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Remembering Judge Sanders: Judicial Pragmatism in the Court of First and Last Resort

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REMEMBERING JUDGE SANDERS: JUDICIAL PRAGMATISM IN THE COURT OF FIRST AND LAST RESORT

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I want to thank the SMU Law Review on behalf of myself, my fellow law clerks, and Judge Sanders' colleagues, friends and family for undertaking to produce this special issue honoring Judge Sanders' career on the bench. In addition, I must express my heartfelt thanks to Ms. Corrina Chandler, my research assistant, for her patience, intellect and essential editorial support.

I. INTRODUCTION

I need to start this piece with two confessions. First, when I called the SMU Law Review inquiring about the possibility of an "in memoriam" issue for the Honorable Harold Barefoot Sanders, I knew the idea was not unique to me. That mine might have been the first phone call and that I would be the "guest editor" for the volume simply reflects my good luck and the confluence of unique circumstances; I am the only Judge Sanders law clerk on the faculty at the Dedman School of Law. I must also confess my first reaction to my own idea was extreme reluctance, not because I did not think Judge Sanders' career—his political career, but more importantly his judicial career—was unworthy of examination or could not offer intriguing insights into the art and craft of judging. But because I knew he would think I had better things to do with my time. From my first meeting with Judge Sanders during my clerkship interview in chambers in my third year of law school through my last meeting with him at an impromptu luncheon in the midst of the recent presidential primary, what stands out in my mind was his arresting directness, his willingness to get to the point, his balanced personal approach, which demanded that all who came into his chambers and his court be treated with respect, and his humility. Not a false "awe shucks" style which often conceals bravado and arrogance, but a sense of his own humanity, rooted in personal integrity and awareness of the responsibilities he assumed over the years; simply stated—his modest sense of his own role in history. I can hear Judge Sanders teasing me, "Now Mo, don't make this into a big deal." That wonderful drawl and impish grin peeking out from under a shock of hair, daring his law clerks to take themselves too seriously while demanding they take their jobs very seriously. If Judge Sanders wanted to be remembered for anything it would be for doing his job well. And I am sure, as far as Judge Sanders is concerned, I could stop right there. With all due respect Your Honor, I think there are important lessons to be learned from you as a federal district trial court judge that go beyond simply acknowledging your judicial career and thanking you from the bottom of my heart for teaching, goading, teasing, mentoring, challenging, laughing with, and encouraging all your law clerks for almost thirty years.

I did not set out in this piece to explain Judge Harold Barefoot Sanders' judicial philosophy or his theory of judging; I can imagine the look on his face had I ever had the temerity to ask such questions. This is a much more modest undertaking, but one I think of which Judge Sanders would approve. Taking this moment to honor and reflect on a judicial career that spans thirty years provides all of us—lawyers, jurists, academics, and

lay people alike—a unique perspective on the federal courts, especially federal trial courts, as the messy, human institutions they are and the important role these institutions play in our constitutional democracy. The "judicial enterprise" is "complex, uncertain, and sometimes inconsistent."[1] Fortunately we have moved past the point where we think of a trial court's actions as involving the narrow application of law to facts, a highly deterministic paradigm of adjudication, to a point where we recognize the inherent scope of discretion accorded judges, who must meet and manage the litigation filed in the federal courts.[2] The "rule of law" as a normative ideal guides all jurists, but as a positive theory, it is an overly simplistic description of what happens in a trial court and belies the complexity of the decisions judges routinely render.[3] How do they do this? Rule 1 of the federal rules tells trial judges they should exercise their power and authority, which includes a large dose of managerial and adjudicative discretion, to achieve the "just, speedy, and inexpensive determination" of the case.[4] In this piece, and in this issue, Judge Sanders' law clerks reflect on their experiences in chambers, working with Judge Sanders, attempting to do just that.

A. Truth and Memory

In a recent study of the federal courts as constitutional laboratories, I discuss the potential and limitation inherent in writing from the perspective of a "participant-observer."[5] I find myself in a similar situation writing about Judge Sanders. I am here in large part because I was one of his law clerks, and I agreed to solicit contributions for this issue from Judge Sanders' clerks, lawyers who appeared before him, fellow jurists, and legal scholars. In my prior study of the federal courts, I focused on a single case as it made its way through the federal courts;[6] in this Article, I focus on a single judge. But I cannot claim the insights provided here as solely my own. Judge Sanders' clerks responded to questionnaires, took time to write their own reminiscences, and generally supported this project. In

1. Daniel A. Farber & Suzanna Sherry, Desperately Seeking Certainty: The Misguided Quest For Constitutional Foundations, at ix (2002).

2. *See, e.g.*, Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. Rev. 493, 507-24 (1997) (discussing the indeterminacy debate that captured the legal academy and its resolution, which acknowledges the legitimate scope of a trial judge's judicial discretion in both the managerial and adjudicative arena) [hereinafter Armour, *Rethinking*]; Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 Hofstra L. Rev. 677, 705-18 (1996) (discussing the paradigm of judicial discretion as a skill developed through the resolution of numerous individual cases, especially in the managerial and procedural arena) [hereinafter Armour, *Practice*].

3. Richard A. Posner, How Judges Think 143 (2008) (presenting a thoughtful and thorough analysis of judging that offers insight into the difference between appellate and trial judges by focusing, as he points out, not on normative mandates but positive descriptions).

4. Fed. R. Civ. P. 1.

5. Maureen N. Armour, *Federal Courts as Constitutional Laboratories: The Rat's Point of View*, 57 Drake L. Rev. 135, 139-45 (2008).

6. *See generally id.*

addition, two of the primary attorneys involved in the *Tasby* Litigation[7] agreed to write about their experiences, and Mr. Sam Tasby, at the age of eighty-seven, agreed to be interviewed for this issue.

In supporting this project, all the individuals who contributed reflected on their own experiences in order to answer the questions: What made the Honorable Judge Harold Barefoot Sanders an outstanding jurist? What makes a great trial judge? Unlike the growing body of empirical work on courts found in the academic literature,[8] this "study" is grounded in data mined from personal histories and the objectivity accorded us as humans when we are willing to step back and reflect critically on our own experiences. Contributors' memories of Judge Harold Barefoot Sanders can always be questioned; the passage of time, personal predilections, and intervening events inevitably shape our memories. But the collection of stories and reminiscences provided by contributors to this project reflect commonalities, similar experiences, and a common vision of time spent in the daily workings of Judge Sanders' court. While each of us has his or her personal story to tell, it is striking how the stories collected here share the ring of truth that is the ultimate test of history.

In 1991, James Atlas wrote an article entitled *Stranger Than Fiction*,[9] in which he explored the idea that historians and journalists—and I would argue, lawyers and judges—can get the facts right but miss the historical "truth." As we embark on the task of writing a small piece of judicial history, we are confronted with the inevitable gap between the "lived event" and "its subsequent narration" even if we are the ones who lived the event and are providing its subsequent narration.[10] If facts are slippery, then interpreting facts, giving them color and intentionality, depth and purpose, context, a past, and a future, is even more problematic. In undertaking to be the guest editor for this special issue of the SMU Law

7. *See infra* note 116; *see also* Edward Cloutman, *Reflections on Judge Barefoot Sanders*, 62 SMU L. REV. 1691 (2009); Robert Thomas, *Longest and Largest—Judge Sanders and the* Tasby *Case*, 62 SMU L. REV. 1737 (2009). Mr. Edward Cloutman and Mr. Robert Thomas, key attorneys in the *Tasby* Litigation, have graciously offered their reminiscences of the case.

8. *See, e.g.*, JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS (Sheldon Goldman & Charles M. Lamb eds., 2008); Theodore Eisenberg et al, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); Monique C. Lillard & Ruth Colker, *Empirical Studies: How Do Discrimination Cases Fare in Court?*, 7 EMPL. RTS. & EMPLOY. POL'Y J. 533 (2003); James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351 (1999); Sean M. McEldowney, *New Insights on the "Death" of Obviousness: An Empirical Study of District Court Obviousness Opinions*, 2006 STAN. TECH. L. REV. 4; Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J. L. & ECON. 381 (2007); Robert Newman et al., *A Methodological Critique of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 307 (2009); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669 (2008).

9. James Atlas, *Stranger Than Fiction*, N.Y. TIMES MAG., June 23, 1991, at 40-42.

10. *See id.* at 40 (quoting SIMON SCHAMA, DEAD CERTAINTIES: UNWARRANTED SPECULATION (1992)).

Review, I did not set out to write a definitive history of Judge Sanders' judicial career; all of us involved in this project modestly claim to do little more than offer our memories and perspective on the "lived events of Judge Sanders' career" as we experienced them and as we now reflect upon them. Others who shared these events with us might disagree with our presentation, but I doubt that they deny we are telling the "truth" about Judge Sanders as a practicing jurist.

II. THE POWERFUL ROLE OF FEDERAL DISTRICT COURTS

Federal courts are institutions that play a critical role in legitimating the political order by shaping the array of constitutional, and civil and criminal federal laws that mediate the relationship between government and individuals. In addition, they play a significant role in the enforcement of private law through their diversity jurisdiction. In these roles they are often the court of first and last resort, a foundational democratic institution.[11] But it is a rare trial judge who sees himself from this lofty perspective. If there is a single truth shared by federal trial court judges it is this: their daily decisions, no matter how discrete or discretionary, affect the lives of individuals. It is the trial judge who hears the litigant's voice in the courtroom, who watches a witness being cross-examined, and who must objectively weigh the arguments of advocates whose ethical duty is allegiance to their client.[12] It is the trial judge who empanels the jury and who must watch the criminal defendant's face when the jury verdict is returned. It is the trial judge who must ultimately set the docket, face the lawyers in the courtroom, and work to ensure that their case moves apace. These judges understand that their first and most important obligation is to uphold the Constitution, administer their courtroom in compliance with the Federal Rules of Civil Procedure and the Local Rules, and render even the most difficult of decisions in accordance with applicable law. In their world, "justice" and the "rule of law" is as much a matter of effective docket management as it is a function of rendering transparent judicial opinions.

The fact that within the institution of the federal courts, trial courts are "the first, best, and likely only practical opportunity to obtain justice for

11. Armour, *supra* note 5, at 226-27. It is true that the federal courts handle state law matters through their diversity jurisdiction, but those matters redress private law issues, or legal relationships between individuals. My primary focus here is the role of federal courts and judges in implementing federal law, especially federal constitutional law.

12. The Rules of Professional Responsibility distinguish between the candor due a client when the lawyer is counseling or advising him and the duty of advocacy due that same client when the lawyer appears in front of a tribunal. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2008). Limited by the mandate not to burden courts with frivolous claims, for example, in Rule 11 of the Federal Rules of Civil Procedure, lawyers' ethical obligations when they appear in court require them to balance their duties as officers of the court with their obligations as advocates, erring, I argue, on the side of advocacy. *See, e.g.*, Armour, *Practice*, *supra* note 2; Armour, *Rethinking*, *supra* note 2; Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2005); David N. Yellen, *"Thinking Like a Lawyer" or Acting Like a Judge?: A Response to Professor Simon*, 27 HOFSTRA L. REV. 13 (1998).

your client" is not lost on the judges.[13] Yet this is not the justice envisioned by most parties, the "clash of opposing positions in the search for simple truth [that] is the hallmark of the adversarial system."[14]

This justice, in reality, is not usually meted out at trial where a jury of lay persons sits and listens to the evidence under the watchful eye of the neutral jurist for the simple reason that only approximately two percent of federal cases are ever tried before a jury.[15] Assuming the other cases are decided by pre-trial summary procedures or are simply abandoned, very few of the cases closed by a district court trial judge are, in fact, appealed.[16] Viewed from this perspective, the formal black letter law-making may be taken care of by the federal appellate courts, but the common law-making—the interface between people's lives and the law that shapes our constitutional democracy—occurs daily in the district courts.[17] While some commentators attempt to problematize the role of federal judges by questioning the legitimacy of courts within a constitutional democracy on grounds that judicial discretion allows these judges too much

13. Joan Humphrey Lefkow, *What Persuades When the Judge Has Discretion?*, 31 LITIG. 21, 21 (2004).

14. *Id.*

15. *Id.*

16. *Id.*

17. The proposition that trial courts play a significant role in democracies by offering a place for individual voices to be heard, a place where minorities can challenge majorities, and a place where powerful government actors can be challenged has been explored by a variety of writers. From their perspective the adjudicative process protects and enhances the core democratic values of discourse, discussion, dissonance, and debate, and while adversarialism has been criticized as an inefficient process for dispute resolution, its advocates point to its essential role in a democracy. *See, e.g.*, Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 769 (1995) (exploring the role of civil rights litigators in giving a voice to their clients' stories in order to challenge the state's majoritarian discourse justifying its unilateral imposition of power); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984) (arguing that adjudication of constitutional issues is an instrument "for using state power to bring a recalcitrant reality closer to our chosen ideals"); Joan Humphrey Lefkow, *Judicial Independence, Judicial Responsibility: A District Judge's Perspective*, 65 WASH. & LEE L. REV. 361, 374 (2008) ("The courts are an incredibly democratic institution. . . . [A]nyone can file a lawsuit and have their individual situation considered. This is grass roots democracy."); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 312 (1997) (examining adjudicative law making as a form of constructive representation of individual interests, which imbues the courts, and their decisions, with democratic legitimacy); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 710-12 (2004) (examining adjudicative speech as expression protected by the First Amendment); Judith Resnick, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes are at Risk*, 81 CHI.-KENT L. REV. 521, 521 (2006) (discussing the political importance of open adjudicatory processes and the importance in a democracy of public access to this process); Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 3-6 (1996) (examining the potential for judicial dialogue and discourse to move from a monologic model to one that is dialogic, if not polyphonic, in order to move the court away from the model of a dispassionate thinking machine to a model that explicitly values individuals and ideas in resolving disputes); Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 837 (2002) (exploring the fundamental right of access to the federal courts as an essential aspect of the democratic process because it is a forum that allows the individual's voice to be heard by the "state" in the guise of a federal judge).

power in shaping the law, this "anti-majoritarian" critique ignores the significant and legitimate role adjudication plays in our democratic practice.[18] Whether handling a dispute with the Army Corps of Engineers,[19] resolving federal antitrust claims,[20] working with state breach of contract laws,[21] or spending thirty years eradicating "root and branch" insidious vestiges of racial discrimination in the local school district,[22] federal district courts take the business of dispensing "justice" on a daily basis seriously. And no one understood this better than the Honorable Judge Harold Barefoot Sanders. When he stepped onto the bench in 1979, Judge Sanders brought with him a wealth of experience. A native of Dallas, Texas, a graduate of the University of Texas School of Law, a father and husband, and veteran of World War II, Judge Sanders had pursued an array of professional careers in politics, private legal practice, and law enforcement before he accepted the challenge of the federal judiciary.[23]

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18. *See* sources cited *supra* note 17. Professor Suzanna Sherry challenges the "countermajoritarian critique" (the claim that unelected judicial actors should not be "making law") on the grounds that it fails to accurately portray what judges actually do. FARBER & SHERRY, *supra* note 1, at 144-51; Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 976-81 (2005) (criticizing jurists' and scholars' misuse of the countermajoritarian critique) [hereinafter Sherry, *Politics*]. Professor Sherry points out that most actions taken within a case fall squarely within the scope of the paradigmatic common law, or pragmatic, judge's legitimate, delegated power. *See* Sherry, *Politics*, *supra*, at 977. The "countermajoritarian critique" is not raised when judges enforce docket rules, evidentiary rules, or other nonsubstantive rules. *Id.* It is puzzling in this context how an analytic principle that initially focused on decisions of the Supreme Court that "made" constitutional law, decisions that interpreted the Constitution's core text, or subsequent precedent and constitutional doctrine, has become so generalized in its application. Professor Sherry points out that judges who must interpret the constitution to discharge their adjudicative responsibilities are constrained in these decisions by the appellate structure of the courts, by judicial norms of restrained decision making, and by use of common law or pragmatic paradigms of legal decision making. Within this context claiming federal judges routinely trespass upon the jurisdiction of elected legislative officials misperceives the essential relationship between these two branches of government in a constitutional democracy. *See id.* at 980-81; *see also* Samuel Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. REV. 547 (1981) (elaborating on Ely's "countermajoritarian" arguments providing a series of insightful critiques); Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1 (2001) (critically exploring the "majoritarian" difficulty, the idea that simple numbers equate to the only legitimate power in a democracy, by examining dimensions of democratic participation other than elections, such as adjudication which, the author argues, is "democratically legitimate" because its core mechanism is one of persuasion, a process of argument that incorporates a variety of methodologies and transforms "free and equal deliberation" into a "collective decision" by proceeding according to rules the "majority" has accepted).

19. *See* John Carlo, Inc. v. Corps of Eng'rs of the U.S. Army, Fort Worth Div., 539 F. Supp. 1075, 1077 (N.D. Tex. 1982).

20. *See infra* notes 89-99 and accompanying text (discussing Judge Sanders' handling of a complex antitrust summary judgment).

21. *See infra* notes 101-13 and accompanying text (discussing Judge Sanders' handling of a state law breach of contract claim).

22. *See infra* notes 116-269 and accompanying text (discussing Judge Sanders' handling of the local school desegregation litigation).

23. *See* Scott Farwell, *Harold Barefoot Sanders Jr.: 1925-2008, Judge Symbolized Civil Rights, Knew 'Fairness Took Backbone'*, DALLAS MORNING NEWS, Sept. 22, 2008, at 1A; Paula Lavigne, *School Desegregation Giant Honored*, DALLAS MORNING NEWS, Jan. 17, 2006, at 1B; Douglas Martin, *Barefoot Sanders Dies: Dallas Judge Was 83*, N.Y. TIMES,

It is clear, looking back over his career as a jurist, that each and every one of these experiences played a role in preparing him for the challenges he was about to face.

A. WHY ARE DISTRICT COURTS SO POWERFUL?

District court judges handling litigation find themselves working within a dynamic environment in which the underlying adjudicative facts are in constant evolution.[24] Pre-trial termination of cases, conducting trials, including trials to the bench, handling questions of legal characterization, those pesky mixed questions of law and fact, and handling post-trial motions and issues ensures that the trial court's primary focus is on the facts! Unlike the appellate courts, who have the luxury of working with an established factual record, a jury verdict, or a trial court's "Findings of Fact and Conclusions of Law," the trial court judge has the responsibility of making sure the facts are adequately developed, the factual disputes are fairly presented, and findings of fact—the first step to raising and resolving legal disputes through the application of "law to facts"—comport with accepted legal norms.[25] Even when a district court judge is faced with an appeal, the federal appellate courts have created doctrinal structures that are highly deferential to the trial judge on managerial, procedural, and factual issues, allowing the appellate judges to defer to the trial court and step in only to reverse a lower court's decision in these areas when the decision can be fairly characterized as an abuse of discretion.[26] This policy of institutional deference makes sense because it acknowledges that these are decisions properly delegated to the trial courts' unique expertise or context such as case management, trial management, and adjudicative fact finding (the trial court sitting as the finder of fact). As Judge Posner points out, within this institutional structure "a federal district judge has more decisional freedom than judges in career judiciaries."[27] However, when questions of law or mixed questions of law and fact are at issue, the highly deferential abuse of discretion appellate standards, or similar standards requiring a showing of prejudice or otherwise raising a serious question about the conduct of the case, are set aside and the appellate court steps into the shoes of the trial court, reviewing the issues de novo.[28] If it disagrees with the district court's judgment on these issues,

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Sept. 24, 2008, at B5; Barefoot Sanders, http://en.wikipedia.org/wiki/Barefoot_Sanders (last visited Sept. 10, 2009); Barefoot Sanders Awards and Recognitions (on file with the author).

24. Trial lawyers will tell you the facts are not final until the case is tried, because there are always surprises.

25. *See infra* notes 82-88 and accompanying text (discussing the special fact standards in an antitrust summary judgment).

26. Armour, *supra* note 5, at 154-56; Lefkow, *supra* note 13, at 21.

27. POSNER, *supra* note 3, at 142.

28. Every case involves a range of "fact" based decisions. Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 148-57 (2008) (examining the phenomenon of defining different categories of facts in terms of the institutional actor best positioned to make the final determination). Some of these decisions are effortless (it was daytime, babies cry, I was angry) and warrant little appellate

the circuit substitutes its judgment for that of the trial judge. But even in these cases, cases that involve complex legal decisions, the application of open, malleable legal standards to complex facts, the trial judge and the three-judge circuit panel[29] revert to predictable rhetorical and adjudicative strategies in rendering their opinions: they focus on the facts, they treat the law as a "black letter" given, and they engage in as little overt "law-making" as feasible.[30] To the extent possible in these types of opinions, the courts adhere as closely as is analytically possible to the normative judicial ideal of a restrained jurist appearing to do nothing more than "apply the law to the facts."[31] As a result, "this [institutional] system generates and tolerates tremendous variability in case outcomes at both the trial level and the initial appellate level, three-judge panels."[32] Within this system, the district courts are truly democracy's "laboratories," with their emphasis on efficient, effective, and fair dispute resolution, largely driven by the unique facts and circumstances of the given

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scrutiny or comment. *Id.* Others, what are often called disputed or adjudicative facts, require the involvement of a fact finder, either a jury or a judge. *Id.* at 147-58. The third type of fact is found in the mixed questions of law and fact—what are often referred to as questions of legal characterization—in which the judge applies the law to a set of facts, but the facts are not subjected to the same rigorous scrutiny through the adversarial process as the adjudicative facts and these facts are never submitted to a jury. *Id.* at 174-82. The question of qualified immunity in a constitutional excessive force case is an interesting example of how "fact based decisions" are treated differently, depending on whether their determination is delegated to the jury or judge as a fact finder or to the judge as a question of law (the legal characterization case or the "mixed question" case). *Id.* at 174-82; *see* Vikrant P. Reddy, Not Qualified to Decide: The Fifth Circuit's Pattern Jury Instructions Allow Juries to Decide Qualified Immunity. That's Wrong—But Who Will Change It? (Spring 2006) (unpublished manuscript, on file with author). Mr. Reddy points out that, as of 2006, six of the federal circuit courts had reserved the question of qualified immunity to the court as a mixed question of fact and law, while the other five circuits submitted the question to the jury as a "pure" issue of disputed fact. *Id.* at 2. In both instances, the same substantive legal standard applies, but on appeal, if the decision is considered properly delegated to a "fact finder," the circuit court will apply a more deferential appellate standard. If the judge is fact finder, the standard of review on appeal is abuse of discretion; however, if the decision is considered properly delegated to the court as a question of "law" and not submitted to the judge as fact finder, the standard of review on appeal is de novo, a standard that allows the circuit court essentially to substitute their judgment for the trial court's.

29. The role of circuit courts within the federal system has been thoroughly explored over the years, especially with respect to the relationship between the three judge panels and the full circuit court rendering *en banc* decisions. When cases are appealed within the federal system, most are decided by three judge panels, and the circuits make it clear they do not want parties seeking en banc review unless there is a very good reason. *See* FED. R. APP. P. 35, *available at* http://www.ca5.uscourts.gov/clerk/docs/frap2007.pdf; *see also* DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1988); WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981); DONALD R. SONGER ET AL, CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS (2000) (discussing the fact that statistical finality at the circuit level lies with the three judge panels); Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315 (2006).

30. Armour, *supra* note 5, at 155.

31. *Id.* at 198.

32. *Id.* at 225.

case and the judicial discretion inherent in the adjudicative process. But what ultimately guides the highly discretionary decisions of district court judges: legal rules, institutional norms, judicial temperament, or political context? Where does accountability lie for a district court judge: with peers, litigants, lawyers, the public, or appellate jurists?[33] If institutional legitimacy is grounded in the courts' perceived and actual adherence to the normative ideal, or some might say myth, of the "rule of law," how do we reconcile that with the discretionary power of the district courts?

Let's start with the question of "decisional freedom," or discretion.[34] How do district court judges handle this power? Particularly, how did Judge Sanders approach this dimension of his judicial decision making? The problem of judicial discretion is one that has challenged legal thinkers over the decades.[35] How do we reconcile this discretion with the "rule of law," a lofty principle deemed essential to the operation of our constitutional democracy, especially when the lower federal courts' output is so variable? If law were determinate and if the "application of law to facts" were as simple as it sounds wouldn't the trial courts' output meet narrower standards of predictability, wouldn't the black letter law be more determinative of case results? Stated in more overtly political terms, what does it mean to give "fallible" decision makers so much power when they are not accountable to the electorate and rarely accountable to other judges through appeal? One response to this conundrum—if discretionary decision makers who are fallible are fatal to a legitimate system of adjudication—is to only "empower final enforcers who are infallible: both perfectly disinterested and perfectly wise in interpreting a complete and principled legal order."[36] Since that is not possi-

33. POSNER, *supra* note 3, at 142-47 (analyzing the relative discretion, and therefore power, of district courts and circuit courts by looking at the district judges' "decisional freedom" relative to that of the circuit judges). In comparing the two courts, Judge Posner examines what he finds to be key distinctions between them: (1) personal factors play more of a role at the trial level because of the courts' "decisional freedom"; (2) federal trial judges are constrained by the dual pressures of case backlogs and reversal on appeal; (3) federal trial judges work alone, without the pressure to be "cooperative" that an appellate judge must address when working with a panel or the full court; (4) federal trial judges have less opportunity, and therefore less incentive, to "influence the law" since they focus primarily on "factual or procedural issues specific to the particular case"; (5) federal trial judges have less incentive to "influence the direction" in which law will evolve since their risk of reversal is higher, reducing "rewards" for creative legal thinking; (6) "professional criticism of judicial decisions" places a "sharper check on extravagant exercises of judicial discretion at the appellate level than at the trial level"; (7) the appellate courts are subject to a system of peer or professional accountability due to the public nature of their product, published judicial opinions; and (8) quantitative output measures may play a more important role at the trial court level than the appellate level. *Id.*

34. *See id.* at 142.

35. *See* Armour, *Rethinking*, *supra* note 2, at 504-24 (examining the debate over judicial discretion, its legal infrastructure, and its institutional context); Armour, *Practice*, *supra* note 2, at 705-61 (examining two paradigmatic approaches to judicial discretion, one which defines it as skill, the favored definition within much of the federal trial courts' managerial and procedural practice, versus principled decision making, which tends to rely upon its own normative expression as the favored limitation on the courts' discretion).

36. Richard Stith, *Securing the Rule of Law Through Interpretive Pluralism: An Argument from Comparative Law*, 35 HASTINGS CONST. L.Q. 401, 401-02. While describing the

ble, how do the federal trial courts work while remaining a legitimate arm of a constitutional government? The answer is judicial pragmatism:

> Pragmatism, as both a descriptive and normative theory of formal adjudication, emphasizes the impact of context and the position of the decision maker upon their decision. . . . Pragmatism has enriched our understanding of adjudication by looking at the judicial norms and values developed to fill in the interstices of the substantive law . . . .[37]

Ten years before those comments were even written, on June 1, 1986, Judge Barefoot Sanders was described as "The Forthright Pragmatist."[38] And in 2008, Judge Richard A. Posner tells us that "[t]he word that best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior is 'pragmatist' [or] more precisely, . . . 'constrained pragmatists'."[39] I could not agree more.[40] Federal district court judges are "sensible pragmatists" who rely

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normative functions of the "rule of law," and especially its ideological and legitimating functions in democratic societies, Professor Stith argues for interpretive pluralism, withdrawing the interpretive hegemony of any single court within a distinct polity, such as the United States Supreme Court. *Id.* at 402. As is seen in this Article and commentary cited herein, the variability of output from the federal district courts and the circuit courts' three judge panels suggests that we do not have a unitary interpretive structure in the United States, since so few cases ever make it to the Supreme Court. As a practical matter, rather than relying on the interpretive hegemony of a single court to legitimate the adjudicative process, the day-to-day interpretation of the Constitution, federal law, and much state law is rendered in the context of rich and fact based rulings of these lower federal courts and a different legitimating paradigm. *See* Armour, *supra* note 5, at 154-56; Lefkow, *supra* note 13, at 21.

37. Armour, *Rethinking*, *supra* note 2, at 526 (exploring the development of positive theories of judicial, managerial, and procedural pragmatism in response to the legal indeterminacy debate, which questioned the courts' legitimacy in the face of judicial discretion).

38. *See* Bryan Woolley, *Barefoot Sanders: The Forthright Pragmatist*, DALLAS TIMES HERALD'S DALLAS CITY MAG., June 1, 1986, at 10.

39. POSNER, *supra* note 3, at 230 (citations omitted). The legal academy has been fascinated with the idea of pragmatism as a normative legal theory that could redress the "problem of judicial discretion" or "doctrinal indeterminacy." *See* P. S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1250-51 (1980) (discussing the tension between pragmatism in the dimensions of the judicial function, defined primarily as dispute resolution, and the resistance to pragmatism, defined as the decline of principles in the judicial function, focusing primarily on formal adjudication); Michael S. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988, 988 (1984); Edward L. Rubin, *Scholars, Judges and Phenomenology: Comments on Tamanaha's Realistic Socio-Legal Theory*, 32 RUTGERS L.J. 241, 242-46 (2000) (critiquing Brian Tamanaha's work on pragmatism); Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 470 (2007), *quoted in* POSNER, *supra* note 3, at 203.

40. *See also* FARBER & SHERRY, *supra* note 1, at 3. Professors Farber and Sherry critique the idea of a grand normative theory of constitutional interpretation on the grounds that "none offers a solution to the problem of judicial discretion." *Id.* at 155. According to the authors, "constitutional law is an uneasy compromise between the constitutional law we expect . . . and the constitutional methods we expect . . . [the Court] to use. This vision of constitutional law as an evolving compromise is often described as a 'pragmatic' approach." *Id.* at 3. Pragmatists, according to the authors, use all available judicial or common law methodologies. *Id.* From this perspective, law is conceptualized as a human product, where doctrine is often messy, and case law evolves slowly. *See, e.g.*, Sherry, *Politics*, *supra* note 18, at 980 (discussing common law judging and its internalized

on a mixed strategy of pragmatism, legalism, and managerialism to move their dockets.[41] Without becoming caught up in the whys and wherefores of the debate over the legitimacy of "pragmatic" versus "principled" decision making, these judges found a "sensible resolution" to the conundrum, which pushed them "to look beyond the bickering of the lawyers to the concrete interests at stake."[42] But judicial pragmatism is not a simplistic, result-oriented approach to adjudicating cases; rather, it is an approach that rejects narrow, scientific legalism as blinders that, rather than ensuring fairness, shut out the real world of disputes and the reality that district court judges' decisions directly affect litigants' lives in ways appellate courts may never see or realize. It is also an approach to resolving legal disputes that does not become bogged down in the uncertainty or malleability of the law, but accepts it as a natural part of the legal process. In this respect, Judge Sanders bears a striking resemblance to the description of Judge Friendly as the essential pragmatist outlined by Judge Posner.[43] Both shared a background of real world problems and both went out of their way to ground their decisions in the reality of the case. For both judges, their initial response to a case was "often an intuitive response to [the diverse] pressures" that a case exerts on a judge—pressure "to conform to precedent, to do justice, to achieve a socially useful result."[44] The academic debates about the legitimacy of "pragmatism" do not interest these individuals. They, like many of their brethren, probably could not trace the philosophical dimensions of "pragmatism" and its seeming conflict with the "rule of law." Nor would they likely consider such an endeavor a useful exercise. As noted above, for most individuals—lay and professional alike—pragmatism connotes the artful blend of law and reality in the trial court. It is a compliment, and not a philosophical critique.

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judicial constraints of "fidelity to the rule of law and a preference for incremental rather than radical change"); Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES MAG., Apr. 10, 2005 (discussing, among other things, the slow evolution of Justice Blackmun's opinions on crucial constitutional issues).

41. POSNER, *supra* note 3, at 238.

42. *Id.* at 248. This pragmatic perspective is found throughout the academic and legal literature. Especially compelling evidence of this phenomenon are instances when judges write about judging or when good judges are remembered. *See, e.g.*, Joan Humphrey Lefkow, *Judicial Independence, Judicial Responsibility: A District Judge's Perspective*, 65 WASH. & LEE L. REV. 361, 375 (2008) ("As for me, I decide cases. I deal with human beings."); Colleen McMahon, *The Monastic Life of a Federal District Judge*, 70 MO. L. REV. 989 (2005); Lee H. Rosenthal, *A View Through Chambers*, 46 S. TEX. L. REV. 557 (2005); William R. Wilson, Jr., *Little Big Man—United States District Judge Ronald N. Davies*, 30 U. ARK. LITTLE ROCK L. REV. 303 (2008); Trang Q. Tran, *Independent Thinker: An Interview with Sim Lake, U.S. District Judge for the Southern District of Texas*, 39 HOUS. LAW., Winter 2001, at 43 (interviewed by Joe Ahmad and Debbie Pacholder).

43. POSNER, *supra* note 3, at 259.

44. *Id.* (quoting Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975, 995-96 (2007)).

B. Democratic Judging with a Small "d"

Perhaps what we are describing here is less a unique dimension of the character or judicial temperament of Judge Sanders than the phenomenon of an individual rising to meet the challenge of a job that cannot be discharged by adherence to a narrow normative theory of adjudication, especially when that theory ignores the institutional role of federal courts and the nature of the disputes they resolve. The complexities of managing and resolving disputes in a federal trial court call upon the judge's skill and expertise as a manager, a proceduralist, a realist, and a legalist who must interpret and apply a range of substantive laws. It is not hard to see how, given this environment, a federal judge develops a "respect for precedent, a dose of legal realism, a pragmatic interest in outcomes, a respect for legal process, an insistence on relative competence, a sense of what is practical, and a concern with judicial overreaching."[45] Simply stated, when Judge Sanders put on his judicial robes, there was no attempt to pretend he was not the same mortal he had been just moments before.[46] The image of the judge removed from the fray, sitting behind a wall of legal principles that dictate case outcomes, a mere "discerner"[47] of correct legal results without the need to know the litigants or understand the personal impact of his decisions, was unacceptable to Judge Sanders. In this regard, he was not only a pragmatic jurist, but also the quintessential democratic jurist (democrat with a small "d").

Judge Lefkow describes the federal district courts as "grassroots democracy" in action.[48] But democracies do not work unless the participants know their voice will be heard, and the oppressed or disadvantaged participants in the adjudicative process must understand that they stand before the judge as an equal—equal to the lawyers, powerful litigants, and even equal to the judge.[49] If there is one major theme that runs

45. *Id.* at 259-60 (quoting Boudin, *supra* note 44, at 995).

46. *Id.* at 260 (discussing Justice Jackson's ability to bridge the "distance between judges and mortals" (quoting G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges 232 (expanded ed. 1988))).

47. *Id.* at 262.

48. Lefkow, *supra* note 17, at 374.

49. *See* sources cited *supra* note 17. The commentators cited here offer important insights into the role of adjudication and federal trial courts in the democratic process. What their scholarship makes clear is that the essence of democratic theory, its core legitimating norm, is its adherence to ensuring that minority opinions and individual concerns are heard. In their turn, electoral majoritarianism and legislative representation are essentially nondemocratic when they exclude these issues from the public discourse by silencing or ignoring electoral minorities or outsider perspectives. Speech, as self expression and political expression, is rendered irrelevant when the state refuses to listen; the *sine qua non* of a democracy is an individual's access to public forums, where what they say matters and is listened to with great deference and interest. It is not a stretch of the imagination to appreciate that federal trial courts provide a unique and essential public forum for these voices. *See, e.g.*, Hannah Arendt, The Human Condition 7-73 (1958) (discussing the essential political nature of public discourse and the importance of dialogue in democratic theory); Marcel Detienne, *Public Space and Political Autonomy in Early Greek Cities*, *in* Public Space and Democracy 41, 42-52 (Marcel Hénaff & Tracy B. Strong eds., 2001) (collecting essays that explore the role of public space and political expression in democratic theory); Sheldon S. Wolin, Tocqueville Between Two Worlds (2003) (exploring the

throughout this memorial issue it is this: Judge Sanders treated litigants, especially those less well-off or less powerful, with respect, and he expected everyone in his court to do the same. His own humility and his unwillingness to cater to arrogance, title, or self-proclaimed rights of privilege in his courtroom, ensured all an equal voice in this very public forum. And he listened. Sitting on the bench, he would hunch over and focus his attention on the parties, the witness, or the lawyer. When anyone appeared and took their place in his court, they received his undivided attention. All this was accomplished without resort to pomp or the pretense of judicial infallibility. Again, this was the result, not of some deep-seated philosophy of adjudication, or even a very conscious strategy; his judicial style or approach to the litigants simply reflected his own interest in and concern for people. Judge Sanders had no desire to "hide" from people in his judicial role, and his natural gregariousness[50] came across even on the bench. When I say Judge Sanders was a democrat with a small "d," what I mean is he was able to take the very messy human process of adjudication and imbue it with a sense of humanity and fairness.[51]

C. The Pragmatic Judge as Docket Manager

The decades beginning with the 1970s saw the rise of the managerial judge, the ascendance of procedural pragmatism as the accepted ideology of the federal "rule makers," and a growing emphasis on non-adjudicative processes to dispose of litigation.[52] This was the institutional context in

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roots, scope and essence of American democracy). Professor Wolin tells us that "Tocqueville was the first political theorist to treat democracy as a theoretical subject in its own right." *Id.* at 59. As a political theory the "potential explosiveness of democracy lay in a conception of the political whose first principle was that no one should be excluded—that is . . . democracy lacked a principled justification for exclusion." *Id.* at 61.

50. When the court went out to lunch or other events, it would take Judge Sanders three times as long to cross the room because he stopped to talk with, it seemed to us, everyone he knew. The law clerks teased Judge Sanders about this, pointing out that he was an Article III Judge with lifetime tenure; he did not run the risk of losing his job in an election.

51. *See infra* Part III.A-C (discussing Judge Sanders' handling of the *Tasby* Litigation and the interview with Mr. Tasby). It is an obvious point but one that should be made here: Judge Sanders was also a Democrat with a large "D."

52. *See* Maureen N. Armour, Public Policy Making and the Courts: Procedural Pragmatism in an Era of Reform (1984) (unpublished manuscript, on file with the author); *see, e.g.*, Judith Resnick, *Whither and Whether*, 86 B.U. L. Rev. 1101, 1101-02 (2006) (examining the important role adjudication has played in society by offering a public forum where individuals, treated as equals by the state, were given a voice in resolving their disputes, and allowing the community to observe the legitimate exercise of state authority and participate in norm development); Judith Resnick, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. Miami L. Rev. 173, 176-77 (2003) (examining a shift in perspective in the federal judiciary in which judges are no "longer heroic solo actors but part of a corporate body that has begun to . . . be suspicious of adjudication and to prefer negotiation"); Judith Resnick, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. Rev. 1471, 1472 (1994) (examining whether courts should favor decisions on the merits or settlements and the impact judicial preferences for settlement have on the political role of the federal courts); Judith Resnick, *Tiers*, 57 S. Cal. L. Rev. 837 (1984) (chal-

which Judge Sanders found himself when he took the bench in 1979. Looking back, it is easy to see how Judge Sanders' own peculiar blend of managerial, procedural, and adjudicative pragmatism rendered him uniquely qualified for this "job." Judge Posner hypothesizes that federal trial court judges' unique problem, managing a growing docket and case backlogs, creates pressure on the courts. According to Judge Posner, this pressure, the pressure to move cases quickly and efficiently, is at odds with the federal trial courts' aversion to reversal by the circuit court.[53] Others have suggested that a similar tension exists between the federal trial courts' pragmatic managerialism and the adversarial process, the former committed to efficiency in dispute resolution while the latter is committed to a lengthy, often resource-demanding, trial and the resolution of cases on the merits.[54] According to the commentators, an aversion to reversal creates incentives which encourage trial judges to take more time with a case. This desire to move more slowly and deliberately increases backlog pressure, and increasing case backlogs call into play the courts' managerial pragmatism. According to the hypothesis, this cycle generates substantial institutional and personal incentives for trial judges to seek nonadjudicative means of terminating litigation and, the thesis is argued, rely on these techniques to avoid difficult (whether procedurally, legally or factually), and therefore institutionally expensive, decisions on the merits.

Federal trial judges have to deal with case backlogs, and Judge Sanders was clearly aware of this reality; moving the docket and managing the growing caseload in the Northern District became even more of a concern when he was appointed Chief Judge of the Northern District of Texas in January 1987.[55] The administrative pressures and managerial concerns of the federal judiciary are also reflected in their professional activities off the bench.[56] After collecting surveys from many of Judge

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lenging the notion that procedure is value neutral by examining the value aspects of the courts' procedures, including such procedural values as finality, economy, and consistency); Thomas D. Rowe, Jr., *American Law Institute: Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824 (1989) (presenting a major study of the "litigation problem," or the accepted perception at the time that litigation was out of control and inundating the federal courts, questioning the alleged scope of "the problem," and offering insights into possible solutions, including procedural, managerial, and nonadjudicative dispute resolution alternatives); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 303-10 (1989) (discussing the dimensions of a "fair adjudication" under the traditional adversarial paradigm, or party control of the investigation and presentation of evidence and the arguments (ensuring that parties have a voice in the litigation), a passive neutral decision maker who limits his decision to the record presented by the parties, and decisions that are judged on their rationality (defined largely in terms of their legal predictability, adherence to legal precedent and applicable rules of decision making)).

53. POSNER, *supra* note 3, at 143.

54. *See* sources cited *supra* note 52.

55. The Northern District of Texas's own approach to managing litigation has evolved over time, including its use of technology. A quick perusal of the Northern District's website (http://www.txnd.uscourts.gov/) reflects many of these changes.

56. The federal judiciary are not professionally isolated. The administrative arm of the federal courts, the Federal Judicial Center, holds conferences, oversees committees, and

Sanders' clerks describing their experiences while at the court, and a couple of pointed questions on my part, the thesis that Judge Sanders avoided decisions on the merits in order to avoid hard legal issues or "reversal on appeal" is not born out by the evidence. Judge Sanders rarely used formal mediation orders, although over time every district court judge's routine "pre-trial order" included an "order" to engage in settlement negotiations. The idea that counsel must report to the district court if settlement negotiations were unsuccessful certainly placed the issue squarely in front of the trial court judges. How they individually reacted when lawyers reported that a settlement was not feasible is an interesting question. I think it is fair to say that Judge Sanders had a keen eye for the case that should settle—not because it raised difficult legal issues, but because the dispute was less legal and more human, driven by litigants' or lawyers' personal investments in the case, which caused them to lose sight of the "risk of going to trial." In these cases, cases which could go either way in front of a jury, Judge Sanders might invite counsel into chambers and suggest they discuss settlement seriously.[57] This informal procedure ensured that the parties and their lawyers knew they would receive a scrupulously fair trial and that neither party entered the courtroom with any advantage.[58] In recent decades, trial courts have adopted a more aggressive stance and a greater focus on settlement; the rationale offered is that settlements take care of both parties' interests and provide a more flexible approach to dispute resolution than a jury verdict and without expending expensive institutional resources.[59] Not everyone agrees with this position, especially in cases like the Dallas Independent School District (DISD) school desegregation litigation.[60] In cases where there are significant constitutional issues or "equality" mandates to be redressed, the full, fair litigation and resolution of the matter in the public domain of the federal court enhances a jurisprudence of power and equality, enforces the democratic ideal that powerful institutional actors must adhere to the law, and encourages minority voices and outsider narratives.[61]

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acts as the glue that holds the federal courts together as an organization. In addition, there is the Judicial Division of the American Bar Association, which includes both federal and state court judges. All of these organizations encourage open and helpful dialogue amongst its members. It is equally obvious that the problem of managing litigation in the federal courts is hardly an issue effectively addressed court by court; however, individual judges' approaches to their own litigation docket play a significant role in generating the overall mix of institutional strategies.

57. The "Collected Surveys" from the Law Clerks, currently on file with the author, will become part of the University of Texas School of Law Archives.

58. Most trial judges who deal with this phenomenon can attest to the fact that a little reality testing goes a long way in helping lawyers, and their clients, appreciate that trials are risky and expensive ventures.

59. *See, e.g.*, Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1984).

60. *See infra* note 116-269.

61. *See supra* note 17.

Perhaps because of his own administrative background and his experience answering to a United States President, President Lyndon B. Johnson, upon taking the bench Judge Sanders quickly implemented chambers procedures that ensured the docket moved. Cases were decided in a timely fashion, either through pretrial methods like settlement or summary judgment; if a trial was needed, it happened within a reasonable time. My co-clerk, Ms. Karen Jones,[62] and I were only the third set of clerks in Judge Sanders' chambers, but by the time we arrived, Judge Sanders was in control of the court's daunting managerial tasks, and I quickly learned that one of my responsibilities was to track motions for my cases to determine when they were ripe, meaning that all papers from movants and respondents had been timely filed. Once the motion was ripe, it was ready to be decided, and for many motions the window for a decision in Judge Sanders' court was one or two weeks. All of Judge Sanders' law clerks quickly learned that justice delayed is often justice denied. After thirty years as a federal district judge, it is fair to say that Judge Sanders was a consummate manager of his docket. Many of the stories and remembrances collected in this issue reflect on how Judge Sanders used an artful blend of humor, suggestion, and firm direction with his clerks, court personnel, and lawyers to make sure litigants received their day in court in a timely fashion.

I would be disingenuous if I ignored the other "judicial" techniques available to Judge Sanders in managing his docket, including the occasional growl of frustration, pointed question, and "removal of the glasses coupled with the raised-eye-brow-stare," but it took a lot to push him to these extremes. Any trial judge can become frustrated with the lawyers in his court and most try very hard not to show it, but sometimes there is a conflict between what the lawyer thinks is best for his client and what the judge thinks is appropriate under the circumstances. I asked Judge Sanders' clerks if he favored using Rule 11 or other formal sanctions routinely to "control" lawyers, and the answer was a unanimous "no." The consummate manager, Judge Sanders understood that even in this role talking and listening to people achieved the best results; his managerial style leaned towards conferences in chambers to openly discuss and address problems or issues with counsel and to make sure everyone involved in the case got on with the business at hand.[63] There was no hiding behind the bench or the robes; Judge Sanders was willing metaphorically and literally to role up his shirt sleeves, sit down with counsel and work on the case.[64]

62. Karen Jones is currently a partner at Riddell Williams P.S. of Seattle, Washington.

63. The fact that federal magistrate judges handle all discovery disputes in the Northern District of Texas helps to limit opportunities for judicial frustration. Some lawyers wish they could bring their discovery conflicts to the judges on grounds that it helps educate the court, but in the long run, I think the current system works to the lawyers' advantage.

64. This is not to say that in thirty years on the bench Judge Sanders never had a problem that required a more direct or stern approach, or one that resulted in some form of sanctions. But that was not his favored approach.

D. The Fear of Reversal

A thorough consideration of trial docket management requires discussion of the seeming tension between "fear of reversal" and efficient management of a trial docket. Judge Sanders never sacrificed fairness for efficiency, and despite the obvious time constraints he and his clerks worked under, careful, judicious consideration of legal and factual issues was always a priority.[65] However, Judge Sanders made it clear to me and my fellow clerks that there was limited utility associated with spending undue amounts of time on any given case, such as searching for the definitive (from the clerks' point of view) determinative precedent, in order to avoid having to exercise any adjudicative discretion or legal judgment. As clerks, we took our responsibilities very seriously, wondering, often out loud, how recent law school graduates could help a federal judge make such important decisions and render judicial opinions that would withstand the searching scrutiny of fellow trial court judges, appellate judges, litigants, the bar, and the community. What Judge Sanders sensed intuitively and made explicit to us in our meetings about the docket was that the system of adjudication sets its own limits. When the law was open and malleable, when legal standards were less than clear, when a disputed legal issue fell into a doctrinal gap, when precedent did not come to grips with the facts of the case, or when the task fell to the court to develop the facts and make "fact findings" in order to apply the law to those facts, whether sitting as a fact finder or sitting as a judge deciding a mixed question of law and fact—the court simply had to do its best and make a decision. And it needed to act in a timely fashion! Trial courts do not have unlimited time to ponder even the most challenging or perplexing of legal questions, and Judge Sanders expected the lawyers, and his clerks, to get to the point when difficult legal issues were honestly disputed. The court's job was to render a decision or, as he once commented to me when we were discussing—really arguing about—a complex legal issue yet to be resolved by the Fifth Circuit Court of Appeals, "Mo, we just have to do our best. Maybe the Fifth Circuit won't agree with our decision, but that's their job. We need to do ours." The comments provided by my fellow clerks emphasize this institutional reality.

Of course, Judge Sanders was not thrilled when he was reversed, but he did not treat it as a "bad grade on a test" or a personal opinion about his intellectual acumen or skills as a judge. Judge Sanders intuitively understood the institutional allocation of responsibilities within the federal judiciary and he understood that, at times, the trial judge has to use his best judgment and skill to make a decision, knowing the appellate court might disagree. It would undermine the checks and balances inherent in the federal judicial system if district court judges saw their judicial role as limited to second guessing the circuit courts. This would remove an im-

65. Collected Surveys, *supra* note 57. The clerks' responses to questionnaires on this point outline in some detail the time and effort spent on dispositive motions and trials.

portant element from the adjudicative process—the independent judgment of the trial court with its access to the facts, the enriched, dynamic, contextual facts that rarely appear in appellate opinions. Sometimes the decision Judge Sanders had to make was a "close call" and disagreement with the Fifth Circuit was foreseeable. For example, with a highly discretionary decision, disagreement might be foreseeable based on the different institutional perspectives of the judges involved. At other times, district court judges might simply be of the opinion that the circuit court got it wrong.[66]

E. Producing Opinions and the Role and Law Clerks

One strategy Judge Sanders used to address these seemingly conflicting institutional goals—careful consideration of the legal and factual merits raised by a litigant's moving papers and efficient management of a growing and complex trial docket—was his approach to writing opinions, issuing orders, and ruling from the bench. When I started this project, I asked Ms. Lynn Murray, one of Dedman School of Law's librarians, to develop a citation list of Judge Sanders opinions. Ms. Murray secured for me a list of 1,386 opinions listed by Lexis, which included both published and unpublished opinions.[67] Yet even this list, impressive as it is, does

66. At the Fifth Circuit Judicial Conference, Justice Scalia presents an award, a duck caller, when a district court judge makes a ruling which the Fifth Circuit reverses, but the Supreme Court ultimately affirms on appeal. The award is the "E pur si muove" Award. The title refers to the legend that, after being forced by the Pope to recant his theory that the Earth revolves around the Sun, Galileo muttered (as translated) "but it still moves." *See* William S. Wakh, Handy-Book of Literary Curiosities 252 (1909). Judge Sanders received this award at the 2006 Fifth Circuit Judicial Conference. In the opinion at issue, Judge Sanders held that a negligence claim against an ERISA-based HMO plan was preempted by ERISA. Calad v. Cigna Healthcare of Tex., Inc., No. CIV-300-CV-3693-H, 2001 WL 705776, at *5-6 (N.D. Tex. June 21, 2001). The Fifth Circuit reversed *Calad* in *Rork v. Humana*, 307 F.3d 298, 306 (5th Cir. 2002), but the Supreme Court later affirmed Judge Sanders in *Aetna Health Inc. v. Davila*, 542 U.S. 200, 204 (2004). The "duck caller" apparently references a case in which Justice Scalia was asked to recuse himself, which he refused to do, because he had been duck hunting with then Vice-President Richard Cheney. Mr. Scott McElhaney, 1982-1983, Jackson, Walker, LLP, and Ms. Susan Maxwell, 2000-2001, Bickerstaff Heath Delgado Acosta, LLP, provided information on the award used in this footnote.

67. The list of citations is on file with the author. In attempting to "acquire" a complete list, we were concerned about "unpublished opinions." In this regard, it is important to note that West's Federal Supplement is not an official publication of the federal district courts. It is a selection of opinions made by West editors from a larger selection of cases submitted by the federal trial judges themselves. In recent decades, federal trial courts have handed down many more opinions than are published. In the days before digital databases, the unpublished opinions would likely disappear. By the late nineties, however, Lexis was placing over 40,000 district court opinions online per year, almost four times the number printed in the Federal Supplement. With the passage of the E-government Act, Pub. L. No. 107-347, 116 Stat. 2899 (codified in scattered sections of U.S.C.), mandating the release of all district court opinions to the public, that number has more than doubled. Today an opinion designated "unreported" or "unpublished" is given that designation by the judge with full knowledge that it will be available in this data base. District court judges are producing work at a significant pace, but no one, neither Westlaw nor Lexis, has every federal district court case ever decided or every opinion ever written. (This information was collected in a series of e-mails from Lexis on file with the author.)

not reflect the Court's output, because it is missing the routinely entered short orders addressing more narrow procedural or evidentiary issues, rulings from the bench (a system that was both efficient and allowed Judge Sanders to look at the litigants as he ruled), and early orders and opinions issued before digital publication became omnipresent. I also asked Ms. Murray to develop a list of Judge Sanders' Federal Supplement and Federal Reporter citations: 238, including two circuit opinions involving cases on which he sat by designation.[68] There is no difference in the analytical quality or judicial judgment involved in the two lists. What is different is the amount of time invested in a written opinion that would be published in the Federal Supplement. Judge Sanders' published opinions, in most instances, focused on cases which addressed important issues of public concern, like the school desegregation case;[69] cases that could have a significant local legal or economic impact, like the *Hunt* litigation;[70] cases in which publication would ensure transparency, accountability, and utility of a decision that was of significant human interest;[71] or cases where publication had been requested by one of the litigants.[72] But in other instances, his direction was clear: working over opinions and readying them for publication was time taken away from other cases. What was routinely produced was outstanding legal product that provided the lawyers and litigants with a clear understanding of Judge Sanders' ruling, its legal basis and the necessary record for appeal.[73] That was, after all, the trial court's real job, and Judge Sanders did that job exceptionally well.

Those who speculate about the role of law clerks as "ghostwriters"[74] may not appreciate the odd role of the federal trial court clerk. As newly minted law school graduates, we are potentially overwhelmed by what is expected of us and, if we are not, there is something seriously wrong with our grip on reality. Much can be learned about trial court judges by examining how they "use their law clerks,"[75] but two recent writers on the subject appear to be highly critical, or at the least overtly suspicious, of what they perceive to be potentially improper delegation to clerks of such

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68. *Id.*

69. *See infra* Part III.A-C.

70. *See, e.g.*, Hunt v. Bankers Trust Co., 689 F. Supp. 666 (N.D. Tex. 1987); Hunt v. Bankers Trust Co., 646 F. Supp. 59 (N.D. Tex. 1986).

71. *See* Kurt Schwarz, *My Favorite Year: What a Law Clerk Learned About Justice, Judging, and Litigation From Working on One Case with Barefoot Sanders*, 62 SMU L. REV. 1657 (2009).

72. *See, e.g.*, John Carlo, Inc. v. Corps of Eng'rs of the U.S. Army, Fort Worth Div., 539 F. Supp. 1075 (N.D. Tex. 1982).

73. Anyone interested in the role of trial court opinions, especially those involving constitutional litigation, should examine the breadth and depth of the opinions written by Judge Sanders in the *Tasby* Litigation. *See infra* Parts III.A-C.

74. POSNER, *supra* note 3, at 221.

75. *See* Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 623 (2008) (studying the role and use of law clerks). "One duty that many judges and clerks acknowledge at all levels has been some drafting of judicial opinions or final orders, though the level of clerk participation varies widely." *Id.* at 631.

tasks as reviewing briefs, checking the law, and checking factual and evidentiary records, with their greatest concern reserved for those judges who use clerks to "draft" portions of substantive or dispositive opinions or orders.[76] As part of a different project involving the creation of an archive of Judge Sanders' papers, including his judicial papers, at the University of Texas at Austin, all of his law clerks were asked to fill out a simple questionnaire commenting on significant experiences and cases during their clerkship. While this catalog is not yet complete, copies sent to me reveal a more dynamic process when the court was engaged in generating a final opinion or order, dispositive or not—a process that started when the first brief is opened and continued up to the issuance of a final order or memorandum opinion signed by Judge Sanders—than the term "ghostwriting" evokes.

I will use my experiences as an example of this process, because Judge Sanders and I had a couple of noteworthy debates about cases to which I had been assigned, but my experiences were not unique. The first "debate" arose in conjunction with a sitting federal grand jury. Without going into the underlying facts, Judge Sanders and I were discussing the problem presented to him by defense counsel who wanted access to the grand jury's proceedings. It was clear, in my opinion, that Judge Sanders' prior experience as U.S. Attorney was making it difficult for him to appreciate what was at stake from the defense lawyers' point of view. I had never dealt with a grand jury, but my own personal background, and therefore biases, made me highly suspicious of the process, and I was having a difficult time grasping Judge Sanders' position, since it seemed to me that he was treating the grand jury as a very routine part of the criminal process. And, for him, it was. As our discussion evolved, we found ourselves in a face-off in the library, but our conflicting concerns and perspectives quickly resolved themselves as I pulled books off of the shelves and, with Judge Sanders, examined the legal authority cited by defense counsel. The relief sought by the defense lawyers in their motion was unique and available to the defendant under a very limited set of facts and circumstances. Judge Sanders acknowledged that he was not familiar with the procedure laid out in the caselaw. But at no time during this rather heated discussion did Judge Sanders pull rank or otherwise demean my contribution to the discussion or question my position by dis-

76. Judge Posner refers to this process as "ghostwriting," an uncomplimentary term that implies that the opinion is really the clerk's and not the judge's. *See* POSNER, *supra* note 3, at 221. The authors of *Inside Judicial Chambers* provide in their article a list of "job duties" for law clerks, which includes reviewing motions and briefs, and drafting orders and memoranda for dispositive and nondispositive motions. Peppers et al., *supra* note 75, app. at 639-45. I do not know what the response would have been from the jurists surveyed if a category of activity had been labeled "ghostwriting," but they might have been more revealing of their opinions and attitudes towards the role played by law clerks in their courts.

missing me as young[77] and inexperienced. I, in turn, learned to appreciate the importance of talking openly and critically about legal issues, without assuming that mere "analytic" skills, or the ability to read the law, would be the ultimate decider. The question the court was forced to grapple with, as with so many that come before a trial court judge, required the application of an open and malleable legal standard to a less than paradigmatic set of facts, and carried the admonition: "so that justice might be done." While I do not recall in detail the final decision Judge Sanders made in this particular instance, I do recall thinking that he had been able to shed his experiential blinders as a U. S. attorney and weigh the facts fairly, just as I had been forced to recognize how my own biases could affect my legal judgment.

Another example of this dynamic process is Judge Sanders' opinion in *Transource International, Inc. v. Trinity Industries, Inc.*, a paradigmatic summary judgment which illustrates the scope of pre-trial disposition issues decided by federal district court judges.[78] This case also illustrates the decisional and rhetorical strategies used by federal trial and appellate judges when they are dealing with cases that do not require a high degree of deference by the appellate court to the trial court's fact expertise, but that don't require either court to "make law" or "find law" in order to fill in a "doctrinal" or "interpretive" gap. The cross-motions for summary judgment raised a broad range of federal and state antitrust issues as well as state law breach of contract issues, but it was as close as you can get to a classic case of applying applicable "law to the facts." When I began my clerkship, I had just completed a class on antitrust law and dove into the summary judgment with great enthusiasm.[79] My enthusiasm soon waned. After reading over the briefs, I met with Judge Sanders to discuss the motion and the issues it raised. Some of his concerns, which accurately reflect the "types of decisions" trial court judges are routinely asked to make, were quite simple: What is it they want me to do? What are the legal standards? Are the applicable doctrinal standards clear? What are the applicable summary judgment standards? And finally, what are the actual "decisions" the court must make: determining facts, deciding if there is a factual dispute, or deciding a mixed question of fact and law (a question of legal characterization)? Fortunately, this was not a case in which the parties disputed the existence of a cause of action or the state of the applicable substantive antitrust or contract law. But that did not mean that it was a simple summary judgment either; the parties' motions ranged across the breadth and depth of antitrust law, and not surprising,

77. For the record, it should be noted that I am oldest of Judge Sanders' law clerks (October 9, 1948), although other clerks began their clerkships at a more advanced age than I (33 years of age).

78. Judge Sanders' summary judgment opinion is not available other than by reading the Fifth Circuit's account of the case on appeal. *See* Transource Int'l., Inc. v. Trinity Indus., Inc., 725 F.2d 274, 279 (5th Cir. 1984).

79. I owe a debt of gratitude to Professor Paul Rogers, Dedman School of Law, Southern Methodist University, my antitrust professor, for making sure I knew enough antitrust law to work effectively on the summary judgment.

the "undisputed" factual record was hotly contested as evidenced by the individual movants' thick factual appendices. My job first involved checking the briefing. The lawyers had done excellent work, but they were advocates, and Judge Sanders wanted to make sure we had the most recent Fifth Circuit cases on point, including those addressing the substantive issues and those addressing the standards for antitrust summary judgments.

In the midst of working on this case, I was, of course, engaged in other tasks within chambers: answering lawyers' phone calls, handling social security appeals, working on other motions, attending case conferences with counsel, working to help Judge Sanders prepare for hearings, attending hearings, helping Judge Sanders handle the occasional Friday afternoon "emergency" temporary injunction, sitting in on criminal trials, attending sentencings, attending tax protester trials, helping prepare jury charges in diversity and federal cases using materials provided by counsel and the Fifth Circuit, providing an initial review of any appeals from the magistrates' court, assisting Judge Sanders with trials (helping to organize pre-trial materials, attending conferences and hearings on pre-trial motions, and attending the actual trial to facilitate the flow of information between the courtroom and chambers during the trial, working with trial counsel on issues that arose during the course of trial to ensure that Judge Sanders addressed their concerns in a timely fashion, helping with pre-trial and post-trial motions, and doing anything else Judge Sanders needed assistance with while he was sitting on the bench in the courtroom conducting the trial), and taking care of the myriad of other tasks that inevitably arise in a busy trial court. After hearings or during trial recesses, Judge Sanders would often ask us, "What do you think?" He took seriously his role as a teacher, and he wanted us to observe and learn. We were also free to ask questions: Why did he impose a certain sentence? Was he being too hard on one of the lawyers? Why did he rule as he had from the bench? The list of possible questions is endless, as any federal district court law clerk will tell you.[80]

Given Judge Sanders' deadlines for "ripe" motions, as soon as the Transource briefs came in, I began pulling together controlling legal standards and precedent, focusing especially on the test or standard that would guide his specific decisions on the summary judgment issue. The format of the Fifth Circuit's appellate decision reflects Judge Sanders' final memorandum opinion granting Trinity's motion on the antitrust and breach of contract claims. It should be noted that both the Fifth Circuit's opinion and Judge Sanders' opinion, which is discussed in the published Fifth Circuit opinion, reflect the narrow rhetorical strategies routinely used by trial courts and three judge appellate panels: treat the doctrinal law as black letter, focus on narrow factual issues, and avoid "making law" or raising issues that could require en banc consideration on ap-

80. Clerking for Judge Sanders involved other pleasurable activities, as the attached reminiscences attest.

peal.[81] The Fifth Circuit affirmed Judge Sanders' rulings on the federal and state antitrust claims but reversed and remanded the breach of contract claims—but more about that later. As I read over the circuit's opinion, the twenty-five years that have elapsed since the decision disappear, and I can vividly recall sitting at my desk with both parties' motions and appendices feeling overwhelmed, until Judge Sanders pointed out the obvious. Summary judgments are part of the trial courts' normal business and in that respect pretty straightforward affairs: identify the legal issues, figure out the factual issues, disputed and undisputed, and line up the applicable law. It is not necessary to recite the facts of the case in any detail here—suffice it to say there were two contracts and a letter of credit that formed the heart of the dispute. It is also worth stating the obvious: the simple recitation of facts in the published appellate opinion and in the memorandum opinion from the trial court reflects extensive effort working with the pleadings and summary judgment evidence, and learning about railroad gondola cars, including their manufacturing and marketing.[82]

Transource's complaint alleged several violations of antitrust laws. Transource claimed that the non-competition clause in the first contract "constituted an unlawful restraint of trade in violation of Section 1 of the Sherman Act"; "Trinity conspired with its manufacturers and suppliers to keep Transource out of the business of manufacturing and leasing gondolas" in violation of Sections 1 and 2 of the Sherman Act; Trinity "had refused to allow Transource to sell its right to purchase gondolas to another railcar leasing company and that noncompetition clause" violated Section 3 of the Clayton Act; the "June 15, 1979, Agreement violated Texas antitrust laws"; and finally, "Trinity breached the Agreement itself by failing to post the Valdunes letter of credit and by failing to advance" $20,000 to Transource at closing.[83] What comes next in the Fifth Circuit's opinion is traditional summary judgment boilerplate language stating basic policy considerations and weighing the difficulty of granting such motions. The opinion states that the "court must draw all inferences in favor" of the defending party, but points out that the "nonmoving litigant cannot establish a genuine issue of material fact merely by introducing conflicting testimony."[84] The party opposing the motion is charged to "produce significant evidence demonstrating the existence of a genuine fact issue."[85] The Fifth Circuit then points out that on appeal of a summary judgment where the trial court found "plaintiff failed to introduce evidence which created a genuine factual dispute," the appellate court is

81. *See* Armour, *supra* note 5, at 213-25.

82. This is one of the problems that law students face when they leave law school—their experience with appellate opinions has not prepared them for the reality of legal practice, where facts are rarely so neatly organized at the inception of a case.

83. *Transource*, 725 F.2d at 278-79.

84. *Id.* at 279.

85. *Id.*

"bound by the same standards" as the trial court.[86] Effectively there is no deference or abuse of discretion standard on the table; the trial court's exercise of its adjudicative discretion is to be examined on appeal under the glaring light of de novo review.[87] This "boilerplate" language can be viewed as a hortatory thumb on the decisional scales, offering a hint to trial courts of which way they should lean if the decision falls into a grey area, which it inevitably will in complex cases like *Transource.* To make this process even more complex, this summary judgment motion required the trial court, and in turn the appellate court, to decide a number of "mixed questions," those challenging legal characterization questions that require the trial court to look at a set of facts, often undisputed, but not always, and apply a legal label. These issues are troubling because, while they involve a certain amount of "fact expertise," they are not delegated to the trial court's fact-finding function and are reviewed under a de novo standard, which relies on the appellate court's limited "fact finding" expertise.[88]

The first characterization issue required both courts to determine if the alleged restraint of trade included in the first contract was vertical or horizontal. Since horizontal restraints "are conclusively presumed to be illegal without elaborate [factual] inquiry," characterizing the restraint as vertical shifted the burden to Transource to "prove an anticompetitive effect."[89] Transource objected to the trial court's characterization of the restraint as vertical, and not horizontal, and claimed this "issue of characterization" should be submitted to a jury as a disputed fact issue.[90] In three lines, the Fifth Circuit takes care of this issue, stating that the record is clear and affirming the district court's characterization of the alleged restraint of trade.[91]

On the second point, whether Transource could be viewed as a potential competitor with Trinity (creating a per se illegal agreement), the appellate court again agrees with the district court's conclusion, pointing to the facts in the record.[92] The Fifth Circuit held that "there was adequate support in the record for the district court to rule as a matter of law that Paragraph 8 of the Agreement did not constitute a per se violation of

86. *Id.*

87. *Id.*

88. *See, e.g.*, Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 281-82 (2001) (examining the different appellate standards of review, shading off from de novo review for legal error through the highly deferential "abuse of discretion" standard); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993-1005 (1986) (discussing the power of appellate courts to withdraw mixed law/fact questions from the discretionary power of the trial court by classifying them as questions of law reviewed de novo on appeal even when that review requires the appellate court to weigh and "find" facts).

89. *Transource*, 725 F.2d at 279.

90. *Id.* at 280.

91. *Id.*

92. *Id.*

section 1 of the Sherman Act as a horizontal restraint."[93] Thus, the potentially vexatious "disputed fact" issue had been transformed into a "legal characterization" issue, which though still a highly fact-based decision, is much more amenable to summary judgment.

The "rule of reason analysis" comes next, and here the Fifth Circuit addresses the question of standing first. Of the three elements of antitrust standing at issue in this case, the district court determined that the plaintiff had adequately pled and met the "target market" and damages requirements. As for the third element of standing, alleging "a sufficient causal relationship between the injury and the antitrust violation," the Fifth Circuit points to the language in the complaint as failing to show "that any injuries could have resulted" from the enforcement of the noncompete clause and quotes the district court's memorandum opinion on this point.[94] Once more the appellate court agreed with the district court's application of law to the "facts" of the case.

The conspiracy, monopoly, Clayton Act, and state law antitrust claims were similarly treated by the Fifth Circuit. On the conspiracy claim, the district court had held that the "plaintiff had failed in its effort to rebut defendant's motion" and the Fifth Circuit agreed.[95] In looking over the district court's ruling, the Fifth Circuit points out that the plaintiff had failed to raise a fact issue (whether or not there is a disputed fact issue is a question of legal characterization), and that Trinity had provided plausible business explanations for what had happened.[96] Again, the tenor of the holding focuses on how the facts in evidence are to be weighed and evaluated, with the Fifth Circuit supporting the district court's determination that something more than reciting "facts suggesting a parallel refusal to deal" is needed where defendants "can fully explain" what happened in terms of an independent business judgment.[97] The monopolization claim failed after the district court and the circuit court rejected Transource's characterization of the relevant market and found it had failed to explain how Trinity could be said to have a "dangerous probability" of monopolization, given its low market shares in the gondola manufacturing market.[98] The Clayton Act claim similarly failed based on the district court's and circuit court's legal characterization of the relevant contracts.[99]

As the opinion unfolds, we see time and time again that what is really at issue is not the substantive legal standard under the antitrust statutes, but rather the specialized standards for evaluating summary judgment evidence in the antitrust context. While there were some "fact" based holdings in which the district court and circuit court found "as a matter of

93. *Id.*
94. *Id.* at 281.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 282.
99. *Id.* at 285.

law" that there was no disputed fact issue and a factual finding could be made without a full trial, these determinations and the "characterization" questions were all reviewed de novo without reference to any other appellate standard. Effectively the circuit court stood in the shoes of the district court and either agreed or disagreed with the lower court's judgments. I do not think that I thought about that when I was working on the case, and I know Judge Sanders never asked me if I thought the circuit court would agree with us, except on the last issue. The final question the district court had to address was a question of contract construction, which question has two parts. The first is whether or not the contract is unambiguous; if the answer is yes, the contract can be construed by the district court as a matter of law. However if the trial court finds the contract is ambiguous, extrinsic evidence of the parties intent should be admitted and the question of the contract's construction submitted to a jury as a disputed fact based issue. The question whether a contract is or is not ambiguous is a classic question of legal characterization, the proverbial mixed question of law and fact and one trial courts routinely address, albeit not always well.[100] When these contractual issues arise, they do so in a predictable context; there is always extrinsic evidence that contradicts one or the other party's claimed interpretation of the contract, hence the dispute. The question is when should such extrinsic evidence be considered by the trial court, as part of the context for interpreting the contract or after the terms of the contract on its face have been determined to be open to interpretation, in other words, ambiguous.

The district court found that the first contract was unambiguous "as a matter of law" and based on its construction of the unambiguous contract, further found that Trinity did not breach its agreement.[101] The contract appeared to require Trinity to post a letter of credit and advance $20,000 working capital to Transource;[102] the core dispute was whether Trinity was unconditionally obligated to post the letter of credit.[103] Transource claimed that this was the case, and Trinity claimed the contract, while it provided for the letter of credit, by its terms did not impose that duty directly and unconditionally on Trinity.[104] Trinity further claimed the letter of credit was a condition precedent to the obligation to fund the capital and that, since this pre-condition failed, no further contractual duties arose. The district court agreed and granted Trinity's motion for summary judgment on the contractual issues and the circuit court reversed, but let's look closely at the circuit's analysis. Having set up the contract issues as described, the Fifth Circuit states: "The basic problem in this case is that both parties were fully cognizant of the fact that the letter of credit had to be posted by someone on the very same day that they signed

100. *See supra* notes 28, 88 (discussing appellate review of mixed questions of fact and law).
101. *Transource*, 725 F.2d at 286-87.
102. *Id.* at 287.
103. *Id.*
104. *Id.*

their own Agreement."[105] The failure to fund the letter of credit caused the agreement to fail;[106] the question posed by the Fifth Circuit is "which party had the duty to post the letter of credit?"[107] The Fifth Circuit reviews the district court's rationale for determining that the contract was unambiguous and the district court's construction of the terms of the agreement and does not agree. The Fifth Circuit finds the contract is ambiguous: "We have examined the Agreement, and we are unable to say as a matter of law that without ambiguity the contract assigns the duty of posting the letter of credit to a particular party."[108] Applying Texas' law governing contract construction the Fifth Circuit went on to hold that, in light of the surrounding circumstances, "both parties offered arguable interpretations of the terms of the Agreement."[109] Having remanded the issue and directed the district court to allow extrinsic evidence on the issue of contract interpretation, the Fifth Circuit continues to outline the applicable Texas law to be applied by the district; according to the circuit the relevant state law standard provides, "[i]f there is any doubt as to the meaning of a contract," extrinsic evidence is to be considered.[110] The Fifth Circuit points to two pieces of deposition testimony, introduced as part of the summary judgment evidence, and holds that "Lewis' admission [in the deposition] creates a factual dispute with respect to the meaning of the Agreement. The deposition casts doubt upon Trinity's contention that the parties did *not* agree Trinity was to post the letter of credit."[111] While its analysis is not pellucid on this point, the Fifth Circuit apparently attempts to determine if the contract is subject to judicial interpretation as a matter of law by considering both the written terms of the agreement as well as some extrinsic evidence raising questions about the parties' intent, but finds that the answer to this question is no, and that a full trial of the contract construction issue is needed. With regard to the defense of novation, the Fifth Circuit again characterized the two contracts as not so clearly inconsistent as to support the legal inference that the second contract was intended to replace the first, thereby finding that there was no novation as a matter of law.[112] According to the Fifth Circuit, absent clear inconsistencies between the two contracts, contractual intent is a triable question of fact unless the evidentiary record supporting the summary judgment is so clear that "reasonable minds" could not differ about the disputed fact.[113]

While twenty-five years have passed since I worked on the case, I do recall finding the Texas case law on the question of contract construction and novation challenging. But I also recall meticulously going over the

105. *Id.* at 287.
106. *Id.*
107. *Id.*
108. *Id.* at 287-88.
109. *Id.* at 288.
110. *Id.*
111. *Id.*
112. *Id.* at 289-90.
113. *Id.* at 290.

"standards" with Judge Sanders and applying them to the contract terms, viewed in their appropriate context. Obviously we were aware of the conflicting extrinsic evidence—it was part of the summary judgment record, but we also were aware that such evidence was not to be considered when making the threshold determination whether the contract was ambiguous. As stated at the outset, questions of contract interpretation always arise when there is extrinsic evidence of ambiguity. So, was Judge Sanders wrong? Did he err? The answer is no. He did not make a mistake in the law or misapply the law. The legal issue is a troublesome one with a summary judgment standard that provides limited direction to the trial court. After addressing the two contract issues, the district court was confident that it had discharged its duty to apply the law to the facts as directed. It was a judgment call, one the Fifth Circuit did not share.

Quite frankly, the issue had me stumped because, coming from law school, I was unfamiliar with the practical issue of contract interpretation and the adjudicative procedures for handling extrinsic evidence of contractual intent in the context of a summary judgment. I do recall working with Judge Sanders on this final issue after we had waded through all of the complex antitrust issues. I also recall his approach to the problem: "We can only do our best. If the Circuit doesn't agree with us, they will let us know." Judge Sanders' final opinion was a judgment call, not an error in judgment. The litigants first had a district judge look at their summary judgment and then they had a three judge circuit panel review that decision and the summary judgment record de novo; the Fifth Circuit's reversal of the district court on appeal was treated by Judge Sanders as evidence that the system works. And that was Judge Sanders' basic take on the relationship between the two courts. The circuit court's judgment might differ from his, and if that was the case, their job was to provide further direction on remand. No judge likes being reversed, and Judge Sanders was no exception. He may not have always agreed with the circuit court, but he always did what they told him to do.[114]

With regard to the actual writing of opinions or memorandum orders, I know that within this process, I would draft different parts of the analysis

114. The question of "error," of course, assumes that there is a single correct and knowable answer to each legal decision, but commentators who have looked at this issue are less than confident that a finding of error by an appellate court necessarily comports with this narrow legalistic paradigm. For our purposes, especially when considering the *Tasby* Litigation, where the dialogue between the district court and the circuit court was extensive and provided an important institutional perspective and sounding board for the desegregation process, the question of error is more fruitfully viewed as the circuit court's attempt to define the limits of a trial judge's discretion—the point at which selecting either of two possible alternative answers is not acceptable—regardless of the particular legal nomenclature used. *See, e.g.*, Armour, *Practice*, *supra* note 2 (operationalizing judicial discretion as the set of acceptable decisions even when the available alternative decisions conflict); Lea Brilmayer, *Wobble, Or the Death of Error*, 59 S. CAL. L. REV. 363, 365-66 (1986) (discussing the play, or wobble, in all legal decisions); *see also* Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1989); Peter Tillers, *Evidence, Uncertainty, and the Rule of Law*, 66 B.U. L. REV. 381, 381 (1986) (discussing the practical reality that "some degree of uncertainty infects nearly all inferences drawn from evidence").

after discussing matters with Judge Sanders, and he would work with those materials. Judge Sanders demanded clarity—get to the point! His drafting, editing, and rewriting ensured the final memorandum opinion issued by the court spoke with restraint and economy; the court's opinions had to say what needed to be said, nothing more and nothing less. The final opinions issued by the court were always Judge Sanders' opinions and represented as much intellectual rigor and honesty as could be brought to bear. There was nothing lazy, sloppy, or disingenuous about Judge Sanders' approach to writing the court's opinions, regardless of the issue at stake. Did Judge Sanders and his law clerks always agree? They usually ended up agreeing, and while disagreements certainly occurred along the way, hopefully those disagreements helped ensure the court's final opinion was transparent and fair.

Working with Judge Sanders on the grand jury issue described above, as well as Transource's and Trinity's summary judgment motions, was not only intellectually challenging, but it also required a certain amount of courage, confidence, and self-awareness. First, regardless of how difficult or complex the issues, the parties deserved a decision, regardless of which way the court ruled. Three years of law school taught me how to argue "both sides" of an issue, but it had not prepared me for the responsibility of helping the court make profound decisions affecting people's lives. Judge Sanders sensed my concerns and encouraged me in my work; he clearly wanted me to learn how the adjudicative process worked. Even though we had disagreed initially on how to resolve the grand jury question, his openness about his own perspectives and experiences with grand juries helped me understand the institutional context of the decision he finally rendered. With regard to the private dispute involving Transource and Trinity, Judge Sanders again was aware of both the legal and institutional context in which we worked. In both instances, the parties deserved an answer. And in both instances, what struck me was his awareness of his institutional role as a trial judge and the scope of his "discretion," or what Judge Posner has called "decisional freedom," when making decisions. He took this responsibility very seriously and understood that his ultimate accountability was not simply to the appellate court, but more importantly to the individual litigants who had come into his court. While it is not often explicitly discussed in his published opinions, Judge Sanders often talked about his "discretion" with his law clerks, the give and take in the numerous decisions he made on a daily basis. In this context, Judge Sanders' law clerks were the perfect foil to his judicial pragmatism. We had little "intuition" to fall back on and, fresh from three years of law school, we were clear adherents to the "legal paradigm" with perhaps a misplaced, but profound, faith in our ability to get the "law" right. I think that one of the ways Judge Sanders encouraged his clerks to "speak" up if they did not agree with one of his decisions was to make them privy to the often intellectually private processes of judicial decision making. Reflecting on my experiences and those of my court colleagues is useful, but the role of law clerks obviously

varies from judge to judge. In Judge Sanders' court our role included "standing up" and, professionally and competently, pointing out potential problems or concerns. Egos and notions of infallibility had no place in Judge Sanders' court, but neither did intellectual timidity. How does a law clerk learn to have the kind of professional moxie Judge Sanders demanded of his clerks?[115] We learned from the Judge.

III. PRAGMATISM AND ACCOUNTABILITY: THE VIEW FROM THE BENCH

A. THE DALLAS DESEGREGATION CASE PRIOR TO 1981

It is impossible to talk about Judge Sanders without discussing the *Tasby* Litigation,[116] the case challenging de jure racial segregation in the Dallas Independent School District (DISD). Judge Sanders was the fourth federal judge asked to oversee the desegregation controversy, following Judges Atwell, Davidson, and Taylor. "Hawley Atwell resigned rather than help desegregate the schools. T. Whitfield Davidson personally opposed desegregation but reluctantly presided over token measures in the 1960's."[117] Without excusing it, the School Board's recalcitrance and the early district courts' reluctance to aggressively enforce *Brown II*'s mandate (for "District Courts to take such proceedings and enter such orders and decrees . . . as are necessary" to implement school desegregation "with all deliberate speed")[118] was not uncommon.[119] But by the

115. As I met each new set of clerks over the years, I was struck by their intelligence and their strength of character, but then, Judge Sanders was a good judge of character.

116. For the purposes of this Article, I will refer simply to the *Tasby* Litigation to describe the lawsuit to desegregate DISD that Judge Sanders inherited from Judge William M. Taylor. Without listing the entire procedural or appellate history, citations to particular opinions or rulings will be provided as needed.

117. *See generally* GLENN M. LINDEN, DESEGREGATING SCHOOLS IN DALLAS: FOUR DECADES IN THE FEDERAL COURTS (1995). Professor Linden chronicles forty years of school desegregation litigation in the federal courts. Published in 1995, the book ends with Judge Sanders' opinion declaring DISD unitary, a decision which, according to Linden, "ended the twenty-three year old case." *Id.* at 213. Sadly, this was not true; it would take an additional ten years, rather than the three originally anticipated, before the school district would be released from court supervision.

118. *See* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

119. The history of school desegregation litigation has been subject to extensive scrutiny over the years by legal scholars examining the phenomenon of recalcitrant school boards confronting federal district court judges and the mixed results. Some scholars have looked at particular judges or particular school districts in an attempt to gain insight into this process, while others have focused more generally on the federal courts' extensive equitable discretion to exercise a range of remedial powers and how they exercised this power in order to desegregate schools. Regardless of their scholarly perspectives, individual scholars inevitably find themselves commenting on the political and institutional challenges facing the federal trial judges delegated the job of desegregating our country's schools. *See, e.g.*, Cheryl Feutz, Note, *The Supreme Court's Reanalysis of School Desegregation Remedial Decrees: Is the Majority Placing Subtle Limits on the Trial Court's Vast Equitable Discretion?*, 61 MO. L. REV. 679, 679 (1996) (examining the narrowing of the federal courts' remedial powers in school desegregation cases over time); Polly J. Price, *The Little Rock School Desegregation Cases in Richard Arnold's Court*, 58 ARK. L. REV. 611, 611 (2005) (examining Judge Richard Arnold's role in the Little Rock school desegregation cases); Doug Rendleman, Brown II*'s "All Deliberate Speed" at Fifty: A Golden An-*

1960s even the United States Supreme Court lost patience with the lack of progress in racially segregated school districts and made it clear that in the face of school boards' efforts to "evade and avoid their responsibilities" under *Brown II* to proceed with all "deliberate speed,"[120] those boards now had the affirmative obligation "to come forward with a plan that promises realistically to work . . . now."[121] When new desegregation litigation against the Dallas Independent School District was filed in 1970, it ended up in Judge William M. Taylor's court. DISD initially took the position that it had complied with the district court's prior desegregation orders discharging its obligations under *Brown* to eradicate the "vestiges" of segregation,[122] but Judge Taylor did not agree, and in 1971 concluded that, despite previous litigation and judicial efforts, Dallas schools were still unconstitutionally segregated.[123] Judge Taylor then spent the next ten years unsuccessfully attempting to desegregate DISD under the watchful eye of the Fifth Circuit. In 1971 a new phase in Dallas' desegregation litigation began when the Fifth Circuit vacated Judge Taylor's original order denying plaintiffs' motion for preliminary injunction and "remanded with directions that the district court in an expeditious manner, on this or a supplemented record, make full written findings of fact and conclusions of law on the merits of the cause, in the light of the principles . . . enunciated in *Swann v. Charlotte-Mecklenburg Board of Education.*"[124] Judge Taylor's subsequent memorandum opinion reflects the federal judiciary's growing frustration with recalcitrant, balky school districts even conservative jurists like Judge William "Mack" Taylor: "It is difficult to believe in this day and time that anyone anywhere would be surprised, shocked or amazed at this case or at the pendency of this law suit."[125] In the face of growing pressure from the circuit court and the minority community to take action, Judge Taylor made a telling pronouncement. Addressing one of the major issues facing every

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niversary or A Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?, 41 SAN DIEGO L. REV. 1575, 1578, 1580 (2004) (examining the seemingly negative nature of the Supreme Court's ruling in *Brown*, arguing that the right at issue was not a right to attend an integrated school, but rather a right to not be forced to attend a segregated school); Carl Tobias, *Charlotte and the American Dilemma*, 48 U. KAN. L. REV. 139, 144 (1999); Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View From the Marshall Papers*, 36 WM. & MARY L. REV. 473, 476 (1995); Jessica E. Watson, *Quest for Unitary Status: The East Baton Rouge Parish School Desegregation Case*, 62 LA. L. REV. 953, 957-58 (2002) (discussing the Fifth Circuit's reluctance to "micromanage" school cases and their deference to the extensive discretion of district court judges in managing their desegregation litigation); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1128 (1996) (arguing that "federal trial courts have exercised a wide degree of discretion with little check on their authority," and tracing the "doctrinal origins" of this discretion to the school desegregation cases, when the "Supreme Court found it necessary to authorize the exercise of this extraordinary power").

120. Tasby v. Estes, 342 F. Supp. 945, 947 (N.D. Tex. 1971) (Taylor, J.).
121. *Id.* (citing Green v. County Sch. Bd., 391 U.S. 430 (1968)).
122. *Id.* at 947.
123. *Id.* at 947-48.
124. Tasby v. Estes, 444 F. 2d 124, 124 (5th Cir. 1971).
125. *Tasby*, 342 F. Supp. at 947.

federal judge attempting to redress decades of racial segregation in their local school district, the remedial use of busing to achieve racial integration,[126] Judge Taylor stated, in very personal terms, that busing was not his remedy of choice: "I am opposed to and do not believe in massive cross-town bussing of students for the sole purpose of mixing bodies. I doubt that there is a Federal Judge anywhere that would advocate that type of integration as distinguished from desegregation."[127] At a time when federal judicial nominees' positions on "constitutional issues" had not yet infiltrated the confirmation process,[128] Judge Taylor's statement on busing is intriguing. It appears designed to reassure the school district, and parts of the local community, that if they will work with him, he will not use the available remedy of district-wide busing aggressively. The statement is worrisome because it is contextless. Judge Taylor does not base his refusal to consider substantial busing as a remedy on his legal or factual analysis of the specific case before him, nor does he argue that busing is not an appropriate remedy in light of constitutional precedent defining the remedial powers of the court. Many of the judges overseeing desegregation cases were accused of "judicial activism"[129] when they ordered busing or used other sanctioned remedies, despite the fact that their decisions were appropriately constrained by legitimate judicial

126. A random search of academic literature, legal and otherwise, from that time reveals numerous articles on busing. Some argued that it was the only means of remediating segregation, others were more critical. *See, e.g.*, R. Loy Waldrop, Jr., Comment, *Busing and Racial Imbalance: Judicial Sword and Social Dragon*, 39 TENN. L. REV. 647, 659-61 (1972).

127. *Tasby*, 342 F. Supp. at 948.

128. The question whether it is appropriate to ask a judicial nominee or candidate his position on issues that might come up in cases before him or whether judges should express their positions on such potential legal issues is the subject of much current debate. *See, e.g.*, Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 IND. L. REV. 719, 719 (2003).

129. Depending on the context, this term has two very distinct applications. To the extent that it has infiltrated the national rhetoric as a rallying cry for those who claim "judges should only apply the law, not make law," it represents a misunderstanding of what judges are required to do in discharging their constitutional duties. *See* Ruth Bader Ginsberg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 12 (2006). But the term may accurately describe those moments in judicial decision making that reflect a sea change in courts' jurisprudential thinking. *See* Armour, *supra* note 5, at 158-63 (discussing the role of the federal courts in prison reform). Those who study judicial methods grapple with the challenge of how to draw a line between appropriate judicial "law making" using the common law method of legal pragmatism and incrementalism and moments when the judge "goes too far." *See, e.g.*, E. Nathaniel Gates, *Justice Stillborn: Lies, Lacunae, Incommensurability, and the Judicial Role*, 19 CARDOZO L. REV. 971 (1997); Mitchel de S.-O.-l'E. Lasser, *Do Judges Deploy Policy?*, 22 CARDOZO L. REV. 863 (2001). This dimension of "judicial activism" focuses on the courts' institutional exercise of discretion and power that is perceived to exceed the bounds of acceptable legal incrementalism in judicial lawmaking, and is distinct from quite different institutional concerns that focus on the problem of individual bias or questionable conduct in discharging the judicial function and rendering decisions. The former addresses the inherent human factor in the institutional process of adjudication, while the latter addresses a form of human error that threatens to undermine the legitimacy of that process. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 GEO. J. LEGAL ETHICS 55, 55-56 (2000); James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 149 (2003).

methodologies.[130] Judicial "activism" may be an appropriate label when a judge does not adhere to precedent or explain why controlling precedent does not apply on principled grounds, or when a judge fails to follow the intent or prudential concerns embodied in that precedent, fails to apply proper standards in rendering fact based decisions,[131] does not limit herself to the issues raised by the parties, engages in "unnecessary dictum," or fails to explain her decision "openly and rationally."[132] Judge Taylor's statement about busing appears to fall outside of these constraints. Similarly, in 1955, District Judge William S. Atwell "ruled against a plaintiff seeking to desegregate Dallas' schools, holding that the United States Supreme Court had overstepped its authority in *Brown*."[133] Overruled by the Fifth Circuit, "he did the same [again] in 1957" when he rejected a case by the NAACP representing two African-American children who wanted to attend the DISD school closest to their home; the school they attended was a predominantly African-American school, the one closest to home was a predominantly Anglo school.[134] Judge Atwell was again overruled by the Fifth Circuit. Was Judge Atwell's conduct judicial activism? The term judicial activism is rarely a helpful or informative term, especially as used in the partisan political arena, but to the extent it reflects a valid dimension of the national debate about judicial judgment, it should at least be properly used to describe, not only judicial actions, but also judicial inaction in the face of controlling precedent and constitutional mandates.[135] Nowhere is this truer than in the arena of

130. *See supra* text accompanying note 33 (discussing judicial decision making and judges' appropriate use of a range of judicial methodologies).

131. *See supra* text accompanying note 28 (exploring the range of "fact" based decisions facing district court judges and the relative degree of discretion accorded these decisions on appeal).

132. *See* Price, *supra* note 119, at 648 (discussing Judge David Tatel's 2004 Madison Lecture at New York University on judicial methodologies, during which he proposed a scale of "judicial activism" that could be used to analyze particular judicial decisions).

133. SMU Dedman School of Law, Desegregating Dallas Schools: The Litigation Archives, http://library.law.smu.edu/DISD/background-info (last visited Sept. 13, 2009). The archives can be accessed through the SMU Dedman School of Law's website and contain a wealth of useful material, including a summary timeline of the *Tasby* Litigation, digital versions of key litigation documents, a selected bibliography, and litigation-related documents dating back to 1971 from Judge Taylor, Judge Sanders, Mr. Edward Cloutman (the plaintiffs' counsel), and Mr. Robert Thomas (DISD's counsel).

134. *Id.*

135. Judicial "activism," when used by lay critics of the judiciary, appears to express concern that judges should only "apply law, not make law," and, as captured in these rather simplistic aphorisms, represents one expression of the narrow ideological approach to the "rule of law" and the role of the federal courts. When judges discharge their constitutional responsibilities, as they attempted to do in the school cases by using their remedial powers to fashion and implement plans for desegregating school districts, the approbation of "activist" is misplaced. While critics might disagree with the judges' actions—and critics of busing were always free to do so—and inactions, as long as these judges adhered to acceptable common law modalities in applying the United States Supreme Court's mandates, they should not be criticized as "activists." My own experience tells me that lay persons often do not understand what it means to say that "judges should just apply the law," since even this seemingly narrow judicial act necessarily includes the inherently problematic process of "interpretation," which is especially true in the arena of constitutional litigation. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 3-9

constitutional litigation where transparency and accountability on the part of governmental actors, including federal judges, is essential to the democratic fabric of our society.

In hindsight, it is not surprising that Judge Taylor's 1971 order finding an unconstitutional dual school system was affirmed by the Fifth Circuit,[136] but his proposed desegregation plan failed to pass constitutional muster.[137] Following remand from the circuit, Judge Taylor entered two significant orders that shaped the litigation in the years to come. In the first order, he refused to include the neighboring Highland Park School District and surrounding suburban school districts, all of which were predominantly Anglo, in a consolidated desegregation plan with DISD,[138] a remedial issue that had recently been addressed by the Supreme Court in *Milliken v. Bradley*.[139] Early in the litigation, Judge Taylor had allowed in an array of intervenors, including the newly targeted defendant suburban school districts. When Judge Taylor held the hearing on this matter there were a number of new "voices" clamoring for the court's attention.[140] Judge Taylor's decision was extremely popular with some segments of the community, especially the suburban schools, but this time Judge Taylor explained his refusal to apply the available remedy of an inter-district desegregation plan in terms of applicable Supreme Court precedent, doctrine, and policy, as well as the facts of the DISD case.[141] In 1976, in his second major order, Judge Taylor adopted a new desegregation plan,[142] which was appealed. The primary issues on appeal were the NAACP's intervention, the court's order refusing to consolidate the Highland Park School District and DISD into a single desegregation plan, a school assignment plan dividing DISD into six sub-districts, including one which was nearly all African-American, and the acquisition of certain school properties. On appeal, the Fifth Circuit made the point that "substantial changes have occurred in DISD" since 1971; a majority Anglo system is now a predominantly minority one, although Dallas itself

(2004) (examining one aspect of constitutional interpretation: the generation of doctrinal rules, tests, and standards needed to implement core constitutional text or holdings); Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1331 (2006) (examining the "judicial role in crafting doctrinal tests to implement the Constitution"); Edmund B. Spaeth, Jr., *How Do Judges Decide? A Course for Non-Lawyers*, 106 DICK. L. REV. 773, 774, 783 (2002).

136. The Fifth Circuit played a notable role in desegregating southern schools. *See generally* JACK BASS, UNLIKELY HEROES (1981). *Unlikely Heroes* pays particular attention to judges Elbert P. Tuttle, John Minor Wisdom, John R. Brown, and Richard Taylor Rives; it should be noted that Judge Wisdom was a member of the three-judge panel that rejected Judge Taylor's desegregation plan for Dallas.

137. *See generally* Tasby v. Estes, 517 F.2d 92 (5th Cir. 1975).

138. Tasby v. Estes, 412 F. Supp. 1185, 1186 (N.D. Tex. 1975).

139. 418 U.S. 717, 745 (1974).

140. The cast of intervenors changed over time and reflected a number of different segments of the community. Whether Judge Taylor's decisions allowing such broad intervention helped the litigation is hard to evaluate, but it certainly expanded the number of "voices" heard by the court.

141. Tasby v. Estes, 412 F. Supp. 1185, 1187 (N.D. Tex. 1975).

142. Tasby v. Estes, 412 F. Supp. 1193, 1193 (N.D. Tex. 1976).

remains majority Anglo.[143] The Fifth Circuit approached the plan question by focusing on the district court's efforts in soliciting different proposals, holding hearings, and developing a voluminous record on the feasibility and effectiveness of the various desegregation proposals pending before the court.[144] While acknowledging the district court's efforts in this regard, the circuit still remanded the student assignment portion of the plan for "further consideration" and urged the district court to "reconsider the other provisions of its plan in the light of the relief it ultimately orders."[145] The circuit's mandate ordering "further consideration" tellingly included a suggestion that the district needed "formal studies of the anticipated times and distances of likely bus route"[146] before a final plan was adopted, a hint that further busing was a remedy the court needed to seriously consider despite Judge Taylor's previous statements.

An appeal from this decision was taken to the United States Supreme Court, which dismissed the writs of certiorari as improvidently granted although Justices Powell, Stewart, and Rehnquist vigorously dissented.[147] Justice Powell argued in his dissent that the DISD case presented "a long-needed opportunity to re-examine the considerations relevant to framing a remedy in a desegregation suit," especially the remedy of busing, and disagreed with the Fifth Circuit's and the majority's opinion that the record was insufficient to do so.[148] According to Justice Powell, the Fifth Circuit had failed to give "proper deference to the district court's conscientious execution" of the task of desegregation, and the court's personal knowledge of the school district acquired through years of litigation, the proverbial view from the bench that was used to justify delegating substantial remedial discretion to the district courts in desegregation cases.[149] Justice Powell also points to Judge Taylor's month-long trial, in which the court considered various plans and testimony, including that of a court-appointed expert, and the input provided from numerous community groups concerned about the proposed integration plans as further evidence that the appellate record was more than adequate for Supreme Court review. Despite his earlier comments that he did not approve of busing, Judge Taylor had in fact used busing as part of his remedial arsenal. The plan being scrutinized included the busing of approximately 20,000 students, but it also created a number of "one-race" student bodies, which was problematic in the eyes of the Fifth Circuit, without more

143. Tasby v. Estes, 572 F.2d 1010, 1013 (5th Cir. 1978).

144. *Id.* at 1013.

145. *Id.*

146. Estes v. Metro. Branches of the Dallas NAACP, 444 U.S. 437, 438 (1980) (Powell, J., dissenting) (dismissing writs of certiorari). *Estes* was first argued October 29, 1979. 444. U.S. 922. It was decided January 21, 1980, 444 U.S. at 437. Justice Marshall took no part in the decision. *Id.*

147. *Estes*, 444 U.S. at 438 (Powell, J., dissenting).

148. *Id.* at 438.

149. *Id.*

fact-finding justifying the decision.[150]

The tenor of Justice Powell's dissent is clear: a growing segment of the Supreme Court was ready to reevaluate busing because they claimed the "promise of *Brown v. Board of Education* cannot be fulfilled by continued imposition of self-defeating remedies."[151] The busing ordered by Judge Taylor fell on the low end of the busing plans proposed for Dallas, with the School Board's plan busing approximately 14,000 students, while the NAACP proposed busing close to 70,000 students.[152] Judge Taylor was clearly reluctant to order additional busing, but the Fifth Circuit had ruled the presence of so many proposed "one-race" schools required specific findings from the district court concerning the feasibility of various "student assignment" techniques and clearly explaining the maintenance of "any one-race schools" under the desegregation plan. Justice Powell saw the issue differently from the Fifth Circuit, claiming that the remedial goal is not integration, but desegregation, and the effectiveness of plans in addressing prior constitutional violations must focus on this fact. Examining *Tasby* in this light, Justice Powell focuses on what he refers to as the destabilizing impact of busing, an impact he inferred from the large reduction in Anglo enrollment in the DISD since 1971 when Judge Taylor first ordered minimal busing, as a factor that should be considered when crafting desegregation plans. Whether Justice Powell was correct in considering "white flight" as a relevant factor when evaluating the feasibility of the equitable remedy of busing, or whether "white flight" had in fact played a role in the racial transformation of DISD, was not discussed by the majority of the Supreme Court. The case was finally remanded to Judge Taylor in 1980 pursuant to the Fifth Circuit's original order directing the district court to make additional findings justifying any "one-race" schools under the proposed desegregation plan, i.e., to revisit the busing issue.

Meanwhile, the litigation had acquired a significant new voice, The Black Coalition to Maximize Education, a group of black community leaders whose position on some of the proposed remedial measures, especially busing of black students, differed from the Plaintiffs' or the NAACP's.[153] Efforts on the part of the parties to settle the case during the lengthy appeals process, i.e., agree on a desegregation plan, ceased when the case was remanded, and upon remand the NAACP asked Judge Taylor to recuse himself "because of his ties to the city's business community."[154] After waiting five years for the circuit court and the Supreme Court to review his prior order, Judge Taylor removed himself from the

150. *Id.* at 442.
151. *Id.* at 439 (citation omitted).
152. *Id.* at 442 n.7.
153. For a more detailed discussion of the events occurring "outside" the courtroom at this time, see LINDEN, *supra* note 117, at 142-51.
154. *Id.* at 145. While the NAACP felt that Judge Taylor could preside over a "negotiated remedy," they questioned whether he could be an impartial trial judge in light of his ties to the business community, his prior membership in DISD's defense firm, and his use of that firm to draw up his wife's will.

Tasby Litigation on March 21, 1981, without taking any judicial action on the desegregation plan in order to avoid any further delays, and the "risk that another Dallas desegregation plan might be overturned on appeal" because of questions about his impartiality.[155] When *Tasby* was reassigned to Judge Sanders, he took the case with all of the numerous legal, prudential and pragmatic challenges it presented.

B. JUDGE SANDERS IS ASSIGNED *TASBY*

Judge Sanders was appointed to the federal trial bench by President Jimmy Carter in 1979. His varied career included service in the Texas House of Representatives, a stint as the United States Attorney for the Northern District of Texas, service in the administration of President Lyndon B. Johnson, a failed nomination to the United States Court of Appeals for the District of Columbia, private law practice, and an unsuccessful run for United States senator.[156] Even though he was more liberal than the three previous federal judges who had handled the Dallas desegregation cases, his appointment caused comment, some fearing he was too liberal, with others concerned about past statements he had made regarding the use of busing as a desegregation remedy.[157] The NAACP, already instrumental in the recusal of one federal judge from the case, asked Judge Sanders if he thought he could preside over the case given that busing was the core remedial issue addressed in the Fifth Circuit's opinion on remand.[158] There were also concerns expressed that the time and distance studies ordered by the Fifth Circuit were inadequate and not produced in a timely fashion.[159] Responding to these concerns, Judge Sanders announced on April 11, 1981, that any past statements he may have made that were critical of busing would not disqualify him. As far as Judge Sanders was concerned the case had been assigned randomly, and he was obligated to handle it fairly under his oath of office.[160]

Assigned the case in March, Judge Sanders immediately set to work addressing the Fifth Circuit's concerns and scheduled a hearing in April on the formulation of a new student assignment plan. In the meantime, Judge Sanders began learning the case, including going on the road to get a feel for the school district, its length and breadth, its social makeup, and the time and distance involved in traveling from one community to another, all aspects of the case relevant to the question of busing. Getting up to speed on the case was no mean feat as the *Tasby* Archives can attest; ten years of desegregation litigation in Judge Taylor's court had generated a substantial number of files, including a variety of desegregation plan proposals.[161] While the archives are still being processed, a

155. *Id.*
156. Barefoot Sanders, *supra* note 23.
157. LINDEN, *supra* note 116, at 151.
158. *Id.*
159. *Id.*
160. *Id.*
161. Desegregating Dallas Schools: The Litigation Archives, *supra* note 103.

quick perusal of the "Scope and Content" of Judge Sanders' papers is a better measure of the demands desegregation litigation makes upon a district court than simply looking at their written opinions.[162] The *Tasby* Archives tell a compelling story, starting with the district court's opinion of August 3, 1981, in which Judge Sanders held that while "vestiges of state-imposed racial segregation remain in the Dallas Independent School District,"[163] "additional systemwide transportation is not a feasible remedy for the existing constitutional violation."[164] The story continues with the day-to-day involvement of Judge Sanders, and the indispensible Special Masters appointed by the court, in the process of desegregation (reports, meetings, hearings, motions and the ever present "publicity"), through Judge Sanders' decision to grant DISD unitary status on July 26, 1994,[165] the additional nine years of court supervision following this order, finally culminating in Judge Sanders' decision to dismiss the litigation and release DISD from judicial supervision in 2003.[166]

What is clear from this voluminous and detailed record, is that school desegregation litigation does not occur within the neat boundaries of the traditional adversarial paradigm. The impedimenta that appear in the court's opinions, judicial record, case filings, and papers cannot begin to capture the "Sturm und Drang" of the *Tasby* Litigation within its larger context in Dallas, Texas. What happened in open court or in the parties' meetings in chambers was merely the tip of the desegregation litigation iceberg, as different players in the larger arena positioned and repositioned themselves on the issue of "proper remedies," especially busing, and when and how DISD was to be desegregated.[167] How these matters, which effectively occurred outside of the courtroom's public view and often off the record, affected Judge Sanders can only be known through his rulings, but it is impossible to claim these events did not impact the litigation. School district desegregation litigation, especially in the south, was a cauldron into which poured decades of distrust, racial bias, and hate, as well as a loss of faith, a growing sense of urgency, and a renewed hope that the federal courts could fashion a remedy using their extensive equitable remedial powers to achieve educational equality and equity. Sadly racial discrimination, whether overt and intentional, as it was in DISD, or a process of more covert social or institutional forces, is an issue the federal judiciary continues to address.[168]

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162. *Id.*
163. Tasby v. Wright, 520 F. Supp. 683, 686 (N.D. Tex. 1981).
164. *Id.*
165. Tasby v. Woolery, 869 F. Supp. 454, 477 (N.D. Tex. 1994).
166. *See generally* Tasby v. Moses, 265 F. Supp. 2d 757 (N.D. Tex. 2003).
167. LINDEN, *supra* note 117, at 150-217.
168. *See generally* Michelle Wilde Anderson, Comment, *Colorblind Segregation: Equal Protection as a Bar to Neighborhood Integration*, 92 CALIF. L. REV. 841 (2004) (examining racial segregation in the housing arena in Dallas, Texas, beginning in the 1950s, and the civil rights litigation challenging the Dallas Housing Authority's and the City's policies of racial isolation and exclusion, the *Walker* litigation, from 1987 to 1999).

There is no doubt in my mind that if a conference were held to evaluate Judge Sanders' "handling" of the *Tasby* Litigation that included all of the lawyers, parties, school officials and community representatives who were involved in the case over the years, there would be a range of opinions, hopefully some complimentary, but I am sure there would be an equal number of critical voices raised as well. The question is not whether everyone agreed with Judge Sanders' handling of the *Tasby* Litigation, but whether he in fact accomplished what he set out to do, which is to fulfill his oath of office and provide the *Tasby* litigants access to an independent district court judge committed to hearing their case and fashioning an effective equitable remedy that would ensure all children in DISD attended desegregated schools. While not an elegant formulation, I like Justice Rehnquist's definition of an independent jurist, and I think it is an especially apt formulation to describe a federal judge's role in a school desegregation case: In school desegregation cases the judge is like "a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home crowd wants him to call it."[169] Judge Sanders fit the bill: the factual record in *Tasby* was well developed, his opinions were thorough, he openly engaged with controlling precedent, he noted when precedent was less than pellucid or provided clear guidance, and he mined the work of other federal judges engaged in similar cases, examining the factual record and judicial actions in desegregation cases from across the country as he set about crafting a plan for DISD. Judge Sanders grappled honestly with the prudential concerns inherent in the Supreme Court's dictates on the use of equitable remedies, and he was honest about his unwillingness to be a "pioneer" on a few of the "new" legal issues raised by *Tasby*. He did not display the same reluctance as his predecessors to

169. Ginsberg, *supra* note 129, at 1 (citing William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227, 229-30 (1980)). In her article, Justice Ginsberg points to *United States v. Nixon*, 418 U.S. 683 (1974), as an exemplar of judicial independence. *Id.* at 3-4. This case was precipitated by United States District Judge John Sirica issuing a subpoena to then-President Nixon, directing him to produce tape recordings and documents that had captured President Nixon's conversations with advisors about an alleged cover-up of illegal activities. *Id.* at 4. Justice Ginsberg notes that the Supreme Court at that time included four Nixon appointees, all of whom acted in concert to affirm Judge Sirica. *Id.* What Justice Ginsberg does not discuss was the country's response, a sense of relief that the judicial branch still functioned as a check and balance on the executive branch. Other examples of judicial independence cited by Justice Ginsberg include *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004). *Id.* at 5. In both of these cases, district court judges, one in the Eastern District of Virginia and the other in the District of Columbia, faced difficult questions of constitutional significance, which asked them to restrict the constitutional powers of the President. *Id.* at 5-7. The issue was ultimately decided by the United States Supreme Court in favor of the petitioners. *Id.* The question of judicial independence and the problem of political pressure is one that engages jurists across the country as they work to maintain an appropriate institutional balance often in the face of extremely harsh criticism and political pressure. *See, e.g.*, STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, AMERICAN BAR ASSOCIATION, RAPID RESPONSE TO UNFAIR AND UNJUST CRITICISM OF JUDGES (2008), *available at* http://www.abanet.org/judind/toolkit/impartialcourts/Rapid_Response_Pamphlet.pdf.

hold the school district's proverbial "feet to the fire" in order to achieve desegregation, but he was equally frank about his desire to find creative and new solutions that would fit the unique circumstances of the case. Finally, he expected the litigants and their lawyers to proceed in good faith as advocates for their clients' constitutional concerns and not attempt to hijack the court or the litigation for their own political gain.[170]

C. Judge Sanders' Desegregation Opinions

When district court judges explain their decisions, especially constitutional rulings, with written opinions, the court's transparency and accountability are enhanced, not just for purposes of appeal but also for purposes of explaining and legitimating the court's actions to the litigants and the larger community. This is especially true for highly discretionary decisions with far reaching social impact, such as those involved in fashioning desegregation plans for a school district like DISD.[171] The institutional and individual context in which judges like Judge Sanders found themselves demanded that their commitment to the adjudicative principles of consistency, predictability, fairness and uniformity in the application of highly malleable constitutional principles to socially complex, historically dynamic facts, the paradigm of the "rule of law" in the desegregation cases, required these judges to fully explain their actions, how they viewed the facts, the actors, the social context, the educational goals and the applicable law.[172] Invoking "the rule of law" as a guiding princi-

170. *See supra* note 135 (discussing "judicial activism") and note 129 (discussing "judicial independence").

171. There is always a question of balance when discussing judicial independence. How does a judge walk the line between appropriate judicial restraint and the need to decide difficult cases that call into question the constitutional structure or the unconstitutional conduct of a state actor? Many have effectively argued that the federal judiciary, including the Supreme Court, was too restrained in its handling of the early cases challenging de jure racial segregation, while others claim they moved too precipitously or exceeded their remedial powers. *See, e.g.*, sources cited *supra* note 119 (chronicling the history of desegregation cases in the South and the role of the federal courts). Today reflecting on this history perhaps the single most important lesson to be learned is the importance of the federal district courts as an open, public forum in which citizens challenging the constitutionality of state action and state actors defending their actions can proceed, knowing the ensuing challenge will be conducted under a set of rules in a public forum designed to ensure their voices will be heard and the disputed facts addressed with as much transparency as can be mustered in the courtroom.

172. The role of judicial opinions and the importance of opinion writing, especially in the constitutional arena, is explored by numerous authors. *See, e.g.*, Ruth Bader Ginsberg, *Remarks on Writing Separately*, 66 Wash. L. Rev. 133 (1990) (discussing the nature and function of opinions in different legal systems); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 Wash. U. L.R. 681 (2007) (discussing the circumstances that generate different types of judicial opinions at the trial court level); Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 Ind. L.J. 1, 18-19 (1984) (defining principled decision making, the sine quo non of judicial self-restraint, as an opinion in which the ground of a decision is stated openly as distinct from the judicial activist who adopts a highly formalist style in an effort "to conceal the degree to which they are asserting judicial power"); Jonathan D. Varat, Review Essay, *Economic Ideology and the Federal Judicial Task: The Federal Courts: Crisis and Reform; by Richard A. Posner*, 74 Cal. L. Rev. 649 (1996) (critiquing Judge Posner's claims for judicial re-

ple does not mean there will be strict uniformity in these trial courts' desegregation decisions, quite the opposite. The variability in outcomes deemed acceptable at the trial court level in the routine run of cases is exponentially enhanced in desegregation cases because of the unique context for each case: urban versus rural settings, the length and nature of the segregation, the racial makeup of the community, the size and structure of the school district, and the ability of the parties to work together and work with the district court judge to develop a desegregation plan.

Realistically, in the school desegregation cases, whether or not to write extensive opinions at significant junctures in the cases was not an option; the district courts exercised highly discretionary equitable powers in designing a desegregation remedy, and the trial court's full explanation of why it had adopted or rejected any given school desegregation plan was essential. The district courts knew that their audience extended beyond the individuals formally designated as parties in the litigation. They also knew that the likelihood the courts' actions would result in actual institutional "change" required the courts to consider the larger context of the litigation; their opinions would help shape and set the ground rules for important local debates about educational policy, educational equity and equality, the quality of individual student's educational experience throughout the district, the legitimacy of parental concerns, and other issues inevitability raised when polities address the goal of "equality of equal opportunity." In addition if the circuit courts were going to evaluate the constitutionality and remedial effectiveness of a proposed desegregation plan, extensive fact findings and analysis were needed; the appellate courts had to rely upon the district courts to provide the uniquely personal "view from the bench" that could capture and express the human dimensions of this type of litigation. Quite early on in the desegregation cases, the dialogue between the circuit courts and the district courts relied upon extensive trial court opinions to shape the legal, factual and remedial issues on appeal and allow the appellate courts to offer clearer direction. Unlike other litigation, where a decision delegated to the trial court's discretion meant less appellate supervision,[173] appellate deference was not the norm in the school desegregation cases, even when the standard of review of certain aspects of the trial court's decisions was the limited "abuse of discretion" standard.[174]

Judge Sanders' first major opinion in the *Tasby* Litigation is notable for its length, attention to detail and extensive analysis of the facts of the case in light of controlling judicial principles, this would be the theme through-

straint by noting that activist judges can be quite candid and that overemphasizing judicial restraint can lead to inaction).

173. *See supra* notes 28, 88 (discussing federal appellate deference to a range of district court functions).

174. *See supra* notes 120-45 and accompanying text (discussing the Fifth Circuit's rejection of Judge Taylor's opinion outlining the original proposed desegregation plan for DISD in 1971); *infra* notes 235-46 and accompanying text (discussing the Fifth Circuit's review of Judge Sanders' desegregation plan).

out the litigation. After hearing testimony for four weeks, including the time and distance studies ordered by the Fifth Circuit in its remand of Judge Taylor's original order, Judge Sanders finished taking evidence. After the hearing it appeared that additional busing might be a feasible option, but it was also clear that the split in the African-American community over busing troubled him.[175] As stated earlier, Judge Sanders ultimately found that "vestiges" of the prior unconstitutional segregation remained in the district, but that "additional system wide transportation" was not a feasible remedy.[176] At the close of the hearing he ordered the parties to "prepare and file desegregation plans for the Court's consideration."[177]

In setting out the prior history of the case in his first opinion, Judge Sanders points out that "DISD was no stranger to desegregation litigation when this action was initiated."[178] In recounting the history of the case prior to the 1970 litigation, Judge Sanders speaks not only of the district's prior inaction, but of the federal judiciary's complicity:

> The courts did not direct DISD (and DISD did not volunteer) to take affirmative action to eradicate the vestiges of the former statutory segregated system. So, while it can fairly be said that DISD, like many another school district, moved with maximum deliberation and minimum speed to carry out the 1955 desegregation mandate of the U.S. Supreme Court, it should also be said that the federal court moved at the same pace; DISD did what the Court ordered no more, no less.[179]

Judge Sanders then recounts the history of the litigation under Judge Taylor, including a range of issues deemed raised and resolved (the prior court's finding a constitutional violation evidenced by segregated schools remaining in the district and the prior court's refusal to apply interdistrict remedies).[180] He describes the essential features of the desegregation plan adopted by Judge Taylor and notes the unsuccessful attempt by the parties to agree on a desegregation plan after the case was remanded by the Fifth Circuit following the Supreme Court refusal to grant certiori.[181] Judge Sanders lays out the history *Tasby* leading up to the assignment of the case to him, including the NAACP's motion requesting "Judge Taylor to recuse himself;" and, as the opinion states, "Judge Taylor did so."[182] The Fifth Circuit's concerns on remand were clear to Judge Sanders: the circuit was concerned about the number of one-race schools that remained under the 1976 plan proposed by Judge Taylor; the circuit wanted the magnet school concept further evaluated; and the circuit wanted the

175. Tasby v. Wright, 520 F. Supp. 683, 690 (N.D. Tex. 1981).
176. *Id.* at 686.
177. *Id.*
178. *Id.* at 687.
179. *Id.*
180. *Id.*
181. *Id.* at 688.
182. *Id.*

district court "to consider assigning Anglo students to the (Nolan Estes Educational Plaza) complex."[183] Judge Sanders also considered it essential to describe the parties to the litigation since its inception, noting how many have come and gone. Of those remaining, eight participated in the hearing, including the Black Coalition to Maximize Education ("Black Coalition"), a "newcomer among the intervenors, representing a class of black parents with children in DISD whose interests and positions on the issues in this case . . . differ from those of the other parties."[184] The court continues by acknowledging the amicus curiae in the case, The Educational Task Force of the Dallas Alliance, and notes their "effort to lend further assistance to the [c]ourt."[185] Describing the litigation's current legal geography the opinion provides a short summary of each party's position in the case, with one group seeking to maintain the 1976 desegregation plan and the other group, led by the plaintiffs, seeking to prove the plan constitutionally inadequate to remedy past discrimination or achieve the constitutionally mandated "greatest possible degree of actual school desegregation."[186]

Though the Black Coalition was the newest party to the litigation, it turned out to be one of the most significant. Described as a "broad-based minority community group," Judge Sanders' opinion names its constituent members and notes the series of meetings it conducted in the black community, seeking members' input on the issues before the court.[187] The testimony offered by the Black Coalition at that early hearing "convinced the Court that there is considerable difference of opinion among sizeable segments of the minority citizenry of Dallas over the type of relief that should be ordered in this case."[188] Without deciding which party "speaks for the greater number of Dallas blacks," the court states with confidence that "no one party to this suit can lay claim" to representing the entire black community;[189] this finding shaped the scope of relief, especially busing, that Judge Sanders would finally order. Judge Sanders discusses other cases in his opinion in which disagreements in the black community over remedial measures occurred, making the point that its occurrence in the Dallas case is not unique, but also finding that *Tasby* was the only case "where intervenor status has been taken for the purpose of advancing the divergent positions on the record."[190] According

183. *Id.*

184. *Id.* at 689 (citing CHARLES DICKENS, BLEAK HOUSE 1, 6 (London 1904) (1853) (discussing the protracted litigation and the changing cast of parties)).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 690.

189. *Id.*

190. *Id.* Judge Sanders finds additional support for this position, giving formal recognition to this division in the black community, in the legal scholarship. *Id.* (citing Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 507-08 (1976)); *see generally* Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1 (2002) (discussing Derrick Bell's career).

to the court, "basic principles of equity require courts to develop greater sensitivity to the growing disagreement in black communities over the nature of school relief."[191] The admission of the Black Coalition as an intervenor in the *Tasby* Litigation may have been one of the most significant events in the case. In a time during which the U.S. Supreme Court and other courts were beginning to express concern over busing,[192] DISD was experiencing declining Anglo enrollments as an absolute measure, and trends in population and enrollment predicted future increases in minority enrollment and decreases in Anglo enrollment as a proportion of the overall enrollment in the district.[193] Situated in an urban area that was spread out and had relatively low population density as a whole, DISD had already been divided into subdistricts which mirrored the racial makeup of the district, and which provided "parents and students a sense of community participation and local control over their schools."[194] In this context the voice of the Black Coalition objecting to busing black students and offering a range of other remedial strategies was bound to be heard loudly and clearly by the court.

Summarizing the demographic and geographic landscape at length in the opinion, Judge Sanders notes that the "single most compelling characteristic of the DISD for purposes of designing an effective desegregation plan" is the reality that the district is a majority-minority school district.[195] Despite this observation the court goes out of its way to make the point that it will not consider theories of "white flight" in formulating its remedy.[196] Judge Sanders is clear about his reasons for taking this position, citing for support Supreme Court and Fifth Circuit authority and the facts introduced at the hearing, which established numerous other reasons for the out-migration of Anglos from DISD.[197] However, putting aside "white flight" as a factor to be explicitly considered in fashioning a new desegregation plan does not mean the court cannot consider population trends and projections in its final analysis.[198] Judge Sanders turns next to the social geography of Dallas—in particular its housing patterns—noting that these patterns reflect "great physical separation of the races."[199] The opinion goes into great detail describing the difference between Dallas and other urban school districts with more of a donut shaped population distribution, with black residents in the city's core, the center of the donut, and white residents, the suburban school districts, forming a ring around the outside, a formation which lent itself to

191. *Tasby*, 520 F. Supp. at 690 (quoting Bell, *supra* note 190, at 507-08).
192. *See supra* text accompanying note 147 (noting Justice Powell's desire to revisit busing as the favored equitable remedy in school desegregation cases).
193. *Tasby*, 520 F. Supp. at 695.
194. *Id.*
195. *Id.* at 699.
196. *Id.*
197. *Id.* at 700 (citing an array of opinions in which other courts had grappled with this conundrum).
198. *Id.*
199. *Id.*

redrawing school attendance zones as pie-shaped wedges.[200] The physical racial segregation in DISD did not lend itself to such a simple geographic fix; Judge Sanders found that this racial geography was "doubtless due to complex socioeconomic factors, which are beyond the writ of this or any other court."[201] There is no doubt that a high correlation exists between de jure school segregation patterns and racially segregated housing patterns; for example, the Fifth Circuit in 1979 ordered the Lubbock School District to make additional findings of fact to determine whether the Board of Education's past intentional acts of discrimination may have had an "incremental segregative effect" on the residential patterns of the school population.[202] But this was unusual; on the whole, federal courts were much more willing to focus on academic achievement and equal access to quality educational resources and programs in fashioning desegregation decrees, while racialized housing patterns always seemed to fall just beyond their remedial reach.[203]

Judge Sanders' recitation of relevant cases and principles in the opinion is thorough, focusing on key Supreme Court and Fifth Circuit precedent, and paying particular attention to other district court decisions, with their carefully developed facts and analysis of similar problems.[204] The opinion certainly meets any standard of transparency in terms of clearly stating the principles Judge Sanders planned to use in exercising his equitable remedial discretion to fashion a new desegregation plan. What warrants comment is that Judge Sanders, in citing relevant cases, pays particular attention to the cases' "facts" and describes their individual judicial remedies and the appellate courts' review of these remedies in great detail.[205]

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200. *Id.* at 701 (the food metaphors are intriguing).

201. *Id.* at n.41.

202. United States v. Tex. Educ. Agency, 600 F.2d 518, 527–28 (5th Cir. 1979), *cited in Tasby*, 520 F. Supp. at 714.

203. This is not to say that racial discrimination in housing and in Dallas in the building of public housing that replicated the old racial divides has not been addressed by the federal courts, but this has happened only when a clear racial motive could be established. The insidious impact of de jure segregation and other forms of racial discrimination, while recognized, have largely been put beyond the reach of the federal courts' constitutional remedial powers. *See* Adam Liptak, *The Same Words but Differing Views*, N.Y. TIMES, June 29, 2007, at A24. The article discusses the Supreme Court's opinion in the most recent school case addressing the use of racial integration to remedy past racial discrimination and segregation, in which both sides in the litigation as well as the majority and dissenting Supreme Court justices cited *Brown v. Board of Education* and its briefs. *Id.* In interviews following this recent decision, lawyers who represented the black schoolchildren in *Brown* said "that several justices in the majority had misinterpreted the positions . . . taken in the [*Brown*] litigation" and "misunderstood the true meaning of *Brown*." *Id.*; *see also, e.g.*, *infra* note 279; *see generally* Jonathan Fischbach, Will Rhee & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation* After Parents Involved in Community Schools, 43 HARV. C.R.-C.L. L. REV. 491 (2008) (discussing the United States Supreme Court's recent opinion in the companion cases of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*, 551 U.S. 701 (2007), and its potential impact on race-based, race-conscious, and race-neutral policies adopted by school districts to achieve the goal of integration).

204. *Tasby*, 520 F. Supp. at 701-05.

205. *Id.*

What we see is a pragmatic jurist looking for guidance and insight from his brethren on the unique problems he faced. Judge Sanders cites and quotes an array of holdings, presumptions, and general principles that he intended to follow and that he found particularly relevant to the remedial problem he faced of "single-race" schools in majority-minority school districts.[206] Whether the continued existence of one-race schools in DISD was an unlawful vestige of past discrimination was the pivotal question for court? In this context what did the Fifth Circuit's mandate of "maximum desegregation practically achievable"[207] mean? The court noted that racial quotas and busing are not required by law, but when would anything less be deemed the maximum desegregation practicable ordered by the Supreme Court and the Fifth Circuit? At the end of his review of this precedent, Judge Sanders outlines the nine legal principles that would govern the case, each one addressing some aspect of the court's desegregation challenges.[208] Rather than attempt a neat, coherent synthesis of applicable constitutional law—an impossible task given the state of the jurisprudence—Judge Sanders simply sets forth the principles in numbered order from one to nine.[209] What becomes clear upon reading these principles and associated precedent is that there has been a shift in the federal courts' perspective on school desegregation over the two decades from 1960 to 1980.

As time and distance grew between the original acts of de jure segregation and judicial attempts to remedy the insidious impact of those acts, including irradicating all "vestiges" of prior discrimination, the courts found themselves increasingly willing to set aside earlier legal and factual presumptions, which had allowed them to find discrimination based primarily on the fact of segregated schools, and focus instead on the difficulties they perceived in desegregating majority-minority districts, and question the remedial efficacy of certain remedies, especially busing.[210] This does not mean the general principles governing the equitable remedy of a desegregation plan were altered; rather it means that the difficulties inherent in achieving racial integration school-by-school within predominately minority urban school districts gained recognition in the judicial discourse. A shift in the dialogue between the circuit courts and district courts followed this trend.[211] In difficult or challenging cases, the district courts' remedial decisions predictably became increasingly fact-sensitive and grounded in the district courts' unique or pragmatic problems; the appellate courts' response in these highly context driven types of cases is to defer to the trial courts' primary institutional expertise, fact finding, its on the ground perspective,[212] which, in the case of

206. *Id.*
207. *Id.* at 702.
208. *Id.* at 704-05.
209. *Id.*
210. *See* sources cited *supra* note 119.
211. Armour, *supra* note 5, at 225-34.
212. *Id.*

school desegregation, included a panoply of individual, contextual, and systemic facts to be considered in designing a remedial plan.[213]

The trial court's equitable remedial powers may only be exercised where a constitutional violation has occurred, and the next section of Judge Sanders' opinion attempts to locate the original scope of the constitutional violation.[214] Judge Sanders grounds his remedial authority in Judge Taylor's 1971 finding that "vestiges of the segregated system remained in DISD" and a "similar finding of system wide vestiges of segregation" by Judge Taylor that was the basis for his 1976 desegregation order.[215] Finding this to be the law of the case, Judge Sanders holds that these findings will not be revisited.[216] The court makes the further finding that DISD has acted in good faith since these original rulings, but this second finding is not dispositive of the question[217] whether DISD has eliminated all vestiges of the former unconstitutional system. In order to resolve this question Judge Sanders holds the *Keyes* presumption to be determinative, meaning that currently segregated schools are considered a vestige of prior segregation policies, even though there has been no intentional racial discrimination since 1971.[218] DISD vigorously opposed this finding, introducing evidence and arguing that the predominately minority schools remaining in the district could be explained by increases in minority student population and residential housing patterns and were not "vestiges" of prior de jure segregation.[219]

Citing Fifth Circuit and Supreme Court authority, Judge Sanders opines that racialized housing patterns cannot be treated as the legal cause for racial imbalance in schools until "all vestiges of the de jure system are eradicated," and that the evidence needed to prove otherwise is likely unobtainable.[220] While the relationship between the predominantly Anglo schools and many of the predominantly minority schools indicates that the relationship between past acts and present segregation has "become so attenuated" it would not support a finding of de jure segregation, "it is neither practical or possible to" determine on a school by school basis which schools are "vestiges" and which are not.[221] Significantly, the court points out that it lacks guiding principles from the higher courts regarding how to measure this attenuation over time, that it has no desire to "pioneer in the field," that it must take into account the practicalities of the situation, and that under prevailing precedent it must treat the school system as a whole.[222] These limiting legal principles, principles appealing to any pragmatic jurist, allowed the court to find that "vestiges

213. *See supra* note 132 and accompanying text; *infra* note 224 and accompanying text.
214. *Tasby*, 520 F. Supp. at 705-07.
215. *Id.* at 706.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at n.45.
221. *Id.* at 706-07.
222. *Id.* at 707.

of past discrimination continue to exist in DISD, evidenced by some of the predominantly minority schools . . . and further evidenced . . . by the lower achievement of minority students as compared to Anglo students."[223] The fact that, as a practical matter, Judge Sanders could not identify the specific one-race schools or measure the achievement gaps that were attributable to prior de jure segregation was not fatal to his holding.[224] In this opinion we can observe how Judge Sanders' unique blending of legal formalism with its reliance on precedent, legal standards, and fact findings—with legal pragmatism—which examines legal problems in a context-enriched setting, looking at legal practicalities, and evaluating results in terms of their overall feasibility and impact came into play.

In evaluating the constitutional adequacy of Judge Taylor's proposed plan, Judge Sanders went through each and every provision in the plan and outlined his concerns, which reflected in large part the Fifth Circuit's expressed concerns.[225] What stands out in this portion of the opinion is the court's incredible attention to detail in terms of student enrollment data, programmatic information, the court's overall comprehension of the educational system, and the potential impact of the proposed plan.[226] Judge Sanders revisits another recurring theme of the case, the lack of bright-line precedent establishing clear benchmarks to determine when a school district is integrated, the reluctance of the appellate courts, including the Supreme Court, to establish specific numerical standards as legal standards by which to measure desegregation, and the resulting institutional pressure on the district courts to use their unique perspective and expertise in determining what will be their acceptable minimum definition of an integrated district considering "the practicalities of the situation."[227] Again, Judge Sanders calls upon his colleagues in other federal courts who are faced with or have faced similar difficult situations, but overall the message is clear; the district court judge is truly the court of first and possibly last resort for the litigants, and more importantly, for the children in DISD.

In order to move forward at this juncture in the litigation, Judge Sanders must resolve the question of single-race schools: What will be the numerical cut-off in defining a minority or single-race school? DISD urges use the of a ninety percent standard, claiming that this is the best measure of a one-race school.[228] Plaintiffs urge the use of a forty percent rule, claiming that any school with a present Anglo enrollment of more than forty percent is out of balance with the system.[229] Announcing that he found both proposals unacceptable, Judge Sanders opted for the twenty-

223. *Id.*
224. *Id.*
225. *Id.* at 707-39.
226. *Id.*
227. *Id.* at 710.
228. *Id.* at 711.
229. *Id.*

five percent to seventy-five percent standard as an initial starting point in defining a desegregated school.[230] What stands out in this debate is the rather obvious middle, or practical course, adopted by the court. It is easy to appreciate the parties' positions when viewed from the perspective of the adversarial paradigm, but, as will be seen, the adversarial process clearly has its limitations when it comes to generating a feasible constitutional plan that can effectively desegregate a large, urban majority-minority school district. The opinion is replete with similar discussions, as Judge Sanders examined different aspects of the 1976 plan in light of the Fifth Circuit's concern over single-race schools. The tenor of the opinion is extremely pragmatic, and fairly reflects the critiques and concerns raised by the parties during four weeks of hearings.[231] Whether the Court was completely successful, Judge Sanders attempted to give a voice to all of the litigants, Judge Lefkow's grass roots democracy in action, as the *Tasby* Litigation moved down the home stretch.

In the end, Judge Sanders ordered the litigants to file separate "desegregation plans prepared in conformity with this Opinion," which were to address the key issues set forth therein.[232] Essentially, the court asked the parties to evaluate, point-by-point, the feasibility of programs and realistically assess the cost and timetable for programmatic remedies; to propose methods for increasing enrollment in the present magnets, especially Anglo enrollment; to address the practicability of attendance zone changes; and finally, to "evaluate the feasibility and appropriateness of adjusting the current 4-8 transportation plan to further desegregate the predominately minority 4-8 schools."[233] Judge Sanders ends his opinion by returning to the most troubling aspect of the litigation, the "substantial body of minority parents" who seek an end to busing.[234]

The Fifth Circuit's opinion on appeal reviewing Judge Sanders' desegregation plan describes the process that unfolded following the issuance of his original analysis of the case and his request for the parties' input. As described by the Fifth Circuit, "the case has come a long way" and "it has now reached the point where the major portion of the district court's judgment is the result of the parties' own agreement."[235] It is not difficult to imagine this result, considering the litigants' and their lawyers' experience with the case, as well as Judge Sanders' clarity in outlining what he considered to be the crucial issues that needed to be resolved before a final desegregation order or, as described by the Fifth Circuit, "a sensitive, thorough opinion could be entered."[236] The experiment in democracy with a small "d" worked; because an "impressive level of agreement"

230. *Id.*
231. *Id.* at 707-49.
232. *Id.* at 749-50.
233. *Id.* at 750.
234. *Id.*
235. Tasby v. Wright, 713 F.2d 90, 91 (5th Cir. 1983).
236. *Id.*

was reached amongst the parties there were limited issues on appeal.[237] A negotiated desegregation plan at this remedial stage, especially after the court has held an extensive hearing and made detailed fact findings, makes sense in a school desegregation case. After ten years of litigation (1971–1981), the parties and their counsel had developed extensive knowledge and expertise regarding feasible, available desegregation remedies. And they, like the district court, faced the challenge of creating a feasible, practical plan that would eradicate the "vestiges" of prior discrimination and move the district forward. In reaching this agreement, the plaintiffs and the NAACP gave up their request for increased busing; Judge Sanders' conclusion that increased mandatory busing was not feasible, because of substantial time and distance problems and because of the low number of Anglo students to be distributed throughout the district, was not appealed.[238] More importantly, none of the parties appealed the adequacy of the district court's desegregation plan as a remedy for past constitutional violations.[239] Additionally, since the parties' stipulations addressing four other areas of judicial concern were approved by the district court and entered as part of its final order the appeal was quite narrowly focused.[240]

DISD continued to argue that the district court erred when it refused to declare DISD unitary instead finding that "vestiges" of past discrimination remained.[241] The Fifth Circuit makes the telling point that in its prior decisions finding a determination of unitary status in school districts similar to DISD was not clearly erroneous does not translate into a holding that a district court refusing to bestow unitary status on a seemingly similarly situated school district is in error. The Fifth Circuit's analysis of this issue and its refusal to create a paradigmatic fact based legal "unitary" standard further highlights the circuit courts' willingness to keep deferring to the trial courts on this point. The circuit's unwillingness to take upon itself the fact sensitive analysis needed to rule on this issue made the point that the school district still had the burden of proof on this issue and it had failed to meet that burden by proving that a "current condition of racial segregation is not a vestige of the [district's] past [discrimination]."[242] Reviewing the district court's opinion as a whole, the Fifth Circuit is satisfied that the issue of whether DISD had produced sufficient evidence to rebut the finding by Judge Taylor in 1976, that vestiges of prior discrimination remained, was not erroneously decided by Judge Sanders.[243] According to the Fifth Circuit, Judge Sanders did not make an independent determination on the issue of unitary status nor

237. *Id.* at 93.
238. *Id.* at 92-93.
239. *Id.*
240. *Id.* at 92.
241. *Id.* at 93.
242. *Id.* at 93-94.
243. *Id.* at 95.

was he required to do so.[244] But the Fifth Circuit notes that when the question of unitary status *is* properly raised, it should be considered by the district court free of any inference that the district court's judgment below, or the Fifth Circuit's affirmance in this appeal, "constitutes a law of the case" holding that DISD was not unitary in 1981.[245] With regard to the challenged remedies reviewed under the highly deferential abuse of discretion standard, the Fifth Circuit affirmed Judge Sanders' rejection of the Minority Neighborhood Option Plan and revision of minority hiring goals, but reversed the district court's alteration of certain school attendance zones.[246] This was the last major appeal in the *Tasby* Litigation. During the ensuing period from 1981 to 1994, the year DISD was declared unitary, Judge Sanders issued orders on a range of topics, including busing, feasibility studies for new, enhanced learning centers, and recruiting more minority faculty, as the court and the parties worked on the daily decisions needed to implement the detailed desegregation plan.[247]

In 1994, DISD formally moved for a declaration of unitary status,[248] a hearing was held, and Judge Sanders issued another lengthy opinion granting the district unitary status but retaining judicial oversight of the case for a three-year monitoring period to allow DISD to correct certain compliance deficiencies raised during the hearing.[249] There are obvious institutional incentives on the part of the school district to pursue "unitary status": to "get rid" of the case; to relieve the district of the time and effort involved in overseeing implementation of a desegregation plan, including reports, hearings and meetings with litigants and the community; attorneys' fees; the existence of extremely malleable legal standards; and

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244. *Id.* at 96.

245. *Id.*

246. *Id.* at 98-99 (noting that, on appeal, neither side objected to the use of the 70% to 75% figure in defining racially identified schools).

247. *See* SMU Dedman School of Law, *supra* note 133 (Summary Timeline of the *Tasby* Litigation)

248. *See, e.g.*, Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283 (2002) (discussing the federal courts' growing reluctance over time to engage in institutional reform litigation, because of concerns about the scope of judicial discretion in the remedial process, and the lack of narrow judicial principles in school desegregation cases to guide that discretion); Watson, *supra* note 119, at 962 (arguing "[t]here has been an increasing tendency in the federal appellate courts to affirm district court rulings of unitary status in order to uphold the goal set out by the Supreme Court of returning school systems to the control of local and state authorities").

249. Tasby v. Woolery, 869 F. Supp. 454, 477 (N.D. Tex. 1994). The question of unitary status came up once before, in 1989. *See* Tasby v. Edwards, No. 3-4211-H, 1989 U.S. Dist. LEXIS 16823 (N.D. Tex. Aug. 22, 1989) (mem. op.). DISD filed a one-page, two-paragraph motion seeking unitary status, to which was appended a document signed by the African-American Board members opposing the motion. *Id.* at *1. The district court ordered DISD to file a reply to the plaintiffs' response, but instead of complying with this directive, the Board sent the district court a letter stating that the Board could not agree on a reply. *Id.* at *2. Treating the letter as a statement to the district court that the Board refused to comply with the its prior order, Judge Sanders issued a stern rebuke: "Defendants may not intend their non compliance with the Court's Order to be contumacious, warranting contempt proceedings, but Defendants are subject to sanctions for such non compliance." *Id.* The district court verbally sanctioned DISD and ordered that no motion for unitary status could be filed before January 15, 1990. *Id.* at *2-3.

the reality that the district court in order to do its job has had to be privy to the innermost workings of the school district on a daily basis. In response to DISD's motion a hearing was held and, again, Judge Sanders prepared a lengthy, thorough, detailed opinion, covering applicable legal precedent and the status of the desegregation plan in his effort to determine whether DISD had acted in good faith and had complied with the court's desegregation decree "for a reasonable period of time."[250] The primary question before the district court was whether the vestiges of past discrimination have been eliminated to the "extent practicable."[251] In reviewing DISD's compliance with the district court's prior decree, the opinion breaks down the desegregation plan element by element, noting where DISD has done well, where deficiencies exist, and where the Plaintiffs offered criticisms and suggestions.[252]

After granting DISD unitary status, Judge Sanders reflects upon the understandable "skepticism of the Black School Board trustees and some in the Black community" regarding the Board's true commitment to desegregation[253] and states his belief that "such intransigence no longer exists" and the shortcomings in compliance noted in the opinion are "due primarily, and perhaps solely, to failures by a few district personnel to follow through."[254] In a very human moment, Judge Sanders admits that "[f]rom time to time the [c]ourt has expressed its impatience at the apparent lack of motivation and good management responsible for these problems,"[255] but he is confident these problems will be quickly resolved. The ruling was not appealed, perhaps in deference to the fact the court "got it right" or, more likely, because there had been substantial compliance with the plan and Judge Sanders, true to his pragmatic nature, was going to keep an eye on the district for a while. By putting in place "court supervision," Judge Sanders circumvented the issue of dismissing the lawsuit and created an opportunity for any of the parties to come back to the court if problems arose, a solution that was practical, fair, efficient, effective, and ensured the minority community could air their concerns in front of Judge Sanders in open court.

The opinion granting unitary status provided for a three-year monitoring period with regular reports to the auditor, but this turned out to be an unduly optimistic timeline. Finally, on June 5, 2003, almost ten years after declaring DISD unitary, Judge Sanders dismissed the *Tasby* Litigation with another thorough opinion setting out the history of the Litigation, DISD's progress desegregating the district, and the current racial/ethnic

250. *Tasby*, 869 F. Supp. at 461-62.
251. *Id.* at 460.
252. Plaintiffs and intervenors argued that the racial tension on the DISD Board evidenced vestiges of past discrimination were not eradicated. *Id.* at 475. The district court noted its concern "about the contentious nature of Board deliberations," but pointed out that this is not a measure addressed in the judgment or a measure of desegregation addressed by the Supreme Court. *Id.*
253. *Id.* at 477.
254. *Id.*
255. *Id.*

composition of DISD's student body.[256] In this opinion the court explores DISD's years of legal and political toil, the hiring of Superintendent Mike Moses, the passage of a significant bond issue, the growth of minority personnel in DISD, and the more collegial operation of the Board of Trustees.[257] At the hearing on unitary status, one of the major points raised in opposition to DISD's motion requesting the court dismiss the litigation was the minority community's frank skepticism that the Board of Trustees would follow the mandates of the court's desegregation order and commit itself to maintaining a desegregated school district after the court's supervision ended. In anticipation of this concern being raised in front of Judge Sanders, DISD's Board of Trustees had adopted a "Declaration of Commitments and Covenants Upon Release from Court Supervision (Covenants)."[258] In addition to the general principle stated in the Covenants that the District was committed to equal educational opportunity, the Covenants also express the District's commitment to maintaining the programmatic remedies initiated during the litigation.[259] Judge Sanders states in his opinion that he is relying on the Covenants as a gesture of good faith on the part of the Board and that the "[c]ourt would be gravely concerned if there were any material departures from the Covenants during the three year term which begins upon the dismissal of this case."[260]

In setting the stage for his final opinion in the *Tasby* Litigation, Judge Sanders' review of applicable precedent focuses on a significant shift in the Supreme Court's jurisprudence on the question of unitary status. The Supreme Court, in a trio of cases from the early 1990s, now stressed the importance of local control, the inherently "transitory nature of judicial supervision," and the importance of returning districts to that local control as soon as practicable.[261] The Supreme Court's juridical "thumb on the scales of justice" now encouraged district courts to withdraw from the arena of school politics and policy. As he has done throughout the litigation, Judge Sanders clearly sets forth the legal principles that will guide his final decision in the *Tasby* Litigation and then walks through in detail his application of this law to the unique facts of the case he had overseen for over twenty years.[262] It is not surprising at this stage in the litigation that there were a number of stipulated and non-contested matters, including the Board's ability to function effectively and its ongoing commitment to desegregation;[263] the court compliments and commends the Board on its achievements in these areas.[264] The contested issues were thoroughly considered and the court's findings were supported by evidence from

256. *See generally* Tasby v. Moses, 265 F. Supp. 2d 757 (N.D. Tex. 2003).
257. *Id.*
258. *Id.* at 761-62.
259. *Id.* at 761.
260. *Id.* at 762.
261. *Id.* at 763.
262. *Id.* at 765-80.
263. *Id.* at 765-68.
264. *Id.*

DISD, the Plaintiffs, and the independent auditor, Ms. Sandra Malone.[265] Even at this late stage, Judge Sanders took the time to develop a full record, which included acknowledging the legitimacy of the Plaintiffs' concerns; and while the end was clearly in sight, there was nothing summary or rushed about the proceedings or the court's final decision.

In concluding the written opinion, Judge Sanders leaves his indelible imprimatur on the case by complimenting Superintendent Moses, the School Board, and the lawyers for both the Plaintiffs and the Defendants.[266] Judge Sanders states that "[t]he [c]ourt is particularly grateful for the careful and constructive work of the External Auditor, Ms. Sandra Malone[,] and her predecessor, Dr. Donald Hood."[267] Perhaps most importantly, Judge Sanders acknowledges the "courageous" Sam Tasby, the original plaintiff in the case.[268] Thirty-three years had passed since the *Tasby* Litigation was filed, with numerous hearings held, orders issued, and hours spent reviewing evidence with a single goal: to eradicate the vestiges of de jure segregation and move DISD toward unitary status.[269] It is telling that Judge Sanders ends his final opinion in the *Tasby* Litigation on a personal note by acknowledging the man whose soft-spoken voice was finally heard in open court and who sat by his lawyer's side through endless, perhaps often incomprehensible, hearings because he believed, as did Judge Sanders, that the federal district court would be his court of first and last resort.

D. Reflecting on *Tasby*

Those reflecting on the *Tasby* Litigation from today's vantage point, or reflecting on the school desegregation cases from the vantage point of history, should not second guess district court judges who undertook the challenging task of redressing state-sanctioned segregation in our public schools.[270] The *Tasby* Litigation, as it evolved, followed patterns similar to those seen in other cases involving large urban school districts. Initially, there was a period of institutional reluctance on the part of the court and the local community to begin aggressively implementing the Supreme Court's *Brown* mandate, and demands for change were met

265. *Id.* at 767-80.
266. *Id.* at 780-81.
267. *Id.* at 781.
268. *Id.* at 780.
269. *Id.*
270. State-sanctioned segregation in the South was not limited to the public schools, but schools so embody democratic ideals, including the ideal of equality of equal opportunity, the debate over integration in the school cases shaped the larger political discourse as well. However, equality cannot be measured simply by reference to the more limited goal of eradicating segregation and its vestiges set forth in the federal courts' desegregation orders from this era. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 823-32 (2007) (Breyer, J., dissenting) (objecting to the narrow definition of desegregation put forth by the majority and citing numerous cases for the proposition that equality, as mandated by the Fourteenth Amendment, is measured by more than narrow remedial attempts to redress de jure segregation.); *see also* Hutchinson, *infra* note 331 (discussing the continuing need for a racial discourse addressing substantive equality).

with a political discourse dominated by the majoritarian communities arguments in favor of a "go slow" strategy. This was followed by a period of educational reform directed at restructuring the schools programmatically, reallocating resources using both targeting and equity funding paradigms, and restructuring school assignment plans by moving boundaries or implementing busing programs. As the federal judges developed expertise in the arena of desegregation, the cases reflect an increasingly engaged dialogue developing between the district courts and the local school districts, in which educational programs and policies were openly scrutinized in the public forum of the courts. The four remedial issues that played such a significant role in shaping the *Tasby* Litigation shaped desegregation litigation across the country: whether and how district courts would use interdistrict desegregation plans to achieve racial integration; whether and how district courts would address segregated housing in their desegregation plans; whether and how busing would be used to achieve integration; and whether and how the courts would address the seemingly intransigent achievement score gaps. The courts responded to the larger integrationist concerns with primarily incremental strategies, reflecting a more pragmatic problem-solving approach, an approach which relied in large part on fostering agreement, and therefore compromise, amongst the litigants as an important institutional strategy. This strategy contrasted sharply with the more far-reaching integrationist vision espoused by early civil rights advocates, including Thurgood Marshall both as a civil rights lawyer and later as a Supreme Court Justice, and their desire for a more aggressive judicial role in restructuring the country's racial landscape.[271] In this respect the evolution of the *Tasby* Litigation paralleled desegregation litigation across the country.

First, there was the question of incorporating suburban, or predominantly Anglo, school districts in the desegregation order in order to achieve racial integration on a school by school basis. The district court in *Tasby*, like its peers throughout the country, did not pursue this strategy,[272] although Booker T. Washington High School for the Performing and Visual Arts, DISD's arts magnet high school, has successfully recruited and admitted students from outside the district since early on in its inception.[273] It is difficult to measure the impact this policy has on the school's racial makeup today, but in 2006 the school reported a racial and ethnic composition of approximately one-third Anglo, one-third African-American, and one-third Latino, at a time when the school district itself

271. *See infra* text accompanying notes 279-94.

272. *See id.*

273. In recruiting out-of-district students, the school includes all applicants to the school in the initial round of auditions and assessments; the school's stated policy is to apply the same artistic eligibility criteria to any and all applicants. According to district policy, out-of-district students are only admitted if the school cannot fill a given class or cluster (dance, music, theater and visual arts) with "qualified" students from within the district. *See* Dallas ISD-TASB Policy On Line, http://www.tasb.org/policy/pol/private/057905/pol.cfm?DisplayPage=FDA (LEGAL).pdf&QueryText=TRANSFER (Interdistrict Transfers policy); DISD, Response to an Open Records Request (on file with the author).

was six percent Anglo, sixty-three percent Latino, and thirty percent African-American.[274] As has already been seen, the question of how to address highly segregated housing patterns challenged Judge Sanders. Ultimately Judge Sanders' pragmatic approach took its inspiration from a range of remedial measures, developed locally or adopted from other school cases, whose primary focus was to eradicate the institutional and programmatic vestiges of segregation by focusing on funding new schools and programs, and providing limited targeted busing in those instances where racial integration could be achieved. Finally, all of the district courts involved in desegregation had to address the continued gap in achievement scores between Anglo students and their African-American and Latino peers. And they, like Judge Sanders, had to decide whether the achievement score gaps were vestiges of prior de jure segregation, the result of more nuanced institutional racial biases, or attributable to other factors, including the economic segregation that had followed "white flight," which fell outside their remedial reach. These same district courts faced the challenge of evaluating the effectiveness of their desegregation programs in closing this achievement score gap;[275] educators touted and district courts implemented a variety of programs, but a substantial racial gap in test scores persists today. In this context, what does success mean? Did the courts define their goal as equality in educational opportunity or were the district courts increasingly focused on meeting the more narrowly defined remedial mandates of the Supreme Court?

While it is fair to criticize the federal district courts' initial institutional reluctance to take an active role in the school desegregation cases,[276] it is harder to answer the question of whether the federal trial judges should have done more, or whether they withdrew from the fray too early.[277]

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274. *See* TEXAS EDUCATION AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM: BOOKER T. WASHINGTON CAMPUS REPORT 8 (2006-2007), *available at* http://ritter.tea.state.tx.us/cgi/sas/broker; TEXAS EDUCATION AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM: BOOKER T. WASHINGTON CAMPUS REPORT 8 (2007-2008), *available at* http://ritter.tea.state.tx.us/cgi/sas/broker. A substantial number of the out-of-district students admitted to Booker T. Washington High School for the Performing and Visual Arts are Anglo. When asked about the continuing policy of admitting out of district students, various individuals, including members of the Booker T. Washington Advisory Board, commented that it was difficult to find qualified students from within the district, given the school's high artistic standards. This would appear to be especially true in those "arts," such as dance and instrumental, where the family resources needed to pay for private lessons and to support years of training correlate more highly with the income distributions in the surrounding predominately Anglo school districts.

275. *See* sources cited *supra* notes 116, 118, 125 (referencing more general scholarship that analyzes the school desegregation cases); *supra* note 202 (arguing that one way to redress this gap in achievement scores is through economic integration within the individual schools).

276. The United States Supreme Court's own policy of gradualism has been well documented. *See, e.g.*, Norman I. Silber, *Brown and Shades of Gray: Ex Parte Communication in the Litigation Over Racial Justice*, 31 LITIG. 6 (2004) (discussing the Court's behind-the-scenes maneuvers leading up to the adoption of "with all deliberate speed" in *Brown II*, 349 U.S. 294 (1955)).

277. *See supra* notes 117, 119, 126, 136; *see, e.g.*, William H. Clune, Courts and Legislature as Arbitrators of Social Change, *Educational Policy Making and the Courts: An Empirical Study of Judicial Activism*, 93 YALE L.J. 763 (1984) (reviewing MICHAEL A.

Just as the federal trial judges began to design more effective desegregation plans, plans that undertook a broader range of remedies than the plans from the 1960s–1970s, the Supreme Court began to retreat from its policy paradigm of an active, engaged federal judiciary overseeing school desegregation cases. As a result, the federal trial judges who were trying to address the real world problems of neighborhood segregation, gaps in test scores, objections to busing in the Anglo community, growing objections to busing in the African-American community, and the challenge of increasing school budgets through taxes or bond issues felt the foundational constitutional jurisprudence shift beneath them. When the Supreme Court dismissed the writ of certiorari and remanded the *Tasby* case in 1975, Justice Powell's dissent was but one example of the Supreme Court beginning to look for opportunities to revisit the district courts' role in the desegregation cases by limiting the scope of their equitable powers and remedies.[278]

The Supreme Court's doctrinal shift was designed to have a direct impact on district courts' handling of desegregation cases.[279] Without entering the debate over what *Brown v. Board of Education* meant to its lawyers, the litigants, the Supreme Court in 1954, or the Supreme Court in 2008, it suffices to point out that Justice Thurgood Marshall, who helped litigate *Brown*, voiced disagreement over time with many of his

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REBELL, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM (1982)) (examining the role of courts as accessible democratic forums for minorities who are underrepresented in state legislatures and the role of the trial courts' fact finding function as a substitute for more normal legislative processes, and challenging allegations of judicial activism, pointing out the important role of constitutional adjudication and the problem of conservative judges who fail to fulfill that role by actively waging a subtle campaign of opposition through their control over the adjudicative process); Book Note, *Grand Illusion*, 105 HARV. L. REV. 1135 (1992) (reviewing GERALD R. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991)) (critiquing the efficacy of the federal courts in addressing segregation).

278. *See* discussion *supra* Part III.A. In *Tasby*, the question whether "one-race" schools could be allowed to exist was extremely divisive. It is not hard to appreciate the district court's and litigants' arguments: If eradicating de jure segregation is the primary goal, is not the primary measure of successful integration defined as the eradication of "one-race" schools? How is this goal of integration to be defined in a predominantly minority school district? However, if integration is reduced to the status of a "remedy," and not the constitutional measure of equality, the debate shifts. This was the case in *Tasby*. If eradicating the vestiges of de jure segregation is viewed through the lens of "history" and the "attenuated" link between de facto segregation and "single-race" schools, concerns about the practicable feasibility of busing to achieve integration capture the jurisprudential debate. Whether busing was the appropriate remedy was openly debated both within and outside of the litigation. The question was how the issue should be resolved: by looking at the "majority of the community" to be bused and ascertaining their wishes or by stepping back and looking only at the remedial impact sought? It is telling that Judge Sanders cites Professor Derrick Bell's article *Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 507-08 (1976), introducing into the debate over busing the voice of a well known African-American civil rights advocate. *See also* Tasby v. Wright, 520 F. Supp. 683, 690 n.11 (N.D. Tex. 1981); *see* Jones, *supra* note 190, at 33-88 (2002) (discussing Professor Bell's career from "legal liberal to critical race theory trailblazer").

279. Sheryll D. Cashin, *American Public Schools Fifty Years After Brown: A Separate and Unequal Reality*, 47 HOW. L.J. 341, 350 (2004) (addressing many of the arguments made by Professor Cashin in her book, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004)).

colleagues on the Court about what it meant to achieve an integrated school system, the goal of the *Brown* litigation.[280] Professor Cashin's essay exploring the Supreme Court's retreat from *Brown v. Board of Education* intertwines analysis of the Court's precedent with conversations she had with Justice Marshall when she was his clerk.[281] Reading Justice Marshall's dissents in case after case, coupled with this more personal view of the Justice as decision after decision beat the retreat from *Brown*, we are made privy to the demise of Justice Marshall's integrationist vision.[282] As will be seen below, this "history" closely tracks what happened in the *Tasby* Litigation with one exception: Judge Sanders did not release the school district from judicial supervision as quickly as many of his judicial peers.

The Supreme Court's decision, *Milliken v. Bradley*, which in 1974 refused to include the increasingly white suburban school districts in Detroit's desegregation plan, is considered the death knell for integration in large urban school districts.[283] *Milliken* "essentially insulated predominately white suburban school districts from the constitutional imperatives of *Brown*" and gave "citizens more incentive to create their own separate school districts" offering white parents in urban districts a place to "flee."[284] Judge Taylor's 1975 decision refusing to include the Highland Park School District in the DISD desegregation plan embraced *Milliken* and sparked considerable comment.[285] *Milliken* set the stage for the remedial challenges the increasingly majority-minority urban districts across the country would face in the years ahead. In 1991, in *Board of Education v. Dowell*, Justice Marshall, in his dissent, questioned whether thirteen years of desegregation was sufficient to undo sixty-five years of segregation in the Oklahoma City schools, and whether the school board should be allowed to return any schools to their one-race status under the rubric of local autonomy.[286] Justice Marshall's dissent reflected the deep divide between civil rights advocates and the Supreme Court over the per se "stigmatic injury" of racial segregation and whether "feasible meth-

280. *Id.*

281. *See generally* Cashin, *supra* note 279, at 346-49.

282. *Id.*

283. *Id.* at 347 (discussing Milliken v. Bradley, 418 U.S. 717 (1974)).

284. *Id.*

285. Tasby v. Estes, 412 F. Supp. 1185, 1192 (N.D. Tex. 1975) (Taylor, J.) (dismissing suburban school districts from the litigation by agreement but declining Plaintiffs' request to include the Highland Park Independent School District in the DISD desegregation plan), *aff'd by* Tasby v. Estes, 572 F. 2d 1010, 1015 (5th Cir. 1978). Discussions with a variety of individuals who were involved in the litigation directly or indirectly at this time, reflect similar perspectives; next to busing, this was an extremely divisive issue within the Dallas community and one of the most discussed and critiqued decisions in the *Tasby* Litigation. With this decision, Judge Taylor effectively put the goal of racial integration beyond the reach of the court. LINDEN, *supra* note 116, at 76, 96. *See, e.g.*, John M. Jackson, *Remedy for Inner City Segregation in the Public Schools: The Necessary Inclusion of Suburbia*, 55 OHIO ST. L.J. 415 (1994) (discussing the impact of *Milliken v. Bradley* on the school desegregation cases).

286. Cashin, *supra* note 279, at 347-48 (discussing Bd. of Educ. v. Dowell, 498 U.S. 237, 251-52 (1991) (Marshall, J., dissenting)).

ods" remained to create an integrated school system.[287] Justice Marshall rejected the idea that then-existing segregated housing patterns justified allowing "one-race" schools on three grounds: (1) the idea that private decision making shapes such housing patterns ignores the historical data documenting the relationship between the school districts' segregationist policies and segregated housing patterns, (2) empirical evidence continued to show that predominately African-American schools were not "equal in fact," and (3) single-race schools, even when within predominately African-American neighborhoods, perpetuated the stigma of segregation.[288] These same issues shaped the *Tasby* Litigation, with the court expressing similar concerns over segregated housing patterns, local control and resistance to busing among portions of the African-American community, the continued existence of single-race schools, the development of special programs to address the racial gap in achievement scores, and the independent auditor's access to, and examination of, DISD data to ensure equality in funding and programming across all schools.

Dowell is doubly significant because it also reversed an important presumption that had guided the district courts' exercise of their adjudicative discretion up to that point. Prior to *Dowell*, any actions by a school board reversing integration were considered presumptively unconstitutional under the Supreme Court's 1968 opinion in *Green v. County School Board*.[289] After *Dowell*, this presumption no longer existed. Rather than presume unlawful segregation from the continued existence of single race schools, a school district's "good-faith" efforts in attempting to comply with the court-ordered plan increasingly became the determinative factor when district courts were deciding whether a school district was constitutionally desegregated.[290] *Dowell* was quickly followed by two more cases, *Freeman v. Pitts*[291] and *Missouri v. Jenkins*,[292] in which the Supreme Court's directions to the district courts were clear. The district court's new priority was to return control of the schools to the school district as soon as possible; their task was to remedy desegregation only to the "extent practicable," even if that meant giving up the goal of integration. In assessing whether the goal of a desegregated—or unitary—school system had been achieved, the district courts were now directed to redetermine as a matter of fact and law whether "single-race" schools were a product of the school district's prior discriminatory conduct. As single-race schools persisted in the large urban school districts, tracing their causal roots to institutionalized racism versus the seemingly benign explanation offered by "demographic shifts in population" or "housing patterns" dic-

287. *Id.* at 348.
288. *Id.*
289. 391 U.S. 430, 441-42 (1968). The Supreme Court in *Green* held that a freedom of choice plan did not meet the requirement of a racially neutral, district wide school admissions/assignment policy when it did not result in integration because the white students refused to "choose to go" to predominately black schools.
290. *Dowell*, 498 U.S. at 237, 250.
291. 503 U.S. 467 (1992).
292. 515 U.S. 70 (1995).

tated whether these schools would continue to be treated as unconstitutionally segregated. The same principles applied to gaps in achievement scores between Anglo and minority students. The burden had shifted and if an explanation other than prior de jure segregation could be found, the gaps were no longer a problem for the courts.[293]

Justice Marshall's dream of racially integrated public schools throughout the country was no longer the stated goal of the United States Supreme Court. In response to this doctrinal shift by the early to mid-1990s district courts faced an onslaught of litigation from the school districts seeking release from judicial supervision. Judge Sanders was fully aware of these cases, and they were important in guiding his decisions.[294] The federal trial bench now had to address such malleable standards as "good faith efforts" on the part of the school districts in determining whether the district was fully desegregated, a finding which depended more on the courts' determination that there was nothing workable left in its remedial grab-bag then it did on their determination that there was nothing left to do. The link between single-race schools and achievement score gaps, the standard bearers of the federal courts' early determinations that schools in this country were unconstitutionally segregated, for some had "receded" into history as cases were in the courts for decades.

Needless to say, the "good faith" of DISD became a focal point of the litigation, and was called into question whenever the district failed to comply with the court-ordered plan, or whenever the board's rancorous deliberations, which often left the board split along racial lines, were covered in the news. Judge Sanders had to revisit the issues of "single-race" schools and "achievement score gaps" under this new constitutional jurisprudence, issues which resonate in his opinions as personally troubling. When Judge Sanders declared the district unitary, the standards set out by the Supreme Court guided his decision, but this does not mean they were outcome determinative in a narrow formalistic sense. Clearly troubled by what he, and many others, viewed as the "attenuated" link between "single race schools" and de jure school desegregation after twenty years of litigation, Judge Sanders' decision is essentially pragmatic. Pragmatically, it is impossible to maintain no causal relationship existed between policies of racial segregation and oppression that permeated Dallas, Texas (and which some might argue still do to some extent) and racially segregated housing patterns in Dallas. Judge Sanders' adoption of the term "attenuated" to describe the relationship between single-race schools, Dallas' segregated housing patterns, and prior de jure segregation acknowledges a relationship, whereas the question raised by the Supreme Court, and not effectively answered, was how this relationship should be defined and addressed constitutionally.

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293. *See, e.g.*, *Jenkins*, 515 U.S. at 120 n.2.

294. *See supra* Part III.C. In the three major opinions issued by Judge Sanders addressing (1) the desegregation plan, (2) the question of unitary status, and (3) the question of dismissal, he was meticulous in setting out the applicable Supreme Court and Fifth Circuit standards and principles, and the work of his fellow federal trial court judges.

There is no inherent logic to the argument that the passage of time and intervening events had so refashioned the social, cultural, political, and demographic landscape of Dallas in 1994 that its racial contours no longer reflected the prior insidious period of de jure racial segregation. It is a little bit like looking through a telescope; depending upon which end you look through and which lens you pick, what you are looking for can seem to recede into the distance, or appear to be right under your nose. Noting that there was no clear legal standard or developed jurisprudence that narrowed or guided the courts' determination on this issue, Judge Sanders followed the path of many of his colleagues on the bench in declaring the district unitary after twenty years of active litigation. Judge Sanders did not pursue Justice Marshall's integrationist vision, but, as reflected in his opinion, he couldn't given controlling precedent.[295] The ideal of pursuing desegregation to the extent practicable clearly resonated with this pragmatic jurist, but he was not insensitive to the concerns expressed by the minority communities that more needed to be done to truly remediate the impact of prior de jure segregation in Dallas. Judge Sanders' decision to declare the district unitary but retain judicial supervision, in spite of the single-race schools and the test score gaps, hopefully addressed these concerns. The solution Judge Sanders crafted for *Tasby* reflected his belief that while federal courts cannot themselves bring about the institutional and educational changes sought through their desegregation orders, they do play an important role. Whether it is a moral role, a formalistic legal role, or perhaps most importantly in a democracy the role of a public forum in which to explore the issue of integration and social change, in 1994 Judge Sanders knew it was not yet time to step out of the picture.[296]

District court judges involved in the desegregation cases found themselves enmeshed in the daily administration of the schools, supervising, among other things, hiring, busing, curriculum, and special programs. When they sat on the bench to consider motions to modify plans or motions to enforce plans, they considered a range of facts other than those narrowly defined as evidentiary facts introduced on the record; they considered facts they had access to through the use of special masters, and through their own interaction with the school boards, the litigants, and the local communities. At times, the remedies available to the district

295. *Supra* notes 278-93 and accompanying text.

296. *See* Book Note, *supra* note 27. In the Book Note both the book reviewed and the article itself reflect the legal discourse of the time and question the role that should or could be played by the federal courts in effecting broad social change in the country's public schools. *Id.* at 1135. The reviewer points to the moral force of the district courts' equitable decrees as significant in shaping the social conscience while acknowledging the remedial conundrum. *Id.* at 1140. If the courts are so seemingly ill equipped to redress these issues perhaps they should cease attempting to do so. *See, e.g.*, Wendy Parker, *The Supreme Court and the Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475 (1999) (exploring the district courts' exercise of their extensive remedial powers and the lack of a clear understanding of the "harm" caused by segregation or the remedies necessary to fully remediate this harm).

courts seemed wholly inadequate, especially when school districts claimed they lacked the funds to implement necessary programs. When the district courts were asked by the school districts to declare unitary status, the courts were inevitably aware of the larger political dialogue taking place outside their doors, and the jurisprudential dialogue taking place amongst their colleagues across the country. The question Judge Sanders had to answer in 2003, ten years after he had declared the district unitary, was whether the goals and standards of both the Supreme Court and the district court for the desegregation plan had been met. When DISD sought an end to court supervision, divisions and disagreements about whether all desegregation practicable had been achieved, and whether vestiges of de jure segregation existed still permeated the litigation. Some things had changed in the years since Judge Sanders was assigned the *Tasby* Litigation: he was a much more experienced federal trial judge and DISD had continued to lose Anglo enrollments. However other aspects of the case had not altered substantially: housing patterns in Dallas were still highly racialized and the gap in achievement scores between Anglo students and African-American students had not completely closed.

To the minority communities, almost as important as the desegregation plan itself was the fact that the district court had proven an accessible public forum where the plaintiffs, the intervenors, the NAACP, DISD, and other members of the community could come together and express their concerns directly to one another and to Judge Sanders. Judge Sanders skillfully used the courtroom and the litigation as a way to bring disparate voices and perspectives together to address problems and find possible solutions. He did this by requiring the litigants to sit down, face-to-face, and listen to one another. Judge Sanders had great faith in the democratic process of an engaged dialogue, parties offering their positions and responding to their "opponents." In this context Judge Sanders expected the parties to act in good faith and honestly determine what could be agreed upon and what could not.[297] At no time during the *Tasby* Litigation did the court loom over the litigation or attempt to insert itself as an expert on educational reform. During this last stage of the litigation, losing this public forum concerned the minority parents in DISD almost as much as anything else; their concerns were an important factor as Judge Sanders weighed what was to be his final decision in the case. Did the parties, and the district's parents, still need a neutral, public

297. It is impossible to recount the number of times parents and other concerned parties approached the court about their concerns regarding a school or the district, perceiving Judge Sanders and the independent auditors as more responsive to their individual concerns than DISD. My own personal experiences as a parent with a child in DISD, along with my discussions with Judge Sanders, demonstrate the openness of the court to a variety of concerns, even if they were not formally brought to the attention of Judge Sanders by the litigants. I was personally involved in one such instance. The Anglo parents at a majority-minority school approached Judge Sanders expressing their concern that DISD was allowing, even encouraging, Anglo parents within their school's attendance zone to transfer to a nearby majority Anglo school on tenuous grounds.

forum in which to discuss their concerns, and a federal judge overseeing that forum to ensure an open and engaged dialogue about the problems facing DISD? Or were the questions and concerns being brought to the court now better handled by DISD without court supervision? Where did the question of seemingly intractable gaps in achievement scores fall within the range of issues addressed by a federal trial court judge considering the dismissal of a school desegregation case? Was this a problem that required the court to fashion yet another remedy, or order additional spending? Was this "gap" sufficient evidence the prior de jure segregation had not been eliminated "root and branch" to keep the case in court for another year, or two, or three?

Which lens would the court look through to make its final decision? I think Judge Sanders adopted the correct perspective: the gap in achievement scores and the single-race schools reflected the history of racial apartheid in Dallas, but the available solutions were either not "practicably feasible" for a court to undertake or fell within the special competency of DISD, and its Board of Trustees to fashion and administer. There might be policies and programs available to them—for example, economic integration—which simply exceeded the courts' equitable discretion, or judicial competence, as defined by the current Supreme Court.[298] Equally important to Judge Sanders was the observable change in the electoral and board politics of DISD. He could see that challenging educational issues were being addressed more openly and systematically by the board; the minority communities had demanded and won the right to sit at the decision makers' table and have their voices heard.

E. THE DALLAS INDEPENDENT SCHOOL DISTRICT POST *TASBY*

I recall asking Judge Sanders about his decision in 2003 to release DISD from judicial supervision and dismiss the *Tasby* Litigation. Large

298. For example, what is the solution to the gap in achievement scores? Many commentators point to the insidious impact of de facto segregation on academic achievement, but this more nuanced form of institutionalized racism was set beyond the trial courts' reach early on in the school desegregation cases. There was nothing to stop DISD on its own from addressing the problem of economic homogeneity, within the district on a school by school basis. If black students disproportionately attended schools located in economically disadvantaged neighborhoods and that had an adverse impact on students' academic achievement, the district could redistribute student populations using factors other than race to address this perceived problem. *See* Cashin, *supra* note 279, at 352-61. One potential solution, economic integration, has received positive reviews from those who claim it redresses the cultural and social predictors of low economic performance. *Id.* at 355-61; *see also* Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1337-53 (2004) (citing studies showing that equalizing funding between schools does not necessarily equalize test scores, and posing the question whether targeting resources, or non-equitable funding strategies, can address the core of the problem "described" by achievement test score gaps); Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES MAG., July 20, 2008, *available at* http://www.nytimes.com/2008/07/20/magazine/20integration-t.html?_r=1 (describing the Louisville, Kentucky School District's efforts to devise an alternative student assignment plan after the Supreme Court's decision in *Meredith* and reflecting on actions being taken in other schools, including Beaumont, Texas, to "switch to class-based integration").

urban school districts that had operated under judicial supervision for over twenty years and whose primary institutional goals had been compliance with court ordered desegregation plans often found their unitary status a challenge. Could such a district like DISD move forward effectively, developing new policies to address their majority-minority status, forging new political and institutional alliances, and fashioning a new democratic dialogue to address the evolving question of equity and equality in educational opportunity? Judge Sanders and I discussed one of the major challenges facing DISD: How would it define educational equity and equality in a multiracial district with high levels of poverty? What role if any should race, ethnicity, or class play as DISD faced a future in which the racial and ethnic landscape of the district was drastically different from that confronting Judge Sanders in 1981? Judge Sanders' answer was a mix of common sense and judicial wisdom: He felt DISD, its Board of Trustees, and its communities needed to approach these issues with a fresh perspective, acknowledging the lessons learned during the desegregation litigation, but open to the new issues and challenges that would inevitably arise. As the federal district court judge who had provided the public forum and overseen much of the debate about how to address past wrongs in Dallas, Judge Sanders wisely believed that the appropriate public forum for raising and addressing future challenges and concerns, for now, was DISD's Board of Trustees. The larger political process needed an opportunity to work and if the local communities disagreed with their board member they could elect a different representative. It was time, as Judge Sanders' opinion states, for the federal courts to step back.

Judge Sanders correctly predicted the community's desire and willingness to move the debate about educational policy in DISD out of the courtroom and into the public arena. Since the *Tasby* Litigation was dismissed, DISD has been subjected to its fair share of public scrutiny, reflecting the community's desire for transparency and accountability in its public schools. A brief review of one year's worth of news articles about DISD reveals a diverse array of topics and concerns discussed in the available public forums including the press, both print and digital, internet forums such as blogs, the School Board's meetings, and the larger political arena.[299] In his final two major opinions—the first declaring the

299. *See, e.g.*, Karen Harper, *Texas High School Students Forced to Fight in Cage Matches*, BIRMINGHAM PROGRESSIVE POL. EXAMINER, Mar. 21, 2009. While these articles do not reflect the many positive achievements of the district, they do illustrate the extent to which DISD is subjected to public scrutiny and highlight the increasingly open access for members of the community to a public discourse about the district. Tawnell D. Hobbs et al., *Mayor Tom Leppert Exploring Takeover of Dallas School District*, DALLAS MORNING NEWS, Feb. 24, 2009, *available at* http://www.da.asnews.comsharedcontent/dws/dn/latestnews/stories/022209dnmetmayordisd.3ebacb.html; Press Release, U.S. Attorney Richard B. Roper, U.S. Dep't of Justice, Former Dallas Independent School District Executive and Houston Businessman Convicted in Federal Corruption Trial (July 10, 2008), *available at* http:/dallas.fbi.gov/dojpressrel/pressrel08/corruption071008.htm; Matt Pulle, *Dallas Independent School District's Check Register Dropped From Website . . . and other unsolicited commentary on dallasisd.org*, TEXAS WATCHDOG, Feb. 16, 2009, http://www.texaswatchdog.org/2009/02/dallas-independent-school-districts-check-register-dropped-from-web-site-

district unitary and the second entering a final judgment dismissing the litigation—Judge Sanders anticipated many of the problems that would challenge the district as it moved forward; the challenge of developing bilingual/ESL programs in a majority Latino district with a large population of LEP students; the challenge of attaining and maintaining equality and equity in per pupil expenditures as the district moves out from under the funding mandates of the desegregation plan; the challenge of developing a multicultural dialogue within the community regarding educational policy; the challenge of ensuring racial harmony and open debate about educational policies by the Board of Trustees; the continuing challenge of closing testing gaps; and ensuring future Board of Trustees' commitment to actively evaluating and monitoring district programs to ensure educational equality and equity for all of the district's students.

1. A Majority-Minority District: The Mexican-American Experience in Texas

From Judge Sanders' perspective, one of the major challenges facing DISD was how it would handle its evolution into a majority Latino district. Judge Sanders was extremely sensitive to the fact that, in Texas, Fourteenth Amendment race jurisprudence and de jure discrimination could not be narrowly viewed as it was in many other places in the country as a binary phenomenon involving African-Americans and Anglos. And he was aware that the relationship between the African-American and Latino communities in Dallas, Texas, paralleled that in other states: there were aspects of cooperation and coalition building, but also dimensions of conflict, which is understandable when the dominant political discourse is couched in terms of competition among diverse communities over scarce resources, including judicially created "rights" and entitlements.[300] The *Tasby* Litigation itself provides a glimpse into the Mexican-

and-other-unsolicited-commentary-on-dallasisdorg/ (discussing DISD's actions following the revelation that the district had overspent its operating budget by tens of millions of dollars).

300. *See, e.g.*, George A. Martinez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO L. REV. 213, 0215 (1998). Professor Martinez discusses the seeming tension between Latinos and African-Americans as Latinos assume the mantle of the "largest minority group in the United States." *Id.* at 213. Professor Martinez argues that the "legal construction of Mexican-Americans as white" early in the twentieth century has handicapped later efforts at coalition building. *Id.* at 214. Professor Martinez's analysis uses as one of its examples an incident in Dallas, Texas, in which "some African-American leaders in Dallas . . . argued that Mexican-Americans should not share in the benefits or gains achieved by African-Americans" because they were not similarly discriminated against. *Id.* at 215. Professor Martinez tracks the "racialization" of Mexican-Americans, rebutting claims they were advantaged by this early racial construction and pointing to their experiences of isolation, discrimination, and segregation. *Id.* at 215-16. He argues that by understanding the Mexican-American experience and the community's long history of waging a "battle for civil rights," the "free-rider" misunderstanding can be avoided. *Id.* at 217. Professor Martinez's documentation of these early civil rights battles begins with two school desegregation cases, *Westminster School District v. Mendez*, 161 F.2d 774 (9th Cir. 1947), and *Gonzalez v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951). Martinez, *supra* at 217. Both of these cases predate and anticipate *Brown v. Board of Education*, 347 U.S. 483 (1954), by holding that intentional racial discrimination and the

American community's use of litigation to expose their experiences of discrimination and marginalization, and to secure their constitutional rights and remedies.[301] Some argue that acknowledging Latinos' experience of discrimination and segregation and exploring it through a lens that moves away from a binary, racialized jurisprudence to one that is truly multiracial and multicultural "may dilute the claims of African-Americans or undermine the claim of African-American exceptionalism" within constitutional jurisprudence.[302] The *Tasby* Litigation's inclusion of Mexican-Americans within its remedial embrace proves this is not the case. Judge Taylor and Judge Sanders both made it abundantly clear that the insidious acts of discrimination and segregation within Dallas and DISD giving rise to a constitutional violation and the court ordered remedies were not limited to the statutorily authorized segregation of African-American students.[303] Applying the Fifth Circuit's Fourteenth Amendment jurisprudence to Mexican-Americans, Judge Taylor, and more importantly, Judge Sanders, affirmed the broader principles of educational equality enshrined in the Constitution. Both Judges held that the Fourteenth Amendment prohibits discrimination in its many forms, including the segregation and isolation of identifiable racial and ethnic groups such as Mexican-Americans, or the unequal distribution of programmatic resources and disparities in funding that have a racial profile. The court's commitment to desegregating DISD meant that all of the students in DISD were constitutionally entitled to an equal education, and since that right had been denied Mexican-American students as well as African-American students, they too were to be addressed in the court's desegregation plan.

Examining the *Tasby* Litigation with an eye toward the role played within the litigation by discrimination against Mexican-American students casts much needed light on the school district's current mandate to address every student's educational needs and what that means within what is now a majority Latino school district. The original *Tasby* plaintiffs included Mexican-American students and their parents, but DISD objected to their participation in the litigation claiming they were not a protected class under the Fourteenth Amendment.[304] In resolving this issue, Judge Taylor held that "Mexican-Americans constitute a clearly

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resulting isolation of Mexican-Americans violated the Fourteenth Amendment and "placed a stamp of inferiority on Mexican-Americans" not unlike that imposed by the segregation challenged in *Brown*. *Id.* at 218. Pointing to the 1952 Texas case, *Hernandez v. Texas*, 251 S.W.2d 531 (Tex. Crim. App. 1952), Professor Martinez highlights the uphill struggle Mexican-Americans faced in the civil rights arena as they battled to secure their right to be treated as a protected class under the Fourteenth Amendment, the early Texas courts' unwillingness to do so, and the importance of subsequent cases reversing that early legal position. *Id.* at 219-20.

301. Tasby v. Estes, 517 F.2d 92, 95-96 (5th Cir. 1975) (deciding an appeal by the Mexican-American plaintiffs in the desegregation suit against DISD).

302. Martinez, *supra* note 300, at 221.

303. *See, e.g.*, Tasby v. Wright, 520 F. Supp. 683, 705-07 (N.D. Tex. 1981) (Sanders, J); Tasby v. Estes, 342 F. Supp. 945, 947 (N.D. Tex. 1971) (Taylor, J.).

304. *Tasby*, 517 F.2d at 96.

separate and clearly identifiable ethnic group," but he went on to hold that "the plaintiff Mexican-Americans have failed in maintaining the burden of proof" on the question whether they were subjected to unconstitutional segregation.[305] Despite his evidentiary finding, Judge Taylor ordered that "any plan or remedy must take the Mexican-American into consideration."[306] In order to ensure that the Mexican-American community was integrally involved in the development of desegregation plans for DISD, Judge Taylor created a "tri-ethnic committee as distinguished from a bi-racial advisory committee" for the litigation, setting the stage for what the court hoped would be a truly multiracial dialogue.[307] On appeal, plaintiffs argued that the court erred in failing to find de jure discrimination against Mexican-Americans, while DISD argued that the error was more fundamental.[308] DISD's position, that Mexican-Americans should not be treated as a distinct ethnic group under the Fourteenth Amendment for public school desegregation purposes raised an unresolved issue at the time.[309]

DISD's argument regarding Mexican-American students' standing in school desegregation litigation was an issue ripe for resolution, but *Tasby* ended up not being the first case to present the matter to the Fifth Circuit for its resolution. In the appeal of this order, the Fifth Circuit affirmed the district court's treatment of Mexican-Americans as a separate ethnic group for purposes of desegregation, but disagreed with the lower court's finding that the community had failed to prove de jure discrimination.[310] According to the Fifth Circuit, "[s]ufficient statistical evidence is available in the record to establish the isolation of Mexican-American students in the DISD from white students and the DISD's practice of 'integrating' its Mexican-American students with black students."[311] In reaching this important result, the Fifth Circuit explicitly relied upon its very recent decision in *United States v. Texas Education Agency (Austin)*.[312] Judge Sanders has already shown that district court judges are pragmatic jurists aware of fellow judges facing similar factual or legal issues, and Judge Taylor was no different. The *Austin* case was obviously known to the other federal judges in Texas and Judge Taylor, in reaching his 1971 ruling, refers to the district court judge in the *Austin* case, Judge Jack Roberts, and patterns his holding on Judge Roberts' refusal to find de jure segregation of Mexican-Americans in the Austin public schools, the finding ultimately reversed on appeal.[313] The question of the status of Mexican-Americans in school desegregation litigation was not new to the federal courts, but the Fifth Circuit's response in *Austin*, and repeated in

305. *Tasby*, 342 F. Supp. at 948.
306. *Id.*
307. *Id.*
308. *Tasby*, 517 F.2d at 102.
309. *Id.*
310. *Id.* at 106.
311. *Id.*
312. 467 F.2d 848 (5th Cir. 1972)).
313. *Tasby*, 342 F. Supp. at 948-49.

Tasby laid the ground rules for the racial equality debate in Texas. As outlined by the Fifth Circuit, "at least in the State of Texas, segregation of Mexican-Americans in the public schools constitutes a deprivation of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution."[314] This ruling had a profound impact on the DISD litigation. The district court, following the Fifth Circuit's direction on this point, continued to closely examine single race schools, but now it was directed to turn its critical lens on predominately minority schools as well, schools that had significant combined Latino and African-American student populations. The federal courts in Texas were not allowed to "use" Mexican-American students to integrate their school districts; for purposes of achieving all desegregation practicable and remediating all "vestiges" of prior de jure segregation, the Fifth Circuit's courts were directed to reject any plans or remedies that treated Mexican-Americans as "white," whether explicitly or implicitly, for desegregation purposes.[315]

In 1982, Judge Sanders entered an order dissolving the Tri-Ethnic Committee established by Judge Taylor.[316] Originally directed in 1971 to de-

314. *Tasby*, 517 F.2d at 107 (citing Hernandez v. Texas, 347 U.S. 475 (1954); Cisneros v. Corpus Christi Indep. Sch. Dist., 467 F. 2d 142 (5th Cir. 1972). The holdings in *Austin, Cisneros* and ultimately *Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973), were significant; they affirmed the constitutional principle that racial and ethnic groups other than African-Americans were protected by the Fourteenth Amendment, that de jure discrimination could exist apart from statutorily mandated segregation, and that school districts could not treat Mexican-Americans as "white" for purposes of defining segregated or integrated schools. *Keyes*, 413 U.S. at 197; *Austin*, 467 F.2d at 852, 861, 863; *Cisneros*, 467 F.2d at 147, 149. The Supreme Court in *Keyes* made it abundantly clear that where Mexican-Americans and African-Americans suffered discrimination in treatment, they would be combined for purposes of determining whether a school could be considered a minority school and therefore segregated. *Keyes*, 413 U.S. at 199. Professor Thomas Romero has written extensively about the *Keyes* case and the emergence of a constitutional tri-ethnic jurisprudence. *See, e.g.*, Tom I. Romero II, *La Raza Latina? Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245, 257, 282 (2007); Tom I. Romero II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73, 74, 77, 84 (2004).

315. There exists a rich legal scholarship discussing the history of school desegregation litigation in Texas and the Latino community's fight for equality. *See, e.g.*, Ariela Gross, *Texas Mexicans and the Politics of Whiteness*, 21 LAW & HIST. REV. 195, 195-96 (2003) (offering insights into the problematic view of civil rights litigation and jurisprudence as binary in the face of extensive data and literature historically documenting discrimination against Mexican-Americans). The challenge at the national level to develop a truly multiracial constitutional jurisprudence is also discussed in the scholarly literature. *See, e.g.*, Lupe S. Salinas & Robert H. Kimball, *The Unequal Treatment of Unequals: Barriers Facing Latinos and the Poor in Texas Public Schools*, 14 GEO. J. POVERTY LAW & POL'Y 215, 216-18 (2007) (looking at the question of equity and equality in providing education to Latinos and highlighting potentially new forms of discrimination); *see also* Jamie L. Crook, *From* Hernandez v. Texas *to the Present: Doctrinal Shifts in the Supreme Court's Latina/o Jurisprudence*, 11 HARV. LATINO L. REV. 19 (2008); Neil Foley, *Over the Rainbow:* Hernandez v. Texas, Brown v. Board of Education, *and* Black v. Brown, 25 CHICANO LATINO L. REV. 139 (2005); Steven Hamon Wilson, *Mexican-Americans and the Politics of Racial Classification in the Federal Judicial Bureaucracy, Twenty-Five Years After* Hernandez v. Texas, 25 CHICANO-LATINO L. REV. 201 (2005).

316. Tasby v. Wright, 559 F. Supp. 9, 12, (N.D. Tex. 1982).

velop and receive input from the community about desegregation, since 1976 the Committee's role had become less clear.[317] In discussing the Committee in his opinion, Judge Sanders points to similar committees and their limited usefulness in other school desegregation cases, including Boston, Denver, and Dayton, and cites to a number of law review articles examining the changing role of community advisory groups similar to the Tri-Ethnic Committee in the school cases.[318] At this stage in the *Tasby* Litigation, the question of monitoring DISD's compliance with the desegregation plan had been handed over to an "external auditor who [would] provide an annual report to the Court."[319] True to his pragmatic and democratic principles, Judge Sanders' opinion evokes the important role played by the Tri-Ethnic Committee in the early stages of the litigation in "facilitating community acceptance of desegregation and providing minorities a meaningful participation in implementing desegregation," but notes that its effectiveness in this arena had come to an end.[320] Judge Sanders finds that minorities are well represented in DISD administration and that this should "afford the minority community a substantial role in school affairs."[321] Finally, and perhaps most importantly, Judge Sanders acknowledges that a single committee cannot be said to "represent or express all or even most points of view" from the community and that at this point in the litigation the parties and their lawyers, "in open court, are the most reliable sounding board available."[322] In reaching this result, Judge Sanders obviously considered the fact that one of those intervenors, the Black Coalition, was a broad-based coalition of African-American and Mexican-American parents and organizations. Judge Sanders' decision opened the court up to the broader community dialogue about desegregation and reflected his belief that successful institutional change required more than a court order.

When Judge Sanders dismissed the *Tasby* Litigation, he did so with the knowledge that a harmonious multicultural dialogue within DISD, within the Board of Trustees, and within the community would be crucial to the district's future success. Dallas had significantly changed since the *Tasby* Litigation was filed, and DISD's obligation to provide an equal education to all of its students could no longer be discharged by simply adhering to the old desegregation plan. DISD needed to develop a new vision of equality that would guide it as it moved out from under the court's supervision, and it needed to be sensitive to new forms of segregation and dis-

317. *Id.* at 10.
318. *Id.* at 10-11.
319. *Id.* at 11.
320. *Id.*
321. *Id.*
322. *Id.* In discussing the remaining parties ("Who's Still Here") in *Tasby v. Wright*, 520 F. Supp. 683, 689-90 (N.D. Tex. 1981), Judge Sanders describes the Black Coalition as a "broad-based minority community group composed of parents, patrons and taxpayers with children in the DISD, as well as representatives from a number of civic, political and ecumenical associations in the black community" that intervened on the behalf of both African-American and Mexican-American community members.

crimination at the individual school level and institutionally. The desegregation plan ordered and implemented by Judge Sanders had achieved its stated goals, but it was not designed to be a narrowly drawn blueprint for the future of the district. The plan's constitutional principles were sound, but any future application of those principles had to take into account the changing circumstances of the district. This is what we discussed when Judge Sanders entered a final judgment dismissing the *Tasby* Litigation. The federal district court judges who handled the school cases, including Judge Sanders, drafted their desegregation plans with an eye towards the immediate remedial concerns facing their school districts. These plans were never intended to cast a long juridical shadow permanently limiting the ability of school districts to develop new policies and programs as needs demanded. Clearly, in all of these school cases when the district courts finally dismissed the litigation everyone, including the judges, expected the school boards and their districts to fulfill their constitutional mandate to continue to pursue equality in providing educational opportunities for all of their students. This is the core principle that must guide any school district's treatment of its students including DISD. The question remains whether the lessons of *Tasby* require more of DISD? Can DISD, its administrators and Board of Trustees develop a more nuanced vision of educational equality and equity in its schools and classrooms after thirty years of constitutional litigation?[323]

2. *Desegregation Litigation After* Tasby*: The* Santamaria *Case*

A recent lawsuit involving DISD illustrates the changing dynamics of racial segregation and the evolving jurisprudence of educational equality in a post unitary world. In 2006, a lawsuit was filed alleging "unlawful segregation of Latino school children at Preston Hollow Elementary

323. The contours and resolution of this debate are beyond the scope of this Article, but when Judge Sanders dismissed the *Tasby* Litigation in 2003, many of the issues that are now coming to define the public debate about equality in public education were already known or at least anticipated. *See, e.g.*, Khin Mai Aung & Christina Mei-Yue Wong, *Advancing Diverse Learning for Asian Pacific Islanders*, 15 ASIAN AM. L.J. 205 (2008); Josie Foehrenbach Brown, *Escaping the Circle by Confronting Classroom Stereotyping: A Step Toward Equality in the Daily Educational Experience of Children of Color*, 11 ASIAN L.J. 216 (2004); Henry Der, *Resegregation and Achievement Gap: Challenges to San Francisco School Desegregation*, 11 ASIAN L.J. 308 (2004); Charles E. Dickinson, *Accepting Justice Kennedy's Challenge: Reviving Race-Conscious School Assignments in the Wake of* Parents Involved, 93 MINN. L. REV. 1410, 1411 (2009) (noting that the Supreme Court's opinion in *Parents Involved* prohibits racially explicit integrationist policies, including the use of race and ethnicity in school assignment plans, while seeming to accept larger integrationist goals); Mariana Kihuen, *Leaving No Child Behind: A Civil Right*, 17 AM. U. J. GENDER SOC. POL'Y & L. 113 (2009); Rosyln Arlin Mickelson, *Twenty-First Century Social Science on School Racial Diversity and Educational Outcomes*, 69 OHIO ST. L.J. 1173 (2008); Maurice E.R. Munroe, *Unamerican Tail: Of Segregation and Multicultural Education*, 64 ALB. L. REV. 241 (2000); Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L.R. 1 (2008); Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467 (2007); Tom I. Romero II, *No Brown Towns: Anti-Immigrant Ordinances and Equality in Educational Opportunity for Latina/os,* 12 J. GENDER RACE & JUST. 13 (2008); William L. Taylor, *Assessment as a Means to a Quality Education*, 8 GEO. J. ON POVERTY L. & POL'Y 311 (2001).

School . . . , an elementary school in a predominantly Anglo neighborhood in Dallas."[324] At the core of the *Santamaria* case was the questionable legality of in-school segregation of Latino students justified by "language differences." In a district that is majority Latino and with a significant student population, including non-Spanish speakers, identified as Limited English Proficiency, the questions raised in *Santamaria* are critical to the district's future. While DISD was not itself found responsible for the school's policy and practice of racial segregation, there is certainly an argument to be made that the district has had its one "free bite at the apple" and as a result of the *Santamaria* case is now on notice of the potential problems that can occur without careful policies to address the implementation and monitoring of programs with segregative potential.[325]

The plaintiffs in *Santamaria* alleged that Latino school children were being segregated from Anglo students within the school through subject class and classroom assignments; plaintiffs alleged that the predominately Latino classes were physically isolated from the predominantly Anglo classes, creating halls within the school which were identifiable by their ethnic makeup. According to the plaintiffs, the principal consciously and intentionally segregated the students in this fashion in order to encourage more of the Anglo parents in the immediately surrounding area to send their children to the school, thereby stopping "white flight."[326] The plaintiffs contended that this behavior denied both Anglo and Latino students the opportunity to be in classes together, and caused "feelings of inferiority and stigmatization" in the Latino students.[327] DISD's response to these allegations focused on the alleged equality in the educational experiences provided in the different classrooms; according to DISD, so long as the school complied with district policies and procedures in developing the curriculum presented in the Latino and the Anglo classrooms, there was no unlawful segregation or discrimination.[328] The plaintiffs in putting on their case at the trial focused on the fact that Latino students who

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324. *See* Santamaria v. Dallas Indep. Sch. Dist., No. Civ. A.3:06CV692-L, 2006 WL 3350194, at *1 (N.D. Tex. Nov. 16, 2006). The opinion is a lengthy review of the facts presented at trial, witness by witness, and statistic by statistic, followed by the district court's careful and clear "Findings of Fact" and "Conclusions of Law." *Id.* Once more, the district court finds its expression in a highly fact-intensive legal rhetoric, which allows it to exercise its unique skills in terms of finding facts and assessing the credibility of witnesses. *See* Armour, *supra* note 5, at 226-28 (discussing the federal trial courts' unique role and judicial rhetoric).

325. Michelle R. Wood, *ESL and Bilingual Education as a Proxy for Racial and Ethnic Segregation in U.S. Public Schools*, 11 J. GENDER RACE & JUST. 599 (2008); Lupe S. Salinas, *Latino Educational Neglect: The Result Bespeaks Discrimination*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 269, 298 (2005) (discussing the "first Latino school case which sought to end segregation in Texas public schools," *Independent School District v. Salvatierra*, 33 S.W.2d 790, 792-93 (Tex. Civ. App.—San Antonio 1930, writ dism'd w.o.j.), in which the district justified segregating Latinos because of language).

326. *Santamaria*, 2006 WL 3350194, at *2.

327. *Id.* at *3.

328. *See, e.g.*, Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420 (2004).

were proficient in English were placed in the predominantly Latino ESL classes, while Anglo students with the same "language needs" as these Latino students were channeled into the "General Education Classes," also known as "the neighborhood classes."[329] The plaintiffs prevailed in their argument that the difference in this treatment of students with similar language needs was based solely on race and ethnicity.[330]

The Dallas federal district court judge assigned the case, Judge Sam Lindsay, found that the segregation was "unexplainable on grounds other than race or national origin."[331] The court went on to find that the segregation in Preston Hollow Elementary School undertaken by Principal Parker constituted a significant deviation from the district's normal and accepted procedures, a finding that was crucial to the court's ultimate decision that the segregation was due solely to the principal's actions and did not reflect DISD's policy, practice, custom, or procedure.[332] Judge Lindsay, an African-American appointed to the federal bench by President Clinton in 1997, is not dispassionate in his consideration of defendant DISD's position that the Latino students were receiving an education equal to the Anglo students when measured by reference to the curricular content of the classes. In response to this argument, Judge Lindsay states: "The court is baffled that in this day and age, Defendants are relying on what is, essentially, a 'separate but equal' argument."[333] Judge Lindsay cites to *Sweatt v. Painter* to make it clear that whether education is unconstitutionally segregated or unequal cannot be measured merely by objective factors that look at the room, the desks, the books, and the curriculum.[334] In *Sweatt v. Painter*, the University of Texas attempted to create a separate "law school" for the African-American law students but the school was ordered by a federal trial judge to admit the students. Echoing the theme in *Sweatt*, which was relied upon in framing *Brown*'s arguments, Judge Lindsay embraces the principle that determining whether or not an equal education is being provided to students requires consideration of a range of experiential and personal factors, including the question of individual choice. In doing so he casts serious doubt on the DISD's claim that the Latino school children who were English proficient would have chosen the Latino ESL classes over the Anglo General Education classes if given the choice.[335] Judge Lindsay's opinion revisits *Brown* and its more nuanced approach to the core stigmatic injury of segregation by focusing on the minority students' and

329. *Santamaria*, 2006 WL 3350194, at *2-4.

330. *Id.* at *47-48.

331. *Id.* at *33 (quoting Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266-67 (1977)); *see* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 (2003).

332. *Santamaria*, 2006 WL 3350194, at *49.

333. *Id.* at *38.

334. *Id.* (citing Sweatt v. Painter, 339 U.S. 629, 633 (1950)).

335. *Santamaria*, 2006 WL 3350194, at *38.

community's perceptions of difference and isolation fostered by their treatment at the school.

Ultimately, Judge Lindsay refused to hold DISD responsible for the policies and practices of racial and ethnic segregation that he found permeated Preston Hollow Elementary School,[336] despite the fact that this was not a case where the acts of racial discrimination or ethnic segregation were isolated or episodic. Quite the contrary, the trial record recounts the testimony of Preston Hollow teachers and administrators who acknowledged the segregation was a fact of life at the school.[337] Significantly, the record also reflects contacts between the Latino parents at Preston Hollow and DISD Superintendent Hinojosa, including a phone call and a letter, in which the parents attempt to put the superintendent on notice of the problem and ask for his help.[338] In reaching his conclusion that DISD could not be held liable despite the open (and rather notorious) policy and practice of racial and ethnic segregation throughout the Preston Hollow Elementary School, Judge Lindsay appears satisfied the superintendent handled the problem appropriately.[339] Noting that DISD has a clear policy of nondiscrimination, Judge Lindsay is sympathetic to the superintendent's need to rely on others in situations like this and to the problems inherent in supervising a district as large and cumbersome as DISD, reasoning that neither Dr. Hinojosa nor the school board could be expected to know what is going on in the individual schools in the district on a daily basis.[340]

While refusing to hold DISD responsible for what appeared to the court to be Principal Parker's isolated conduct, the court found that certain of the districts administrators, apparently some area superintendents, knew of parental and community concerns about racial discrimination at Preston Hollow and the court expressed puzzlement as to why this information was not passed on to Superintendent Hinojosa.[341] Although Judge Lindsay expresses some concern regarding how the matter was handled, ultimately he concludes that the plaintiffs failed to meet the Fifth Circuit's "stringent test for imposing governmental liability" in civil rights cases.[342] According to Judge Lindsay, *Santamaria* was a case where DISD failed to take "affirmative steps" to educate itself and redress legitimate parental concerns, but such conduct did not rise to the level of intentionality needed to turn negligent oversight into unconstitutional conduct.[343] Online discussions of the *Santamaria* case revealed a range of comments, some claiming that this type of discrimination had been going on since the late 1970s and early 1980s, others arguing that Preston

336. *Id.* at *44.
337. *Id.* at *47.
338. *Id.* at *42-43.
339. *Id.*
340. *Id.* at *44.
341. *Id.* at *42.
342. *Id.*
343. *Id.* at *44.

Hollow would be a perfect place to implement a program of economic integration, and still others expressing anger and frustration over the fact that one of the school teachers involved in the litigation was fired.[344] A more detailed analysis of the *Santamaria* decision is beyond the scope of this Article, but the case points to the efficacy of parents, students, staff, and community members having access to an independent forum or advocate when issues such as discrimination need to be raised within a large school district such as DISD.[345]

It is well-documented that large, complex organizations, such as DISD, do not actively seek to expose problems that might impose additional administrative burdens or lead to greater legal exposure and liability.[346] DISD is large and hierarchical, and it uses its chain of command to distribute policy directives and oversee their implementation, passing needed information from the schools up to the Superintendent, from the Superintendent to the Board of Trustees and from the Board back to the Superintendent and then down to the schools through the district's administrative infrastructure. There is no dispute about the limited legal role of the School Board; it makes the general policy decisions for the district and it adopts, as needed, a range of more specific policy directives that shape DISD's operation.[347] In this institutional context the Fifth Circuit's highly deferential jurisprudence narrowly defining those instances in which a large urban district like DISD that must depend upon its principals to run their schools and implement the programmatic mandates issued by the Board might be held liable for the unconstitutional conduct of its employees raises serious policy questions. Obviously it is troubling that *Santamaria* occurred only three years after DISD was released from the supervision of the district court, especially in light of DISD's promises and covenants in the *Tasby* Litigation, which were recited in open court by then-Superintendent Moses, referenced in Judge Sanders' opinion dismissing the *Tasby* Litigation, and published by DISD in its policies—that

344. *See, e.g.*, Posting of Robert Wilonsky to Dallas Observer Blog, Don't Forget, the DISD Still Has a Preston Hollow Lawsuit to Deal With, http://blogs.dallasobserver.com/unfairpark/2008/10/ (Oct. 16, 2008, 3:49 p.m.).

345. The district court's reference to the chain of command and the implication that the parents, and the teachers who became involved with the parents, should have followed the district's normal complaint procedures is interesting because this process directs the parents to go first to the classroom teacher, then to the principal, and then work their way up the chain. It is difficult to believe that an allegation of school-wide racial segregation is the type of problem intended to be handled in this fashion. *See* Dallas Independent School District's Policies and Procedures (local), Apr. 24, 2008, http://www.tasb.org/policy/pol/private/057905/pol.cfm?DisplayPage=FNG(LOCAL).pdf&QueryText=COMPLAINT; Dallas Independent School District's Policies and Procedures (Exhibit), Jan. 29, 2009, http://www.tasb.org/policy/pol/private/057905/pol.cfm?DisplayPage=FNG(XHIBIT).pdf&QueryText=COMPLAINT.

346. *See* Armour, *supra* note 5, at 178-225 (discussing prison leaders' reluctance to undertake proactive monitoring and investigation of conditions that might uncover constitutional problems).

347. DISD recently published its organizational structure in a 250 page document entitled *Dallas ISD Central Staff Organization Chart (2008)*, which is available at http://dallasisdblog.dallasnews.com/September%202008%20DISD%20Org%20Charts.pdf (last visited Sept. 8, 2009).

DISD would be especially vigilant in ensuring that there would be no resegregation or racial discrimination in its schools.[348] These promises and reassurances following as they did thirty years of desegregation litigation evoke a heightened sense of concern and responsibility on the part of DISD to be extra vigilant in avoiding any racial discrimination, segregation, isolation or stigmatization in its schools.

The *Santamaria* case raises a number of questions concerning federal trial courts' treatment of school districts recently released from judicial supervision under a district-wide desegregation plan.[349] As a matter of constitutional policy, when a school principal, such as Principal Parker, implements a school-wide policy and practice of racial segregation, it is difficult to see how a reasonably prudent policy maker, even under the Fifth Circuit's highly deferential standards for school districts, can claim that it neither knew nor should have known what was going on, especially in light of the continuous monitoring previously mandated under the court's desegregation order.[350] It is equally difficult to comprehend as a matter of constitutional policy that in order for an overt, continuous school-wide policy and practice of racial segregation to meet the Fifth Circuit's institutional liability standards, such segregation must permeate all of the schools in the district or have been explicitly authorized or ratified by the Board of Trustees.[351] The district court in *Santamaria* seems to treat the case as one free bite at the apple for DISD.[352] The size of the district, the difficulty inherent in managing so many schools, and the district's hierarchical institutional structure are viewed by the district court as limiting DISD's constitutional responsibilities,[353] even though the *Tasby* Litigation dealt with similar issues and challenges for over thirty years without reaching this conclusion. Effectively, the holding insulates DISD from any legal responsibility for acts of institutional racial discrimination and resegregation undertaken openly in one of its schools.[354]

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348. *See* Tasby v. Moses, 265 F. Supp. 2d 757, 766-67 (N.D. Tex. 2003); BD. OF TRS., DALLAS INDEP. SCH. DIST., DECLARATION OF COMMITMENTS AND COVENANTS UPON RELEASE FROM COURT SUPERVISION, *available at* http://www.dallasisd.org/about/boardcandc.htm.

349. *See generally* Santamaria v. Dallas Indep. Sch. Dist., No. Civ. A. 3:06CV692-L, 2006 WL 3350194 (N.D. Tex. Nov. 16, 2006).

350. *See* Armour, *supra* note 5, at 178-81, 213-25 (discussing the Fifth Circuit's evolving standard in "municipal" liability cases under 48 U.S.C.§ 1983).

351. The *Santamaria* opinion warrants further study on this point since it appears to misapply the policy and practice element of a civil rights municipal liability claim to the facts of the case. *Id.*

352. *See Santamaria*, 2006 WL 3350194, at *42-44.

353. *See id.*

354. The court's application of the municipal liability standard in *Santamaria* creates a conundrum. Parents with concerns about the unconstitutional conduct of DISD employees are told to work their way up through the system, but it would appear that taking their issues directly to the Board of Trustees, bypassing even the Superintendent, is the only way to ensure that DISD is put on legal notice. *See id.* at *34-37 (outlining relevant Supreme Court and circuit court precedent discussing those situations in which conduct within the institution which is not intermittent or episodic, but rises to the level of a custom or practice, will suffice to establish institutional liability without the actual knowledge or authorization of the designated "policymaker," in school cases the Board of Trustees).

The *Santamaria* case offers important insights into the concerns expressed by some when Judge Sanders dismissed *Tasby*, concerns that the district would not be vigilant in monitoring its schools for acts of discrimination and that parents and students would not have access to an open forum in which to air their concerns. *Santamaria* could be considered evidence that the federal courts are available, but it does not fully address the issue of how districts who have emerged from desegregation litigation should be treated when new acts of segregation and discrimination are raised. Is a unitary district to be treated as a "new" district, or should past acts and conduct be considered in evaluating the district's liability? On balance, Judge Lindsay's opinion moves the discussion about equality and segregation in DISD's schools forward by focusing on the experience of isolation, difference, and second class status imposed on the Latino students at Preston Hollow as the experiential core of stigmatic racial segregation.[355] Echoing *Austin*, *Cisneros*, *Tasby*, and *Keyes*,[356] Judge Lindsay's opinion ensures that future debates over educational equality in DISD will need to address these issues.

3. *Defining Equality and Equity in a Post Unitary District: The Question of Intra-District Per-Pupil Funding Comparability*

One issue all desegregation cases addressed was resource allocation—whether there were racialized disparities within the district that needed to be remediated.[357] *Tasby* was no different,[358] and when Judge Sanders dismissed the case, the question of equity and equality in per-pupil funding had been an issue in the school desegregation cases for years.[359] Because of the racial and ethnic makeup of DISD, integration as a remedial goal quickly gave way to resource reallocation, building new schools and funding programs to ensure educational equality, as the court's major remedial strategy.[360] For example, one of the major programmatic ventures of DISD under the desegregation plan was to open new schools called Learning Centers in minority neighborhoods that had previously been ignored or underserved by the district, and to ensure students previously denied access to an adequate education would have the quality of programs needed to put them on par with students in the Anglo schools.[361]

355. *See, e.g.*, *id.* at *9-12.
356. *See supra* notes 300-23 and accompanying text.
357. *See, e.g.*, Tasby v. Wright, 520 F. Supp. 683, 741-42 (N.D. Tex. 1981).
358. *Id.*
359. *See, e.g.*, Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 437 & n.1 (8th Cir. 1985); Vaughns v. Bd. of Educ., 18 F. Supp. 2d 569, 588 (D. Md. 1998).
360. *See Tasby*, 520 F. Supp. at 737 (indicating DISD's statistical enrollment by race for grades four through eight); *id.* at 741-42, 749-50 (instructing DISD to create desegregation plans throughout the district similar to those in East Oak Cliff, which had received an increased budget allocation and improved teacher-to-pupil ratios).
361. *See* Tasby v. Moses, 265 F. Supp. 2d 757, 759, 767 (N.D. Tex. 2003) (discussing the court ordered DISD Learning Centers, which were "designed to close the achievement gap" between minority and Anglo students); *Tasby*, 520 F. Supp. at 749-50 (requiring desegregation plans from DISD, which included "[p]rogrammatic remedies").

In targeting and reallocating resources in this fashion, the court exercised its extensive remedial powers to equalize educational experiences across the district, anticipating Judge Lindsay's opinion in *Santamaria*, in which the court examined educational equality from the perspective of the individual student's daily experiences.[362] Yet how does a unitary school district like DISD approach the question of resource allocation and per-pupil expenditure after the court's desegregation mandate has been met? Should the district revisit its overall resource allocation policies by school, by student, or by program? What does it mean to allocate resources in a manner that is equitable and equal from school to school, student to student?[363] The Supreme Court of Texas addressed the question of funding comparability in terms of the state's constitutional prohibitions and mandates when it decided *Edgewood Independent School District v. Kirby*;[364] while the case raised very different issues from those raised by the federal constitution's Fourteenth Amendment, at least in the Texas context, the question of funding comparability is an issue with which school districts are familiar.[365]

This question of per-pupil and per-school funding comparability within the district came to a head in April 2009, but not because of state or federal constitutional concerns.[366] In an unprecedented move in the Spring of 2009, DISD announced it would have to cut funding at thirty-four campuses, some of which were initially created by Judge Sanders' desegregation plan.[367] The Texas Education Agency (TEA), the state's educational oversight agency,[368] appeared to take the position that DISD had been "inaccurately filling out a report used by the state and federal government to determine" DISD's eligibility for Title I funds, federal funds targeting low-income students.[369] Title I requires school districts to meet certain school funding parameters; under this program the per-pupil funding per school district-wide must fall "within 10 percent of a district's average per-campus allocation."[370] DISD was informed that failure to

362. *See* Santamaria v. Dallas Indep. Sch. Dist., No. Civ. A. 3:06CV692-L, 2006 WL 3350194, at *39 (N.D. Tex. Nov. 16, 2006). (analyzing the question of educational equality in terms of experiential as well as objective factors).

363. The question of equity and equality in education has generated a healthy discourse. *See, e.g.*, William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545 (2006).

364. 777 S.W.2d 391, 392 (Tex. 1989), *vacated in part*, 804 S.W.2d 491, 492-93 (Tex. 1991); *see also* Neeley v. West Orange-Cove Consolidated Indep. Sch. Dist., 176 S.W.3d 746, 751 (Tex. 2005); W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 107 S.W.3d 558, 563 (Tex. 2003); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 725 (Tex. 1995); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 492 (Tex. 1992).

365. *See Alanis*, 107 S.W.3d at 563.

366. *Id.*

367. Tawnell D. Hobbs & Kent Fisher, *Dallas Schools Must Cut Funding at 34 Campuses to Qualify for Aid*, DALLAS MORNING NEWS, Apr. 9, 2009, *available at* http:www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories.

368. About TEA, http://ritter.tea.state.tx.us/about.html (last visited Sept. 13, 2009).

369. Hobbs & Fisher, *supra* note 367.

370. *Id.*

meet this funding comparability standard could result in the district forfeiting all of its Title I funding. TEA expressed concern that DISD had not been including in its funding comparability calculations and reports all of the figures from its specialized schools, its most expensive campuses, which included, in addition to the Learning Centers, three of the district's magnet high schools.[371] The magnet high schools were also among the special programs developed and provided enhanced funding under the desegregation plan.[372] At the final court hearing in 2003, when Judge Sanders was asked to dismiss the *Tasby* Litigation, DISD made a special promise to the Court and the community that it would continue to pursue the goals and mandates of the desegregation plan including supporting the programs created under the plan.[373] True to its word, many of these same programs were shielded from the budget cuts and staff riffs that shook DISD following the revelation of a massive budget shortfall at the end of the 2007–2008 school year.[374] The question was raised in the face of this new financial crisis whether the district would once more exempt these schools and programs from any resource or funding comparability requirements, whether federal, state, or district.[375]

The Title I revelations sent a seismic tremor through the district and quickly mobilized the community, many coming forward to ask for special funding treatment for the Learning Centers and magnet high schools, focusing on their roles in the desegregation plan, their successes, and their national reputations.[376] Not everyone took this position; some advocated for the reallocation of resources or at least the equal allocation of resources across the district.[377] It is not surprising that many of these community advocates spoke on behalf of schools whose per-pupil expenditures fell on the extremely low end of the district's allocations. By May 30, 2009, the debate had clarified: there were those who thought the special programs deserved more money and should be exempt from cuts under the Title I guidelines; there were those who thought the per-school and per-pupil allocations across the district should be more equitable; and there were those who argued the district should put new money into the underfunded schools in order to increase comparability across the district

371. The three schools, often referred to as the district's flagship schools, are Booker T. Washington High School for the Performing and Visual Arts, Talented and Gifted, and Science and Engineering. *Id.*

372. *See supra* notes 156-246 and accompanying text (discussing the Court Ordered Plan for Desegregating DISD).

373. *See supra* notes 248-55 and accompanying text (discussing the final dismissal of the *Tasby Case*).

374. *See* Tawnell D. Hobbs, Dallas ISD Magnet Schools May be Spared from Funding cuts, DALLAS MORNING NEWS, May 12, 2009.

375. *Id.*

376. *See, e.g.*, Letter from Peter O'Donnell, Jr. to Dr. Michael Hinojosa, Superintendent, Dallas Indep. Sch. Dist. (May 12, 2009), *available at* http://www.schbd.com/doc/15387758/ODonnel-Letter; Postong of Tawnell d. Hobbs to Dallas Indep. Sch. Dist. Blog, http://dallasblog.dallasnews.com/archives/2009/04/busy-night-for-disd-trustees.html (Apr. 23, 2009, 15:59 CST).

377. Steve Blow, *Learning Centers Lose Purpose, Not Defenders*, DALLAS MORNING NEWS, Apr. 23, 2009, at B1.

without cuts.[378] Over the summer, DISD "redid" the numbers under Title I's comparability formulas and worked to exempt certain schools from the original proposed cuts. By summer's end, the Board had a plan; not everyone was happy with it, but at least the threatened cuts in Title I funds to the district were avoided.[379]

These questions of intra-district resource allocation patterns will become increasingly important as school districts move beyond their court ordered desegregation plans. The question has been studied to a limited extent, and the data to date indicates that "variation in funding within districts remains high" and may pose a more troubling public policy and legal question then originally envisioned.[380] DISD's experience confirms this reality; the final comparability per-pupil per school budgets adopted by the district and approved by the TEA under Title I allowed for a greater variation in per school expenditures than the "10% figure" originally discussed, did not require DISD to make as extensive cuts as originally proposed, but still required some cuts across the district.[381] As other school districts have discovered, the district courts were in a unique position to target funding and programs within the context of a desegregation case.[382] Once released from the courts' protective umbrella, however, school districts are finding it harder to explain funding strategies that are not facially equal or demonstrably equitable or that use race in targeting programmatic resources.[383]

Title I "funds are supposed to boost spending for high-poverty students, not fill in the holes created by district allocation practices."[384] This is the stated goal of the federal comparability requirement; Title I monies

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378. Tawnelle D. Hobbs & Holly K. Hacker, *Depth of DISD Cuts Up in Air*, DALLAS MORNING NEWS, May 30, 2009, at A1.

379. While the final plan was not reported in the Dallas Morning News, the Board of Trustees decided that only those schools receiving Title I funds would need to be brought within the funding comparability requirement in order to satisfy Title I requirements. Under this plan schools of comparable size would have the same staff allocation formulas which led to staffing reallocations with some campuses experiencing substantial reductions. The other result of this plan is that the non-Title I schools are now at 110%, 125%, and 143% funding versus their comparable Title I schools. The non-Title I schools are the two Montessori schools (Stone and Dealey), Travis (TAG) Middle School, Booker T. Washington High School for the Performing and Visual Arts, and all six magnet high schools in the Townview Complex. (Communications with the Board of Trustees are on file with the author). *See, e.g.*, Jim Schutze, *Wherein the* DO *and the DISD Have a Math-Off Concerning Per-Pupil Expenditures*, DALLAS OBSERVER, May 20, 2009, *available at* http://blogs.dallasobserver.com/unfairpark/2009/05/ (discussing available per-pupil funding data).

380. Marguerite Roza et al., *Do Districts Fund Schools Fairly?*, EDUC. NEXT, Fall 2007, at 69, 70-71 (finding that "noncategorical funding between schools within Texas districts was considerably less equal than between districts"), *available at* http://educationnext.org/files/ednext_20074_68.pdf.

381. *See supra* note 279.

382. *See supra* text accompanying note 203.

383. *See, e.g.*, Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 531 (2001) (examining resource comparability litigation to expand the debate about educational equality and equity).

384. Marguerite Roza et al., Strengthening Title I to Help High-Poverty Schools: How Title I Funds Fit Into District Allocation Patterns (Aug. 18, 2005) (unpublished manuscript, *available at* http://www.crpc.org/cs/crpe/download/csr_files/wp_crpe6_title1_aug05.pdf).

are designed to layer in on top of the local monies "such that the federal dollars serve to augment services for poor students."[385] The operative assumption is that the district is treating its students equally and equitably on an individual basis, at least as measured by the per-pupil budgets developed school by school. This assumption is worth examining in a public debate such as the one held within DISD this past summer. The result of that debate left many unsatisfied and did not directly answer some of the important questions raised, such as whether DISD is in fact allocating its basic resources equally on a school by school basis and, if not, what justifies any differences in the district's per-pupil per school allocation. An equally important question, but one for a national rather than a local debate, is whether Title I's funding comparability formulas in fact enhance the equitable allocation of school resources within districts.[386] These debates about educational equality and funding comparability may never be finally resolved, but an open and engaged discussion about fundamental issues of educational equity, equality, and opportunity reflect a natural evolution in the political discourse of a post-unitary school district like DISD. When Judge Sanders dismissed the *Tasby* Litigation, he knew the district faced challenges and would need to develop an engaged democratic process to address these fundamental issues.

IV. CONCLUSION: PRAGMATISM, JUDICIAL CHARACTER, AND THE ROLE OF THE REFLECTIVE JUDGE[387]

How then do federal trial court judges as pragmatic jurists resolve the conundrum of discretion and accountability—the fact that uncertainty in

385. *Id.* at 3.

386. *See, e.g.*, Goodwin Liu, *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 IOWA L. REV. 973, 994-1009 (2008).

387. The idea that reflection is a skill that can be learned and that enhances the practice of law is not new. *See* William J. Witteveen, *Reading Vico for the School of Law*, 83 CHI.-KENT L. REV. 1197, 1217 (2008) (claiming that "it is worthwhile to recover a role model of the jurist as a reflective practitioner of the art of lawmaking"). Judges are trained in law schools, and it is there that we should look to see if the skill of self-critique and self-awareness as an antidote to bias, be it racial, gender, age, social class, cultural, or political, is being developed. Critiques of core law school curricula question why the dominant paradigm for training attorneys still emphasizes lawyering as a set of neutral legal skills when, in fact, legal skills and, by implication, judicial skills are imbedded in a series of potentially distorting decisional paradigms. This is less true in clinical programs where faculty use guided and structured reflection in clinical supervision as an effective method for exploring the question of bias as a potential source of misperception and misunderstanding in the practice of law. *See, e.g.*, Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1074 (2009) (discussing the lack of cultural perspectives in core legal training and the legal academy's undue emphasis on the "myth" of legal neutrality, or the positivist assumption that the legal process is inherently neutral); Richard K. Neumann, Jr., *Donald Schon, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 404-05 (2000) (critiquing law schools' emphasis on technical rationality on the grounds it fails to address how in fact legal problems are solved and legal decisions rendered). There is a growing consensus in the literature on legal education that law schools committed to training their students to "think like a lawyer" need to recognize and incorporate multiple lawyering intelligences and competencies into the curriculum as an antidote to this historically narrow pedagogical perspective. *See, e.g.*, David T. ButleRitchie, *Situating "Thinking Like Lawyer" Within Legal Pedagogy*, 50 CLEV.

many, if not most, judicial decisions gives them immense "decisional power"? Do they approach different types of discretionary decisions differently? How do they bridge the apparent gap between judicial pragmatism, with its context-enriched approach to real-world solutions, and legalism, the normative ideal of the rule of law? How do these jurists think about their ubiquitous decisional thumb on the scales of justice?[388] What can they do to ensure that their decisions and the adjudicative system's handling of disputes is perceived as fair and neutral? Given the degree of decisional freedom and appellate deference accorded federal district court judges, they may be the "most powerful judges in the land" in large part because "they are the only check on their own behavior."[389] Thus, the question remains, what is the nature of this restraint? There are the obvious institutional and legal restraints that guide federal trial judges, but it is also fair to raise questions about judicial temperament, or character, and how they guide a judge through difficult decisions. Judges operate both institutionally and individually, and questions of fairness and neutrality, the touchstones of adjudicative accountability, are questions ultimately asked of the individual judge.

In examining Judge Sanders' career on the bench, especially his handling of the *Tasby* Litigation, three aspects of his character, or judicial temperament, have been consistently on display: humility, courage, and self-awareness.[390] Why is self-awareness, the capacity for self-reflection, an important judicial trait? How can it be cultivated? Does it offer an answer to the questions posed above? Self-awareness, as a conscious judicial strategy, can help redress the problematic role personal and institutional preconceptions can play in shaping judges' responses to the uncertainty inherent in discretionary decisions, especially decisions that touch upon areas of potential bias such as race, age, gender, disability, social class, or any other quality that might insert the distorting lens of

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ST. L. REV. 29, 31 (2003) ("The trend in recent years, however, has been to view the traditional notion of 'thinking like a lawyer' as unduly narrow and restrictive."); Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137 (2001).

388. *See, e.g.*, POSNER, *supra* note 3, at 35 (providing a thorough overview of the range of scholarship exploring judicial decision making and how it is shaped by explicit decisional methodologies as well as implicit biases, be they psychological, attitudinal, strategic, organizational, sociological, economic, pragmatic, phenomenological, or legalist (citing, among others, C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS (1996) and Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998))); *see also* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (exploring trial judges' decisional biases and cognitive heuristics).

389. McMahon, *supra* note 42, at 992.

390. Judge Sanders' other clerks and I have discussed these traits at length and in our written recollections. *See* File of Clerk Questionnaires (on file with the author) and the written reminiscences published in this issue. I did not begin this article thinking about the potential convergence between Judge Sanders' openness to debate and his willingness to examine legal decisions from a variety of perspectives and the literature on the ideal of the "reflective practitioner." *See supra* note 387. The connection only occurred to me after I decided to insert the footnotes on potential bias in the courts. *See infra* notes 391, 392 and 397.

"difference" between the judge and the litigants.[391] Being open to "knowledge about who one is as a person, what one values and does not value and what motivates one's decisional processes" as a judge is critical.[392] If the extremely human process of adjudication is to be seen as fair, judges must "proactively nurture their own ability" to scrutinize their decisions for preconceptions, assumptions, or any other form of bias[393]

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391. POSNER, *supra* note 3, at 35 (making the telling observation that pragmatic jurists are often the most self-reflective); Armour, *supra* note 5 (arguing that courts need an explicit strategy and rhetoric to address the phenomenology of judicial discretion); Armour, *Practice*, *supra* note 2 (exploring the problem of judicial discretion in Rule 11 sanctions decisions and arguing that the courts need to develop an explicit legal vocabulary that renders highly discretionary decisions more transparent); *see, e.g.*, Armour, *Rethinking*, *supra* note 2. Journalistic reports and legal scholarship offer insights into the inevitable biased perceptions of humans when viewing new situations and our tendency to use our own personal experiences as a template for evaluating others' actions. *See, e.g.*, Judith A.M. Scully, *Seeing Color, Seeing Whiteness, Making Change: One Woman's Journey in Teaching Race and American Law*, 39 U. TOL. L. REV. 59 (2007). Recent pieces reflect the professional and lay communities' interest in the individuals behind the robes and those same individuals' unique judicial perspectives. *See, e.g.*, Adam Liptak, *Court Debates Strip Search of Student*, N.Y. TIMES, Apr. 22, 2009, at A13 (describing a case involving the strip search of a young female, where Justice Breyer observed from the bench, "We changed for gym, O.K.? And in my experience, too, people did sometimes stick things in my underwear"); Adam Liptak, *Reticent Justice Opens Up to a Group of Students*, N.Y. TIMES, Apr. 14, 2009, at A11 (describing Justice Thomas's visit with a group of school children as a "revealing look at Justice Thomas's worldview these days" in which "[h]e talked about his own school days, reminiscing fondly about seeing 'a flag and a crucifix in each classroom'").

392. McMahon, *supra* note 42, at 990-95 (citing Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003)). Judge McMahon focuses on what she sees as the essential judicial virtue of self-awareness, a virtue rendered doubly important given the isolated environment in which of district court judges work. *Id.* Judge McMahon's observations resonate with the ideal of the "reflective practitioner" as a lawyer and a judge, *see* sources cited *supra* note 387, and a range of empirical scholarship examining different types of conscious, if not explicit, decision making biases. *See, e.g.*, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (2005); William Bradford, *In The Minds of Men: A Theory of Compliance with the Laws of War*, 36 ARIZ. ST. L.J. 1243 (2004) (examining how decision makers process information in an attempt to open up those decision makers to the prospect of bias and error); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000) (examining the well-documented "hindsight bias" of decisionmakers).

393. The problem of racial and ethnic bias in the legal system was the topic of a conference at Southern Methodist University. The conference, *Justice for All? Perceptions of Racial and Ethnic Bias in Our Courts?*, was jointly hosted by the Judicial Division of the American Bar Association and SMU Dedman School of Law on April 7, 2009. The conference provided an opportunity for practitioners and scholars to explore various dimensions of racial bias in the courts. Most importantly, participating scholars were able to turn the perceptions of the practice arena—that racial bias potentially permeates the courts and impacts seemingly neutral judicial decisions—into quantifiable data. Empirical research focusing on institutional, adjudicative, and legal bias provides insight into what might otherwise be dismissed as mere anecdote. *See, e.g.*, Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009) (Professor Chew presented her preliminary results from this study at the conference); Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part II*, 60 VAND. L. REV. 801 (2007); Todd Brower, *Pride and Prejudice: Results of an Empirical Study of Sexual Orientation Fairness in the Courts of England and Wales*, 13 BUFF. WOMEN'S L.J. 17 (2005); Sean M. McEldowney, *New Insights on the "Death" of Obviousness: An Empirical Study of District Court Obviousness Opinions*, 2006 STAN. TECH. L. REV. 4; Monique C. Lillard, Professor, Univ. of Idaho & Ruth Colker,

that might unconsciously or subconsciously affect a judicial decision.[394] Courts are contextual institutions and neither they nor their judges exist outside of time and space, history, and culture. It is perhaps not surprising that judges able to engage in this type of self-reflection—judges who view their discretion and decision making as conscious acts—tend to think of themselves as pragmatic judges, sensitive to the human dimension of adjudicative and legal processes.[395] In this approach to adjudication, these thoughtful jurists identify the essential bridge between pragmatism and legalism—the intuitive, and perhaps not fully formed, phenomenological strategy of self-awareness and reflection. What they know and practice, as an essential juridical skill,[396] is that by being aware of decision-making as something more than the rote application of law to facts, jurists can begin to root out distorting biases in their decision mak-

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Professor, Ohio St. Univ., Empirical Studies: How Do Discrimination Cases Fare in Court?, Address Before the 2003 Annual Meeting of the Association of American Law Schools, Section on Employment Discrimination (Jan. 2003), *in* 7 EMP. RTS. & EMP. POL'Y J. 533 (2003).

394. *See* Sophia H. Hall, *In the Pursuit of Justice: Reflections on Changes in the Judicial Role After Three Decades as a State Court Judge*, JUDGES' J., Winter 2009, at 5-7 ("Taking an oath of office does not immunize judges from prejudice. Judges are all too human.").

395. POSNER, *supra* note 3, at 40. These pragmatic jurists reject the myth of judicial neutrality, the positivist ideology, embraced by much of the legal academy, that legal skills and legal methods render decisions culturally, socially, or politically contextless and, therefore, value-neutral. Again drawing from my areas of teaching and research, law schools' clinical faculty have been addressing this issue for years: How do we help student attorneys become aware of unconscious and subconscious biases that come into play in the representational and adjudicative contexts? A major component in the orientation provided students in the Civil Clinic at SMU Dedman School of Law involves exploring and examining the idea of bias and how our own personal biases (including the assumption that "thinking like a lawyer" avoids bias problems) and those of our clients influence our perceptions of the clients' cases. *See, e.g.*, Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Self-Awareness in Performance*, 13 CLINICAL L. REV. 143 (2006) (offering a method that can be used to teach law students (future lawyers and judges) how to engage in a regular, rigorous analysis of their lawyering and emphasizing the difference between criticism, which evokes defensiveness and rarely leads to insightful learning, and critique, which engages the student at a collaborative level in the goal of identifying how their lawyering can be improved); Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 CLINICAL L. REV. 329 (2006) (admonishing lawyers, and by implication judges, to learn, see, and hear clients' and parties' stories without forcing them into an "official story" or a set of perceptions based on the lawyer's, or judge's, personal experiences); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373 (2002); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369 (2005) (challenging the utility of learning information about clients' cultures and, given that human nature tells us that everyone reacts to people who are different from themselves in unconscious and subconscious ways, arguing that multicultural or difference training should focus on self-analysis of the lawyer's (or judge's) own culture and how the two might interact).

396. *See* Armour, *Practice*, *supra* note 2, at 730-61. In this piece, discussions of judicial skill and judgment in the case law are shown to relate directly to the trial courts' pragmatic and phenomenological approach to Rule 11 sanctions. *Id.* This skill, the ability to be consciously impartial and reflective about the very uncertain or discretionary nature of the decision before the court, is an essential aspect of an independent judiciary whose discretion must be perceived to be exercised fairly and impartially. *See, e.g.*, H. Thomas Wells, Jr., Introduction, *Judicial Independence: Preserving a Fair and Impartial Judiciary*, A.B.A. HUMAN RIGHTS: SECTION OF INDIVIDUAL AND RIGHTS AND RESPONSIBILITIES, Winter 2009, at ii.

ing and in the legal system as a whole, which is after all simply the accumulation of these individual juridical acts.[397] The call to root out bias in judicial decision making is really little more than asking our judiciary to reflect on whether they are acting as close to the ideal of a neutral decision maker as possible without losing their humanity or their ability to hear and respond to different personal narratives and examine legal problems from different perspectives.

This is where the other two judicial virtues discussed above, humility and courage, come into play.[398] Humility paired with courage is essential to ensure "self-awareness" because critical reflection cannot occur without the willingness not only to entertain the idea you might be wrong, but to actively seek critique from others in order to guard against bias, personal motive, or hubris. These virtues are important because they combat the threat posed to the judicial process by arrogance, intellectual timidity, or laziness.[399] "Arrogance, of course, comes in many forms. The most common judicial variant is . . . a misleading certitude in the correctness of one's own decisions."[400] But there is a more dangerous form of arrogance—the arrogance that leads a judge to disregard the common law

397. *See, e.g.*, Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (examining the feasibility of reducing racial bias among "white legal decisionmakers"); Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83 (2008) (exploring the extent to which cognitive bias operates beyond the reach of decisionmaker's self-awareness); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1861 (2007) (arguing that the effects of cognitive bias can be reduced when a decisionmaker adopts an "outsider" perspective); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006) (examining in part the reluctance of the government and the courts to target implicit racial bias because it lacks the intentionality necessary to render it legally problematic according to current constitutional and statutory norms); George A. Martinez, *Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities from the Class Action Device*, 33 J. LEGIS. 181 (2007) (exploring the differing treatments received by human rights class actions and race discrimination class actions in the courts); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994) (stating that, given indeterminacy in legal standards, decisions in cases involving race would be expected to be randomly distributed within that zone of discretion but pointing to patterns of decisions that correlate with race and illustrate the potential biasing impact race has on cases); Justice for All Conference Handout from Mark W. Bennett, The Deeply Troubling Prevalence of "Implicit Bias" and What the Legal Profession Should do About It (discussing the problem of implicit racial bias in decision making and the legal profession's obligation to address this bias within the legal system) (on file with author).

398. *See* Sherry, *supra* note 392 and accompanying text (extolling the judicial virtues of humility and courage).

399. It is comforting to find that my experiential insights into what makes a good judge and those of Judge Sanders' other law clerks' echo the ideas of other judicial observers and judges. *See, e.g.*, POSNER, *supra* note 3; McMahon, *supra* note 42; Sherry, *supra* note 392. It is even more comforting, however, to know that reflection is a skill than can be taught. *See, e.g.*, Blaustone, *supra* note 395; Kandis Scott, *Non Analytical Thinking in Law Practice: Blinking in the Forest*, 12 CLINICAL L. REV. 687 (2006); Ian Weinstein, *Teaching Reflective Lawyering in a Small Case Clinic: A Love Letter to My Clinic*, 13 CLINICAL LAW REV. 573 (2006).

400. *See* Sherry, *supra* note 392, at 799.

method, that unique mix of judicial pragmatism "in the service" of legalism,[401] and decide cases based on a personally perceived "greater good."[402] The district court judges who found themselves, like Judge Sanders, enmeshed in the legal, political, social, cultural, and educational process of desegregating public schools throughout the our country quickly learned that they could not claim to sit as the paradigmatic neutral jurist, unmoved or untouched by the case before them. These judges were forced to confront their own personal biases and moral views regarding segregation and the role of the federal courts in integrating the public schools. Some fell sway to their own personal opinions about the Supreme Court's desegregation rulings or local concerns about the speed with which the process of desegregation should proceed.[403] Judge Sanders did not display this quality of judicial arrogance and he did not bring his personal agenda to the table. He was willing to look the lawyers and their clients in the eye when he ruled, and when he ruled, especially as we have seen in *Tasby*, he knew he was accountable to the parties, their lawyers, circuit judges, and ultimately the Supreme Court. More importantly he was a democrat with a small "d," who understood the important role independent federal trial judges play within our democracy. He knew that judges must not only be seen to be fair, but they must be fair in fact, and that fairness required the district court to be accessible to all citizens. Ultimately, Judge Sanders knew he was accountable to the people who never visited his court because he had been given the privilege and responsibility of enforcing the law—state, federal, and especially that of the United States Constitution—as one of the federal trial courts of first and last resort.

The Honorable Judge Harold Barefoot Sanders grew up in the South and attended segregated schools; he was a product of his world, but he was much more. He was a willing listener, ready to hear a party's story.[404] He was a legal craftsman whose opinions were clear and to the point. He was a skilled trial judge who could express impatience if a lawyer seemed to be wasting time, but whose humor and arched brow could keep a trial on track. He was a gregarious man who enjoyed meeting his jurors and listening to their stories. He was an able court administrator who (perhaps slightly) terrorized his law clerks in order to ensure the docket moved and parties had their day in court. He was a valued colleague on the bench, willing to mentor younger judges and willing to take on extra responsibility in order to make sure the federal courts func-

401. POSNER, *supra* note 3, at 40.

402. Sherry, *supra* note 392 (discussing two decisions, *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and *Bush v. Gore*, 51 U.S. 98 (2000), and arguing that the Supreme Court's extra-legal motive, avoiding what it perceived to be potential national crises, resulted in questionable results).

403. *See supra* notes 117-18. In the 1950s and 1960s there were federal judges who refused to act in the face of racial apartheid or whose acts were so restrained as to accomplish little more than rubberstamping the school districts' foot dragging when it was obvious they were in violation of the Supreme Court's mandate.

404. *See, e.g.*, *supra* note 268.

tioned properly. He was sensitive to the special role he played as a trial judge within the triumvirate of the federal courts, but he was not intimidated by either the Fifth Circuit or the Supreme Court. He was a beloved friend to many, a husband, a father, and a grandfather. He was willing, when needed, to challenge or be challenged by his colleagues, his clerks, the lawyers and litigants appearing before him, and his own innate sense of fairness and justice. In the *Tasby* Litigation, he was a critic of the biases and assumptions that had shaped the South and its policies of racial oppression and he was willing to make difficult decisions with full awareness of their effect in people's lives, without hiding behind an obfuscating cloud of legal formalism. Ultimately, he had great faith in the federal courts' ability to move Dallas, Texas, one step closer to a fuller realization of the Constitution's promise of justice and equality for all.

We have come full circle. What is left to be said? The Honorable Harold Barefoot Sanders of the United States District Court for the Northern District of Texas got it right. Democracies cannot survive without an independent judiciary, and Judge Sanders believed in democracy as a principle and as a practice. When the drafters of the Constitution sat down to work out its details, they crafted nuanced and complex compromises because they were willing to find common ground with their fellow citizens.[405] Judge Sanders understood the delicate balance between principle and pragmatism that defines the world of a federal trial judge, and he understood that the federal courts must continue to provide a common ground, a public forum for dialogue concerning democracy, equality, and justice.

405. Walter Isaacson, *A Delicate Balance*, N.Y. TIMES, Apr. 12, 2009 (reviewing RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION (2009)) (focusing on the drafters' need to balance principle and pragmatism in negotiating key compromises in drafting the Constitution establishing the United States of America).