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## Connecting the Dots: Grutter, School Desegregation, and Federalism

Wendy Parker

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# CONNECTING THE DOTS: *GRUTTER*, SCHOOL DESEGREGATION, AND FEDERALISM

WENDY PARKER\*

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## INTRODUCTION

Dissenting in the University of Michigan Law School affirmative action case, *Grutter v. Bollinger*,<sup>1</sup> Chief Justice Rehnquist twice described the approach of the majority as “unprecedented,”<sup>2</sup> while Justice Kennedy declared it “antithetical to strict scrutiny.”<sup>3</sup> Justice Thomas followed suit, also labeling the Court’s analysis “antithetical to strict scrutiny” and twice calling it “unprecedented.”<sup>4</sup> But the idea judged as dangerous and different—the idea of affording school administrators a degree of “deference” in judging their race-conscious activity<sup>5</sup>—is surprisingly as old as *Brown v. Board of Education II*.<sup>6</sup>

The 1955 *Brown II* case is well-known for requiring schools to desegregate only “with all deliberate speed,” rather than immediately.<sup>7</sup> Most examining *Brown II* and its aftermath have debated the utility and justification for the judiciary’s allowance of remedial

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1. 123 S. Ct. 2325 (2003).

2. *Id.* at 2362, 2370 (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, JJ.).

3. *Id.* at 2372 (Kennedy, J., dissenting) (“Deference [to defendants] is antithetical to strict scrutiny, not consistent with it.”); *see also id.* at 2370 (Kennedy, J., dissenting) (“The Court, however, does not apply strict scrutiny.”); *id.* at 2371 (Kennedy, J., dissenting) (“The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School’s assurances that its admissions process meets with constitutional requirements.”); *id.* (Kennedy, J., dissenting) (“The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns [about racial preferences].”); *id.* at 2373 (Kennedy, J., dissenting) (“It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decisionmaking.”); *id.* at 2374 (Kennedy, J., dissenting) (“It is regrettable [that] the Court’s important holding ... is accompanied by a suspension of ... strict scrutiny ....”).

4. *Id.* at 2350, 2356 (Thomas, J., concurring in part and dissenting in part, joined by Scalia, J.); *see also id.* at 2359 (Thomas, J., concurring in part and dissenting in part) (describing the majority’s approach as “reflexive deference”); *id.* at 2359 n.9 (Thomas, J., concurring in part and dissenting in part) (using the term “incredible”).

5. *See id.* at 2338-46; *infra* notes 45-71 and accompanying text (analyzing the majority’s approach to deference).

6. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*]. *Brown II* is discussed at length *infra* Part II.A. In *Brown v. Board of Education I*, the Court declared that *de jure* segregation is unconstitutional. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [hereinafter *Brown I*]. This liability decision was followed by *Brown II*, which addressed the remedy.

7. *See Brown II*, 349 U.S. at 301.

delay.<sup>8</sup> Another important concept, however, emerges from *Brown II*, one almost completely overshadowed by the debate over timing. This is the idea of promoting “local control” in school desegregation, and concerns the role afforded to the defendants, by the judiciary, in ending *de jure* segregation. That aspect of *Brown II* makes *Grutter*’s analysis less novel than some members of the Court have characterized it—and reveals that federalism and judicial competency partially justify *Grutter*’s idea of deference.

This Article proceeds in four parts. Part I analyzes *Grutter*’s approach of deferring to education officials defending their affirmative action policies. In upholding the constitutionality of the University of Michigan Law School’s race-conscious admissions program, the Court finally laid to rest, at least temporarily, the idea that strict scrutiny is always fatal in fact.<sup>9</sup> The question now is whether *Grutter*’s strict scrutiny is *true* strict scrutiny because the majority was highly deferential to the defendants. That is, in holding that diversity could be a compelling governmental interest, the majority took the school officials at their word when the school officials said they needed racial diversity for educational reasons and, in holding that the program was narrowly tailored, the majority gave the defendants the benefit of the doubt in the operation of the racial preferences.<sup>10</sup> As a result, educators can classify students according to their race in admissions, and educators are given some degree of deference in making and implementing that decision, albeit within critical limitations.<sup>11</sup> The dissenting

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8. For a summary of the debate regarding “with all deliberate speed,” see Jack M. Balkin, *Brown v. Board of Education—A Critical Introduction*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 2, 64-72 (Jack M. Balkin ed., 2001).

9. Justice O’Connor had written before that strict scrutiny was not always fatal in fact. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (O’Connor, J., writing for the majority) (stating that “we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact’”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)); *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) [hereinafter *Jenkins III*] (O’Connor, J., concurring) (reasoning that “it is not true that strict scrutiny is ‘strict in theory, but fatal in fact’”) (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment)). See generally Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, *Foreword to The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 8 (1972) (coining the phrase “strict in theory and fatal in fact”).

10. See *infra* notes 45-71 and accompanying text.

11. Two colleges have attempted, unsuccessfully, to defend their admission practices by

Justices labeled the majority's approach not only as novel, but wrong.<sup>12</sup>

Part II turns to school desegregation to consider whether the role of deference in *Grutter* is new. The comparison of affirmative action to school desegregation might strike some as odd. Most scholars considering both have limited their discussion to whether affirmative action is consistent or inconsistent with the *Brown v. Board of Education I* prohibition of assigning students according to their race (i.e., whether *Brown I* reflects an anticlassification or antisubordination principle).<sup>13</sup> There is more to be said, however, because affirmative action and school desegregation cases are fundamentally quite similar. Both are Equal Protection Clause challenges to the racial activities of public schools that can result in federal court participation in local and state educational policy.<sup>14</sup>

With these similarities in mind, Part II explores the concept of "local control" in school desegregation as a potential precursor to *Grutter's* use of deference.<sup>15</sup> This history reveals that starting with *Brown II*, the Supreme Court has hesitated in involving itself too closely in school administration and has instead promoted the idea

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reference to educational needs or academic policy. See *Gratz v. Bollinger*, 123 S. Ct. 2411, 2417 (2003) (deeming the University of Michigan undergraduate admissions program an unconstitutional quota); *United States v. Virginia*, 518 U.S. 515, 547-48, 558 (1996) (holding unconstitutional a state all-male military college).

12. See *supra* notes 2-4 and accompanying text; *infra* notes 72-76 and accompanying text.

13. See *Brown I*, 347 U.S. 483, 493 (1954). Because of *Brown I's* status, those participating in the debate over the legality and utility of affirmative action would often claim support from *Brown I*. See generally Balkin, *supra* note 8, at 55-56. Those supporting affirmative action would define *Brown I* as establishing an antisubordination principle. See *id.* That is, the inequality outlawed by *Brown I* is the subordination of one group for the benefit of another or for the perpetuation of inequality. See *id.* at 56. Affirmative action opponents, on the other hand, contend that *Brown I* had adopted an anticlassification principle—that the Equal Protection Clause precludes any consideration of race, regardless of the reason. See *id.* at 55.

14. Two structural differences exist, but neither affects this Article's thesis. See *infra* notes 335-44 and accompanying text (discussing the primary differences between affirmative action and school desegregation causes of action). First, defendants in these two types of cases consider race for different reasons. School desegregation defendants undertake race-conscious activity to redress the effects of their past unlawful discrimination, while affirmative action defendants consider race typically to promote educational diversity. See, e.g., *Grutter v. Bollinger*, 123 S. Ct. 2325, 2338 (2003); *Jenkins III*, 515 U.S. at 74, 76-77. More significantly, remedial differences may exist. See *infra* notes 340-44 and accompanying text (analyzing the potential remedial differences).

15. See *infra* Part II.A-D.

of state and local control over the desegregation process.<sup>16</sup> To be sure, the common perception of school desegregation is that of the district court or magistrate judge moving into the school superintendent's office.<sup>17</sup> This perception, however, is based on both a brief time in history and the influence of some unique, high profile judges.<sup>18</sup> The past and present reveal a federal judiciary that generally, although not always, defers to public school officials to define the nature of the right to be free from *de jure* segregation by promoting the concept of local control over schools undergoing desegregation.<sup>19</sup>

Part III compares the local control in school desegregation with *Grutter*'s deference in affirmative action and finds remarkable similarities. Both reveal the judiciary's reluctance to involve itself too closely in school operation.<sup>20</sup> As a result, both allow school officials to regard race without a traditional strict scrutiny analysis, and both promote local and state control over schools at the expense of the power of the federal judiciary.<sup>21</sup> Thus, Part III argues that it is wrong to characterize the *Grutter* Court's approach to deference as new.<sup>22</sup>

In Part IV, this Article again turns to school desegregation, this time as a vehicle to evaluate the dissents' normative arguments that the *Grutter* Court erred in interjecting deference into Equal Protection jurisprudence. Part IV first argues that one of the Court's favorite subjects of late—federalism—strongly justifies the role of local control in school desegregation. Throughout its almost fifty-year history, school desegregation appears to be part of what Professor Richard H. Fallon has deemed the “quiet fronts”<sup>23</sup>

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16. See *infra* Part II.E.

17. Cf. OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* 28 (1978) (noting the importance of individual judges in structural injunction cases).

18. See *infra* Part II.B; *infra* notes 220-35, 241-43 and accompanying text.

19. See *infra* Part II.E.

20. Competency is the idea that educators are better equipped to make educational policy than any judge. See *infra* Part IV.B.3. Federalism, on the other hand, dictates that some matters are properly within the sole authority of state and local governments. See *infra* Part IV.A.

21. See *infra* Part III.

22. The role of deference in *Grutter* should not be surprising for other reasons as well. See *infra* note 78.

23. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism*

of federalism—areas in which the Supreme Court can, and in some instances has, promoted federalism, but areas outside of those areas typically associated with the Court's recent federalism "revival."<sup>24</sup> One rarely thinks of school desegregation as furthering federalism because of its strong association with rejecting a state's right to choose a school system that segregates.<sup>25</sup> Further, the underlying right at issue in school desegregation, the right of students to equal protection of the law, is, at its core, a prohibition aimed at states.<sup>26</sup> Similarly, academic literature largely has treated federalism and the Equal Protection Clause separately.<sup>27</sup> Yet, throughout the history of school desegregation, the Court has often crafted rules allowing state and local choice and, as a consequence, limiting national authority.<sup>28</sup> Federalism principles provide a strong foundation for these school desegregation rules. Although it is far too early to make a definitive assessment, affirmative action in schools may also become another quiet front.<sup>29</sup> For reasons similar to those supporting local control in school desegregation, federalism

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*Decisions*, 69 U. CHI. L. REV. 429, 432 (2002).

24. *Id.* at 430; Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213 (1998); see also Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1303 (2002) (describing a "federalism revolution").

25. See *infra* notes 88-89 and accompanying text (discussing the Southern response to *Brown I* and *II*).

26. See U.S. CONST. amend. XIV, § 1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").

27. The connection between equal protection, federalism, and public schools has gone almost completely unnoticed in the academic literature. One notable exception is Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753 (2000). That article applies the values of federalism to charter schools in arguing that a more pragmatic approach to Equal Protection challenges should be applied to charter schools. See *id.* at 834-48. One discussion of the Supreme Court's recent federalism decisions briefly noticed the connection with the Court's approach to school desegregation remedies. See John J. Dinan, *The Rehnquist Court's Federalism Decisions in Perspective*, 15 J.L. & POL'Y 127, 174-75 (1999) (including a brief analysis of the Supreme Court's recent school desegregation opinions); see also DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 105 (1995) (arguing that *Brown I* can further federalism values).

28. See *infra* Part II.

29. See *infra* notes 345-48 and accompanying text. Of course, federalism will not cover private schools' defense of affirmative action programs, although competency will still apply. See *infra* Part IV.B.3.

supports a role of deference for education officials in affirmative action litigation.<sup>30</sup>

After connecting local control and deference to federalism, Part IV next analyzes whether federalism should impact Equal Protection Clause jurisprudence. School desegregation's experience reveals two reasons to limit federalism's impact. First, courts can manipulate federalism to reach a desired outcome.<sup>31</sup> Although local control has counted throughout much of the history of school desegregation, this has not been true at every step.<sup>32</sup> Local control has, in some limited instances, been absent from school desegregation. This occurred not because of federalism itself, but because federalism conflicted with other ideologies.<sup>33</sup> That is, federalism was short-changed so that a different substantive agenda could be advanced. The same will likely be true for deference in affirmative action; deference to educators will likely have less force when it conflicts with other belief systems.<sup>34</sup> That federalism principles will sometimes yield to other policies also means that the idea of deference, while important, is far from determinative.

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30. That is, federalism principles should have at least limited applicability in both school desegregation and federalism, despite differences between the two. *See infra* notes 335-44 and accompanying text.

31. *See infra* Part IV.B.1.

32. *See infra* Part II.B; *infra* notes 220-35 and accompanying text.

33. *See infra* notes 241-43 and accompanying text. Some commentators have noted other inconsistencies in the current federalism revival. *See* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 142 (asserting that "the anticommandeering doctrines cannot ... be otherwise justified on federalism grounds"); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 503 (1995) (arguing that "the values of federalism seem almost completely unrelated to the Supreme Court's federalism decisions"); Colker & Scott, *supra* note 24, at 1311 (concluding after an analysis of voting practices of individual Justices when invalidating state laws or action that we must "redefine federalism so as to include activism on behalf of a conservative political agenda"); Fallon, *supra* note 23, at 434 ("[T]he substantive conservatism of the Court's majority explains most, if not all, of the quiet fronts in the federalism revival.... When federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates."). *See generally* Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24 (2001) (discussing the "happy development" of the Court's revival in federalism jurisprudence); Lawrence Lessig, *Translating Federalism*: United States v. Lopez, 1995 SUP. CT. REV. 125, 174-80 (advocating the Frankfurter constraint—under which the Court is pressured to avoid seemingly politically based opinions—as an explanation for the Court's seemingly inconsistent opinions).

34. *See infra* Part IV.B.1.

A second and related lesson from school desegregation is the possibility that the Equal Protection right will have profoundly different meanings for different students.<sup>35</sup> By giving defendants some control over the definition of the right at play, the federal judiciary is affording students rights dependent on the school to which they seek admittance.<sup>36</sup> This geographical component to Equal Protection rights is contrary to the ideal of freedom from race discrimination. Even more troubling is the possibility that the different meanings will result in weak constitutional rights for some students.<sup>37</sup>

Yet, given the institutional limitations of the courts, as school desegregation demonstrates far too well,<sup>38</sup> some allowance of state and local authority in Equal Protection Clause enforcement is not only inevitable, but necessary.<sup>39</sup> The judiciary's competency in educational matters is limited, and both affirmative action and school desegregation include not only legal principles, but educational ones as well. In short, *Grutter* ultimately got it right when it deferred to education officials defending their affirmative action policies—but the idea of deference must be closely monitored.

### I. *GRUTTER* AND DEFERENCE

In *Grutter v. Bollinger*, the Supreme Court held constitutional the University of Michigan Law School's (law school) race-conscious admission program by a 5-4 vote.<sup>40</sup> The law school justified its preference for African American, Hispanic, and Native American applicants on the need for "educational benefits that flow from a diverse student body."<sup>41</sup> Employing the rhetoric of strict scrutiny, the Supreme Court held that diversity can be a compelling govern-

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35. See *infra* Part IV.B.2.

36. See *infra* Part IV.B.2.

37. See *infra* Part IV.B.2.

38. For some of the more prominent competency critiques of school desegregation, see DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 17-19, ch. 4 (1977); MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* ch. 8 (1982); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* pt. 1 (1991).

39. See *infra* Part IV.B.3.

40. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003).

41. *Id.* at 2338 (quoting Brief for Respondents *Bollinger et al.* at i, *Grutter* (No. 02-241)).

mental interest in the education setting, and that the law school's program was narrowly tailored to achieve the goal of diversity.<sup>42</sup>

Justice O'Connor, author of the majority opinion, followed black letter law by adopting the strict scrutiny standard. The defendants admitted that the program treated students differently because of their race,<sup>43</sup> and the Supreme Court has firmly established that strict scrutiny governs such a situation, regardless of whether the treatment is defined as "benign" or "invidious."<sup>44</sup> Yet, the Court's application of strict scrutiny surprised many because of the Court's explicit adoption of deference to the defendants in evaluating the challenged program.<sup>45</sup>

On the first part of the strict scrutiny test, whether diversity is a compelling governmental interest, the majority began by taking the defendants at their word on diversity's *educational* necessity, a matter over which the Court typically claims no special authority.

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42. *Id.* at 2338-41.

43. *Id.* at 2334.

44. *Id.* at 2337-38; see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225-26 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ., plurality opinion); *id.* at 520 (Scalia, J., concurring).

Not all race-conscious activity has been deemed a racial classification subject to strict scrutiny. For example, legislators may consider race in redistricting without surviving strict scrutiny, so long as race is not the predominant consideration. See *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (stating that for legislative scheme to use racial considerations improperly, "[r]ace must not simply have been 'a motivation for the drawing of a majority-minority district,' ... but 'the predominant factor motivating the ... decision'" (citations and internal quotation marks omitted)); Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1573 (2002) (arguing that the Supreme Court's recent voting jurisprudence "suggest[s] a nuanced understanding both of what triggers and of what satisfies strict scrutiny"). Similarly, Professors Michelle Adams and Kathleen M. Sullivan have argued that the Constitution allows governments to consider race at some level, such as the gathering of racial and ethnic data on the census or other types of "soft" affirmative action, and not be subject to strict scrutiny. See Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1396; Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1047 (1998); see also Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 592-99 (2001) (arguing that state legislation requiring charter schools to be racially balanced should not be subject to strict scrutiny). Thus, no one has yet challenged public schools for gathering race and ethnicity data on their students or personnel or for celebrating February as African American History Month.

45. Other aspects of Justice O'Connor's opinion were also unexpected by most. See Jack Greenberg, *Diversity, The University, and the World Outside*, 103 COLUM. L. REV. 1610, 1616 (2003) (arguing that Justice O'Connor's views on race in *Grutter* were "path-breaking").

Thus, the Court reasoned that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."<sup>46</sup> But the Court also noted a role for deference on the legal question of what is a compelling governmental interest: "Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."<sup>47</sup>

In response to the dissenters' complaints about the role of deference, Justice O'Connor reasoned that "[o]ur scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university."<sup>48</sup> Yet, Justice O'Connor's analysis is clearly one of deferring to the defendants on a legal question.

The Court's analysis on whether diversity can be a compelling governmental interest took four steps. First, the majority declared that education is entitled to special treatment in constitutional law.<sup>49</sup> The Court quoted Justice Powell's opinion in *Regents of the University of California v. Bakke*<sup>50</sup> that recognized a good faith presumption for universities: "good faith' on the part of a university is 'presumed' absent 'a showing to the contrary'."<sup>51</sup> Second, the

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46. *Grutter*, 123 S. Ct. at 2339.

47. *Id.*

48. *Id.*

49. *Id.* at 2338 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.") (emphasis omitted); *id.* at 2339 ("[U]niversities occupy a special niche in our constitutional tradition."); *id.* at 2341 ("[Strict scrutiny] must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."); see *id.* at 2366 (Rehnquist, C.J., dissenting) ("Before the Court's decision today, we consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used.").

50. 438 U.S. 265 (1978). In that case, the Court held unconstitutional the admissions system of the Medical School of the University of California at Davis. *Id.* at 271. Justice Powell announced the judgment of the Court, holding that the system was not narrowly tailored, although Powell believed that diversity could be a compelling interest which might allow affirmative action in admissions decisions. See *id.* at 314, 319-20. Four other justices concurred in the judgment that the system was unconstitutional, on the ground that Title VI prohibited racial preferences in admissions decisions. See *id.* at 421 (Stevens, J., concurring in the judgment and dissenting in part, joined by Burger, C.J., and Stewart and Rehnquist, JJ.).

51. *Grutter*, 123 S. Ct. at 2339 (quoting *Bakke*, 438 U.S. at 318-19). Justice O'Connor's reasoning probably shares more in common with Justice Blackmun's opinion in *Bakke* than

Court recounted the "substantial benefits" associated with diversity, a conclusion based entirely on what others told the Supreme Court. That is, the Court relied on findings by the district court,<sup>52</sup> social science studies,<sup>53</sup> Fortune 500 companies,<sup>54</sup> and the United States military<sup>55</sup> on why diversity in education is needed. Third, the Court described why education is so important, particularly legal education.<sup>56</sup>

Lastly, the Court concluded that the law school's quest for diversity imposed no viewpoint stereotypes.<sup>57</sup> Justice O'Connor has expressed in prior opinions on race-conscious activity a concern that such action reduces all individuals to representing the "majority" viewpoint associated with their race and assumes stereotypical individuals.<sup>58</sup> In an interesting twist, the Court used the focus of

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Justice Powell's. See Wendy Parker, *The Legal Cost of the "Split Double Header" of Gratz and Grutter*, 30 HASTINGS CONST. L.Q. (forthcoming 2004).

52. *Id.* at 2338-40. Specifically, the Court noted:

As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." ... These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

*Id.* at 2339-40 (quoting Appendix to Petition for Certiorari at 246i, *Grutter* (No. 02-241)).

53. *Id.* at 2340 (citing well-known social science studies on the benefits of diversity).

54. *Id.* (citing Brief of Amici Curiae 3M et al. at 5, *Grutter* (No. 02-241); Brief of Amicus Curiae General Motors at 3-4, *Grutter* (No. 02-241)).

55. *Id.* (citing Brief of Amici Curiae Julius W. Becton et al. at 27, *Grutter* (No. 02-241)). Becton and his fellow amici were "high-ranking retired officers and civilian leaders of the United States military." *Id.*

56. *Id.* at 2341 ("Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."); see also Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View From a Limestone Lodge*, 103 COLUM. L. REV. 1596, 1608 (2003) (agreeing with Justice O'Connor).

57. *Grutter*, 123 S. Ct. at 2341.

58. See *Bush v. Vera*, 517 U.S. 952, 985 (1996) (plurality opinion) (citing jury preemption cases and concluding that "Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes"); *United States v. Hays*, 515 U.S. 737, 744 (1995) (citing *Shaw v. Reno*, 509 U.S. 630, 643 (1993) [hereinafter *Shaw I*]) (characterizing the harm of racial redistricting as "threaten[ing] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility"); *Shaw I*, 509 U.S. at 647 (concluding that racial districting "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the

Chief Justice Rehnquist's and Justice Kennedy's dissents—the idea that the law school adopted a quota by admitting a “critical mass” of preferred minority students<sup>59</sup>—to counter the problem with stereotypes. The law school had sought to enroll a critical mass of preferred nonminority students, a goal achieved by admitting and enrolling a range of preferred minority students.<sup>60</sup> By affecting more than a token number of preferred minority students, Justice O'Connor concluded, the law school “saved” these students from having to be one of the few spokespersons for their race or ethnicity and imposed no stereotypes.<sup>61</sup>

In allowing that diversity can be a compelling governmental interest the Court granted a great deal of authority to the defendants. Because they work in such an important profession (education), because they and others have deemed diversity to be important, and because the program affects a large number of students, the Court agreed that diversity is a compelling governmental interest. That other educators disagreed on the value of diversity was of no concern to the majority.<sup>62</sup> The decision affords the

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same political interests, and will prefer the same candidates at the polls”); *see also* *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (majority opinion by Kennedy, J., joined by O'Connor, J.) (declaring that “[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race” have similar voting interests).

59. *See supra* notes 2-4, *infra* notes 72-76 and accompanying text (discussing the dissenting opinions in *Grutter*).

60. *See Grutter*, 123 S. Ct. at 2343. The majority and dissents characterized the operation of admitting a critical mass differently. Justice O'Connor wrote for the majority that “between 1993 and 2000, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.” *Id.* Justice Kennedy found a smaller deviation by focusing on a shorter period. *See id.* at 2371 (Kennedy, J., dissenting) (explaining that from 1995 to 1998, “[t]he percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%”). Chief Justice Rehnquist, on the other hand, compared the admittance figures for preferred minority students with their application figures and found a strong proportionality between the two. *See id.* at 2368 (Rehnquist, C.J., dissenting) (noting that “from 1995 to 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school’s applicant pool who were from the same groups”). For example, in 1995, 9.7% of the law school’s applicants were African American, and 9.4% of the law school’s admittees were African American. *See id.*

61. *Id.* at 2333-34, 2347.

62. Justice Thomas noted the disagreement among educators about the value of promoting racial diversity in the education setting, an argument the majority ignored. *See id.* at 2358 (Thomas, J., concurring in part and dissenting in part) (noting that “[t]he Court never acknowledges, however, the growing evidence that racial (and other sorts) of

judiciary a narrow role—essentially one of affirming a decision by the law school—with little independent judicial input.

The second step of the strict scrutiny analysis—narrow tailoring—follows much from the decision that diversity can be a compelling governmental interest. As with the first prong of strict scrutiny, the Court recognized that the context of education affects the narrow tailoring analysis.<sup>63</sup> The educational setting would not support a quota, but the Court deemed the law school's plan too "flexible [and] nonmechanical" to suffer this fate.<sup>64</sup> Once the Court reached this critical conclusion, a matter beyond the scope of this Article, much of its narrow tailoring analysis followed from the idea of deference and its support for educational diversity. The Court considered three factors common to narrow tailoring: the consideration of race-neutral alternatives, the burden on nonfavored groups, and the permanence of the program.

On the issue of the availability of race-neutral alternatives, the Court primarily stated what defendants need *not* do to have adequately considered race-neutral alternatives. Thus, defendants need not "exhaust[] ... every conceivable race-neutral alternative," nor must they adopt race-neutral alternatives contrary to diversity.<sup>65</sup> The Court declared that programs based on a lottery or a percentage plan or that devalue the LSAT or GPA were contrary to diversity and, therefore, unacceptable race-neutral alternatives.<sup>66</sup> Furthermore, a school need not choose between diversity and its elite status.<sup>67</sup> Instead, a school must give "serious, good faith consideration of workable race-neutral alternatives that will achieve the *diversity the university seeks*."<sup>68</sup> Diversity need not be short-changed by race-neutral alternatives.

Second, the law school's broad definition of diversity saved individuals in nonpreferred racial and ethnic groups from any undue burden. The law school's quest for diversity extended beyond identified minority groups by including characteristics belonging to

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heterogeneity actually impairs learning among black students").

63. *Id.* at 2341 (holding that narrow tailoring "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education").

64. *Id.* at 2342. *But see* Gratz v. Bollinger, 123 S. Ct. 2411, 2417 (2003).

65. *Grutter*, 123 S. Ct. at 2344.

66. *Id.* at 2345.

67. *Id.* at 2344.

68. *Id.* at 2345 (emphasis added).

all racial and ethnic groups.<sup>69</sup> Thus, the inclusive definition of diversity helped insure its constitutionality. Third, on the question of an end point, the Court gave the defendants the benefit of the doubt—the Court agreed to “take the Law School at its word” that it will try its best for the program to end one day.<sup>70</sup> The Court further added its “expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>71</sup>

The dissenting opinions authored by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas all labeled the idea of deference as both novel and wrong.<sup>72</sup> Justice Scalia joined in these portions of the opinions by Chief Justice Rehnquist and Justice Thomas.

Justice Kennedy focused on the matter at length in his opinion. He concurred that a court’s acceptance of a defendant’s judgment that racial diversity improves education was acceptable, but only

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69. *Id.* at 2345-46. Professor Derrick Bell has argued that the entire affirmative action program benefitted nonpreferred individuals. See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1626 (2003) (“[Justice O'Connor] evidently viewed [the admissions program] as a benefit and not a burden on nonminorities.”).

70. *Grutter*, 123 S. Ct. at 2346.

71. *Id.* at 2347. This harkens back to Justice Blackmun in *Bakke*:

I yield to no one in my earnest hope that the time will come when an “affirmative action” program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, 374 U.S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one.

*Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978) (opinion of Blackmun, J.).

72. See *supra* notes 2-4 and accompanying text. The dissenting Justices disagreed with the majority on other issues as well. Chief Justice Rehnquist authored a dissenting opinion, which was joined by Justices Kennedy, Scalia, and Thomas. See *Grutter*, 123 S. Ct. at 2365. His dissent contended that the program was really a quota because the law school sought a critical mass of preferred minority students. See *id.* at 2365-70 (Rehnquist, C.J., dissenting). Justice Scalia filed an opinion, concurring in part and dissenting in part, in which Justice Thomas joined. See *id.* at 2348. Justice Scalia argued that the benefits of educational diversity propounded by the majority and the law school were achievable in a wide range of activities, from the Boy Scouts to public employee settings, and that the majority’s opinion would lead to more litigation. See *id.* at 2348-50 (Scalia, J., concurring in part and dissenting in part). For a response to Justice Scalia’s argument that *Gratz* and *Grutter* will increase litigation, see Parker, *supra* note 51. Justice Thomas authored an opinion concurring in part and dissenting in part, which was largely joined by Justice Scalia. See *id.* at 2350. That detailed opinion analyzed at length the law school’s purported need for educational diversity based on race. See *id.* at 2350-66 (Thomas, J., concurring in part and dissenting in part). Justice Kennedy’s opinion is discussed *infra* notes 73-76 and accompanying text.

when that judgment was supported by empirical evidence.<sup>73</sup> He, in fact, agreed that diversity can be a compelling governmental interest.<sup>74</sup> Justice Kennedy, however, contended that deference afforded to education officials in *Grutter* was not justified because the program was actually a quota that failed the narrow tailoring test.<sup>75</sup> He argued that the majority “confuses deference to a university’s definition of its educational objective with deference to the implementation of this goal.”<sup>76</sup> In other words, Justice Kennedy concluded that the majority’s use of deference precluded the Court from recognizing the program as an unconstitutional quota.

In sum, the majority afforded the law school a special status in two decisions: that diversity could be a compelling governmental interest and that the program was narrowly tailored. The idea of deferring to education officials finally allowed a race-conscious program to survive the no longer “strict in theory, fatal in fact” test of strict scrutiny.<sup>77</sup>

## II. SCHOOL DESEGREGATION AND LOCAL CONTROL

This Part turns to school desegregation to determine whether its jurisprudence indicates that *Grutter*’s approach to education defendants is as new as it has been labeled.<sup>78</sup> Specifically, this Part

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73. *Id.* at 2371 (Kennedy, J., dissenting).

74. *Id.* at 2370 (Kennedy, J., dissenting).

75. Justice Kennedy argued that the quest for a critical mass, coupled with the law school’s daily reports of the racial composition of the incoming class, resulted in race being considered without the requisite individual review. *See id.* at 2372 (Kennedy, J., dissenting) (“The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself.”).

76. *Id.* at 2370-71 (Kennedy, J., dissenting); *see also id.* at 2372 (Kennedy, J., dissenting) (“By deferring to the law schools’ choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration.”).

77. *See supra* note 9 and accompanying text.

78. Police misconduct, prison conditions, and voting rights litigation also make *Grutter*’s approach less surprising. *See infra* notes 347-48 and accompanying text. Likewise, the special exceptions courts have afforded educators for other constitutional rules reduce the novelty of the idea of deferring to school officials. *See generally* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1338 (2000) (concluding that for the First Amendment, Fourth Amendment, and due process rights, “the Court has characterized the government as acting in a special capacity—that of educator—and has accordingly given education officials greater leeway to bend constitutional rights in order to achieve certain education goals”).

considers "local control" in school desegregation jurisprudence—the idea, well grounded in American history, that public schools are best governed locally rather than nationally.<sup>79</sup> It chronicles the history of the Court's key school desegregation opinions, beginning with *Brown II* and ending with the Supreme Court's recent cases on termination of the school desegregation lawsuit. This history demonstrates that, in the name of local control, courts have crafted for school officials a special role in defining what it means to be free from *de jure* segregation.

### A. *Brown II*

When a case involves the administration of a state's schools, as federal judges we try to sit on our hands.

— Judge John Minor Wisdom (1962)<sup>80</sup>

Valuing local control in school desegregation began remarkably early, in the 1955 opinion of *Brown II*.<sup>81</sup> That opinion was the remedial counterpart to *Brown I*, which exclusively addressed the legality of *de jure* school segregation.<sup>82</sup> Rather than ordering a specific remedy, the *Brown II* Court afforded defendants, who at this stage were adjudicated wrongdoers, a very unusual authority:<sup>83</sup> "School authorities have the *primary responsibility* for elucidating, assessing, and solving these [school desegregation] problems ...."<sup>84</sup>

79. See *infra* notes 324-26 and accompanying text.

80. *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491, 501 (5th Cir. 1962). Judges Richard T. Rives and John R. Brown joined Judge Wisdom on that panel. All three judges, along with Chief Judge Elbert P. Tuttle, were subsequently identified as "The Four"—that is, the four consistent judicial proponents of civil rights enforcement." David J. Garrow, *Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr.*, 109 YALE L.J. 1219, 1222 n.21 (2000); see also Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1187 n.210 (2000).

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

82. *Brown I*, 347 U.S. 483 (1954).

83. Typically, judges have the "primary responsibility" for devising the remedy. They may seek counsel from the parties, but the wrongdoers rarely have any special standing in crafting the remedy.

84. *Brown II*, 349 U.S. at 299 (emphasis added); see also *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action.").

Rather than imposing a national standard, the court ordered the local school boards to devise the remedy. The defendants' role in crafting the remedy was certainly not exclusive; the Court identified lower courts as key players in the remedial process when defendants failed to fulfill their duty.<sup>85</sup> Regarding the terms of any acceptable remedy, the Court allowed that the remedy would necessarily differ depending on each community's situation<sup>86</sup> and should occur "with all deliberate speed."<sup>87</sup> Although southern leaders had voiced their refusal to recognize the legitimacy of *Brown I*,<sup>88</sup> they generally expressed relief in *Brown II*'s articulation

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85. See *Brown II*, 349 U.S. at 299 ("[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.").

86. See *id.* ("Full implementation of these constitutional principles may require solution of varied local school problems."). The Court further explained the need for "adjusting and reconciling public and private needs" and the permissibility of "tak[ing] into account the public interest in the elimination of such obstacles in a systematic and effective manner." *Id.* at 300 (footnote omitted). The Court also noted that local issues would determine the particular remedy. See *id.* at 300-01; see also J. HARVIE WILKINSON III, *FROM BROWN to BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, at 64-65 (1979) (noting that the Court in *Brown II* "thrice suggested that varied local problems and obstacles might require a varied pace of school desegregation") (citation omitted).

87. *Brown II*, 349 U.S. at 301. Many scholars have examined the aftermath of *Brown II* and have questioned the allowance of a remedy "with all deliberate speed" and its role in encouraging massive resistance and delaying desegregation. See *supra* note 8. The issue of timing, however, is only part of that history. What has received far less attention, and is the subject of this section, is what role the judiciary afforded the defendants. The courts largely gave the defendants a great deal of leeway, not only on the issue of timing, but also on the more important issue of substance and control.

88. For descriptions of southern responses to *Brown I*, see PETER IRONS, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION 172-80* (2002); BENJAMIN MUSE, *TEN YEARS OF PRELUDE: THE STORY OF INTEGRATION SINCE THE SUPREME COURT'S 1954 DECISION* 20-21, 24 (1964); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 37-39 (2000); WILKINSON, *supra* note 86, at 69. Specific acts included school closings and terminations of state funding laws. See MUSE, *supra*, ch. 11; WILKINSON, *supra* note 86, at 82-83, 94, 98-100. Other legislation included

the use of police powers to prevent the admission of Negroes to white public schools; the placing of schools under the control of the governor or the state legislature (where it was hopefully calculated they could not be reached by federal courts); the financing of litigation opposing desegregation; investigation of pro-integration and pro-segregation activities (with emphasis entirely on the former); commissions to publicize the "Southern point of view...."

MUSE, *supra*, at 67-68. Some northern and border school districts quickly and voluntarily ended racial segregation in their schools. See *id.* at 22-24. This was also true for some school

of the process of remedying segregation,<sup>89</sup> and the initial history of *Brown II* demonstrates why.

Courts demonstrated a basic commitment to prohibiting explicit segregation by race, the basic principle announced in *Brown I*. In all but a handful of district courts,<sup>90</sup> courts held unconstitutional efforts to continue to use race as an explicit factor in admissions.<sup>91</sup>

districts in western and southern Texas, where few African Americans lived. *See id.* at 27.

89. For a discussion of the positive reaction of the South to *Brown II*, see MUSE, *supra* note 88, at 27. One Mississippi attorney stated: "We couldn't ask for anything better than to have our local, native Mississippi federal district judges consider suits.... Our local judges know the local situation and it may be 100 years before it's feasible." GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 16 (1969); *see also* C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 153 (2002) (quoting the Lieutenant Governor of Georgia as saying that federal judges "are steeped in the same traditions that I am.... A 'reasonable time' can be construed as one year or two hundred [years] .... Thank God we've got good Federal judges."). The Court's approach in *Brown II* was very similar to that advocated by southern states in their briefs. *See* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 723-31 (1977).

90. *See* ORFIELD, *supra* note 89, at 20. Some southern judges were pointed in their criticism of *Brown I*. One of my favorite anecdotes is that of Judge T. Whitfield Davidson who had this to say when he dismissed the Dallas, Texas school desegregation lawsuit:

I received my first nourishment from a Negro woman's breast. There is no animosity, no hatred of any kind in my heart. The southern white gentleman does not feel unkindly toward the Negro.... [T]he white man has a right to maintain his racial integrity and it can't be done so easily in integrated schools.... We will not name any date or issue any order.... The School Board should further study this question and perhaps take further action, maybe an election.

J. W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 118-19 (1961); *see also* REED SARRATT, *THE ORDEAL OF DESEGREGATION* 201-02 (1966) (quoting District Court Judge E. Gordon West of Louisiana as saying "the now-famous *Brown I* case [is] one of the truly regrettable decisions of all times.... As far as I can determine, its only real accomplishment to date has been to bring discontent and chaos to many previously peaceful communities, without bringing any real attendant benefits to anyone").

91. For example, federal courts quickly held unconstitutional Louisiana's and Virginia's pupil assignment laws because the states demonstrated a complete unwillingness to abide on any level with *Brown I*. A district court held Louisiana's statute unconstitutional because, *inter alia*, contemporaneous acts and resolutions indicated that race would be considered, and the Fifth Circuit affirmed. *See* *Bush v. Orleans Parish Sch. Bd.*, 138 F. Supp. 337 (E.D. La. 1956), *aff'd*, 242 F.2d 156 (5th Cir. 1957). For a history of the Louisiana legislation, see Daniel J. Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517, 536-39 (1959). Likewise, Virginia's first pupil placement statute was declared unconstitutional for its unmistakable quest for continued segregation. *Adkins v. Sch. Bd.*, 148 F. Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir. 1957). That law required all transfer requests to be "efficient," but declared that integrated schools by definition were inefficient.

But so long as race was not *explicitly* stated as a factor, anything else was deemed permissible. The judiciary readily accepted the defendants' assurances that student assignment would be race-neutral, even when evidence strongly indicated otherwise. Courts also refused to order the admission of African American students to white schools; instead, they continually deferred to defendants to make desegregation happen.

This took place in the litigation surrounding pupil assignment laws. In the aftermath of *Brown II*, Southern state legislatures enacted race-neutral pupil assignment laws. Of the eleven former states of the Confederacy, all but Georgia passed such statutes from 1954 to 1957.<sup>92</sup> Pupil assignment laws, also known as pupil enrollment acts and pupil placement acts, eliminated race as an explicit factor in student assignment, thereby revoking prior state laws requiring schools to be segregated by race.<sup>93</sup> Yet, the laws were designed to continue segregated education. The laws maintained a student's prior school assignment, which had been based on race. The statutes permitted *individual* students to apply for *transfers* from their currently assigned school to another school, and local school boards would decide the requests on race-neutral grounds, as specified in the statute.<sup>94</sup> Thus, no wholesale change of the past was enacted. The statutes only allowed the possibility of change in the assignment of individual students.

That possibility was rarely more than an illusion. The statutes included more than traditional student assignment issues, such as

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*Id.* at 442; see also Meador, *supra*, at 539-41 (discussing the Virginia legislation). At this point, a formerly all-white school would be considered integrated with the enrollment of a single African American student. If an African American student's transfer request to a white school was for some reason granted, the state would *automatically* close that admitting school and terminate all state funds. See Adkins, 246 F.2d at 327; see also *infra* note 115 (discussing other challenges in which the defendants admitted the continued consideration of race).

92. The ten states and their respective dates of passage are as follows: Alabama (1955), Arkansas (1956), Florida (1956), Louisiana (1954), Mississippi (1954), North Carolina (1955), Tennessee (1957), Texas (1957), and Virginia (1956). See Meador, *supra* note 91, at 527.

93. An excellent student note details these statutes and the resulting legal challenges. See Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448, 1453 (1962); see also Meador, *supra* note 91, at 571 (reviewing such plans and their legal challenges in the hopes that through these laws "the schools can find shelter from the storm").

94. See Note, *supra* note 93, at 1452-53. North Carolina, South Carolina, and Virginia only had general standards. *Id.* at 1477-79.

capacity and transportation,<sup>95</sup> but also race-neutral factors that could easily be manipulated to produce discriminatory effect. The statutes allowed local school boards to consider the "academic preparation," "[s]cholastic aptitude and relative intelligence or mental energy or ability of pupil," and "[p]sychological qualification of pupil for type of teaching and associations involved."<sup>96</sup> As if that were not enough discretion for the school boards, they could also consider the "[p]ossibility or threat of friction or disorder among pupils or others," the "[p]ossibility of breaches of peace or ill will or economic retaliation within community," the "[m]orals, conduct, health, and personal standards of pupil," and "[o]ther relevant matters."<sup>97</sup> Any transfer request denied was to be appealed first through state administrative proceedings.<sup>98</sup> Only then could the individual student turn to federal courts.<sup>99</sup>

Remarkably, courts in the Fourth and Fifth Circuits held the North Carolina and Alabama statutes facially constitutional.<sup>100</sup> In both opinions, the courts were surprisingly willing to accept school officials' assurances that the pupil assignment laws would not lead to decisions based on race and were willing to impose substantial burdens on students.

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95. *See id.* at 1477 (noting that Alabama, Arkansas, Louisiana, Tennessee, and Texas all had such provisions).

96. *See id.* at 1477-78 (noting that Alabama, Arkansas, Louisiana, Tennessee, and Texas all had such provisions).

97. *See id.* at 1478-79 (noting that Alabama, Arkansas, Louisiana, Tennessee, and Texas all had such provisions).

98. *See id.* at 1457-59 (describing review procedures). Despite state statutory provisions to the contrary, the federal courts did not then require appeal from the adverse administrative determinations to state courts before a federal court could entertain the suit. *Id.* at 1457-58; *see, e.g., East Baton Rouge Parish Sch. Bd. v. Davis*, 287 F.2d 380 (5th Cir. 1961); *Orleans Parish Sch. Bd. v. Bush*, 268 F.2d 78 (5th Cir. 1959); *Jackson v. Rawdon*, 235 F.2d 93 (5th Cir. 1956); *Romero v. Weakley*, 226 F.2d 399 (9th Cir. 1955). Likewise, federal courts held invalid state statutory provisions disallowing class action challenges. *See, e.g., Carson v. Warlick*, 238 F.2d 724, 729 (4th Cir. 1956). The Fourth Circuit required that all class members and class representatives had to first exhaust administrative remedies. *See Covington v. Edwards*, 165 F. Supp. 957 (M.D.N.C. 1958), *aff'd per curiam*, 264 F.2d 780 (4th Cir. 1959).

99. *See Note, supra* note 93, at 1457-58.

100. *See Carson*, 238 F.2d at 724; *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala.) (three-judge court), *aff'd per curiam*, 358 U.S. 101 (1958).

In 1956 in *Carson v. Warlick*,<sup>101</sup> the Fourth Circuit upheld the North Carolina statute as constitutional on its face regarding the exhaustion of administrative remedies. The standards themselves in the statute—"so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, and general welfare of such pupils"—were, on their face, acceptable.<sup>102</sup> Relying on *Brown II*, the *Carson* court held that "[s]omebody must enroll the pupils in schools.... [W]e can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge."<sup>103</sup> As a result, African American or white pupils who wanted to enroll in a school other than the one to which they had been assigned under a racially segregated system first had to apply to the school district; if unsuccessful, appeal through a state administrative proceeding; and, if still unsuccessful, appeal to a state court jury.<sup>104</sup> This was all to be determined by race-neutral standards, but ones that allowed a great deal of discretion. Only individuals who had exhausted this entire process could finally bring their complaint to a federal court.<sup>105</sup> This process afforded defendants a great deal of power in determining what a post-*Brown I* school would look like, even though they sought to maintain segregation. Students had to use the system devised by the defendants and could not directly ask the

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101. 238 F.2d at 728 ("It is argued that the Pupil Enrollment Act is unconstitutional; but we cannot hold that the statute is unconstitutional upon its face and the question as to whether it has been unconstitutionally applied is not before us, as the administrative remedy which it provides has not been invoked.").

102. *Id.* at 728.

103. *Id.*

104. See Note, *supra* note 93, at 1456. Thus, regarding the statute as applied, in *Carson* the African American students' requests for transfers to the white school had been denied. *Carson*, 238 F.2d at 727. The recourse was not a suit in federal court for injunctive relief. See *id.* at 728-29. Instead, the students needed to first appeal to the school board through the administrative process. See *id.* at 726, 728-29. If the students were still not allowed to enroll in the white school, then the statute required the students to appeal the case to state court, with their transfer requests to be decided by a jury. See *id.* at 726. Then if the North Carolina jury still denied the request, the students could file a federal suit. See *id.* at 727. These procedural requirements were eventually eliminated. See Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 194, 206-07 (1964) (noting the early conflict between the Fourth and Fifth Circuits).

105. The Fifth Circuit imposed smaller procedural hurdles on challenges to pupil placement laws. See Bickel, *supra* note 104, at 206.

federal courts to enroll them in their closest school or any school. The Fourth Circuit deferred to defendants even in the face of continued attempts at segregation. Local control trumped any federal efforts to achieve desegregation.

Similarly, the Alabama statute survived a facial attack in a narrow opinion by a three-judge court for the Northern District of Alabama.<sup>106</sup> The court went so far as to presume that the Alabama legislature intended to comply with the Constitution in passing the legislation, even though that body in 1956, the year before the pupil assignment law was enacted, had declared that "the decisions and orders of the Supreme Court ... relating to separation of races in the public schools are, as a matter of right, null, void, and of no effect."<sup>107</sup> Also suspicious was the statutory language that "no child shall be compelled to attend any school in which the races are commingled,"<sup>108</sup> and with the same "standards" for evaluating transfer requests as quoted above for North Carolina.<sup>109</sup> Further, the State Superintendent of Education in this case had written the plaintiffs a letter detailing the "strengths" of Alabama's African American schools and questioned "why do you [the parents] want to change the conditions that produced these gains for you and your people?"<sup>110</sup> Finally, the letter promised "abolishment of the public schools" if the parents "refuse[d] to cooperate with the city board of education in the school placement of your children."<sup>111</sup> Instead of asserting federal authority, the court noted the importance of allowing local and state authorities to solve the "problem"<sup>112</sup> of

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106. See *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala.) (three-judge court), *aff'd per curiam*, 358 U.S. 101 (1958).

107. *Id.* at 373 n.1, 380 n.9. The court characterized the legislation as "no more than protest, an escape valve through which the legislators blew off steam to relieve their tensions." *Id.* at 381. A similar, but sufficiently different situation existed in Louisiana when the Fifth Circuit held its pupil enrollment act unconstitutional. See *supra* note 91 and accompanying text. In Louisiana, the pupil assignment law was passed immediately after another law requiring separate schools. See *Shuttlesworth*, 162 F. Supp. at 376. In Alabama, however, a year passed between the legislature's repudiation of *Brown I* and the passage of its pupil enrollment act. See *id.* at 373 n.1, 384 n.9.

108. Note, *supra* note 93, at 1474-75.

109. *Id.* at 1454-55.

110. *Shuttlesworth*, 162 F. Supp. at 374.

111. *Id.*

112. *Id.* at 379 ("No intellectually honest person would deny that those laws were passed in an effort to meet and solve problems presented by the School Segregation Cases.").

*Brown I* and quoted the language of deference to local educational authorities found in *Brown II* and *Carson*,<sup>113</sup> the Fourth Circuit opinion on North Carolina's act.<sup>114</sup> The court thus evidenced a strong hesitation to question school officials, even when faced with strong evidence indicating good reason to do so. This allowed defendants to implement a system designed to perpetuate segregation with federal court approval.

Subsequent challenges to pupil enrollment acts concerned the application of the standards to individual students, unlike the previous facial challenges discussed above. In this round of cases, lower courts held the school officials in violation of *Brown I* because defendant testimony or school policy still *admitted* the continued assignment of the vast majority of students based on race.<sup>115</sup>

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113. See *supra* notes 84, 101-03 and accompanying text.

114. *Shuttlesworth*, 162 F. Supp. at 383-84. The court further stated:

The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered.... The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State.

*Id.* at 384.

115. See, e.g., *Wheeler v. Durham City Bd. of Educ.*, 309 F.2d 630, 631, 633 (4th Cir. 1962) (holding unconstitutional the continued use of attendance zones based on race as "an unconstitutional administration of the North Carolina Pupil Enrollment Act," even though eight African American students (out of 133 applications) had been allowed to transfer to formerly all-white schools); *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491, 494-95, 498, 500 (5th Cir. 1962) (rejecting implementation of Pupil Enrollment Act because school district still assigned students based on racial enrollment maps); *Northcross v. Bd. of Educ.*, 302 F.2d 818, 820, 823-24 (6th Cir. 1962) (holding unlawful discrimination even though thirteen African American students had been permitted to attend formerly all-white schools because the school district still used "dual area zone maps, one for white schools and one for Negro schools"); *East Baton Rouge Parish Sch. Bd. v. Davis*, 287 F.2d 380, 381 (5th Cir. 1961) (holding the system was unconstitutional despite race-neutral language of Louisiana pupil placement law because superintendent admitted that enrollment was based solely on race); *Dove v. Parham*, 282 F.2d 256, 258-59, 261 (8th Cir. 1960) (holding law unconstitutional even though Arkansas's Pupil Assignment Law was race-neutral because the school district exhibited no intention to change the current enrollment patterns, although noting press reports of the enrollment of one African American in a formerly all-white school); *Gibson v. Bd. of Pub. Instruction*, 272 F.2d 763, 765-66 (5th Cir. 1959) (finding discrimination because school district failed to give students the opportunity to apply for transfers under pupil enrollment law); *Borders v. Rippey*, 247 F.2d 268, 271-72 (5th Cir. 1957) (holding the Dallas, Texas school district in violation of *Brown I* because students' transfer requests under Texas law were denied "solely on account of their race or color," and assuming future constitutional behavior by state officials, even though the state had passed a law possibly terminating six

In only the truly exceptional case would the court order African American students enrolled in white schools.<sup>116</sup> Instead, the clear majority of cases ordered that defendants again consider the transfer applications of the students according to the race-neutral terms of the pupil enrollment acts.<sup>117</sup> In fact, one order compelling "system-wide desegregation" to begin that year—by a district court judge obviously angry that the Fifth Circuit had reversed his decision to dismiss the school desegregation lawsuit outright—was overruled for inadequate deference to the defendants.<sup>118</sup>

The work of Professor Davison Douglas on North Carolina's desegregation period provides additional evidence of the judicial reticence toward imposing judicially crafted remedies on school desegregation defendants.<sup>119</sup> School districts in North Carolina

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million dollars in state funding if Dallas complied with the court order on integration), *overruled in part by* United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967); *Beckett v. Sch. Bd.*, 185 F. Supp. 459, 462 (E.D. Va. 1959) (holding unconstitutional application of Virginia Pupil Placement Act in Norfolk because "[t]he Board candidly admits that the race of the child is the controlling factor wherever a child of one race seeks admission to a school solely or predominantly attended by children of the opposite race"), *aff'd sub nom.* Hill v. Sch. Bd., 282 F.2d 473 (4th Cir. 1960).

116. See, e.g., *Wheeler*, 309 F.2d at 631, 633 (ordering admission of 125 students who had applied for transfers and had been denied); *Dillard v. Sch. Bd.*, 308 F.2d 920, 924-25 (4th Cir. 1962) (ordering admission of seventeen elementary students and affirming district court order of admission of nine high school students in Charlottesville, Virginia); *Jones v. Sch. Bd.*, 278 F.2d 72, 73-74, 77 (4th Cir. 1960) (affirming district court order for Alexandria, Virginia, denying admission to five plaintiffs, while district court order of admission for nine students not appealed).

117. See, e.g., *McCoy v. Greensboro City Bd. of Educ.*, 283 F.2d 667, 668-70 (4th Cir. 1960) (ordering school district that had admitted African American students to formerly all-white school, but then transferred the white children to another mostly-white school, to "reassign the minor plaintiffs to an appropriate school in accordance with their constitutional rights"); *Dove*, 282 F.2d at 262 (affirming denial of actual enrollment of three student applicants because "the court was entitled to require in relation to the problem of general achievement, that the enjoyment of their right to desegregation be geared to a reasonable, definitive, transitional program of 'all deliberate speed'"); *Gibson*, 272 F.2d at 765-67 (ordering that "the Board may ... submit for the consideration of the district court a plan whereby the plaintiffs ... are hereafter afforded a reasonable and conscious opportunity to apply for admission to any schools for which they are eligible without regard to their race or color"); *Borders*, 247 F.2d at 272 (noting that plaintiffs were not even seeking actual admission by court order but rather an order requiring appellees to desegregate the schools under their jurisdiction "with all deliberate speed"); see also *East Baton Rouge Parish Sch. Bd.*, 287 F.2d at 381 (upholding declaratory judgment of violation and injunction banning illegal practices, but ordering no additional relief).

118. See *Rippy v. Borders*, 250 F.2d 690, 691-94 (5th Cir. 1957).

119. See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During*

enjoyed considerable success in federal court litigation. Professor Douglas found that “by 1960, no North Carolina federal or state court had ever ruled in favor of a black plaintiff in a school desegregation case.”<sup>120</sup> This did not mean, however, that race had been eliminated from the student assignment.<sup>121</sup> Nor did it mean that North Carolina schools were generally integrated. In fact, “ten years after the *Brown* decision, less than one half of one percent of the schoolchildren in the state attended school with a child of another race.”<sup>122</sup> Instead, North Carolina’s lack of successful African American plaintiffs demonstrates the deference afforded to public school officials so long as they were not publicly declaring that race would still be considered. North Carolina correctly “understood that voluntary token desegregation and avoidance of statements of defiance would allow the state to continue with segregated schools without judicial interference.”<sup>123</sup> Lower court judges, in the words of Judge Wisdom, “sat on their hands,”<sup>124</sup> except when faced with outright defiance. Control by local school boards over the desegregation process was paramount.

In the immediate aftermath of *Brown II*, the idea of giving defendants “primary responsibility”<sup>125</sup> over the desegregation remedy may have had more of an influence on making the right to be free from *de jure* segregation meaningless than on the allowance of a period of delay.<sup>126</sup> No one at the time treated the idea of “with all deliberate speed”<sup>127</sup> as one allowing *no* progress whatsoever toward the disestablishment of *de jure* segregation. Rather, the idea was

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*the Decade After Brown*, 89 NW. U. L. REV. 92, 138 (1994).

120. *Id.* Atlanta, considered to be a moderate Southern city on race relations, enjoyed judicial success in the Fifth Circuit as well. See *Calhoun v. Latimer*, 321 F.2d 302 (5th Cir. 1963); Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Interracial Conflict*, 151 U. PA. L. REV. 1913 (2003) (discussing the Atlanta school desegregation cases).

121. Douglas, *supra* note 119, at 138 (concluding that during the 1950s “every school child in North Carolina was still assigned to school on the basis of race”) (footnote omitted).

122. *Id.* at 128. Louisiana and Virginia had higher levels of integration “due to adverse court decisions compelling desegregation.” *Id.* at 95.

123. *Id.* at 129; see also WILKINSON, *supra* note 86, at 85 (“Token compliance often ‘succeeded’ where total defiance fell flat.”).

124. See *supra* note 80 and accompanying text.

125. See *supra* note 84 and accompanying text.

126. See *supra* notes 8, 87 and accompanying text.

127. See *supra* note 87 and accompanying text.

promoted to allow a gradual change in the system,<sup>128</sup> that is, a grade or a handful of students each year. By contrast, the idea of affording defendants primary responsibility for the remedy kept the judiciary out of the business of ordering any integration, whether it be for an individual student, or for an entire grade, until the early 1960s, as the next section demonstrates. As a result, extreme segregation continued.

### B. Title VI

The courts acting alone have failed.

— Judge Wisdom (1966)<sup>129</sup>

Faced with, at best, token southern integration, judicial patience eventually waned.<sup>130</sup> Beginning in 1963, the Supreme Court repeatedly noted its “exasperation” with the passage of time with almost no desegregation.<sup>131</sup> The days of allowing defendants control

128. See WILKINSON, *supra* note 86, at 62-65.

129. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966) (emphasis omitted) [hereinafter *Jefferson I*]. Judge Wisdom also stated: “A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities.” *Id.*

130. See WILKINSON, *supra* note 86, at 95 (“By the early 1960s, the attitudes of lower federal courts toward southern evasion became perceptibly less indulgent.”). For the eleven states of the Confederacy, only 1.17% of African American students were enrolled in a formerly all-white school by 1963. James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 42 (1967); see also WILKINSON, *supra* note 86, at 65, 102 (noting that “[a]s late as 1962, not a single Negro attended white schools or colleges in Mississippi, Alabama, or South Carolina. By 1964—one decade after *Brown*—a scant 2.3% of southern blacks were enrolled in desegregated schools”) (footnotes omitted). Texas had the highest level at 5.52%, and seven of the states had less than 1.0%. Dunn, *supra*, at 42 n.3. The seven border states had substantially higher levels of integration, with an overall desegregation rate of 54.8%. *Id.* This lack of change has led many to question the utility of courts as agents of social change. See STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* 2-3 (1995); ROSENBERG, *supra* note 38, at 52; Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10-13 (1994).

131. WILKINSON, *supra* note 86, at 101; see *Bradley v. Sch. Bd.*, 382 U.S. 103, 105 (1965) (per curiam) (concluding that for Richmond, Virginia, “more than a decade has passed since we directed desegregation of public school facilities ‘with all deliberate speed’ .... Delays in desegregating school systems are no longer tolerable”) (citations omitted); *Griffin v. County Sch. Bd.*, 377 U.S. 218, 229, 234 (1964) (noting that for Prince Edward County, Virginia, “[t]he case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits.... The time for mere ‘deliberate speed’ has run out”); *Goss v. Bd.*

over the remedial process were ending. Lower courts began actively overseeing school districts starting in the mid-1960s and continuing through the 1970s. During this period, local control was of little importance. On one level the judiciary had no choice but to increase its involvement in the remedial phase in order to implement the fundamental principle of *Brown I*. The courts had given public school officials the chance to discontinue the use of race in student assignment, a chance largely rejected. The judiciary had many choices in deciding how to increase its involvement, and the courts, particularly the Fifth Circuit and eventually the Supreme Court, made decidedly expansive choices that interjected the judiciary into educational affairs. Schools had to desegregate all aspects of their operations, even if that meant busing. This is primarily reflected in two Supreme Court opinions, *Green v. County School Board*<sup>132</sup> and *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>133</sup>

In 1968 the Supreme Court in *Green* held that a school district's freedom-of-choice plan,<sup>134</sup> which had produced little desegregation, was "unacceptable."<sup>135</sup> Speaking in strong language and echoing the Fifth Circuit's ground-breaking opinion in *United States v. Jefferson*

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of Educ., 373 U.S. 683, 689 (1963) (recognizing that for Knoxville, Tennessee, "eight years after this decree [of 'with all deliberate speed'] was rendered and over nine years after the first *Brown* decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered"). By contrast, in the more recent school desegregation opinions, the Court emphasizes the longevity of the litigation. See *infra* note 213 and accompanying text.

132. 391 U.S. 430 (1968).

133. 402 U.S. 1 (1971).

134. Under freedom-of-choice plans, parents could choose their child's school. See WILKINSON, *supra* note 86, at 104; Dunn, *supra* note 130, at 44, 56, 59, 64-65 (describing the failure of the freedom-of-choice plans as a desegregation tool).

135. *Green*, 391 U.S. at 441. In *Green*, no white student had chosen to attend the African American school, and 115 African American children had chosen to attend the white school. *Id.* (also noting that "85% of the Negro children in the system still attend the all-Negro Watkins school"); see also WILKINSON, *supra* note 86, at 109-10 (describing how school districts discouraged other-race enrollment through freedom-of-choice plans); Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 335 n.50 (1967) (reporting the failure of other freedom-of-choice plans). Two months before the decision in *Green*, the United States Department of Health, Education, and Welfare (HEW) had issued desegregation guidelines indicating that freedom-of-choice plans alone likely were not enough to comply with *Brown*. Neal Devins & James B. Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1249 n.32 (1984).

*County Board of Education (Jefferson II)*,<sup>136</sup> the Court held that "[s]chool boards ... operating state-compelled dual systems were ... clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."<sup>137</sup> The concept of a unitary system included not just student assignment, but also "faculty, staff, transportation, extra curricular activities and facilities."<sup>138</sup> Desegregation was no longer the responsibility of students to seek a transfer (under the pupil enrollment acts) or choose their school (under the freedom-of-choice plans); now the responsibility of producing actual desegregation lay with school districts.<sup>139</sup> Integration was the expected result, and the failure to achieve it would result in federally crafted mandates.

In some respects, *Green* was an easy case to support integration. At issue was a rural school district with no housing segregation.<sup>140</sup> The district operated two schools, one African American and one

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136. 380 F.2d 389 (5th Cir. 1967) (en banc) (per curiam) [hereinafter *Jefferson II*]. In *Jefferson II*, the Fifth Circuit adopted the approach of Judge Wisdom's opinion in *Jefferson I*. See *supra* note 129; see also WILKINSON, *supra* note 86, at 328 n.195. One commentator has described the *Jefferson I* opinion as "far and away the most famous and substantively important of all of John Minor Wisdom's appellate opinions on civil rights." Garrow, *supra* note 80, at 1222; see also WILKINSON, *supra* note 86, at 111 (opining that Judge Wisdom's opinions in three cases "transformed the face of school desegregation law"); Joel Wm. Friedman, *John Minor Wisdom: The Noblest Tulerian of Them All*, 74 TUL. L. REV. 1, 25 (1999) (describing *Jefferson II* as one of the cases that was "the cornerstone of the Fifth Circuit's efforts ... to effect an irrevocable shift away from token desegregation to massive integration in school systems across the South"); Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, LAW & CONTEMP. PROBS., Winter 1975, at 7, 20 (deeming *Jefferson II* as one of the cases marking "the most important doctrinal change in interpretation of the [E]qual [P]rotection [C]ause, as applied to public education, since *Brown* itself"). Two earlier cases were also important in changing the meaning of *Brown I* to mandating actual integration. See *Jefferson I*, 372 F.2d 136, 847 (5th Cir. 1966); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 731 (5th Cir. 1965).

137. *Green*, 391 U.S. at 437-38.

138. See *id.* at 435.

139. See *id.* at 441-42 (recognizing that "[r]ather than further the dismantling of the dual system, the [freedom-of-choice] plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board"); WILKINSON, *supra* note 86, at 116 (recognizing that *Green* "removed, at long last, from black children the onus of achieving integration and threw it squarely—affirmatively—onto the backs of local school boards").

140. See *Green*, 391 U.S. at 432.

white, and extensive busing maintained the separate school systems.<sup>141</sup> Neighborhood schools would be integrated.

The remedial reach of *Green* was exceeded three years later in *Swann*.<sup>142</sup> In that case, the Supreme Court allowed that not only may courts order busing as a remedy to achieve the integration required by *Green*,<sup>143</sup> but that remedies should be designed to achieve "the greatest possible degree of actual desegregation."<sup>144</sup> *Swann* made explicit that the actual results were crucial in evaluating a remedy's acceptability.<sup>145</sup> More specifically, the Court upheld the decision of the district court to give the school board three alternative plans from which to choose because the school board's plan did not adequately integrate the elementary schools.<sup>146</sup>

In essence, the Supreme Court had mounted an attack on *continued* segregation, not just the consideration of race. Fundamentally, the Court redefined the right of *Brown I* to include not just the end of assignment based on race, but also a right to integration.<sup>147</sup> These two rights would not be thwarted by the defendants, for no longer did they have the "primary responsibility" of desegregation that *Brown II* had envisioned.<sup>148</sup> Although the Court in *Swann* and *Green* relied upon the language of *Brown II* that placed responsibility on the defendants,<sup>149</sup> the Court in those cases was willing to

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141. *Id.*

142. 402 U.S. 1 (1971).

143. *Id.* at 29-31.

144. *Id.* at 26.

145. *Id.* at 22-25. Granted, the Court only allowed that "mathematical ratios" may be "a starting point in the process of shaping a remedy, rather than an inflexible requirement," *id.* at 25, and that not "every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24.

146. *Id.* at 9-11, 32.

147. The Court in *Green* characterized the first stage of *Brown* as the elimination of race as a factor in admissions. See *Green*, 391 U.S. at 435-36. It also recognized a second step—the creation of a unitary system. *Id.*; see also HALPERN, *supra* note 130, at 58 ("What is so critical about the HEW Guidelines and the Fifth Circuit's decision in *Jefferson* is that they helped produce a new understanding of the right established in *Brown*.").

148. See *supra* note 84 and accompanying text; see also WILKINSON, *supra* note 86, at 114 ("The detail of Judge Wisdom's 1966 *Jefferson* decree finally dashed the Supreme Court's hope in *Brown II* that school authorities would assume 'the primary responsibility for elucidating, assessing, and solving' the problems of desegregation.") (footnote omitted) (quoting *Brown II*, 349 U.S. 294, 299 (1955)).

149. See *Swann*, 402 U.S. at 11-13 (quoting extensively from *Brown II* on the remedial process); *id.* at 15 (recognizing the "affirmative duty" of the defendants); *id.* at 16 (concluding that "[r]emedial judicial authority does not put judges automatically in the shoes of school

second guess the remedial plans of the defendants. The actual deference afforded to defendants was practically nonexistent. With little hesitation, the Court rejected the defendants' remedial plans. The Court, for the first time, controlled the content of the remedy.

Yet, all three federal branches of government, not just the judiciary, bear some responsibility for requiring actual integration at the cost of devaluing local control. The responsibility of the executive and legislative branches began with the passage of the Civil Rights Act of 1964,<sup>150</sup> which was designed, in part, to promote actual desegregation of formerly *de jure* segregated schools.<sup>151</sup> Through Title VI of the Act,<sup>152</sup> Congress enacted legislation that required the Department of Health, Education, and Welfare (HEW) to ensure that school districts desegregate or lose federal funding. Title IV authorized the Department of Justice (DOJ)—through the Attorney General—to litigate school desegregation cases.<sup>153</sup> HEW's 1966 Guidelines for defining whether schools were desegregating required actual integration,<sup>154</sup> and DOJ supported the Guidelines

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authorities whose powers are plenary. Judicial authority enters only when local authority defaults"); *id.* at 21 (noting that "[i]n devising remedies where legally imposed segregation has been established, [desegregation] is the responsibility of local authorities and district courts"); *Green*, 391 U.S. at 437-38 (placing an "affirmative duty" on defendants); *id.* at 439 (seeking a proposed plan from the defendants); *id.* at 442 (requiring the school board to formulate the needed policy).

150. 42 U.S.C. §§ 2000 to 2000h (2000).

151. For a detailed examination of legislative history demonstrating that the purpose of Title VI was to further school desegregation, see HALPERN, *supra* note 130, at 22-33.

152. Title VI specifically provides in pertinent part, that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

153. *Id.* § 2000c-6.

154. See 45 C.F.R. §§ 181.1-.76 (1967); see also *id.* §§ 80.1-.13 (effectuating Title VI's nondiscrimination provisions); HALPERN, *supra* note 130, at 52-58 (describing the Guidelines in detail). The HEW 1966 Guidelines accepted the South's preferred method of desegregation, freedom-of-choice, as an option for *de jure* school districts. See 45 C.F.R. § 181.54. Under the Guidelines, however, the freedom-of-choice plans had to abide by specified requirements regarding the process of choice. *Id.* Even more dramatic was the requirement of actual, specified outcomes for any plan to be acceptable. See *id.* Specifically,

[t]he Guidelines recommended that districts with 8 to 9 percent integration in the 1965-66 school year should attempt to double that in the 1966-67 academic year, that districts with 4 to 5 percent integration in 1965-66 should try to triple that figure in the following year, and that those with less than 4 percent integration (primarily districts in Mississippi, Louisiana, Alabama, Georgia, South Carolina, and Arkansas) should make a "substantial" effort to catch up

in litigation.<sup>155</sup> The Fifth Circuit in *Jefferson II* strongly endorsed the HEW 1966 Guidelines.<sup>156</sup> In doing so, the Fifth Circuit implied that HEW had superior competency in defining what desegregation should entail,<sup>157</sup> and that courts should defer to Congressional will, as expressed in the Civil Rights Act of 1964.<sup>158</sup> Only then did the Supreme Court adopt as well the command that ending *de jure* segregation would entail meaningful integration.<sup>159</sup>

In sum, all three federal branches decided that enforcing *Brown I* should produce widespread integration. No branch emphasized local control. The executive branch through HEW and DOJ advocated a broader reading of *Brown I* than had been enforced previously. The federal judiciary, first by the Fifth Circuit and then by the Supreme Court, began to require for the first time specific, affirmative steps to integrate after HEW and DOJ so advocated. In

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with the leading desegregated districts.

HALPERN, *supra* note 130, at 52-53 (footnote omitted); *see* 45 C.F.R. § 181.54. The numbers were not absolute requirements, but indications of the effectiveness of the plan. Dunn, *supra* note 130, at 63 n.113. For the first time, HEW was also requiring desegregation of faculty. *See* 45 C.F.R. § 181.13(b)-(d). Thus, HEW demanded a plan designed to produce actual desegregation before allowing disbursement of federal funds. The South vehemently opposed the HEW 1966 Guidelines. *See* HALPERN, *supra* note 130, at 54-56; WILKINSON, *supra* note 86, at 104-05; Dunn, *supra* note 130, at 44-45; Comment, *supra* note 135, at 357.

155. *See* Comment, *supra* note 135, at 329. Judge Wisdom readily admitted his close working relationship with the DOJ. *See* Garrow, *supra* note 80, at 1229 n.73. The DOJ worked to apply *Jefferson I* and *II* to other cases. *See* Comment, *supra* note 135, at 338.

156. *See* *Jefferson II*, 380 F.2d 389, 390 (5th Cir. 1967).

157. *See id.* at 400 n.6 ("[M]ost judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers."); *Jefferson I*, 372 F.2d 836, 858 (5th Cir. 1966) ("It is evident to anyone that the Guidelines were carefully formulated by educational authorities anxious to be faithful to the objectives of the 1964 Act."); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 731 (5th Cir. 1965) (reasoning that "[a]bsent legal questions, the United States Office of Education is better qualified than the courts and is the more appropriate federal body to weigh administrative difficulties inherent in school desegregation plans"); HALPERN, *supra* note 130, at 62-65 (detailing this aspect of the Fifth Circuit's opinions); *see also* Price v. Denison Indep. Sch. Dist. Bd. of Educ., 384 F.2d 1010, 1014 (5th Cir. 1965) (supporting administrative enforcement of school desegregation because that is "largely where it ought to be—in the hands of the Executive and its agencies").

158. *Jefferson I*, 372 F.2d at 852 ("We read Title VI as a congressional mandate for change—change in pace and method of enforcing desegregation."); *id.* at 856 ("When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy."). *But see id.* at 910 (Cox, J., dissenting) (arguing that the judiciary was abdicating its constitutional authority).

159. *See supra* notes 134-49 and accompanying text.

addition, the Supreme Court rejected any appeals for delay in producing integration.<sup>160</sup> As a result, and for the first time, the South integrated its public schools.<sup>161</sup>

### C. *Milliken I*, *Milliken II*, and *Jenkins II*

The Supreme Court may have strayed from valuing local control in *Swann* and *Green*, but only briefly. The Court retreated quickly to enforcing local control with great consequences in its 1974 opinion in the Detroit school desegregation lawsuit, *Milliken v. Bradley (Milliken I)*.<sup>162</sup> The district court and court of appeals had allowed the remedy for Detroit, a majority African American school district, to include fifty-three surrounding school districts that were predominately white.<sup>163</sup> Having the remedy reach all fifty-four school districts was the only feasible way of offering integrated education to Detroit public school students.<sup>164</sup> The Supreme Court reversed.<sup>165</sup>

The Court's opinion referenced well-known remedial principles in reversing, but the principles fail to explain the decision. For example, the Court stated the rule that the scope of the violation determines the scope of the remedy.<sup>166</sup> Yet, this principle and the others mentioned by the Court are almost universally condemned for their indeterminacy in public law context.<sup>167</sup> The standards can support any number of remedies, sometimes even conflicting ones.<sup>168</sup>

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160. See *Carter v. West Feliciana Parish Sch. Bd.*, 396 U.S. 290, 291 (1970) (reversing an order delaying the merger of student bodies into unitary system by six months); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (vacating an order delaying desegregation for four months). Uncertainty over the terms of the orders still remained. See WILKINSON, *supra* note 86, at 122 (listing questions which remained open after *Alexander* and *Carter*).

161. See WILKINSON, *supra* note 86, at 121 (reporting that "[b]y 1971, according to HEW estimates, 44 percent of Negro pupils attended majority white schools in the South as opposed to 28 percent who did so in the North and West").

162. 418 U.S. 717 (1974) [hereinafter *Milliken I*].

163. *Id.* at 739-40.

164. See *id.*

165. *Id.* at 753.

166. *Id.* at 738.

167. See *infra* notes 245-48 and accompanying text.

168. For example, in the case challenging the constitutionality of the all-male admissions policy at the state school of Virginia Military Institute (VMI), the author of the majority

Rather, concerns of judicial competency and local control compelled the Court's decision. Consolidating fifty-four school districts created a number of serious implementation problems, and the Court questioned the district court's competency to handle these issues: "[T]he District Court will become first, a *de facto* 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform ...."<sup>169</sup> Continuing, the Court emphasized the federalism implications of such a role "which would deprive the people of control of schools through their elected representatives."<sup>170</sup> As a result, the Court held that school district boundary lines matter when crafting the school desegregation remedy, even with the State as a liable defendant.<sup>171</sup> School district lines must be respected in the remedial process and cannot be changed, absent proof of discrimination crossing school district lines.<sup>172</sup>

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opinion (Justice Ginsburg) and the author of the concurring opinion (Chief Justice Rehnquist) both agreed that the remedy should place the victims of the violation in the place they would have been but for the violation. *United States v. Virginia*, 518 U.S. 515, 547-48 (1996) (Ginsburg, J., for the majority); *id.* at 565 (Rehnquist, C.J., concurring in the judgment). Yet, the two disagreed on the nature of the violation, and thus disagreed over potential constitutional remedies. *See id.* at 550-51 (Ginsburg, J., for the majority) (defining the violation as the exclusion of women from a state-funded school); *id.* at 565 (Rehnquist, C.J., concurring in the judgment) (defining the violation as the failure to provide women a comparable education from a state-funded school). Justice Ginsburg required the remedy to include the admission of women to VMI. *See id.* at 557-58. Chief Justice Rehnquist agreed that admission of women should be the remedy in this case, but allowed that in a different case a comparable school for women would be an acceptable remedy as well. *See id.* at 565 (Rehnquist, C.J., concurring in the judgment).

169. *Milliken I*, 418 U.S. at 743-44.

170. *Id.* at 744. The Court also noted that:

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.... [W]e observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."

*Id.* at 741-42.

171. *Id.* at 741.

172. This could occur in at least two situations: "Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on

As a result, the values of competency and local control greatly restricted the authority of federal courts. The judiciary would confine its authority within school district boundary lines, even if that meant continued segregation. Keeping school desegregation remedies almost always within school district boundary lines has had profound practical consequences. Many blame *Milliken I* for ending any chance for meaningful integration in large northern cities.<sup>173</sup>

The concern with local control continued when the Supreme Court returned to the remedy for *de jure* school segregation in Detroit in *Milliken v. Bradley (Milliken II)*.<sup>174</sup> Given that the schools would be largely segregated, at issue was whether the remedy could reach non-student assignment issues. The school district had proposed compensatory education programs to redress problems in the academic program caused by *de jure* segregation,<sup>175</sup> along with a limited student reassignment plan to redress segregation in Detroit's predominantly white schools.<sup>176</sup> The State defendants, which had been held liable for Detroit's *de jure* segregation and for one-half of the costs of any desegregation plan, protested the school district's plan.<sup>177</sup> After the district court approved the school district's plan and the court of appeals affirmed, the State defendants sought Supreme Court review.<sup>178</sup>

The Supreme Court upheld the compensatory education remedy.<sup>179</sup> The Court developed a three-part test for evaluating a school desegregation remedy, with the third element explicitly recognizing

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the basis of race." *Id.* at 745.

173. See, e.g., Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1607-09 (2003). For a brief argument that local school district boundary lines should not tie the hands of judges redressing a state's illegality, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1875 n.99 (1994).

174. 433 U.S. 267 (1977) [hereinafter *Milliken II*].

175. The school district was then 71.5% African American. *Id.* at 271 n.3.

176. See *id.* at 271-72. By contrast, the plaintiffs' proposed plan focused exclusively on reassigning students to produce more student integration than the defendants' proposal. *Id.* at 271.

177. *Id.* at 272-73, 289-90.

178. *Id.* at 279. The State of Michigan was not a named defendant. *Id.* at 272 n.6. Instead, Michigan's governor, attorney general, state superintendent of public instruction, state treasurer, and state board of education were named. *Id.*

179. *Id.* at 291.

a role for the defendants.<sup>180</sup> The Supreme Court required that the “federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.”<sup>181</sup> This third element was clearly satisfied in *Milliken II* because the school board had proposed the compensatory education program—hence, the remedy originated with the school district, which evidenced not only some degree of control over, but also some sense of participation in, the remedial process.<sup>182</sup> The Court recognized that educational programs are “normally left to the discretion of the elected school board and professional educators”<sup>183</sup> and that “principles of federalism [are not] abrogated by the decree,”<sup>184</sup> which was almost entirely based on the school board’s proposed remedy.

The opinion, however, was not a wholesale adoption of local control. The federal judiciary also ordered the state defendants to fund programs without their consent.<sup>185</sup> With little effort, the Court rejected the state defendants’ Tenth Amendment argument,<sup>186</sup> Eleventh Amendment contention,<sup>187</sup> and general federalism

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180. *See id.* at 280-81. The first two elements concerned the scope of the remedy: [T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation .... [T]he decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible “to restore the victims ... to the position they would have occupied in the absence of such conduct.”

*Id.* at 280 (quoting *Milliken I*, 418 U.S. 717, 746 (1974) (citations omitted)). These two elements are discussed *infra* notes 247-52 and accompanying text.

181. *Milliken II*, 433 U.S. at 280-81.

182. *See id.* at 281 (“[P]etitioners do not contend, nor could they, that the prerogatives of the Detroit School Board have been abrogated by the decree, since of course the Detroit School Board itself proposed incorporation of these programs in the first place.”). Rather, the state defendants contended that the remedy was beyond the scope of the violation. *See id.* at 281. Interestingly, the Court rejected that argument, partly on the grounds that the school district itself would properly know the effects of the segregated system. *Id.* at 287 (“[T]he District Court was adopting specific programs proposed by local school authorities, who must be presumed to be familiar with the problems and the needs of a system undergoing desegregation.”).

183. *Id.* at 282.

184. *Id.* at 291.

185. *Id.* at 278-79, 291.

186. *See id.* at 290-91. Because the state defendants’ conduct was unlawful, the Tenth Amendment was not violated by the federal court judgment. *See id.*

187. The state defendants argued that the Eleventh Amendment immunized them from paying for the compensatory program. *Id.* at 288-89. The Court held that the state defendants could be held responsible for the costs of implementing the compensatory

complaint that the state defendants should not be required to fund partially the compensatory education programs.<sup>188</sup> While local control principles would affect the content of the remedy, as the *Milliken II* test commanded, local control and federalism principles would not affect the *enforcement* of the remedy. The state defendants would be obligated to fund their portion, even under protest. For without funding by the adjudicated wrongdoers, the remedy would obviously fail.

Giving a school district the ability to propose a remedial plan, to which the courts would give deference, creates an obvious incentive for school districts to propose expensive remedial plans when the state is liable for funding. Kansas City, Missouri, the site of the most expensive school desegregation case, aptly demonstrates this incentive.<sup>189</sup> The school district and State of Missouri shared fiscal responsibility for the remedy, and the school district lacked adequate funds to meet its court-ordered financial responsibilities.<sup>190</sup> The issue became the federal court's authority to enable a school district to tax at a rate sufficient to implement the remedy.

The Supreme Court decided the matter with little respect for state control over tax laws in *Missouri v. Jenkins (Jenkins II)*.<sup>191</sup> On

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education programs under the Eleventh Amendment because the relief was entirely prospective. *See id.* at 288-90. Under the Court's interpretation of the Eleventh Amendment in *Edelman v. Jordan*, a state defendant may be subject to prospective injunctive relief, but not retrospective monetary relief. *See Edelman v. Jordan*, 415 U.S. 651, 658-78 (1974). It is certainly plausible that the *Milliken II* Court could have characterized the order as retrospective monetary relief because the money was designed to redress a past illegality. Instead, the Court characterized the relief as redressing present and future harm, thus coming within *Edelman's* allowance of prospective relief. *See Milliken II*, 433 U.S. at 289-90; *see also* James M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1858-60 (1984) (reconciling *Milliken II* and *Edelman*).

188. *Milliken II*, 433 U.S. at 291. Lastly, the Court found no violation of federalism principles because "[t]he District Court has neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing." *Id.*

189. *See generally* Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 492-95 (1999) (describing in detail the funding of Kansas City's court-ordered remedial plan).

190. *See Missouri v. Jenkins*, 495 U.S. 33 (1990) [hereinafter *Jenkins II*].

191. *Id.* For an argument that *Jenkins II* is inconsistent with recent federalism decisions by the Supreme Court, *see* Janice C. Griffith, *Judicial Funding and Taxation Mandates: Will Missouri v. Jenkins Survive Under the New Federalism Restraints?*, 61 OHIO ST. L.J. 483 (2000).

the grounds of comity, the Court held that the district court *itself* could not raise the school district's property tax rate.<sup>192</sup> Such an approach "not only intruded on local authority but circumvented it altogether."<sup>193</sup> Yet, the district court could enjoin state laws preventing the school district from setting a sufficient property tax rate (for example, laws requiring voter approval).<sup>194</sup> The Court then characterized the resulting tax not as a federal court tax, but a school district tax. Enjoining state laws was entirely permissible, according to the Court, because it was necessary to enable a local government to fulfill its constitutional duty under the Fourteenth Amendment.<sup>195</sup> State tax laws could not be allowed to stand in the way of the school district's constitutional duty to desegregate. The Court concluded that "[t]o hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them."<sup>196</sup> In short, a federal court cannot itself raise taxes, but it can order state and local governments to fund a remedy and enjoin any restricting state law.

This is a remarkable holding given the American tradition of "no taxation without representation." The Court could have imposed more of the financial burden on the State of Missouri, which it had actually requested the judiciary to do.<sup>197</sup> Instead, by allowing a school district to increase its property tax rate without compliance with state laws, the Court placed almost no value on state control over rules of taxation. True, the Court stressed that its approach of not having the federal court itself set the tax rate afforded the defendants power over the remedy, but the idea of a federal court

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192. *Jenkins II*, 495 U.S. at 50-52.

193. *Id.* at 51.

194. *Id.*

195. *Id.* at 57.

196. *Id.* The Court argued that

[t]he difference between the two approaches is far more than a matter of form. Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems.

*Id.* at 51.

197. The State of Missouri made this argument, but the Court found no abuse of discretion by the district court in not taking this route. *See id.* at 53-54.

involving itself in local tax matters is hard to square with the traditional value of local and state autonomy over taxes.

As with requiring the state defendants to bear a financial burden for the remedy in *Milliken II*, the Court promoted strong enforcement power. In a sense, *Jenkins II* is not about the right or the remedy to be free of racial discrimination in education, but about how to enforce the remedy. For without adequate funding, the remedy could not be enforced. Further, the local control at issue is not one of defining the right to be free from racial discrimination—the heart of school desegregation jurisprudence—but the power over local tax rates, a different matter altogether.

In sum, in *Milliken I* and *II*, the Supreme Court devised remedial standards that emphasized the importance of involving the defendants in the remedial process<sup>198</sup> and in limiting the extent of the intrusion of the federal government in school operation.<sup>199</sup> It returned to the idea of defendant responsibility propounded by *Brown II* and rejected by *Green* and *Swann*.<sup>200</sup> As a result, defendants have had a remarkable level of authority in devising school desegregation remedies.<sup>201</sup> Yet, on the issue of enforcement, as reflected in the treatment of the state defendants in *Milliken II* and *Jenkins II*, the Court has had no concern with local control. In these two instances, federal power clearly trumped local and state authority.

#### *D. Unitary Status*

This section considers the Supreme Court's last three school desegregation opinions, all of which concern the end point of the school desegregation lawsuit. The Supreme Court has held that school desegregation lawsuits are not to operate in perpetuity. At some point in time, the school desegregation lawsuit must end, and the courts must restore complete local control over schools. Strong hints of this result began as early as *Brown II*,<sup>202</sup> and the Supreme

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198. See *supra* notes 180-84 and accompanying text.

199. See *supra* notes 169-72 and accompanying text.

200. See *supra* notes 84-85, 139, 148-50 and accompanying text.

201. See *infra* notes 242-43 and accompanying text.

202. See *Brown II*, 347 U.S. 294, 301 (1955) (identifying the purpose of the remedy "to effectuate a transition to a racially nondiscriminatory school system," and limiting court

Court developed a test for terminating school desegregation cases in the 1991 opinion in *Board of Education v. Dowell*,<sup>203</sup> the Oklahoma City school desegregation lawsuit. The end point of school desegregation is when the school district has achieved "unitary status" and no longer operates a dual system.<sup>204</sup> In devising *Dowell's* three-part test for unitary status, the Court highlighted the temporary nature of school desegregation remedies and the "allocation of powers within our federal system."<sup>205</sup> A school desegregation suit could end, even if it meant immediate resegregation of the schools.<sup>206</sup> In reaching this conclusion, the Court emphasized the importance of local control over schools as part of the American system of federalism.<sup>207</sup>

Likewise, in *Freeman v. Pitts*, the Court declared that the "end purpose" and "ultimate objective" of the lawsuit was to "return

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jurisdiction to "this period of transition"); see also *Raney v. Bd. of Educ.*, 391 U.S. 443, 449 (1968) (allowing jurisdiction to continue "until it is clear that disestablishment [of *de jure* segregation] has been achieved").

203. 498 U.S. 237 (1991).

204. *Id.* at 244-46 (noting different uses of the term "unitary," but recognizing an end point to school desegregation cases).

205. *Id.* at 248. Justice Marshall, in his last school desegregation opinion, criticized the majority's approach to local control. *Id.* at 267 (Marshall, J., dissenting). He defined local control as relevant only as to the feasibility of the remedy. *Id.*

206. See *id.* at 242 (recognizing that the school board's new plan would resegregate schools).

207. In rejecting a more restrictive standard for terminating school desegregation injunctions based on *United States v. Swift & Co.*, 286 U.S. 106 (1932), the Court reasoned as follows:

Considerations based on the allocation of powers within our federal system, we think, support our view that the quoted language from *Swift* does not provide the proper standard to apply to injunctions entered in school desegregation cases. Such decrees, unlike the one in *Swift*, are not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.... Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."

*Dowell*, 498 U.S. at 248 (citations omitted) (quoting *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)). The Court's approach closely parallels the values associated with state and local authority over a matter, as opposed to national power. See *infra* notes 314-22 and accompanying text.

school districts to the control of local authorities.<sup>208</sup> The Court allowed that this should occur even if schools were never desegregated<sup>209</sup> and again emphasized the value of federalism.<sup>210</sup> Finally, in *Missouri v. Jenkins (Jenkins III)*, the Court stressed the importance of local control,<sup>211</sup> and accepted disparities in the achievement of minority and white school children.<sup>212</sup> The message of the Supreme Court's recent school desegregation opinions is clear. All three start with a statement of the longevity of the case, recognize continued segregation, and ultimately afford immediate return of complete local autonomy.<sup>213</sup>

Lower courts have gotten the Supreme Court's message, and have proven willing to dismiss school desegregation lawsuits. Complete local control is returning. A recent ten-year study of district court opinions and the appeals of these opinions demonstrated that every request for unitary status was granted, save one in which the court awarded only "partial" unitary status.<sup>214</sup>

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208. 503 U.S. 467, 489 (1992); see also *id.* at 490 ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'" (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977))).

209. See *id.* at 476 (permitting continued school segregation because it was not the result of defendants' actions, but the result of purely private housing choices).

210. The Court relied on the values of federalism in emphasizing the importance of local control over schools: "When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course." *Id.* at 490.

211. See *Jenkins III*, 515 U.S. 80, 99 (1995) ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition ....").

212. See *id.* at 101-02.

213. See *id.* at 73 (starting the opinion with "[a]s this school desegregation litigation enters its 18th year"); *Freeman*, 503 U.S. at 471 (recognizing in the second paragraph of the opinion that the school district has been subject to a school desegregation order since 1969); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 240 (1991) (stating in the second paragraph of the opinion that the lawsuit "began almost 30 years ago"). By contrast, opinions issued in the 1970s emphasized that the time for desegregation was now. See *supra* note 131 and accompanying text.

214. See Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1633 (2003). One small school district in suburban Pittsburgh, Woodland Hills School District, sought unitary status in all respects, but was granted unitary status in only particular areas. See *Hoots v. Pennsylvania*, 118 F. Supp. 2d 577, 614-15 (W.D. Pa. 2000). This is called "partial unitary status" and is specifically allowed by *Freeman*. See *Freeman*, 503 U.S. at 490-91 (1992). Interestingly, many school districts have decided not to seek unitary status. See Parker, *supra* note 80, at 1212-13 (discussing the reasons for this occurrence).

### *E. Summary and Implications of Local Control*

Overall, the federal judiciary has valued local control in school desegregation cases. In the name of local control over schools, courts have crafted for defendants a prominent role in the remedial process. Even critics of institutional reform litigation have sometimes admitted the importance of local control in school desegregation.<sup>215</sup> While local control has not mattered at every juncture, the federal judiciary has deferred to defendants' wishes a great deal, with profound implications.

In the first decade or so of school desegregation, courts were exceptionally deferential to school authorities. Granted, the Supreme Court placed the judiciary at the school house door when it interpreted the Equal Protection Clause to prohibit *de jure* segregated schools. Yet, the judiciary's authority to interpret the Equal Protection Clause is largely unquestioned,<sup>216</sup> and the

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215. See William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 683 (1982) (concluding that "the lesson of the last decade is that even in race cases the Court has to some degree sought to limit the occasions for federal judicial intervention, and has sporadically sought to control the scope of the district courts' discretion"); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 766 (1978) (focusing criticism on prison conditions cases and concluding that "twenty-four years after *Brown*, the cases seem instead to demonstrate an extraordinarily patient recognition of the need for local responsibility and of the practical restraints the localities face in achieving compliance with the constitutional mandate"); see also Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 717 (1978) (concluding that *Milliken I* and other non-school desegregation opinions "have been sensitive to separation of powers considerations, although [their] explanations have not referred to that doctrine").

216. *Marbury v. Madison* established that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("*Marbury v. Madison* ... declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."). But see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 175 (1999) (affording the federal judiciary no role in enforcing the Constitution). See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778-88 (1991) (examining the current meaning of *Marbury*); *Marbury v. Madison: A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003) (exploring *Marbury* from multiple perspectives). Other branches of the national government and the states themselves can certainly limit that authority. Congress, for example, can use its powers under Section 5 of the Equal Protection Clause to declare unlawful more than that proscribed by the Supreme Court. See

involvement of the judiciary largely ended with that interpretation. The courts proved unwilling to enter the school building to oversee the desegregation process. The courts announced the rule, but allowed the schools to ascertain what that rule exactly meant and how to best implement that rule. Judges demanded only that the schools stop student assignment explicitly based on race, and gave the school districts the time and opportunity to choose how to effectuate that objective. As a result, defendants who were willing at least to pretend to quit assigning students based on race, like ones in North Carolina, were able to avoid any judicial oversight.<sup>217</sup> Defendants not willing to do so—and included here were the majority of school districts subject to litigation—were told to stop considering race, but with little judicial involvement in actualizing that demand.<sup>218</sup> Judicial remedial orders specifying the necessary steps to desegregate were relatively rare; instead, courts told school officials to try again to desegregate.<sup>219</sup> Not surprisingly, children continued to attend segregated schools.

The judiciary took a very different approach starting in the mid-1960s. The Supreme Court in *Green* and *Swann* paid little heed to the value of local autonomy over school districts.<sup>220</sup> Although language in both opinions stressed the need for local control over schools and allowed defendants primary responsibility over the

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Katzenbach v. Morgan, 384 U.S. 641 (1966) (holding that Congress can prohibit the use of certain literacy tests for voter eligibility although the Supreme Court had upheld the constitutionality of such tests); see also *City of Boerne v. Flores*, 521 U.S. 507 (1997) (limiting *Katzenbach* through a narrow reading of the scope of Congressional power under Section 5). The Executive Branch can use its pardon power to invalidate a criminal penalty that the Executive Branch, in disagreement with the judiciary, believes to be unconstitutional. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228-61 (1994) (advocating executive review). States and Congress can pass constitutional amendments to invalidate the Supreme Court's constitutional commandments. For example, in response to *Chisholm v. Georgia*, the states and Congress passed the Eleventh Amendment. See U.S. CONST. amend. XI (disallowing suits such as that in *Chisholm*); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (upholding a federal court suit by an individual to collect money from a state). Finally, Congress can also limit key aspects of the federal judiciary's jurisdiction. See generally U.S. CONST. art. III, § 1. Nonetheless, the national judiciary is principally charged with the power to interpret the Constitution under *Marbury*.

217. See *supra* notes 119-23 and accompanying text.

218. See *supra* notes 116-18 and accompanying text.

219. See *supra* notes 116-18 and accompanying text.

220. See *supra* Part II.B.

school desegregation remedy, local control was of nominal effect.<sup>221</sup> In both opinions, the Court second guessed the educators' decisions about how to best fulfill the requirements of *Brown I* and approved court-crafted remedies.<sup>222</sup>

In *Green*, the Court had good reason to suspect that the defendants' remedy of a freedom-of-choice plan was intended to perpetuate segregation, although the plan allowed limited integration.<sup>223</sup> The Court took the opportunity to offer, for the first time, an expansive definition of *Brown I*, focusing on integration as the expected goal.<sup>224</sup> The Court began, in other words, to enter the schoolhouse to require wholesale integration.

*Swann* limited the defendants' role even more than *Green*.<sup>225</sup> In *Swann*, the defendant school district had offered a relatively strong school desegregation remedial plan, but the Supreme Court paid little attention to that plan, instead focusing on, and affirming, the district court's order of widespread busing.<sup>226</sup> The Supreme Court gave little attention to the school district's preferences about how to desegregate. In both *Green* and *Swann*, the Court defined expansively what it meant to desegregate, at the expense of altering the role of the defendants as articulated in *Brown II*.

Perhaps with the overwhelming majority of school districts abdicating the opportunity to take the desegregation responsibility seriously, the courts had no choice but to increase their involvement or risk the effective overruling of *Brown I* by recalcitrant school districts. The courts, however, certainly increased their involvement in public schools more than absolutely necessary. *Swann*, after all, involved a far-from-obstructionist school district.<sup>227</sup> The Supreme Court in *Green* and *Swann* recognized that *Brown II* placed the primary responsibility for desegregation on the defendants, but the Court's approaches in the opinions were inconsistent with that primary responsibility.

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221. See *supra* note 149 and accompanying text.

222. See *supra* notes 138-39, 145-46 and accompanying text.

223. See *supra* notes 140-41 and accompanying text.

224. See *supra* notes 134-39 and accompanying text.

225. See *supra* notes 142-46 and accompanying text.

226. See *supra* note 143 and accompanying text.

227. See *supra* note 146 and accompanying text (focusing on the lack of busing for elementary school students and indicating that the school district in *Swann* bused middle and high school students to achieve integration).

The shift in *Green* and *Swann* from *Brown II* regarding which level of government should have primary remedial authority—the local school districts or the federal judiciary—is best explained by a newly discovered need for a national standard, one mandating actual integration.<sup>228</sup> Once local control was deemed a failed experiment because it perpetuated segregation, then the judiciary asserted its own authority to assert a national rule. Certainly, the support of the other two branches of the national government eased the way for the judiciary to impose more judicial oversight,<sup>229</sup> but this support only partially answers why the judiciary changed its approach. The courts decided that more active national oversight was necessary because affording the defendants primary responsibility had failed, and it had failed, according to the judiciary, because of the lack of actual integration,<sup>230</sup> not because of some change in the opportunity to actualize the values supporting state and local government authority. In both *Green* and *Swann*, the Court presumed that a successful desegregation remedy would result in largely integrated schools. The freedom-of-choice plan was ineffective because of its outcome; a successful plan, a constitutional plan, would result in greater levels of integration.<sup>231</sup> Further, in *Swann*, the district court's remedy was constitutional because it produced the greatest possible level of integration.<sup>232</sup> Constitutional desegregation remedies must expect integration.<sup>233</sup>

Underlying *Green* and *Swann*, and subsequent Supreme Court cases on proving the cause of segregation in the North,<sup>234</sup> was a

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228. According to the principles of federalism, the national government should have primary authority whenever a national standard is necessary. See *infra* notes 320-22 and accompanying text (exploring when federalism endorses national power). The federalism values supporting state and local authority—public participation in democracy, promotion of experimentation, prevention of tyranny, and allowance of shared communities—have equal applicability in *Brown II*, *Green*, and *Swann*. See *infra* notes 314-19 and accompanying text (discussing when federalism supports state and local authority). The only possible, relevant change that could explain the shift in *Green* and *Swann* is that the federal judiciary decided that a uniform standard was needed.

229. See *supra* notes 150-59 and accompanying text.

230. See *supra* Part II.D.

231. See *supra* notes 134-41 and accompanying text.

232. See *supra* note 144 and accompanying text.

233. See *supra* notes 147-49 and accompanying text.

234. See *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979). In this pair of cases, the Supreme Court articulated powerful causation presumptions that greatly lessened the burden of proving intentional segregation

presumption that absent the present-day effects of discrimination, schools would be integrated.<sup>235</sup> Defendants, therefore, had the legal responsibility to produce integration. Courts could not defer to school officials who were not pursuing the plan producing the “greatest” degree of desegregation and be true to this principle. In short, a belief that desegregation should entail integration trumped the idea of local control in *Brown II*.

Since *Swann* and *Green*, however, local control has mattered, with the exception of the Court’s treatment of enforcement powers in *Jenkins II* and *Milliken II*.<sup>236</sup> Certainly, school districts cannot argue local control to escape *Swann* and *Green*, and this is a critical limitation on defendants. In the implementation of *Swann* and *Green*, however, the federal judiciary has been generally respectful of public school officials. In fact, the recent unitary status cases have greatly restricted the reach of *Swann* and *Green* by accepting segregation as an outcome.<sup>237</sup>

In *Milliken I*, federalism and competency concerns kept the judiciary out of desegregating predominantly minority city school systems surrounded by white suburban school districts.<sup>238</sup> The Supreme Court decided to respect local school district boundary

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(a prerequisite for judicial oversight) in northern school districts. First, systemwide discrimination is presumed (absent persuasive counterproof) from discrimination in a substantial part of the system. See *Columbus*, 443 U.S. at 455-58 (“Proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board.”). Second, and more importantly in the later stages of litigation, once a violation is found, any current disparity is presumed to be caused by the defendants’ unlawful actions, unless the defendants prove that their actions in *no way* contributed to the disparity. See *Dayton*, 443 U.S. at 537 (holding the defendants responsible for current segregation if the segregation “was caused at least in part by [the defendants’] prior intentionally segregative official acts”). These presumptions are greatly lessened today. See Parker, *supra* note 80, at 1172-73; James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1672-73 (2003).

235. See Parker, *supra* note 80, at 1172-73; Ryan, *supra* note 234, at 1666.

236. *Jenkins II*’s strong abdication of federalism values—allowing a federal court judge to have substantial influence over taxation rates—appears strongly inconsistent with the long tradition of promoting democracy and preventing tyranny over matters of taxation. See *supra* notes 191-97 and accompanying text. Yet, the Supreme Court decided that another value, affording the judiciary strong enforcement powers, was more important than exclusive state and local control over taxing legislation. See generally *infra* Part IV.B.1. (discussing why local control counts in some school desegregation opinions but not others).

237. See *supra* Part II.D.

238. See *supra* notes 166-73 and accompanying text.

lines in determining the remedy, and paid little attention to the involvement of the state defendants in maintaining segregated Detroit schools.<sup>239</sup> Further, *Milliken II* mandated that the school desegregation remedy take into account the autonomy interests of public school officials.<sup>240</sup>

As a result, courts have generally been quite deferential to defendants in the school desegregation process. Certainly, some exceptional cases demonstrate extensive judicial involvement, particularly cases when the state is liable for the remedial costs.<sup>241</sup> In the run-of-the-mill school desegregation lawsuit, however, defendants' proposed remedies are almost always accepted.<sup>242</sup> From

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239. See *supra* note 171 and accompanying text.

240. See *supra* notes 180-84 and accompanying text.

241. See, e.g., *Jenkins v. Missouri*, 216 F.3d 720, 724, 727 (8th Cir. 2000) (en banc) (reversing district court's *sua sponte* declaration of unitary status); *Morgan v. Nucci*, 831 F.2d 313, 326 (1st Cir. 1987) (declaring Boston's public schools unitary with respect to student assignment); *United States v. Yonkers Bd. of Educ.*, 123 F. Supp. 2d 694, 723 (S.D.N.Y. 2000) (finding continuing "vestiges of segregation"); *Tasby v. Woolery*, 869 F. Supp. 454, 477-78 (N.D. Tex. 1994) (approving three-year plan to deem Dallas Independent School District unitary). The cases that seem to generate the most judicial opinions—e.g., *Jenkins* and *Yonkers*—are the ones where the state is liable for part of the remedy. In those cases, the defendant school district and state defendants often disagree about the scope of the remedy, thereby necessitating judicial determination of which defendant deserves deference. See *supra* notes 197-98 and accompanying text.

242. See, e.g., *Hull v. Quitman County Bd. of Educ.*, 1 F.3d 1450, 1451, 1456 (5th Cir. 1993) (allowing defendants to close partially integrated school); *Harris v. Crenshaw County Bd. of Educ.*, 968 F.2d 1090, 1091 (11th Cir. 1992) (upholding approval of defendant's plan to consolidate a predominantly black high school with other schools); *United States v. Mississippi*, 921 F.2d 604, 605-06 (5th Cir. 1991) (upholding district court order allowing the consolidation of two school districts); *Flax v. Potts*, 864 F.2d 1157, 1158 (5th Cir. 1989) (affirming district court's approval of defendant's proposed plan to eliminate desegregative busing); *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 854 F.2d 127, 128 (5th Cir. 1988) (rejecting challenge to defendant's "achievement grouping" practices); *Adams v. Bd. of Pub. Educ.*, 770 F.2d 1562, 1563 (11th Cir. 1985) (upholding approval of defendants' modified desegregation plan which included closing predominantly African American elementary schools); *Andrews v. City of Monroe*, 730 F.2d 1050, 1051 (5th Cir. 1984) (affirming district court's order approving defendant's proposed advanced placement program); *Lee v. United States*, 914 F. Supp. 489, 496 (N.D. Ala. 1996) (approving the Tuscaloosa City Board of Education's new construction plan); *Lee v. Geneva County Bd. of Educ.*, 892 F. Supp. 1387, 1396 (M.D. Ala. 1995) (approving defendants' request to consolidate school districts); *Arthur v. Nyquist*, 514 F. Supp. 1133, 1134, 1140-41 (W.D.N.Y. 1981) (approving defendant's remedial plan). But see *Lee v. Macon County Bd. of Educ.*, 995 F.2d 184, 184-85 (11th Cir. 1993) (en banc) (per curiam) (affirming by an equally divided court district court's refusal to allow closure of racially integrated school); *United States v. Pittman*, 808 F.2d 385, 392 (5th Cir. 1987) (reversing district court's approval of school desegregation plan which included the conversion of two nearly all-black schools into magnet schools); *Lee v. Chambers County Bd.*

1992 to 2002, for example, defendants' proposed remedies were overwhelmingly approved, especially when the remedy concerned more than minor issues.<sup>243</sup>

The deference to local school authorities has become a leading remedial approach in part because the other factors for determining the scope of the school desegregation remedy are highly indeterminate. In addition to taking into account the interests of the state and local defendants, the remedy is to place the plaintiffs in the position they would have been but for the violation.<sup>244</sup> Where any of us would be absent *de jure* segregation is simply unknowable.<sup>245</sup> Further, the standard requires that the scope of the violation shall determine the scope of the remedy.<sup>246</sup> The school desegregation right is largely unknowable without reference to the remedy. In fact, this "right-remedy test" is uniformly criticized for its inherent ambiguity in public law cases.<sup>247</sup> The only aspect of the test that has

of Educ., 849 F. Supp. 1474, 1475, 1503 (M.D. Ala. 1994) (rejecting request of city to operate school district independent of county). For an analysis of district court opinions from June 1, 1992 to June 1, 2002 reaching this result, see Parker, *supra* note 214, at 1633-38.

243. See Parker, *supra* note 214, at 1629-34.

244. See *supra* note 180.

245. No one knows—not even social scientists studying the issue—the answer to that question. See *Freeman v. Pitts*, 503 U.S. 467, 503 (1992) (Scalia, J., concurring) ("Racially imbalanced schools are ... the product of a blend of public and private actions, and any assessment that they would not be segregated, or would not be as segregated, in the absence of a particular one of those factors is guesswork."); Richard A. Epstein, *The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CAL. L. REV. 1101, 1111-16 (1996) (arguing that "the inability to disentangle the remote causes of the present situation renders unworkable the traditional causal inquiries"); Ryan, *supra* note 234, at 1671-74 (demonstrating why social science evidence has very limited applicability in school desegregation opinions).

246. See *supra* note 180.

247. This test is typically referred to as placing plaintiffs in their "rightful position," or as the right-remedy connection—meaning that the right determines the remedy. See, e.g., Owen M. Fiss, *The Forms of Justice, Foreword to The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 46-49 (1979) (characterizing the right-remedy as a test that "fundamentally misleads" and "gives us an impoverished notion of remedy"); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 747 (1992) (arguing that the right-remedy test is "vague and somewhat indeterminate ... [and] permit[s] courts to do pretty much what they want"); John Leubsdorf, *Completing the Desegregation Remedy*, 57 B.U. L. REV. 39, 83-85 (1977) (describing the test as "so trite that it is hard to see how it could either enlighten or cause controversy"); Nagel, *supra* note 215, at 715 (critiquing the right-remedy connection as "indeterminate"); Parker, *supra* note 189, at 511-22 (critiquing the right-remedy connection on causation grounds); Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 879 (1991) (criticizing the right-remedy connection for its lack of honesty).

meaning standing alone is deference to state and local government defendants, thereby increasing its importance.<sup>248</sup>

At the end stage of school desegregation, unitary status, the federal judiciary has not hesitated to dismiss school desegregation suits in the name of local control.<sup>249</sup> One could argue that the judiciary is only doing so in recognition of the successful work of the defendants in eradicating the *de jure* system and any present day disparities. The standard for unitary status, in fact, requires proof of the elimination of the "vestiges of discrimination"—any remaining racial disparities—"to the extent practicable" and to the extent caused by the defendant's illegality.<sup>250</sup>

In all the unitary status cases recently decided by the Supreme Court, racial disparities remained.<sup>251</sup> Thus, the question became whether the defendants' actions caused the existing disparities. Again, the issue begged the unknowable question of causation. To what extent were continuing vestiges of discrimination defendants' fault? This is the central question for unitary status, but one that is an unanswerable one.

In deeming the defendants not responsible for the continuing disparities, in answering this unanswerable question, the Supreme Court has been more than willing to *choose* that the defendant is

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248. Professor John Choon Yoo has recognized the prominence of the language of local control, but has characterized the language as "nothing more than ... a concern." John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1133 (1996). He reasons that "[t]he Court does not appear to have ever invalidated a structural remedy on the ground that it improperly intruded upon the proper authority of state and local institutions." *Id.* He further explains his position as follows: "If there is a core attribute of sovereignty into which federal courts cannot intrude, the Supreme Court has yet to identify it." *Id.* at 1134. He argues that the Court imposed limitations on the remedies in *Jenkins III* and *Milliken I* because "the remed[ies were] not tailored to the constitutional violation." *Id.* at 1133 n.83. In doing so, Professor Yoo is referencing the standard that the scope of the violation determines the scope of the remedy. He admits, however, that this standard is essentially meaningless, as is uniformly recognized. See *supra* note 247 and accompanying text. He, in fact, describes the standard as "Delphic." Yoo, *supra*, at 1132; see also *id.* ("It is difficult, however, to see how an appellate court can apply such an open-ended phrase in any principled, consistent manner. Whether a remedy 'directly address[es] and relate[s] to' a violation often rests in the eye of the beholder ...."). Limitations in *Jenkins III* and *Milliken I*, however, could not have been due to a meaningless standard; instead, judicial perceptions and choices unrelated to the stated standard better explain the results.

249. See *supra* Part II.D.

250. See *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991).

251. See *supra* notes 208-13 and accompanying text.

not at fault and excuse their responsibility for continuing disparities.<sup>252</sup> With this choice, local control is completely restored. The question of unitary status demands a judicial choice, and judicial choice has reflected a strong judicial attitude that continuing disparities are caused by matters beyond the defendants' control.<sup>253</sup> The courts have decided, in other words, that our country would still be segregated, even if defendants had never illegally segregated. Private action is deemed the cause of the current segregation.

In short, local control has allowed defendants remarkable authority in the remedial process.<sup>254</sup> Defendants were able to stall the beginning of the desegregation process after *Brown II*,<sup>255</sup> then were effectively shut out of the remedial process with *Green* and *Swann*,<sup>256</sup> but were eventually invited back into remedial decision making with *Milliken I* and *Milliken II*.<sup>257</sup> While parts of *Milliken II* and *Jenkins II* promoted strong judicial enforcement values over local authority, defendants generally have been granted remarkable power in the remedial process. Finally, the recent school desegregation cases evidence a strong desire to restore complete local control and to craft a right with almost no meaning.<sup>258</sup>

### III. DEFERENCE AND LOCAL CONTROL

This Part compares affirmative action's notion of deference with school desegregation's allowance of local control. At their core, both are the same: an expansion of the role of state and local education officials in defining the Equal Protection Clause's mandate over schools, at the expense of the national judiciary's authority.<sup>259</sup> Both are also easily manipulated to fit the desired outcome, and both have the potential to result in rights that vary by school.<sup>260</sup> Thus,

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252. See *supra* Part II.D.

253. *Id.*

254. Defendants' authority has also had a profound impact on the meaning of the *right* to be free from *de jure* segregation. See *infra* notes 288-98 and accompanying text.

255. See *supra* Part II.A.

256. See *supra* Part II.B.

257. See *supra* Part II.C.

258. See *supra* Part II.D.

259. See *infra* notes 264-76 and accompanying text.

260. See *infra* Part IV.B.2.

this Part argues that affirmative action's deference and school desegregation's local control are similar enough that it is unfair to characterize Justice O'Connor's approach in *Grutter* as "unprecedented,"<sup>261</sup> even though differences between the two exist.<sup>262</sup>

Deference and local control are quite similar. First and most importantly, both craft a role for educators in determining the constitutionality of race-conscious activity. In school desegregation, defendants can consider race if remedying past discrimination, which has long been recognized as a compelling governmental interest.<sup>263</sup> School desegregation opinions, however, lack traditional strict scrutiny analysis.<sup>264</sup> To begin with, the narrow tailoring prong is absent. School desegregation opinions omit both the language and idea of narrow tailoring and the typical factors associated with it.<sup>265</sup> Instead, courts focus on one-half of the strict scrutiny analysis and ask whether defendants' past discrimination caused the current disparity.<sup>266</sup> If this is true, then a compelling governmental interest

261. See *supra* notes 2-4 and accompanying text; see also *supra* note 78 (noting other reasons why *Grutter's* approach is not novel).

262. See *infra* notes 284-97 and accompanying text.

263. See *supra* notes 136-47 and accompanying text.

264. The term "strict scrutiny" appears infrequently in school desegregation opinions. In the three Supreme Court school desegregation opinions since 1990, for example, the phrase "strict scrutiny" appears only in two sentences authored by Justice O'Connor in a concurring opinion:

But it is not true that strict scrutiny is "strict in theory, but fatal in fact[.]" ... It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination.

Jenkins III, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) (citations omitted) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)). The issue arose in the context of discussing Justice Thomas' argument about restricting school desegregation jurisdiction and limiting judicial authority. See *id.* (O'Connor, J., concurring); *id.* at 131-33 (Thomas, J., concurring) (arguing that courts should exercise judicial restraint and terminate their jurisdiction with the pronouncement of the school desegregation remedy).

265. The narrow tailoring factors typically include the following:

(1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties.

See *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 706 (4th Cir. 1999) (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality)).

266. This mode of inquiry was absent at the beginning of school desegregation, when the

exists, and courts will conclude that race-conscious relief is appropriate. As has been discussed previously,<sup>267</sup> the necessary causation inquiry is often pointless.<sup>268</sup> Any answer to the question is usually one based on non-causation grounds. One value continually stressed is respecting the tradition of local control over schools. Courts have effectuated this value by deferring to school desegregation defendants in crafting and enforcing the remedy.<sup>269</sup> Deference was true at the beginning of school desegregation<sup>270</sup> and continues today,<sup>271</sup> although it has abated at times.<sup>272</sup> As a result, defendants have had a great deal of control over race-conscious activities undertaken in the pursuit of desegregation.

In affirmative action plans, defendants can consider race in the pursuit of diversity so long as the program is not a quota.<sup>273</sup> Diversity itself gives defendants control over the constitutionality of race-conscious activity. It is so amorphous a term that it permits any number of race-conscious activities, as well as giving educators a great deal of discretion in engaging in race-conscious activity.<sup>274</sup> Further, the Court's decision affirming the law school's program was explicitly deferential to the school officials. The principle of

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critical question was not remedy, but whether defendants had unlawfully segregated. Once the litigation turns to the question of remedy, this becomes the central question, particularly as the time between the original violation and the remedy increases.

267. See *supra* notes 247-48 and accompanying text.

268. Courts have developed other tests for evaluating school desegregation remedies, but the tests are exceptionally ambiguous. See *supra* notes 244-46 and accompanying text.

269. One recent study of school desegregation district court cases published between June 1, 1992 and June 1, 2002 found only one case in which a defendant's request for unitary status was denied in part. See Parker, *supra* note 214, at 1633. For a small school district outside of Pittsburgh, only partial unitary status was awarded, meaning only portions of the school desegregation case were dismissed, instead of the full unitary status requested. See *supra* note 214. On the question of remedy, the study found that defendants' requests were overwhelmingly granted, especially when the request concerned more than minor implementation issues. See *supra* note 214 and accompanying text.

270. See *supra* Part II.A; *supra* notes 216-19 and accompanying text.

271. See *supra* Part II.D; *supra* notes 236-54 and accompanying text.

272. See *supra* Part II.B; *supra* notes 220-35 and accompanying text.

273. See *supra* Part I. Justice Scalia and Professor Derrick Bell, among others, have complained that the line between the law school's constitutional program and the undergraduate school's unconstitutional one is too narrow. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2349 (2003) (Scalia, J., concurring in part and dissenting in part); Bell, *supra* note 69, at 1622. Yet, the constitutionality of the law school's system provides ample room for other merit-based systems to pursue diversity. See Parker, *supra* note 51.

274. See generally Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573 (2000).

deference was crucial in the decision that diversity could be a compelling governmental interest.<sup>275</sup> The Supreme Court also evidenced some degree of deference on the issue of narrow tailoring in *Grutter*, although not in *Gratz*.<sup>276</sup>

Second, not only do local control and deference both craft a role for educators in deciding the constitutionality of race-conscious activity, but the underlying rationales are likely similar as well. Both competency and federalism validate local control in school desegregation and deference in educational affirmative action.<sup>277</sup> As explored below, the federal judiciary has generally recognized the superior competency of educators in the classroom setting, and federalism usually supports nonfederal authority over public schools.<sup>278</sup> Both concepts counsel the judicial hesitation inherent in school desegregation's local control and affirmative action's deference.

Third, neither deference nor local control will solely determine the outcome of litigation.<sup>279</sup> Local control mattered at critical school desegregation junctures, but not always.<sup>280</sup> Further, deference may have had a large role in *Grutter*,<sup>281</sup> but the concept was not enough to save Michigan's undergraduate program from being declared an unconstitutional quota in *Gratz*.<sup>282</sup> Instead, as explored in more detail below, other values may trump deference and local control.<sup>283</sup> In other words, school officials' authority will be questioned.

One striking difference exists between deference and local control.<sup>284</sup> *Grutter* crafted a role for educators on the legal question

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275. See *supra* notes 47-62 and accompanying text.

276. In *Grutter*, once the majority determined that the program was not a quota, then the idea of narrow tailoring received little in-depth analysis. See *supra* notes 63-71 and accompanying text. But in *Gratz*, the school officials were not able to prove the absence of a quota. See *Gratz v. Bollinger*, 123 S. Ct. 2411, 2430-31 (2003).

277. See *infra* Part IV.A.

278. See *infra* Part IV.A.

279. See *infra* Part IV.B.1.

280. See *supra* Part II.E (summarizing the role of local control in school desegregation jurisprudence).

281. See *supra* Part I.

282. See *Gratz v. Bollinger*, 123 S. Ct. 2411, 2427-28 (2003).

283. See *infra* Part IV.B.

284. Differences between affirmative action and school desegregation exist as well. See *infra* notes 336-44 and accompanying text. But the differences are irrelevant to comparing deference to local control.

of whether diversity could be a compelling governmental interest,<sup>285</sup> which is a question primarily associated with rights. School desegregation defendants, on the other hand, have had no input on the legal question of whether remedying past discrimination could be a compelling governmental interest. The notion of local control instead has had a direct impact on the remedy. Thus, at first blush the deference in *Grutter* appears to have had a large impact on defining fundamental legal principles affecting rights, while local control did not, instead affecting only the school desegregation remedy.

Yet, this difference is largely insignificant for two reasons. First, the legal question of whether diversity can be a compelling governmental interest contains an element of educational policy—the matter is presented as an idea impacting classroom learning. This makes the deference of courts not entirely novel<sup>286</sup> and consistent with general ideas about federal courts limiting their authority to legal matters. Whether remedying past discrimination can be a compelling governmental interest, however, has no interplay with educational judgment, so it is not too surprising that local control had no role in this legal determination. Granted, school districts at one point defended the legality of *de jure* segregation by arguing that racial segregation was an educational necessity.<sup>287</sup> The Supreme Court then rejected the rhetoric of educational necessity, perhaps because this was only a small part of the justification and it was obvious that the overall goal of *de jure* segregation was to establish a caste system.

Second, in school desegregation the connection between right and remedy is so exceptionally close that distinction between the two is largely meaningless. Impacting the remedy will impact the right. Legal realist Lon Fuller contended long ago that often the best way to study legal rights is by examining the remedies to enforce those rights.<sup>288</sup> This is particularly true for school desegregation because the right at issue is *only* knowable by reference to its remedies.<sup>289</sup>

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285. See *supra* Part I.

286. See *supra* note 78.

287. See KLUGER, *supra* note 89, at 250.

288. See Lon L. Fuller, *Williston on Contracts*, 18 N.C. L. REV. 1, 4 n.5 (1939) (book review).

289. See *infra* notes 290-98 and accompanying text.

For example, the right in *Brown I* was the right to be free from public school assignments based on race, but the prohibition of the consideration of race was only the first of many steps in ascertaining what the right included.<sup>290</sup> Critically, the Supreme Court in *Brown I* did not resolve whether the right included more than an end to student assignment based on race.<sup>291</sup> Eventually, the Court declared that the right meant more than race-neutral alternatives to race-based assignment.<sup>292</sup> The result came, however, from the remedial decision in *Green* regarding whether a freedom-of-choice plan was an adequate remedy.<sup>293</sup>

In this and other instances the right declared in *Brown I* developed meaning largely through its remedies.<sup>294</sup> The decision in *Milliken I* to respect school boundary lines is generally recognized as allowing whites to flee to the suburbs to avoid desegregation altogether, which in turn caused overwhelmingly minority school districts to stay segregated.<sup>295</sup> More recently, the unitary status

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290. See *supra* Part II.A-B.

291. See WILKINSON, *supra* note 86, at 29 (listing the following questions as open to debate after *Brown I*: "If segregated schools were not constitutional, what kinds of schools were? Was the evil segregation itself or merely the state's imposition of it? Was a color-blind society or the betterment of an oppressed race the Court's chief objective?"); Steven D. Smith, *Brown v. Board of Education: A Revised Opinion*, 20 S. ILL. U. L.J. 41, 43 (1995) (recognizing in rewriting *Brown* that "the notion of 'equal protection,' or of 'equality,' is a purely formal concept empty of substantive content; not surprisingly, that concept might be embodied in any number of different substantive doctrines"); Jordan Steiker, *American Icon: Does It Matter What the Court Said in Brown?*, 81 TEX. L. REV. 305, 309 (2002) (noting that *Brown I* left open "the hard question of whether compliance required an end to intentional separation along racial lines or the establishment of non-racially identifiable schools") (reviewing WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID (Jack M. Balkin ed., 2001)).

292. See *supra* Part II.B.

293. See *supra* notes 134-39 and accompanying text.

294. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1293-94, 1298-1302 (1976) ("The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc."); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 50 (1979) ("Pronouncing [public law] rights, however, does nothing to illuminate the remedy."); Fiss, *supra* note 247, at 47 (acknowledging only a loose connection between right and remedy); Robert D. Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 4-5 (1978) ("In public law litigation, there has been a deepening bifurcation of the liability and remedy stages of the lawsuit, with the result that once a right and violation have been found, the judge may exercise broad discretion to order a wide range of innovative, experimental, and intrusive remedies.").

295. See *supra* notes 162-73, 238-39 and accompanying text.

cases indicate a willingness to accept continued segregation without any need for judicial oversight.<sup>296</sup>

In sum, no clear demarcation between right and remedy exists in school desegregation; the two overlap almost completely.<sup>297</sup> What it means to be free from *de jure* segregation is defined by the remedy for such an offense. The defendants' substantial role in defining the remedy affected the right as well.<sup>298</sup> Thus, both affirmative action's deference and school desegregation's local control have affected the rights at issue.

#### IV. FEDERALISM LESSONS

Part IV addresses the normative claim of the dissenting Justices in *Grutter* that deference should have no impact on a strict scrutiny analysis.<sup>299</sup> It argues that federalism ideals (of value for these same Justices elsewhere) underlies in many respects the role of local control, and, relatedly, deference.<sup>300</sup> Federalism's support, however, comes at a very high price.<sup>301</sup> It can be easily manipulated to reach a desired outcome, and the manipulation will have no relation to federalism values.<sup>302</sup> This makes federalism's support of any doctrine tenuous. Further, a federalism component in Equal Protection jurisprudence means that different schools will be allowed to offer different protections to their applicants and

296. See *supra* Part II.D; *supra* notes 249-53 and accompanying text.

297. See generally Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 913-14 (1999) ("[R]emedial equilibration emphasizes that rights and remedies operate as part of a single package."); Doug Rendleman, *Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1353 (2002) (advocating a "fluid, contextual view of a court's characterizations" of remedies); Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 681-95, 747 (2001) (presenting a broad analysis of rights essentialism and advocating the unified right theory).

298. See Friedman, *supra* note 247, at 747 (arguing that considering state and local interests is "either ... a meaningless gesture to placate state and local officials or is invoked to rob plaintiffs whose rights have been violated of an effective remedy"); Thomas D. Rowe, Jr., *No Final Victories: The Incompleteness of Equity's Triumph in Federal Public Law*, LAW & CONTEMP. PROBS., Summer 1993, at 105, 114 (noting that public law litigation in general is limited by the judiciary's "deference to state interests in the name of federalism").

299. See *supra* notes 2-4, 72-77 and accompanying text.

300. See *infra* Part IV.A.

301. See *infra* Part IV.B.

302. See *infra* Part IV.B.1.

students.<sup>303</sup> For if local education officials are to have an impact on the meaning of the Equal Protection Clause, varying meanings of the Equal Protection Clause will necessarily arise. That leaves Equal Protection rights changing by locality, with the possibility that some plaintiffs may have very weak constitutional protections. While such an outcome is inconsistent with the common perception of the Equal Protection Clause, school desegregation litigation teaches that such an outcome is the best possible one given the judiciary's limited competency in educational policy.<sup>304</sup>

### A. Local Control and Federalism

This section explores the connection between local control and federalism<sup>305</sup>—the idea that over some matters the national government is to have control, while other areas are reserved for state and local governments.<sup>306</sup> For to the extent federalism can

303. See *infra* Part IV.B.2.

304. See *infra* Part IV.B.3.

305. At issue here is the Supreme Court's treatment of state and local education officials in its Equal Protection jurisprudence. Thus, not specifically at issue is the relationship between Congress and the States, the more prominent part of the Supreme Court's federalism revival. See generally Fallon, *supra* note 23, at 431 (concluding that the Supreme Court has established "Congress cannot compel the states to submit to private suits for money damages even when they violate federal rights"); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 396 (2002) (arguing that the Supreme Court's "new limits on congressional power have already had a seriously adverse impact, stripping individuals of liberty and equality rights and other protections that have long been recognized by Congress").

306. This Article assumes that local governments are covered by federalism to the same extent as state governments. See Adler & Kreimer, *supra* note 33, at 72 n.6 (noting that the anticommandeering doctrines, which are based on federalism, protect both state and local governments); Fallon, *supra* note 23, at 441 (concluding that "[a] jurisprudence of federalism that ignores local governments would ... be functionally (even if not constitutionally) incomplete"); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1488 n.5 (1994) (noting that federalism can concern the relationships between state and local governments and the federal government, although his article addresses states and federal governments); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1484-85 (1987) (including local governments as part of a historical and normative analysis of federalism) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 6-7, 49 (1988) (including local governments as part of the federalism analysis). For a summary of the Supreme Court's inclusion of local governments in federalism, see Richard Briffault, "What About the 'Is'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1328-35 (1994). For an argument that local governments should be distinguished from state

justify local control, it may also justify the very similar approach of deference.<sup>307</sup>

To determine whether local control is based on federalism, one must start with defining federalism. The textual bases for federalism<sup>308</sup> provide little guidance on the actual meaning of federalism as interpreted by the courts.<sup>309</sup> Nor is any definition of federalism universally accepted.<sup>310</sup> Yet, considerable agreement on federalism's underlying values exists.<sup>311</sup> Academics may disagree on the

governments, see *id.* at 1335-49.

307. This section first analyzes local control, rather than deference, from the standpoint of federalism because its almost fifty-year history, see *supra* Part II, allows more in-depth analysis than the Court's very recent opinion in *Grutter*. See *supra* Part I.

308. At least five constitutional provisions are at play. See U.S. CONST. art. IV, § 3 (protecting each state's territorial integrity); U.S. CONST. art. IV, § 4 (guaranteeing every state "a Republican Form of Government"); U.S. CONST. art. V (protecting each state's equal representation in the Senate); U.S. CONST. amend. X (retaining for the states and the people all powers not delegated to the United States or prohibited to the states); U.S. CONST. amend. XI (disallowing certain suits against states).

309. See *New York v. United States*, 505 U.S. 144, 156-57 (1992) (describing the Tenth Amendment as "essentially a tautology"); Jackson, *supra* note 24, at 2215 (concluding that "standards limiting national legislation in substantive matters claimed to be 'reserved' to the states do not emerge clearly from the naked text of Congress's enumerated powers"); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (discussing Justice O'Connor's opinion in *New York v. United States*); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLAL. REV. 903, 928 (1994) (noting Justice O'Connor's functional approach to federalism). For an argument that the language and history of the Guarantee Clause, U.S. CONST. art. IV, § 4, "provides an essential constitutional limit on federal interference with state autonomy," see Merritt, *supra* note 306, at 22-36. For an argument that the First Amendment provides protections to states, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157, 1161-62 (1991).

310. See Fallon, *supra* note 23, at 439 ("There is no agreed-upon definition of constitutional federalism.").

311. See *id.* at 440 ("[N]early all agree ... that federalism serves important values."). Rubin and Feeley have prominently argued that federalism is served by none of its underlying values. See Rubin & Feeley, *supra* note 309, at 910 (contending that the values of federalism are achieved by the "managerial concept" of "decentralization"); see also Briffault, *supra* note 306, at 1327 (concluding that "federalism may not be necessary to promote the values it is said to advance," yet recognizing the benefits of federalism often occur at the local level, which he excludes from his definition of federalism). For responses to Rubin and Feeley, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 380-405 (1997) (contending, *inter alia*, that Rubin and Feeley's theory "begins from an unrealistic baseline" because their idea of decentralization is so contrary to American history); Jackson, *supra* note 24, at 2218-20 (arguing that "Rubin and Feeley's analysis also underestimates the value of states as alternative locations of independently derived government power"); Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE J. ON REG. 149, 153 (1996) (responding by analyzing the "institutional structure found

connection between state and local autonomy and actualization of the values,<sup>312</sup> but the values underlying federalism provide the basis of a commonly employed "functional analysis" to determine when it is appropriate to assign authority to the states and local governments.<sup>313</sup>

Four values support the autonomy of states and localities: public participation in democracy, prevention of tyranny, promotion of experimentation, and allowance of shared communities. All apply in the education setting. Public participation in democracy is the first value for allowing state or local control over a matter.<sup>314</sup>

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in these fifty states" as central to notions of contemporary American federalism).

312. Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 433 (2002) (arguing that liberals should embrace judicial enforcement of states' rights); Fallon, *supra* note 23, at 430 (discussing Supreme Court cases decided on federalism grounds); Jackson, *supra* note 24, at 2213 (discussing the scholarly literature on the federalism revival).

313. For a discussion of the necessity of functional analysis, see Chemerinsky, *supra* note 33, at 534.

314. The Supreme Court recognized this reason in *New York v. United States*, 505 U.S. 144, 169 (1992). In reaching its decision on the unconstitutionality of the Low Level Waste Policy Act, the Court recognized that

where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

*Id.*; see also *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (noting that federalism "increases opportunity for citizen involvement in democratic processes"); Adler & Kreimer, *supra* note 33, at 81-82 ("It is a shibboleth of the literature endorsing federalism that states facilitate a kind or degree of political participation by citizens that does not occur at the national level."); Samuel Beer, *Federalism, Nationalism and Democracy in America*, 72 AM. POL. SCI. REV. 9, 10 (1978); Fallon, *supra* note 23, at 440 ("[I]n comparison with the national government, state and local governments are closer to the people and more capable of reflecting local needs, values, and mores."); *id.* at 441 ("[T]here are more opportunities to participate in government, and to do so efficaciously, at the local level."); Friedman, *supra* note 311, at 390 (concluding that "[i]ntuition suggests that more people would and could participate in smaller levels of government, and common experience seems to bear this out"); Jackson, *supra* note 24, at 2213 (identifying "increasing opportunities for political participation" as one of the "potential benefits of federalism"); McConnell, *supra* note 306, at 1509 (providing support among the Founders for the idea that "representatives in a smaller unit of government will be closer to the people"); Merritt, *supra* note 306, at 7-8 ("The greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decisionmaking."); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 395-408 (analyzing in detail the ideal of "providing a space for participatory politics"). Professor

Because states and localities are smaller elected bodies than national ones, individuals will have a greater voice in the decision-making process, and the smaller elected bodies will be more accountable. Another value counseling state or local authority is the diffusion of power to protect liberty. As the Supreme Court has noted, "the principal benefit of the federalist system is a check on abuses of government power."<sup>315</sup> The conception of states and localities as laboratories for experimentation is a third value in evaluating state authority.<sup>316</sup> As smaller entities of government,

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Deborah Jones Merritt identifies several benefits resulting from this participation: "[I]t trains citizens in the techniques of democracy, fosters accountability among elected representatives, and enhances voter confidence in the democratic process." Merritt, *supra* note 306, at 7-8 (footnotes omitted).

315. *Gregory*, 501 U.S. at 458; see also *Printz v. United States*, 521 U.S. 898, 921 (1997) (concluding that "[t]his separation of the two spheres is one of the Constitution's structural protections of liberty"); *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring) (recognizing that "the Federal and State Governments ... hold each other in check by competing for the affections of the people"); *New York*, 505 U.S. at 181 (reasoning that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front") (quoting *Gregory*, 501 U.S. at 458); Adler & Kreimer, *supra* note 33, at 79-80 (arguing that "tyranny prevention" ... has figured most prominently in the recent case law"); Chemerinsky, *supra* note 33, at 525 (contending that "the Framers saw the separation of powers horizontally, among the branches of the federal government, and vertically, between the federal and state governments, as the best safeguard against autocratic rule"); Fallon, *supra* note 23, at 441 (recognizing that "state and local governments function as counterweights to national power"); Friedman, *supra* note 311, at 402-04 (concluding that "the states serve as an independent means of calling forth the voice of the people, if and when this is necessary"); Jackson, *supra* note 24, at 2214, 2218-20 (recognizing "maintaining the possibility of checks on oppression by the federal government" as a reason for state authority); McConnell, *supra* note 306, at 1500 (discussing support among the Founders to the idea that "state and local governments are better protectors of liberty"); Merritt, *supra* note 306, at 3-7 (discussing Madison's and Hamilton's justification for federalism on the grounds of checking abuses of governmental power); Rapaczynski, *supra* note 314, at 380-95 (deeming the prevention of tyranny as "[p]erhaps the most frequently mentioned function of the federal system").

316. See, e.g., *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (recognizing that "[s]tates may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"); *Gregory*, 501 U.S. at 458 (arguing that federalism "allows for more innovation and experimentation in government"); *FERC v. Mississippi*, 456 U.S. 742, 787-88 (1982) (O'Connor, J., dissenting in part) ("[T]he Court's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas."); *Roth v. United States*, 354 U.S. 476, 505-06 (1957) (Harlan, J., dissenting) ("It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (reasoning that "[i]t is one of the happy incidents of the federal system that a single courageous State may,

states and localities can experiment with different approaches to maximize the opportunities for success. Lastly, and closely related to the value of promoting states as laboratories for experimentation, is the value of creating communities of shared interests.<sup>317</sup> Allowing experimentation at the state and local level will also allow cultural and local diversity that can benefit any number of viewpoints.<sup>318</sup> Through the creation of communities of shared interests, people can choose to live in these communities. This allows maximization of choice and utility through competition and exit.<sup>319</sup>

To determine whether a matter properly falls within the power of the national government, one typically determines first whether

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if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"); SHAPIRO, *supra* note 27, at 87-88 (finding notable examples of the benefits of state experimentation); Adler & Kreimer, *supra* note 33, at 78-79 ("[I]t makes sense to create a mechanism by which to test novel policies on a subnational scale."); Fallon, *supra* note 23, at 440 (contending that "diversity of state and local governments permits experiment and competition"); Friedman, *supra* note 311, at 397-400 (arguing that the idea of experimentation is really better captured by the phrase of "innovation as an evolutionary process"); Jackson, *supra* note 24, at 2214 (including "providing opportunities for experiment and beneficial innovation" as a reason for federalism); McConnell, *supra* note 306, at 1498 (discussing support for the proposition that "state and local governmental units will have greater opportunity and incentive to pioneer useful changes"); Merritt, *supra* note 306, at 9 (stating that "[s]tate governments repeatedly have proved the truth of this statement by pioneering new social and economic programs").

317. See Chemerinsky, *supra* note 33, at 536 ("Safeguarding community decisionmaking enhances diversity, as groups are allowed to decide their own nature and composition. Communities can define themselves to best serve the needs of their members."); Fallon, *supra* note 23, at 440 ("[F]ederalism fosters connection and community."); Friedman, *supra* note 311, at 389-94 (noting that public participation at the local level discourages elitism); Jackson, *supra* note 24, at 2213-14 (listing "maintaining opportunities for creation or preservation of diverse cultures" as a reason for state autonomy); Merritt, *supra* note 306, at 8-9 ("Acting through their state and local governments, citizens in each region create the type of social and political climate they prefer."). For an argument that the same result could still be achieved by a national government, see Arthur Macmahon, *The Problems of Federalism: A Survey*, in *FEDERALISM: MATURE AND EMERGENT* 11 (Arthur Macmahon ed., 1962). Jackson distinguishes this value as follows: "The theme of preserving diversity could be viewed as subsumed in the 'preference maximizing' possibilities of local competition and exit, but captures more the possibility of group culture and the capacity of legal institutions to form preferences as well as to satisfy existing preferences." Jackson, *supra* note 24, at 2214 n.156.

318. See Gregory, 501 U.S. at 458 ("This federalist structure ... assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society ....").

319. See *id.*; Adler & Kreimer, *supra* note 33, at 78 ("[I]f separate governments defined by geographic region exist, then citizens will migrate to different regions depending on, say, their needs, interests, or ethical views ...."); McConnell, *supra* note 306, at 1503 (describing the idea of "[l]iberty through mobility").

the states should have control. If that question is answered with a “no,” then the matter is thought to be properly within the national power. Professor Barry Friedman, however, has properly noted that such an inquiry is only “half of the story about valuing federalism.”<sup>320</sup> He cites four separate values for evaluating the need for national authority, all of which often arise in analyses of the values for evaluating the need for state or local authority, but only one of which is applicable to national authority over public schools.<sup>321</sup> That is, when uniformity is needed, national power is necessary.<sup>322</sup>

At one level, asking whether federalism is the reason for allowing local control in school desegregation jurisprudence is troublesome. The Court has, at times, emphasized the need for local control on grounds traditionally associated with federalism.<sup>323</sup> On another

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320. Friedman, *supra* note 311, at 405.

321. The three other values are commonly described as public goods, externalities, and race to the bottom. *See id.* at 405-09. The national government, for example, has authority over public goods such as the military, interstate highways, and lighthouses because states lack incentives to fund such costly measures. *See SHAPIRO, supra* note 27, at 39-40 (providing the examples of lighthouses and nuclear deterrent); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1469 (1995) (“The most obvious role for the national government is to provide public goods that the states are unlikely to provide through ordinary cooperation: a unified foreign policy, the interstate highway system, and the hydrogen bomb.”); Friedman, *supra* note 311, at 406 (“Public goods are those that would not be provided if it were not for the existence of some central authority to fund them.”). Environmental laws are the common example of externalities, which is the idea that weak environmental laws may entail no harm within the state, but will export high costs outside the state. *See SHAPIRO, supra* note 27, at 40-41 (giving the examples of environmental laws and corporate governance). The race to the bottom concept is closely related to that of externalities. National authority is needed when states will benefit from offering the weakest level of protection, which can occur with labor and employment laws. *See Friedman, supra* note 311, at 408 (“The theory of the race to the bottom is that in enacting otherwise sensible regulations, states may disadvantage themselves by raising the cost of doing business in the state, thus driving the business to states that regulate less rigorously.”); *see also* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271, 274 (1997) (examining empirical evidence on environmental law’s race to the bottom). These three values—public goods, externalities, and race to the bottom—are rarely implicated by public schools. After all, public schools provide benefits to individual communities, and the benefits usually provide adequate incentives for local and state support. No externalities exist that would support national authority. To the extent that a state or locality decides not to support education, then the costs are borne by that state or locality. Thus, no race to the bottom with respect to education is likely to occur.

322. *See SHAPIRO, supra* note 27, at 44-49 (outlining economic arguments in favor of centralized government); Friedman, *supra* note 311, at 408-09 (noting that a need for uniformity may necessitate national, as apposed to local, power).

323. *See supra* notes 205-11 and accompanying text.

level, however, the Court could be employing federalist rhetoric to reach a desired result. In addition, guessing why the judiciary reaches a particular result surely cannot be reduced to a single concept.

Yet, one cannot disconnect the idea of local control from federalism. Local control, at its core, prefers state and local authority over federal intervention; and this approach is, by definition, federalism at work. In addition, the American history of education rests on a solid foundation of "local control" of schools.<sup>324</sup> Schools are typically governed not by the national government, but by state and, particularly for primary and secondary schools, local governments.<sup>325</sup> Granted, public schools are not operated entirely independently of the national government, but local and state governance still predominates in theory and practice.<sup>326</sup>

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324. See generally Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?*, 14 HARV. J.L. & PUB. POL'Y 447, 447-49 (1991) (providing a historical account of local control).

325. Some schools even experimented with "community control," with mixed results. See Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1334 n.368 (1988) (discussing the community control movement). Local control over primary and secondary education is also fundamentally constrained by many state laws. This includes attendance laws, curriculum standards, approved textbook lists, teacher certification rules, diploma standards, financing formulas, and accountability measures such as high-stakes tests. See generally Faber, *supra* note 324, at 449-50, 456 (discussing the prevalence of such laws and concluding that "there has been an increase in both state and national control of our schools, and a corresponding decrease in local control, during the past forty years"); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266-72 (1999) (reviewing school finance litigation); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 457-71 (1999) (analyzing legislative responses to school finance litigation). Even charter schools, which are designed to avoid state regulations, must comply with a wide variety of state rules. See generally Parker, *supra* note 44, at 574-81 (discussing many of the legal rules imposed on charter schools). For an analysis of how best to protect local governments from state governments, see Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627 (2001).

326. For example, substantial federal money supports public schools, and obligations attach to this money. Beginning with the Civil War, the federal government has offered federal monies in exchange for implementing specified federal policy. Thus, at the higher education level, after the Civil War, federal legislation funded engineering and agricultural programs at public colleges and the establishment of "Negro" colleges. See ORFIELD, *supra* note 89, at 10; Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1316 (2002). Prominent federal funding of programs at primary and secondary schools includes the federal school lunch program, Richard B. Russell National School Lunch Act, 42 U.S.C. §§ 1751-1769 (2000), the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. §§ 2701-3386 (2000), which helps fund poor schools, and the Head Start program, 42 U.S.C. §§ 9831-9852 (2000). The national government has also established educational policy more directly, particularly

Three of the four values associated with state and local authority support school desegregation's allowance of local control over the remedial process. First, the value of public participation in democracy is furthered by state and local power over desegregating schools. If the alternative is authority by non-elected, life-tenured judges, then the opportunity for participation will only exist within the confines of party participation in litigation. Affording authority to officials in the state and local executive and legislative branches will further democratic ideals by increasing the number of voices heard in the remedial process and by holding the decision makers accountable through any attending electoral process. Second, promoting state and local officials' authority will decrease the chances for tyranny because the checks on the abuses of judicial power—appellate review and impeachment—are significantly weaker than that afforded by the electoral process.

Third, local control furthers experimentation in school desegregation more than exclusive judicial control. Given educators' superior knowledge of education, promoting local control has the strong possibility of increasing experimentation. While judges could certainly draw upon the educators' knowledge in any number of ways, imagining judges taking responsibility for educational innovation in school desegregation is difficult. Educators, on the other hand, likely would have the necessary confidence and incentive to undertake experimentation. Further, because school desegregation will vary by locality—local conditions will affect every aspect of school desegregation—then experimentation is of high value and a national standard is of low value. In sum, not only is school desegregation's promotion of local control faithful to the

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through the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1491 (2000), and Title IX, 20 U.S.C. §§ 1681-1688 (2000). No national curriculum or national high-stakes tests exist. The National Assessment of Education Progress tests, given for math, reading, and science, in the fourth, eighth, and twelfth grades, are voluntary and are used only for research purposes. See Jennifer C. Bracer, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1122 n.31 (2002). Yet, school districts are now required to improve their outcomes on state-selected tests or face severe penalties under the No Child Left Behind Act of 2001, now part of ESEA. See Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.). Some schools are claiming that the Act will result in a national curriculum, particularly in reading. See Kathleen Kennedy Manzo & David J. Hoff, *Federal Influence Over Curriculum Exhibits Growth*, EDUC. WK., Feb. 5, 2003, at 1, 10.

American tradition of school governance, but it is consistent with three values supporting state and local authority.

Left open is the impact of the fourth value associated with state and local authority—creating communities of shared interest—and the value supporting federal authority over schools—establishing a national standard. The two are obviously related. When is it acceptable for Americans to form their own unique communities, or when must they live by the same standard? Federalism itself provides no answer to these two questions, for they relate not to *who* should be the decision maker but *what* should be the available decisions. The questions depend on policy unrelated to federalism.

For example, *Brown I* established a national standard because the Court had determined that the Equal Protection Clause must outlaw *de jure* segregation.<sup>327</sup> *Green* and *Swann* evidenced a judicial conclusion that the local experimentation with remedying school desegregation had gone astray because of the continued segregation.<sup>328</sup> Only then was a national rule again necessary. None of these cases asserted a need to usurp state and local authority in every instance, but only when the Equal Protection Clause required a uniform standard. Thus, the national rule in *Brown I* was the end to *de jure* segregation, and the national value in *Green* and *Swann* was the end to continued segregation. These Equal Protection Clause values, unrelated to federalism, were enough to overcome the American tradition of local control.

Despite these exceptions, however, federalism provides a solid foundation for the promotion of local control in school desegregation. When a uniform standard is necessary, the national judiciary will assert its authority. More typically, the values supporting state and local authority are found in the school desegregation setting.

Many will resist making a connection between school desegregation and federalism. After all, school desegregation at its core rejected a state's right to choose a school system that segregates;<sup>329</sup> and the substantive right at issue, the Equal Protection Clause, is a prohibition aimed at states.<sup>330</sup> Yet, the idea and implementation

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327. See *supra* Part II.A.

328. See *supra* Part II.B.

329. See generally *Brown I*, 347 U.S. 483 (1954).

330. U.S. CONST. amend. XIV, § 1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").

of local control are too closely aligned to the theory of federalism to make any other conclusion. Close national oversight of local schools is too antithetical to the American tradition of school governance, even if that tradition is far from complete today,<sup>331</sup> to isolate the idea of local control from federalism.

To the extent federalism justifies local control, federalism should support *Grutter's* idea of deference. The similarities in outcome—federal courts crafting state and local authority when educational policy is challenged under the Equal Protection Clause<sup>332</sup>—equally support the three values associated with state and local authority.<sup>333</sup> When the choice is between federal court oversight and local or state authority over public schools, then the latter is clearly more consistent with promoting public participation in democracy, preventing tyranny, and encouraging experimentation. Further, in both affirmative action and school desegregation, federalism itself leaves unanswered when a uniform standard is needed and deference should be disregarded. For example, in *Gratz*, the Court declared the University of Michigan undergraduate admissions program unconstitutional on grounds independent of federalism.<sup>334</sup>

While affirmative action and school desegregation are very similar,<sup>335</sup> differences exist, and these differences may indicate that

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331. See *supra* note 326 and accompanying text.

332. See *supra* notes 263-76 and accompanying text.

333. See *supra* notes 314-19, 324-28 and accompanying text.

334. See *Gratz v. Bollinger*, 123 S. Ct. 2411, 2427-28 (2003) (holding that a policy giving an advantage to every underrepresented minority applicant to the College of Literature, Science, and the Arts was a quota and thus not narrowly tailored).

335. Affirmative action and school desegregation share fundamental similarities. Both involve public schools and the Equal Protection Clause, and both concern exceptions to the Equal Protection Clause's prohibition against racial classification of students. School desegregation remedies involve the exception of remedying past discrimination. See *supra* Part III. Affirmative action plans are defended on diversity grounds. See *supra* note 41 and accompanying text. Thus, the two are attempting to use race in ways allowed by the Equal Protection Clause. Furthermore, because both forms of litigation have been filed against public schools, they raise federalism concerns because a federal court is potentially overruling the preferences of state and local governments. Finally, the two concern public K-12 schools and higher education governed by state and local governments. While school desegregation has focused on primary and secondary education, public colleges and universities have also been subject to desegregation orders. See, e.g., *United States v. Fordice*, 505 U.S. 717, 729 (1992) (holding inadequate the remedy for Mississippi's higher education system); *Knight v. Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995) (outlining remedial order for Alabama higher education desegregation lawsuit); Settlement Agreement, Ayers

federalism should apply to school desegregation, but not to affirmative action. If this were so, then *Grutter's* use of deference could not be justified on the grounds of federalism, although local control in school desegregation could be supported by federalism.

Two primary differences exist between affirmative action and school desegregation, and both concern the scope of the remedy. First, school desegregation litigation since the 1960s has almost always been either certified as a class action or treated as a class action. Thus, any relief will have system-wide implications and will not be confined to an individual student. By contrast, some, but not all, affirmative action cases were filed as individual suits.<sup>336</sup> Yet, even individual suits have system-wide implications. In reaching the merits of a claim that a student was unlawfully denied admission based on her race or ethnicity, the court will necessarily have to determine the constitutionality of the entire program. The remedy may concern whether an individual should attend a particular school, but the remedy will not end there. A ruling on the constitutionality of the challenged program will have system-wide effects because that program will have to be changed not just for the individual plaintiffs, but for everyone. That some affirmative action cases are litigated as individual suits should not diminish the potential reach of any injunction or declaratory judgment on the constitutionality of the program, nor the opportunities for intruding upon state and local authority.

Further procedural posture did not change federalism's role in school desegregation. In the late 1950s, most school desegregation

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v. Musgrove (N.D. Miss. Mar. 29, 2001) (No. 4:75 CV9-B-D) (settlement agreement for desegregation of Mississippi's public colleges and universities), available at <http://www.msnd.uscourts.gov/ayerssa.pdf>; Consent Decree, *Geier v. Sundquist* (M.D. Tenn. Jan. 4, 2001) (Civil Action No. 5077) (consent decree for desegregation of Tennessee's public colleges and universities), available at <http://www.usdoj.gov/crt/edo/documents/geiersettle.htm>. Likewise, affirmative action challenges have been filed against both K-12 and higher education. See, e.g., *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001); *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 126-27 (4th Cir. 1999); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

336. For suits filed by individual students, see, for example, *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 741 (2d Cir. 2000); *Eisenberg*, 197 F.3d at 125; *Comfort v. Lynn Sch. Comm.*, 150 F. Supp. 2d 285, 288 (D. Mass. 2001). For suits filed by multiple students, see, for example, *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003); *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 249 n.3 (D. Mass. 1999).

lawsuits were limited to individual claims because of procedural limitations in the pupil enrollment acts passed after *Brown II*.<sup>337</sup> The suits, for the most part, solely concerned the application of the race-neutral statutes to individual students and had limited potential for a system-wide impact.<sup>338</sup> Yet, federalism still had a significant impact in post-*Brown II* litigation.<sup>339</sup> The difference in procedural posture in some affirmative action cases, therefore, should not affect the applicability of federalism.

Second, perhaps the best reason why federalism should apply to school desegregation, but not to affirmative action, is the broad scope of the school desegregation remedy and the resulting impact on federalism values. In dismantling *de jure* segregation, the judiciary involves itself in *all* facets of school administration.<sup>340</sup> This strongly suggests a need for sensitivity to matters of local control so that in the name of imposing a uniform standard courts do not completely eradicate public participation in democracy, the opportunity for experimentation, and protection from tyranny. In addition, jurisdiction continues throughout the desegregation process,<sup>341</sup> increasing the opportunities for treading on the values supporting local control. Thus, while the Equal Protection Clause may compel a national standard for school desegregation, in implementing that standard courts may need to, as much as possible, preserve the values supporting state and local control. In affirmative action cases, on the other hand, the remedy is relatively contained. Only admission practices are subject to court order, and judicial involvement in implementing the remedy is relatively brief.

Yet limiting federalism to school desegregation because of the scope of its remedy ultimately proves unsatisfactory. First, it fails to explain the inconsistent use of federalism within school desegregation. *Green* and *Swann* were very intrusive on state and local authority over schools; yet federalism values received only lip service.<sup>342</sup> By contrast, the remedies sought immediately after *Brown II* only involved the admission of individual children, like

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337. See Note, *supra* note 93, at 1457; *supra* notes 93-94, 98-99 and accompanying text.

338. See *supra* notes 115-18 and accompanying text.

339. See *supra* Part II.C-E.

340. See *supra* notes 136-40 and accompanying text.

341. See *Brown II*, 349 U.S. 294, 301 (1955).

342. See *supra* Part II.B; *supra* notes 220-35 and accompanying text.

current affirmative action litigation,<sup>343</sup> but federalism received a great deal of attention.<sup>344</sup> Second, even though school desegregation remedies reach many facets of schooling, affirmative action remedies have similar potential. Now that diversity *can be* an adequate justification for race-conscious admissions programs, a strong possibility exists for diversity to extend to other aspects of school administration, including scholarships and hiring. This raises the possibility of further litigation.

Third, even if affirmative action presents fewer opportunities for federal courts to trample on state and local autonomy than school desegregation, those opportunities still exist. The *number* of opportunities should not affect the need to respect state and local authority, only the *nature* of the opportunities should. And the nature of the opportunities in school desegregation shares much in common with the opportunities in affirmative action that make federalism applicable. In both, a federal court is involving itself in educational policy at a public school, a matter traditionally outside a court's authority.

In sum, the difference in the scope of the affirmative action remedy and school desegregation remedy cannot adequately explain why federalism would apply in school desegregation but not affirmative action. To the extent values indicate state and local authority—promoting public participation in democracy, allowing experimentation, and preventing tyranny—the values should have equal applicability to all Equal Protection Clause challenges to public schools. No meaningful difference between affirmative action and school desegregation exists with respect to the values of state and local authority.

It is too soon to evaluate definitively whether deference will also become part of the "quiet fronts" of federalism,<sup>345</sup> as has been true for school desegregation, but *Grutter's* idea of deference may have some staying power. In other substantive areas, the Court has also evidenced respect for state and local governmental officials,<sup>346</sup> including police misconduct and prison cases<sup>347</sup> and voting rights

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343. See *supra* notes 115-18, 336.

344. See *supra* Part II.A; *supra* notes 216-19 and accompanying text.

345. See *supra* note 23 and accompanying text.

346. See *supra* note 78 (noting other special constitutional rules for schools).

347. See *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) ("[C]ourts cannot assume that state

litigation.<sup>348</sup> Thus, *Grutter's* deference analysis *may* become one

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legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system ...."); *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) ("[A]ppropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief."); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974) ("[W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities."), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

348. In seven voting rights cases, the Court recently evaluated the constitutionality of majority-minority voting districts devised by state legislatures. *See, e.g., Easley v. Cromartie*, 532 U.S. 234 (2001); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996) [hereinafter *Shaw II*]; *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw I*, 509 U.S. 630 (1993). The majority and dissenting opinions in these cases largely agreed that state legislatures should have some degree of discretion in devising districting lines. *See Vera*, 517 U.S. at 977 (O'Connor, J., plurality opinion) ("We also reaffirm that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests."); *id.* at 992 (O'Connor, J., concurring) ("In addition, fundamental concerns of federalism mandate that States be given some leeway so that they are not 'trapped between the competing hazards of liability.'") (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring)); *Shaw II*, 517 U.S. at 917 n.9 ("States retain broad discretion in drawing districts to comply with the mandate of § 2."); *Miller*, 515 U.S. at 915 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); *id.* at 934-35 (Ginsburg, J., dissenting) ("[W]e agree that federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures.").

Members of the Court have, however, disagreed on whether the majority actually afforded any discretion to the state legislatures. *See Vera*, 517 U.S. at 1036-37 (Stevens, J., dissenting) ("In light of this Court's recent work extolling the importance of state sovereignty in our federal scheme ... I would have expected the Court's sensibilities to steer a course rather more deferential to the States than the one that it charts with its decisions today."); *Shaw II*, 517 U.S. at 949-50 (Stevens, J., dissenting) ("[T]he Court has fashioned ... a pure judicial invention that unfairly deprives the legislature of a sovereign State of its traditional discretion in determining the boundaries of its electoral districts.... Such a proposition confounds basic principles of federalism ....") (footnote omitted). After all, the Court held unconstitutional the challenged districts in all but one case. *See Easley*, 532 U.S. at 237 (holding that the district court was clearly erroneous in concluding that race was a predominant factor in devising the district and that strict scrutiny therefore was not applicable).

Voting rights defendants also have the right to propose first a remedy to any unconstitutional voting practice, and that remedy must be accepted if it is constitutional. *See White v. Weiser*, 412 U.S. 783, 794-95 (1973) ("In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'") (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)); *Scott v. Germano*, 381 U.S. 407, 409-10 (1965) (per curiam) (holding that federal district courts should defer to state courts and state legislatures before drafting their own apportionment plans); *Scranton v. Drew*, 379 U.S. 40, 41-42 (1964) (per curiam) (vacating

constant and forceful enough to be an example of federalism. In the meantime one can evaluate whether deference *should* impact affirmative action jurisprudence by exploring what local control, a related concept, has meant for school desegregation jurisprudence.

### *B. Desegregation's Lessons for Affirmative Action*

School desegregation litigation provides almost fifty years worth of lessons on interjecting federalist principles into the Equal Protection Clause. Given the similarities between local control and deference,<sup>349</sup> school desegregation is an excellent vehicle for evaluating, from the standpoint of federalism, the claim of the dissenting Justices in *Grutter* that deference is a dangerous approach to strict scrutiny.<sup>350</sup> School desegregation evidences two strong reasons to limit the impact of federalism on the Equal Protection Clause: (1) federalism is easy to manipulate to reach a desired result, and (2) substantive rights end up varying by locality. Yet, school desegregation ultimately evidences strong structural support for *Grutter's* idea of deference. The judiciary's limited competency in academic affairs, which includes most race-conscious programs based on diversity, substantiates promoting deference.

#### *1. Flexibility*

School desegregation first teaches affirmative action that the importance of federalism will fluctuate over time for reasons unrelated to federalism. The idea of local control mattered in school desegregation jurisprudence, but it had no impact at critical points when the judiciary adopted a national standard.<sup>351</sup> As discussed previously, local control was of no importance when the judiciary believed that states should not be able to choose to segregate students by their race (*Brown I*),<sup>352</sup> that actual integration should

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district court judgment in light of deference to state legislature's attempts to correct reapportionment plan); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.").

349. See *supra* Part III.

350. See *supra* notes 2-4 and accompanying text.

351. See *supra* Part II.E.

352. 347 U.S. 483 (1954).

result when *de jure* segregation ends (*Green and Swann*),<sup>353</sup> and that the judiciary should have strong enforcement powers (*Milliken II, Jenkins II*).<sup>354</sup> The same fluidity likely will be true with the role of deference in affirmative action jurisprudence. After all, deference had great force in *Grutter*, but could not overcome the majority's conclusion in *Gratz* that the program was a quota and therefore unconstitutional.<sup>355</sup>

The contrast appears in other education cases as well. In *Sweatt v. Painter*<sup>356</sup> and *McLaurin v. Oklahoma State Regents for Higher Education*,<sup>357</sup> two higher education desegregation cases decided before *Brown I*, the Court held two graduate programs unconstitutional for their failure to be "separate and equal" and had no concern for local control, but had much to say about how the Court believed education occurs.<sup>358</sup> Yet, in *San Antonio Independent School District v. Rodriguez*, the Court rejected a constitutional challenge to the State of Texas' K-12 school financing system and emphasized the importance of local control at length.<sup>359</sup>

353. See *supra* Part II.B.

354. See *supra* notes 173-200, 236 and accompanying text.

355. See *supra* Part I. Relatedly, the idea of deference to administrators had no impact in the opinion holding Virginia's all-male military college, Virginia Military Institute, unconstitutional. See *United States v. Virginia*, 518 U.S. 515 (1996). The Court gave no credence to the defendants' arguments that admittance of women would destroy the very foundation of the education offered. *Id.* at 534-39.

356. 339 U.S. 629 (1950).

357. 339 U.S. 637 (1950).

358. In *Sweatt*, the opinion ordered the admittance of Herman Marion Sweatt, who had been denied admission to the University of Texas School of Law solely because of his race, and at no point discussed local control or federalism. See *Sweatt*, 339 U.S. at 631, 636. The same was true in *McLaurin*, where the Court ordered equal treatment of G.W. McLaurin in the University of Oklahoma Graduate School. See *McLaurin*, 339 U.S. at 641-42. For an analysis of the Court's decision in *Sweatt*, see Heise, *supra* note 326, at 1314. Heise noted that in *Sweatt*:

[d]elving to a level of nuance informed by the Justices' first-hand knowledge of and experience with law schools and legal education, as well as exceptionally detailed amicus briefs, the Court's level and rigor of scrutiny rendered the *Plessy* doctrine little more than a feeble shell, at least as it applied to higher education.

*Id.* (footnotes omitted). Heise continued that, "[t]he *McLaurin* opinion acknowledged that a truly broad educational experience involves much more than the bricks-and-mortar issues associated with physical facilities. Rather, the Court noted that critical educational benefits flow from the free and unfettered exchange of ideas and interaction among students." *Id.* at 1315 (footnotes omitted).

359. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) ("[A]ppellees would

Relatedly, the dissenting justices in *Grutter*—Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas—have advocated limiting the judiciary's intervention in school desegregation because it interfered with local control over schools.<sup>360</sup> Yet, in the affirmative action arena these four Justices have attempted to curtail that local control by arguing that school officials deserve no deference in their race-conscious admissions programs.<sup>361</sup> Yet, *Grutter's* use of deference and school desegregation's promotion of

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have the Court intrude in an area in which it has traditionally deferred to state legislatures.”); *id.* at 42 (“[T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.”); *id.* at 43 (“In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.”).

360. The Supreme Court has decided three school desegregation cases since 1990, and the dissenting Justices in *Grutter* were in the majority in all three. See *Jenkins III*, 515 U.S. 70, 72 (1995) (Rehnquist, C.J., with Kennedy, O’Connor, Scalia, and Thomas, JJ., majority opinion); *Freeman v. Pitts*, 503 U.S. 467, 470 (1992) (Kennedy, J., joined by Rehnquist, C.J., and White, Scalia, and Souter, JJ., majority opinion, with Thomas, J., taking no part in the case); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 239 (1991) (Rehnquist, C.J., joined by White, O’Connor, Scalia, and Kennedy, JJ., majority opinion, with Souter, J., taking no part in the case). All three opinions emphasize the importance of local control and limiting judicial involvement in local schools. See *supra* Part II.D.

Two Justices advocated limited judicial intervention in school desegregation litigation in concurring opinions in *Jenkins III*. Justice Thomas argued that jurisdiction should end with the pronouncement of the school desegregation remedy because continued jurisdiction “inject[s] the judiciary into the day-to-day management of institutions and local policies—a function that lies outside of our Article III competence.” *Jenkins III*, 515 U.S. at 135 (Thomas, J., concurring); see also *Lewis v. Casey*, 518 U.S. 343, 392 (1996) (Thomas, J., concurring) (noting that the injunction requiring system-wide changes at Arizona prisons “subjected the entire system to the requirements of the decree and to ongoing federal supervision”); *Jenkins III*, 515 U.S. at 131 (Thomas, J., concurring) (“Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems.”). Justice Thomas ended his opinion in *Jenkins III* as follows: “At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions.” *Id.* at 138 (Thomas, J., concurring).

361. Further, Chief Justice Rehnquist and Justices Scalia and Thomas would limit the available choices to educators by not allowing diversity to ever be a compelling governmental interest. See *supra* note 72. This argument restricts local control, but the conclusion is entirely consistent with possible interpretations of federalism. That is, the federal judiciary has primary responsibility for interpreting the U.S. Constitution, see *supra* note 216 and accompanying text, and disallowing diversity as a compelling governmental interest can be defined as solely a question of legal interpretation.

local control share much in common. The value of consistency, which the Supreme Court has strongly advocated of late in its Equal Protection jurisprudence,<sup>362</sup> would counsel support of both deference and local control.<sup>363</sup>

Standing alone, federalist principles are rarely determinative because the judiciary can determine that the nonfederal approach is unlawful (a decision usually based solely on Equal Protection Clause jurisprudence), resulting in federal intervention.<sup>364</sup> State and local control will receive minor respect, if at all, once this decision is reached.<sup>365</sup> School desegregation's experience with local control thus indicates that federalism can be manipulated to reach a desired result.

## 2. Varying Rights

School desegregation also teaches that interjecting federalist concerns into Equal Protection jurisprudence likely will result in rights varying by locality. That is, by allowing defendants in school desegregation to have strong control over the remedial process and by potentially affording defendants in affirmative action litigation deference in their racial programs, different students will be offered

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362. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223-24 (1995) (O'Connor, J., majority opinion) (concluding that the Court "ha[s] established three general propositions with respect to governmental racial classifications": skepticism, consistency, and congruence). The Court has insisted on consistency in its Equal Protection jurisprudence on a number of fronts. Thus, "benign" discrimination is judged by the same "fatal in fact" strict scrutiny standard as invidious discrimination. *See id.* at 225-26; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., plurality opinion); *id.* at 520 (Scalia, J., concurring). Congress is subject to strict scrutiny, as are states and localities when passing race-conscious public contracting legislation. *See Adarand*, 515 U.S. at 224, 227. Further, constitutional challenges to the construction of voting districts are all judged by strict scrutiny, regardless of whether the district is majority white or majority minority. *See Shaw I*, 509 U.S. 630, 650-51 (1993).

363. Justice O'Connor, in fact, has been largely consistent. In both affirmative action and school desegregation, she has counseled a limit to judicial intervention. *See, e.g., Jenkins III*, 515 U.S. at 112 (O'Connor, J., concurring) ("Those myriad factors are not readily corrected by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice ...."); *supra* notes 40-71 and accompanying text (detailing Justice O'Connor's majority opinion in *Grutter*).

364. *See supra* Part IV.A.

365. *See supra* Part IV.A.

different programs.<sup>366</sup> This result is directly related to one federalism justification for interjecting deference and local control in Equal Protection Clause jurisprudence—the need for promoting experimentation.<sup>367</sup>

For example, in some schools undergoing desegregation, the defendants have proposed extensive compensatory education programs which the judiciary has approved,<sup>368</sup> while other school districts proposed no or only minor compensatory education programs and no court order compelled such programs.<sup>369</sup> Imagining that the effects of *de jure* segregation on education are so different as to justify opposite remedial approaches is hard. Surely, the vast majority of experiences with *de jure* segregation, if not all, impacted learning; yet, some remedies pay only minor attention to such concerns. The difference in remedy afforded to students—whether pursuant to court order they ride a bus, have transfer choices, attend a reading program, or have specially trained teachers—is more directly tied to which particular programs are supported by the defendants (and less typically by the judge) than to the particular effects of *de jure* segregation. *De jure* segregation certainly has different contours in different parts of the country and may vary from rural to urban school settings. The great variety of school desegregation remedies, however, suggest an entirely different matter. Some students attending desegregated school systems get extensive compensatory education programs, others get long bus rides, while groups of students may have choices in what school they attend.<sup>370</sup> At the local level, in the way individual students are treated, school desegregation means very different

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366. See generally Parker, *supra* note 189, at 485-501 (analyzing the very different remedial decrees of Kansas City, Missouri and Kansas City, Kansas).

367. See *supra* notes 316-19 and accompanying text.

368. See, e.g., Johnson v. Bd. of Educ., 188 F. Supp. 2d 944, 945, 947-50 (C.D. Ill. 2002) (Champaign Unit School District #4); Brinkman v. Gilligan, 85 F. Supp. 2d 761, 784 (S.D. Ohio 1999) (Dayton Board of Education); Jenkins v. Sch. Dist., 73 F. Supp. 2d 1058, 1059 (W.D. Mo. 1999) (Kansas City, Missouri), *rev'd*, 216 F.3d 361 (3d Cir. 2000).

369. See, e.g., Mills v. Freeman, 942 F. Supp. 1449, 1452 (N.D. Ga. 1996) (DeKalb County School System); Arthur v. Nyquist, 904 F. Supp. 112, 118-19 (W.D.N.Y. 1995) (Buffalo School System); Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341, 1419 (D.S.C. 1995), *rev'd in part on other grounds*, 84 F.3d 707 (4th Cir. 1996); Stell v. Bd. of Pub. Educ., 860 F. Supp. 1563, 1582-83 (S.D. Ga. 1994) (Savannah-Chatham County Schools).

370. See *supra* Part II.

things to different students. Granting defendants significant control over the desegregation process ensures a variety of remedial approaches.

In *Grutter*, Justice O'Connor wrote approvingly of local experimentation on admissions programs designed to increase minority enrollment in different ways.<sup>371</sup> She even quoted one of the Court's more recent federalism opinions, *United States v. Lopez*, on the benefit of allowing experimentation.<sup>372</sup>

The troubling part of allowing experimentation is evidenced by the aftermath of *Brown II*.<sup>373</sup> School officials then were able to define the school desegregation right so narrowly—with almost no true enforcement of even that narrow definition of the right—that plaintiffs were denied the promise of their constitutional rights. With federalism impacting Equal Protection rights, schools have an opportunity to weaken constitutional rights.

### 3. A Better Way?

That federalism may come and go as a value in affirmative action jurisprudence, as it has in school desegregation, and that it may result in different rights to different students, indicates a major weakness in *Grutter*'s idea of affording educators deference when judging their race-conscious activity. A constancy in rights is

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371. Justice O'Connor wrote for the majority:

Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.

*Grutter v. Bollinger*, 123 S. Ct. 2325, 2346 (2003).

372. See *id.* ("The States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.") (alteration in original) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). Justice Kennedy countered in his dissenting opinion in *Grutter*: "By deferring to the law schools' choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration." *Id.* at 2373 (Kennedy, J., dissenting); *id.* at 2374 (Kennedy, J., dissenting) ("If universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review.").

373. See *supra* Part II.A.

paramount to the Equal Protection Clause, and the role of federalism indicates a lack of predictability in Equal Protection Clause jurisprudence.

Left open is the question of whether affording no deference is a better approach. School desegregation again is a useful reference point. American jurisprudence indicates that strong judicial involvement in educational affairs is rarely a good thing and the benefits of judicial involvement depend on the characteristics of the individual judge and the impacted community.<sup>374</sup> Too many commentators have already recounted the judiciary's lack of competency in overseeing school desegregation for anyone readily to accept the idea of strong judicial oversight in affirmative action.<sup>375</sup> In other words, school desegregation strongly counsels allowing education officials some degree of deference when analyzing their affirmative action policies. Judges simply lack the institutional tools and knowledge to involve themselves closely in educational policy or to effectuate meaningful policy change.<sup>376</sup>

Also left open is the question of whether affirmative action litigation runs the risk of involving the judiciary in matters outside its competency, such as educational theory. Affirmative action is defended on the idea of diversity, which addresses educational policy: How do students best learn inside and outside the classroom?<sup>377</sup> Diversity can be a subterfuge for considering race for reasons completely unrelated to education, such as societal discrimination or discrimination by non-defendant actors.<sup>378</sup> If that

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374. See *supra* text accompanying notes 38-39, 130.

375. For a summary of the debate over the competency of federal judges in overseeing cases requiring changes in institutional policy, see Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1406-08 (1991). Justice Thomas has made a similar point. See *supra* note 360.

376. See *supra* Part IV.A.

377. See *supra* Part I.

378. Professor Sanford Levinson has declared that Justice Powell's analysis has led to a game of "Simon Says": "[I]f Simon says, 'Start talking about diversity—and downplay any talk about rectification of past social injustice,' then the conversation proceeds exactly in that direction." Levinson, *supra* note 274, at 578. This game of Simon Says, however, did not begin with Justice Powell. He got the idea from educators who filed an amicus brief describing their programs as being based on diversity. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17 (1978) (Powell, J.); see also 99 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1977 TERM SUPPLEMENT, pt. 2, at 695-738 (Philip B. Kurland & Gerhard Casper eds., 1978).

is true, then the judiciary would be within its institutional competency to determine that intent (although *Grutter* indicates this may be a futile inquiry). Otherwise, judges should be hesitant to second-guess educators on their educational policy.

This should not mean, however, a wholesale deference to defendants. In fact, the Court evinced a willingness to second-guess the judgment of educators in the University of Michigan undergraduate case, *Gratz v. Bollinger*.<sup>379</sup> Thus, deference is not a blank check; nor should it be. The Supreme Court has not excused itself entirely from judicial oversight, only showing a proper hesitation in delving too deeply into how students learn best, a matter best left for educators.

### CONCLUSION

The idea of courts affording education officials some degree of deference when judging their race-conscious activity is not nearly as novel as labeled by the dissenting Justices in *Grutter*. In fact, these same Justices have actively supported a very similar value in the context of school desegregation—local control. Thus, the Justices stretched the truth a bit in describing deference as a new approach.

On the question of whether the idea of deference is a good one, school desegregation provides good reasons to be hesitant. Affording defendants a role in constitutional analysis runs the serious risk that the defendants' authority will be afforded deference only when it supports the Court's desired outcome and that rights will vary significantly by geography, with the possibility of school officials skirting the judiciary's true principles. Yet, this Article ultimately comes to support *Grutter*'s notion of deference. The judiciary certainly has limited expertise in educational policy and limited success in affecting social change. Therefore, defendants

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(reprinting the amicus brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania, which discussed at length the importance of diversity). Thus, educators have claimed diversity before knowing that the Supreme Court would find the reason acceptable. Granted, the justification of diversity may not justify the actual practices of schools, but it is an *idea* at least originating in schools themselves, not the courts.

379. 123 S. Ct. 2411 (2003).

must have some authority as a practical matter, but the judiciary should be watchful in making sure that the authority stays within minimally prescribed constitutional limits.