discussing the roles of Chief Justice Earl Warren and Justice Felix Frankfurter in assuring a unanimous result); BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 95 (1983) (“If anyone worked for a unified Court to strike down segregation, it was Frankfurter . . . [He] cooperated closely with the new Chief [Justice Earl Warren] in securing Court unanimity.”). See also Brad Snyder & John Q. Barrett, *Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631, 632 (2012) (discussing William Rehnquist’s advice to Justice Jackson during the 1952 *Brown* oral arguments, that *Plessy v. Ferguson* should be affirmed) (citing Memorandum from William H. Rehnquist to Justice Robert H. Jackson, A Random Thought on the Segregation Cases (1952), available at [http://www.pbs.org/wnet/supremecourt/rights/sources\\_document7.html](http://www.pbs.org/wnet/supremecourt/rights/sources_document7.html)).
- 18 *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).
- 19 Gary Orfield, Genevieve Siegel-Hawley & John Kucsera, *Sorting Out Deepening Confusion on Segregation Trends*, CIVIL RIGHTS PROJECT 1, 7 (2014), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/sorting-out-deepening-confusion-on-segregation-trends/Segregation-Trends-Dispute-CRP-Researchers.pdf> (“When it comes to segregation measures, known as the exposure and isolation indices . . . black students [since 1989 have] increasingly attended schools with disproportionately low shares of whites . . .”). But see Sean Reardon & Ann Owens, *60 Years After Brown: Trends and Consequences of School Segregation* 40 ANN. REV. SOC. 199, 213 (2014), available at <http://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-071913-043152> (concluding that the changes in school segregation patterns in the last few decades are not as dramatic as social scientists may purport).
- 20 To mark the fiftieth anniversary of the *Brown* decision, the U.S. Departments of Justice and Education, several law schools, and other social, civic, and government organizations sponsored commemorative activities to honor the impact of the decision on the

lature, and the social mores of our country, the promise that *Brown I* held and the harms that the decision sought to remedy—that were inflicted upon the courageous plaintiffs and the classes represented—<sup>21</sup>have yet to be fully realized in practice.<sup>22</sup>

After over half a century of attempting to implement *Brown I* and find common ground among those who advocate integration and those who reject judicially ordered integration, all while at least ostensibly honoring *Brown I*'s legacy,<sup>23</sup> in 2007 the Supreme Court is-

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American way of life. The following is a short sampling of such events: April 2, 2004, Virginia Historical Society, Before and After *Brown* in Virginia; April 8-May 2, 2004, Cardozo School of Law, Yeshiva University, Judge Damon Keith's Marching Toward Justice Exhibit on *Brown v. Board of Education* (later to be on display at Howard University School of Law from May 17, 2004 through the summer); April 13, 2004, UMBC Department of American Studies, panel presentation on "Reflections on the *Brown* Decision: African American Experience and Schooling in Baltimore County"; April 14, 2004, Cardozo School of Law, Yeshiva University, a panel discussion: "*Brown v. Board of Education*: Yesterday and Today"; April 15 & 16, 2004, Georgetown University Law Center, *Bolling v. Sharpe* at 50: Desegregation in the District of Columbia: Past, Present, and Future; May 10, 2004, "Unfinished Business: Keeping the Promise of *Brown v. Board of Education*," sponsored by Institute for Educational Leadership, The Century Foundation, and The Center for American Progress; May 13, 2004, Library of Congress Exhibit on *Brown v. Board of Education*; May 13, 2004, Department of Justice, *Brown v. Board of Education* 50th Anniversary Commemoration; May 13-14, 2004, University of Kansas, Conference on Fifty Years after *Brown v. Board of Education*: Social Psychological Research Applied to the Problems of Racism and Discrimination. *Outside Events*, BROWN@50: FULFILLING THE PROMISE, <http://www.brownat50.org/brownevents/BrownEventsOthers.htm>.

<sup>21</sup> See ROBERT CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* 132 (2005) (indicating the rights of the victorious *Brown* litigants were never truly realized because none of the original plaintiffs in the South Carolina, Kansas, or Virginia cases ever attended an unsegregated school, which demonstrates that the educational opportunities *Brown I* required and the speediness *Brown II* insisted upon were never enforced, even in the instances of the nationally highlighted plaintiffs).

<sup>22</sup> Even as the nation heralded the fiftieth anniversary of the *Brown I* decision, rates of integration were declining. In 1970, black students typically attended schools where enrollment was 32% white. By 2010, black students typically attended schools that were only 29% white. Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, CIVIL RIGHTS PROJECT, 22 fig. 3, [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield\\_epluribus\\_revised\\_omplete\\_2012.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf) (last updated Oct. 18, 2012).

<sup>23</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 842 (2007) (Breyer, J., dissenting) ("And it was *Brown* . . . that affected so deeply not only Americans but the world."); *Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000) ("*Brown* and its progeny established a moral imperative to eradicate racial injustice in the public schools."). See also KLUGER, *supra* note 17, at x (arguing that no other Supreme Court opinion has "affected more directly the minds, hearts, and daily lives of so many Americans"). See also Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 OHIO ST. L.J. 939, 940 (2008) ("Presently invoked to support every popular decision on racial inequality, the 1954 school segregation cases no longer stand for any

sued its first school desegregation case in over a decade.<sup>24</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, and its companion case *Meredith v. Jefferson County Board of Education* (hereinafter *Parents Involved*),<sup>25</sup> addressed the extent to which a school district can use race to desegregate. The issues in this case starkly divided the Court, whereby five opinions were rendered, none garnering a majority.<sup>26</sup> In this highly fractured decision, the Court struck down race-based student assignments used by districts attempting to voluntarily integrate schools.<sup>27</sup> The Court's ruling maintained that the Fourteenth Amendment places different standards on the use of race-based student assignments in schools that are under court order to desegregate, as opposed to those that choose to voluntarily integrate students and are not subject to mandatory desegregation plans.<sup>28</sup>

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contested proposition or are identified in any distinctive way with the civil rights movement. *Brown*, like Paris Hilton, is now famous largely for being famous.”).

24 See Graber, *supra* note 23, at 939 (indicating that, prior to 2007, the Rehnquist and Roberts Supreme Courts rarely cited *Brown I* or *Brown II* for any significant legal proposition, and almost never did so after George W. Bush took office in 2001).

25 *Parents Involved*, 551 U.S. 701.

26 Chief Justice John Roberts' opinion garnered agreement by Justices Antonin Scalia, Clarence Thomas and Samuel Alito. Justice Stephen Breyer's dissent obtained the consent of Justices John Paul Stevens, Ruth Bader Ginsburg and David Souter. Justice Anthony Kennedy's opinion, concurring in part and concurring in the judgment, has been considered the controlling opinion in this case. See *id.*

27 Although the Supreme Court granted certiorari in this instance, there were previous cases in which lower courts were required to consider the constitutionality of voluntary integration plans that considered race. See, e.g., *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 746–53 (2d Cir. 2000) (holding that the reduction of racial isolation resulting from de facto segregation can be a compelling state interest in denying a requested preliminary injunction directing the school district to allow a white student to transfer from a city school district to a suburban school district in spite of a state-administered interdistrict transfer program); *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 701 (4th Cir. 1999) (holding that the weighted admissions policy for a public, alternative school, which considered applicants' races and ethnicities, was not narrowly tailored to achieve an allegedly compelling interest in attaining diversity); *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1063 (9th Cir. 1999) (holding that the consideration of race or ethnicity in the admissions process at an elementary school did not violate the Equal Protection Clause); *Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854, 865 (9th Cir. 1998) (holding that public schools that denied enrollment to students of Chinese descent through the use of racial classification and a quota system set forth in a 1983 consent desegregation decree must demonstrate at trial that: (1) the “vestiges” of racism sufficiently remain to justify the ethnically-based limitations in the consent decree; and (2) the limitations are narrowly tailored to remove such vestiges); *Wessmann v. Gittens*, 160 F.3d 790, 792 (1st Cir. 1998) (holding that an admissions policy that makes race a determining factor in the admission of a subset of each year's incoming classes was not justified either on the basis of asserted governmental interest in diversity, or as means of redressing vestiges of past discrimination).

28 *Parents Involved*, 551 U.S. at 702–03 (“Although remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test, that interest is not



Reviewing the student assignment plans under strict scrutiny, the *Parents Involved* Court maintained that the school districts had to demonstrate that the use of racial classifications in their student assignment plans were narrowly tailored to achieve a compelling governmental interest. The Court held that school districts' stated goal of remedying the effects of past intentional discrimination could not serve as a compelling interest to justify their use of race-based classifications when making student assignments and student transfer determinations. The Court distinguished that remedying the effects of past intentional discrimination is a compelling interest for districts under court order to desegregate, but such interests were impermissible under strict scrutiny for districts that were not required by law to desegregate.<sup>29</sup> Further, the Justices held that the districts' goal of fostering increased educational and broader socialization benefits through racially diverse learning environments that were linked to racial demographics and not to any identified pedagogical goal was impermissible, and thereby unconstitutional.<sup>30</sup> The Court was clear to indicate that the districts' reliance on the Court's prior ruling of a compelling interest in diversity in higher education<sup>31</sup> could not justify the kindergarten through twelfth grade school districts' use of race for student assignments under the Equal Protection Clause.<sup>32</sup>

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involved here because the Seattle schools were never segregated by law nor subject to court-ordered desegregation, and the desegregation decree to which the Jefferson County schools were previously subject has been dissolved.") (citation omitted).

<sup>29</sup> *Id.* at 720–21.

<sup>30</sup> *Id.* at 725–27.

<sup>31</sup> *See generally* *Grutter v. Bollinger*, 539 U.S. 306 (2003) ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.").

<sup>32</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) ("The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be patently unconstitutional.") (internal quotation marks omitted); *Id.* at 724 ("In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education . . ."). However, the Court in *Brown I*, relying on the Supreme Court's prior desegregation decisions in higher education, did not distinguish the benefits of desegregation for students in institutions of higher education from those for students in elementary and high schools. *Brown v. Bd. of Educ.*, 347 U.S. 483, 491–92 (1954), ("In more recent cases [heard by this Court], all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications.").

If a school district is obviously segregated, but a judge does not say it is segregated, is it segregated?<sup>33</sup> In this decision, the Court posited the distinction between the responsibilities of school districts that are required to desegregate by judicial order and the rights of those that choose to do so voluntarily due to a finding that students benefit from being educated in a diverse educational setting.<sup>34</sup> There was great disagreement among the Justices as to whether Seattle schools operated *de jure*<sup>35</sup> segregated schools.<sup>36</sup> Justice Roberts maintained that Seattle had never legally operated segregated schools, nor was it ever subjected to court-ordered desegregation; therefore, all of its desegregation efforts were strictly voluntary.<sup>37</sup> Alternatively, the dissent

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33 A variation of the colloquial philosophical thought experiment, "If a tree falls in a forest and no one is around to hear it fall, does it make a sound?" that raises questions regarding observation and acknowledgment of reality.

34 Since *Brown I* was decided, courts have responded to the issue of whether the *Brown* mandates apply solely to districts that segregate by order of the law, *de jure* segregation, or whether districts in which social norms perpetuate segregation, *de facto* segregation, are also subject to *Brown*. *Parents Involved* was the first time, however, that the Supreme Court, in evaluating the constitutionality of race-based desegregation policies, noted a distinction between districts obligated to desegregate by court order and districts that choose to voluntarily desegregate. *Parents Involved*, 551 U.S. at 702–03. See, e.g., *Taylor v. Bd. of Educ.*, 191 F. Supp. 181, 192–93 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2d Cir. 1961) ("I see no basis to draw a distinction, legal or moral, between segregation established by the formality of a dual system of education, as in *Brown*, and that created by gerrymandering of school district lines and transferring of white children as in the instant case. The result is the same in each case: the conduct of responsible school officials has operated to deny to Negro children the opportunities for a full and meaningful educational experience guaranteed to them by the 14th Amendment. . . . Having created a segregated school, the Constitution imposed upon the Board the duty to end segregation, in good faith, and with all deliberate speed.") (internal citations omitted).

35 For purposes of this Article, districts that have been declared unitary yet still have segregated schools are considered to be *de facto* segregated because the distinction of being declared unitary presumes that the discriminatory intent to segregate students has been removed "root and branch" in the district. See *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968). See also, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17–18 (1971) (noting *de facto* segregation is present "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities"); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 712–13 (2d Cir. 1979) (affirming a district court's finding that, what the panel labeled as *de facto* segregation of the school, "resulted from population changes" in the surrounding neighborhoods).

36 *Parents Involved*, 551 U.S. at 749 (Thomas, J., concurring) ("Because this Court has authorized and required race-based remedial measures to address *de jure* segregation, it is important to define segregation clearly and to distinguish it from racial imbalance. In the context of public schooling, segregation is the deliberate operation of a school system to 'carry out a governmental policy to separate pupils in schools solely on the basis of race.' . . . Racial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large.") (citation omitted).

37 *Id.* at 712 (plurality opinion).

argued that in 1966 plaintiffs in Seattle filed a federal lawsuit claiming unconstitutional segregation on the part of the Seattle School Board.<sup>38</sup> The complaint alleged that the school board created a segregated school system by drawing boundary lines and enforcing school attendance policies that created and maintained predominately separate white and black schools. The complaint also charged that the board discriminated in assigning teachers.<sup>39</sup> The parties in the case settled after the school district pledged to undertake a desegregation plan that included race-based transfers and mandatory student busing.<sup>40</sup> Although Jefferson County had been found to maintain a segregated school system,<sup>41</sup> after over 25 years, the district was declared unitary in 2000 and relieved of its duty to operate under a desegregation order.<sup>42</sup>

In spite of the lack of clarity by all of the *Parents Involved* Justices as to whether desegregative remedies should be enforceable only in de jure segregated districts solely as opposed to both de jure and de facto segregated schools, *Brown I* appears to settle the issue.<sup>43</sup> The Warren Court in *Brown I* was very explicit in its holding that:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The *impact is greater when it has the sanction of the law*, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn.<sup>44</sup>

Although the Warren Court indicated that the harms imposed on students in segregated school environments were greater when segregation had the authority of the law behind it, the Warren Court never indicated that the harms that resulted from receiving education in segregated schools were exclusively inflicted upon children attending schools that were lawfully segregated. This lack of distinction between de jure and de facto segregation by the *Brown I* Court

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38 *Id.* at 808 (Breyer, J., dissenting).

39 *Id.* at 809 (Breyer, J., dissenting).

40 *Id.* at 806–09 (Breyer, J., dissenting).

41 *See* Newburg Area Council, Inc. v. Bd. of Educ., 489 F.2d 925, 931 (6th Cir. 1973).

42 *See* Hampton v. Jefferson Cnty. Bd. of Educ., 102 F. Supp. 2d 358, 382 (W.D. Ky. 2000).

43 *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208–09 (1973) (holding that, absent laws requiring school segregation, plaintiffs must prove intentional segregative acts affecting a substantial part of the school system); Freeman v. Pitts, 503 U.S. 467, 495 (1992) (“Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.”). This approach is consistent with the Supreme Court cases that maintain when facially neutral laws have a discriminatory impact, proof of discriminatory purpose is necessary to show an equal protection violation. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (holding that discriminatory impact devoid of discriminatory intent is insufficient to prove a racial classification).

44 *Brown v. Bd. of Educ.*, 347 U.S. 482, 494 (1954) (emphasis added).

and the harms that are inflicted upon students who attend segregated schools should have been significant to the *Parents Involved* Court that relied heavily upon *Brown I* to base its decision.<sup>45</sup> Further, while Justice Breyer in his dissent acknowledged the legal distinction between de jure and de facto segregation, he aptly points out that “[the] distinction concerns what the Constitution *requires* school boards to do, not what it *permits* them to do.”<sup>46</sup>

The impact of this distinction is great<sup>47</sup> in that *Parents Involved* forecloses districts that have been declared unitary<sup>48</sup> or those that recognize the benefits of diversity in their schools from engaging in racially-based student assignments. For de facto systems, the controlling *Parents Involved* opinion interpreted the Equal Protection Clause as prohibiting the use of overt racial classifications in voluntary desegregation programs.<sup>49</sup> In effect, *Parents Involved* maintains that if a school district identifies harms to students that *Brown I* found unconstitutional,<sup>50</sup> it may not engage in the self-correction remedies<sup>51</sup> that

<sup>45</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 705 (2007) (indicating that it was not the inequality of facilities that *Brown* found unconstitutional but the fact of legally separating children based on race).

<sup>46</sup> *Id.* at 844 (Breyer, J., dissenting).

<sup>47</sup> *But see* James Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132–33 (2007) (positing that the *Parents Involved* decision will not change much in the landscape of school desegregation).

<sup>48</sup> Unitary status denotes the end of school desegregation litigation and the case is usually dismissed. Once a school district is declared unitary, it is assumed that schools in the district have removed the stigma of being “black” or “white” schools. *See Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 442 (1968) (“The Board must be required to formulate a new plan and . . . fashion steps which promise realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”); *see also* *Bd. of Educ. v. Dowell*, 498 U.S. 237, 246 (1991) (“Courts have used . . . ‘unitary’ to describe a school system which has been brought into compliance with the command of the Constitution.”). However, the existence of racially homogeneous schools within school systems will not necessarily bar a school district from being declared unitary. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25–26 (1971); *Valley v. Rapides Parish Sch. Bd.*, 702 F.2d 1221, 1226 (5th Cir. 1983) (“It is axiomatic that the existence of a few racially homogeneous schools within a school system is not per se offensive to the Constitution.”).

<sup>49</sup> Citing that the districts in this case were not judicially mandated to comply with a desegregation order, the Court maintained that “[t]he justification for race conscious remedies . . . is therefore not applicable here.” *Parents Involved*, 551 U.S. at 737.

<sup>50</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494, 494 (1954) (“We must look instead to the effect of segregation itself on public education. . . . To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

<sup>51</sup> *But see Swann*, 402 U.S. at 16 (“School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for

would be judicially allowable if a judge were to find such harms present. While the *Parents Involved* Court did little to upend the equal protection precedents that uphold the use of race-conscious policies for school districts judicially ordered to follow desegregation decrees, the Court did emphasize that “[e]ven in the context of mandatory desegregation, we have stressed that racial proportionality is not required . . . .”<sup>52</sup>

In maintaining differing standards for de jure and de facto segregated districts for ensuring schoolwide diversity, the *Parents Involved* Court made an ideological reversal from several decades of jurisprudence that extended substantial deference to local school board authority, particularly as it relates to setting school desegregation policy issues for districts under court mandate to desegregate.<sup>53</sup> The Roberts opinion indicates “[s]uch deference [toward local authorities] ‘is fundamentally at odds with our equal protection jurisprudence.’”<sup>54</sup> Citing *Richmond v. Croson*,<sup>55</sup> the Court stated that “[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no

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the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.”); *Parent Ass’n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 713 (2d Cir. 1979) (“It is permissible, accordingly, for local officials to attempt *voluntarily* to correct or combat such an imbalance at a slower pace than would be satisfactory for a school or district under a court order to dismantle a dual system[.]” (internal citation omitted)).

<sup>52</sup> *Parents Involved*, 551 U.S. at 732 (2007).

<sup>53</sup> See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 138 (1995) (“Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers. At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions.”); *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973) (lauding local control for “the opportunity it offers for participation in the decisionmaking process that determines how . . . local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities.”); *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (“Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for . . . solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”).

<sup>54</sup> *Parents Involved*, 551 U.S. at 744 (citation omitted).

<sup>55</sup> 488 U.S. 469, 501 (1989).

place in equal protection analysis.”<sup>56</sup> However, desegregation precedent has historically relied on the assumption that return to local control—a return to the authority of local decision makers who can best set policy for districts—is one of the main reasons to declare a district as unitary as fast as possible.

In maintaining distinctions in school-level segregation, the Roberts opinion rejects the “motives test” applied by Justice Breyer in his dissent of the opinion.<sup>57</sup> Justice Breyer indicated that it was critical to look at the context in which school districts were choosing to use race as part of their admission criteria. “If one examines the context more specifically, one finds that the districts’ plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand student choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts.”<sup>58</sup> Citing various precedents, the *Parents Involved* majority maintains that their purpose in rejecting the motives test is due to the judiciary’s inability “to distinguish good from harmful governmental uses of racial criteria.”<sup>59</sup>

Yet, this outright rejection of the motives of the local school authorities in this instance is in direct contradiction to desegregation jurisprudence that urges lower courts to consider the “good faith efforts” of local school authorities when making unitary status determinations. The Supreme Court has granted vast discretion to federal district courts to determine the good faith of school authorities when determining the adequacy of their compliance with desegregation orders, any ongoing responsibilities the district may have to address educational inequities, and school actions that have caused segregation.<sup>60</sup> District courts often rely on the same factors that were pre-

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56 *Parents Involved*, 551 U.S. at 744–45. But see *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1632, 1635 (2014) (using the Fourteenth Amendment to analyze the validity of whether voters may choose to amend the state constitution to prohibit the consideration of racial preferences with respect to school admissions, the majority held, “courts may not disempower the voters from choosing what path to follow.”).

57 Justice Roberts’ opinion refers to Justice Breyer’s discussion of “context matters” as a “motives test,” although Justice Breyer does not refer to it as such. See *Parents Involved*, 551 U.S. at 741–42, 835.

58 *Id.* at 835.

59 *Id.* at 742 (citation omitted).

60 See, e.g., *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (“In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but to ‘every facet of school operations . . . .’”); *Freeman v. Pitts*, 503 U.S. 467, 489–90, 495 (1992) (“Just as a court has

sented in this instance—the experience of the school authorities and the reliance on community consultants—when making determinations on the legitimacy of court ordered desegregation plans. It appears to be incongruent that the *Parents Involved* Court would reject the motives of local officials who are voluntarily enforcing integration plans,<sup>61</sup> yet rely on the motives and good faith of these same local officials, even if vestiges of segregation persist in those districts, when determining if they have complied with desegregation decrees.

In the instant case, seven years prior to *PICS* the Western Kentucky District Court relied on the good faith of the Jefferson School District to release the district from its desegregation court order and grant it unitary status, even in light of a finding of an Equal Protection violation in its student assignment plan that barred assigning African-American students to a magnet school in the interest of maintaining diversity. Moreover, the district was granted unitary status against the desire of the school district that argued that the latent demographic imbalances in the school system were vestiges of de jure segregation.<sup>62</sup> Yet, the *Parents Involved* Court rejected the motives of the Jefferson School Board when it made the determination that increased diversity was not a compelling interest sufficient to justify using race to make student assignments, simply because they were no longer under court order to desegregate.<sup>63</sup>

## II. HOW DO WE GET TO “UNITARY STATUS?”

JUSTICE JACKSON: “[P]rivate litigation will result in every school district in order to get effective enforcement . . . . But the judicial enforcement remedy means just that, does it not, lawsuit after lawsuit? . . . What

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the obligation at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of its decree, so too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance.”).

<sup>61</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 835 (2007) (Breyer, J., dissenting) (“The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.”).

<sup>62</sup> See *Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 370 (W.D. Ky. 2000) (“[T]he Board steadfastly maintained its desire for an integrated, nondiscriminatory school system. JCPS has treated the ideal of an integrated system as much more than a legal obligation—they consider it a positive, desirable policy and an essential element of any well-rounded public school education. This Court joins Judges Gordon and Ballantine in finding overwhelming evidence of the Board’s good faith compliance with the desegregation Decree and its underlying purposes.”).

<sup>63</sup> See *Parents Involved*, 551 U.S. at 856 (Breyer, J. dissenting) (“But if the [Jefferson County] plan was lawful when it was first adopted and if it was lawful the day before the District Court dissolved its order, how can the plurality now suggest that it became *unlawful* the following day?”).

are we going to do to avoid the situation where in some districts everybody is perhaps held in contempt almost immediately because that judge has that disposition, and in some other districts it is twelve years before they get to a hearing? What criteria do you propose?"<sup>64</sup>

For years, the executive, legislative and judicial branches of government and academics have debated the reach and scope of Article III courts, particularly in the field of school desegregation.<sup>65</sup> At the heart of these discussions lie the unique qualities that encompass the federal judiciary.<sup>66</sup>

Although Supreme Court decisions are considered to be the defining law by which all lower courts and legislatures must frame their decisions and actions,<sup>67</sup> the pronouncement of school integration proved to be a decision that would have a peculiar effect on the na-

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<sup>64</sup> Transcript of Oral Argument, *supra* note 13, at 254.

<sup>65</sup> See, e.g., S. 3395, 92d Cong., 2d Sess. 1972 (providing for financial assistance to districts under judicial order to desegregate to be subject to certain restrictions with respect to time, distance, and the number of students involved in busing); Student Transportation Moratorium Act of 1972, H.R. 13916, 92d Cong., 2d Sess. 1972 (calling for a moratorium on federal court ordered desegregation plans that required busing, reorganization of school districts, and reassignment of students); MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO BUSING AND EQUALITY OF EDUCATIONAL OPPORTUNITY, AND TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO IMPOSE A MORATORIUM ON NEW AND ADDITIONAL STUDENT TRANSPORTATION, H.R. DOC. NO. 92-195, 92d Cong., 2d Sess. at 15 (1972) (purporting to clarify existing constitutional case law on school desegregation matters and deal with "the fears and concerns" relating to busing issues, while the true intent of President Nixon's message was rather to deny the federal judiciary's power to enforce busing as a desegregation remedy); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (mentioning the recent proposals to restrict federal court jurisdiction in the school desegregation context and offering a neo-Federalist interpretation of Article III); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 599 (1985) (discussing the debated role of the federal judiciary in bills on busing).

<sup>66</sup> See, e.g., *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("No provisions of the Constitution . . . are more explicit and specific than those pertaining to courts established under Article III. 'The judicial power' which is 'vested' in these tribunals and the safeguards under which their judges function are enumerated with particularity. Their tenure and compensation, the controversies which may be brought before them, and the distribution of original and appellate jurisdiction among these tribunals are defined and circumscribed, not left at large by vague and elastic phrasing. . . . This was not due to chance or ineptitude on the part of the Framers. The differences in subject-matter account for the drastic differences in treatment. Great concepts like . . . 'due process of law,' 'liberty,' 'property' were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.").

<sup>67</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").



tion's subsequent judicial and legislative judgments.<sup>68</sup> In contradiction to the Supreme Court's history of expecting immediate national compliance with judicial verdicts,<sup>69</sup> the Court ordered the lawyers in *Brown I* to return a few months later to answer questions about the scope of the influence and impact of its decision.<sup>70</sup> Although the decision in *Brown I* sought to offer relief to segregated school children for the harms they suffered, the Court set no standard or deadline for the desegregation of schools, and even contemplated whether it should allow citizens to gradually accept the ruling, whether only certain citizens should be subject to relief under the law, and whether the ruling should have a duration of enforcement.<sup>71</sup> Ironically, in spite of holding that all citizens are guaranteed equal protection under the law, the Justices avoided the responsibility of providing immediate equal relief to all schoolchildren nationwide.<sup>72</sup>

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68 For example, after refusing to follow *Brown I* and *Brown II*, the Governor and legislature of Arkansas argued that the states could nullify federal court decisions if they felt that the federal courts were violating the Constitution. The Supreme Court unanimously rejected this argument and held that only the federal courts can decide when the Constitution is violated in *Cooper v. Aaron*, 358 U.S. 1 (1958). However, on the very day the Court announced the ruling, the Arkansas legislature responded by enacting a law permitting the Governor to close any public school in the State, thereby stripping local school districts of their decision-making authority so long as the Governor determined that local officials could not maintain a suitable educational system. See *Bush v. Orleans Parish Sch. Bd.*, 187 F. Supp. 42, 44–45 (E.D. La. 1960) (holding all statutes that directly or indirectly required segregation of public schools unconstitutional, and thus invalidating the Louisiana legislature's effort to resist integration by granting the Governor the authority to supersede any school board's decision to integrate.); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 49–67 (2010) (discussing the conditions in Little Rock, Arkansas post-*Brown*).

69 See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351–52 (1938) (holding that personal rights of equal protection cannot be denied due to difficulty of immediate remedy).

70 *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 n.13 (1954) (listing questions for the lawyers about implementation methods of a potential decision that segregation in public schools is unconstitutional).

71 *Id.*

72 See Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1928 (1991) (“The Court had achieved agreement on the merits [of *Brown*] in large measure because most of the Justices had a vague idea that they could avoid difficulty by allowing desegregation to occur gradually. Yet . . . the more acute problem was that they never truly decided what they wanted the [lower] courts to accomplish [through judicial decrees].”). But see *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1632, 1654 (2014) (Sotomayor, J., dissenting) (“I firmly believe that our role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection.”).

Consequently, a year after hearing rearguments from both sides in response to the questions posed, the Court decided in *Brown II*<sup>73</sup> that schools were to desegregate “with all deliberate speed.”<sup>74</sup> Since this decision likewise did not provide a clear timeline of when to eliminate segregation, despite the Court’s prior decree that required integration of public schools, the responsibility for integration and implementation had been left to local school boards and federal district courts to achieve.<sup>75</sup> This notion of “deliberate speed” and veritable silence by the Supreme Court on the issue of desegregation<sup>76</sup> from 1955 through the passage of the Civil Rights Act of 1964,<sup>77</sup> served to

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<sup>73</sup> *Brown v. Bd. of Educ.*, 349 U.S. at 301 (1955) (“[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”).

<sup>74</sup> *Id.* The *Brown* lawyers responded definitively that the Court should order the integration of schools forthwith. See CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 9–10 (2004). On the other hand, the lawyers for the districts that were being sued argued that integration would cause irreparable harm to these communities; white hostility and violence would be rampant and the loss of employment of black teachers would be eminent. *Id.* Oppositional arguments also included rhetoric that many black children were inherently retarded and bringing them into the schools would be detrimental to white students; venereal diseases and illegitimate children would increase as a result of school integration. *Id.*

<sup>75</sup> See Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 889–90 (1993) (“*Brown* is the only case I know of where the Supreme Court found a constitutional violation but did not order immediate vindication. Even after the ‘all deliberate speed’ remediation ordered a year later in *Brown II*, the Supreme Court allowed school boards to dawdle in fashioning meaningful desegregation remedies. . . . Thus, from the start the message to the public was that the denial of equal educational opportunities to black students is not as serious a constitutional violation as other constitutional infractions.”).

<sup>76</sup> The noteworthy exception to this silence is the Supreme Court’s forceful holding in *Cooper v. Aaron*, 358 U.S. 1 (1958), ordering the desegregation of Little Rock, Arkansas schools after the Arkansas legislature amended the state constitution, under the doctrines of nullification and interposition, to relieve the state of the responsibility to follow the *Brown* decision. See also *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963) (holding that a desegregation plan that included a provision allowing students to transfer from a school in which their race was a minority to one in which it was the majority was in violation of the Fourteenth Amendment and contrary to *Brown I*); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964) (concluding that the closing of a public school in Prince Edward County and the use of state tuition grants and tax credits to support private segregated schools for white children unconstitutionally denied the plaintiffs equal protection under the law and were devices used to evade the constitutional mandate of desegregation).

<sup>77</sup> Title VI of the 1964 Civil Rights Act prohibits the use of federal funds in programs that discriminated on the basis of race. 42 U.S.C. § 2000d. Many have made the argument that *Brown I* was the impetus for introducing such sweeping legislation in 1964. For a more thorough discussion of the theory that the fear of violence among the citizenry—not the federal courts—had the most profound effect of Congressional action to bring about the 1964 Civil Rights Act, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN*

legitimize the noncompliance and further delay tactics by state and local officials.<sup>78</sup> Although the phrase “massive resistance” was coined by U.S. Senator Harry F. Byrd, the sentiment behind it was expressed by many states and local school boards toward the mandate of school desegregation.<sup>79</sup>

Federal district court judges were charged with the responsibility to guide local school districts into compliance with the mandates from *Brown I and II*, without guidelines of how the remedies for Equal Protection violations would be implemented, who to include in the group of wrongdoers or wronged citizens,<sup>80</sup> and how the judiciary would determine when the wronged parties were made whole. This resulted in atypical remedies ordered for various districts.<sup>81</sup>

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COURTS BRING ABOUT SOCIAL CHANGE? 157 (1991) (“[P]ro-civil-rights forces existed independent of the Supreme Court and could plausibly have accounted for eventual congressional and executive branch action as well as for Court action. While we can never know what would have happened if the Court had not acted as it did [in *Brown*], the existence and strength of pro-civil-rights forces at least suggest that change would have occurred, albeit at a pace unknown.”).

<sup>78</sup> See Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROBS. 7, 10 (1975) (“In retrospect the Supreme Court’s heavy reliance on local school authorities and federal district court judges seems to have been misplaced. . .”).

<sup>79</sup> “Massive Resistance” was a policy adopted in 1956 by Virginia’s state government to block the desegregation of public schools mandated by the U.S. Supreme Court. See J. HARVIE WILKINSON III, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS 1946–1966, 112–14, 151–54 (1968). The “Massive Resistance” policy reflected the views of many southern politicians who had a disdain for federal government intrusion into state affairs and believed that, if citizens were firm enough, the Supreme Court would reverse the mandate for school integration. See Michael J. Klarman, *Why Massive Resistance?* 14 (Univ. of Virginia Sch. of Law Pub. Law & Legal Theory, Working Paper No. 03-7, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=410062](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=410062) (“One cannot know how many white southerners genuinely believed that *Brown* could be nullified and segregation preserved. But many southern politicians spoke this way, and constituents may well have believed what they wanted to. . . . A Louisiana legislator observed: ‘When those birds in the Supreme Court realize we mean business, we’ll find we won’t have to change our entire school system.’ A South Carolina judge expressed confidence that ‘this decision will be eventually reversed, though it may take years.’ Countless other southern politicians insisted that desegregation would not come ‘in a thousand years’ or in their ‘lifetime.’”).

<sup>80</sup> One of the unusual things about *Brown* and school desegregation is that very few states and school districts have obeyed the ruling without being directly and immediately sued.

<sup>81</sup> Countless types of integration remedies were ordered by district court judges since the Supreme Court did not proscribe a particular remedy for the legal violation. See, e.g., *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 29–31 (1971) (holding that federal district courts could order busing to desegregate schools). See also DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 11–16, 161–63 (1995) (describing the conflict by various district courts in interpreting desegregation law and the various remedies that were ordered, including busing, school transfer policies, school choice methods, geographic attendance zones, and school closure).

In an attempt to quell the numerous surreptitious tactics used to evade integration cloaked as remedial plans,<sup>82</sup> the Supreme Court offered guidance nearly a decade post-*Brown*<sup>83</sup> to lower courts in *Green v. New Kent*<sup>84</sup> with six factors that should be addressed in school district plans that would constitute a complete remedy: (1) student assignment; (2) hiring and assignment of faculty; (3) hiring and assignment of staff; (4) transportation; (5) extracurricular activities; and (6) school facilities.<sup>85</sup> The Supreme Court reaffirmed to school districts that “the time for mere ‘deliberate speed’ has run out.”<sup>86</sup> The Court maintained that “[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.”<sup>87</sup>

For nearly two decades the federal judiciary addressed significant issues related to school desegregation efforts in the South, while the North remained untouched,<sup>88</sup> despite clear evidence of segregated

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82 See, e.g., *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 229 (1964) (holding that the action of the County School Board in closing the public schools of Prince Edward County simultaneously supported the private, segregated white schools that took their place and denied black schoolchildren equal protection of the law and noting that “[t]here has been entirely too much deliberation and not enough speed” in achieving integration); *Raney v. Bd. of Educ.*, 391 U.S. 443, 445–46 (1968) (holding that the freedom of choice desegregation plan for a school system was an inadequate method of converting to a unitary, nonracial system where no attendance zones were established and, after three years of operation, not one white child had enrolled in the all-black school and over 85% of the black children continued to attend the all-black school).

83 Very little desegregation was achieved in the nearly ten years post-*Brown*. “In the South, just 1.2% of black school children were attending school with whites. In South Carolina, Alabama, and Mississippi not one black child attended a public school with a white child in the 1962–63 school year. In North Carolina, only one-fifth of one percent—or 0.026%—of all black students attended desegregated schools in 1961 and the figure did not rise above one percent until 1965. Similarly, in Virginia, in 1964, only 1.63% of blacks were attending desegregated schools.” Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure To Achieve Equal Educational Opportunity*, 45 *MERCER L. REV.* 999, 1004 (1994).

84 *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968).

85 *Id.* at 435.

86 *Id.* at 438.

87 *Id.* at 439.

88 See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 218–19 (1973) (Powell, J., concurring in part and dissenting in part) (“There is segregation in the schools of many of these [Northern] cities fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half. The focus of the school desegregation problem has now shifted from the South to the country as a whole. Unwilling and footdragging as the process was in most places, substantial progress toward achieving integration has been made in Southern States. No comparable progress has been made in many nonsouthern cities with large minority populations primarily because of the *de facto/de jure* distinction nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South. But if our national concern is for those who attend such schools, rather than for perpetuating a legalism rooted in history

public schooling experiences for children.<sup>89</sup> The efforts to integrate northern schools highlighted the dissonance between legal rule and judicial decision-making in forcing social change.<sup>90</sup> The Supreme Court was forced to clarify whether the Constitution required integration or merely outlawed discrimination in districts and states that did not have legally sanctioned apartheid,<sup>91</sup> but segregated experiences in practice.<sup>92</sup>

In *Keyes v. Denver School District*, the first school desegregation case that involved a major city outside of the South, the Supreme Court addressed the issue of applying *Brown* in areas where de facto as opposed to de jure segregation existed.<sup>93</sup> The Court found that although there was no legal sanctioning of school segregation in this

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rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.” (internal footnotes omitted)).

89 In 1968, 66.8% of all black children in the Northeast attended schools that were predominately black; 42.7% of Northern black children attended schools that were 90–100% black. GARY ORFIELD, PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968–1980, at 4 (1983), available at [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/public-school-desegregation-in-the-united-states-1968-1980/orfield\\_american-desegregation-1983.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/public-school-desegregation-in-the-united-states-1968-1980/orfield_american-desegregation-1983.pdf). For a more detailed description of national desegregation trends, see *id.* at xi–21.

90 Most northern states established public schools during the first half of the nineteenth century, but black students were not automatically privy to the full benefits of these public school systems. In some states, black children were excluded from the public schools altogether. In others, black children were relegated to separate and inferior schools. Ohio, for example, excluded black children from public schools until the late 1840s; Illinois did likewise until the 1860s. Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677, 685 n.17 (1996). New York permitted the segregation of children in schools through legislation. *Id.* at 685 n.18. However, a few northern states—Maine, Vermont, New Hampshire, and Massachusetts—operated integrated schools by the mid-nineteenth century. See *id.* 685. See generally Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986) (providing a comprehensive overview of the condition of blacks in the North during the nineteenth century).

91 See, e.g., *Spencer v. Kugler*, 404 U.S. 1027, 1031–32 (1972) (Douglas, J., dissenting) (“Senator Javits recently summarized the problem: ‘Whatever you call it, ‘de facto segregation,’ ‘racial unbalance,’ or ‘the absence of intergroup activity,’ it is a serious block to effective education for children of minority groups anywhere in the country, especially in the north and central part of the country where you don’t have the established social order of segregation.”) (citing *Emergency School Aid Act of 1970: Hearings before the Subcomm. on Educ. of the Senate Comm. on Labor and Pub. Welfare*, 91st Cong., 2d Sess. 21 (1970)).

92 For a more complete discussion of the judicial distinction between the two notions in an attempt to maintain segregated systems, see Robert L. Carter, *Rexamining Brown Twenty-Five Years Later: Looking Backward Into The Future*, 14 HARV. C.R.-C.L. L. REV. 615, 619–20 (1979) (discussing Judge Parker’s opinion in *Briggs v. Elliot*, 132 F. Supp. 776 (E.D.S.C. 1995)).

93 *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 191 (1973).

school district, the Board of Education, through the enactment of attendance zoning policies, created a separation of children by race within the district.<sup>94</sup> Through this decision, the Court held all school districts responsible for practices that resulted in racial isolation in their school systems, including constructing schools in racially isolated neighborhoods and gerrymandering attendance zones. Through this decision, the Supreme Court, for the first time, also recognized the rights of Latinos to attend desegregated educational settings.<sup>95</sup>

The promise of nascent and expanded desegregation efforts<sup>96</sup> effectively came to a halt with a series of Supreme Court decisions that followed from 1974–1995.<sup>97</sup> The Court began to establish boundaries

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<sup>94</sup> The Court opined greatly about the discriminatory intent behind *de jure* versus *de facto* segregation. *Id.* at 210–11. *But see* Justice Douglas' and Powell's concurrences recognizing that there is no difference between the two terms. *Id.* at 214–15 (Douglas, J., concurring) (“[T]here is, for the purposes of the Equal Protection Clause of the Fourteenth Amendment as applied to the school cases, no difference between *de facto* and *de jure* segregation.”); *id.* at 219 (Powell, J., concurring in part and dissenting in part) (“In my view we should abandon a distinction which long since has outlived its time, and formulate constitutional principles of national rather than merely regional application.”).

<sup>95</sup> *Id.* at 197–98. *See also* *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947) (holding that the segregation of children of Mexican descent in California public schools was contrary to the laws of California and violated the Fourteenth Amendment by depriving the children of: 1) liberty and property without due process of law, and 2) the equal protection of the laws).

<sup>96</sup> *See e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25–30 (1971) (giving district courts the power to gerrymander attendance zones, provide interdistrict remedies in districts in communities where “white flight” resulted in a paucity of white students to integrate schools, and enforce busing as a means to transport students to schools that were not in their neighborhoods). Many lower courts ordered remediation in various schools to help minority children make up for time in inferior segregated schools. *See e.g.*, *Hart v. Cmty. Sch. Bd.*, 383 F.Supp. 699, 770 (E.D.N.Y. 1974) (noting “[s]o long as the Constitution and laws are not violated, state school officials must be afforded the broadest latitude to meet their educational responsibilities”); *Barrera v. Wheeler*, 475 F.2d 1338, 1340 (8th Cir. 1973) (examining questions relating to the lawful programming and proper allocation of funds to educationally deprived children); *United States v. Texas*, 447 F.2d 441, 448 (5th Cir. 1971) (requiring school districts to institute a study of the educational needs of minority children to ensure equal educational opportunities); *George v. O’Kelly*, 448 F.2d 148, 150 (5th Cir. 1971) (ordering the district court to consider whether achievement grouping or remedial programs during the regular school year result in racial segregation).

<sup>97</sup> *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 99–102 (1995) (holding that the District Court abused its discretion in imposing a tax increase to boost a magnet school program’s attractiveness and discourage “white flight” from the inner city); *Milliken v. Bradley*, 433 U.S. 267, 269, 290–91 (1977) (authorizing lower courts to order states to fund additional educational programs that would remedy the negative educational effects of prior imposed segregation); *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 436–37 (1976) (holding that a District Court exceeded its remedial authority in requiring annual readjustment of school attendance zones in the Pasadena school district when changes in the racial makeup of the schools were caused by demographic shifts “not attributed to any segregative acts on the part of the [school district]”); *Washington v. Davis*, 426 U.S.

and guidelines as to when school districts would be relieved of desegregation efforts. In *Board of Education of Oklahoma v. Dowell*,<sup>98</sup> the Court for the first time attempted to put parameters around lower court rulings with respect to when a district would be declared “unitary,” or no longer needing supervision because it operates under a legal system free of the vestiges of past discrimination. The Court acknowledged that there was inconsistent application of the system that declared districts free of judicial oversight.<sup>99</sup> The Court held that school districts would be declared as having “unitary status” by achieving parity in the six factors outlined in the 1968 *Green* decision: (1) student assignments; (2) faculty assignments; (3) staff assignments; (4) transportation; (5) extracurricular activities; and (6) facilities.<sup>100</sup> Once the school district provided sufficient evidence to the Court that it was compliant in these areas, it would be declared unitary and would no longer be subjected to judicial oversight.<sup>101</sup>

Nearly a year later, in the *Freeman*<sup>102</sup> decision, the Court granted more leeway to districts that had been held culpable of Constitutional violations<sup>103</sup> by holding that district courts could incrementally retreat<sup>104</sup> from their supervisory functions before full desegregation

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229, 240 (1976) (remarking that the existence of “both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause”); *Miliken v. Bradley*, 418 U.S. 717, 746–48 (1974) (holding that suburban districts could not be ordered to help desegregate a city’s schools unless the plaintiffs could prove that those suburbs had illegally segregated them in the first place despite some findings of intentional discrimination by both state and local officials that intensified segregation in the metropolitan area).

98 498 U.S. 237 (1991).

99 *Dowell*, 498 U.S. at 245 (“The lower courts have been inconsistent in their use of the term ‘unitary.’”).

100 *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 435 (1968).

101 *Dowell*, 498 U.S. at 250.

102 *Freeman v. Pitts*, 503 U.S. 467 (1992).

103 The Supreme Court has consistently maintained that although district courts have the power to impose appropriate relief when constitutional violations are found on the part of local school authorities, local control of schools is a vital national tradition that must be maintained and district courts must return schools to the control of local authorities at the earliest practicable date in order to maintain true accountability. See *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) [hereinafter *Dayton I*]; *Miliken v. Bradley*, 418 U.S. 717, 741–42 (1974); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *Wright v. Council of Emporia*, 407 U.S. 451, 469 (1972). But see Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 891 (1993) (“The federal courts should not run our nation’s educational system, but they do have a serious obligation to stand guard for as long as it takes to ensure that the constitutional right of black children to equal education is fulfilled.”).

104 For a more complete discussion on how *Freeman* permits nonunitary school districts to resegregate their schools and how such incremental resegregation can result in release from judicial supervision of formerly segregated schools which have yet to remove their

compliance had been achieved in every area of school operations.<sup>105</sup> The Court maintained that critical to the determination of whether school districts are in compliance and judicial withdrawal is proper is:

whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.<sup>106</sup>

The Court maintained that district courts should look to school districts' records of compliance to make determinations of whether judicial intervention should be relieved.<sup>107</sup>

However, to the benefit of the children being served in schools under the court order, the Supreme Court upheld the discretion of district courts to exercise flexibility in the application of the *Green* factors that determine whether unitary status has been found.<sup>108</sup> In *Freeman*, the Supreme Court upheld the discretion of the District Court's finding that the quality of education that black students received was inferior to that of their white counterparts because teachers in schools with a higher percentage of white students were better credentialed and had greater experience,<sup>109</sup> and because per pupil expenditure in majority white schools exceeded that of majority black

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racially identifiable characters, see Bradley W. Joondeph, *Killing Brown Softly: The Subtle Undermining of Effective Desegregation in Freeman v. Pitts*, 46 STAN. L. REV. 147, 161-67 (1993).

105 *Freeman v. Pitts*, 503 U.S. 467, 491 (1992) ("[U]pon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all [six *Green* factor] areas, the court in appropriate cases may return control to the school system in those [six *Green* factor] areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree.").

106 *Id.* at 491.

107 *See, e.g., Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) ("The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.").

108 *Freeman*, 503 U.S. at 492-93 ("The District Court's approach illustrates that the *Green* factors need not be a rigid framework. It illustrates also the uses of equitable discretion.").

109 *See J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978* 96 (1979) (describing the desegregation of faculty in schools as "the least visible and most flammable part of the entire school picture").



schools.<sup>110</sup> The school district was ordered to equalize spending between the schools and remedy the other inequities.

Ironically in 1992, the first case to interpret the consequences of the *Dowell* and *Freeman* decisions was the then forty-year-old *Brown* case.<sup>111</sup> In this instance, the Tenth Circuit very narrowly applied the *Freeman* decision and would not incrementally release the school district from judicial review in its finding that the Topeka school district had not shown good faith compliance in its commitment to integration.<sup>112</sup> The Court of Appeals opined “[t]o expect the lingering effects of legally mandated separation to magically dissolve with as little effort as the Topeka school district exerted, is to expect too much.”<sup>113</sup>

After sixty years of varying levels of effort behind the integrative tenets of *Brown I* by the judiciary, federal, and state legislatures and the executive branches of governments, federal district, and appellate courts are now left in the untenable positions of finding congruence with the school district cases that remain on their dockets under judicial order to desegregate. The most recent holding by the Supreme Court in *Parents Involved* that voluntary plans that solely contemplate race conscious student assignments are not narrowly tailored to serve a compelling government interest places a new burden on district court judges who are deciding pivotal local desegregation cases. The impact of granting unitary status to districts becomes even greater now that districts will be foreclosed from engaging in race-conscious decisions upon release from desegregation court orders.

In the years since *Parents Involved*, scholars have speculated as to the long-term impact the case<sup>114</sup> will have on the desegregation efforts of districts.<sup>115</sup> For sure, even the *Parents Involved* Court disagreed as to

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<sup>110</sup> *Freeman*, 503 U.S. at 483–84.

<sup>111</sup> *Brown v. Bd. of Educ.*, 978 F.2d 585 (10th Cir. 1992). For a more complete discussion of the application of *Freeman* in this case and the ease with which *Freeman* allows districts to be released from judicial oversight, even when racially identifiable schools have not been dismantled, see Carter, *supra* note 103, at 892–93 (disussing the Tenth Circuit’s reinterpretation of *Freeman* after the Supreme Court’s 1992 remand of *Brown*).

<sup>112</sup> *Id.* at 592.

<sup>113</sup> *Id.* at 590.

<sup>114</sup> See, e.g., Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1019–20 (2008) (positing that, in *Parents Involved*, the Court failed to provide a remedy for the problem of increasing racial isolation in K-12 schools); Alyssa M. Simon, “Race” to the Bottom?: *Addressing Student Body Diversity in Charter Schools After Parents Involved*, 10 CONN. PUB. INT. L.J. 399, 417 (2011) (stating “[t]he ultimate impact of *Parents Involved* may be more symbolic than critics of the opinion suggest”).

<sup>115</sup> Some in academia posit that desegregation is no longer a goal of most schools and therefore the *Parents Involved* ruling on voluntary desegregation efforts is moot. They maintain that the greater challenge in modern day education reform is the battle in state

whether the outcome of the decision would have far-reaching effects.<sup>116</sup> The social milieu is that far fewer districts nationwide are focused on school integration issues,<sup>117</sup> and the judiciary now has less power by which to enforce remedial measures even over districts that are under court order. It is clear that federal courts may not hold school districts under judicial court orders in perpetuity.<sup>118</sup> However, the data continues to evidence that once districts are released from judicial oversight,<sup>119</sup> they will resegregate.<sup>120</sup> Given this context of fewer options available to districts to voluntarily combat increased

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courts and legislatures over school funding, school choice, standards and testing, and access to preschool. For a more complete discussion on the broader implications of school desegregation and school reform efforts, see James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132 (2007) (describing how the modern reform agenda of most school districts does not include racial integration, and has not for over twenty years).

116 *Compare* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 745 (2007) (Roberts, C.J.) (“Justice Breyer’s dissent ends on an unjustified note of alarm.”), *with id.* at 863 (Breyer, J., dissenting) (“Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of ‘race-conscious criteria from among their available options. . . . Today however, the Court restricts . . . that leeway. I fear the consequences of doing so for the law, for the schools. . . .”) (citation omitted).

117 Several states that do operate segregated systems, albeit those of de facto segregation, have focused their efforts on financial equity issues. *See, e.g.,* M.A. v. State-Operated Sch. Dist. of Newark, 344 F.3d 335, 341, 352 (3d Cir. 2003) (holding that special education services must be provided on a timely basis); Gannon v. Kansas, 319 P.3d 1196, 1251 (Kan. 2014) (finding inequities in school funding throughout state schools); Abbott v. Burke, 575 A.2d 359, 411–12 (N.J. 1990) (holding that students in the poorest urban districts were deprived of their constitutional right to a thorough and efficient education due to the State’s failure to provide adequate financial resources for their educational programming); Campaign for Fiscal Equity, Inc. v. New York, 801 N.E.2d 326, 367 (N.Y. 2003) (holding that a state funding system failed to provide a sound basic education to the city’s school children in violation of the New York Constitution).

118 Bd. of Educ. v. Dowell, 498 U.S. 237, 249 (1991) (holding that that it is imperative that desegregation orders be dissolved once a school district has demonstrated compliance for a reasonable amount of time).

119 Some district courts have also examined school districts that are under court order to desegregate that have desegregated and then resegregated while under court order and found that the subsequent racial imbalance while under court order does not constitute de jure segregation. *See* Freeman v. Pitts, 503 U.S. 467, 478 (1992); NAACP, Jacksonville Branch v. Duval Cnty. Sch., 273 F.3d 960, 969–73 (11th Cir. 2001).

120 *See* Gary Orfield & Chungmei Lee, Brown at 50: King’s Dream or Plessy’s Nightmare? 38–39 (2004), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/orfield-brown-50-2004.pdf> (showing that of the thirty-five school districts examined in this study that were released from judicial court order, a large majority saw more than a ten percent decline in the percent of white students in the class of a typical black student).

segregation since *Parents Involved*,<sup>121</sup> what are the practical academic outcomes for students in these districts? How will federal district courts maintain the spirit and mandates of *Brown I* while enforcing the mandates of *Parents Involved*?

### III. DOES DESEGREGATION MATTER ONCE SCHOOLS ARE DECLARED UNITARY?

Mr. Rankin (on behalf of the United States): “Now if you look back at the history of the schools in the North and also throughout the South, you will see that everybody was involved in the problem of “What are we going to do to educate the Negro?”<sup>122</sup>

This Part identifies the school districts that courts declared unitary since the 2007 *Parents Involved* decision.<sup>123</sup> The districts selected for review have been particularly identified in an effort to determine if there has been any change to their graduation rates since their release from judicial court order. Justice Breyer in his dissent in *Parents Involved*<sup>124</sup> warned of the detrimental effects of limiting the power of school districts that choose to voluntarily engage in desegregation efforts, including a decline in achievement test scores of children of all races.<sup>125</sup> The importance that our nation has placed on high school

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<sup>121</sup> *Parents Involved*, 551 U.S. at 865–66 (Breyer, J., dissenting) (“Yesterday, school boards had available to them a full range of means to combat segregated schools. Today they do not.”).

<sup>122</sup> Transcript of Oral Argument, *supra* note 13, at 246.

<sup>123</sup> The school desegregation opinions in this Part were obtained from both Lexis and Westlaw, two commonly used empirical tools for obtaining judicial opinions. The searches include both cases that were published and unpublished. However, there may be more opinions that have been rendered in this area of the law that are excluded from this survey because some District Court judges may have released school districts through oral opinions not reflected in a written opinion. Additionally, a major limitation in tracking school desegregation cases is that the United States is not a party to every case; therefore, the U.S. Department of Justice does not have a compendium of all cases that exist with which to determine their progress. See U.S. COMM’N ON CIVIL RIGHTS, BECOMING LESS SEPARATE?: SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 111–71 (2007), available at [http://www.usccr.gov/pubs/092707\\_BecomingLessSeparateReport.pdf](http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C.L. REV. 1623, 1628 n.36 (2002); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1195–97 (2000).

<sup>124</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 839 (2007).

<sup>125</sup> Racial and economic integration at the K–12 level has been linked to considerable academic improvements, particularly for minority students. Racially integrated schools “are more likely to have stable staffs composed of highly qualified teachers—the single most important resource for academic achievement, and to have better school climates (academically oriented peers, lower dropout rates, more parents with higher expectations) than racially isolated schools.” PHILIP TEGELER, ROSLYN ARLIN MICKELSON, & MARTHA BOTTIA, RESEARCH BRIEF NO.4: WHAT WE KNOW ABOUT SCHOOL INTEGRATION,

graduation,<sup>126</sup> and the societal consequences of our children not graduating from high school has been historically recognized by courts and social scientists. Additionally, research has evidenced that only 64% of African-American children graduate from high school on time, as compared with 82% of whites.<sup>127</sup> This disparity is particularly pernicious in racially segregated schools.<sup>128</sup> If graduation rates were adversely affected post-dissolution of judicial court orders, the evidence would support a finding that an educational interest in racially integrated schools is in fact a compelling one that would survive strict scrutiny.<sup>129</sup>

Although state educational standards vary,<sup>130</sup> over the past three decades public schools have been increasingly pressured<sup>131</sup> to demon-

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COLLEGE ATTENDANCE, AND THE REDUCTION OF POVERTY (2011) (internal footnotes omitted), available at <http://www.school-diversity.org/pdf/DiversityResearchBriefNo4.pdf>.

126 See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 113 (1973) (“Thus, in the final analysis, ‘the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable.’”).

127 See THE EDUC. TRUST, THE STATE OF EDUC. OF AFRICAN AMS., available at <http://www.edtrust.org/sites/edtrust.org/files/AfricanAm%20Booklet.pdf> (describing the gaps that persist between black and white students in a K-12 school context).

128 GARY ORFIELD, DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS 64 (2004).

129 The Roberts decision in *Parents Involved* asserts that “[t]he [districts’ plans] are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate . . . [r]ather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.” *Parents Involved*, 551 U.S. at 704. See also, *id.* at 843 (Breyer J., dissenting) (“The compelling interest at issue here . . . includes an effort to create school environments that provide better educational opportunities for all children; it includes an effort to create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not ‘compelling,’ what is?” (internal citations omitted)).

130 Unlike the United States Constitution, which does not refer to education, many state constitutions require states to provide some level of “adequate” education to its citizens. See *Rodriguez*, 411 U.S. at 111–12, (1973) (“[I]n 48 of our 50 States the provision of public education is mandated by the state constitution. No other state function is so uniformly recognized as an essential element of our society’s well-being.”).

131 By the 2005–2006 school year, states who received funding under the Federal No Child Left Behind grant program were required to begin testing students in grades 3–8 annually in reading and mathematics. See *Issues A-Z: No Child Left Behind*, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR. (Sept. 19, 2011), <http://www.edweek.org/ew/issues/no-child-left-behind/>. By the 2007–2008 school year, they had to test students in science at least once in elementary, middle, and high school. The tests had to be aligned with state academic standards. *Id.* States were required to bring all students up to the “proficient” level on state tests by the 2013–2014 school year. *Id.* Individual schools had to meet state “adequate yearly progress” targets toward this goal (based on a formula spelled out in the Elementary and Secondary Elementary School Act) for both their

strate increased educational accountability toward the students they serve.<sup>132</sup> It has been noted in several studies that the impact of school level accountability policies have been particularly pernicious in predominantly minority segregated schools.<sup>133</sup> State testing programs that regularly publish school level testing data frequently identify segregated minority schools with concentrated poverty as low performing schools.<sup>134</sup> Additionally, research has maintained that racially segregated schools have lower graduation rates than do racially diverse schools.<sup>135</sup> Given this information, it is critical to review the educational outcomes of students who attend schools that are released from desegregation court orders, since it is likely that those schools

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student populations as a whole and for certain demographic subgroups. *Id.* Starting with the 2002–2003 school year, states were required to furnish annual report cards showing a range of information, including student-achievement data broken down by subgroup and information on the performance of school districts. *Id.* By the end of the 2005–2006 school year, every teacher in core content areas working in a public school had to be “highly qualified” in each subject taught. *Id.*

132 Department of Education Secretary T. H. Bell created the National Commission on Excellence in Education in 1981, directing it to examine the quality of education in the United States and to make a report to the nation. *A Nation at Risk – April 1983*, DEP’T OF EDUC., <https://www2.ed.gov/pubs/NatAtRisk/intro.html> (last visited Feb. 20, 2015). The Commission was created as a result of the Secretary’s concern about “the widespread public perception that something is seriously remiss in our educational system.” *Id.* Since then, there has been a growing national focus on increased excellence and greater accountability in schools. *Id.* Most recently, federal initiatives such as “No Child Left Behind” and “Race to the Top” have mandated competency tests for students and greater reporting of outcomes by districts receiving federal money for education reform efforts. See DEP’T OF EDUC., <http://www.ed.gov/esea> (last visited Oct. 26, 2014) (focusing on policy initiatives undertaken by the department).

133 ORFIELD, *supra* note 128.

134 See Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, HARV. UNIV. CIVIL RIGHTS PROJECT 2, 12 (2001), available at <http://files.eric.ed.gov/fulltext/ED459217.pdf> (“Anyone who wants to explore the continuing inequalities need only examine the test scores, dropout rates, and other statistics for various schools in a metropolitan community and relate them to statistics for school poverty (free lunch) and race (percent black and/or Latino) to see a distressingly clear pattern. The state testing programs, which now publish school level test data in almost all states, identify schools as low performing, many of which are segregated minority schools with concentrated poverty. There is a very strong correlation between the percent poor in a school and its average test score. Therefore, minority students in segregated schools, no matter how able they may be as individuals, usually face a much lower level of competition and average preparation by other students. Such schools tend to have teachers who are themselves much more likely to be teaching a subject they did not study and with which they have had little experience.”)

135 See e.g., Susan E. Mayer, How Much Does a High School’s Racial and Socioeconomic Mix Affect Graduation and teenage Fertility Rates?, in *THE URBAN UNDERCLASS* 332 (Christopher Jencks & Paul E. Peterson eds., 1991) (“As a school’s mean SES fell, as its student body became more economically diverse, and as its minority enrollment increased, tenth graders of any given race . . . were more likely to drop out.”).

either will resegregate,<sup>136</sup> or even be released from judicial oversight already segregated.<sup>137</sup> Since it is unlikely that the federal legislative or executive branches will make educational policy decisions with integration as a goal,<sup>138</sup> such information will be critical for federal judges, the sole branch with authority to impact desegregation efforts, to consider as they make determinations of whether districts should be returned to local control.

The information presented in Appendix A is a compendium of the cases identified since 2007 in which courts made determinations of unitary status motions. Additionally, the chart identifies some of the key issues that the court reviewed when deciding the motion, whether the district court compelled the parties in the action to attend a status hearing due to prolonged inactivity in the case, and whether the United States government filed any objections to the motion for unitary status. Lastly, the chart identifies the graduation rates<sup>139</sup> for each district.<sup>140</sup> Where available, dropout data were also included for the districts.

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<sup>136</sup> See GARY ORFIELD & CHUNGMEI LEE, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, UCLA CIV. RIGHTS PROJECT 5–6 (2007) (“Resegregation, which took hold in the early 1990s after three Supreme Court decisions from 1991 to 1995 limiting desegregation orders, is continuing to grow in all parts of the country for both African Americans and Latinos and is accelerating the most rapidly in the only region that had been highly desegregated—the South. . . . Many of these segregated black and Latino schools have now been sanctioned for not meeting the requirements of No Child Left Behind and segregated high poverty schools account for most of the ‘dropout factories’ at the center of the nation’s dropout crisis.”).

<sup>137</sup> Courts will routinely excuse districts with segregated schools on the grounds of private housing choices, and nevertheless grant unitary status motions. See *Freeman v. Pitts*, 503 U.S. 467, 495 (1992).

<sup>138</sup> See ORFIELD, *supra* note 134, at 6 (“There has been no significant positive initiative from Congress, the White House or the Courts to desegregate the schools for more than 30 years.”); see also GARY ORFIELD & SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 16–18 (1996) (describing the opposition to school desegregation during the Reagan administration and, particularly, the hostility toward specific integration remedies such as busing by the Department of Justice). But see *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation In Elementary and Secondary Schools*, U.S. DEP’T OF J. & U.S. DEP’T OF EDUC. (2011) available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html> (detailing the ways in which elementary and secondary schools can legally, in light of *Parents Involved*, pursue the compelling educational interest of reducing the very high level of separate and unequal schooling that may exist in their districts by drawing on the words of the Supreme Court to clearly communicate a range of legally and educationally sound approaches for educators and communities to consider). Nevertheless, in spite of this progressive guidance, the administration has offered no policy guidance or decisions which have set integration as a goal.

<sup>139</sup> These data are limited solely to four-year graduation rates. Additionally, these graduation rate data consider the rates of the districts overall, and do not take into account students who are graduating in alternate settings within the districts, including juvenile justice

## IV. TRENDS IN UNITARY STATUS MOTIONS DETERMINATIONS

As Appendix A reveals, there have been twenty-four judicial cases since 2007 where decisions were published with respect to unitary status motions.<sup>141</sup> These cases involved desegregation orders in twenty-three school districts<sup>142</sup> in ten different states.<sup>143</sup> Of the twenty-four cases,<sup>144</sup> fifteen motions were granted unitary status,<sup>145</sup> four were granted unitary status with prejudice,<sup>146</sup> three were granted partial unitary status,<sup>147</sup> and two were denied unitary status.<sup>148</sup>

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facilities or alternative schools. Additionally, these data are not disaggregated by race, socioeconomic class or disability.

<sup>140</sup> Graduation data were gathered from individual districts and state department of education websites from the publicly available report card data. Therefore, the amount of data available and the years for which the data are available are particular to each district and state. In the cases of districts for which the data were not available online, individual state departments of education were contacted telephonically to obtain such information.

<sup>141</sup> An additional motion was granted in the case of *United States v. Bakersfield City Sch. Dist.*, No. 1:84-cv-00039 OWW JLT, 2011 WL 121638 (E.D. Cal. Jan. 12, 2011), however, it was not included in Appendix A because the Bakersfield School District is a K-8 district and does not graduate high school students.

<sup>142</sup> Madison County, Mississippi; Tucson, Arizona; Houston County, Alabama; Phoenix Union High School, Arizona; Galveston, Texas; Chicago, Illinois; Shelby County, Tennessee; Little Rock, Arkansas; North Little Rock, Arkansas; Pulaski, Arkansas; Alamance-Burlington, North Carolina; Monroe County, Tennessee; Jackson County, Tennessee; Madison Parish, Louisiana; Caldwell Parish, Louisiana; Lowndes County, Mississippi; Evangeline Parish, Louisiana; Ouachita Parish, Louisiana; St. Martin Parish, Louisiana; City of Monroe, Louisiana; Morehouse Parish, Louisiana; Sumter, South Carolina; Franklin Parish, Louisiana. *See infra* Appendix A, at 2-16.

<sup>143</sup> Alabama, Arizona, Arkansas, Illinois, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas. *Id.*

<sup>144</sup> Some cases involved multiple motions for more than one school district.

<sup>145</sup> *Little Rock Sch. Dist. v. Arkansas*, 664 F.3d 738 (8th Cir. 2011); *Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 561 F.3d 746 (8th Cir. 2009); *Robinson v. Shelby Cnty. Bd. of Educ.*, 566 F.3d 642 (6th Cir. 2009); *Anderson v. Sch. Bd. of Madison Cnty.*, 517 F.3d 292 (5th Cir. 2008); *Randall v. Sumter Sch. Dist. No. 2*, No-3:63-CV-1240, 2013 WL 3786344 (D.S.C. July 18, 2013); *United States v. Morehouse Parish Sch. Bd.*, No. 69-14429, 2013 WL 291578 (W.D. La. Mar. 4, 2013); *Graham v. Evangeline Parish Sch. Bd.*, No. 65-11053, 2012 WL 1833400 (W.D. La. May 16, 2012); *United States v. Caldwell Parish Sch. Bd.*, No. 71-CV-16751, 2011 WL 2634086 (W.D. La. July 5, 2011); *Williams v. Kimbrough*, No. 65-11329, 2010 WL 1790516 (W.D. La. May 3, 2010); *United States v. Alamance-Burlington Bd. of Educ.*, 640 F. Supp. 2d 670 (M.D.N.C. 2009); *United States v. Bd. of Educ. of Chi.*, 663 F. Supp. 2d 649 (N.D. Ill. 2009); *Smiley v. Blevins*, 626 F. Supp.2d 659 (S.D. Tex. 2009); *Castro v. Phoenix Union High Sch.*, Nos. 82-302-PHX-RCB, 85-1249-PHX-RCB, 2008 WL 324229 (D. Ariz. 2008); *Fisher v. Tucson Unified Sch. Dist.*, 549 F. Supp. 2d 1132 (D. Ariz. 2008); *Lee v. Houston Cnty. Bd. of Educ.*, No. 1:70-CV-1058, 2008 WL 166954 (M.D. Ala. Jan. 16, 2008); *Lee v. Dothan City*, No. 70-CV-1060 WHA, 2007 WL 1856928 (M.D. Ala. June 27, 2007). *See infra* Appendix A, at 2-16.

<sup>146</sup> *See Taylor v. Ouachita Parish Sch. Bd.*, 965 F. Supp. 2d 758 (W.D. La. 2013); *United States v. Franklin Parish Sch. Bd.*, No. 70-15632, 2013 WL 4017093 (W.D. La. Aug. 6, 2013); *Gray v. Lowndes Cnty. Sch. Dist.*, 900 F. Supp. 2d 703 (N.D. Miss. 2012); *Monroe v.*

A review of the graduation rate data shows mixed results, largely because eight of the motions were decided between 2012 and 2013 and graduation data are not yet available for those districts.<sup>149</sup> Of the fifteen districts granted unitary status with timely graduation data available, seven have decreased graduation rates,<sup>150</sup> seven have increased graduation rates,<sup>151</sup> and one remained the same.<sup>152</sup> The districts denied unitary status with relevant reported data has a decreased graduation rate,<sup>153</sup> and the one district granted partial unitary status has an increased graduation rate.<sup>154</sup>

Phoenix Union High School District reported its data by individual school. Of the fifteen high schools in the district, eleven experienced a decrease in graduation rate,<sup>155</sup> three had an increase<sup>156</sup> and one maintained the same 100% graduation rate.<sup>157</sup> While the graduation rates that decreased varied, it is critical to highlight that Suns Diamondbacks Academy has fallen to a 26% graduation rate; this re-

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Jackson-Madison Cnty. Sch. Sys., C.A. No. 72-1327, 2010 WL 3732015 (W.D. Tenn. Sept. 24, 2010).

147 Taylor v. Ouachita Parish Sch. Bd., No-66-12171, 2012 WL 4471643 (W.D. La. Sept. 27, 2012); Andrews v. City of Monroe, No. 65-11297, 2012 WL 2357310 (W.D. La. June 20, 2012); Little Rock Sch. Dist. v. Pulaski Cnty. Bd. of Educ., No. 4-82cv00866-BSM, 2011 WL 1935332 (E.D. Ark. May 19, 2011).

148 Fisher v. Tucson, 652 F.3d 1131 (9th Cir. 2011); Thomas v. St. Martin Parish Sch. Bd., 879 F. Supp.2d 535 (W.D. La. 2012).

149 Taylor v. Ouachita Parish Sch. Bd., 965 F. Supp. 2d 758 (W.D. La. 2013); United States v. Franklin Parish Sch. Bd., No. 70-15632, 2013 WL 4017093 (W.D. La. Aug. 6, 2013); Randall v. Sumter Sch. Dist., No-3:63-CV-1240, 2013 WL 3786344 (D.S.C. July 18, 2013); United States v. Morehouse Parish Sch. Bd., No. 69-14429, 2013 WL 291578 (W.D. La. March 4, 2013); Thomas v. St. Martin Parish Sch. Bd., 879 F. Supp. 2d 535 (W.D. La. 2012); Andrews v. City of Monroe, No. 65-11297, 2012 WL 2357310 (W.D. La. June 20, 2012); Taylor v. Ouachita Parish Sch. Bd., No-66-12171, 2012 WL 4471643 (W.D. La. Sept. 27, 2012); Graham v. Evangeline Parish Sch. Bd., No. 65-11053, 2012 WL 1833400 (W.D. La. May 16, 2012).

150 Shelby County, Tennessee; Madison County, Mississippi; Houston, Alabama; Phoenix Unified High School; Little Rock, Arkansas; North Little Rock, Arkansas; Tucson, Arizona (however, the Tucson determination of unitary status was later reversed and the motion was denied). *See infra* Appendix A, at 2–5, 7–8.

151 Galveston, Texas; Chicago, Illinois; Alamance-Burlington, North Carolina; Monroe County, Tennessee; Jackson County, Tennessee; Madison County, Louisiana; Lowndes County, Mississippi. *See infra* Appendix A, at 2, 6, 9, 11–12.

152 Caldwell Parish, Louisiana. *See infra* Appendix A, at 10–11.

153 Tucson, Arizona. *See infra* Appendix A, at 3.

154 Pulaski, Arkansas. *See infra* Appendix A, at 8.

155 Alahambra High School; Betty Fairfax High School; Carl Hayden High School; Central High School; Franklin Police and Fire High School; Maryvale High School; MetroTech High School; North High School; South Mountain High School; Suns Diamondbacks Academy; Trevor Brown High Academy. *See infra* Appendix A, at 4–5.

156 Bostrom Alternative Center; Camelback High School; Cesar Chavez High School. *See infra* Appendix A, at 4–5.

157 Phoenix Union Bio-Science High School. *See infra* Appendix A, at 5.



flects that thirty-six of the 135 eligible students in the cohort graduated.

Although dropout data were not available for all of the districts reviewed, it is critical to note that of the seven unitary districts that reported increased graduation rates, three of them also reported their dropout data. All three districts have reported increased dropout rates during the same time period that they have reported increased graduation rates.<sup>158</sup> Of the seven districts that had unitary status motions decided in 2012–2013, for which timely graduation rate comparison data are not yet available, five have reported their dropout rates for the 2013 school year. Two districts granted unitary status have demonstrated increased drop-out rates,<sup>159</sup> and one district granted unitary status has exhibited a stable drop-out rate.<sup>160</sup> The district granted partial unitary status in 2012 has a decreased drop-out rate.<sup>161</sup> The district denied unitary status in 2012 has a stable drop-out rate.<sup>162</sup>

Of the twenty-four motions decided, the courts noted that there were no objections by the United States Government in seventeen cases.<sup>163</sup> The United States objected to the unitary status motion in four cases,<sup>164</sup> and in three cases, the plaintiffs and the defendants filed joint motions for unitary status.<sup>165</sup> In four cases, the court initiated the review of the unitary status of the district after prolonged inactivity in the cases by both parties.<sup>166</sup>

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<sup>158</sup> Monroe County, Tennessee; Jackson County, Tennessee; and Madison Parish, Louisiana. *See infra* Appendix A, at 9–11.

<sup>159</sup> Morehouse Parish, Louisiana and Franklin Parish, Louisiana. *See infra* Appendix A, at 15–16.

<sup>160</sup> Ouachita Parish, Louisiana. *See infra* Appendix A, at 13–14.

<sup>161</sup> City of Monroe, Louisiana. *See infra* Appendix A, at 15.

<sup>162</sup> St. Martin Parish, Louisiana. *See infra* Appendix A, at 14.

<sup>163</sup> Houston County, Alabama; Tucson, Arizona; Phoenix, Arizona; Galveston, Texas; Little Rock, North Little Rock, Pulaski, Arkansas; Jackson and Monroe Counties, Tennessee; Madison Parish, Louisiana; Caldwell Parish, Louisiana; Lowndes County, Mississippi; Evangeline Parish, Louisiana; Ouachita Parish, Louisiana; St. Martin Parish, Louisiana; Morehouse Parish, Louisiana. *See infra* Appendix A, at 3–4, 6–15.

<sup>164</sup> Madison County, Mississippi; Chicago, Illinois; City of Monroe, Louisiana; Franklin Parish, Louisiana. *See infra* Appendix A, at 2, 6, 15–16.

<sup>165</sup> Shelby County, Tennessee; Alamance-Burlington, North Carolina; Sumter, South Carolina. *See infra* Appendix A, at 7, 9, 16.

<sup>166</sup> Franklin Parish, Louisiana; Caldwell Parish, Louisiana; Ouachita Parish, Louisiana; St. Martin Parish, Louisiana. *See infra* Appendix A, at 10–11, 13–14, 16.

## V. "WHAT'S A COURT TO DO?"

Mr. Marshall (on behalf of appellants): "The duty of enforcing the Fourteenth Amendment is placed upon this Court . . . ."<sup>167</sup>

Mr. Wilson (on behalf of the State of Kansas): "[A]ny decision that this Court makes in this case will become the law of the case. In that sense, certainly the entire matter is within the judicial power. However . . . we are constrained to recognize a great deal of limitation and restraint upon that exercise."<sup>168</sup>

The U.S. Department of Education released a report indicating that during the 2011–2012 school year more than 1,200 local educational agencies, inclusive of school districts and charter schools in forty-eight states, self-reported that they were under a federal desegregation plan that was either ordered by a court or entered into with the Office for Civil Rights under Title VI of the Civil Rights Act of 1964.<sup>169</sup> Those desegregation plans affect nearly 7.7 million students. These desegregation plans mandate a range of actions that districts must take, such as reducing racial isolation in schools, increasing the diversity of faculty, ensuring all students have access to rigorous courses, and improving the quality of capital facilities and classroom materials. Concurrent to courts making determinations on unitary status motions, research continues to illustrate that most districts released from court orders to desegregate are rapidly resegregating.<sup>170</sup> Contemporaneous to these demographic changes and judi-

<sup>167</sup> Transcript of Rebuttal Argument, *Briggs v. Elliot*, 342 U.S. 350 (1952), *quoted in BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT* 238 (Leon Friedman ed., 2004).

<sup>168</sup> Transcript of Oral Argument, *supra* note 13, at 268, 271.

<sup>169</sup> *School Desegregation Plans: A National Census*, EDUC. WK., May 13, 2014, [www.edweek.org/ew/section/multimedia/desegregation-map.html](http://www.edweek.org/ew/section/multimedia/desegregation-map.html). Notably, Hawaii and Nevada did not report to the U.S. Department of Education that they operated under a federal desegregation plan. *Id.* See *id.* for a more complete view of the total number of desegregation plans and the states where these plans are in effect.

<sup>170</sup> GARY ORFIELD, ERICA FRANKENBERG, JONGYEON EE & JOHN KUSCERA, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, UCLA CIVIL RIGHTS PROJECT, 27–30 (2014), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> (exhibiting the decrease in enrollment of white students during the period from 2001 to 2011 and adapting the results demonstrated in Sean F. Reardon, Elena Grewal, Demetra Kalogrides & Erica Greenberg, *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876, 899–900 (2012), available at <http://cepa.stanford.edu/content/brown-fades-end-court-ordered-school-desegregation-and-resegregation-american-public-schools>). A review of the fifty largest districts to receive unitary status reveals that most of these districts are resegregating. See ORFIELD et al. *supra*. See *id.* for a more complete overview of all the states reviewed.

cial determinations, the legislative<sup>171</sup> and executive branches continue to enforce various educational accountability measures for districts to meet.<sup>172</sup> Yet in spite of the educational policies set forth at the legislative and executive levels to meet educational standards, veritably no policies have been set forth with respect to issues regarding segregation.<sup>173</sup> Once again, in the face of moderate support by the executive branch,<sup>174</sup> and veritably no support by the legislative branch,<sup>175</sup> the

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<sup>171</sup> Congress has not been able to enact any major federal education law since the No Child Left Behind Act in 2002. See New Maerica Foundation, No Child Left Behind—Overview, FEDERAL EDUC BUDGET PROJECT (Apr. 24, 2014 3:55 pm), <http://feb.newamerica.net/background-analysis/no-child-left-behind-overview>.

<sup>172</sup> The Obama administration awarded “Race To the Top” grants to states implementing innovative education reform plans and waiver polices related to the No Child Left Behind Act for districts that could not meet the set goals. See *Race to the Top Fund*, U.S. DEP’T OF EDUC. (Mar. 25, 2014), [www2.ed.gov/programs/racetothetop/index.html](http://www2.ed.gov/programs/racetothetop/index.html), for more information on the policy guidance.

<sup>173</sup> While the Obama administration did take action in releasing guidance in 2011 on ways in which districts could take efforts to voluntarily integrate in light of *Parents Involved*, and the administration has been very active in supporting various ways to assess teachers to assure that students are taught by high-level educators, bold support behind school integration efforts has been scant. See OFFICE FOR CIVIL RIGHTS, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, U.S. DEP’T OF EDUC. (Jan. 3, 2012), available at [www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html](http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html).

<sup>174</sup> It should be noted that the Office for Civil Rights of the Department of Education and the Civil Rights Division of the Department of Justice under the Obama administration have been more active about enforcement of desegregation orders than they were in previous presidential administrations in recent history. Cf. President Barack Obama, *Presidential Proclamation—60th Anniversary of Brown v. Board of Education*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (May 15, 2014), [www.whitehouse.gov/the-press-office/2014/05/15/presidential-proclamation-60th-anniversary-brown-v-board-education](http://www.whitehouse.gov/the-press-office/2014/05/15/presidential-proclamation-60th-anniversary-brown-v-board-education) (“Yet today, the hope and promise of *Brown* remains unfulfilled. In the years to come, we must continue striving toward equal opportunities for all our children, from access to advanced classes to participation in the same extracurricular activities. Because when children learn and play together, they grow, build, and thrive together.”); THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION (William L. Taylor et al. eds., 2007), available at [http://cdn.americanprogress.org/wp-content/uploads/issues/2007/03/pdf/civil\\_rights\\_report.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2007/03/pdf/civil_rights_report.pdf) (criticizing the administration of President George W. Bush for its record on civil rights advancement and removal of the lack of authority of the Department of Justice’s Civil Rights Division with respect to the use of race conscious voluntary integration by districts); *The Bush Administration Takes Aim: Civil Rights Under Attack*, LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND (2003) available at [http://www.civilrights.org/publications/reports/taking\\_aim/bush\\_takes\\_aim.pdf](http://www.civilrights.org/publications/reports/taking_aim/bush_takes_aim.pdf) (critiquing the Bush administration’s prioritization of states’ rights—and consequent limitation of the ability of Congress to enact civil rights policies—and use of federal authority to stop the civil rights policies with which they disagree).

<sup>175</sup> The Civil Rights Act of 1964 specifically removes racial integration in its definition of desegregation. See 42 U.S.C. § 2000c(b) (“‘Desegregation’ means the assignment of students to public schools and within such schools without regard to their race, color,

goal of school integration and enforcing *Brown v. Board*, lies in the hands of the judiciary. As noted in several of the cases presented in this Article, many of the unitary status motions were made only at the behest of federal district courts that requested an update from parties in cases who had not reported anything to the court with respect to desegregation efforts in several years. Given the resegregation trends, particularly in the northern part of the country, it is imperative that judges place the responsibility in the hands of the parties to continue their efforts to end the vestiges of poor educational opportunity.<sup>176</sup>

An analysis of the cases heard since *Parents Involved* in this Article demonstrates that the Department of Justice does not always intervene or provide guidance to the courts with respect to desegregation orders, even in the face of continuing segregation. For example, in Chicago, the court was deliberate in asserting that despite evidence of the school district not providing a high quality education to students, the U.S. government had not filed a complaint in the twenty-eight-year history of the case, despite the annual reports submitted by the defendants to the federal courts.<sup>177</sup> Furthermore, in spite of a showing of increased segregation and very little effort on the part of the defendant to make substantive changes in student or faculty assignments, the Court of Appeals showed deference to the Shelby County, Tennessee motion because the motion was made as a joint effort by the plaintiffs, the U.S. government, and the school district.<sup>178</sup>

Given the judiciary's unique role of being the sole body with an opportunity to make an impact on the formulation of desegregation orders, and to force the continued enforcement and determine the scope and duration of such orders, it is imperative for the judiciary to have a full understanding of the impact of such decisions. Although precedent precludes federal judges from allowing school districts to voluntarily enforce race conscious integration policies, it is of critical importance for the judiciary to grasp the impact of allowing racial segregation to persist, whether that segregation is de jure or de facto.

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religion, sex or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.").

176 Data indicate that in the 2011–2012 school year, the following states had the most black students attending schools that were 90–100% minority: New York, 64.6%; Illinois, 61.3%; Maryland, 53.1%; New Jersey, 48.5%; and Pennsylvania, 46%. For more information with respect to the most segregated states for black and latinos, see ORFIELD, ET. AL., *supra* note 170, at 20.

177 *United States v. Bd. of Educ. of Chi.*, 663 F. Supp. 2d 649, 654 (N.D. Ill. 2009).

178 *Robinson v. Shelby Cnty. Bd. of Educ.*, 566 F.3d 642, 650 (6th Cir. 2009).

Racial isolation in public schools is particularly pernicious because it is associated with a host of other forms of isolation that impede learning opportunities for students of color. While it is evident that public school integration is not the sole means to address persistent racial and socioeconomic disparities in educational opportunities, the judiciary should be aware of the harms that are associated with such isolation; they are the very same harms that were admonished by the *Brown* court. These harms include less experienced and less qualified teachers, high levels of teacher turnover, less successful peer groups, and inadequate facilities.<sup>179</sup> Research has evidenced for many years that students in schools with high concentrations of poverty suffer from poorer academic achievement outcomes.<sup>180</sup> Segregated public schools are also less likely to offer Advanced Placement or other honors level courses that will make students better prepared for college study.<sup>181</sup> Other factors—including expulsion rates, dropout rates, success in college, test scores, and graduation rates—are all more negatively impacted in segregated schools.<sup>182</sup> Research has evidenced that even for states with the lowest graduation rates, the graduation rate for blacks and Latinos is still lower than 20% of the statewide average.<sup>183</sup> It is just as evident today as it was sixty years ago, when the Warren Court decided *Brown I*, that the impact of attending segregated schools will influence a student's status in life in immeasurable ways.

In providing flexible latitude by which lower courts could apply the *Green* factors when making unitary status determinations, the

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179 Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417, 449–50 (2005); Charles T. Clotfelter, Helen F. Ladd & Jacob Vigdor, *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 *ECON. EDUC. REV.* 377, 377–78 (2005).

180 See Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 *TCHRS. C. REC.* 1999, 2020 (2005); Caroline Hoxby, *Peer Effects in the Classroom: Learning from Gender and Race Variation* 1, 35–36 (Nat'l Bureau of Econ. Research, Working Paper No. 7867, 2000), available at <http://www.nber.org/papers/w7867> (finding that the average socioeconomic level of students' schools had as much impact on their achievement growth as their own socioeconomic status). See James Coleman, *The Concept of Equality of Educational Opportunity*, 38 *HARV. EDUC. REV.* 7, 9 (1968) (discussing the impact on class structures on access to educational opportunity).

181 See GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 233–34 (1996).

182 See ROBERT BALFANZ & NETTIE LEGTERS, *LOCATING THE DROPOUT CRISIS: WHICH HIGH SCHOOLS PRODUCE THE NATION'S DROPOUTS? WHERE ARE THEY LOCATED? WHO ATTENDS THEM?* 23 (2004), available at <http://www.csos.jhu.edu/crespar/techReports/Report70.pdf>.

183 See RUSSELL RUMBERGER, *DROPPING OUT: WHY STUDENTS DROP OUT OF SCHOOL AND WHAT CAN BE DONE ABOUT IT* 77 (2011).

*Freeman* Court contemplated these “quality of education” factors, which can cause destructive outcomes for students if not regulated properly.<sup>184</sup>

[Q]uality of education was a legitimate inquiry in determining DCSS’ compliance with the desegregation decree, and the trial court found it workable to consider the point in connection with its findings on resource allocation. . . . [I]t underscores the school district’s record of compliance in some areas but not others. The District Court’s approach illustrates that the *Green* factors need not be a rigid framework. It illustrates also the uses of equitable discretion.<sup>185</sup>

In consideration of the unitary status motions before the federal judiciary since *Parents Involved*, it is evident that several judges chose to exercise this flexibility in equitable discretion. For example, in *Lee v. Dothan City Board of Education*, the court noted that the district’s elementary schools had achieved adequate yearly progress for two years under No Child Left Behind Act when granting the motion for unitary status.<sup>186</sup> With respect to the Tucson Unified School District, the court relied heavily upon the school district’s persistent achievement gap data in determining that the district officials did not exhibit a good faith commitment to the desegregation order.<sup>187</sup> Moreover, the Court of Appeals in this instance held that the district’s commitment to address the issues in the future was not sufficient for a finding of unitary status. Rather, the Court of Appeals insisted that the district show how it would address the issues prior to the grant of the motion.<sup>188</sup> In North Little Rock, Arkansas, the court granted only partial unitary status to the district because of the lack of minority student enrollment in Advanced Placement courses.<sup>189</sup> The court in Alamance-Burlington County, North Carolina looked to a variety of factors when granting the unitary status motion, including student dis-

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184 The District Court in *Freeman* examined the academic achievement of black students in the district and achievement levels of black students on the SAT. See generally *Freeman v. Pitts*, 503 U.S. 467 (1992). Although the Court found no evidence of purposeful discrimination as it related to achievement levels, the court denied the district unitary status because it found that teachers in predominately black schools were overall less educated and experienced than were teachers in white schools and per pupil expenditure in predominately black schools was lower than in predominately-white schools. *Id.* at 483–84.

185 *Id.* at 492–93.

186 No. 70CV 1060-WHA, 2007 WL 1856928, at \*3 (M.D. Ala. June 27, 2007).

187 *Fisher v. United States*, 549 F. Supp. 2d 1132, 1164–65 (D. Ariz. 2008), *rev’d sub nom. Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131 (9th Cir. 2011).

188 *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1143–44 (9th Cir. 2011).

189 *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist.*, No. 4:82cv00866 BSM, 2011 WL 1935332, at \*26–27 (E.D. Ark. May 19, 2011) *aff’d in part, vacated in part, rev’d in part sub nom. Little Rock Sch. Dist. v. Arkansas*, 664 F.3d 738 (8th Cir. 2011).

cipline, minority participation in gifted and talented programs, student achievement rates, and graduation rates of minority students.<sup>190</sup> In *Anderson v. School Board of Madison County*, the concurring opinion took careful attention to note that the same harm of the current day segregation that existed as the Court granted the district unitary status was just as deleterious as it was when the litigation began.<sup>191</sup>

This level of flexibility with respect to quality of education issues allows district courts to ensure that motions for unitary status require evidence that school districts address the educational needs of students to the greatest extent possible. As such, when designing desegregation programs, it is critical for district court judges to consider programs that could remain in place once the school district is granted unitary status. If district courts were to require that school districts create programs that specifically addressed issues of low graduation rates among minority students in a school district, such programs could be designed to properly pass constitutional muster after a unitary status determination.

Any court ordered program that solely classifies students on the basis of race would not pass constitutional muster under strict scrutiny upon release from court order.<sup>192</sup> Facially race-neutral policies could be implemented that assign students to particular programs and schools based on academic need. Such a plan, on its face, would neither use racial classification as a factor for student assignments nor would it distribute any burdens or benefits on the basis of racial classification.<sup>193</sup>

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<sup>190</sup> United States v. Alamance-Burlington Bd. of Educ., 640 F. Supp. 2d 670, 681–82 (M.D.N.C. 2009).

<sup>191</sup> 517 F.3d 292, 305 (5th Cir. 2008) (“[T]he cruel irony is that racial isolation, albeit not as the product of *de jure* segregation, largely remains as foreboding and potentially deleterious as it was when federal court supervision began.”).

<sup>192</sup> *But see* Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (holding that intentional discrimination can be shown when a facially race-neutral law or policy applied evenhandedly is motivated by discriminatory intent and has a racially discriminatory impact).

<sup>193</sup> Such a plan would be distinguishable from the policies in prior Supreme Court equal protection education cases in which the school districts or universities used racial classifications as the sole factor, or a factor among many, to make determinations regarding student school assignments or admissions to schools. *See e.g.*, Gratz v. Bollinger, 539 U.S. 244, 253–57 (2003) (examining a university admission policy based its system on points given to applicants for multiple factors including points awarded to applicants from underrepresented ethnic and racial groups); Grutter v. Bollinger, 539 U.S. 306, 316 (2003) (noting that a university admissions policy that admitted students based on an evaluation of all the information in each student’s file, including an essay on how the applicant would contribute to the school’s diversity, reaffirmed the school’s commitment to diversity in an attempt to enroll a “critical mass” of underrepresented minority students); Regents of Univ. of California v. Bakke, 438 U.S. 265, 275 (1978)

A school district's use of the knowledge that minority students in its district are not obtaining the optimal level of educational outcomes for future success (or even minimal level of knowledge to be fully functioning) in fashioning educational programs that would address such remedial issues would not invalidate such a program post unitary status. Equal protection law does not conflate knowledge or awareness of race with racial classifications or racially discriminatory purpose. A racial classification<sup>194</sup> occurs only when an action "distributes burdens or benefits on the basis of" race.<sup>195</sup> A racially discriminatory purpose would be evident if the school district adopted a policy at least partially because the action would benefit or burden an identifiable group.<sup>196</sup> Therefore, designing a school desegregation policy with racial factors in mind that would increase graduation rates would not constitute a racial classification if the policy were facially race-neutral and administrated in a race-neutral fashion. The Supreme Court has never held that strict scrutiny should be applied to a school policy where race is not a factor merely because the school administrators were aware of or considered race when adopting the policy.

It is critical for the judiciary to understand the impact not only on the lives of the children who are served in districts, but also on society at large that will occur as a result of the granting of unitary status motions.<sup>197</sup> Further, the actions that are approved by the court while the

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(recognizing that the policy included a special admissions program that considered applicants who self-identified as minority group members and admitted a prescribed number of self-identified minority students each year).

194 See *United States v. Hays*, 515 U.S. 737, 745 (1995) (noting that the record contained "evidence tending to show that the legislature was *aware* of the racial composition of [the districts where the plaintiffs lived]"). The Court in *Hays* was also careful to note: "We recognized in *Shaw*, however, that 'the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.'" *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993)). It follows that proof of "[t]hat sort of race consciousness" in the redistricting process is inadequate to establish injury in fact. *Id.* at 745–46.

195 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

196 See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (internal citation and footnotes omitted).

197 See, e.g., *Santamaria v. Dallas Indep. Sch. Dist.*, No. Civ.A.3:06CV692-L, 2006 WL 3350194, at \*39 (N.D. Tex. Nov. 16, 2006) (discussing that, in an attempt to curb white flight, a school principal reserved certain classrooms for white students and assigned other classrooms specifically for Latino and Black students, "in effect, operating, at taxpayer's expense, a private school for Anglo children within a public school that was predominantly minority").



district is under the court's direction will have a permanent effect and will be favored, even if they have a disparate impact on the most vulnerable students.<sup>198</sup>

The members of the federal judiciary are experienced in the application of the principles and precedents of equity; nevertheless, the dismantling of desegregation efforts of public schools has proved to be without parallel or analogue in legal history.<sup>199</sup> In view of the unique nature of this social revolution, it is not surprising that desegregation cases have presented many problems that even sixty years of evolving equitable remedies have not resolved.

Almost a decade after *Brown I*, Alabama Governor George Wallace, in his 1963 inaugural speech, pronounced these words:

Let us rise to the call of freedom-loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw a line in the dust and toss the gauntlet before the feet of tyranny,<sup>200</sup> and I say: segregation now, segregation tomorrow, segregation forever.

## CONCLUSION

Over a half a century later, we must ask ourselves, “was he being defiant or prophetic?” The federal courts are now faced with the responsibility and honor to serve the American citizens in the legacy of the federal judiciary that relied upon resourcefulness, experimentation, straining the traditional equitable powers, and expanding available remedies to overturn *Plessy*. It is evident that the legal transition from segregation to integrated public education took over a century

<sup>198</sup> See *U.S. v. Franklin Parish Sch. Bd.*, No. CIV. A. 70-15632, 2013 WL 4017093, at \*9 (granting a motion for unitary status, court maintains that even though a particular school is segregated it cannot be a vestige of de facto segregation because the school opened under court's supervision).

<sup>199</sup> Consider the fact that the Kansas Supreme Court struck down segregated schools in 1881, however, the *Brown* decision encompassed a review of Kansas' segregated school systems in 1954, seventy three years later. Further, sixty years after *Brown I*, in 2014, the Kansas Supreme Court in 2014 maintained that Kansas maintained wealth based disparities within the various districts of the State. See *Bd. of Educ. Of City of Ottawa v. Tinnon*, 26 Kan. 1, at \*20 (1881) (holding that the school board cannot establish separate schools on the basis of race.); *Gannon v. State*, 319 P.3d 1196, 1239 (Kan. 2014) (holding that the State created unconstitutional, wealth-based disparities in violation of the State Constitution).

<sup>200</sup> See JODY CARLSON, *GEORGE C. WALLACE AND THE POLITICS OF POWERLESSNESS: THE WALLACE CAMPAIGNS FOR THE PRESIDENCY, 1964-1976* 24 (Transaction Books, 1981); See also Leon A. Higginbotham, Jr., *Violence in America: Contracts, Myths and History*, 36 B.C. L. REV. 899, 904-905 (1994-1995) (describing the use of such outright defiance toward the equality of minorities used as the rallying cry for equal justice advocates).

to reconcile. However, the time is now for our judiciary to make the legal truth of public school desegregation codified in *Brown I* a reality for all children.

## APPENDIX A

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
Anderson v. School Board of Madison County, 517 F.3d 292 (5 <sup>th</sup> Cir., 2008)	Madison County, Mississippi	Granted	<p>US Government and Plaintiffs objected the motion on the following grounds (1) faculty assignment; (2) employment procedures; (3) lack of racial balance in the magnet program; (4) facilities; (5) lack of "good faith" by defendants because they had not been in compliance for a reasonable amount of time and because they have not created an adequate program to attract white students to the magnet program.</p> <p>Court held (1) white students are not attracted to the magnet program due to cultural and geographic considerations; (2) the defendants have shown "good faith" with being in compliance with consent decrees throughout the years; (3) district did not show bad faith in not reaching its goal of ensuring that the faculty within the district is within a 15% range of the district ration of African American to white teachers by not forcing more experienced teachers to transfer within the district; (4) although the baseball facilities at the predominately black school are not as nice as those of the other schools, there is less interest in the sport at the identified school.</p>	US government and private plaintiffs opposed the motion	No	2011-86.4% <sup>201</sup> 2010-88.1% 2009-84.4% 2008-89.5%

201 ALABAMA STATE DEPARTMENT OF EDUCATION, <http://www03.alsde.edu/accountability/preaccountability.asp> (illustrating data obtained from the Alabama Department of Education website) (last visited Feb. 3, 2015).

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
			Concurring opinion by Judge Stewart admitted that it is undisputed that racial isolation continues to occur in the district for black students; although de jure segregation exists, the racial isolation that has remained is just as deleterious as when federal court oversight began. Judge Stewart warned of the harms that will occur when students will no longer be able to participate in the majority to minority transfer program due to termination of court supervision.			
Lee v. Houston County Board of Education, No. 1:70-CV-1058, 2008 WL 166954 (M.D. Ala. Jan. 16, 2008).	Houston County, Alabama	Granted	The court offered very little dicta and rather simply states that the district has shown good faith compliance with all of the court decrees ordered and has removed vestiges of past discrimination.	None noted	No	2013- 89% <sup>202</sup> 2012- 87% 2011- 83% 2010- 93.5%
Fisher, et al, v. Tucson Unified School District, 549 F.Supp.2d 1132 (D. Ariz., 2008)	Tucson, Arizona	Granted pending approval of post unitary status plan	The District Court found that TUSD failed to make the most basic inquiries necessary to assess the ongoing effectiveness of its student assignment plans, and programs which included race and ethnic sensitive school boundaries, magnet programs, open enrollment, and providing an equal education to all students including those attending all minority schools. The court held that TUSD ignored evidence and refused to answer questions regarding the effec-	None noted	No	2013- 77.23% <sup>203</sup> 2012- 80.15% 2011- 82.12% 2010- 83.76% 2009- 82.98% 2008- 82.05% 2007- 84.66% 2006- 85.11%

<sup>202</sup>*Id.*<sup>203</sup>

TUSD STATS,

<https://tusdstats.tusd1.org/paweb/aggD/graduation/gradrate.aspx> (illustrating data obtained from Tucson Unified School District website) (last visited Feb. 3, 2015).

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
Fisher et. al, v. Tucson, Nos. CV 74-90 TUC DCB, CV 74-204 TUC DCB, 2011 WL 4102233, (D. Ariz., Sept. 14, 2011).		Denied	<p>tiveness of these programs in order to address demographic shifts in schools.</p> <p>The court found that the district failed to make a good faith effort to combat the demographic changes in the district and exacerbated the inequities of the racial imbalance in its failure to assess programs. The court reviewed much of the achievement gap data from the district that demonstrated persistent gaps in the district. As such the court held that the district failed to make good faith effort to implement changes required under desegregation agreement.</p> <p>The court granted the district unitary status upon the adoption of a post-unitary status plan. On remand from the court of Appeals, (<i>Fisher v. Tucson</i>, 652 F.3d 1131 (9<sup>th</sup> Cir, 2011), the Court of Appeals held that District Court erred in granting unitary status and held that adoption of plan that merely promised future improvements was not sufficient to demonstrate past good faith in this instance. Upon remand, the District Court held a special master appointed to develop a report on how unitary status might be achieved.</p>	None noted	No	
Castro, et al., v. Phoenix Union High School, Nos.	Phoenix, Arizona	Granted	The court granted unitary status in 2005 over the other eighteen districts included in the original	None noted	No	Alahambr a High School <sup>204</sup> 2012- 69.98%

<sup>204</sup> Graduation data were only available for these years and reported by individual schools. ARIZONA STATE DEPARTMENT OF EDUCATION, <http://www.azed.gov/research-evaluation/graduation-rates/> (illustrating data obtained by the Arizona Department of Education) (last visited Feb. 3, 2015).

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
82-302-PHX-RCB, 85-1249-PHX-RCB, 2008 WL 324229, (D. Ariz., 2008)			suit, but maintained limited oversight over Phoenix Union High School District during construction of new high school—Betty Fairfax. Since there was completion to the high school construction, the court ordered an end to the judicial oversight.			2011-83.96%  Betty Fairfax High School 2012-85.89% 2011-87.05%  Bostrom Alternative Center 2012-55.81% 2011-52.24%  Camelback High School 2012-77.75% 2011-76.18%  Carl Hayden High School 2012-68.74% 2011-77.73%  Central High School 2012-74.27% 2011-75.17%  Cesar Chavez High School 2012-82.86% 2011-81.63%  Franklin Police/Fire High School 2012-98.15% 2011-100%  Maryvale High School 2012-85.6% 2011-87.66%

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
						MetroTech High School 2012- 82.86% 2011- 86.17%  North High School 2012- 80.29% 2011- 81.58%  Phoenix Union Bio Science 2012- 100% 2011- 100%  South Mountain High 2012- 70.8% 2011- 79.56%  Suns-Diamond-backs Academy 2012- 26.67% 2011- 33.53% Trevor Browne High Academy 2012- 76.61% 2011- 78.79%
Smiley, et al, v. Blevins, et al., 626 F. Supp.2d 659 (S.D.	Galveston, Texas	Granted	In reviewing all of the <i>Green</i> factors, the court held that although the district did not address the	Court notes that DOJ did not oppose the motion for unitary	No	2013- 84.7% <sup>205</sup> 2010- 73% <sup>206</sup> 2009- 73%

<sup>205</sup>

GALVESTON INDEPENDENT SCHOOL DISTRICT,  
<http://www.gisd.org/education/page/download.php?fileinfo=MjAxM19HSVNEX0FjY291bnRhYmlsaXR5X1N1bW1hcnkucGRmOjo6L3d3dzUvc2Nob29scy90eC9nYWxzZXN0b25pc2QvaW1hZ2VzL2RvY21nci9BTExmaWxlODA5Ny5wZGY=&sectiondetailid=30985> (last visited Feb. 3, 2015).

<sup>206</sup>*Id.*

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
TX, 2009)			issue of good faith effort, they have been in compliance with court orders throughout the years—the district met its racial percentage goal between 1978 and 1979, but was never able to meet such goals thereafter. Yet complete racial balance is not required to be granted a unitary motion	status.		2008- 33% 2007- 52%
United States v. Board of Education of the City of Chicago, 663 F. Supp. 2d 649 (N.D. Ill., 2009)	Chicago, Illinois	Granted	Court stated that US never filed a complaint in the twenty-eight year history of the consent decree in spite of the defendant's annual reports with the court detailing their remediation practices to satisfy the consent decree. In 2008, the US filed a complaint alleging ELL inadequacies in the district. The court maintained that they lack jurisdiction over ELL issues. The court contended that the school system does not provide a sufficient quality of education as likely necessary but held the policies were lawful nevertheless.	Yes	No	2013- 65.4% <sup>207</sup> 2012- 61.2% 2011- 58.3% 2003- 44%
Robinson, et al. v. Shelby County Board of Education, 566 F.3d 642, (6th Cir., 2009)	Shelby County, Tennessee	Granted	The lower district court in this case found that the district lacked unitary status in student assignment, faculty and extracurricular activities and granted only partial unitary status. The lower court held that the school district had not reported any desegregation data for years, that only 10/44 schools were	No, joint motion for unitary status by US, plaintiffs and defendants	No	2013- 88% <sup>208</sup> 2012- 88% 2011- 88% 2010- 91%

<sup>207</sup> Data is not offered for any years between 2003 and 2011. *CPS Students Set Record High Graduation Rate of 65.4 Percent for School Year 2012-2013*, CHICAGO PUBLIC SCHOOLS (Aug. 14, 2013), [http://www.cps.edu/News/Press\\_releases/Pages/PR1\\_08\\_14\\_2013.aspx](http://www.cps.edu/News/Press_releases/Pages/PR1_08_14_2013.aspx).

<sup>208</sup> TENNESSEE STATE DEPARTMENT OF EDUCATION, [http://www.tn.gov/education/research/dataavailablefordownload\\_000.shtml](http://www.tn.gov/education/research/dataavailablefordownload_000.shtml) (last visited Feb. 3, 2015).



Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
			<p>integrated, and that a lot of segregation was due to zoning laws and school construction. The lower court held the district made very little effort to integrate; faculty integration never really occurred, and black teacher hiring decreased over the years. The district never submitted any docs about faculty placement, nor did the district submit sufficient information to show how students participated in extracurricular activities.</p> <p>Court of Appeals held that the ongoing racial unevenness in student assignment did not further subject the district to the court's equitable powers. Court of Appeals reversed the decision of the district court and granted full unitary status.</p> <p>Judge Marbley (dissenting) contended that the plaintiffs—in over 40 years of the litigation—rarely filed any opposition against the district's plans. The dissent explained that the district court admitted that they had been rubber stamping most of the motions during the forty year history of the case because no information was ever offered to show that the plans offered would have had a negative impact on desegregation plans.</p>			
Little Rock	Little Rock,	Unitary Status	Court of Appeals	None noted	No	Little

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
School District et al. v. North Little Rock School District et al., v. Pulaski County Board of Education et al., 561 F. 3d 746 (8th Cir., 2009)	Arkansas	granted for Little Rock	affirmed the District Court's grant of unitary status for Little Rock Schools and the finding that the school district acted in good faith compliance with the desegregation order.			Rock 2013-75.35% <sup>209</sup> 2012-81.78% 2011-65.7% 2010-78.5% <sup>210</sup> 2009-78% 2008-83% 2007-74% 2006-76%
Little Rock School District et al. v. North Little Rock School District et al., v. Pulaski County Board of Education et al., No. 4-82cv00866-BSM, 2011 WL 1935332, (E.D. Ark., May 19, 2011)	North Little Rock and Pulaski County, Arkansas	Partial Unitary Status Granted for both districts	North Little Rock and Pulaski granted partial unitary status in all respects. The District Court admonished Pulaski County for not increasing minority enrollment in AP course, and not reporting in good faith.	None noted		North Little Rock-2013-69.01% <sup>211</sup> 2012-73.25% 2011-74.4%  Pulaski District-2013-72.89% <sup>212</sup> 2012-65.65% 2011-60.8%
Little Rock School District et al. v. North Little Rock School District et al., v. Pulaski County Board of Education et al., 664 F.3d 738 (8th Cir., 2012)	North Little Rock and Pulaski County, Arkansas	Full Unitary Status for North Little Rock Granted; Partial Unitary Status for Pulaski overturned	The Court of Appeals granted unitary status for North Little Rock—holding that they had good faith compliance even though their teacher recruitment wasn't satisfactory because they provided sufficient evidence that they attempted to recruit from diverse job fairs, and their black teacher rates exceeded that of the labor market.  Court held Pulaski	None noted		

<sup>209</sup> ARKANSAS DEPARTMENT OF EDUCATION, <http://www.arkansased.org/> (last visited Feb. 3, 2015).

<sup>210</sup> *Great Ideas for Great Public Schools: Arkansas, Union Perceived as a Force For 'Positive Change,'* NATIONAL EDUCATION ASSOCIATION (Sept. 2009), <http://www.nea.org/assets/docs/111012-arkansas.pdf>; Barbara Moldauer, *Stories of Closing Achievement Gaps Through Community Engagement*, NATIONAL EDUCATION ASSOCIATION (Sept. 2009), <http://www.nea.org/assets/docs/HE/PEPSuccessStories.pdf>.

<sup>211</sup> ARKANSAS DEPARTMENT OF EDUCATION, <http://www.arkansased.org/> (last visited Feb. 3, 2015).

<sup>212</sup> *Id.*

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
			district did not make a good faith effort with compliance because they did not comply with the reporting mechanisms requested. Court held they merely showed evidence that their stats looked better than other districts that were declared unitary.			
United States v. Alamance-Burlington Board of Education, et al., 640 F.Supp. 2d 670 (M.D. N.C., 2009)	Alamance-Burlington Board of Education, North Carolina	Granted	Despite the joint motion filed, the district court ordered supplemental information with respect to the district including racial school disciplinary rates; rates of participation in gifted and talented programs, and racial disparities in achievement and graduation rates. The court held in spite of the continued existence of racially identifiable schools, the district showed good faith and vestiges of de jure segregation were eliminated.	No; Joint motion by US government and the district for unitary status		2013-78.6% <sup>213</sup> 2012-75.4% 2011-75.5% 2010-72.8% 2009-70.6% 2008-62.5% 2007-71.7% 2006-66.71%
Monroe, et al, v. Jackson-Madison County School System, C.A. No. 72-1327, 2010 WL 3732015 (W.D. Tenn, Sept. 24, 2010)	Monroe and Jackson Counties, Tennessee	Granted with prejudice	The sole issue before the court was student assignment because all other <i>Green</i> factors had been previously satisfied. Since 2001, the number of non-racially identifiable schools increased; the court held this is not evidence of de jure segregation. The court cited to demographic changes that indicated that that district was once 60% white and was now 40% white. The court maintained that the demograph-	No	No	Graduation Rate Jackson- <sup>214</sup> 2012- 90% 2011- 88.9% 2010- 87.4% 2009- 86.4% 2008- 92.4% 2007- 88.3%  Dropout Data Jackson- <sup>215</sup> 2012- 4.2% 2011- .8%

<sup>213</sup> NORTH CAROLINA DEPARTMENT OF EDUCATION,  
<http://accrpt.ncpublicschools.org/app/2006/cgr/> (last visited Feb. 3, 2015).

<sup>214</sup> TENNESSEE DEPARTMENT OF EDUCATION,  
<http://edu.reportcard.state.tn.us/pls/apex/f?p=200:50:4127973740266296::NO> (last Feb. 3, 2015).

<sup>215</sup> *Id.*

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
			ic change was so great that the increases in segregation rates were due to demographic shifts not de jure segregation. The court held that issues such as student achievement and quality of schools were not legal matters, rather issues of local accountability.			2010-.6% 2009-3.2% 2008-2.3% 2007-1.3% Graduation Rate – Madison <sup>216</sup> 2012-95.1% 2011-91.6% 2010-91.5% 2009-83.8% 2008-81.7% 2007-81.8%  Dropout Data – Madison <sup>217</sup> 2012-4.3% 2011-1.3% 2010-2.5% 2009-1.9% 2008-2.0% 2007-3.1%
Williams et al., v. Kimbrough, et al., No. 65-11329, 2010 WL 1790516, (W.D. La, May 3, 2010)	Madison Parish, Louisiana	Granted	The court held the district was 93% black and the school demographics were such that all schools have predominately black enrollment. The court held that nevertheless, the district has complied in good faith and vestiges of de jure segregation have been eliminated.	No objections by the US Government, plaintiffs or the community	No	Graduation Rate- <sup>218</sup> 2012-67.5% 2011-66.3% 2010-65.4% 2009-64.7% 2008-48.8%  Dropout Rate- <sup>219</sup> 2013-7.1% 2012-8.1%

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> LOUISIANA DEPARTMENT OF EDUCATION, <http://www.louisianabelieves.com/resources/library/data-center> (last visited Feb. 3, 2015).

<sup>219</sup> *Id.*

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
						2011-7.4% 2010-7.0% 2009-6.4% 2008-10.3%
United States v. Caldwell Parish School Board, No. 71-CV-16751, 2011 WL 2634086, (W.D. La., July 5, 2011)	Caldwell Parish School, Louisiana	Granted	District court reviewed <i>Green</i> factors and concluded that the district has eliminated all vestiges of de jure segregation.	Court notes that the US filed no objections.	Yes, unitary status review initiated by the court	Graduation Rate - <sup>220</sup> 2012-72.4% 2011-72.4% 2010-82.2% 2009-83.5% 2008-73.7%  Dropout Rate - <sup>221</sup> 2013-<1.0% 2012-<1.0% 2011-<1.0% 2010-<1.0% 2009-<1.0% 2008-1.9%
Gray, et al., v. Lowndes County School District, 900 F. Supp. 2d 703 (N.D. Miss., 2012)	Lowndes County, Mississippi	Granted; case dismissed with prejudice	The remaining <i>Green</i> factors under consideration for this motion were facilities and extracurricular activities. The plaintiffs argued that there were several inequalities: unequal baseball fields at the schools; an unequal entrance to school; disparity in the passage rate for black students (although the district implemented an AP exam process that increased the number	The Court noted that the US did not oppose the motion.	No	Graduation Data - <sup>222</sup> 2013-80.2% 2012-74.7% 2011-78.9% 2010-75.4%.

<sup>220</sup> *Id.*<sup>221</sup> *Id.*<sup>222</sup> MISSISSIPPI DEPARTMENT OF EDUCATION,  
<http://reports.mde.k12.ms.us/report2009.aspx> (last visited Feb. 3, 2015).

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
			<p>of black students taking the exam, the passage rate remained low for black students); the continuation of the word "confederate" as a school nickname; and the playing of Dixie at school events.</p> <p>The court examined the <i>Green</i> factors and held student assignments were equalized; the baseball field and entrance to the school were fixed; and that there was evidence that black students had equal access to extracurricular activities. The court expressed concern over the school nickname and playing of Dixie at school events, however, maintained that this did not represent official resistance to a unitary system or a source of racial tension. The court relied on the good nature of the superintendent and indicated that his "heart is in the right place" with the confederate nickname.</p>			
Graham v. Evangeline Parish School Board, et al., No. 65-11053, 2012 WL 1833400, (W.D. La., May 16, 2012)	Evangeline Parish, Louisiana	Granted	District court holds that through reporting and concrete efforts that good faith compliance had been shown. The Court held there were still some schools that were racially identifiable, but court maintained that this was a matter of private choice.	Government nor plaintiffs file any objections to unitary status motion.	No	<p>Graduation Rates-<sup>223</sup></p> <p>2012-67.3%</p> <p>2011-66.8%</p> <p>2010-5.3%</p> <p>2009-56.9%</p> <p>2008-66.8%</p> <p>Dropout Rates -<sup>224</sup></p> <p>2012-5.4%</p>

<sup>223</sup> LOUISIANA DEPARTMENT OF EDUCATION, <http://www.louisianabelieves.com/resources/library/data-center> (last visited Feb. 3, 2015).

<sup>224</sup> *Id.*

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
						2011-2.2% 2010-4.4% 2009-7.2% 2008-6.6%
Taylor, et al., v. Ouachita Parish School Board, et. al, No-66-12171, 2012 WL 4471643, (W.D. La., Sept. 27, 2012)	Ouachita Parish, Louisiana	Partial unitary status granted	District Court grants partial unitary status with respect to faculty and staff assignment, extra-curricular activities and physical facilities. The court held that although the numbers of faculty and staff did not meet target goals, the district offered a non-discriminatory reason for its failure to reach such goals.	The court noted that neither the US Government nor the plaintiffs opposed the motion for unitary status. None noted	District Court called for a status conference with respect to unitary status	Graduation Data- <sup>225</sup> 2012- 73% 2011- 72.9% 2010- 68.7% 2009- 67.5% 2008- 65%  Dropout Data- <sup>226</sup> 2013- 3.3% 2012- 3.3% 2011-3.3% 2010- 3.8% 2009- 6.3% 2008- 6.8%
Taylor, et al., v. Ouachita Parish School Board, et. al, No-66-12171, 2013 WL 4094370, (W.D. La., Aug. 13, 2013)		Unitary Status Granted; Dismissed with prejudice	The District Court held that although all of the schools were still racially identifiable, this disparity was due to geography and maintained that "aggressive" tactics such as cross parish bussing would be counter-productive to desegregation orders and lead to more charter schools.			
Thomas, et al. v. St. Martin Parish School Board, et al., 879 F. Supp.2d 535 (W.D. La., 2012)	St. Martin Parish, Louisiana	Denied	In this instance, the school district argued res judicata indicating that they were declared unitary in 1974 when a judge called then unitary. The NAACP opposed saying that they were still under court order and provided evidence that indicated that very little happened after 1974 with respect to desegregation. The District Court held that district is still under court order.	None noted	Court ordered a status conference on status of unitary motion	Graduation Rate - <sup>227</sup> 2012- 69.8% 2011- 69.7% 2010- 72.2% 2009- 63.1% 2008- 60.9%  Dropout Data- <sup>228</sup> 2013- 4.0% 2012- 4.0% 2011-

<sup>225</sup> *Id.*<sup>226</sup> *Id.*<sup>227</sup> *Id.*<sup>228</sup> *Id.*

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
						3.3% 2010- 5.3% 2009- 6.8% 2008- 6.3%
Andrews, et al., v. City of Monroe, et al., No. 65-11297, 2012 WL 2357310 (W.D. La., June 20, 2012)	City of Monroe, Louisiana	Partial unitary status granted	Plaintiffs opposed the motion indicating that the student assignment plan left the southern part of the city just as segregated as it was in 1964. Court held the segregation is not a result of discriminatory intent—rather residential housing patterns. The plaintiffs argued that the district had done a good job of desegregating the northern part of the city. The court remarked that plaintiffs had suggestions for integrating the southern part of the city, but merely that the plans are not feasible. Court granted the motion for partial unitary status for student assignment.	DOJ filed motion to oppose	No	Graduation Data- <sup>229</sup> 2012- 65.9% 2011- 65.6% 2010- 62.6% 2009- 58.5% 2008- 54.7%  Dropout Data- <sup>230</sup> 2013- 4.0% 2012- 8.4% 2011- 5.7% 2010- 6.9% 2009- 6.6% 2008- 7.9%
United States v. Morehouse Parish School Board, et al., No. 69-14429, 2013 WL 291578 (W.D. La., March 4, 2013)	Morehouse Parish, Louisiana	Granted	District Court held unitary status found in all areas including student assignment although the court maintained that the schools are not racially balanced. The court held that school assignments were due to changing demographics and residential housing patterns.	Court noted that the US filed no objection.	No	Graduation Rate - <sup>231</sup> 2012- 61.7% 2011- 61.0% 2010- 55.4% 2009- 51.1% 2008- 52.7%  Dropout Data- <sup>232</sup> 2013- 7.5% 2012- 4.7% 2011- 7.2%

<sup>229</sup>LOUISIANA DEPARTMENT OF EDUCATION,  
<http://www.louisianabelieves.com/resources/library/data-center> (last visited Feb. 3, 2015).<sup>230</sup>*Id.*<sup>231</sup>*Id.*<sup>232</sup>*Id.*



Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
						2010-7.9% 2009-12.1% 2008-13.4%
Randall, et al., v. Sumter School District, No. 3:63-CV-1240, 2013 WL 3786344, (D. S.C., July 18, 2013)	Sumter, South Carolina	Granted	District Court held that any racial imbalance in student assignment was from white flight and declining white enrollment, not vestiges of discrimination.	None noted. Joint motion filed by plaintiffs and defendant for unitary status.	No	Graduation Data <sup>233</sup> 2013-80.4% 2012-81.5% 2011-79.3% 2010-77.1% 2009-80.2%
United States v. Franklin Parish School Board, No. 70-15632, 2013 WL 4017093, (W.D. La., Aug. 6, 2013)	Franklin Parish, Louisiana	Granted; dismissed with prejudice	Throughout the course of the litigation, fourteen amendments were made over forty-three years and DOJ never filed any motions or had any objections until this instant motion. DOJ argued that three of the elementary schools were out of compliance with respect to faculty assignments. DOJ maintains that the district can merely assign newly hired white teachers to those schools. The district maintained that they make teacher assignments according to teacher preference and they feared that if they assign teachers to rural black schools, the teachers will leave. The court held the racial faculty/student ratio was set fifteen years ago and the law doesn't require strict compliance. The court held that there is no vestige of past dis-	DOJ opposed the motion	Court sua sponte ordered the United States to review the case in 2009	Graduation Data <sup>234</sup> 2012-62.6% 2011-62.6% 2010-59.6% 2009-65.4% 2008-63.5%  Dropout Data <sup>235</sup> 2013-5.5% 2012-5.4% 2011-4.6% 2010-7.1% 2009-10.9% 2008-7.2%

<sup>233</sup> SOUTH CAROLINA DEPARTMENT OF EDUCATION, <http://ed.sc.gov/data/reports-cards/2009/district/s/D4317999.pdf> (last visited Feb. 3, 2015)..

<sup>234</sup> LOUISIANA DEPARTMENT OF EDUCATION, <http://www.louisianabelieves.com/resources/library/data-center> (last visited Feb. 3, 2015).

<sup>235</sup> *Id.*

Case Citation	District/ State	Unitary Status Granted/ Denied	Key details regarding unitary status decision	US Objections	Did Court order status update of case?	Graduation Rates
			crimination. The court noted that although schools that were integrated during earlier desegregation efforts have now resegregated, they are not evidence of de jure segregation. The court held that schools opened under court order with the court's approval that are now segregated could not be held as de jure segregation.			