Freeman v. Pitts: Congress Can (and should) Limit Federal Court Jurisdiction in School Desegregation Cases

Chip Jones

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I. INTRODUCTION

[W]e must resolve—if not today, then soon—what is to be done in the vast majority of other [school] districts, where, though [federal courts] continue to profess that judicial oversight of school operations is a tem-

porary expedient, democratic processes remain suspended, with no prospect of restoration, 38 years after *Brown v. Board of Education*.[1]

THIS statement indicates that the role of the federal courts in supervising the hundreds of school districts involved in desegregation litigation is at a crossroads. From one perspective comes frustration with the apparent fact that court intervention for 30 years has not succeeded. From another direction comes a new emphasis on efficient case management and efficient dispute resolution. The Civil Justice Reform Act of 1990[2] is Congress's attempt at relieving the federal courts of the explosion of newly created statutory rights invoking federal court jurisdiction.[3] For the time being, Congress has responded to the increase in the caseload of the federal courts by attempting to streamline adjudication, rather than altering substantive rights.[4]

Finally, Congress is approaching the crossroads with plans to improve educational performance.[5] Congress has adopted national educational goals and initiated research;[6] making educational policy decisions, however, remains a responsibility of local governments.[7] While deliberating the federal government's role in solving local school problems, Congress also must face claims that its Chapter I program, which is the fundamental program for helping to improve the basic academic skills of disadvantaged children, is failing.[8] As a result, the debate on the extent of federal involvement in fundamental educational issues is likely to escalate.[9]

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1. Freeman v. Pitts, 112 S. Ct. 1430, 1450 (1991) (Justice Scalia, concurring). For additional commentary on this case, see David Crump, *From Freeman to Brown and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 WASH. L. REV. 753 (1993), and John Dayton, *Desegregation: Is the Court Preparing to Say It Is Finished*, 84 EDUC. L. REP. 897 (1993).

2. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

3. Don J. DeBenedictis, *An Experiment in Reform*, A.B.A. J., Aug. 1992, at 16.

4. *Id.*

5. *See, e.g.*, H.R. 2460, 101st Cong., 2d Sess. (1991) [hereinafter America 2000].

6. Education Council Act of 1991, Pub. L. No. 102-62, 105 Stat. 305 (1991).

7. *See, e.g., Schools and Standards*, WASH. POST, Oct. 19, 1993, at A22 ("If national standards help . . . to improve the quality of U.S. education, it's going to be by force of example, not by force of federal law"); *see also infra* notes 17, 44, 47, 85, 120, 140, 157-59, and 180 and accompanying text.

8. *See, e.g.*, William Celis III, *School Program for Poor is Failing a Panel Says*, N.Y. TIMES, Dec. 11, 1992, at A24 (disclosing the Commission on Chapter I's report entitled "Making Schools Work for Children in Poverty"); Mary Jordan, *Panel Says Poor Children Disserved by School Aid*, WASH. POST, Dec. 11, 1992, at A10. For the Clinton Administration response to these criticisms, see Mary Jordan, *Writing a New Chapter in Public School Aid. More Money Focused on Fewer Institutions*, WASH. POST, Sept. 9, 1993, at A19.

9. Former President Bush's America 2000 legislation fell into political debate because of the Democrats' concern that the voucher system would institutionalize de facto segregation. Tex Lezar, *School Choice Actually Saves Public Money*, DALLAS MORNING NEWS, Feb. 5, 1993, at A23. Despite the fact that President Clinton has opted to send his daughter to a private school, the "choice" plans are labelled as the "cornerstone of conservative education" reform. William Claiborne, *California Votes Turn Down Proposal on School Vouchers*, WASH. POST, Nov. 4, 1993, at A25.

The recent release of a study showing that the "civil rights impulse from the 1960s is dead in the water and the ship is floating backward toward the shoals of racial segregation" will spark additional debate. Carol Innerst, *Schools Becoming Less Integrated*, WASHINGTON TIMES,

This comment proposes that as these three forces[10] - judicial frustration with school supervision, civil justice reform, and implementation of national educational goals - meet at the crossroads, Congress should shape these forces into a comprehensive education plan which will: (1) bring an end to school district supervision by the federal courts; and (2) place the responsibility for ensuring equal protection in education upon the shoulders of Congress rather than the federal courts.[11]

Before such a comprehensive education plan is enacted, Congress should confront, in particular, constitutional limitations on its power to alter federal court jurisdiction.[12] Admittedly, Congress could enact a national educational plan without addressing the propriety of continued court involvement with school administration. Failing to address the court's role in shaping educational policy likely will produce the same confusion that courts and school administrators have had for thirty years in trying to implement *Brown*.[13]

This comment's focus is on a constitutional issue: Whether or not Congress has the power to alter the federal court's jurisdiction in school desegregation cases. Section II of this comment first identifies the sources of Congressional power to control the federal courts. After identifying the sources of power, this comment discusses limits on the exercise of the power itself. Section III analyzes these limits in terms of desegregation issues. Why Congress has not been successful in attempting to control federal court supervision of school districts is attributable more to lack of effort than to constitutional law.[14] Yet, because of past attempts and the lapse of time in

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Dec. 14, 1993, at A5 (quoting GARY ORFIELD, THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968, NATIONAL SCHOOL BOARDS ASSOCIATION (1993)).

10. There are other forces at work as well. The National Education Association, a national teachers' union, "will concentrate its national lobbying efforts in 1991 on getting more federal money for education and a new federal statute to guarantee collective bargaining rights for teachers." *Convention Report: NEA Plan for 1991*, Gov't Empl. Rel. Rep. (BNA) July 16, 1990, at 904. In addition, comparisons with other countries are putting pressure on Congress to get more involved with education. *See, e.g., National Commission on a Longer School Year*, S. Rep. No. 26, 102d Cong., 1st sess. (1991) ("Although States and localities in our country bear the primary responsibility for elementary and secondary education, rapidly increasing international competitiveness demands that educational achievement become a national priority.").

11. There are many ways to demonstrate that Congress should take the lead in making educational policy. One could attempt to reach a conclusive determination, relying on whatever social-scientific-moral-religious theories are available. Another way is an existential approach; the presumption that Congress must step forward to take responsibility for education is a leap of faith from a point where basic educational systems are not performing to a point where they might perform.

A leap of faith alone is not sufficient to recommend a change of a tradition which is as old as the Constitution. When basic educational systems remain segregated, however, how can a school district, drawn by arbitrary local boundaries, desegregate? *See* ORFIELD, *supra* note 9.

12. *See infra* text accompanying notes 31-50.

13. Brown v. Board of Educ., 347 U.S. 483 (1954) [hereinafter *Brown I*]; Brown v. Board of Educ., 349 U.S. 294 (1955) [hereinafter *Brown II*]. Unless referring to one of the specific cases, the two decisions together will hereinafter be called *Brown*. *Brown I* is the decision that struck down the separate but equal precedent, and *Brown II* set forth guidelines for district courts and school districts to follow in moving to desegregated systems of education.

14. The likely answer is that the political process itself has prevented Congress from tak-

allowing courts to legislate Fourteenth Amendment issues, any future Congressional attempt to alter federal court jurisdiction in desegregation cases should comport with these limits. Section III proposes that Congress has room to act depending on the appropriate result (as opposed to the remedy) of school desegregation litigation. If the result required by the Fourteenth Amendment is complete and idealistic desegregation, then Congress will never be able to enact legislation which would guarantee this result. If the result is measured practically, however, then Congress may alter the federal court's jurisdiction of desegregation litigation and stay within constitutional limits.

Section IV reviews *Freeman* to determine what result is required in school desegregation litigation. In *Freeman* the Court suggests that the time has come for federal courts to withdraw from desegregation cases.[15] Then, this comment compares the Court's philosophy revealed in *Freeman* with previous attempts to streamline the federal courts. From this comparison, the comment concludes that the time has come to end federal court supervision of school districts and suggests that Congress take control.

II. CONGRESSIONAL AUTHORITY TO LIMIT FEDERAL COURT JURISDICTION

A premise[16] of this discussion is that Congress desires to take a more active role in implementing a national educational policy.[17] Implementing a national educational policy will require Congress to alter the continuing role of the federal courts in desegregation cases.[18] The issue then becomes how much authority does Congress have to change federal court jurisdiction.

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ing measures to restrict the Court's ability to supervise school district desegregation plans. The idea that Congress could enact legislation to control the courts' ability to fashion equitable relief is not new. Members of Congress have tried several times to limit busing orders and mandatory assignments along racial lines, often in opposition to remedies the courts have considered necessary to remedy the constitutional violation. *See infra* text accompanying notes 24, 58. These unsuccessful attempts by Congress do not necessarily reflect an absolute constitutional bar to the exercise of Congress' power in Article III to affect federal court jurisdiction. *See* Archibald Cox, *The Role of Congress in Constitutional Determination*, 40 U. CINN. L. REV. 199, n.50 (1971).

15. *See supra* note 1.

16. *See supra* note 11.

17. This begs the question of what power Congress has to interfere with local school operations. Without going into a separate treatise, Congress would likely have the necessary power to regulate local schools through its commerce, tax and spend, and/or Fourteenth Amendment powers. *See generally* Laurence Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983). Absent equal protection precedent, however, the real issue is whether or not Congress is politically willing to infringe on traditionally local affairs. *See supra* note 9 and *infra* notes 44, 47, 85, 120, 142, 157-59, and 182 and accompanying text.

18. *See* JOHN C. HOGAN, THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST 10 (1985). The *Brown* decision spurred an explosion of education litigation in the federal courts. Between 1789 and 1956, the federal courts heard 398 cases on education issues; between 1956 and 1984, they heard over 6,999. *Id.*

A. CONGRESSIONAL POWER TO CONTROL FEDERAL COURT JURISDICTION

The starting point for any discussion of Congress' power to control the jurisdiction of the federal courts begins with Article III of the Constitution.[19] Section 1 of this article establishes one Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish."[20] Like much of the Constitution, this section represents a compromise between those wanting a strong national government and those wanting a federation of empowered states.[21] Since the framers could not agree on the extent or the necessity of federal courts with original jurisdiction, they settled on vesting Congress with the power to create courts of original jurisdiction on an as-needed basis.[22]

A plain reading of the Constitution suggests that no constitutional limitation exists to prevent Congress from eliminating federal district and appellate courts.[23] Yet, while Congress has debated stripping the lower federal courts of original jurisdiction, it rarely takes such action.[24] In theory, Congress could end the litigation of desegregation lawsuits, as they now exist, by stripping federal courts of original jurisdiction.[25]

The "exceptions clause"[26] specifically grants to Congress power to control the appellate jurisdiction of the Supreme Court. Little precedent exists, however, for anticipating how a modern court would judge a statute using this power since Congressional exercise of the power is rare.[27]

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19. U.S. CONST. art. III. Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974).

20. U.S. CONST. art. III § 1.

21. PAUL M. BATOR, ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 360 (3d ed. 1988) [hereinafter HART & WECHSLER'S FEDERAL COURTS].

22. *Id.*

23. Daniels v. Railroad Co., 70 U.S. 250, 254 (1865) (stating that "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation"). *See also* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 907 (1982) (stating that the exceptions clause is a "relatively unambiguous constitutional provision").

24. For the purposes of this comment, the most relevant Congressional debates occurred as a result of several proposals to limit busing orders to remedy constitutional violations. *See* Alphonso Bell, *Congressional Response to Busing*, 61 GEO. L.J. 963 (1973); Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988 (1982); *see also* Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357.

25. This action theoretically would shift the litigation to state courts.

26. Except for cases "affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be Party," the Supreme Court "shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III § 2, cl. 2.

27. The best known example of Congress stripping jurisdiction of the federal courts is *Ex parte* McCardle, 74 U.S. 506 (1869). In that case, the Supreme Court upheld an act that removed the Court's authority to hear certain habeas corpus writs. Most commentators suggest, however, that this decision is more of a product of the time period in which it was decided (in the midst of reconstruction) than a precedent for unrestrained power by Congress to limit federal court jurisdiction. *See* Mark Tushnet & Jennifer Jaff, *Why the Debate Over Congress' Power to Restrict the Jurisdiction of the Federal Courts Is Unending*, 72 GEO. L.J. 1311 (1984).

These two sections of Article III undeniably grant Congress with a broad power to alter the judicial system of the United States.[28] Yet, the issue is trying to define the extent of this power.[29] The next section of this comment attempts to establish the limits upon Congressional power to restrict the jurisdiction of the federal courts.[30]

B. LIMITS ON CONGRESSIONAL POWER TO ALTER FEDERAL COURT JURISDICTION

The first generally accepted limit focuses on the origination of a party's right to invoke federal court jurisdiction.[31] Different standards should apply if an applicant to a court invokes jurisdiction based on a right created by statute versus a right created by the Constitution.[32] One commentator has concluded:

> the use by Congress of the exceptions power to single out a class of cases involving fundamental rights, withdrawn from the Supreme Court's appellate jurisdiction only from dissatisfaction with the Court's exercise of its power of substantive constitutional review in respect to such cases, may, ironically, today be subject to fifth amendment challenge.[33]

Therefore, one limit on Article III power suggests that Congress cannot alter the federal court's jurisdiction if a constitutional right would be made unavailable.[34]

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28. Redish, *supra* note 23, at 901.

29. Other commentators have identified "internal limits" such as the "essential functions" thesis and the "limitation-as-to-fact theory." Redish, *supra* note 23, at 906-13. The "essential functions," which cannot be invaded by Congressional fiat, provide: 1) "a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts," and 2) "a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority." Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960). In other words, "the 'essential functions' thesis is little more than constitutional wishful thinking." Redish, *supra* note 23, at 911. The "limitation-as-to-fact" theory suggests that the words "with such Exceptions" modifies only the word "Fact" and not "appellate Jurisdiction" in article III. Professor Redish concludes that *McCardle* "clearly disposes of the review-as-to-fact theory, since the limitation on the Court's appellate jurisdiction upheld there was in no way confined to review of factual determinations." *Id.* at 914-15.

30. Since little case law exists on this point, it is necessary to rely on theories put forth by constitutional scholars.

31. In *McCardle* the Supreme Court upheld a law which repealed a statutory right of appeal. 74 U.S. at 509.

32. *See* United States v. Bitty, 208 U.S. 393 ("What such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having, of course, due regard to all the provisions of the Constitution."). Stated another way, "to push the Congressional power to withhold jurisdiction to the extreme of permitting constitutional rights to be made completely unenforceable would be to read the basic document as authorizing its own destruction." Bell, *supra* note 24, at 969; *see* Redish, *supra* note 23, at 915-16 (finding that the due process clause of article V "requires an independent judicial forum for the ultimate adjudication of claims of constitutional right").

33. William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 265 (1973).

34. *Cf.* Redish, *supra* note 23, at 917 ("[I]f all Congress has done is to remove a class of cases involving assertion of a particular right from the Supreme Court's appellate jurisdiction, and has done so for everyone, there would not even appear to exist a prima facie equal protec-

The second limit that is most often mentioned is the foundation of the constitution itself - the separation of powers.[35] If Congress possessed the power to cripple the effectiveness of the judicial branch of the government, the people and the states would have no protection from the acts of Congress.[36] The case law on this point, however, is sparse.[37] Nonetheless, few would argue that Congress has the power to "eliminate entirely the courts' function of preserving fourteenth amendment rights."[38]

The third limit appears in *Klein*.[39] In that case, the Supreme Court "refused to sustain a statutory withdrawal of Court jurisdiction on the grounds that it was an improper congressional attempt to prescribe the result in a pending case."[40] This limit prohibits Congress from enacting legislation which would require an improper result in a pending controversy.

That none of these limits prevent Congress from taking action should be noted. The reason Congress has not, or will not, become the primary educational policy maker is out of respect for the tradition that schools are to be controlled on a local level. If the Court decided to abandon *Brown*, desegregation proponents would have only the political system as a forum for debating the merits of desegregated education.[41] Thus the question becomes "who should have authority to shape the education of future citizens."[42] If education "involves the social reproduction of culture" and "cultures are, by their nature, culturally biased," can democratic education really prepare students to understand "equality of citizenship?"[43] The answers to these questions require more than philosophical answers; they require a policy determination. If Congress decides to maintain the country's long-standing position that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools,"[44] then the puzzle of how a

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tion problem, assuming no clear, disproportionate impact and no demonstration of an ultimate legislative purpose to single out a particular group for negative treatment.").

35. United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) ("Congress has inadvertently passed the limit which separates the legislative from the judicial power"). Redish *supra* note 23, at 923-24; *see also* Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982).

36. Eisenberg, *supra* note 19, at 507.

37. *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530, 541 (1962) ("Congress may not by fiat overturn the constitutional decisions of this Court. . . ."); *see also* Redish, *supra* note 23, at 903 ("[A] discussion of the relevant case law concerning past congressional efforts to curb Supreme Court jurisdiction . . . proves to be far from definitive, and ultimately aids the inquiry very little").

38. Bell, *supra* note 24, at 970.

39. 80 U.S. 128.

40. Bell, *supra* note 24, at 969 n.55.

41. Relying solely on this limit would be a radical departure from the active role currently played by the courts. One reason suggested for resorting to the political process is that in "the post-World War II era, the engine for school reform was driven by ideology of equal educational opportunity" but now the issue is more "excellence than equality." Mark G. Yudof, *Should We Move Beyond Tolerance? Examining Education and American Multiculturalism*, TEXAS LAW., Oct. 29, 1990, at 18.

42. *Id.* at 19.

43. *Id.*

44. Milliken v. Bradley, 418 U.S. 717, 741 (1974); *see also* Christopher Steskal, *Creating Space for Racial Difference: The Case for African American Schools*, 27 HARV. C.R.-C.L. L. REV. 187 (1992).

local culture which has exhibited discriminatory tendencies, can teach its children not to discriminate, is more difficult to solve.[45] If educational policies are federally mandated and not subject to local control or veto, however, the potential for instilling new values into a local culture is greater.[46]

The Warren Court established itself in the country's mind as the preeminent policy maker for educational equality issues. Whether the Court would have been faced with *Brown* if Congress had assumed a more prominent role in protecting equal protection rights is mere speculation. Thirty years of hindsight, however, show that the courts are not suited to be an educational policy maker.[47]

While the amount of commentary on the congressional authority to limit the jurisdiction of the federal courts, both generally and specifically on Fourteenth Amendment questions, is extensive,[48] little precedent exists to support the myriad of theories advanced by scholars.[49] If Congress enacted a statute to alter the federal courts' jurisdiction, however, and the statute did not exceed the limits mentioned above, presumably the statute would be constitutional.[50]

III. OVERCOMING THE LIMITS: A FRAMEWORK FOR FEDERAL LEGISLATION TO CHANGE FEDERAL COURT JURISDICTION IN DESEGREGATION LITIGATION

A. STEP #1: PRESERVING EQUAL PROTECTION

As mentioned above, one limitation on Congressional authority to alter federal court jurisdiction is the requirement that constitutional rights remain protected. Therefore, any congressional alteration of federal jurisdiction of pending or future desegregation cases, regardless of the statutory or constitutional origin of the claim, may not retreat from any relevant constitutional guarantee.

In *Brown* Chief Justice Warren announced that dual educational systems, based on race and sanctioned by state law or action, violate the equal protection clause of the Fourteenth Amendment.[51] The first step then for Con-

45. Yudof, *supra* note 41, at 18.

46. *Id.*

47. Even the Supreme Court recognized this assertion:

> [W]e stand on familiar grounds when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions . . . . In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

48. Bell, *supra* note 24, at 969.

49. For example, one commentator belittled *Klein* because it "cannot easily be reconciled with the well-established principle that appellate courts are obliged to follow changes in the law enacted during the pendency of an appeal." *See* Eisenberg, *supra* note 19, at 526. He concludes that "the safest reading of *Klein* is that it precludes Congress from impairing the Executive's power to pardon." *Id.* at 526-27.

50. Cox, *supra* note 14, at 260.

51. *Brown I*, 347 U.S. at 493.

gress is to protect an individual's right to equal protection of educational laws. Accordingly, Congress may not inhibit that right through use of its powers to alter federal court jurisdiction.[52]

Using the *Brown I* holding as a starting point for developing a minimum constitutional national education plan is not, today, revolutionary.[53] Congress and the American people have, except for a few extremists, accepted that systems of dual education based on race are unconstitutional. Therefore, Congress could readily enact and enforce legislation to prohibit intentional state acts of segregation.[54]

This first step also should satisfy the first limit on Congressional authority to limit federal court jurisdiction — that no state may abrogate a constitutional right. By relying on the enforcement clause of the Fourteenth Amendment,[55] Congress can legislate equal protection issues.[56] If federal legislation guaranteed the individual's right to equal protection as interpreted by *Brown*, then the legislation should, on its face, be constitutional.

B. STEP #2: PROVIDING A FORUM FOR JUDICIAL REVIEW

The second step requires that the legislation maintain an opportunity for the federal courts to be the ultimate arbiter of constitutional rights. The Supreme Court has consistently maintained that it alone determines what the law is, and any legislation which would prevent it from making constitutional determinations would not survive judicial scrutiny.[57]

In the context of desegregation litigation, Congress' previous attempts to alter federal jurisdiction focused on circumventing judicial review rather than providing for equal protection of rights. This approach not only exceeds the doctrine of separation of powers by attempting to remove the federal court's power to define the contours of the Fourteenth Amendment, but it also implicates the *Klein* limit by attempting to improperly prescribe the

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52. *See* Cox, *supra* note 14, at 217-24.

53. *See, e.g.*, James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 353 (1990).

> During the late 1950's and early 1960's, *Brown* was simultaneously simple, optimistic, and naive. Its uncomplicated demand for formal equality was made with the confident assumption — credulous, it is true, given the nation's history, but perhaps excusably so given the period's flush economic conditions — that nothing more than abolishing 'separate but equal' was needed to end the subordination of black Americans.

Id.

54. In fact, Congress has already enacted this sort of legislation. *See* 20 U.S.C. § 1221-1 (1988):

> Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.

Id.

55. U.S. CONST. amend. XIV, § 5.

56. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 330-50 (2d ed. 1988).

57. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

result in a pending case.[58] Other approaches will allow Congress to enact national education legislation and provide proper judicial review.

For example, the Department of Education allows claimants to challenge administrative decisions. The first step is a review of the claim by an administrative law judge.[59] A claimant does not, however, have to accept the administration's determination; review by an Article III court is available.[60] In addition, legislation allowing other agencies to use administrative law judges provides for either concurrent or appellate jurisdiction by an Article III court.[61] Nonetheless, any legislation that might alter the courts' role in articulating the Fourteenth Amendment deserves special attention.[62]

For example, the record of the States and Congress in complying with the Court's definition of the Fourteenth Amendment in the school desegregation context is notable for one reason - the amazing show of opposition to the Court at every turn.[63] Therefore, the Court should approach suspiciously the subject of Congress requiring the courts to defer to legislation of the Fourteenth Amendment. Despite Congress' past opposition to the Court's desegregation rulings, the Court has deferred review of the constitutional issues because the constitutional challenge presents a "political question."[64] The political question doctrine is not a sufficient basis for removing federal court jurisdiction, however, because usually a politically motivated decision by a state actor precipitates the cause of action in the first place.[65]

In other constitutional cases, the Supreme Court has adopted a "presumption of constitutionality."[66] The reason for this presumption is that the "ascertainment and characterization of facts, even when constitutionally decisive, may be a job for the legislature rather than the judiciary."[67] In desegregation litigation, Congress has rarely used its superior fact-finding

58. *See supra* notes 14 and 24.

59. *See, e.g.*, 20 U.S.C. §§ 1234, 1708 and 2834 (1988).

60. *Id.*

61. The conclusion that the creation of any legislative court is constitutional glosses over significant legal issues that exceed the scope of the Comment. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Northern Pipeline Constr. Co. v. Marathon Pipe Line, 458 U.S. 50 (1982). Nonetheless, with the passage of the Civil Justice Reform Act of 1990, the bright line between Article III courts and legislative courts is beginning to dull. *See* 28 U.S.C. §§ 471-482 (Supp. IV 1992).

62. In theory, Congress could abolish lower federal courts, which would have the effect of either shifting desegregation to state courts or ending the litigation entirely. This drastic step would ignore, however, other constitutional issues such as providing a check on the other two branches of government, in order to achieve "uniformity of decision on questions of national concern . . . [and to] ensure that federal interests take precedence over those of any particular state in matters of federal competence." Eisenberg, *supra* note 19, at 504-05.

Strict review is also required because of the sensitive nature of the rights protected by the Fourteenth Amendment. For example, South Africa does not permit its courts "to enquire into or to pronounce upon the validity of any Act passed upon by Parliament." Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 131 (1981). This implies that a weak court would never be able to secure equal protection of the laws.

63. *See supra* notes 14, 24, and 58 and accompanying text.

64. Cox, *supra* note 14, at 201-06.

65. *See supra* text accompanying notes 41-46.

66. Cox, *supra* note 14, at 208.

67. *Id.* at 207.

function to resolve desegregation issues.[68]

Another possibility is to require state courts to adjudicate constitutional claims.[69] The problem with this approach is two-fold: (1) if Congress enacted national education legislation, the legislation would be subject to fifty varying interpretations; and (2) state court judges are more likely to be biased in a local school district case than are federal judges.[70] Despite these problems, it is not per se unconstitutional for Congress to withdraw jurisdiction of federal district courts.[71]

Even though the Court has dodged the ultimate question of whether Congress can withdraw jurisdiction and potentially leave constitutional rights without protection, the Court will always have jurisdiction to decide whether the jurisdiction is constitutional.[72] Consequently, the mechanics of providing or not providing jurisdiction is swallowed by the issue of protecting a constitutional right. In other words, the question is not whether Congress can withdraw jurisdiction, but what happens when it does: Did Congress provide for the proper result.

C. STEP #3: PROVIDING FOR A PROPER RESULT

The third step that Congress should consider is the result that the equal protection clause guarantees to individuals who have suffered from unlawful segregation.[73] In this third step, Congress also must stay within the third limit discussed above — the purpose of the legislation must not be to improperly "prescribe the result in a pending case."[74] To do this, Congress must determine the proper consequence of violating the equal protection clause of the Fourteenth Amendment. If the legislation required a result different from that which a court would order, then the legislation would not meet the *Klein* limitation. This third step, then, involves analyzing the significant Supreme Court decisions to identify the proper result for school desegregation litigation.[75]

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68. The absence of a fact-finding process in *Brown* is cited as a reason for the Court's "espousing highly questionable social propositions." *Id.* at 209.

> The opinion in *Brown v. Board of Education* would have been far more persuasive if it had asserted the political proposition that a State cannot be the government of all the people if it supports a caste system by racial segregation, instead of invoking the writings of controversial sociologists to the effect that segregated schools hamper the education of black children — a proposition that may be true or false or partly true and partly false but which the Court had neither the time to investigate nor the qualifications to decide.

Id.

69. Cox, *supra* note 14, at 258.

70. *Id.*

71. *Id.* at 259.

72. HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 21, at 423.

73. It is important to remember that segregation is not always unlawful.

74. Bell, *supra* note 24, at 969 n.55.

75. This process, in a strict sense, is impossible. There have been so many interpretations of the meaning of *Brown* that any attempt to restate actual principles of law will not address the confusion created in implementation of the law. That is, *Brown* represents a general principle upon which are built a myriad of specific court decrees based on particular facts. It is not uncommon for the specific decree to be inconsistent with the general principle. For legislation

1. Setting the Stage: Brown *Provides No Real Guidance*

At the heart of any review of *Brown* and its progeny is the tension between lawful and unlawful segregation.[76] A violation of the Fourteenth Amendment results from either state sanctioned dual educational systems or intentional acts of segregation by the state.[77] Therefore, de jure (by force of law) segregation is actionable, but private acts of segregation are not.[78] This dichotomy has frustrated the courts' attempts at fashioning remedies which actually desegregate schools.[79] Since the court's authority was limited to the enforcement of desegregation plans on the parties to the case, private individuals who sought to escape integration were not affected.[80] Therefore, interpretation of equal protection by the courts has, in effect, created conflicting rights for individuals in seeking an education. On the one hand, the Court states that victims of segregation are entitled to a remedy, while, on the other hand, every parent has the choice of selecting the school for his

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to be successful, the specifics of an appropriate plan based on the best method for educating all students should be built first. From the specific plan will evolve the general principle. It is probable, then, that any attempt by Congress to establish a uniform system of any kind will be subject to attack as a violation of the general principle set forth by *Brown*. Just as the Supreme Court has allowed a significant amount of district court discretion in applying the general principle, however, so should Congress be allowed some lee-way in developing a consistent application of the general principle.

76. Many argue that the rationale used by Chief Justice Warren to create a new constitutional right in *Brown I* and *Brown II* had no legal precedent. These arguments are interesting but, to a degree, moot. It is farfetched to think that now, 30 years later, that any Court would find that "separate but equal" is constitutional.

77. *Brown I*, 347 U.S. at 495.

78. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977). *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 592 (1983).

79. The choice the Court made by selecting "all deliberate speed" as the method to initiate integration is often cited as promoting resistance to the desegregation movement. Gewirtz, *supra* note 78, at 613. Professor Gewirtz also quoted a portion of Thurgood Marshall's oral argument in *Brown II* to support this argument:

> [T]he argument [to postpone enforcement of a constitutional right] is never made until Negroes are involved.
>
> And then for some reason this population of our country is constantly asked, "Well, for the sake of the group that has denied you these rights all of this time," . . . to protect their greatest and most cherished heritage, that the Negroes should give up their rights.

Gewirtz, *supra* note 78, at 613 (quoting ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA 1952-55 525 (Leon Friedman ed.,1969)); *see also* Louis Lusky, *The Stereotype: Hard Core Racism*, 13 BUFF. L. REV. 450, 457-59 (1964).

80. Nonetheless, Professor Gewirtz argues that

> white flight itself is an effect of the original de jure segregation, and therefore segregated attendance patterns resulting from flight are an effect of the original violation. . . . Because long-standing segregation may well have contributed to the conditions and attitudes that make whites want to flee the public school system, white flight can be characterized as an effect of the original segregation for which the defendant is responsible.

Gewirtz, *supra* note 78, at 640. Despite making these statements, Gewirtz nonetheless recognizes that even if white-flight is symptomatic of de jure segregation, an individual's decision to avoid the reach of the court by moving elsewhere is not subject to injunction and is protected by the constitution. *Id.*

or her child.[81] In other words, it is illegal for a state actor to intentionally segregate children in schools by race, but it is not illegal if segregation naturally occurs because of individual voluntary movement.

The implication of the de jure and de facto dichotomy is that a significant causation factor is beyond the reach of the courts. Instead of acknowledging the reasonable possibility that no court order would ever improve attempts to desegregate, the Court moved further into the realm of establishing educational policy.

2. *The Duty to Desegregate*

Determining what result *Brown* requires by law is difficult and courts have struggled with this for more than three decades. "[T]he desegregation decisions that followed *Brown I* . . . have with reason been described as 'patchwork of unintelligibility,' 'chaos out of confusion,' and 'surrealistic.' "[82] "Heeded differently, however, *Brown*'s meaning need not be discerned from the discordant messages the decision seems to voice and instead may be descri[b]ed [sic] in the changing tenor of the times through which the decision has lived."[83]

Beginning in 1954, the Supreme Court proclaimed that "in the field of public education the doctrine of 'separate but equal' has no place" and "is a denial of the equal protection of the laws."[84] Because of the "wide applicability of this decision and because of the great variety of local conditions,"[85] the Court requested the parties to present further argument on "the consideration of appropriate relief."[86]

Therefore, in *Brown I* the Court did not specify what the result should be for violating the Fourteenth Amendment, except that states must dismantle dual systems of education. *Brown II*[87] does not help either. After rehearing arguments on the appropriate relief, the Court remanded the cases to the district courts "[b]ecause of [the court's] proximity to local conditions and the possible need for further hearings."[88] In fashioning equitable remedies, the Court noted that district courts should reconcile "public and private needs,"[89] the private needs being "the personal interest of the plaintiffs in being admitted to public schools as soon as practicable and on a non-discriminatory basis."[90] This vague instruction to the district courts has caused

81. Liebman, *supra* note 53, at 352.
82. Liebman, *supra* note 53, at 352 (citing Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 87, 99, 102, 105 (1978)). *See also* Liebman, *supra* note 53, at 353 n.20 ("[M]ore than 30 years after the *Brown* decision there is no political or intellectual consensus about where we are, what we have learned or where we should be going.").
83. Liebman, *supra* note 53, at 353.
84. *Brown I*, 347 U.S. at 495.
85. *Id.*
86. *Id.*
87. 349 U.S. 294 (1955).
88. *Id.* at 299.
89. *Id.* at 300.
90. *Id.*

decades of confusion about the role of the courts in supervising school desegregation plans. However, looking back at the decision attempting to define what the result should be, one theme stands out - practicality.[91] That is, the courts are reminded several times to remain cognizant of the practical problems inherent in operating a school district.

While *Brown* and its progeny have succeeded in changing the mindset of most Americans, these cases have not succeeded necessarily in improving educational opportunities for the victims of de jure segregation, and, especially, for the victims of de facto segregation.[92] Furthermore, the dichotomy created by *Brown* between state actors who permitted dual educational systems in 1954 and those state actors who had instituted alleged integrated systems has outlived its purpose. The same afflictions which prevent one urban school system not under court supervision from improving achievement are generally the same afflictions which impede progress in school systems that are under court supervision.[93]

The issue becomes how Congress can overcome this legal hurdle of addressing past constitutional violations which, if tested by the courts, would pass constitutional muster. The answer should be that if the legislation provides for programs which will produce a proper result for a constitutional violation, the Court should find the legislation acceptable to compensate for past violations. This answer is, however, easier stated than applied. One of the basic principles of equity jurisprudence is that a court should not consider equitable remedies if legal remedies are adequate.[94] Accordingly, if Congress can fashion an educational program which serves as a remedy for both past and future violations, the courts' ability to single-handedly fashion equitable relief should be diminished significantly,[95] if not eliminated entirely.

If *Brown* were the only case interpreting the Fourteenth Amendment, the limitation on Congress to legislate equal protection issues would not be as

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91. The theme originated in *Brown II* when the Court referred to its equity powers as being "a practical flexibility in shaping its remedies." *Brown II*, 349 U.S. at 300. Over time, however, "flexibility" became the dominant trait of equitable remedies, as an arsenal of ideas were thrown at educational problems with the hopes that one theory would stick. Even though the Supreme Court in Missouri v. Jenkins, 495 U.S. 33 (1990), expressed concern that Kansas City's desegregation plan "as a practical matter raises many of the concerns," the Court did not invalidate drastic remedies to improve "the quality of education to attract nonminority students." *Jenkins*, 495 U.S. at 76, 78.

92. *See* Christine H. Rossell, *Applied Social Science Research: What does It Say About the Effectiveness of School Desegregation Plans?*, 12 J. LEGAL STUD. 69, 80-91 (1983). Rossell concludes, "[t]he average court ordered desegregation plan . . . results, on average, in an additional white enrollment loss of 8-10 percentage points in the year of implementation." *Id.* at 105. Rossell further states that opposition to desegregation plans "can have serious consequences for student achievement and race relations either directly through their effect on attendance and in-school behavior or indirectly through their effect on white flight and polarization of community attitudes." *Id. See also* Gewirtz, *supra* note 78, at 629.

93. As of 1988, more than a hundred cases were being litigated actively in federal courts. *Current Status of Federal School-Desegregation Lawsuits*, EDUC. WK., June 1, 1988, at 18-19.

94. Cox, *supra* note 14, at 258.

95. *Id.*

significant. During the 1960's and 1970's, however, the courts increasingly expanded a school district's duty to achieve the proper result.

If the states, and even Congress, had reacted to *Brown* by supporting voluntary integration, instead of creating roadblocks to the disestablishment of dual educational systems, many of the problems created by court supervision of school districts might not have occurred.[96] As a result of this institutional entrenchment to oppose judicial orders, the Court responded by expanding the duty of school districts to devise constitutional plans and by increasing the responsibility of the district courts to retain jurisdiction of cases until desegregation occurred.

In *Green v. County School of New Kent County*[97] the Court faced its last easy fact situation. New Kent County Virginia had only two schools in the entire county, one for blacks and one for whites. For several years after *Brown*, the school district did little to dismantle its dual educational system, and the State of Virginia prohibited a school district's changing attendance zones without state approval. Finally, in order to retain federal education funding, the school board adopted a "freedom-of-choice" plan. No white students chose the black school and very few black students chose the white school. In effect, ten years after *Brown*, New Kent County still operated a dual system of education.

Faced with a recalcitrant school board, the Court held that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."[98] The Court sent the parties back to the district court to develop a new plan, despite acknowledging that "[t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case."[99] Despite this caveat, the Court made it clear that the result or "ultimate end" of desegregation litigation is to create a "unitary, nonracial system of public education."[100]

In *Raney v. Board of Education*[101] the Court held that a district court should "retain jurisdiction until it is clear that disestablishment has been achieved"[102] and until the goal of "a desegregated, non racially operated school system is rapidly and finally achieved."[103] Therefore, going into the 1970's, school districts were faced with the overwhelming task of creating desegregation plans which not only dismantled dual systems of education but also created racially balanced systems of education.

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96. *See Chafee Scores Failure to Plan Desegregation*, HARV. L. REV., Jan. 31, 1957, at 1, 4.

97. 391 U.S. 430 (1968).

98. *Id.* at 439.

99. *Id.*

100. *Id.* at 436.

101. 391 U.S. 443 (1968).

102. *Id.* at 449.

103. *Id.* (quoting Kelley v. Altheimer, 378 F.2d 483, 489 (8th Cir. 1967)).

3. Creating the Paradox

The Court continued to operate in an environment of public opinion fiercely opposed to desegregation plans requiring involuntary student assignments.[104] Nonetheless, the imperative of *Green* was clear - a school district had to come up with a plan that promised, realistically, to work immediately. The obvious solution was forced busing.

In *Swann v. Charlotte-Mecklenburg Board of Education*[105] the Court approved busing as an appropriate remedy and the white-flight race began.[106] Not only did the scope of remedies to achieve desegregation begin to expand, the class of potential defendants also enlarged.

The *Keyes*[107] case dealt with a school district that, as a result of an election sweeping out proponents of desegregation, in a certain area of Denver intentionally maintained segregated schools.[108] In addition, the Court found that segregated inner city schools were educationally inferior to the mostly white schools in other parts of the city. The court of appeals, however, "disregarded respondent School Board's deliberate racial segregation policy respecting the Park Hill schools and accepted the District Court's finding that petitioners had not proved that respondent had a like policy addressed specifically to the core city schools."[109] The primary issue was the extent to which an intentional segregative act affecting one area of the school district (Park Hill) could be used as proof to establish intentional segregation in another area (the inner city). The Court held that where there is a "systematic program of segregation affecting a substantial portion of the students, school, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system."[110] This predicate created a rebuttable presumption of "unlawful segregative design on the part of school authorities, and shift[ed] to those authorities the burden of proving that other segregated schools within the system [were] not also the result of intentionally segrega-

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104. Ironically,

> the *Brown* decision was aimed primarily at ending the shameful practice of busing black students past white schools in order to maintain racial segregation. Today many black students find themselves bused past black schools to maintain integration - and their parents are no more pleased with this system than their forebears were pleased with the old one.

Clarence Page, *Re-examining the Old Solutions*, CHI. TRIB., Jan. 27, 1991, at C3.

105. 402 U.S. 1 (1971).

106. Gewirtz, *supra* note 78, at 634.

107. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

108. *Id.* at 192.

> The District Court found that by the construction of a new, relatively small elementary school, Barrett, in the middle of the Negro community west of Park Hill, by the gerrymandering of student attendance zones, by the use of so-called 'optional-zones,' and by the excessive use of mobile classroom units, among other things, the respondent School Board had engaged over almost a decade after 1960 in an unconstitutional policy of deliberate racial segregation with respect to the Park Hill schools.

Id.

109. *Id.* at 195.

110. *Id.* at 201.

tive actions."[111] This case did not add to defining the appropriate result, but it expanded the group of potential defendants to include even those who did not have de jure systems of segregation at the time the Court decided *Brown*.

In *Milliken v. Bradley*[112] the Court provided its most elaborate discussion of remedial and compensatory education programs as remedies for constitutional violations. The issue in that case was "whether a District Court can, as part of a desegregation decree, order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of de jure segregation."[113] Seven years earlier these same parties had been before the Supreme Court.[114] In *Milliken I* the Supreme Court reversed a district court determination that only a metropolitan desegregation plan (as opposed to an intradistrict plan), consisting of fifty-four school districts, would effectively desegregate the schools.[115] After the Court's reversal, the parties labored for six years to desegregate a system which was 71.5% black.[116] The Detroit Board of Education proposed a plan which included, in addition to student reassignments, thirteen remedial or compensatory educational programs.[117] Of these thirteen programs, only four were at issue before the Court—inservice training for teachers and administrators, guidance and counseling programs, revised testing procedures, and a remedial reading and communications skills program.[118] Instead of providing an independent assessment of whether these programs satisfy *Green* - desegregate now, the Court discussed the equitable powers of the district court to fashion remedies based on the extent of the constitutional violation. In other words, if the district court found these programs were appropriate to remedy the violation, then the Supreme Court would not disturb the findings. Since the Court had struck down the previous interdistrict plan, the options available to the lower court were limited. Therefore, beginning with *Milliken II*, remedial and compensatory education programs were given new prominence as a desegregation remedy. This shift in remedies also moved the appropriate result from racial population balancing to improving educational performance for those who suffered from the constitutional violation.

The paradox was beginning to take shape. As private acts of segregation began to diminish the populations capable of being desegregated, the school districts' duty to desegregate increased. Instead of recognizing white-flight

111. *Id.* at 208.
112. 433 U.S. 267 (1977) [hereinafter *Milliken II*].
113. *Id.* at 269.
114. Milliken v. Bradley, 402 U.S. 1 (1971) [hereinafter *Milliken I*].
115. *Id.* at 24. School district boundaries are sacred even though they are entirely arbitrary dividing lines, in most cases. These arbitrary lines, when tested by common sense, often fail logic. For example, in Connecticut, the state brought a suit against one city to end racial and ethnic segregation, where the segregation is within the current boundaries of the city; and the state is being sued for opposing an attempt to integrate another city, whose schools are more than ninety percent black and Latino, with the city's overwhelmingly white suburban neighbors. Carole Bass, *State Position on School Desegregation: Two Cases, Two Faces*, CONN. L. TRIB., Aug. 5, 1991, at 1.
116. *Milliken II*, 433 U.S. at 271.
117. *Id.* at 272.
118. *Id.* at 272-73.

as a contributing cause of segregation and as an impediment to achieving desegregation, the Court shifted its focus to shaping remedies which provided compensatory education programs to the victims of past segregation.

The paradox took final form once the Court created obstacles for imposing interdistrict remedies. If, as the result of white-flight, a school district did not have a sufficient number of racially diverse students to create a racially balanced school system, it is logical to take the position that the school district created by the white-flight should be joined in the lawsuit. The Court blocked this remedy, however, because the newly created school district had not violated the Fourteenth Amendment. In 1979, the Supreme Court decided two cases on the same day, *Columbus Board of Education v. Penick*[119] and *Dayton Board of Education v. Brinkman*.[120] The defendants in both cases, Ohio school districts, had allegedly failed to discharge their duties to eliminate their dual systems of education.

In *Dayton II* the defendant school district sought to overturn the district court's determination that, although "the Dayton schools were highly segregated[,] . . . the Board's failure to alleviate this condition was not actionable absent sufficient evidence that the racial separation had been caused by the Board's own purposeful discriminatory conduct."[121] Previously, the court of appeals reversed two district court desegregation orders for having limited remedial objectives.[122] Then, the district court ordered the school board to take "the necessary steps to assure that each school in the system would roughly reflect the systemwide ratio of black and white students."[123] In *Dayton I*[124] the Supreme Court remanded the case to the district court because "there was no warrant for imposing a systemwide remedy."[125] On remand, the district court held an extensive evidentiary hearing and, based on the court's findings of fact and law, dismissed the complaint. Consequently, some six years after the plaintiffs filed the original complaint, the case had proceeded through the system once and was about to go before the Supreme Court for the second time.

4. *Past Sins Are Not to Be Forgotten*

The issue in *Dayton II* was whether the court of appeals correctly determined that the district court made clearly erroneous findings of fact and law.[126] The most important finding in dispute was whether the defendants "were intentionally operating a dual school system in violation of the Equal Protection Clause of the Fourteenth Amendment."[127] The Court, without much detail, affirmed the court of appeals, and then proceeded to discuss the

119. 443 U.S. 449 (1979).
120. 443 U.S. 526 (1979) [hereinafter *Dayton II*].
121. *Dayton II*, 443 U.S. at 532.
122. *Id.* at 530.
123. *Id.* at 531.
124. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) [hereinafter *Dayton I*].
125. *Dayton II*, 443 U.S. at 531.
126. *Id.* at 534.
127. *Id.*

duty of a school district who has violated the Fourteenth Amendment.[128] The Court stated that "[g]iven intentionally segregated schools in 1954, . . . [a school board is] thereafter under a continuing duty to eradicate the effects of that system."[129] The measure of whether a school district has met this duty "to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."[130] This case indicates that the proper result for violating the Fourteenth Amendment is an effective implementation of a plan which actually desegregates the school system. The Court offers no hope for good-faith but unsuccessful implementation.

In *Penick* the Court addressed whether the Columbus Public Schools should be required to institute a "systemwide" desegregation plan.[131] The complaint in this case was filed in June 1973. The trial began a year later, "consumed 36 trial days, produced a record containing over 600 exhibits and transcript in excess of 6,600 pages, and was completed in June 1976."[132] In March 1977, the district court found that the Columbus Public Schools "were openly and intentionally segregated on the basis of race when *Brown* was decided in 1954."[133] The school district argued that "whatever unconstitutional conduct it may have been guilty of in the past such conduct at no time had any systemwide segregative impact and surely no remaining systemwide impact at the time of trial."[134] The Court rejected this argument because the findings of the district court indicated that characteristics of the previous dual system of education remained and the school district has a continuing obligation to eradicate "all vestiges of that dual system."[135] Again, the Court's emphasis was on eradication of all vestiges of past unlawful segregation, not on good faith attempts.

5. *Appropriate Result: Ideal or Practical*

After reviewing these cases, is it possible for Congress to enact legislation changing the courts' jurisdiction which will not violate *Klein* and prescribe the result of a constitutional violation? The answer depends on which one of two interpretations is selected for defining the appropriate result for a constitutional violation. One interpretation, for simplicity's sake called the idealistic interpretation, requires any remedy which has not completely and permanently removed all vestiges of unlawful segregation to be considered incomplete and unlikely to produce the appropriate result. The idealistic interpretation does not weigh good faith compliance; it measures the result by the effectiveness of the remedy ordered.

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128. *Id.* at 537-40.
129. *Id.* at 537.
130. *Id.* at 538.
131. 443 U.S. at 453.
132. *Id.*
133. Penick v. Columbus Bd. of Educ. 429 F. Supp. 229, 260 (S.D. Ohio 1977).
134. *Penick*, 443 U.S. at 454-55. This argument sounds like the one used by the school district in *Freeman*. *See infra* notes 148 to 178 and accompanying text.
135. *Id.*

The other approach, the realistic interpretation, recognizes the paradox in the law which permits remedies to address public acts of discrimination but does not permit remedies to address private acts of discrimination. Therefore, the law cannot completely remedy the constitutional violation because private acts are a realistic impediment to achieving the idealistic result.[136]

D. THE IDEALISTIC RESULT — A FAILED GOAL AND A CONSTITUTIONAL LIMITATION TO CONGRESSIONAL ACTION

The courts have done more for desegregation than any other branch of government or state, but the courts have reached their limit. The limit is not one in the law; it is an organizational limit. The judiciary has never been equipped to undertake the enormous task of implementing reform.

The preceding analysis of several cases indicates the courts' willingness to continue ordering remedies until an appropriate result is obtained. This willingness has made many courts the authorizing agent for new educational programs. Courts will often strike down state laws that may impede implementation of a remedy aimed at achieving the ideal result.[137] This raw power is often attractive to the defendant school district because the court can protect the school system from unwanted intrusions from other bureaucracies. The difficulty lies with the practical determinations: What program will disestablish a previous dual system? When and how do you determine whether the effects of a dual system have been eliminated? What really compensates an individual for past sins of discrimination? The courts have been unable to answer these questions.[138]

It is difficult to construct legislation that will remedy past violations because the courts, believing in achieving the ideal result, have considered, tried, and eliminated so many programs that very little empirical data exists for determining the success of any particular approach.[139] Desegregation plans that are based solely on involuntary movement have largely failed.[140] Yet, despite this failed remedy and because of a desire to achieve the ideal result, the courts began requiring other remedies, often very costly, which attempted to prevent voluntary movement away from the segregation problem by creating programs so attractive that those with the ability to make voluntary choices would choose to stay within the district.[141] Again, these programs have not been very successful.[142] As educators became more ad-

136. For example, the then U.S. Secretary of Education Lamar Alexander said, "I cannot think of anything as coercive in American life as telling people where they have to send their children to school." Betsy White, *Education Chief Defends Controversial School Choice Plan, Alexander Reveals Details of Proposal*, ATLANTA J. & CONST., Apr. 27, 1991, at A7. If it is coercive to prohibit the freedom to choose, how can a school district's desegregation plan succeed?

137. *See* Missouri v. Jenkins, 495 U.S. 33, 42 (1990).

138. It is a distinct possibility that these questions cannot be answered at all.

139. A good source of empirical data is Rossell, *supra* note 92.

140. *See* Treadwell, *infra* note 144.

141. More bluntly, magnet schools were created to attract white students from private schools. See *infra* note 147, discussing the Kansas City schools.

142. The irony is that those who consider the programs the most successful are the whites

ept at recognizing the effects of segregation and of identifying disparity in achievement, the courts began fashioning remedies that ordered more resources to be applied to programs directed at victims of segregation.[143] While not an overwhelming success, these remedies at least provide a closer approximation of matching the remedy with the violation.[144] The other important aspect of these compensatory programs is that they are also much more likely to address the root causes of the sort of discrimination which is producing this generation's segregation problem - segregation based on wealth.[145]

The final area found in most desegregation plans is a sophisticated monitoring program.[146] The types of monitoring plans have varied but their essential purpose regardless of the past violation has been: (1) quantify the learning gap disparity so that the success or failure of any program can be measured; (2) identify movements in the population which may ultimately present segregative results; and (3) monitor compliance with desegregation court orders.[147] This evolving remedy will make it impossible for Congress to enact legislation that will guaranty the prescription of the ideal result unless Congress can prohibit or prevent private acts of discrimination from occurring.[148]

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for whom a remedy was not intended. Also, the minorities, for whom the remedy was intended, were/are displaced from their neighborhood schools to make room for students who are taking advantage of the voluntary programs.

143. Paul Holtzman, *Symposium: Confronting the Challenge of Realizing Human Rights Now*, 34 How. L.J. 27 (1991).

144. *Id.*

145. Consider these facts:

1. "The median income among African-Americans remains only 59.4 percent of whites, a slightly lower percentage than in 1970." David Treadwell, *Seeking a New Road to Equality; A Split Develops Among Blacks as Many Question Whether Integration can Bridge the Gap with White America; Is the Strategy of the 60's Outdated and Ineffective in the 90's*, L.A. TIMES, July 7, 1992, at A1.
2. The share of blacks living in poverty, after dropping from more than half in 1959 to about one-third in 1969, has changed little since. *Id.*
3. While one-third of all blacks live below the poverty line, nearly forty-five percent of black children are living in poverty. Holtzman, *supra* note 150.

146. William L. Christopher, Note, *Ignoring the Soul of Brown: Board of Education v. Dowell*, 70 N.C. L. REV. 615 (1992).

147. *See Id.*

148. In Kansas City, a federal judge required the local school district to build "palatial new schools" to attract white students voluntarily back into the district and ordered a tax increase to pay for the construction. *School Desegregation: Parents, Pundits and Experts Debate*, HOTLINE, Apr. 13, 1992 [hereinafter *Parents, Pundits and Experts*]. Despite these new facilities, few white students have returned to the district; only a commitment to achieving perfection would justify such an order. *Id.*

In the Charlotte-Mecklenburg County North Carolina school district, where the busing remedy gained notoriety, school officials are considering abandoning the twenty year-old busing plan in favor of a voluntary, magnet school plan. Robert A. Watts, *Charlotte Schools May End Busing; Officials Propose Magnet Programs*, ATLANTA J. & CONST., Mar. 7, 1992, at A3. The Charlotte-Mecklenburg County school district's motive behind changing to a voluntary plan, however, is not to attract white students into the district but to limit busing, with which the local patrons express dissatisfaction. *Id.* Since Charlotte-Mecklenburg's racial composition has remained stable for the past twenty years, implementing a voluntary plan may disrupt

IV. THE PRACTICAL RESULT

A. WHY *FREEMAN V. PITTS*[149] CHANGES THE LAW

Until recently,[150] Congress had not attempted to enact an education plan that would significantly affect local school activities. In part, this hands-off approach is based on an attitude, which is supposedly based on a historical notion that national government should not usurp local school authority.[151] A review of federal legislation suggests, however, that Congress does not believe that local school authorities have either the aptitude or wherewithal to address the severity of educational problems in this country.[152] As a result of the belief that local school authorities cannot fully address the scope of the problem, Congress has enacted several programs which provide supplementary aid to local government agencies.[153]

The Fourteenth Amendment provides Congress with the power to enforce the due process and equal protection guarantees against the states.[154] Consequently, if Congress enacted legislation based solely on this authority, it should be constitutional.[155] At issue is the extent to which Congress must abide by the Court's interpretation of the Fourteenth Amendment.[156] Presuming that Congress wants to abide by the relevant judicial interpretations of the Fourteenth Amendment, any legislation seeking to alter the jurisdiction of the courts should provide programs that would be sufficient to compensate victims of de jure segregation.[157]

Until *Freeman*, the Supreme Court had implicitly maintained that eliminating vestiges of past discrimination was possible.[158] With *Freeman*, the

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an already acceptable racial mix under an educational policy that is the primary judicial remedy in another district.

149. 112 S. Ct. 1430 (1992).

150. Former President George H.W. Bush's America 2000 legislation has been the most dramatic attempt to change local school operations. America 2000, *supra* note 5.

151. *See, e.g., Dayton I*, 433 U.S. at 410 (stating that "local autonomy of school districts is a vital national tradition").

152. *See, e.g.*, 20 U.S.C. § 801(a) (1988).

> The Congress finds that the rapid expansion of the Nation's urban areas and urban population has caused severe problems in urban and suburban development and created a national need to (1) provide special training in skills needed for economic and efficient community development, and (2) support research in new or improved methods of dealing with community development problems. *Id.*

20 U.S.C. § 1221(e) ("While the direction of American education remains primarily the responsibility of State and local governments, the Federal Government has a clear responsibility to provide leadership in the conduct and support of scientific inquiry into the educational process.").

153. *See, e.g.*, 20 U.S.C. § 2911 (1988) (effective schools training); 20 U.S.C. § 2966 (1988) (Blue Ribbon schools); and 20 U.S.C. § 2981 (1988) (Eisenhower scholarships for critical skills improvement).

154. U.S. CONST. amend. XIV, § 5.

155. Cox, *supra* note 14, at 259.

156. *See* text accompanying notes 154-56.

157. Cox, *supra* note 14, at 259.

158. The Court reversed the Eleventh Circuit's holding that a school district must employ " 'heroic,' 'even bizarre' measures to attain racial balance when the imbalance is attributable neither to the prior de jure system nor to a later violation by the school district but rather to

Court adds a new qualifier in measuring whether a school district has met its burden to desegregate — pragmatism.[159] The Supreme Court shifted to a more realistic approach for reasons that are both political and empirical. For the first time since *Brown* was decided, the Court is composed of a solid, so-called conservative bench which is under the direction of a Chief Justice who consistently maintains the Court is both incapable of administering schools and unable to develop the remedies for the constitutional violations it has found.[160] In addition, the amount of research available on the success and failure of desegregation litigation (which was only speculative at the time of *Brown*) is enormous, but inconclusive.[161] These studies have dramatically changed the issues currently facing legislators, the courts, and school administrators.[162]

Under *Brown*, a school district that had a dual system of education in 1954 had a duty to disestablish and remove all vestiges of that dual system. Only when a school district had effectively removed all vestiges of segregation would it have met this affirmative duty. Since *Brown* regarded the psychological impact of segregation on a student as a basis for the constitutional violation, it follows that removing adverse psychological impact would remedy the constitutional violation. Yet, *Freeman* offers no proof that the victims of segregation are measurably better off than they were in 1954.

For example, the facts of *Freeman* resemble the situations in many other Southern school districts. In 1969, the district court entered a consent order approving a plan to dismantle the de jure segregation that had existed in the Dekalb County, Georgia, School System (DCSS).[163] The court "abolished [a] freedom of choice plan and adopted a neighborhood school attendance plan," which closed all of the former de jure black schools and reassigned these students among the remaining neighborhood schools.[164] Then, between 1969 and 1986, judicial intervention was "infrequent and limited."[165] In 1986, "DCSS sought a declaration that [it] had satisfied its duty to eliminate the dual education system."[166] DCSS sought this declaration on the following facts: (1) "[t]he school system that the District Court ordered desegregated in 1969 had 5.6% black students" and "by 1986 the percentage of black students was 47%;"[167] (2) "the population of the northern half of Dekalb County is now predominantly white and the southern half of Dekalb County is predominantly black;"[168] and (3) "50% of the black students at-

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independent demographic forces." U.S.L.W. (BNA) Aug. 7, 1992 (quoting Pitts v. Freeman 887 F.2d 1438 (11th Cir. 1989)).

159. *Freeman*, 112 S. Ct. at 1446.

160. *See Penick*, 443 U.S. at 489-525 (Rehnquist, J., dissenting).

161. *Parents, Pundits and Experts Debate*, *supra* note 155.

162. *See* Cynthia Durcanin, *Escape from the Killing Fields; Educators Debate Role of All-Black Schools for Males*, ATLANTA J. & CONST., July 24, 1991, at A1; William Raspberry, *Is Segregation Really a Major National Problem?*, ATLANTA J. & CONST., Jan. 17, 1992, at A11.

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

164. *Id.*

165. *Id.* at 1437.

166. *Id.*

167. *Id.* at 1438.

168. *Id.*

tended schools that were over 90% black [and] . . . 27% of the white students attended schools that were more than 90% white."[169] DCSS countered these facts with the assertion that the 1969 order "effectively desegregated DCSS for a period of time."[170]

The primary issue for the Court was deciding whether a district court may relinquish control of certain aspects of the desegregation litigation, and, if so, when.[171] The answer to this issue is not as significant as how the Court answered it. First, the Court presented the reasons for the district court's finding that DCSS had "accomplished maximum practical desegregation" in its student assignment function.[172] Then, Justice Kennedy recanted the holdings in *Brown I and II*[173] without discussing whether the district court's finding comports with either or both *Brown I and II*. The opinion makes its first major departure from *Brown*. Justice Kennedy writes, "[w]e have said that the court's end purpose must be to remedy the violation and in addition to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution."[174] While the entire case

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169. *Id.*

170. *Id.* at 1439.

171. *Id.* at 1442. As part of this determination, the Court reviewed the various factors which determine unitary status. While *Brown* initially discussed the other aspects which might affect the desegregation effort, its first priority was desegregating the student assignment function. Therefore, the subsidiary issues, including desegregating extra-curricular activities, are not usually discussed in Supreme Court opinions. *Freeman* is different in this respect because the test of establishing unitary status, as developed in *Green*, requires such an examination. This Comment addresses only what the *Freeman* Court says is required to have achieved a desegregated student assignment function.

172. *Id.* at 1440. The Court quoted this passage from the District Court's finding:

> [The actions of DCSS] achieved maximum practical desegregation from 1969 to 1986. The rapid population shifts in Dekalb County were not caused by any action on the part of the DCSS. These demographic shifts were inevitable as the result of suburbanization, that is, work opportunities arising in DeKalb County as well as the City of Atlanta, which attracted blacks to DeKalb; the decline in the number of children born to white families during this period while the number of children born to black families did not decrease; blockbusting of formerly white neighborhoods leading to selling and buying of real estate in the DeKalb area on a highly dynamic basis; and the completion of Interstate 20, which made access from DeKalb County into the City of Atlanta much easier. . . . There is no evidence that the school system's previous unconstitutional conduct may have contributed to this segregation. This court is convinced that any further actions taken by defendants, while the actions might have made marginal adjustments in the population trends, would not have offset the factor that were described above and the same racial segregation would have occurred at approximately the same speed.

Id.

173. *Id.* at 1443. Justice Kennedy also quoted this passage from the *Brown* opinion:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law: for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id.

174. *Id.* at 1445.

requires the Court to uphold a determination that a past constitutional violation has been remedied, the Court, nonetheless, never specifically addressed it. Instead, the opinion asserted that equally important as achieving desegregation is reaching the goal of "[r]eturning schools to the control of local authorities at the earliest practicable date."[175] Then, as an aside, the Court said that the measure of achieving a desegregated school system is determined not by whether the effort is effective but by whether the "school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution."[176] Therefore, the Court requires only "maximum *practical* desegregation" (emphasis added) and provides that the test is to "give particular attention to the school system's record of compliance."[177]

Does this mean that the nation must wait until every school district has relitigated all of its past sins before resuming control of its operations? Certainly, this is an option because, without initiating a massive study, it is reasonable to believe that the justifications for other major urban southern cities failing to fully desegregate are not much different than those in Atlanta, Georgia.

In *Freeman*, the court made clear that it is willing to withdraw from school desegregation cases. The Court's motives for this willingness are immaterial. What is material is that the Court will entertain arguments that the federal courts' involvement in supervising school districts is coming to an end.

B. THE CIVIL JUSTICE REFORM ACT OF 1990[178]

The most significant congressional alteration of the federal courts' power to uniformly settle constitutional desegregation questions occurred with the passage of the Civil Justice Reform Act of 1990 (CJRA).[179] On its face, CJRA is nothing more than an attempt to streamline dispute resolution in civil cases. Beneath the surface, however, is the same theme developed in *Freeman v. Pitts*: the practicality of judicial supervision is becoming an increasingly important component in civil jurisprudence.

The weakness of the CJRA is the potential for uneven application of justice in desegregation cases.[180] Many critics argue that this potential has always been present in school desegregation cases under the guise of discretion.[181] The CJRA could, however, make the uneven application of justice systematic; but, school desegregation litigation may or may not be affected.

The strength of the CJRA is that it serves as a precedent for Congressional alteration of federal court jurisdiction. Admittedly, Congress went

175. *Id.*
176. *Id.*
177. *Id.* at 1434.
178. Pub. L. No. 101-650, 104 Stat. 5089 (1990).
179. DEBENEDICTIS, *supra* note 3, at 16.
180. *Id.*
181. *See Penick*, 443 U.S. at 525 (Rehnquist, J., dissenting).

through the back door and did not face the issue directly. Nonetheless, the potential for one district court to adopt a plan that operates differently from another district court is present.[182] Accompanying this potential difference is the possibility that similarly situated claimants will not enjoy the same process for adjudication of their claim.[183] Even though Congress did not attempt to dictate the result in a pending case, the implementation of CJRA will likely have that effect. Therefore, CJRA stands for the proposition that a proper attempt to prescribe a result in a case may be couched in terms of promoting judicial efficiency.

As part of any legislation to alter federal court jurisdiction over school desegregation cases, Congress should include, as a basis for the legislation, the national interest in improving the federal courts' ability to manage their caseload. Incident to promoting judicial efficiency is an effort to improve communication between the three branches of government.[184] Chief Justice Rehnquist, at the beginning of each new session of Congress, informs legislators of issues facing the federal judiciary.[185] In his 1991 year-end report on the federal judiciary, Chief Justice Rehnquist stated, "[m]odest curtailment of federal jurisdiction is important."[186]

Determining whether Congress is willing to accept the Chief Justice's request to curtail federal court jurisdiction, particularly in school desegregation cases, is purely speculative. Yet, with school desegregation continuing to consume extensive judicial and local government resources and with little proof of educational improvement,[187] school desegregation is an ideal candidate for reform, especially from a judicial efficiency perspective. Reform carries with it risks, particularly since Congress has, until recently, spent significant energy fighting the courts rather than trying to provide equal educational opportunities.[188]

V. CONCLUSION

In declaring that "we must resolve — if not today, then soon . . ." the continuation of judicial supervision of school districts,[189] it is unclear who "we" is. It probably means that "we" the Supreme Court of the United States must develop new law to provide federal courts and school districts with sufficient guidance to end litigation with certainty. If the Court believes that this is possible, the Court is making the same mistake made by the Warren Court in believing that *Brown v. Board of Education* would end segregation. As long as the Supreme Court is the primary policy maker for educational equality issues, local school officials and federal district courts

182. DEBENEDICTIS, *supra* note 3, at 16.
183. *Id.*
184. 138 CONG. REC. E811 (Mar. 25, 1992) (remarks of Mr. Hughes).
185. *Id.* at E812.
186. *Id.*; *see also* 138 CONG. REC. E746 (Mar. 1992) (remarks of Mr. Smith).
187. *See supra* notes 92 and 152 and accompanying text.
188. *See supra* notes 14 and 24 and accompanying text.
189. *Freeman*, 112 S. Ct. at 1450 (Scalia, J., concurring).

will never know how to apply specific facts to broad legal, and implicitly social, theories.

If "we" means Congress or the people of the United States, however, then everyone should be on notice that elected officials will have primary control over educational equality or the lack thereof. Which entity steps forward to assume the role that the federal courts have played in the last thirty years will go a long way in the attempt to end federal court supervision of schools. Congress has suggested that it will boldly go where no Congress has gone before. If this is the case, Congress should assume the role envisioned by the framers of the Fourteenth Amendment to legislate and enforce equal protection. Once Congress accepts this responsibility, an attempt to remove jurisdiction from the federal courts will be more palatable, and the courts will be more apt to defer to the superior fact finding ability of Congress. If the reform movement seeks to return absolute control over local school activities to local governments, then expect bitter legal battles fought by those who suffered the most from the decisions made by local governments and who believe the federal courts are the only enforcers of equal protection.

Throughout this comment, I strove to avoid typically liberal or conservative positions for two reasons:

(1) The conservative political dogma typically ignores the fact that a significant number of black people continue to attend racially identifiable, inferior schools; and
(2) The liberal political dogma refuses to admit that Court intervention has not produced lasting and meaningful improvement.

Once it is conceded that the courts' role in desegregation litigation is ineffective, then the question of who will protect against unequal education is important. The choices are few. One choice is to return to local government control, which the Court prefers. This approach is problematic because: (1) local government recalcitrance in large part perpetuated the current mess; and (2) the link between educational excellence and national interests is so great that incongruity between local and national interests will impede progress for both interests. A second possibility is not to change anything.[190] Let the courts continue to plod along for another thirty years. If a *Freeman*-type Court remained on the bench for that long, then perhaps the remaining desegregation cases would end.

A third possibility is for Congress to assume the role intended for it in the Fourteenth Amendment. Even though political passions might cloak educational facts in the debate, at least Congress would be solely responsible for the success or failure of the educational system. Now it is impossible to determine upon whom to place credit or blame.

190. There are, of course, other possibilities. One is the creation of a constitutional right to education. *See* Susan H. Bitensky, *Legal Theory: Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992).