The Not So Strange Path of Desegregation in America’s Public Schools

PHILIP T. K. DANIEL

Introduction

The [Brown] decision . . . became the archetype of a landmark decision. Landmark decisions are, at bottom, designed through reference to constitutional interpretations and supportive legal precedents to address and hopefully resolve deeply divisive social issues. They are framed in a language that provides at least the appearance of doing justice without unduly upsetting large groups whose potential for noncompliance can frustrate relief efforts and undermine judicial authority. For reasons that may not even have been apparent to the members of the Supreme Court, their school desegregation decisions achieved over time a far loftier place in legal history than they were able to accomplish in reforming the ideology of racial domination that Plessy v. Ferguson represented. (Bell 2004)

This passage from the book Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform by Derrick Bell provides a fitting description of the life of racial equality in America’s public schools, and Bell’s own early career illuminates the sequence of judicial events. Bell
began his legal career in the Civil Rights Division of the United States Justice Department. In the years 1960–65 Professor Bell was an attorney for the NAACP Legal Defense Fund supervising the litigation of desegregation cases for that organization. In 1966 he reunited with the Justice Department, aiding in the enforcement of Title VI of the Civil Rights Act “authorizing the termination of federal funds to school districts . . . in noncompliance” with early federal court desegregation decisions (Bell 2004, 3). Today, Mr. Bell is an ardent critic of those same decisions he helped to enforce, claiming that court-ordered desegregation is a “fiction,” that racial discrimination against people of color is as ingrained in American society as apple pie, and that school districts are inappropriate places to seek racial reform.

So goes the journey of school integration as the legal status of discriminatory acts against students on the basis of race is rooted firmly in the United States Constitution, especially the concept of equal protection of the laws found in the Fourteenth Amendment. The journey of desegregation has been circular following the swings of social eras involving more than one hundred and fifty years of litigation. Except for a few significant cases, state and local government officials and members of school boards have been afforded power in determining authority to circumvent desegregation decrees based on the Tenth Amendment of the United States Constitution declaring, “[t]he powers not delegated to the [federal government] by the Constitution . . . are reserved to the states” (U.S. Constitution, Amend. X). Specifically, racial discrimination in schools has had a history largely supported by judicial decisions under the rubric of states’ rights.

Those in the racial majority in the South and the North have steadfastly resisted any change in the status quo of student separation. African Americans, more recently, have themselves begun to question judicial intervention that would force students to remain together particularly in the kind of hostile environment that for years accompanied black student attempts at integration. This is the not so strange story; one where the undermining racial rationales of apartheid constitute a closed plane curve in the chronicles of American education.

The Expansion of Judicial Authority to Order Desegregation

The history of education for black children in the United States began with laws making it a crime to teach slaves to read or write (Goldstein et
History informs us that pre-Civil War education provided for blacks in the North was often encapsulated by discriminatory laws. In *Roberts v. City of Boston* (*Roberts* 1849), for example, the Supreme Court of Massachusetts held that state law did not require blacks to attend school with whites, and for that matter, did not even require education for black students notwithstanding the fact that black parents were taxed for education at the same rate as whites. Such attitudes and beliefs continued well into the twentieth century and some states had laws against black children attending any school or simply built no facilities in areas for segregated black populations (Daniel 1980). When education was finally provided for black children, state laws required that the races be separated; the direct consequence of such decisions was that black children for many years received an inferior education with substandard instruction and instructional materials (Kluger 1975). Legal separation was a product of a decision announced by the United States Supreme Court in *Plessy v. Ferguson* (*Plessy* 1896). *Plessy* ushered in the doctrine of “separate but equal” in railway and other public accommodations in society; this included education in public schools. It is interesting to note that the Supreme Court in *Plessy* cited as a foundation for its decision the case of *Roberts v. City of Boston* (*Plessy* 1896, 544).

National school desegregation by court order began with *Brown v. Board of Education* (*Brown I* 1954). In that case the United States Supreme Court asked the question: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive children of the minority group of equal educational opportunities? We believe it does” (*Brown I* 1954, 493). When the Court answered affirmatively, it reversed the separate but equal doctrine of *Plessy* and ruled unconstitutional the legal basis for segregated and dual public school systems under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

For a year *Brown I* was the center of great confusion and even greater controversy. In an attempt to clarify its intent and provide direction to the lower courts, the Supreme Court heard further arguments on the question of appropriate relief. In *Brown II* (*Brown II* 1955) the Court

1. The decision in *Roberts* was similar to a concurring opinion rendered by Associate Justice Clarence Thomas in the recent desegregation case of *Missouri v. Jenkins*, 215 U.S. 70 [1995] (*Missouri II*), where he stated that black and white children could be separated in school and that all-black public schools were not necessarily the product of constitutional violations.
stated that lower federal courts should consider all relevant factors such as transportation systems, physical conditions of the buildings, difficulties in revising school districts and attendance zones, and other necessary local laws when framing a remedy and considering any plans by the school districts to remedy the illegal discriminatory acts. The Court concluded: “[A]nd the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases” (*Brown II* 1955, 301).

Although school districts, with the help of the federal courts, were supposed to move with “all deliberate speed” toward dismantling of dual school systems, the next ten years saw massive resistance on the part of the public schools and creation of novel schemes by states to avoid the mandates of *Brown I* and *Brown II*. State and local officials at first decided not to follow the dictates of *Brown I*. These included terminating state support of education and closing of schools (*Griffin* 1964). Feigned compliance came after *Brown II*, however, and one of the reasons for this quick turnabout was the message of the Supreme Court itself. After expressing the hegemony of federal law and the Supremacy Clause (U.S. Constitution, Article VI) over state law in *Brown I*, *Brown II*’s decision gave state and local government primary responsibility for defining how desegregation would take place. Changes need not take place immediately, but “with all deliberate speed”; moreover, all corrective efforts could be premised upon the conditions of the region (*Brown II* 1955, 299).

As such, state and local government in both the South and North was generally sanguine about *Brown II*. Two issues were at stake: the meaning of “all deliberate speed” and the court’s interpretation of a desegregation remedy. One official in Georgia spoke for many states about the significance of “all deliberate speed” indicating that he had faith that local judges would define the phrase as “one or two hundred years” (Woodward 1974, 153). The remedy could reflect the rationale for the actions of local government. If those actions were said to be race neutral, even if the discriminatory status quo was maintained, courts typically agreed with the remedy. States created pupil assignment laws which on paper eliminated explicit racial placement, but were designed, nonetheless, to maintain segregation. State statutes also permitted students to apply for transfers to adjacent schools based on race-neutral criteria. Those criteria included whether a student would be a good fit relative to intelligence,
aptitude, academic preparation, morals, breaches of the peace, and the health of the student (Meador 1959). Under these conditions few students were granted transfers (Dillard 1962).

A Brief Desegregative Respite

The Supreme Court, after more than a decade, began again aggressively scrutinizing school districts and their desegregation efforts. As in Brown I, during this time, states’ rights were viewed as subordinate to the authority of the federal courts. On one level, the federal judiciary had no choice but to increase its involvement in integration. The courts had given public school officials the opportunity to discontinue the use of race in student placement, a chance largely rejected. In Griffin v. County School Board of Prince Edward County (Griffin 1964), a case decided in 1964, the Supreme Court ruled that the local school district could not close its public school system while providing tuition grants to private all-white schools because this denied African American pupils equal protection of the law. The Court, in requiring Prince Edward County to reopen and desegregate its public schools, gave notice to the states that it would no longer tolerate state-sanctioned devices created to perpetuate a segregated education system.

At approximately the same time that the Griffin case was announced, the United States Congress helped to expedite the process of desegregation by enacting the Civil Rights Act of 1964 (Civil Rights Act 1964). Led by President Lyndon Johnson, the United States Congress passed Title VI of the Act requiring educational institutions to operate devoid of racial discrimination (Title VI 2000). Corollary federal legislation was promulgated in the Elementary and Secondary Education Act (ESEA 2000) making federal funds available to states and their school districts. The executive branch of government through the former Department of Health, Education, and Welfare (HEW) also played a prominent role. School officials had to commit in writing to HEW that they were in compliance with federal law. Those school districts found in violation of the legislation were subject to lose the federal set-aside funds. Congress, however, gave HEW no influence over school district compliance other than fund termination. Consequently, to further persuade states to desegregate, congressional legislation granted license to the Department of Justice to initiate legal causes of action against school districts for continued discrimination under Title IV of the Civil Rights Act.
With the three branches of government operating in unison, the federal will could now compel desegregation with both a carrot and a stick. The battle came quickly; three years after the Griffin decision the Supreme Court was faced with another scheme to avoid desegregation (Green 1968). This time, New Kent County, Virginia had promulgated a “freedom-of-choice” plan in response to pressures that it develop a method to desegregate its public schools. Under the plan, black and white students were free to choose which schools they would attend. In practice, no white students chose to attend the all-black school, and only 15 percent of the black students chose to attend the former all-white schools. Although the Court did not declare “freedom-of-choice” plans unconstitutional per se, it ruled that “if there are reasonably available other ways, such, for illustration, as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, ‘freedom of choice’ must be held unacceptable” (Green 1968, 441). In so ruling, the Supreme Court removed from affected school districts the power to devise plans that would just eventually desegregate dual school systems as Brown I and Brown II had required. Rather, the districts were commanded to assume the additional task of creating a totally “unitary nonracial system of public education” (Green 1968, 436). Any plans that did not have as an immediate goal the elimination of racial discrimination “root and branch,” and that were not intended “realistically to work, and . . . realistically to work now” (Green 1968, 439) would not be acceptable. The Court further determined that school systems must satisfy seven factors in order to comply with a desegregation order. Known later as the “Green factors,” they require that (a) students of all races receive the same quality education; (b) administrator and teacher assignments be race neutral; (c) student assignments be race neutral; (d) all students be given equal access to the school transportation system; (e) all schools receive equitable allocations of resources; (f) school buildings and facilities be of equal quality; and (g) all students be given equal access to extracurricular activities (Green 1968, 440). The Court announced that the burden of desegregation was not upon students and parents, but, instead, upon the school district, based on these seven factors. The Court concluded that the district had not satisfied the factors and required New Kent County to formulate a new plan for desegregation which would result in the elimination of racially identifiable schools (Green 1968, 442).

The Supreme Court’s impatience with dilatory tactics and inadequate desegregation plans was further emphasized in 1969 when it refused to allow certain Mississippi school districts any additional extensions of
time to develop acceptable desegregation plans. In *Alexander v. Holmes County Board of Education* (*Alexander* 1969), the Court simply stated that “continued operation of segregated schools under a standard of allowing ‘all deliberate speed’ for desegregation is no longer constitutionally permissible” (*Alexander* 1969, 20).

The above-cited cases *Green* and *Alexander* established the present standards to which a school district must adhere in eliminating the vestiges of de jure discrimination. In effect, the Fourteenth Amendment is read as requiring the immediate establishment of a unitary, racially heterogeneous school system to replace dual systems or any remnants of such systems.

**Busing to Achieve Racial Balance**

When the Supreme Court ruled that formerly segregated school systems must not simply adopt a racially neutral policy, but must take affirmative action to assure that any vestiges of a prior discriminatory policy are eliminated, the lower courts were left to devise a variety of remedial plans. The most difficult problems arose in school districts encompassing large metropolitan areas in the South. To meet the desegregation requirements of the Supreme Court, many lower courts ordered major restructuring of attendance zones and intradistrict busing to eliminate “black” and “white” schools. There was a substantial question as to whether the Constitution allowed the courts such wide discretion inremedying past discrimination. This issue was addressed by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education* (*Swann* 1971). In *Swann*, the federal district court had ordered cross-district busing in Charlotte, North Carolina, in order to bring about better patterns of integration within the school district. The federal circuit court reversed on the grounds that massive busing such as that ordered by the district court would place an unreasonable financial and educational burden on the school district and school pupils.

In upholding the district court’s busing plans, the Supreme Court sanctioned busing as a legitimate means to remedy the problems caused by de jure discrimination. The Court noted that “bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. . . . [T]herefore we find no basis for holding that the local school authorities may not be required
to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school” (Swann 1971, 29–30). In fact, the only limitations that the Court placed upon busing plans were “when the time or distance of travel is so great as to risk either the health of children or significantly impinge upon the educational process” (Swann 1971, 30–31).

In addition to mandating unitary school systems, the Swann decision acknowledged a difference between de jure and de facto segregation. De jure racial discrimination, as defined by the courts in desegregation cases, occurs in public education when the state or its representative agencies classify and segregate students according to race and thereby create dual school systems or racially identifiable schools within a school district. In contrast, de facto segregation in the public schools refers to a racial imbalance caused by such social or economic factors as housing patterns, rather than any official action. The Swann Court held that regardless of the type of segregation, where a system evidences a history of statutory segregation, school authorities bear the burden of eliminating vestiges of such discrimination (Swann 1971, 15–16).

Although Swann was specifically directed toward correcting the problems created by dual school systems that had existed mainly in the South, an upshot of the decision was to focus attention on the “black” and “white” schools in many Northern cities. In Keyes v. School District No. 1, Denver Colorado (Keyes 1973), a federal district court found that the Denver School District had engaged in de jure discrimination in one part of the district by making decisions concerning such things as attendance boundaries, school placements, and optional attendance zones by considering racial and ethnic rather than educational factors. The district court ordered the desegregation of the area affected by de jure discrimination, and in addition ordered integration of the core city schools because they provided an “inferior education.” The United States Court of Appeals for the Tenth Circuit upheld the desegregation order as it applied to those schools affected by racially motivated decisions, but reversed the order’s application to the core city schools, concluding that schools segregated solely because of housing patterns or other factors not caused by the state should not be subject to desegregation orders. The Supreme Court agreed with the district court and court of appeals as far as the desegregation order concerning those schools where de jure discrimination had occurred. But the Court went further than either of the two lower courts by imposing upon the school district a burden to show that discrimination had not occurred throughout the whole system if
discriminatory actions were found in a part of the system. The Court was cautious to note that it was still addressing itself to de jure discrimination, but the effect of the Keyes decision was to put school districts in all areas of the country on notice that they are not immune from desegregation orders and court-ordered busing if discriminatory acts were found to have adversely affected any part of the school system.

**A Shift in Judicial Activism**

The *Brown I, Green, Swann*, and *Keyes* cases resulted in federal courts retaining a great deal of authority over public school systems. But the Supreme Court only briefly strayed away from the dominance of states’ rights over the field of public education. Beginning in 1974 the Court, in an abrupt departure from previous rulings, removed much of the remedial authority it had granted to the lower courts.

The busing orders considered by the Supreme Court up to 1974 dealt only with intradistrict busing. But in order to devise remedies to correct problems caused by racial discrimination, especially in large metropolitan areas where many of the core cities are occupied almost exclusively by blacks, some lower courts ordered busing across district lines. The Supreme Court was asked in *Milliken v. Bradley* (*Milliken* 1974) to decide whether an interdistrict busing order affecting the Detroit school district and fifty-three outlying districts met constitutional requirements. The facts as determined by the district court showed that de jure school segregation had occurred in the Detroit school district, but that there was no evidence that other school districts included in the plan had failed to operate unitary school systems or had engaged in acts of intentional segregation, the specter of white flight notwithstanding. Chief Justice Warren Burger began the unraveling of desegregation remedies found in previous Supreme Court decisions by claiming that federal courts had become pseudo school superintendents and had exhibited de facto legislative authority in holding for plaintiffs in such cases. He reemphasized states’ rights, finding that such inappropriate judicial roles would “deprive the people of control of schools through their elected representatives” (*Milliken* 1974, 744). In holding that the lower courts’ remedies were too broad, the Supreme Court set forth the applicable constitutional standard:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial
purposes or by imposing a cross-district remedy, it must be shown that there has been a constitutional violation within one school district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. . . . [W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. (Milliken 1974, 744–45)

The Court rendered its support of attendance policies for schools established by school officials, independent of discriminatory motive or result, and stated that lower-court judges were not in a position to supplant the decisions of school board members or licensed school administrators. Such a preemption, according to the Court, would produce problems involving pupil assignments, transportation, and tax-based financial support. For this reason lower-court decisions sanctioning an interdistrict remedy were found to unconstitutionally abolish local control and the Court refused to impose a desegregation remedy without extant evidence that suburban, mostly white, school districts had participated in intentional segregation.

Milliken represents a movement away from active judicial intervention in school desegregation so typical in cases from Brown I to Keyes. Subsequent rulings followed Milliken in finding no constitutional violation in desegregation disputes. In Pasadena City Board of Education v. Spongier (Pasadena 1976) the Supreme Court held that a district court exceeded its authority when ordering that school officials adopt a desegregation plan that required annual adjustments of attendance zones to avoid a majority of either black or white students in any school. The new trend continued in Dayton Board of Education v. Brinkman (Dayton 1977), where the Supreme Court in vacating and remanding the judgment of a federal appeals court held that a system-wide remedy imposed to eliminate racial discrimination in the operation of the Dayton, Ohio, schools, following the school board’s repudiation of previous resolutions for desegregation, could not be justified. Directly following its Milliken decision, the Supreme Court held that there should be a system-wide remedy for segregation only if there has been a system-wide segregative impact from constitutional violations. This means that school district boundary lines matter when crafting a remedy. Those boundaries must be respected; as in the early desegregation decisions the Court had returned to state and local control as the locus of its opinion.
**Dowell, Freeman, and Missouri III**

The most recent and meaningful school desegregation cases heard by the Supreme Court have involved school districts attempting to extricate themselves from federal court supervision of desegregation obligations. In *Board of Education of Oklahoma City Public Schools v. Dowell* (*Dowell* 1991) the Supreme Court addressed what it considered to be the proper standards for declaring a former segregated school district unitary by a federal district court. The Oklahoma City schools had been declared unitary in 1977. African American plaintiffs, however, claimed resegregation and attempted to reopen the case in 1985. Plaintiffs’ rationale for claiming resegregation related to a new school reassignment plan introduced in 1984 which effectively returned many previously desegregated schools to one-race schools. In response to the plaintiffs’ complaints, the school district sought an end to federal judicial oversight of the schools. In a sharply divided opinion, the Supreme Court held that judicial control of public school desegregation efforts should be temporary if there is a finding that the district has cooperated with existing decrees and has eliminated past discrimination as much as practicable. The Court reasoned that federal supervision of local school districts was intended to be a temporary measure to remedy past discrimination. It repeated the *Milliken* Court’s emphasis on local control of education; if a school district has complied with court conditions for a reasonable period, dissolution of a judicial desegregation decree recognizes the importance of states’ rights. The decision established a good-faith standard whereby school districts need only demonstrate “that they had eliminated the vestiges of past discrimination, ‘to the extent practicable,’ rather than make a more definite showing of compliance” (*Brown-Nagin* 2000, 791).

This now meant that “de jure segregated school district[s] that had been found unitary could return to assigning students to neighborhood schools, even if such schools would be racially segregated” (*Brown-Nagin* 2000, 785). In this case the Court declared that school officials needed only to establish that they were operating within the Equal Protection Clause and that it was “unlikely [they] would return to [their] former ways” (*Dowell* 1991, 247). Such a showing would demonstrate “that the purposes of desegregation litigation had been fully achieved” (*Dowell* 1991, 247). The Court retreated from much prior litigation in making it clear that lower-court jurisdiction should cease once a school district is unitary, since at that point the purpose of litigation would be accomplished. The mandate of Supreme Court precedent before *Dowell*
requiring school districts to remove all vestiges of past discriminatory practices was overruled. The Court now only required the removal of discriminatory vestiges to the extent practicable. The Court, however, offered no insight on how “practicable” a school district’s effort toward the elimination of discriminatory vestiges had to be.

This trend was followed in *Freeman v. Pitts* (*Freeman* 1992), where the Supreme Court refined the guidelines to be used by lower federal courts in determining how to relinquish authority over school desegregation to school authorities. In a case directly influenced by the findings in *Milliken*, the Supreme Court held that resegregation of schools does not have constitutional implications if the resegregation results from private choices rather than state action. A local school system in Georgia sought a final release from judicial supervision for its desegregation efforts. School officials claimed that private residential decisions by parents caused resegregation in the area; this was remarkable since racial separation had been the issue before the desegregation decree. Moreover, while the desegregation plan in place required busing for students wishing to transfer schools, school leaders budgeted no funding for this kind of transportation. The school district asserted that a plan had been created that satisfied some, but not all, of the factors necessary for achieving unitary status. A federal district court held that the district had achieved unitary status in some but not all relevant areas. The court released the school district from judicial control in those areas that had been found unitary. The United States Court of Appeals for the Eleventh Circuit reversed, holding that full judicial control should be retained until unitary status is achieved in all areas.

In reversing the decision of the appellate court, the Supreme Court restated its holding in *Dowell* that judicial control of a district’s desegregation efforts was intended to be temporary and that the ultimate objective was to return control to local authorities. In another divided opinion, the Supreme Court declared that lower courts may relinquish control of school systems in incremental stages before full compliance is realized (*Freeman* 1992, 488). The Court also indicated that racial imbalance in schools was only to be remedied if there were constitutional implications (*Freeman* 1992, 469). Specifically, courts are under no obligation to remedy racial imbalance in schools caused by private demographic decisions.

The recent triumvirate of Supreme Court decisions undermining desegregation and further compromising the education of African American students includes *Missouri v. Jenkins* (*Missouri III* 1995). The state of
Missouri had incorporated laws fostering de jure segregation and agreed to follow the desegregation mandate of Brown, but only after several years of legal complaints by Black parents. The Supreme Court considered the validity of three desegregation remedies that a lower federal court had imposed on the Kansas City, Missouri school system. The remedies consisted of salary increases for all personnel, the creation of a remedial quality education program in the form of a city-wide “magnet” school district, and additional state funding for the purpose of increasing student achievement scores of African American students to those approaching national norms. All of the remedies were designed to make the school system attractive enough to avert white flight and to encourage some suburban children to seek education in the city.

The Supreme Court, in yet another sharply divided opinion, reversed and held that the district court went beyond its remedial powers when it fashioned this novel set of remedies for the school district. Namely, courts must only order remedies that “restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct” (Missouri III 1995, 70). In this case salary increases would make the district more attractive and contribute to the impermissible goal of inducing white students from outside the school district to return to Kansas City. Such a remedy was outside the district court’s remedial authority because the Court found no constitutional violation that could be attributed to any school district outside the city (Missouri III 1995, 70). This was also true of the magnet school remedy; it too focused on bringing nonwhites back into the city (Missouri III 1995, 71–72). Finally, the Supreme Court questioned the propriety of ordering additional state funding for the purpose of bringing the achievement scores of Kansas City school children to that approaching national norms. The Court found that disparities in test scores did not justify a continued desegregation order in that Brown signified an educational opportunity for all students, not a commensurate outcome. Differences in test scores between blacks and whites was said to be an insufficient basis for continuing a court order. Such an endeavor was not an appropriate remedy under a desegregation order as it was not necessary to achieve partial unitary status (Missouri III 1995).

**Conclusion**

The circle of racial segregation in schools has completed itself based on the more recent Supreme Court cases pervasively weakening the welfare
of African American and other students of color as regards an appropriate education. The tenor of the federal courts, though at one ten-year period in the 1960s and 70s serving as a champion of equal educational opportunity rights, has now determined that the vehicle for supporting those rights, a desegregation decree, may not operate in perpetuity. The lawsuit has a short locus of points and soon after state and local control of schools must be restored. This legal phenomenon is not a new one. As noted above, southern state officials were sanguine about the language of Brown II, decided in 1955; changes could be arranged at the pace decided by the wrongdoers themselves and corrective efforts could be premised upon the social and economic conditions of the region.

The three branches of government, legislative, executive, and judiciary, once a trio to enforce desegregation decrees, later banded together to circumvent such activities. For example, part of the return to judicially supported segregation in education occurred in the 1980s when the Justice Department during the administration of President Ronald Reagan offered its assistance to school boards, particularly in the South, to help end federal judicial supervision of decrees (Boger 2003). Finding solace in this presidential approach, the three primary cases of Dowell, Freeman, and Missouri III offer persuasive arguments that the judiciary will interpret Brown v. Board of Education as standing for an opportunity for an education, not protection of education, and certainly not a right to racial desegregation. The three decisions indicate a willingness to defer to state and local authorities even if a consequence is the resegregation of mostly one-race schools. With local control as a constitutional imperative, courts cannot issue remedial orders for interdistrict remedies for de jure segregation absent findings that all of the school districts in the order deliberately participated in discrimination that affected other school districts. Furthermore, segregation is constructively sanctioned by the courts when that separation is deemed to be caused by private actors.

The courts have accepted the provision of a return to one-race schools due to choices of domicile causing self-segregation. Justice Antonin Scalia, for example, in his concurring opinion in Freeman v. Pitts determined that “[r]acially imbalanced schools are . . . the product or a blend of public and private actions, and any assessment of a particular one of those factors[,] is guesswork” (Freeman 1992, 503). This legal fiction informs us that discrimination in education can almost never be the fault of government. Such a position not only introduces forgiveness for the initiation of discrimination, but also perpetuates its longevity since private choice is the eternal and indefinite culprit. A casualty of this philosophy is the achievement of students of color who today, statistically as a group, lag
behind their white counterparts. The courts have found that poor student achievement that might be occasioned by these private choices is not remediable under the Fourteenth Amendment equal protection clause when no state actor is implicated.

While *Brown I*, *Green*, *Swann*, and *Keyes* required compliance in realistic time, states’ rights notwithstanding, the more recent Supreme Court decisions have engaged in local authority restoration, thereby excusing failure or intended desire not to achieve desegregation. Lower courts have gotten the message, and have been quite willing to dismiss school desegregation lawsuits. Local control is returning. One ten-year study of district court opinions and the appeals of these opinions demonstrated that nearly every request for unitary status was granted (*Parker* 2003). They note that while unitary status is a goal, and not a conditional precedent, a return to local control is the intended outcome. Protection from the invidious effects of a segregated education, hence, is bounded by local control of education.

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U.S. Constitution, Amendment X. U.S. Constitution, Article VI, Cl. 2.