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SCHOOL DESEGREGATION LAW IN THE 1980's: THE COURTS' ABANDONMENT OF BROWN V. BOARD OF EDUCATION

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I. THE PROBLEM

Pupil transportation remedies have increasingly become the end of desegregation litigation rather than the means of eliminating dual school systems that deprive black pupils of equal educational opportunity. In so shifting the emphasis of desegregation law, the courts have antagonized the other branches of government and the American people. ¹ Although courts are bound by the Constitution, 

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1. Congress has considered enacting legislation which would severely limit the jurisdiction of federal courts on issues such as school desegregation, abortion, and school prayer. Last year, for example, Congress considered enacting legislation which provides that no federal courts can order the transportation of a student to a public school unless the student is attending a particular school voluntarily or the requirement is 'reasonable.' The requirement would not be 'reasonable' under specified circumstances, including if the time consumed in traveling to and from school for a particular student exceeded thirty minutes a day or if the distance traveled to and from school exceeded 10 miles a day.

they should not be bound by misconstrued principles of constitutional law.

The recent Nashville, Tennessee desegregation lawsuit, *Kelley v. Metropolitan County Board of Education*, represents one signifi-

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65 JUDICATURE 199 (1981). Congress has also considered the enactment of appropriations restrictions that would prohibit the Department of Justice from instituting lawsuits that "require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home (except in special circumstances)." Amendment to H.R. 3462, 97th Cong., 1st Sess., 127 CONG. REC. H2796 (1981). In 1974, Congress enacted legislation which sought to restrict court-ordered busing. The enactment provided, in part, that "[n]o [federal] court . . . shall . . . order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence." 20 U.S.C. § 1714 (1976). The legislation had little effect, however, because Congress also recognized that courts could order mandatory pupil reassignments if "such remedies . . . are essential to correct particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (1976). As a matter of course, federal courts rarely bother to determine whether busing is essential before ordering it. In fact, no United States Supreme Court decision concerning busing has referred to the statute. *But see* Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *stay denied*, 523 F.2d 917 (1st Cir.), *aff'd*, 530 F.2d 401 (1st Cir. 1971), *cert. denied*, 426 U.S. 935 (1976), *reh. denied*, 429 U.S. 873 (1977).


A February 1981 Gallup poll reflects the popular opposition to forced busing. This "survey shows opinion among whites 4-to-1 in opposition to busing. Blacks, however, are 2-to-1 in favor of this means of achieving better racial balance in the schools." Gallup, *Whites, Blacks in Sharp Disagreement on Busing*, at 1 (Feb. 5, 1981).

cant strand in school desegregation cases. In May 1980, United States District Judge Thomas Wiseman ruled that factors other than racial composition could be considered in the modification of the preexisting busing order for Nashville. The United States Court of Appeals for the Sixth Circuit, however, overturned the Wiseman decision in July 1982. The appellate court held that modifications in desegregation remedies must reflect current black-white student population ratios, even if such an approach cannot effectively desegregate the schools and is educationally unsound. The United States Supreme Court declined to comment on the Sixth Circuit's approach, refusing to review the case in January 1983.


6. The Sixth Circuit narrowly defined "effectiveness" as the attainment of unitary status measured solely in terms of current black-white student population ratios. The court deemed irrelevant the impact of white flight on past desegregation orders and concerns over educational achievement. See infra notes 120-26; see also Devins, New Dilemmas and Opportunities in Integrating Schools, Educ. Week, Mar. 9, 1983, at 24; Devins, Did Cincinnati Court Err on Busing?, The Nashville Banner, Sept. 30, 1982.

7. See 103 S. Ct. 834 (1983). Commentators disagree on the significance that should be accorded Supreme Court denials of certiorari. In Darr v. Burford, Justice Frankfurter remarked: "The denial means that this Court has refused to take the case. It means nothing else." 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting). Other Justices, however, have recognized that certiorari denials may have some significance. For example, Justice Jackson commented:

The Court is not quite of one mind on the subject. Some say denial means nothing, others say it means nothing much. Realistically, the first position is untenable and the second is unintelligible. . . . True, neither those outside of the court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari. . . . Because no one knows all that a denial means, does it mean that it means nothing?

Brown v. Allen, 344 U.S. 443, 542 (1953) (Jackson, J., concurring). Justice Reed went one step further than Justice Jackson:

[We think] that where a record distinctly presenting a substantial federal constitutional question disentangled from problems of procedure is brought here by certiorari and denied, courts dealing with . . . the same issues presented in
The Nashville school board began implementing the Sixth Circuit's busing order in the fall of 1983. The effects of the appellate earlier applications for writs of certiorari to this court, should have the power to take the denial into consideration in determining their actions. Id. at 456. Although Justice Reed wrote the majority opinion in Brown v. Allen, Justice Frankfurter's view prevailed on the certiorari issue.

Social science evidence supports the conclusion that certiorari denials indicate the Justices' views on the merits of a case. S. Sidney Ulmer prepared a study in 1972 which indicated that between 1947 and 1956 eight of the eleven Justices surveyed voted against petitioners on the merits in cases in which they had voted to deny certiorari. Ulmer, The Decision to Grant Certiorari as an Indicator to Decision 'On the Merits', 4 POLICY 429 (1972); see also Ulmer, Voting Blocs and 'Access' to the Supreme Court: 1947-56 Terms, 16 JURIMETRICS J. 6 (1975). Another authority offers additional information:

Even more striking are the figures for the post-Douglas October 1978 Term. In that Term, the Court denied 3406 petitions for certiorari. During the 1978 term a total of 405 notations of dissent to the denial were made by eight of the nine Justices, and six of the Justices dissented between 23 and 131 times. Equally striking, eight of the Justices indicated on some occasions their position on the merits of the case.


In his comprehensive article on certiorari denials, Peter Linzer offers some additional insights:

That dissatisfaction with the decision below plays a part when certiorari is granted can hardly be doubted from the high percentage of reversals on the merits and from the findings of . . . Ulmer. . . . [W]hen two-thirds or more of the Justices agree to deny certiorari and another Justice dissents on the merits we can hardly believe that those in the majority—who are willing to consider the merits when they dissent—have suddenly shut their minds to all but neutral reasons. More likely, they have considered the arguments on the merits and found themselves not greatly dissatisfied. . . . Absence of dissatisfaction with the decision below may not be the same thing as agreement with it, and definitely is not agreement with its reasoning, but it surely shows a lack of strong belief that the decision below was wrong and that it was important enough to be reviewed by the Supreme Court.

Id. at 1302-03 (emphasis in original).

Estimating the significance that should be given to the Court's refusal to review Kelley is especially difficult. Certainly, the case raised a significant legal issue. See infra notes 133-47. A strong argument can be made that Justices either voted against granting certiorari because they agreed with the holding or were waiting for a clearer case to overturn. That none of the Justices dissented to the denial in Kelley while Justice Powell (joined by Justices Rehnquist and Stewart) filed a vigorous dissent to the Court's certiorari denial in a similar but weaker case, Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437 (1980), supports this interpretation. Yet, as demonstrated by Justice Frankfurter's discussion of the issues, these considerations are not legally significant. Instead, they merely place the Kelley case in a broader social context. See infra text accompanying notes 92-95.

8. On April 14, 1983, Judge Wiseman held a hearing on the Metropolitan County Board of Education's "Plan Submitted in Response to Opinion of the Court of Appeals for the Sixth Circuit." NAACP plaintiffs made no objection to this plan. On June 1, 1983, Judge
court's expansive holding and shortsighted reasoning, however, are not limited to Nashville. The Sixth Circuit's insistence on a continuing school board obligation to adjust the school system to reflect black-white student population ratios sounds a clear warning to school districts nationwide that they may expect judicial oversight. Worse than this continued judicial surveillance, Kelley suggests that school districts may have to abide by a failing desegregation agenda, which makes not only for bad education policy but also for bad constitutional law.

The late Alexander Bickel noted in his book, The Supreme Court and The Idea of Progress, that "no policy that a court can order, and a school board, a city or even the state has the capacity to put into effect, will in fact result in the foreseeable future in racially balanced public schools. Only a reordering of the environment . . . might have an appreciable impact." In the implementation of a general policy by current desegregation decisions, Professor Bickel thus would recognize a dangerous centralization of government in which court decisions—and hence the Court as an institution—could become irrelevant. This centralization is dangerous because the Court traditionally has been a dispute resolver that relies on others to successfully implement its decisions. Considering executive, legislative, and popular opposition to forced busing, the Court may find itself faced only with those who would inhibit, rather than implement, its decisions.10

Wiseman approved the board's plan in the form of a consent decree. Kelley v. Metropolitan County Bd. of Educ., Civ. No. 2904 mem. op. (M.D. Tenn. June 1, 1983). Judge Wiseman found that, under this plan, "every effort has been made to draw zones for schools which will approximate the 33% black student population presently existing in the school system, with a deviation of 15% on either side of this percentage." Id. at 2. Simultaneously, "the Board of Education retains the flexibility to make refinements where necessary in the plan to improve the integrity of zone lines, to improve feeder patterns, so long as these improvements do not adversely impact the pupil assignment plan." Id. at 3. To ensure good faith compliance with this plan, the district court required the School Board annually to report on the following: (1) the use of portable classrooms; (2) proposed construction; and (3) proposed zone changes. Id.


10. This opposition has many implications. First, congressional opposition to judicially created desegregation policies might result in a "constitutional crisis" if Congress enacts legislation which seeks to restrict the remedial authority of federal courts. Second, if Congress does so limit court jurisdiction, there would be inadequate redress for acts of intentional segregation. Third, Congress might seek to enact further legislation restricting courts'
This Article maintains that federal district court judges have the power to modify desegregation orders in light of a school system's experience in implementing a mandatory pupil transportation remedy. Racial discrimination is an egregious offense. Desegregation remedies, however, can do no more than correct substantive violations of the Constitution. These remedies cannot provide greater relief to a prevailing party than a restoration to the condition that would exist, absent an unconstitutional act. Judges should begin with the presumption that a school district would naturally be integrated absent illegal governmental fostered segregation. Consequently, the first remedy in a desegregation lawsuit should involve measures designed to achieve racial balance in the school system, such as mandatory pupil transportation and the restructuring of attendance zones. Yet, if a school board has been unable to desegregate its system through the good faith implementation of a mandatory desegregation plan over an extended period of time, the judiciary should permit that school system to modify its remedial obligations to accord with its experience in implementing that remedial plan.

Two considerations support such a conclusion. First, the failure of a school district's protracted good faith efforts to implement a mandatory pupil reassignment plan rebuts the presumption of a naturally integrated world. Additional mandatory remedies requiring black-white student population ratios would be overbroad because racial balance might not represent conditions that would have existed in the absence of unconstitutional segregation. Second, plaintiffs no longer have an interest in population-ratio remedies once the presumption of a naturally integrated world has been

power on social issues such as abortion and school prayer. Fourth, the executive branch might restrict its role as enforcer of desegregation law. In fact, some argue this has already occurred with the Reagan administration's refusal to pursue mandatory busing remedies. See supra note 1. Fifth, public dissatisfaction with current desegregation remedies might lead to disobeying court orders. Subsequent white, and black, flight and loss of community support would further deteriorate the public schools. For a more complete discussion of this issue, see supra note 1.


12. Under certain circumstances, voluntary desegregation techniques can satisfy these criteria. See infra notes 19, 162.
rebuted. Initially, plaintiffs can adduce social science evidence suggesting that forced busing remedies are the best solution to racial segregation in the public schools. Once mandatory reassignments have proved ineffective in addressing the problem of racial segregation, however, plaintiffs lose the empirical (or even normative) basis to justify a claim for population-ratio relief.

This Article consists of four sections. The first section provides an overview of Supreme Court decisions touching on the question of desegregation remedies. This section suggests that the Court’s conclusions on the scope of desegregation remedies necessarily comport with the Court’s belief in a naturally integrated or a naturally segregated world. The second section presents a case history of the Nashville desegregation lawsuit. This section particularly emphasizes the treatment given Supreme Court precedents by the district court and court of appeals in addressing the novel issue of whether and when a school district’s attempt to implement a school desegregation plan becomes legally significant. Further exploring this novel issue, the third section of this Article suggests that the implementation of a school desegregation plan satisfies the requirement of legal significance. Therefore, this section concludes that the Sixth Circuit wrongly applied Supreme Court precepts in its review of the district court opinion. The final section of this Article recommends the adoption of a standard of review in desegregation lawsuits which recognizes busing as a preferred initial remedy in desegregation lawsuits, but permits school boards to rebut the busing presumption by demonstrating that busing ineffectively addresses the problem of past racial discrimination in their school system. School boards can make this demonstration by showing that the mandatory transportation remedy was ineffective despite good faith efforts to implement the plan over an extended period of time.

II. Brown In Perspective

In *Brown v. Board of Education of Topeka I (Brown I)*\(^{13}\) the Supreme Court struck down governmentally imposed segregation in public schools. In doing so, the Court affirmed plaintiff

\(^{13}\) 347 U.S. 483 (1954).
NAACP's contention "that segregated public schools [were] not 'equal' and [could not] be made 'equal,' and that hence [plaintiffs were] deprived of the equal protection of the laws."\(^{14}\) Brown I thus established the basic substantive principle that intentional segregative acts are unconstitutional.

**Brown v. Board of Education of Topeka II (Brown II)**\(^{15}\) established the remedial structure to enforce the holding of Brown I. The remedial structure rested on two mandates. First, after recognizing that regional differences would make the district courts the appropriate forum to oversee desegregation lawsuits, the Court imposed a duty on local school boards to disestablish the governmentally created dual school system to the district court's satisfaction.\(^{16}\) Second, the Court required that school boards implement desegregation orders with "all deliberate speed."\(^{17}\)

**A. Integration versus Desegregation: The Extent of The Affirmative Duty**

Brown I and Brown II served as broad pronouncements on the evil of racial discrimination and the need for the swift disestablishment of dual school systems. The decisions provided little guidance, however, regarding the structure of desegregation remedies. Aside from suggesting that Brown II remedies address "varied local school problems,"\(^{18}\) the Court remained silent on the nature and scope of the remedies. The Court thus left unresolved the central issue whether a school board could satisfy the Brown mandates merely by permitting black and white students to attend previously one-race schools or whether school districts must act affirmatively to bring together black and white schoolchildren. The Court's use of sociological evidence in Brown I, suggesting that black students would psychologically and educationally benefit from attending racially mixed schools, encouraged black plaintiffs to seek affirmative desegregation remedies.\(^{19}\) The Brown decisions

\(^{14}\) Id. at 488.
\(^{15}\) 349 U.S. 294 (1955).
\(^{16}\) See id. at 299.
\(^{17}\) See id. at 301.
\(^{18}\) Id. at 299.
\(^{19}\) The social science evidence introduced in Brown I suggested "that Negro children, from a very young age, are sensitive to and strongly affected by prejudice and discrimination.
failed to discuss whether courts had authority to issue such affirmative relief. In other words, the Court left unanswered the question whether affirmative, effect-oriented remedies would restore a plaintiff class to the position that would exist absent unconstitutional segregation or whether such affirmative relief would go too far by restructuring a possibly segregated world.\textsuperscript{20}

Courts initially interpreted the "all deliberate speed" language of \textit{Brown II} as requiring a policy of nondiscriminatory admissions.\textsuperscript{21} This interpretation permitted recalcitrant school districts to frustrate the spirit of the \textit{Brown} decisions through the use of remedial devices, such as open admissions policies, which placed


This sociological evidence, however, does not support the contention that desegregation obligations can be satisfied solely by providing educational offerings, unless those educational offerings enhance the likelihood of increased racial mixing in the schools. Racial isolation, not educational achievement, is the wrong to be addressed in desegregation lawsuits. \textit{But see} \textit{Milliken v. Bradley II}, 433 U.S. 267 (1977) (educational remedies, designed to improve achievement levels of students attending previously segregated schools, are a proper component of a school desegregation plan). \textit{See infra} note 120.

Voluntary remedies, relying on magnet schools and enhanced educational offerings, must therefore promise to effectively desegregate area schools to pass constitutional muster. To accomplish these ends, educational offerings must be sufficiently attractive to entice students to voluntarily transfer to a school outside their neighborhood. The costs of such effective voluntary techniques are substantial and may surpass the costs of mandatory devices. \textit{See} R. Blank, R. Denther, D. Baltzell, and D. Chapster, \textit{Survey of Magnet Schools: Analyzing a Model for Quality Integrated Education} 4-5 (Executive Summary, September 1983). These staggering costs are exemplified in two ongoing segregation lawsuits. In \textit{Liddell v. Missouri}, the United States Court of Appeals for the Eighth Circuit ruled that St. Louis' voluntary desegregation plan would cost the state and the city approximately $500,000,000. \textit{See} 731 F.2d 1294 (8th Cir. 1984). Similarly, a federal district court in Chicago ruled that the city's desegregation plan would cost approximately $170,000,000 to implement for the 1984-85 school year. \textit{United States v. Board of Educ.}, No. 80-C-5124 (N.D. Ill. June 8, 1984).

\textsuperscript{20} The Court's refusal to pass judgment on this issue can, in part, be explained because "[i]one of the empirical studies brought to the Court's attention . . . even purported to isolate the effects of public school segregation per se . . . ." Goodman, \textit{supra} note 19, at 279. Such evidence finally came to the Court's attention in the form of the 1966 \textit{Coleman Report}. \textit{See infra} note 25. The combined effect of this evidence and the disappointing efforts of southern school systems to desegregate their schools ultimately led the Court to require school boards to take affirmative steps to eradicate past racial discrimination. \textit{See infra} text accompanying notes 25-30.

the burden on students to elect to go to a previously one race school.\textsuperscript{22} Congress' passage of Title VI of the 1964 Civil Rights Act,\textsuperscript{23} which allowed a willing executive branch to prohibit federal funds to recalcitrant school districts, increased the pressure on school boards to comply with \textit{Brown II}.\textsuperscript{24}

The 1966 Coleman Report exposed freedom-of-choice as "desegregation in name only,"\textsuperscript{25} which led to increasing dissatisfaction with these plans. The Coleman Report, according to Vanderbilt Law Professor James Blumstein, "developed a pervasive view that integration in the classroom, per se, had a beneficial effect on black children, was not harmful educationally or socially for white children, and would help offset years of officially fostered racial isolation and stereotyping."\textsuperscript{26} The report helped provide an impetus for an effect-oriented approach to determining the legitimacy of school boards' efforts to abate desegregation.

The first major Supreme Court decision after the Coleman study was the 1968 case of \textit{Green v. County School Board of New Kent County}.\textsuperscript{27} \textit{Green} established the principle that school boards governing previously segregated school systems had an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."\textsuperscript{28} Specifically, \textit{Green} concerned a freedom-of-choice plan in a rural southern school district. This plan gave black and white students the choice of attending the previously all-black high school or the previously all-white high school. The plan predictably led to a low, fifteen percent, crossover rate of blacks to previously state mandated white schools. The Court invalidated the plan, holding that an acceptable plan not only must be made in good faith, but also must disestablish the dual school system at the

\begin{itemize}
\item \textsuperscript{22} See Devins and Stedman, supra note 3; see Kirp, School Desegregation and the Limits of Legislation, 47 PUB. INTEREST 101 (1977).
\item \textsuperscript{23} 42 U.S.C. § 2000(d) (1976).
\item \textsuperscript{26} Blumstein, supra note 11, at 3.
\item \textsuperscript{27} 391 U.S. 430 (1968).
\item \textsuperscript{28} Id. at 437-38.
\end{itemize}
earliest practicable date. The Court demanded that school boards come forward with a plan "that promises realistically to work now." Although Green specified no precise standard for determining effectiveness, it appeared to suggest that the Court would examine black-white ratios as an indication of a plan's success.

In 1971, Swann v. Charlotte-Mecklenburg County Board of Education settled the principle that courts would look at the actual effects of a desegregation plan in judging its adequacy, although not every school in a system necessarily had to be desegregated for a plan to work satisfactorily. Swann recognized the use of black-white pupil ratios and mandatory student reassignments as "starting point[s] in the process of shaping a remedy." The Court recognized that, to eliminate all vestiges of an unconstitutional dual school system, desegregation remedies might have to be "administratively awkward, inconvenient, and even bizarre."

Swann extended the reasoning of Green to an urban context. Unlike rural New Kent County, Charlotte-Mecklenburg was the nation's forty-third largest metropolitan area. As in New Kent County, however, most black students attended all-black schools. The school board maintained its system of segregated education "by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods." Faced with pervasive school segregation and a school system that "served more than 84,000 pupils in 107 schools," the district court felt compelled to rearrange attendance zones and to order transportation to eradicate past discrimination. The Supreme Court upheld the bold plan in its entirety.

Swann, however, did acknowledge that desegregation remedies

29. See id. at 442.  
30. Id. at 439 (emphasis in original).  
31. See Blumstein, supra note 11, at 4.  
33. Id. at 25.  
34. Id. at 28.  
35. Id. at 7.  
36. Two-thirds of the black students who attended schools within the city of Charlotte attended 21 schools which were either totally Negro or more than 99 percent Negro." Id.  
37. Id.  
38. Id. at 6.  
39. Id. at 32.
may be limited if they endanger "the health of the children or significantly impinge on the educational process."\textsuperscript{40} More importantly, the Court held that once school officials made an affirmative good faith effort to desegregate their schools, they need not make "year-to-year adjustments of the racial composition of student bodies."\textsuperscript{41} In other words, school districts were not required to maintain a certain level of racial balance among schools. Instead, they were required only to eliminate all vestiges of past discrimination. Consequently, there could be substantial racial imbalance within a school system if governmentally fostered segregation had not contributed to that imbalance.

\textit{Pasadena City Board of Education v. Spangler}\textsuperscript{42} reaffirmed the Court's ruling in \textit{Swann} that a school district subject to \textit{Brown II} liability had an affirmative duty to desegregate rather than to integrate. \textit{Spangler} concerned a 1974 district court order that required the Pasadena Unified School District annually to readjust its attendance zones in order to conform with a 1970 court order which had mandated that no district school have "a majority of any minority students."\textsuperscript{43} The district court had held that, in the event of widespread racial imbalance or segregation, the "use of a strict neighborhood school policy and a policy against cross-town busing take[s] on constitutional significance as a violation of the Fourteenth Amendment."\textsuperscript{44} Four years later, the district court found the school board still subject to \textit{Brown II} duties despite its literal compliance with the 1970 order.\textsuperscript{45} Thus, the district court prohibited implementation of a freedom-of-choice plan.\textsuperscript{46} The United States Court of Appeals for the Ninth Circuit affirmed in a divided opinion.\textsuperscript{47} The Supreme Court reversed.\textsuperscript{48} Justice Rehnquist, writing for a majority of the Court, concluded that "[t]he District Court's interpretation of the order appears to contemplate the

\textsuperscript{40} Id. at 30-31.
\textsuperscript{41} Id. at 32.
\textsuperscript{42} 427 U.S. 424 (1976).
\textsuperscript{43} Id. at 428 (quoting Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 505 (D.C. Cal. 1970)).
\textsuperscript{46} See id. at 1309.
\textsuperscript{47} See 519 F.2d 430 (9th Cir. 1975).
‘substantive constitutional right [to a] particular degree of racial balance or mixing’ which the Court in Swann expressly disapproved.” The Court stated, as central to the holding, that “subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants [school board] could not be considered responsible.” Spangler, however, did not indicate the remedy that was needed to eliminate vestiges of previously imposed government segregation.

B. The Scope of Desegregation Remedies: The Nature of the World Absent Intentional Desegregation

Brown II remedial orders should rectify the racial imbalance among district schools that arose from prior intentional segregation. Therefore, an affirmative pro-integration remedy suggests that the world absent intentional segregation would be integrated. Alternatively, a remedy designed merely to rectify specific acts of intentional segregation suggests that the world could be naturally segregated.

Social scientists pursue an academic, and sometimes fiercely emotional, debate concerning the natural integration or segregation of the world. Ambiguous court standards reflect a similar disagreement among judges. School systems may remain racially imbalanced so long as they have not practiced intentional segregation. If the school system has practiced some intentional segregation, however, it often must rectify its actions through system-wide mandatory pupil transportaton.

Keyes v. (Denver) School District No. 1 held that purposeful segregation in a significant portion of a school district justified a system-wide remedy. The Court reasoned that intentional segre-

49. Id. at 434 (quoting Swann v. Board of Educ., 402 U.S. 1, 24 (1971)).
50. 427 U.S. at 434.
52. See infra note 150.
56. See id. at 208.
gation in a limited area suggested a reciprocal impact district wide.\textsuperscript{57} The positive correlation between the purposeful (de jure) segregation in the Park Hill section of Denver and the observed (de facto) segregation elsewhere justified the system-wide remedy at issue in \textit{Keyes}\.\textsuperscript{58} The school system could rebut this presumption by showing that there were "separated, identifiable, and unrelated" areas of the district that were not affected by the impermissible conduct.\textsuperscript{59} Put differently, a school district subject to the \textit{Keyes} presumption "must either desegregate its schools or satisfy the almost impossible burden of demonstrating that the system would have been segregated regardless of its conduct."\textsuperscript{60} So far, no school district has rebutted the \textit{Keyes} presumption.

Two 1977 Supreme Court decisions defined the breadth of the \textit{Keyes} presumption. In \textit{Austin Independent School District v. United States},\textsuperscript{61} the Court reaffirmed the \textit{Keyes} requirement that a court find at least some intentional segregative conduct before requiring desegregation. The Court remanded a ruling by the United States Court of Appeals for the Fifth Circuit that de facto segregation alone did justify remedial action.\textsuperscript{62} The Fifth Circuit had held that

\begin{quote}
[s]chool authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. A segregated system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent.\textsuperscript{63}
\end{quote}

The Fifth Circuit based its conclusion on demographics establishing that half of minority preschool students attended schools with populations composed of more than three-fifths minority groups,
even though the school district was sixty percent white. More significantly, seventeen percent of black high school students and thirty percent of Mexican-American high school students attended an all minority high school while sixty percent of white high school students attended schools with populations composed of more than four-fifths whites. The Supreme Court based the remand on its 1976 decision in Washington v. Davis, which had upheld the use of a screening test for police officer candidates. Despite the test’s disproportionate impact on minority applicants, the test was allowed because no intentional desegregation had been shown.

No majority opinion was filed in Austin. Justice Powell, however, filed a concurring opinion expressing his opposition to the appellate order: "[T]he [Fifth Circuit] plan is designed to achieve some predetermined racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities." In short, Justice Powell argued that de facto segregation would exist in the Austin school system regardless of the school’s de jure segregation. He concluded that “racial and ethnic imbalance in urban public schools across the country . . . is [caused by] the imbalance in residential patterns . . . patterns [which] are typically beyond the control of school authorities.”

Dayton Board of Education v. Brinkman I (Dayton I) addressed the issue of how a school district could rebut the Keyes presumption. Dayton I held that the district-wide presumption of Keyes did not apply to a school district that had committed three relatively isolated discriminatory acts, despite substantial racial imbalance in student enrollment throughout the school system. Justice Rehnquist, writing for a unanimous court, asserted:

[A court] must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton School population as presently constituted, when that distribu-

64. Id. at 390.
65. Id.
68. Austin, 429 U.S. 990, 993 n.3 (1976) (mem.) (Powell, J., concurring).
69. Id. at 994.
71. See id. at 419-20.
tion is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.\textsuperscript{72}

In requiring a district court to determine the incremental effect of segregative conduct, the \textit{Dayton I} decision implies that racial imbalance may exist absent intentional government segregation. According to James Blumstein, "\textit{Dayton I} appears to respond to a growing skepticism among some justices as to the validity of the pro-desegregation [naturally integrated world] assumptions of \textit{Green} and \textit{Swann}."\textsuperscript{73}

The Supreme Court's shift from a naturally integrated model in cases decided between 1968 and 1973\textsuperscript{74} to a possibly segregated model in cases decided between 1974 and 1977\textsuperscript{75} abruptly ended in 1979 with two decisions, \textit{Dayton Board of Education v. Brinkman II}\textsuperscript{76} and \textit{Columbus Board of Education v. Penick}.\textsuperscript{77} \textit{Dayton II} and \textit{Columbus} extended the \textit{Keyes} presumption from focusing solely on the location of segregation (segregation in one part of a system implying segregation in other parts of the system) to inquiring about the time of segregation (segregation at one time implying segregation at other times).

\textit{Dayton II} represents the culmination of litigation resulting from the Supreme Court's remand in \textit{Dayton I}. On remand, plaintiffs had challenged practices and policies of the school board such as faculty hiring and assignments, the use of optional attendance zones and transfer policies, the location and construction of new and expanded school facilities, and the rescission of prior resolutions recognizing the board's responsibility to eradicate racial separation in the public schools.\textsuperscript{78} The district court observed, however, that despite "an inexcusable history of mistreatment of black stu-

\begin{itemize}
\item \textsuperscript{72} Id. at 420.
\item \textsuperscript{73} Blumstein, supra note 11, at 14.
\item \textsuperscript{74} The \textit{Green} (1968), \textit{Swann} (1971), and \textit{Keyes} (1973) decisions suggest a naturally integrated model. \textit{See supra} text accompanying notes 27-41, 55-60.
\item \textsuperscript{75} The \textit{Pasadena} (1976), \textit{Austin} (1977), and \textit{Dayton I} (1977) decisions suggest a possibly segregated model. \textit{See supra} text accompanying notes 42-50, 61-73.
\item \textsuperscript{76} 443 U.S. 526 (1979).
\item \textsuperscript{77} 443 U.S. 449 (1979).
\item \textsuperscript{78} \textit{See Dayton II}, 443 U.S. at 532-33.
\end{itemize}
dents," plaintiffs had failed to prove any current incremental segregative effects from acts of segregation that occurred over twenty years previously. The Sixth Circuit reversed, holding that the school board had a continuing obligation to eliminate past discrimination. The Supreme Court affirmed.

*Columbus* involved facts similar to *Dayton II*. The Columbus school system was highly segregated, with half of the schools being ninety percent one race and an additional one-fifth of the schools being eighty percent one race. As in *Dayton II*, the school board had engaged in segregative conduct about the time of the *Brown* decisions. Unlike *Dayton*, the district court imposed a systemwide remedy under the continuing obligation theory. The Sixth Circuit and the Supreme Court both affirmed the district court decision.

The Court based its *Dayton II* and *Columbus* decisions on the line of reasoning developed by the district court in *Columbus*:

[T]hat at the time of *Brown I*, the [school b]oard was operating a dual school system, that it was constitutionally required to disestablish that system and its effects, that it had failed to discharge this duty, and that the consequences of the dual system, together with the intentionally segregative impact of various practices since 1954, were of systemwide import and an appropriate basis for a systemwide remedy.

The Court rejected the *Dayton I* provisions for distinguishing the effects of segregation, holding that a plaintiff need not "prove with respect to each individual act of discrimination precisely what effect it has had on current patterns of segregation." After *Dayton*
II and Columbus, past constitutional violations could serve as a basis for relief, even though a plaintiff failed to show any current impact from that past discrimination. James Blumstein summarized the Dayton II and Columbus cases as follows:

[These cases represent] a return to the expansive causality notions of Keyes, Swann and Green. The Court assumed that a pre-1954 substantive violation, unremedied by affirmative action of the Green/Swann standard, is the cause of current observed segregation. . . . [T]he assumption is consistent with Green, Swann, and Keyes and reinforces a (naturally integrated) theory that private choice, unfettered by governmental interference, will generate a racially desegregated school system. . . . [T]he Supreme Court appears to have adopted an assumption that a racially desegregated society exists absent discriminatory governmental action. 89

University of Chicago law professor Edmund W. Kitch criticized these cases more severely:

The Court endorses an approach to the ‘factual’ question that makes proof of a neighborhood social policy into proof of racial discrimination. It then approves a remedy which, by implication, assumes that a neighborhood social policy, when combined with any significant residential segregation, is unconstitutional. 90

Estes v. Metropolitan Branches of NAACP 91 again reflected the Court’s pro-integration spirit. In Estes, the Court refused to review the Fifth Circuit’s overturning of a district court order that had substituted educational remedies and neighborhood schools for systemwide busing predicated on black-white student population ratios. 92 The district court had crafted its remedy in light of the political dynamics of Dallas and emphasized educational quality over racial balance. 93 The appellate court required mandatory pupil reassignments unless “the natural boundaries and traffic con-

89. Blumstein, supra note 11, at 16-17.
siderations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing. Justice Powell, writing for three members of the Court, felt that the Supreme Court should have reviewed the case:

Unless courts carefully consider those issues [remedy related to identifiable acts of segregation and effectiveness of a desegregation plan measured in social and educational costs], judicial school desegregation will continue to be a haphazard exercise of equitable power that can, 'like a loose cannon . . . inflict indiscriminate damage' on our schools and communities.

The Supreme Court's refusal to review Estes demonstrated a naturally integrated view because it thereby left standing a court order requiring that the initial remedy resemble that in Swann. Estes, therefore, assumed that the perceived outcome of mandatory busing best reflected the nature of the world without intentional government segregation.

Estes, Dayton II, and Columbus did not address the question whether a school district's experience in implementing a Swann remedy could rebut this presumption of a naturally integrated world. That question was answered in Kelley.

94. Tasby v. Estes, 572 F.2d 1010, 1014 (5th Cir. 1978).
96. Because literal compliance with only an approved desegregation plan obviates future desegregation obligations, see supra text accompanying notes 42-50, current black-white student population ratios will be the point of departure in crafting a desegregation plan until a comprehensive desegregation plan has been approved. Kelley conflicts with the interpretation of Swann and Pasadena given in Estes. The point of departure for the district court's analysis was a post-Swann desegregation plan approved by the Supreme Court, not post-plan black-white student population ratios. See infra notes 102-116 and accompanying text. When Estes was decided, no court had ever approved any of the district court's desegregation plans. For that reason, the legal issue raised in Kelley was of greater merit than that raised in Estes. See infra notes 102-106. Yet, in Estes, Justices Powell, Stewart, and Rehnquist filed a vigorous fifteen-page dissent to the Court's denial of certiorari. This suggests that the Court's unanimous denial of certiorari in Kelley was a political decision, possibly speaking to the merits of the case. See supra note 7. Both Linzer, supra note 7, and the lengthy dissent filed in Estes, see supra note 7, suggest that the denial of certiorari in Estes reflected the Court's view of the substantive issues or merits.
III. Kelley v. Metropolitan County Board of Education

A. The Early Rounds (1955-1980)

The Nashville-Davidson County desegregation lawsuit began in 1955 when black school children filed suit to enjoin state imposed racial segregation in the public schools of Nashville, Tennessee. In November 1969, plaintiffs filed a motion for immediate relief following the Supreme Court’s decision in Green v. County School Board of Kent County. At that time, eighty-one percent of white pupils attended schools with populations that were more than ninety percent white, while sixty-two percent of black pupils attended schools with populations that were more than ninety percent black. Plaintiffs succeeded in their motion. While the court devised a remedy, the Supreme Court decided Swann v. Charlotte-Mecklenburg Board of Education. The district court subsequently approved a Swann plan which had been filed with the United States Department of Health, Education and Welfare. The 1971 district court order mandated the redrawing of zone lines to achieve racial balance in individual schools. However, in implementing the HEW plan the court found that requiring extensive transportation was not feasible in outlying areas of five-hundred square mile Davidson County; costs, distance, and common sense dictated their exclusion. The court left unchanged the all-white composition of twenty-two elementary schools and ten junior and senior high schools lying on the county’s perimeters. The court order, therefore, required desegregation only in an area carved from the densely populated heart of the county, leaving the

99. See id. at 983-93.
101. See id.
102. See Brief for Defendants-Appellees at 1, Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732 (6th Cir. 1972).
103. See id. at 1-2.
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remainder untouched.\textsuperscript{104} The Sixth Circuit approved the district court's order in 1972.\textsuperscript{105} The Supreme Court refused to review the case.\textsuperscript{106}

In August 1972, the district court determined that the school board's inadequate provision of transportation facilities indicated that the school board had failed to implement the desegregation plan in good faith. Following the 1972 court order, however, "[the school board] acted in good faith in its efforts to comply with [the 1971] order while going about the task of operating a school system."\textsuperscript{107} During this period, however, the school board filed several motions to modify the 1971 plan and plaintiffs filed several petitions for contempt.\textsuperscript{108} The district court did not respond to any of these motions. In June 1979, newly appointed United States District Judge Thomas A. Wiseman, Jr., began hearings on all pending matters.

B. The Wiseman Decision

Judge Wiseman found the 1971 court plan itself resegregative because it excluded the predominately white suburbs on the outskirts of Davidson County and placed a disproportionate burden of busing on black children.\textsuperscript{109} Ironically, therefore, the "good faith efforts of the school board in the implementation of the Court's order"\textsuperscript{110} amounted to unconstitutional segregation. After finding

\textsuperscript{104} See id.
\textsuperscript{105} See Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732 (6th Cir. 1972).
\textsuperscript{106} See 409 U.S. 1001 (1972).
\textsuperscript{107} Kelley v. Metropolitan County Bd. of Educ., No. 2956, mem. op. (M.D. Tenn. Feb. 23, 1983).
\textsuperscript{108} See Brief, supra note 102 at 3-6; Brief for Plaintiffs-Appellants at 13-18, Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732 (6th Cir. 1972).
\textsuperscript{109} Kelley v. Metropolitan County Bd. of Educ., 479 F. Supp. 120, 122-23 (M.D. Tenn. 1979).
\textsuperscript{110} Id. at 123. NAACP plaintiffs objected to Judge Wiseman's determination that the school board had acted in "good faith." First, the district court in 1972 determined that the school board had failed to meet its affirmative obligation to provide a sufficient number of buses to implement the 1971 plan. Brief in Opposition to Petition for a Writ of Certiorari at 7, Metropolitan County Bd. of Educ. v. Kelley, 103 S. Ct. 834 (1983). Second, Judge Wiseman had found that the school board engaged in resegregative conduct by allowing students assigned to a predominantly black school to transfer. The transfer option was "utilized extensively by white students assigned to (that black school) to escape such assignments." Id. at 10 (quoting Kelley v. Metropolitan County Bd. of Educ., 479 F. Supp. at 124) (M.D.}
segregation, however, Judge Wiseman rejected the school board's proposed busing plan, which focused on the problem of racial imbalance among Davidson County schools. Judge Wiseman considered the plan impracticable because of (1) its failure to offer realistic promise of a unitary system; (2) its disparate burden on black school children; (3) its social cost in diminishing public support for education; (4) its educational cost and (5) its economic cost. Judge Wiseman claimed (and this is crucial) that the court was able to undertake such an analysis because it could review Nashville's experience in "nine years of zoning and busing to achieve a desegregated system and the changes that [had] taken place in the community and in the attitude manifested by the School Board." 113

111. For a discussion of the components of the school board's plan, see Kelley v. Metropolitan County Bd. of Educ., 492 F. Supp. 167, 178-83 (M.D. Tenn. 1980). Interestingly, the disproportionate burden that black students bore under the 1971 order initially concerned the NAACP plaintiffs. Id. at 183-85. In fact, plaintiffs' educational expert testified that black majority neighborhood schools might benefit black students educationally. See Brief, supra note 102, at 8. As noted in Judge Wiseman's opinion, "the black plaintiffs urge upon the court less busing, more neighborhood characteristics to the assignment plan, and the permissibility of majority black schools." 492 F. Supp. at 184. On appeal, however, the black plaintiffs altered their position and demanded county-wide busing.


113. Id. at 189.
Judge Wiseman grounded his analysis in Supreme Court decisions\textsuperscript{114} describing the ultimate goal of school desegregation litigation as the creation of a unitary system of public education. These decisions required the school board to "'come forward with a plan that promises \textit{realistically} to work, and promises \textit{realistically} to work \textit{now}.'"\textsuperscript{115} Thus, Judge Wiseman believed it appropriate to assess the effectiveness of a busing order and alter it to maximize that effectiveness.\textsuperscript{116}

Judge Wiseman characterized the Davidson County school system busing program as economically, educationally, and socially undesirable. For him, "'[t]he spectre that haunts all of the parties to this case, the Court, and the community is a public school system populated by the poor and black, and a private school system serving the affluent and white.'"\textsuperscript{117} Hence a rigid adherence to black-white student ratios premised upon the social goal of assimilation is not only constitutionally unrequired but also socially undesirable.

Instead of recrafting a "traditional" busing remedy, therefore, Judge Wiseman devised an original remedy. Increased emphasis was placed on educational quality, with a particular focus on criteria such as multicultural studies, smaller classes, greater accessibility of parents to teachers.\textsuperscript{118} Unwilling to ignore integration, however, Judge Wiseman required that fifteen percent of either race be represented in grade levels five to eight "because it seems to represent a reasonable attempt to provide intercultural and interr-a-

\textsuperscript{114} See, \textit{e.g.}, Green v. County School Bd., 391 U.S. 430 (1968).
\textsuperscript{116} That the 1971 plan did not encompass Davidson County's outlying suburban area clouded the court's ability to assess its effectiveness. Thus, Judge Wiseman left his factual analysis incomplete. He did not explain how analyzing the Nashville experience in implementing a resegregative busing plan could aid in deciding whether a county-wide busing plan would be more effective. Additionally, Judge Wiseman failed to answer the question whether the school board's modifications significantly changed the nature of the 1971 order. If they did, the school board's "good faith" efforts might not provide any insights into the efficacy of the 1971 plan. The Sixth Circuit did not rule on the significance of these analytical gaps in Judge Wiseman's fact-finding.
\textsuperscript{117} Kelley v. Metropolitan County Bd. of Educ., 492 F. Supp. 167, 189 (M.D. Tenn. 1980).
\textsuperscript{118} For a description of Judge Wiseman's plan, see \textit{id.} at 192-97.
cial contact as a foundation for social harmony."

C. The Sixth Circuit Reversal

The Sixth Circuit affirmed the educational components of the Wiseman order. The court reversed, however, all portions of the district court order addressing the racial imbalance in the Nashville-Davidson County schools. The Sixth Circuit decided that

119. Id. at 193.

120. Kelley v. Metropolitan County Bd. of Educ., 687 F.2d 814, 816-17 (6th Cir. 1982). The issue of when educational remedies are appropriate in a desegregation case remains unsettled.

The Supreme Court, in *Milliken v. Bradley II*, held that educational remedies may be appropriate in desegregation cases. 433 U.S. 267 (1977). The Court required that desegregation remedies "be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Id.* at 280 (quoting *Milliken v. Bradley I*, 418 U.S. 717, 746 (1974)). The Court, however, also noted that "'[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems.'" *Milliken II*, 433 U.S. at 281 (quoting *Brown v. Board of Educ.* II, 349 U.S. 294, 299 (1955))(emphasis added in *Milliken II*). In part, the total failure of Detroit school authorities to effectively run their schools persuaded the Court to uphold educational remedies. For instance, Justice Powell noted that the district court had "found the structure of the Detroit school system 'chaotic and incapable of effective administration.'" *Milliken II*, 433 U.S. at 296 (Powell, J., concurring) (quoting Appellants Petition for Certiorari at 124a); cf., *Milliken II*, 433 U.S. at 291-92 (Marshall, J., concurring) ("[p]rograms of remediation [are often] necessary to supplement the primary remedy of pupil reassignment").

*Kelley* presented a factual situation different from the *Milliken* cases. *Kelley* did not concern educational disunity such as that which had plagued the Detroit school board. Instead, the case considered the plan's inapplicability to certain public schools and the mass exodus of white students. Judge Wiseman, therefore, did not need to issue specific educational directives. Instead, the school board could have decided what, if any, educational components should be added to the desegregation plan.

Judge Wiseman's explicit educational directives represents a pragmatic equitable remedy. In politics, pragmatic compromise solutions are justified, even laudible. For a federal court judge, however, they are not. The judiciary does not run our schools. As the Supreme Court has stated, "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . [for] public education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Interestingly, the Nashville-Davidson County School Board did not seek reversal of this component of the Wiseman plan for several reasons. First, the Board was concerned with establishing a good relationship with the judge overseeing its desegregation efforts. Second, the Board thought Judge Wiseman's "educational plan" reasonable. Third, the Board was concerned with having a positive civil rights image. Conversations with Marian Harrison, Nashville school board attorney (Sept. 15, 1982).

121. See *Kelley v. Metropolitan County Bd. of Educ.*, 687 F.2d 814, 817-24 (6th Cir. 1982).
Judge Wiseman improperly focused his attention on questions irrelevant to the case's one germane issue—racial imbalance in Davidson County schools. Instead of inquiring into the plan's social, educational, and economic costs, the court believed Judge Wiseman should have limited his focus to the sixty-eight percent white to thirty-two percent black pupil ratio in the Davidson County school system. Accordingly, the court viewed Judge Wiseman's standard of fifteen percent of either race in grades five to eight as clearly inappropriate.

The Sixth Circuit also viewed Judge Wiseman's reliance on Nashville's experience in implementing the 1971 order as unnecessary. Such factors were insignificant in the resolution of the Nashville case because the school board's actions led to increasing segregation. The appellate court characterized the duty to desegregate as a continuing one and defined desegregation as racial imbalance, treating as irrelevant questions of educational effectiveness and white students' exodus from public schools.

D. The Issue on Appeal

The Nashville-Davidson County school board, joined by the United States Department of Justice as amicus curiae, asked the Supreme Court to review the Sixth Circuit's decision. The school

122. See id.
123. See id. at 817.
124. Id. Under Judge Wiseman's plan, the district would have had a racial imbalance 19% greater than that in 1980-81 and 25% greater than that in 1971-72. The Wiseman plan, however, would have reduced 47% of the racial imbalance existing throughout the system in 1970-71. The 1971 plan reduced 78% of the racial imbalance among these schools. M. Smylie, Narrative Summary of Nashville-Davidson County School Desegregation Data (1982).

Under the Wiseman plan, 47 of 75 primary schools would have been more than 90% single race with 14 schools more than 75% black. This disparity reflects a 48% increase in racial imbalance from that in 1980-81 and a 59% increase from that in 1971-72. Id.

Under Judge Wiseman's plan, racial imbalance among secondary schools (middle and high schools) would have declined 4% from 1980-81 levels but would have increased 5% over 1971-72 levels. The 1971 plan reduced 76% of racial imbalance among these schools. The Wiseman plan would have reduced it by 69%. Id. These figures suggest that Judge Wiseman may have gone too far, substituting social, economic, and educational concerns for racial-balance concerns. The Sixth Circuit, which rejected Judge Wiseman's legal analysis, never addressed this issue.

125. See Kelley v. Metropolitan County Bd. of Educ., 687 F.2d 814, 816 (6th Cir. 1982).
126. See id. at 818.
board alleged that the Nashville case raised two significant legal issues. First, the school board argued that *Pasadena City Board of Education v. Spangler* prohibits the reallocation of attendance zones after a school board's good faith implementation of a busing plan. NAACP plaintiffs countered, asserting that the school board’s contention “can only be maintained by wholly ignoring specific factual findings of the board’s own wrongdoing.” Second, the school board contended that *Swann v. Charlotte-Mecklenburg Board of Education* permitted a district court judge to alter a desegregation remedy in light of a school board’s long-term good faith efforts to implement a *Swann* remedy. Assuming racial bal-

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127. The case also raised the issue whether “[t]he Court of Appeals decision ignored the standard of review articulated by [the Supreme Court] for review of a desegregation decree.” Petition for a Writ of Certiorari at 15, Metropolitan County Bd. of Educ. v. Kelley, 103 S. Ct. 834 (1983). Although important, this issue would have been decided in accordance with existing Supreme Court standards. It would not have forced the Court to tackle a new substantive legal issue—as would other issues raised in the Nashville case.


129. Brief in Opposition, supra note 110, at 21.

130. Petition, supra note 127, at 11-13. The Justice Department raised this issue in a significantly altered form in their amicus petition: “This case presents questions of fundamental importance concerning the proper interpretation to be given *Swann*. . . . *Swann* does not mandate the use of any particular remedial device (e.g., mandatory busing) but instead indicates in general terms which devices are permissible and what the limits on their use might be.” Brief for the United States as Amicus Curiae in Support of Petitioners at 9, Metropolitan County Board of Education v. Kelley, 103 S. Ct. 834 (1983). The Justice Department, therefore, challenged the principle of busing, rather than the narrower issue whether a district court judge could deviate from ineffective mandatory remedies.

Assistant Attorney General William Bradford Reynolds has expressed concern that mandatory pupil transportation remedies per se “are threatening to dilute the essential (national) consensus” “that racial discrimination is wrong and should not be tolerated in any form.” Speech before the Delaware Bar, supra note 1, at 9. The Reagan administration has adopted this position because it believes that the flight from urban public schools has eroded the tax base of many cities, which has in turn contributed to the growing inability of many school systems to provide high-quality education to their students—whether black or white. Similarly, the loss of parental support and involvement has robbed many public school systems of a critical component of successful educational programs. When one adds to these realities the growing empirical evidence that racially balanced public schools have failed to improve the educational achievement of the students, the case for mandatory busing collapses.

Id. at 12.

The Reagan administration sought to use *Kelley* as a test of busing principles. Yet *Kelley* raises a substantially different issue, namely whether ineffective busing remedies may later be modified. In the Chicago desegregation case, however, the Reagan administration suc-
ance measured effectiveness, NAACP plaintiffs maintained that "the original constitutional violation was compounded by specific acts of the board which resegregated the school system." On January 24, 1983, after several panel discussions and months of delay, the Supreme Court denied the school board's petition.

IV. LEGAL LIMITATIONS ON THE SCOPE OF DESEGREGATION ORDERS: AN ANALYSIS OF KELLEY

Supreme Court precedents suggest that three situations may lead to the dismantling of a comprehensive busing plan. One, obviously, would be the attainment of a desegregated school system. The Court suggested as much in Pasadena City Board of Educa-

cessfully argued that the busing remedy need not be utilized in all desegregation cases. In Chicago, United States District Judge Milton T. Shadur approved an initial desegregation plan, developed by the Chicago Board of Education and endorsed by the Reagan Justice Department, that relies almost exclusively on voluntary measures. Judge Shadur agreed with the Chicago school board's contention that "desegregation techniques which are not compulsory on children are the most effective and most practicable in achieving stable desegregation." Glenn, Cautious 'Pragmatism' in Chicago Plan, Educ. Week, March 9, 1983, at 24. See also Devins and Stedman, supra note 3.

131. Brief in Opposition, supra note 110, at 23.
133. This article does not answer the question whether the good faith efforts of the Nashville-Davidson County school board in implementing the 1971 plan should terminate any future affirmative desegregation obligations. The resolution of that issue requires analysis of two questions not yet addressed by the Supreme Court: (1) must a school district obtain unitary status, whatever that means, before its duty to desegregate ends; and (2) can a good faith, rather than a literal, implementation of a desegregation order end future liability under Pasadena City Board of Education v. Spangler. See supra text accompanying notes 42-50. Although these questions are important, this article only analyzes the legal significance to future obligations of a school district's success or failure in implementing a desegregation plan.

134. Pasadena City Board of Education v. Spangler suggests that a school district's literal implementation of a desegregation order satisfies the unitary status requirement. Pasadena recognized that a court should not alter a desegregation order solely because demographic changes beyond the control of the school board prevents full attainment of the order's goals. See supra text accompanying notes 42-50. Additionally, the 1979 decision of the United States Court of Appeals for the Ninth Circuit in Spangler v. Pasadena City Board of Education recognized that a desegregation plan may be in place for some time before a federal court concludes that the effects of pre-plan constitutional violations have been fully vitiated. 611 F.2d 1239 (9th Cir. 1979). Thus, attaining unitary status, either as racial balance or achievement of the desegregation plan's "racial balance potential," appears to justify ending the school board's obligations.
tion v. Spangler.\textsuperscript{135} Aside from the Pasadena area, only a few school districts have achieved "unitary" status.\textsuperscript{136} Because the 1971 desegregation plan impeded desegregation by excluding outlying white suburbs and placing the burden of busing on black children, the first situation did not exist in Kelley. Indeed, the "good faith efforts of the School Board in implementing the Court's order" amounted to unconstitutional segregation.\textsuperscript{137}

Second, the continued disruption of a school district's educational processes, associated with interracial violence or decreasing test scores, may also permit the dismantling of a Swann remedy. In Swann, the Court cautioned that a desegregation remedy may be limited if it otherwise would risk either "the health of the children or significantly impinge on the educational process."\textsuperscript{138} Neither Kelley nor any other suit, however, has involved such issues.\textsuperscript{139}

Third, a comprehensive desegregation plan could be terminated if it did not satisfy the Green mandate "that a school board devise

\begin{itemize}
\item \textsuperscript{135} 427 U.S. 424, 434-35 (1976).
\item \textsuperscript{136} See \textit{e.g.}, Ross v. Independent School Dist., 699 F.2d 218 (5th Cir. 1983) (Houston); Calhoun v. Cook, 522 F.2d 717 (5th Cir. 1975) (Atlanta); Beckett v. School Bd., No. 2214 (E.D. Va. Feb. 14, 1975) (Norfolk). Based on its "unitary status," the Norfolk, Virginia, school system recently elected to reduce significantly its massive cross town busing and return to neighborhood schools. The school board made the decision in response to both black and white interest groups. The NAACP sued the Norfolk school board because a return to neighborhood schools will lead to greater racial imbalance in that school system.
\item On July 9, 1984 the United States District Court for the Eastern District of Virginia upheld the School Board's plan. Riddick v. School Bd. of the City of Norfolk, No. 83-326-N (E.D. Va. July 9, 1984). The court held that because of the earlier finding of unitariness "the burden of proof [has shifted] from the defendant School Board to the plaintiffs [NAACP], who must now show that the 1983 Proposed Plan results from an intent on the part of the School Board to discriminate on the basis of race." \textit{Id.} at 10 (slip op.). In other words, the Norfolk case, according to the district court, should be decided in a manner analogous to Austin Indep. School Dist.. \textit{See supra} notes 61-69.
\item \textsuperscript{137} Kelley v. Metropolitan County Bd. of Educ., 479 F. Supp. 120, 123 (M.D. Tenn. 1979).
\item \textsuperscript{138} Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30-31 (1971).
\item \textsuperscript{139} In \textit{Tasby v. Wright}, United States District Judge Barefoot Sanders used time-distance studies in determining that a county-wide pupil transportation remedy would unduly risk the health of children in the metropolitan Dallas area. \textit{See} 520 F. Supp. 683 (N.D. Tex. 1981). The United States Court of Appeals for the Fifth Circuit affirmed this portion of Judge Sanders ruling. \textit{Tasby v. Wright}, 713 F.2d 90 (5th Cir. 1983). In its ruling, the appellate court noted that "all of the parties who [in the past] have been urging increased desegregation . . . appear to be satisfied with the district court's decision." \textit{Id.} at 92.
\end{itemize}
a plan 'that promises realistically to work, and promises realistically to work now.'"140 Because of *Green*, Judge Wiseman thought it appropriate to assess and alter the preexisting busing order in light of its effectiveness. His decision emphasized the dicta in Supreme Court desegregation decisions which stressed a balancing of cost and benefit.141 For instance, these Court decisions suggested that district courts must be guided by the sense of basic fairness inherent in equity,142 and that they must also "take[e] into account the practicalities of the situation."143

The Sixth Circuit, however, insisted that a school district subject to a desegregation order could not deviate from present black-white student population ratios when modifying the order. The Sixth Circuit's holding directly contradicts the *Pasadena* decision that a school district's literal compliance with a desegregation order protected it from any further affirmative remedial obligations. In *Pasadena*, the Court explicitly rejected the existence of a "substantive constitutional right [to a] particular degree of racial balance or mixing."144

The rigidity of the Sixth Circuit's decision also conflicts with *Swann*, which viewed student population ratios only as an appropriate "starting point" in designing a desegregation remedy.145 Apparently, the Sixth Circuit construed the Supreme Court's requirement that a school district "eliminate all vestiges of past discrimination" as requiring the district's schools always to reflect its black-white student population ratio. This analysis conflicts with the *Swann* ruling, unless one assumes that the Nashville community, absent intentional government segregation, would be naturally integrated.146

The Sixth Circuit decision ignored Nashville's unique situation. As the school board pointed out, *Kelley* was "not a case involving the imposition of a desegregation plan upon a system that is segre-

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142. See *Id.* at 31.
145. See *Swann*, 402 U.S. at 25; see also *supra* text accompanying notes 51-96.
146. See *supra* text accompanying notes 51-96.
gated and is trying to achieve desegregation ab initio." Initially, a presumption might very well exist in favor of pupil transportation plans which use black-white student population ratios. Nashville had advanced beyond that point, however. Its ten-year experience offered lessons that could predict the effectiveness of future desegregation plans. That experience ought not be ignored. Otherwise, pupil transportation remedies become the end of desegregation litigation rather than the means of eliminating dual school systems which deprive black pupils of equal educational opportunity. As school districts increasingly fail to implement Swann mandatory busing remedies, the issue rises in national importance.

Perhaps Judge Wiseman incorrectly determined that expansive busing orders would not eliminate racial isolation in Davidson County schools. An admittedly faulty desegregation plan might indeed prove inadequate experience upon which to base such a decision. The Sixth Circuit, however, should have focused its attention on Judge Wiseman's factual determinations, not his methodology. The appellate court's failure may leave the Davidson County school system in hopeless disarray.

V. DESSEGREGATION LITIGATION: WHAT STANDARD OF REVIEW?

Desegregation remedies attempt to restore the parties to a status assumed to exist before official acts of segregation had their effect. If intentional governmental segregation exists, courts must determine what remedy would restore plaintiffs to the status they would have obtained had there been no such de jure segregation. The parameters of desegregation remedies would be defined by the nature of the world absent intentional governmental segregation.

Social science evidence does not explain satisfactorily the impact of governmentally fostered segregation. According to University of Texas law professor Marc Yudof, "social scientists . . . teach the need for humility and the foolishness of relying on pseudo-scienc-

147. Brief, supra note 102, at 19.
148. In Boston, for example, public schools are more segregated today than they were ten years ago. See Higgins, Boston's Busing Disaster, The New Republic, Feb. 28, 1983, at 16. For a contrary view, see Daniels, In Defense of Busing, The N.Y. Times Mag., Apr. 17, 1983, p. 34.
The Senate Judiciary Committee hearings concerning the Neighborhood School Transportation Act illustrated Yudof's point when both proponents and opponents of forced busing produced social scientist experts supporting their position.

James Blumstein explained the failure of social science research:

It is possible that, in a given set of circumstances, a plaintiff could show a statistically significant causal linkage between past segregative acts and current observed segregation; it is also possible that a defendant school board could present statistically probative evidence rebutting that causal inference. Much more likely, however, is that the results of statistical analysis will be inconclusive. By the nature of statistical methodologies, no hypothesis can either be proven or disproven in terms of fact. Statistical analysis identifies empirical relationships among observable data that lend support to or cast doubt on hypotheses in terms of probabilistic inference.

Supreme Court desegregation decisions evidence a vigorous debate among the Justices about the nature of the world absent in-

149. Yudof, supra note 51, at 430.

150. The Neighborhood School Transportation Act would have prevented a court from compelling busing of more than five miles or fifteen minutes each way. S. 528, 97th Cong., 1st Sess. (1981). Opponents of the Act predictably argued that busing best achieved racial balance. Testifying before the Senate Judiciary Committee, Willis Hawley identified five “myths” of school desegregation: (1) desegregation has not substantially reduced racial isolation; (2) desegregation can be achieved through voluntary choice rather than busing; (3) desegregation undermines schools’ ability to provide a quality education; (4) desegregation leads to interracial conflict in schools, disrupting the educational process and increasing racial prejudice; and (5) school desegregation results in community conflict that undermines race relations and disrupts the social peace. Testimony of social scientists James McPortland (Center for Social Organizations of Schools), Reynolds Farley (Population Studies Center), and Meyer Weinberg (Horace Mann Bond Center for Equal Education) further supported Hawley’s contentions. Hawley, The New Mythology of School Desegregation, Law & Contemp. Probs., Autumn 1978, at 214. Opponents of forced busing claim that busing remedies fail to achieve anti-discrimination objectives, and lead to the five “myths” discussed by Hawley. Social scientists Herbert Walberg of the University of Illinois and John Roos of Boston University testified at the Neighborhood School Transportation Act hearings about the failure of busing.


151. Blumstein, supra note 11, at 12.
tentional governmental segregation. Some cases, such as *Green*, *Swann*, *Keyes*, *Dayton II*, *Columbus*, and *Estes*, suggest that ours is a naturally integrated world. Other decisions, such as *Pasadena*, *Austin*, and *Dayton I*, suggest that our world might be naturally segregated. Although the conflict among social scientists and within the Court has created a standoff, lower courts need some standard as a principled basis for applying and enforcing desegregation law.

The first step in framing a standard involves determining whether mandatory desegregation remedies, such as forced busing and restructured attendance zones, advance the interests of black plaintiffs. Most likely, blacks have an interest in seeing an end to racial isolation in public education. "[B]lacks are thought to benefit educationally in a desegregated environment. . . . Society gains by reducing racial and ethnic isolation and increasing inter-racial networks of communication, friendships, and business relationships." George Peabody College of Education Dean Willis Hawley noted, based on social science data, that desegregation (1) enhances the academic development of minorities; (2) reduces interracial conflict and prejudice; (3) benefits the development of self-esteem, aspiration to achieve, and racial and ethnic identities among minorities; (4) enhances the post-high school opportunities and socioeconomic standing of minorities; and (5) increases racial heterogeneity of communities. Although some social scientists disagree with Dean Hawley's conclusions, his conclusions provide support for black plaintiffs' demands for mandatory desegregation remedies.

Having established that black plaintiffs have an interest in mandatory remedies, the question remains whether courts have authority to issue such relief. As James Blumstein has noted,

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152. *Id.*, at 9.
153. *Hawley*, *supra* note 150.
154. *See supra* notes 149-51 and accompanying text.
155. Owen Fiss and other advocates of mandatory desegregation remedies suggest that proof by black plaintiffs that they have an interest in mandatory desegregation remedies alone justifies such relief. Fiss, *Racial Imbalance in the Public Schools: the Constitutional Concepts*, 78 *Harv. L. Rev.* 564 (1965). To Fiss, a situation of de facto segregation would justify such broad relief:

The abstract question is not: Is the creation and maintenance of racially imbalanced schools and the assignment of children to them unconstitutional?
Faced with a finding of unconstitutional racial discrimination, a court must determine the proper remedy. It is axiomatic that a remedy must correct a substantive violation of the Constitution, restoring a prevailing party to the condition that would be obtained in the absence of an unconstitutional act. The problem is to determine what the world would have looked like if the illegal, discriminatory activity had not occurred.

Social science cannot provide a conclusive answer to the question. Consequently, courts must consider normative values.

Mark Yudof has suggested that courts must choose between the racial neutrality principle and the universalistic ethic in framing desegregation remedies. In accord with the pro-integration model, the universalistic ethic recognizes "that a stable, just society, without violence, alienation, and social discord, must be an integrated society." For the universalist, "[s]egregation of the races . . . will inevitably lead to conflict and the destruction of democratic values and institutions. In short, the goal is a shared culture in which all segments of the population participate." Alternately, the racial neutrality principle accepts the possibility of a naturally segregated world. The communitarian values behind the racial neutrality ethic support the right of parents to direct the upbringing and education of their children. According to Harvard
sociology Professor Nathan Glazer, "[i]t is a perfectly sound American path . . . to assume that groups are different and will have their own interests and orientations, but . . . [also to] insist that no one be penalized because of group membership. . . ." 161

Both the racial neutrality principle and the universalistic ethic are solutions that are too extreme in their approach to the problem of racial imbalance, especially given the inconclusive nature of social science evidence. Universalists seek to restructure the entire educational environment of public school children, rather than simply to eradicate the effects of past governmental segregation. Conversely, the racial neutrality principle improperly assumes the possibility of a segregative consistency in human behavior.

Fortunately, courts need not choose one of these extremes. Instead, they can adopt the sensible standard of a rebuttable presumption. Presumptively, courts should favor busing as an initial remedy. 162 Yet a school district's experience in implementing a Swann remedy still can be used to rebut that presumption.

Mandatory pupil ratio plans should be presumptively favored as a remedy in desegregation lawsuits for a number of reasons. First, desegregation remedies seek to redress the wrong of governmental imposed racial segregation. 163 Ideally, desegregation remedies should result in the racial mix that would be found in a school system had there been no state-mandated segregation. Because government is the wrongdoer, courts as a matter of equity should favor the plaintiffs. Second, mandatory busing appears more likely than voluntary remedies to attain the approximate black-white student ratio of an ideal system. 164 Even in Nashville, where social

162. In certain instances, courts may permit a comprehensive voluntary plan as a first remedy. Such a plan, however, must include educational components that increase the likelihood of voluntary transfers from neighborhood schools. See supra note 19. If such a voluntary plan can be devised, the school district can stay the presumption that busing is a preferred first remedy in desegregation cases. Yet if, after a reasonable period of time (as defined by the district court), the voluntary plan has not led to the desegregation of area schools, a school system should revert to the "rebuttable presumption" model which favors mandatory busing as an initial remedy. See Devins, The Middle Road in Desegregation Litigation, 3 EDUC. WK. _____ (1984).
164. See supra note 130.
science research indicated that comprehensive district-wide busing would lead to whites fleeing the school system, no one disputed that mandatory busing would result in greater racial balance than voluntary plans. 165 Third, a presumption in favor of busing can be rebutted by demonstrating the failure of busing to desegregate a school system. By way of contrast, no plaintiff could rebut the presumption of a naturally segregated world. The very imposition of government segregation would make people less willing to integrate, 166 which could make disproving the presumption of a naturally segregated world impossible.

School districts could rebut the presumption mandating busing with evidence of their experience in implementing a comprehensive pupil transportation order. Because desegregation remedies are equitable, they ought to be fair, workable, realistic 167—taking "into account the practicalities of the situation." 168 A district court should carefully consider all evidence indicating the effectiveness of future desegregation plans, including a school district's experience in implementing a past order. To be reliable, however, the school district's actions must have been in good faith and over an extended period of time.

This proposed standard of review offers several advantages over other standards either proposed by commentators or adopted by courts. First, it strikes a balance between the universalistic ethic and the racial neutrality principle. Second, instead of using inconclusive social science research of national desegregation, the court can use research specifically addressing the school district in question. Third, a school district that effectively rebuts the presumption in favor of busing may also rebut minority plaintiffs' interest in mandatory desegregation techniques. Fourth, and most importantly, the scope of the remedy will fit the nature of the offense. That, in sum, is the aim of equitable remedies.

In any given case, the proposed model places great reliance on


166. David Kirp, for example, contends: "Discrimination might lie at the source of this 'disease,' but since it had taken on a life of its own, ending the discrimination without doing more would not produce a cure." D. KIRP, JUST SCHOOLS 23 (1982).


federal district judges to determine two issues: (1) whether the school board has acted in good faith over a sufficiently long period of time for the court to determine the efficacy of a forced busing remedy; and (2) whether the forced busing remedy effectively addresses the problem of illegal racial discrimination in area public schools. The district judge can best make these decisions. He has responsibility for overseeing local school boards in their efforts to eradicate past racial discrimination. Because of this supervision, the district court judge intimately understands the community and its school system.

The proposed standard of review would have produced a different result in Kelley. Judge Wiseman had examined the long-term good faith efforts of the school board in implementing the 1971 plan and concluded that a comprehensive district-wide busing plan would be ineffective. Thus, under the proposed standard, the Nashville-Davidson County school board would have been exonerated of future affirmative desegregation obligations, provided that Judge Wiseman's finding that future busing would be ineffective was not "clearly erroneous." 

Contemporary judicial desegregation policy, as reflected in the Nashville case, has placed the courts in conflict with the other branches of government and the American people. Although bound by the Constitution, courts have extended desegregation law from well-principled constitutional law to the worst sort of judicial overreaching. Perhaps this overreaching will provoke congressional challenges to the survival of courts as institutions. Certainly, it has resulted in limitations on the American public school system

169. In Brown v. Board of Education II, the Supreme Court explained the role of federal district courts in school desegregation lawsuits:

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts 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.


170. Assuming Judge Wiseman correctly applied the law, his decision would be overruled only if his fact finding was "clearly erroneous." Deficiencies in Judge Wiseman's fact findings are discussed supra in note 116.

171. See supra notes 9-10.
that are both constitutionally unnecessary and educationally unsound.