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The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges

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THE DECLINE OF JUDICIAL DECISIONMAKING: SCHOOL DESEGREGATION AND DISTRICT COURT JUDGES

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This Article examines all published or electronically available federal district court opinions concerning school desegregation from June 1, 1992 to June 1, 2002. Based on the resulting analysis, Professor Parker argues that the commonly held perception of the all-powerful district court judge is outdated. Instead of controlling the process and outcome of the school desegregation cases, district court judges have ceded to the parties, particularly the defendants, a great deal of control over both the process and outcome of the litigation. In doing so, the judges have allayed, to no small degree, many of the criticisms of their role in school desegregation. Yet the price of the deference to defendants has been denial to school desegregation plaintiffs the fulfillment of their rights, even under the admittedly pro-defendant standards of the Supreme Court. This Article identifies two Alabama district court judges who are exceptions to the pattern of deference to defendants. Unlike their colleagues, these judges have taken an active role in overseeing their school desegregation cases. Through their efforts, school desegregation suits are being dismissed, but only after thorough and relatively successful desegregation efforts.

INTRODUCTION 1624
I. THE ABSENCE OF JUDICIAL DECISIONMAKING 1626
A. *When Defendants Win* 1629
B. *When Defendants Lose* 1634

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C. When Parties Settle 1636
D. Process 1639
E. Summary and Implications 1640
II. THE ABDICATION OF RESPONSIBILITY 1644
A. Supreme Court Standards and District Courts 1645
B. The Alabama Exception 1652
CONCLUSION 1657

INTRODUCTION

Power once defined the school desegregation judge. To many, district court judges embodied the cause of forced integration through their orders to bus students and close schools. For this, they were subject to public vilification and violent threats.[1] Academics criticized them for stepping beyond the limits of judicial authority and into the power reserved to the states and granted to the national executive and legislative branches.[2]

This judicial power also had its proponents, who believed that judges were skilled "political powerbroker[s]"[3] who "g[a]ve meaning to our public values."[4] Professor Abram Chayes deemed judges "dominant figures" in his influential public law litigation model that explained and justified the very different roles the judiciary takes in overseeing our schools, prisons, police and fire departments, and public housing.[5]

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1. *See* J. ANTHONY LUKAS, COMMON GROUND 244, 460, 472 (1985); BERNARD SCHWARTZ, *SWANN'S* WAY 20–21 (1986); TINSLEY YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 58, 99, 152 (1981).

2. *See, e.g.*, Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 715–16 (1978) (criticizing the degree of judiciary involvement in state and local fiscal matters); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978) (arguing that the separation-of-powers doctrine imposes limitations on the authority of the federal government over states and localities in institutional reform litigation); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1122–24 (1996) (examining the structural-powers problems with federal courts exercising remedial powers in structural reform cases).

3. Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46 (1979); *see also* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 753 (1992) (noting that lower courts "have taken a highly political approach to the problem of getting remedies enforced").

4. Owen M. Fiss, *The Supreme Court 1978 Term Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979); *see also* Peter Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531, 550–53 (1988) (arguing that the dominant judicial approach to constitutional interpretation has been aspirational).

5. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976); Fiss, *supra* note 4, at 26. By "public law" I refer to cases challenging the

That power, however, no longer exists today.[6] District court judges have ceded to the parties, particularly school desegregation defendants, a great deal of control over both the process and outcome of school desegregation cases.[7] In fact, judges in school desegregation cases are in many respects acting as they would in any routine private law case, thereby calling into question the continued relevance of Chayes's model to school desegregation.[8] In so doing, the judges have allayed, to no small degree, many of the criticisms of their role in school desegregation.[9]

The current role of district court judges is the subject of Part I of this Article, which examines a ten-year period of district court opinions. Part II argues that the district court judges have relinquished even more power than is compelled by the admittedly pro-defendant standards developed by the Supreme Court.[10] Although the Supreme Court's jurisprudence directs that the return of local control be a guiding principle in school desegregation cases today, the Court still requires a commitment to the elimination of vestiges of discrimination that are caused by the defendant and can be practically redressed.[11] Yet district courts have ignored this responsibility. Today courts are willing to accept lingering segregation that the Supreme Court's jurisprudence prohibits.[12] This is due in part to a fatigue in the efforts to desegregate.[13] Part II concludes with an examination of an exception to the pattern identified in Part I—two district court judges in Alabama who have taken an active role in overseeing their school desegregation cases.[14] Through their efforts, school desegregation suits are being dismissed, but only after thorough and relatively successful desegregation efforts.

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operation of public institutions, e.g., school desegregation, the rights of institutionalized persons, public housing discrimination, police and fire department employment, and voting rights.

6. Perhaps, however, the degree of power has long been overstated. *See infra* note 97 and accompanying text.

7. *See infra* Parts I.A, I.D.

8. *See infra* notes 28–35, 97–113 and accompanying text. In contrast to public law, I use the term "private law" to include litigation concerning private rights of private parties, such as contracts, torts, or property. *See* Chayes, *supra* note 5, at 1282–83. The form of private law litigation is further explained *infra* note 20 and accompanying text.

9. *See infra* notes 116–21 and accompanying text.

10. *See infra* Part II.A.

11. *See infra* notes 125–41 and accompanying text.

12. *See infra* notes 145–60 and accompanying text.

13. *See infra* notes 162–63 and accompanying text.

14. *See infra* Part II.B.

I. THE ABSENCE OF JUDICIAL DECISIONMAKING

Proponents and opponents of school desegregation once agreed that district court judges controlled their school desegregation cases in a way very different from the run-of-the-mill, private lawsuit.[15] Their disagreement concerned the legitimacy of that judicial power, not whether the power was exercised.[16] For example, a prominent proponent, Professor Chayes, described the judge in public law litigation as setting the issues for the parties to explore and actively developing the factual record.[17] Moreover, because any number of particular remedies could be ordered (given that no particular remedy was legally compelled by the violation),[18] the judge, rather than any legal principle, was crucial in determining the contours of the remedy.[19] This stood in contrast to private law litigation, where the judge ruled on matters initiated by the parties, on records entirely developed by the parties, and according to established legal principles.[20] For Chayes, the judge in public law litigation had "passed beyond even the role of legislator and ha[d] become a policy planner and manager."[21]

Opponents of public law litigation largely agreed with Chayes's description of the judge, but questioned the legitimacy of judges taking such an active role in shaping the litigation and deciding policy issues rather than neutrally applying legal principles to matters identified and developed by the parties.[22] By interjecting themselves into the minutiae of school administration, the argument went, judges were acting more like school superintendents or legislators than judges.[23] At least among some conservatives, judges are still

15. *See supra* notes 1–5.

16. *But see* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 481–91 (1980) (arguing that judges in probate, bankruptcy, and other private law cases exercised similar power as is exercised in public law cases).

17. *See* Chayes, *supra* note 5, at 1296–98.

18. For example, in deciding how to desegregate the student body, one could choose from any number of methods, which are not mutually exclusive, including busing, transfer policies, choice methods, geographic attendance zones, school building structure, school construction, or school closure. These broad choices then break down into an amazing number of implementation options. For a description of traditional and nontraditional school desegregation remedies, see DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 11–16, 161–63, 166–69 (1995).

19. *See* Chayes, *supra* note 5, at 1300–01.

20. *See id.* at 1282–83.

21. *Id.* at 1302.

22. *See supra* note 2 and accompanying text.

23. *See supra* note 2, *infra* notes 24–27 and accompanying text.

perceived as impermissibly micromanaging school systems. Professors Richard Epstein[24] and John Choon Yoo,[25] for example, have recently criticized judges for intruding upon the authority of the states and other federal branches, as have Justice Clarence Thomas[26] and even occasionally Justice Sandra Day O'Connor.[27]

This Article's study of the role of district court judges today, however, calls into serious question the characterization of judges behaving in ways atypical of judges but typical of the legislative and executive branches and state and local governments. The study, as explored in more detail below,[28] reveals that school desegregation cases today follow a process common in most private law litigation, but very different from that normally attributed to school desegregation and other types of public law litigation.[29] The parties initiate the matters to be decided by the court[30] and often propose a

24. Richard A. Epstein, *The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CAL. L. REV. 1101, 1103–04 (1996) (contending that school desegregation remedies continue to exceed the judiciary's capacity and concern matters best governed by local school districts).

25. Professor John Choon Yoo has argued that school desegregation remedies violate separation of powers, are ineffective, and abuse federal power. *See* Yoo, *supra* note 2, at 1138–41.

26. Justice Thomas has claimed that public law remedies should be rejected or severely limited for lack of judicial competency and for violating federalism, separation of powers, and the Eleventh Amendment. *See* Lewis v. Casey, 518 U.S. 343, 385–93 (1996) (Thomas, J., concurring); Missouri v. Jenkins, 515 U.S. 70, 131–33, 132 n.5 (1995) (Thomas, J., concurring). He specifically has argued that courts should terminate jurisdiction because it "inject[s] the judiciary into the day-to-day management of institutions and local policies—a function that lies outside of our Article III competence." *Jenkins*, 515 U.S. at 135 (Thomas, J., concurring); *see also Lewis*, 518 U.S. at 391–92 (Thomas, J., concurring) (criticizing the district court's usurpation of prison officials' authority).

27. In *Jenkins*, Justice O'Connor evidenced some agreement with Justice Thomas's arguments regarding federalism and separation of powers. *See Jenkins*, 515 U.S. at 112–13 (O'Connor, J., concurring) ("The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills.").

28. *See infra* Part I.

29. The one major difference between public law and private law remedial process continues to be the sustained jurisdiction of courts after the remedy is declared. *See generally* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*) (retaining jurisdiction during the transition to desegregated public schools). In private law cases, judicial oversight essentially ends with the pronouncement of the remedy, while in public law cases jurisdiction continues through the enforcement of the remedy. *See id.* at 301. Although maintaining judicial involvement in public law cases continues today, its impact is abating in school desegregation as school districts are declared unitary and their suits dismissed. For a definition and discussion of unitary status, see *infra* notes 50, 125–44 and accompanying text.

30. *See infra* notes 89–90 and accompanying text.

settlement crafted with minimal judicial involvement.[31] The litigation process, in short, is controlled by the parties just like in the typical private law lawsuit. The primary difference in judges' actions in school desegregation and private law litigation is that the outcome of the process is largely deferential to defendants' preferences.[32] In other words, defendants are very likely to win.

The end result is that district court judges have ceded to the parties, particularly the defendants, the power the judges once held, or at least once attributed by many to judges.[33] The process is entirely party initiated and driven, and defendants' desired outcome is typically awarded. Gone is the day of the judge as the "dominant figure." As a result, we must rethink the description of the judges as controlling the process and outcome of school desegregation cases.[34] As discussed in more detail below, this argument only reaches the role of judges. I readily admit the obvious: school desegregation litigation itself has a profoundly different impact than routine private law litigation.[35]

The current role of district court judges is revealed in a study of written district court opinions officially published or electronically available over a ten-year period from June 1, 1992 to June 1, 2002.[36]

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31. *See infra* Part I.C.

32. *See infra* Part I.A. Most cases are governed by the case-selection effect theory or expectations model, which predicts plaintiffs and defendants each win half the time. *See infra* note 60. The deference afforded to defendants in school desegregation cases is not found in private liability standards, as is true for the explicit deference afforded to school administrators in liability standards developed for "[s]tudent free speech, Fourth Amendment, and due process rights." *See* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1338 (2000). Instead, there is a deference to defendants' preferences as to remedies and, relatedly, the declaration of unitary status. *See infra* Part I.A.

One exception has, however, occurred. Courts have rejected school districts' preferences not to be declared unitary so that the school districts could continue race-conscious student assignment practices. *See infra* notes 66–71 and accompanying text.

33. *See supra* notes 1–5 and accompanying text.

34. In addition, Linda S. Mullenix has questioned the applicability of Chayes's model to newer types of litigation such as mass tort litigation. *See* Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 421 (1999).

35. *See infra* text following note 121.

36. The school desegregation opinions were collected from both Lexis and Westlaw, commonly used empirical tools. *See* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 24 n.139 (1998). Lexis and Westlaw electronically publish opinions designated by the court for official publication and opinions not designated by the court for official publication. Frequently included in this latter category are complex litigation cases such as school desegregation. I included officially unpublished opinions available on Lexis and Westlaw in hopes of providing as complete a picture as possible. No other sources provide more opinions in school

An analysis of the resulting eighty-four opinions, concerning the desegregation of fifty-three school districts, clearly demonstrates the following four points:[37] (1) defendants win when they are sued for traditional school desegregation issues;[38] (2) defendants lose on significant issues only when their race-conscious student assignment policies are challenged or when defendants oppose each other;[39] (3) parties often settle;[40] and (4) the process of school desegregation cases further minimizes the role of the judiciary.[41]

A. *When Defendants Win*

First and foremost, defendants usually win when minority parents and students and/or the United States are suing school authorities for desegregation.[42] This is particularly true after appeals are taken into account. The following table summarizes the thirty-eight opinions covering this situation:

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desegregation cases, other than contacting each court's clerk of court for copies of opinions. The searches were conducted on the district court databases offered by Lexis and Westlaw. The search term used for Lexis was <school desegregation>. In Westlaw, the search term was <school /p desegregation>. Both searches had date restrictions of June 1, 1992 to June 1, 2002.

From the Lexis and Westlaw searches, included were cases concerning the disestablishment of primary and secondary education segregation prohibited by the Equal Protection Clause of the Fourteenth Amendment. Excluded from the survey were opinions concerning matters which reveal little about the settlement or success rates of plaintiffs and defendants on school desegregation matters. This exclusion primarily applied to requests for attorneys' fees and intervention. Although these two issues can have profound implications on school desegregation cases, the issues are too narrow to reveal much about the process of addressing school desegregation issues and the power of the judge and the parties.

For the limits on relying on written opinions, see Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1195–97 (2000). The most notable limit applicable here is the possibility that judges are influencing parties through oral means that are not reflected in their written work.

37. I also compiled information regarding the judges who heard the cases and the President who appointed each judge. No pattern emerged regarding how the judges handled the cases and the President by whom they were appointed.

38. *See infra* Part I.A.

39. *See infra* Part I.B.

40. *See infra* Part I.C.

41. *See infra* Part I.D. By process, I mean the very minor role judges play in supervising and controlling the course of the litigation.

42. Excluded from this section are instances of the plaintiffs seeking the end to the desegregation decree and the defendants opposing each other. Both situations are discussed *infra* Part I.B.

Table 1. Win/Loss Rates in Thirty-Eight Opinions in Which Plaintiffs and Defendants Disagree About Traditional School Desegregation Issues.

Litigation Stage	Defendant Loses[43] in Full Percentage (Raw Number)[44]	Defendant Wins in Part Percentage (Raw Number)[45]	Defendant Wins in Full Percentage (Raw Number)[46]
Before District Court	18% (7)	24% (9)	58% (22)
After Appeals, If Any, Completed	16% (6)	13% (5)	71% (27)

The table actually inflates the import of plaintiffs' victories. In seven opinions defendants lost entirely, producing a victory rate of eighteen percent for the plaintiffs, but all the wins involved narrow issues such as the assignment of only a handful of students, or, at most, the closure of a small school.[47] Only one opinion was appealed, and the court of appeals remanded for an evidentiary hearing on one of the issues on which defendants lost.[48]

43. Included as a loss in part or in full are instances in which a court refuses to adopt defendant's preferred proposal entirely or anytime it appears at all possible that the court was not adopting the defendant's proposal wholesale. For example, counted as a loss in part was the court's approval of defendant's proposed remedy made as an alternative to another proposed remedy. *See* Stanley v. Darlington County Sch. Dist., No. CIV.A.4:62-7749-22, 1996 WL 294369, at *3 (D.S.C. May 24, 1996). Also included as a loss in full were instances where it was unclear how the remedy was devised. *See* Lee v. Chambers County Bd. of Educ., No. CIV.A.844-E, 1994 WL 241165, at *2–*4 (M.D. Ala. Feb. 16, 1994).

44. *See infra* notes 47–48 and accompanying text.

45. *See infra* notes 49–51 and accompanying text.

46. *See infra* notes 52–54 and accompanying text.

47. *See* Berry v. Sch. Dist., 141 F. Supp. 2d 802, 803 (W.D. Mich. 2001) (City of Benton Harbor) (granting plaintiffs' motion in limine); Lee v. Autauga County Bd. of Educ., 59 F. Supp. 2d 1199, 1200 (M.D. Ala. 1999) (denying defendants' petition to close small African-American high school); Stanley v. Darlington County Sch. Dist., 915 F. Supp. 764, 772 (D.S.C. 1996) (involving minor student assignment issue to magnet high school); Lee v. Chambers County Bd. of Educ., 1994 WL 241165, at *2–*3 (resolving interdistrict transfers among three school districts primarily through consent decree, with court deciding unresolved issues); Coalition to Save Our Children v. State Bd. of Educ., Nos. 1816-1822-SLR, 1994 U.S. Dist. LEXIS 20548, at *1–*2 (D. Del. Aug. 29, 1994) (Red Clay Consolidated School District) (involving a "discreet and narrow" student assignment issue); Fisher v. Lohr, 821 F. Supp. 1342, 1347 (D. Ariz. 1993) (Tucson Unified School District No. 1) (denying defendant's petition for approval of school closure); Liddell v. Bd. of Educ., 795 F. Supp. 930, 932 (E.D. Mo. 1992) (City of St. Louis, Missouri) (maintaining its supervisory role over student assignment issues), *remanded*, 988 F.2d 844 (8th Cir. 1993) (remanding for an evidentiary hearing on one issue).

48. *See* Liddell v. Bd. of Educ., 988 F.2d 844, 850 (8th Cir. 1993) (City of St. Louis, Missouri) (remanding for an evidentiary hearing).

In the partial victory for defendant category, defendants suffered partial, but minor, losses in three opinions.[49] In six separate opinions, three other school districts suffered substantial, partial losses before the district court on important remedial issues and on "unitary status" petitions.[50] But the two school districts who appealed their significant losses then won on appeal and were declared fully unitary.[51]

By contrast, fifteen school districts won twenty-two contested motions entirely, a total win rate of fifty-eight percent. These wins covered substantial issues, including ten unitary status petitions,[52] six

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49. *See* Citizens Concerned About Our Children v. Sch. Bd., 966 F. Supp. 1166, 1177 (S.D. Fla. 1997) (Broward County, Florida) (finding individual plaintiffs lacked standing to pursue compensatory damages but had standing on all other matters), *aff'd in part, appeal dismissed in part*, 193 F.3d 1285 (11th Cir. 1999); Stanley v. Darlington County Sch. Dist., No. CIV.A.4:62-7749-22, 1996 WL 294369, at *3 (D.S.C. May 24, 1996) (involving student assignment to magnet high school of less than twenty students); Stanley v. Darlington County Sch. Dist., 879 F. Supp 1341, 1368–69 (D.S.C. 1995) (same), *rev'd in part on other grounds*, 84 F.3d 707, 710–11 (4th Cir. 1996).

50. Unitary status is the end point of school desegregation litigation. Once a school district is determined to have converted from "black schools" and "white schools" to "just schools," the district is deemed unitary and the case should be dismissed. Green v. County Sch. Bd., 391 U.S. 430, 442 (1968) (New Kent County); *see also* Bd. of Educ. v. Dowell, 498 U.S. 237, 246 (1991) (Oklahoma City) (holding that courts should use the word "unitary" to describe a school system which "has been brought into compliance with the command of the Constitution"). The standards for unitary status are discussed in more detail *infra* notes 110–20 and accompanying text.

The Rockford School District lost on significant liability and remedial issues. *See* People Who Care v. Rockford Bd. of Educ., No. 89-C-20168, 2000 U.S. Dist. LEXIS 17988, at *36–*38 (N.D. Ill. Aug. 11, 2000) (remedy), *rev'd*, 246 F.3d 1073, 1078 (7th Cir. 2001); People Who Care v. Rockford Bd. of Educ., No. 89-C-20168, 1996 WL 364802, at *1–*2 (N.D. Ill. June 7, 1996) (remedy), *aff'd in part, rev'd in part*, 111 F.3d 528, 541 (7th Cir. 1997); People Who Care v. Rockford Bd. of Educ., 851 F. Supp. 905, 908 (N.D. Ill. 1994) (liability), *aff'd in part, rev'd in part*, 111 F.3d 528, 541 (7th Cir. 1997).

The Hillsborough County School District in Florida and a small Pennsylvania school district were declared only partially unitary. *See* Hoots v. Pennsylvania, 118 F. Supp. 2d 577, 579 (W.D. Pa. 2000) (awarding partial unitary status to the Woodland Hills School District); Manning v. Sch. Bd., 24 F. Supp. 2d 1277 (M.D. Fla. 1998) (Hillsborough County, Florida), *clarified in part*, 28 F. Supp. 2d 1353 (M.D. Fla. 1998), *rev'd*, 244 F.3d 927 (11th Cir.), *cert. denied*, 534 U.S. 824 (2001).

51. *See supra* note 50 for citations to the four appellate reversals in favor of the Rockford School District and the Hillsborough County School District. The Woodland Hills School District did not appeal.

52. *See* Berry v. Sch. Dist., 195 F. Supp. 2d 971, 973 (W.D. Mich. 2002) (City of Benton Harbor); Jacksonville NAACP v. Duval County Sch. Bd., No. 85-316-Civ-J-10C, 1999 U.S. Dist. LEXIS 15711, at *3 (M.D. Fla. May 27, 1999), *aff'd*, 273 F.3d 960, 962 (11th Cir. 2001); Reed v. Rhodes, 1 F. Supp. 2d 705, 708–09 (N.D. Ohio 1998) (Cleveland City School District), *aff'd*, 215 F.3d 1327 (6th Cir. 2000); Mills v. Freeman, 942 F. Supp. 1449, 1452 (N.D. Ga. 1996) (DeKalb County School System); Reed v. Rhodes, 934 F. Supp. 1533, 1558 (N.D. Ohio 1996) (Cleveland City School District), *aff'd*, 179 F.3d 453 (6th Cir. 1999); Arthur v. Nyquist, 904 F. Supp. 112, 118 (W.D.N.Y. 1995) (City of Buffalo); Keyes v. Cong. of Hispanic Educators, 902 F. Supp. 1274, 1275 (D. Colo. 1995) (Denver School

important remedial decisions,[53] and six minor remedial issues.[54] Plaintiffs appealed seven of these decisions but lost every appeal.[55]

The following table summarizes the results of the written opinion survey if the opinions concerning minor issues are omitted:

District No. 1), *appeal dismissed*, 119 F.3d 1437 (10th Cir. 1997); Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784, 785 (D. Del. 1995) (Brandywine School District, Christina School District, Colonial School District, Red Clay Consolidated School District), *aff'd*, 90 F.3d 752 (3d Cir. 1996); Stell v. Bd. of Pub. Educ., 860 F. Supp. 1563, 1583 (S.D. Ga. 1994) (City of Savannah and County of Chatham); Tasby v. Woolery, 869 F. Supp. 454, 456 (N.D. Tex. 1994) (Dallas Independent School District).

53. *See* Hampton v. Jefferson County Bd. of Educ., 72 F. Supp. 2d 753, 783 (W.D. Ky. 1999) (allowing defendant-supported-race-conscious policy to continue until unitary status determined); Ho v. S.F. Unified Sch. Dist., 965 F. Supp. 1316, 1318 (N.D. Cal. 1997) (denying plaintiff's challenge to race-conscious programs supported by school district on summary judgment), *appeal dismissed*, 147 F.3d 854 (9th Cir. 1998); Vaughns v. Bd. of Educ., 941 F. Supp. 579, 584 (D. Md. 1996) (Prince George's County) (approving significant modification to race-conscious admission standards for magnet school); Lee v. Macon County Bd. of Educ., 914 F. Supp. 489, 496 (N.D. Ala. 1996) (approving Tuscalloosa City Board of Education's proposed facilities plan); Lee v. Geneva County Bd. of Educ., 892 F. Supp. 1387, 1396 (M.D. Ala. 1995) (granting county school board's petition to eliminate of grades six through twelve from the school district, with students to be educated in the adjoining school district); United States v. Charleston County Sch. Dist., 856 F. Supp. 1060, 1061–65 (D.S.C. 1994) (holding a school district not liable for segregation).

54. *See* Berry v. Sch. Dist., No. 4:67-cv-9, 2002 U.S. Dist. LEXIS 8256, at *2–*4 (W.D. Mich. April 30, 2002) (City of Benton Harbor) (denying plaintiffs motion in limine); Tasby v. Gonzalez, 972 F. Supp. 1065, 1066–67 (N.D. Tex. 1997) (Dallas Independent School District) (involving a variance in faculty assignment ratios); Reed v. Rhodes, 934 F. Supp. 1459, 1471 (N.D. Ohio 1996) (Cleveland City School District) (dismissing plaintiffs' motion for recusal of judge), *aff'd*, 179 F.3d 453 (6th Cir. 1999); Reed v. Rhodes, 934 F. Supp. 1485, 1486–90 (N.D. Ohio 1996) (Cleveland City School District) (denying motion to vacate order); Tasby v. Edwards, 807 F. Supp. 421, 424–26 (N.D. Tex. 1992) (Dallas Independent School District) (granting school district's request for court approval of downsized supermagnet school); Tasby v. Edwards, No. CIV.3:4211-H, 1992 WL 367840, at *1–*2 (N.D. Tex. Nov. 27, 1992) (Dallas Independent School District) (granting school district's motion to relocate school).

55. *See supra* notes 52–54.

Table 2. Win/Loss Rates in Twenty-Two Opinions in Which Plaintiffs and Defendants Disagree on Significant Issues.

Litigation Stage	Defendant Loses in Full Percentage (Raw Number)	Defendant Wins in Part Percentage (Raw Number)	Defendant Wins in Full Percentage (Raw Number)
Before District Court	0% (0)	27% (6)	73% (16)
After Appeals, If Any, Completed	0% (0)[56]	5% (1)[57]	95% (21)[58]

Thus, in ten years of written, published opinions, only one school district suffered any significant loss: a small school district in Pennsylvania was declared only partially unitary, despite its request for full unitary status.[59]

Defendants' overwhelming victory rates reveal the following.[60] First, the study demonstrates that courts are not substituting their

56. Each time the defendant lost in full, the matter concerned a minor issue. *See supra* notes 43–44, 47–48 and accompanying text.

57. Although in six opinions the defendant lost in part on a significant issue, five of those opinions were reversed on appeal. *See supra* notes 50–51 and accompanying text.

58. Defendants won in full on significant issues in sixteen opinions before the district court. *See supra* notes 52–53. All cases that were appealed were affirmed. *Id.* Defendants appealed five opinions in which they had partial losses on a significant issue before the district court, and each opinion was reversed on appeal. *See supra* note 57. Thus, after appeals are taken into account, defendants won in twenty-one opinions.

59. *See* Hoots v. Pennsylvania, 118 F. Supp. 2d 577 (W.D. Pa. 2000) (Woodland Hills School District); *supra* notes 50–51 and accompanying text.

60. This type of study calls into question what Professor Theodore Eisenberg labels the "case-selection effect theory," also known as the expectations model. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588 (1998). This is the idea that parties select to contest only disputes unclear in outcome, i.e., matters in the "gray zone." Under this theory, one would expect the win/loss rates to favor neither the defendant nor the plaintiff and to be evenly split between plaintiff victories and defendant victories, or converge on a 50/50 outcome as the law becomes clear and known. *See id.* at 588–91. The theory would predict that plaintiffs would quit contesting more issues as the plaintiffs' chances for success decreased. If the law favors the defense point of view, then plaintiffs would have little incentive to litigate that issue. For citations to key scholarship, see *id.* at 588 n.21.

Thus, the case-selection effect theory would predict that the number of school districts granted unitary status would equal (or would be converging toward equal results as shifts in the law became clear) the number of school districts denied unitary status. This result was not found in the study in this Article. The theory presumes a rationality likely absent from cases concerning issues as emotionally and politically charged as race and education. Parties may expect a loss, but still want to protest a perceived injustice. The same was likely true for the defendants in the 1970s, when defendants continued to litigate, but faced frequent losses on the issue of liability. This suggests that a look at the entire history might produce a more evenly split win/loss ratio. Even if this were true, and I am far from certain that it is, the point of this Article is that, presently, defendants win at overwhelming rates, particularly for significant issues, and plaintiffs still choose to litigate in the face of unfavorable precedent.

judgment for that of the defendants. Rather than acting like school superintendents, judges are deferring to school superintendents. As argued below, this level of deference is certainly consistent with Supreme Court precedent.[61] The Supreme Court has held that federal courts must be mindful of the importance of local control and deference to state and local government defendants.[62] Yet, this level of deference is certainly not *compelled* by Supreme Court precedent. The Court's approach is so indeterminate that it could validate any number of approaches to ending school desegregation cases,[63] as demonstrated by two district court judges in Alabama.[64] In short, district court judges have chosen to defer to defendants. Further, and less obvious, at least some of the time plaintiffs continue to value school desegregation litigation as worthy of their time and energy. Plaintiffs have continued to litigate these cases and, at times, oppose the defendants, even when faced with almost certain loss.[65]

B. When Defendants Lose

Defendants lose in two situations. The first is when parents and students challenge defendants' race-conscious student assignment policies. In two contested unitary status proceedings, plaintiffs requested unitary status so that race-conscious policies would end, while the school districts denied that they were unitary.[66] Both school districts were still deemed unitary.[67] This occurred in Charlotte-Mecklenburg as a white father challenged the race-conscious student assignment policies that kept his daughter out of the school he preferred.[68] In addition, African-American plaintiffs in Lexington, Kentucky challenged a magnet school's race-conscious policy that kept desks empty as African-American students remained on waiting lists.[69] Even though the defendants argued otherwise, the school

61. *See infra* Part II.A.

62. *See infra* Part II.A.

63. *See* Epstein, *supra* note 24, at 1104, 1111–13; Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 513–22 (1999); *see also infra* Part II.A.

64. *See infra* Part II.B.

65. Perhaps plaintiffs do so just as people buy lottery cards. The potential payoff may be considered worth the time and expense despite the long odds.

66. Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 359 (W.D. Ky. 2000); Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228, 232 (W.D.N.C. 1999), *aff'd in part and rev'd in part*, 269 F.3d 305 (4th Cir. 2001) (en banc) (per curiam).

67. *See infra* notes 68–69 and accompanying text.

68. *Capacchione*, 57 F. Supp. 2d at 239.

69. *Hampton*, 102 F. Supp. 2d at 377. A similar situation in Prince George's County led to a consent decree eliminating the race-conscious student assignment practices. *See*

districts were still declared unitary. This suggests at least one of three explanations: (1) unitary status is easily granted; (2) the school districts had meaningful desegregation of their schools; and/or (3) the legal system is hostile to race-conscious assignment practices. The court's deference to the defendants when the plaintiffs oppose unitary status, as discussed in the preceding section, appears entirely absent in this context.[70] Here courts readily rule against defendants on substantial issues.[71]

Second, defendants lose when they oppose each other. This occurs in two situations: when the state is also a party and financially liable for a portion of the desegregation costs or, even rarer, when a school district asserts a claim against another school district.[72] This pattern was found in ten school desegregation cases, which produced twenty-four opinions, or twenty-eight percent of the cases in the written opinion study.[73] By the very nature of these disputes, when

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Vaughns v. Bd. of Educ., 18 F. Supp. 2d 569, 572–73, 580 (D. Md. 1998) (Prince George's County).

70. For a fuller discussion of the tendency of courts to second guess educators in the affirmative action context but not in the school desegregation context, see Wendy Parker, Federalism, Equal Protection, & Public Schools (Mar. 6, 2003) (unpublished manuscript, on file with the North Carolina Law Review).

71. *See supra* notes 68–69 and accompanying text.

72. This typically arises in cases concerning proposed consolidations of school districts or student transfers between schools.

73. *See* United States v. Yonkers Bd. of Educ., 123 F. Supp. 2d 694 (S.D.N.Y. 2000); Brinkman v. Gilligan, 85 F. Supp. 2d 761 (S.D. Ohio 1999) (Dayton Board of Education); Jenkins v. Sch. Dist., 73 F. Supp. 2d 1058 (W.D. Mo. 1999) (Kansas City, Missouri); United States v. Yonkers Bd. of Educ., 7 F. Supp. 2d 396 (S.D.N.Y. 1998); United States v. Yonkers Bd. of Educ., 984 F. Supp. 687 (S.D.N.Y. 1997); Jenkins v. Missouri, 965 F. Supp. 1295 (W.D. Mo. 1997) (Kansas City, Missouri School District); Lee v. Lee County Bd. of Educ., 963 F. Supp. 1122 (M.D. Ala. 1997); Valley v. Rapides Parish Sch. Bd., 960 F. Supp. 96 (W.D. La. 1997); Jenkins v. Missouri, 959 F. Supp. 1151 (W.D. Mo. 1997) (Kansas City, Missouri School District), *aff'd*, 122 F.3d 588 (8th Cir. 1997); United States v. Yonkers Bd. of Educ., No. 80Civ.6761(LBS), 1997 WL 311943 (S.D.N.Y. June 9, 1997); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 934 F. Supp. 299 (E.D. Ark. 1996); United States v. City of Yonkers, 888 F. Supp. 591 (S.D.N.Y. 1995), *vacated*, 96 F.3d 600 (2d Cir. 1996); United States v. City of Yonkers, 880 F. Supp. 212 (S.D.N.Y. 1995), *vacated*, 96 F.3d 600 (2d Cir. 1996); Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341 (D.S.C. 1995); Lee v. Chambers County Bd. of Educ., 849 F. Supp. 1474 (M.D. Ala. 1994); United States v. City of Yonkers, 833 F. Supp. 214 (S.D.N.Y. 1993); Jenkins v. Missouri, No. 77-0420-CV-W-4, 1993 WL 566488 (W.D. Mo. July 30, 1993) (Kansas City, Missouri School District), *aff'd*, 13 F.3d 1170 (8th Cir. 1998); Jenkins v. Missouri, No. 77-0420-CV-W-4, 1993 WL 546576 (W.D. Mo. June 30, 1993) (Kansas City, Missouri School District), *aff'd*, 11 F.3d 755 (8th Cir. 1998); Liddell v. Bd. of Educ., 814 F. Supp. 788 (E.D. Mo. 1993) (City of St. Louis, Missouri); Bd. of Pub. Educ. v. Georgia, No. CV490-101, 1992 WL 699499 (S.D. Ga. Aug. 11, 1992) (City of Savannah and County of Chatham); Bd. of Pub. Educ. v. Georgia, No. CV490-101, 1992 WL 322299 (S.D. Ga. Oct. 16, 1992) (City of Savannah and County of Chatham); United States v. City of Yonkers, No. 80CIV.6761(LBS), 1992 WL 176953 (S.D.N.Y. July 10, 1992); Jenkins v. Missouri, No. 77-0420-CV-W-4; 1992 WL

defendants assert claims against each other, a defendant will lose. In some of these instances, the defendant school district won;[74] in others, the defendant state prevailed.[75] In sum, defendants' losses are confined to the atypical cases in which the defendant opposes the declaration of unitary status or the defendants oppose each other.

C. *When Parties Settle*

Parties in school desegregation cases often reach agreement. In twenty-three opinions, or twenty-six percent of the opinions studied, the parties filed either joint motions or requested approval of consent decrees.[76] Given that the survey only included published opinions, the rate of settlement is probably at least slightly higher than indicated by the survey. It seems reasonable to assume that when parties are in agreement, the court would be less likely to designate an opinion for publication or write an opinion to be electronically published, although this absence of publication may not happen too frequently.[77]

551568 (W.D. Mo. June 25, 1992) (Kansas City, Missouri School District); Jenkins v. Missouri, No. 77-0420-CV-W-4, 1992 WL 551569 (W.D. Mo. June 17, 1992) (Kansas City, Missouri School District).

74. *See Valley*, 960 F. Supp. at 101 (ruling in favor of the school board that had challenged the constitutionality of a Louisiana statute the state had tried to use to split-up the school district); *Bd. of Pub. Educ.*, 1992 WL 699499, at *16 (finding state liable for dual school system); *Bd. of Pub. Educ.*, 1992 WL 322299, at *4 (requiring state to pay 15% of desegregation costs); *Jenkins*, 1992 WL 551568, at *9 (adopting school district's teacher salary proposal).

75. *See Jenkins*, 959 F. Supp. at 1152, 1179–80 (granting in part the state's motion for unitary status of school district, despite opposition from the district); *City of Yonkers*, 888 F. Supp. at 593 (holding the State of New York not liable under the Equal Educational Opportunities Act and Title VI of the Civil Rights Act), *vacated*, 96 F.3d 600 (2d Cir. 1996); *City of Yonkers*, 880 F. Supp. at 245 (holding state not liable under § 1983, Title VI, and the EEOA because there was no evidence that the state had engaged affirmatively in pro-segregative conduct), *vacated*, 96 F.3d 600 (2d Cir. 1996).

76. *See* Vaughns v. Bd. of Educ., 980 F. Supp. 834, 841 (D. Md. 1997) (Prince George's County) (approving a consent decree covering assignment of identified children on a waiting list for magnet schools); Lee v. Randolph County Bd. of Educ., 160 F.R.D. 642, 652 (M.D. Ala. 1995) (approving a settlement addressing the future employment of a high school principal); *infra* notes 78–80. The twenty-three opinions involved twenty-one separate cases.

77. In class actions, a federal district court must evaluate any settlement and may approve or disapprove the proposed settlement. *See* FED. R. CIV. P. 23(e). The overwhelming number of school desegregation cases are certified as class actions or treated as class actions. *See, e.g.*, Hoots v. Pennsylvania, 118 F. Supp. 2d 577, 579 (W.D. Pa. 2000) (Woodland Hills School District). Because a court must analyze school desegregation settlements, it is more likely that the court will write an opinion that is published. *See* Parker, *supra* note 36, at 1195–96.

Most remarkably, the settlements concerned major substantive issues. Eleven school districts were granted unitary status without opposition from any party,[78] and in one school district, the parties agreed to partial unitary status and the court granted such status.[79] Nine other opinions approved major remedial consent decrees, covering a wide range of matters.[80]

78. *See* Goodwine v. Taft, No. C-3-75-304, 2002 WL 1284228, at *4 (S.D. Ohio Apr. 15, 2002) (Dayton Public School System) (adopting the parties' stipulation that the Dayton public school system is unitary); Lee v. Russell County Bd. of Educ., No. CIV.A.70-T-848-E, 2002 WL 360000, at *8 (M.D. Ala. Feb. 25, 2002) (granting unitary status to the school district but not dismissing the court orders relating to statewide special education issues, which only applied to the state); Lee v. Auburn City Bd. of Educ., No. CIV.A.70-T-851-E, 2002 WL 237091, at *4, *9 (M.D. Ala. Feb. 14, 2002) (declaring the school system to be unitary and noting that there was no opposition); Lee v. Opelika City Bd. of Educ., No. CIV.A.70-T-853-E, 2002 WL 237032, at *10 (M.D. Ala. Feb. 13, 2002) (granting unitary status to the district, but not the state on the issue of statewide special education issues); Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d 1359, 1367 (M.D. Ala. 2002) (granting unitary status); Davis v. Sch. Dist., 95 F. Supp. 2d 688, 692, 697 (E.D. Mich. 2000) (City of Pontiac) (noting that no judicial action had been taken for twenty-five years and declaring unitary status); Brown v. Unified Sch. Dist. No. 501, Shawnee County, Kan., 56 F. Supp. 2d 1212, 1213 (D. Kan. 1999) (declaring unitary status and noting lack of opposition by plaintiff); Liddell v. Bd. of Educ., No. 4:72CV100 SNL, 1999 WL 33314210, at *6 (E.D. Mo. Mar. 12, 1999) (City of St. Louis, Missouri) (approving settlement agreement of the parties in favor of declaring unitary status); United States v. Bd. of Pub. Instruction, 977 F. Supp. 1202, 1227 (S.D. Fla. 1997) (St. Lucie County) (granting motion for unitary status supported by all parties); United States v. Unified Sch. Dist. No. 500, Kansas City, Kan., 974 F. Supp. 1367, 1368, 1370 (D. Kan. 1997) (granting unitary status supported by the government and the school district); United States v. Bd. of Educ., No. CIV.A.679, 1995 WL 224537, at *1 (S.D. Ga. Feb. 16, 1995) (Coffee County, Georgia) (granting unitary status).

79. *See* Lee v. Lee County Bd. of Educ., No. CIV.A.70-T-845-E, 2002 WL 1268395, at *11 (M.D. Ala. May 29, 2002) (granting unitary status in all respects except faculty assignment to two schools).

80. *See* Johnson v. Bd. of Educ., 188 F. Supp. 2d 944, 945, 947–50 (C.D. Ill. 2002) (Champaign Unit School District #4) (approving joint motion by parties in favor of comprehensive remedial consent decree); Lee v. Butler County Bd. of Educ., No. CIV.A.70-T-3099-N, 2000 WL 33680483, at *1 (M.D. Ala. Aug. 30, 2000) (approving consent decree on statewide special education issues); S.F. NAACP v. S.F. Unified Sch. Dist., 59 F. Supp. 2d 1021, 1025 (N.D. Cal. 1999) (agreeing on elimination of race-conscious admission standards); Vaughns v. Bd. of Educ., 18 F. Supp. 2d 569, 570 (D. Md. 1998) (Prince George's County) (approving a comprehensive plan agreed to by the parties); Berry v. Sch. Dist., 184 F.R.D. 93, 106 (W.D. Mich. 1998) (City of Benton Harbor) (reaching agreement on multiple remedial issues); Stanley v. Darlington County Sch. Bd., 879 F. Supp. 1341, 1419 (D.S.C. 1995) (consenting to comprehensive remedial plan), *rev'd in part on other grounds*, 84 F.3d 707 (4th Cir. 1998); Reed v. Rhodes, 869 F. Supp. 1274, 1276 (N.D. Ohio 1994) (Cleveland City School District) (approving final consent decree); Reed v. Rhodes, 869 F. Supp. 1265, 1265 (N.D. Ohio 1994) (Cleveland City School District) (tentatively approving agreement); Lee v. Chambers County Bd. of Educ., 849 F. Supp. 1474, 1475 (M.D. Ala. 1994) (approving consent decree on interdistrict transfer orders).

In many respects, the prevalence of agreement is not surprising given the longstanding use of settlement in public law litigation.[81] Further, party agreement may be preferable for any number of reasons, most notably the likelihood of successful implementation.[82] Yet, it must be recognized that settlement can divorce the judge from influencing the lawsuit, as the written opinion study has shown.[83]

The study demonstrated that the involvement of judges in settlements was minimal. At most the judges would appoint a special master or mediator to assist the settlement process.[84] The typical role was simply noting the availability of settlement.[85] Granted, the district court must evaluate any settlement for the settlement to be deemed valid,[86] but courts in the study approved every settlement proposed by the parties.[87] No opinion even hinted at the judge playing the role of "political powerbroker" that Professor Colin Diver long ago assigned the judges.[88] The judges were not attempting to broker settlements. Even more fundamentally, it appeared that the judges had no role in determining what areas should be covered by the negotiated remedy or what the goals of the litigation should be.

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81. *See* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1367–76 (1991). In fact, Professor Chayes expected that "[t]he negotiating process ought to minimize the need for judicial resolution of remedial issues." Chayes, *supra* note 5, at 1299.

82. *See generally* Sturm, *supra* note 81, at 1427–44 (recognizing the importance of parties' participation in successful implementation of public law remedies).

83. One of public law litigation's early and influential proponents, Professor Owen M. Fiss, opposed the use of settlement in part because it separated judges from their role of articulating and actualizing public values. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082–90 (1984).

84. *See* Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d 1359, 1362 (M.D. Ala. 2002) (appointing magistrate judge to oversee discovery and mediate disputes); *S.F. Unified Sch. Dist.*, 59 F. Supp. 2d at 1025 (referring settlement negotiations to a special master); Liddell v. Bd. of Educ., No. 4:72CV100 SNL, 1999 WL 33314210, at *8 (E.D. Mo. March 12, 1999) (City of St. Louis, Missouri) (utilizing a settlement coordinator); *Berry*, 184 F.R.D. at 101 (appointing special master to help case move toward termination); *Vaughns*, 18 F. Supp. 2d at 579 (appointing a mediator); United States v. Bd. of Pub. Instruction, 977 F. Supp. 1202, 1227 (S.D. Fla. 1997) (St. Lucie County) (utilizing a biracial monitoring committee to discuss ways of achieving racial harmony and understanding).

85. *See S.F. Unified Sch. Dist.*, 59 F. Supp. 2d at 1024–25 (delaying the start of trial to allow the parties to finalize a settlement); *Vaughns*, 18 F. Supp. 2d at 572 (noting "a gentle push from the Court" to attempt a settlement).

86. *See supra* text accompanying note 77.

87. Not surprisingly, some considerations of proposed consent decrees were more thorough than others. *Compare* Johnson v. Bd. of Educ., 188 F. Supp. 2d 944, 945–70 (C.D. Ill. 2002) (Champaign Unit School District #4) (examining carefully the entire record before approving a comprehensive consent decree), *with* United States v. Bd. of Educ., No. CIV.A.679, 1995 WL 224537, at *1 (S.D. Ga. 1995) (Coffee County, Georgia) (granting uncontested unitary status motion with little evidence of reviewing the record).

88. Diver, *supra* note 3, at 46.

As a result, the prevalence of settlements further limits the power that judges are able to exercise over their school desegregation cases.

D. Process

The process of school desegregation cases further minimizes the role of the judiciary. Not only are cases settled with little judicial involvement, but the courts are also having little impact on the scope of the issues to be considered. With the exception of two Alabama judges who are taking a unique approach to their school desegregation cases,[89] in only two cases did the district court judge sua sponte raise an issue in a written opinion.[90] Granted, in oral communications with parties judges may be influencing what issues are raised. But the opinions are written as if the court is reacting solely to the parties' motions, thus supporting the conclusion that parties are generally driving the process.

The written opinion study also revealed the hidden existence of the overwhelming majority of school desegregation cases. The United States is a party to school desegregation cases concerning over 400 school districts, but it is not a party to every case.[91] One prominent school desegregation expert estimates the pendency of 695 school desegregation cases.[92] Yet, a ten-year search of district court opinions revealed only fifty-three school districts subject to actively litigated cases.[93] Not one opinion concerned a school district in Mississippi or Tennessee, where school desegregation decrees remain.[94] In California, Louisiana, North Carolina, and Texas, only one school district in each state was the subject of a written opinion.[95] This suggests the possibility that many cases are languishing on court dockets, with either no opinion being written for ten years, or no

89. *See infra* Section II.B.

90. *See* Davis v. Sch. Dist., 95 F. Supp. 2d 688, 690–91, 697 (E.D. Mich. 2000) (City of Pontiac) (raising sua sponte the issue of unitary status); Manning v. Sch. Bd., 24 F. Supp. 2d 1277, 1286–87 (M.D. Fla. 1998) (Hillsborough County, Florida) (same), *clarified in part*, 28 F. Supp. 2d 1353 (M.D. Fla. 1998), *rev'd*, 244 F.3d 927 (11th Cir. 2001).

91. *See* Civil Rights Division, U.S. Dep't of Justice, Education Section, Open Cases as of Dec. 19, 2002 (on file with the North Carolina Law Review).

92. *See* ARMOR, *supra* note 18, at 166.

93. *See supra* text accompanying notes 36–37.

94. The Department of Justice's list of school desegregation cases to which it is a party or litigating amicus includes sixty-nine cases in Mississippi and fourteen cases in Tennessee. *See* Civil Rights Division, Open Cases as of Dec. 19, 2002, *supra* note 91, at 28–35, 38–39.

95. The Department of Justice's list of school desegregation cases to which it is a party or litigating amicus includes forty cases in Louisiana, four cases in North Carolina, and seventeen cases in Texas. *See id.* at 23–27, 35–36, 39–41.

opinion being deemed worthy of electronic or official publication for ten years.[96]

E. Summary and Implications

Perhaps the uniqueness and extent of the power exercised by district court judges in institutional reform litigation was once overestimated by both sides of the debate.[97] What seems certain now, however, is that the model of the all-powerful judge in school desegregation is outdated. Today, many judges have no power, as they "preside" over cases with no recent activity.[98] In active cases, the parties are determining which issues need judicial resolution and are developing the requisite record.[99] Often the parties resolve the matter on their own with minimal judicial intervention.[100] When the parties are unable to settle, the court routinely grants the defendants' request for a modification of the remedial decree or for termination of the lawsuit.[101] Because the governing law is universally condemned for its ambiguity, the courts are not simply "applying" the law,[102] rather, choices are being made. Judicial decisionmaking largely occurs only when defendants themselves cannot agree and the judge must decide between conflicting choices presented by the defendants. It also occurs in the more limited instances when the defendant wants to use school desegregation to justify its race-conscious student assignment practices but is opposed by another party.[103] Thus, judges rarely "control" the school desegregation lawsuit or the school system.

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96. *See generally* Parker, *supra* note 36, at 1199, 1211–12 (demonstrating through an examination of unpublished docket sheets that many school districts are subject to long-standing school desegregation orders, but that the pending cases have had little or no activity for years).

97. Many contend, for example, that the focus on the judiciary has obscured the importance parties and other interested entities play in the public law remedial process. *See generally* Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2031 (1994) (noting a number of scholars who have advocated a party-driven, "bottom-up" approach to litigation analysis). Others have made a similar but distinct argument: that the power in public law cases is similar to that exercised in private law litigation. *See, e.g.*, Eisenberg & Yeazell, *supra* note 16, at 491–94 (finding historical, private law similarities to the power exercised in institutional reform litigation); Sturm, *supra* note 81, at 1382 (demonstrating that judges in public law cases often play a role in settlement similar to that performed in private law cases).

98. *See supra* notes 91–96 and accompanying text.

99. *See supra* notes 90–91 and accompanying text.

100. *See supra* Part I.C.

101. *See supra* Part I.A.

102. *See infra* Part II.A.

103. *See supra* Part I.B.

Through this largely reactive and deferential posture, district court judges are giving defendants a large degree of control over their desegregation lawsuits. Granted, defendants' choices are restricted. First, they cannot change the fact that the lawsuit was originally filed against them.[104] The lawsuits, and the resulting liability determinations, were a necessary consequence of defendants' having de jure segregation (itself a choice), having a federal judiciary charged with enforcement of the Equal Protection Clause,[105] and of defining the Clause as prohibiting de jure segregated schools.[106] This reality is largely free from controversy.[107] The many controversies surrounding institutional reform litigation, in fact, concern the remedial process and not the judiciary declaring the violation of de jure segregation.[108] School districts can, however, seek dismissal of these suits, and their chances of success are great. In the study, all but one school district that sought dismissal (either in whole or in part) of their pending lawsuits were entirely successful.[109]

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104. The highly controversial Kansas City, Missouri school desegregation case is an exception. The school district was originally a plaintiff, but the district court quickly re-aligned it as a nominal defendant. School Dist. v. Missouri, 460 F. Supp. 421, 442 (W.D. Mo. 1978) (Kansas City, Missouri), *appeal dismissed on jurisdictional grounds*, 592 F.2d 493 (8th Cir. 1979). Other school districts have supported the continued pendency of their suits because of the financial benefits associated with the suits' remedial decrees or because of the political cover for unpopular decisions given by the remedial decrees. *See* Parker, *supra* note 36, at 1211–13.

105. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

106. *See generally* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (*Brown I*) (ruling "that in the field of public education the doctrine of 'separate but equal' has no place").

107. *See, e.g.*, Sturm, *supra* note 81, at 1405 (noting that "the courts and academic critics acknowledge that the Constitution permits, indeed requires, continued judicial involvement in enforcing constitutional and statutory norms"); Yoo, *supra* note 2, at 1166 (arguing that a court can declare a constitutional violation, but "the obligation to impose a remedy would fall upon the other entities in our national political system: the states, the executive branch, and the Congress"). Rather, the controversy surrounding the declaration that de jure segregation violates the Equal Protection Clause centers on the reasoning for this conclusion, not the conclusion itself. *See generally* BRUCE ACKERMAN ET AL., WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 44–64 (Jack M. Balkin ed., 2001) (summarizing criticisms of the reasoning in *Brown*).

108. Yet criticisms about remedies are often really attacks on the rights at issue. *See* Frank H. Easterbrook, *The Limits of Judicial Power in Ordering Remedies: Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103, 103 (1991) ("When we hear an objection to the remedy, it is almost always a disguised objection to the definition of what is due, and not to the methods used to apply the balm."); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 593 & n.16 (1983) ("Criticism of a remedy . . . may reflect criticism of the underlying right."); Sturm, *supra* note 81, at 1382 ("At least some of the debate over the court's proper remedial role is a thinly veiled attack on the prevailing interpretation of the Constitution.").

109. *See supra* Part I.B–I.D, notes 50–55 and accompanying text.

Second, the defendants cannot change existing Supreme Court jurisprudence. Even though that jurisprudence is pro-defendant, it still confines the options available to defendants. For example, a defendant will not request unitary status based solely on compliance with pending remedial orders because the standards for unitary status require more.[110] Yet, because the standards are largely indeterminate,[111] the defendant faces a great deal of choice in what course to pursue.

Taking these two limitations on defendants' choices as true, one must still recognize that the deference given to the defendants—this almost universal "deferrer model of remedial process"[112]—creates a new approach to the oversight and implementation of school desegregation remedies.[113] Defendants can choose to seek unitary status, for which their chances of success are high. Defendants can also choose not to seek unitary status and use the remedial decree for additional financing or as an excuse for unpopular, but desired, policy.[114] When the school district then needs a modification of the remedial decree, it can usually get that modification, particularly if the modification is significant. Plaintiffs, on the other hand, face a more limited choice: settle with the defendant or face a likely defeat before a court.[115]

The judges' current approach to their school desegregation dockets addresses in part two traditional critiques of the role of judges in the public law remedy: the competency critique and the allocation-of-power critique.[116] The competency critique of judges contends that judges lack the competency or capacity with which to undertake the necessary policymaking to ensure effective

110. *See infra* notes 127–32 and accompanying text.

111. *See infra* notes 133–37 and accompanying text.

112. *See* Sturm, *supra* note 81, at 1412. This is the model of "delegating the task of remedial formulation to the defendants." *Id.*

113. Others have recognized this trend of a deferrer model of adjudication by the federal courts in many types of cases and have critiqued it on a variety of fronts. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 369 (1990); ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 257–65 (1995); Sturm, *supra* note 81, at 1412.

114. The exceptions are Charlotte-Mecklenburg and Hampton County, where plaintiffs successfully sought unitary status. *See supra* notes 66–69 and accompanying text.

115. *See supra* Part I.A.

116. *See generally* Sturm, *supra* note 81, at 1403–08 (describing the two critiques). When defendants oppose each other or defendants oppose unitary status so that they can continue race-conscious student assignment, then the deference to defendants discussed here is not applicable.

remediation.[117] To the extent that one believes defendants have competency superior to judges to determine the appropriate remedy, most likely because of the defendants' expertise and control over school administration, one would welcome the high win rates of defendants at least on motions addressing the scope of the remedy and possibly on declarations of unitary status as well.

Another traditional critique concerns the allocation of powers: the judges are undertaking tasks that are beyond their sphere of power and within that designated for other governmental agencies.[118] The concern is not in the declaration of a violation, but that in the crafting of the remedy, courts are trampling upon the rights of state and local governments in the running of their affairs. The Supreme Court has agreed in part with this federalism critique and has required that courts "in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[119]

The great leeway afforded to the defendant pacifies some of the allocation-of-powers critique. By granting a high percentage of defendants' requests, courts are affording defendants more control over their affairs. Granted the defendant is placed in the position of having to ask for permission, and it is entirely possible that the defendant internally checks itself by asking only for what is reasonable under the law. Regardless, particularly because the governing standards are highly indeterminate and ambiguous,[120] much of the allocation-of-governmental-powers critique is abated when the defendants are allowed to control the course and outcome of the remedial process to such a great extent. The power given to defendants arguably creates in turn its own separation-of-powers concerns: when the courts defer to the defendants, the courts are not

117. *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 17–19, 106–70 (1977) (analyzing the competency of federal courts in school desegregation); MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM 147–74 (1982) (conducting an empirical investigation of school desegregation cases to determine the legitimacy and competency of federal courts in public law cases); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–169 (1991) (critiquing the role of federal courts in integrating public schools). For a description of the debate over the judiciary's competency in public law litigation, see Sturm, *supra* note 81, at 1406–08; Yoo, *supra* note 2, at 1137–38.

118. *See supra* notes 2, 22–27 and accompanying text.

119. Milliken v. Bradley, 433 U.S. 267, 280–81 (1977). The Supreme Court has obviously not excused itself altogether from interpreting the Equal Protection Clause in ways contrary to the preferences of public schools.

120. *See infra* notes 133–37 and accompanying text.

fulfilling their constitutional role of resolving cases properly before them.[121]

It is important to note what this Article does not concern. This Article addresses only the involvement of judges in the remedial process, and its thesis is relatively straightforward: district court judges have crafted for themselves a very limited role, a role that comes at the expense of the rights of plaintiffs, as explored in the next section. It does not argue that school desegregation itself does not have a very different impact on society than routine private law litigation or that the remedial process itself does not raise serious separation-of-powers or federalism implications, even with judges deferring to defendants.

II. THE ABDICATION OF RESPONSIBILITY

This Part explores one possible explanation for the passive role judges play in school segregation—namely, Supreme Court precedent that may explain adequately the approach of district court judges. Professor Erwin Chemerinsky has aptly demonstrated the Supreme Court's culpability for the segregation and resegregation of failing public schools.[122] I believe, however, that responsibility is not the Supreme Court's alone. Rather, district court judges must also share the blame. They have the power and ability to effectuate more meaningful desegregation of public schools than they have undertaken. Those who contend that the judiciary lacks the requisite tools with which to effectuate meaningful social change are mistaken.[123] The Supreme Court's standards, while decidedly allowing continued segregation of minority students in underperforming schools, still allow for some degree of integration and redress of disparities in the quality of education. Two Alabama judges, in fact, have demonstrated the potential of school desegregation to produce positive change in ways entirely consistent

121. *See, e.g.*, MINOW, *supra* note 113, at 369 (arguing that "[t]he courts' own responsibilities to the parties before them cannot be acquitted simply by asserting deference to other branches"); Sturm, *supra* note 81, at 1406 (contending that federal judges are assigned the role of determining remedies). *But see, e.g.*, Frug, *supra* note 2, at 743–49 (arguing that public law remedies sometimes violate separation of powers); Nagel, *supra* note 2, at 662–63 (contending that courts crafting school desegregation remedies raises its own separation-of-powers issue).

122. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003).

123. *See* STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 6–13 (1995); HOROWITZ, *supra* note 117, at 255–98; ROSENBERG, *supra* note 117, at 39–169.

with Supreme Court precedent.[124] Yet, as reflected in Part I, almost all district courts have refused to undertake this responsibility.

A. *Supreme Court Standards and District Courts*

The Supreme Court has evidenced its desire that school desegregation orders end *now*, even if disparities remain and even if immediate resegregation will follow termination of the lawsuit.[125] Further, the award of unitary status seems almost guaranteed by the results of the written opinion study. After all, even school districts protesting unitary status are still declared unitary.[126] But the Supreme Court's standards for terminating school desegregation litigation themselves do not lead to this result. To be declared unitary, a defendant faces no easy test. Specifically, a defendant must prove the following:

> [1] defendant's good faith compliance "with the desegregation decree since it was entered;"[127]
>
> [2] defendant's elimination of vestiges of past discrimination—the present day inequities caused by defendant's past violation—"to the extent practicable;"[128] and
>
> [3] defendant's commitment to future compliance with the Fourteenth Amendment.[129]

By its terms, the three-part test imposes a heavy burden on defendants. School desegregation litigation ends not just with proof of compliance with outstanding court orders.[130] Instead, the second element of the test mandates the elimination of vestiges of past

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124. *See infra* Part II.B.

125. *See* Missouri v. Jenkins, 515 U.S. 70, 89 (1995); Freeman v. Pitts, 503 U.S. 467, 489 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (Oklahoma City, Oklahoma). *See generally* Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1014 (1994) (arguing that after *Dowell* and *Freeman*, "the Court is declaring victory over the problem of school inequality and simply giving up"); Epstein, *supra* note 24, at 1108 (describing "fatigue" as "the dominant impulse on the Court"); Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 767 (1996) (describing *Jenkins* as the "we've done enough" theory, comparable to the Civil Rights Cases of 1883). This stands in stark contrast to the Supreme Court's 1968 ruling that the time for meaningful integration of schools was *now*. *See* Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (New Kent County).

126. *See supra* notes 66–71 and accompanying text.

127. *Dowell*, 498 U.S. at 249–50.

128. *Id.* at 250.

129. *Id.* at 247.

130. *See* Parker, *supra* note 36, at 1167.

discrimination. This requires the district court to examine all disparities existing in the school system to determine whether they are caused by the defendant's past violations and, if they are, whether they can be eliminated practicably. An analysis of disparities typically includes an examination of student assignment, faculty and staff assignment, transportation, facilities, extracurricular activities, and quality of education.[131] The resulting full-scale analysis of the school system is no easy task because it requires an examination not just of process—whether the terms of the decree were fulfilled—but with outcome—whether compliance with the decree was successful in its goals. To the extent segregation remains, that segregation must be examined and be found legally justifiable. The desegregation of schools, to the extent practicable, includes the expectation of the unitary status standards and also what plaintiffs seek through the litigation. In other words, the standards center on fulfilling the rights of the plaintiffs.[132]

Critically, ambiguity in the test for unitary status exists. The judicial discretion required by the Supreme Court's standards is universally recognized.[133] Today, the most difficult issue presented is causation.[134] Defendants have the responsibility for redressing only the portion of present day vestiges (which loosely translates to racial and ethnic disparities) that are attributable to the defendants' illegal actions.[135] Thus, plaintiffs are entitled to their ultimate goal in the lawsuit—desegregation to the extent practicable—but only to the extent that current segregation is attributable to the defendants. But as Professor James Ryan correctly argues, no one knows the extent of this relationship, not even social scientists who study these concerns.[136] No one can tell us how integrated our schools would be

131. *See* Freeman v. Pitts, 503 U.S. 467, 492 (1992); Green v. County Sch. Bd., 391 U.S. 430, 435 (1968) (New Kent County); *see infra* note 175 and accompanying text (discussing *Freeman* in more detail).

132. *See* Parker, *supra* note 36, at 1176–77.

133. *See* Missouri v. Jenkins, 515 U.S. 70, 134 (1995) (Thomas, J., concurring); *Freeman*, 503 U.S. at 503 (Scalia, J., concurring); Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1108–09 (1990); Friedman, *supra* note 3, at 747; Parker, *supra* note 63, at 524–26; Yoo, *supra* note 2, at 1127, 1132, 1172.

134. *See Freeman*, 503 U.S. at 503–05 (Scalia, J., concurring); Epstein, *supra* note 24, at 1101, 1117; Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 280–81 (1997).

135. *See Jenkins*, 515 U.S. at 101–02.

136. *See* James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1671–74 (2003).

or how students would score on achievement tests in the absence of the defendants' illegal actions.[137] Courts are directed to determine to what extent defendants are responsible, but the answer is unknowable. This ambiguity in standards allows, actually even requires, *choice*. The Supreme Court's own choices indicate a willingness to believe that present inequities are not due to the defendants' illegality.[138] Thus, the Court has excused segregated schools on the grounds of purely private housing choices[139] and racial disparities in achievement scores for the reason of non-defendant causation.[140]

Another goal competes against this backdrop of ambiguity over which, if any, disparities are the legal responsibility of the defendants. This is the goal of local control, which is the idea, grounded in federalism, that courts should return schools to local governance, unencumbered by judicial orders.[141] The goal suffers no ambiguity. Its end result is easily articulated and achieved: dismiss the lawsuit. Reference to this goal, which centers on the rights of defendants, can help resolve the question whether plaintiffs' rights have been vindicated. When in doubt, terminate.

By judicial choice—a choice by which judges largely defer to the defendants' preferences—district court judges seem very willing to accept inadequacies in result, even after decades have passed during the attempt.[142] At times, the judicial action is entirely consistent with the Supreme Court's articulated goal of local control and consistent with the Supreme Court's own approaches to causation.[143] Further, a court's choice is at least defensible in the area of disparities in achievement scores or even in the area of student assignment. These matters are influenced by a wide array of factors beyond the control

137. *See* John Leubsdorf, *Remedies for Uncertainty*, 61 B.U. L. REV. 133, 135 (1981) ("But saying that, had it not been for constitutional violations, a given school would have had 158 white students and 110 black ones is hard to distinguish from writing a treatise on the habits of unicorns.").

138. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 250 n.2 (1991) (Oklahoma City, Oklahoma) (allowing that residential segregation independent of the defendants may be responsible for resegregation of over half of the elementary schools).

139. *See Freeman*, 503 U.S. at 476.

140. *See Jenkins*, 515 U.S. at 101.

141. *See id.* at 89; *Freeman*, 503 U.S. at 489; *Dowell*, 498 U.S. at 248.

142. *See, e.g.*, Reed v. Rhodes, 1 F. Supp. 2d 705 (N.D. Ohio 1998) (Cleveland City School District) (granting unitary status despite widespread disparities), *aff'd*, 215 F.3d 1327 (6th Cir. 2000); Keyes v. Cong. of Hispanic Educators, 902 F. Supp. 1274 (D. Colo. 1995) (Denver School District No. 1) (same), *appeal dismissed*, 119 F.3d 1437 (10th Cir. 1997).

143. *See supra* notes 138–40 and accompanying text.

of the defendants, making the link between defendants' past illegality and present day disparities difficult.[144] Further, solutions to these issues are subject to intense, well-meaning, and long-standing debate.

The area of faculty and staff assignment, however, is different. Here district court judges allow disparities in ways very different from those allowed under Supreme Court precedent. One of the hallmarks of de jure segregation was the assignment of white faculty and staff to schools attended by white children and the assignment of African-American faculty and staff to schools attended by African-American children.[145] Teachers and staff were critical in designating the racial identifiability of schools. Thus, from early in the history of school desegregation, courts have required that the assignment of teachers and staff be racially neutral as part of the elimination of schools' racial identifiability.[146]

School districts exercise quite a bit of control over teacher and staff assignment. Recruitment, hiring, and retention of educators is not at issue. Rather, only at issue is the distribution of the educators already employed by the school district. If race is not considered, one would expect assignment of teachers and staff over time to mirror the overall employment numbers. Thus, if the school district had a teaching staff that is seventy percent white, one would expect each school to have a teaching staff that is likewise generally seventy percent white. After all, administrators have a great deal of control over where teachers will teach.[147] Difficulties and complications inherently present in the student assignment area—developing manageable busing routes, determining tipping points, managing demographic change[148]—are entirely absent. Even Justice Thomas has recognized the relatively straightforward nature of faculty and staff assignment.[149] All that is at issue is which teachers and staff will be assigned to which school.

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144. *See* ARMOR, *supra* note 18, at 76–98; Epstein, *supra* note 24, at 1111, 1115; Leubsdorf, *supra* note 137, at 135–37.

145. *See* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 96 (1979) (describing desegregation of teaching staffs as "the least visible and most flammable part of the entire school picture").

146. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 435 (1968) (New Kent County) (requiring disestablishment of continued segregation in faculty and staff assignment); United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 394 (5th Cir. 1967) (en banc) (per curiam) (outlining requirements for racially neutral employment and dismissal).

147. School districts can choose to contract these rights away in union contract negotiations, but the court order would still take precedence.

148. *See* ARMOR, *supra* note 18, at 174–80.

149. Justice Thomas has argued that remedies addressing student assignment, transportation, staff assignment, resource allocation, and activities are "fairly

Yet, district courts have continually recognized the continuing identifiability of faculty and staff and then excused that continuing vestige of discrimination. This is true even though school districts are not required to have an exactly racially neutral distribution of teachers. The distribution must be within a stated range—typically a band of ±15%.[150] Thus, if a school district's teaching staff is 30% African-American, then each school would be expected to have a teaching staff between 15% and 45% African-American. Even with this significant allowance—after all, why should the distribution not be closer to the overall racial makeup if the distribution is truly racially neutral, courts readily allowed schools to fall outside the requisite band.[151] By doing so, the defendants fail to comply with outstanding remedial decrees and with one of the ultimate goals of the lawsuit, the elimination of racial identifiability of schools by their faculties.

Granted, the noncompliance was not startling or egregious. The clear majority of schools were in compliance.[152] Critically, however, the overrepresentation always mirrored the student population. This suggests a pattern of assigning teachers to schools according to the racial makeup of the student body, a pattern rooted in the system of de jure segregation. Thus, if the school had an overrepresentation of African-American educators, then African-American students were

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straightforward and [have] not produced many examples of overreaching by the district courts. It is the 'compensatory' ingredient in many desegregation plans that has produced many of the difficulties in the case before us." *See* Missouri v. Jenkins, 515 U.S. 70, 136 (1996) (Thomas, J., concurring).

150. *See, e.g.*, Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 326 (4th Cir.) (en banc) (upholding district court's use of the 15% variance), *reconsideration denied en banc*, 274 F.3d 814 (4th Cir. 2001), *cert. denied*, 535 U.S. 986, *and cert. denied*, 535 U.S. 986 (2002); Tasby v. Woolery, 869 F. Supp. 454, 470 (N.D. Tex. 1994) (Dallas Independent School District) (allowing a variance of 15% for teachers and principals).

151. *See, e.g.*, Davis v. Sch. Dist., 95 F. Supp. 2d 688, 694 (E.D. Mich. 2000) (City of Pontiac) (excusing schools for not complying with the court order regarding distribution of teachers because the variance matched the racial composition of the student population); Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784, 804 (D. Del. 1995) (Red Clay Consolidated School District) (noting a continuing violation of variances in the distribution of teachers), *aff'd*, 90 F.3d 752 (3d Cir. 1996); *Tasby*, 869 F. Supp. at 471–72, 477 (awarding unitary status but requiring, inter alia, additional efforts to address substantial unequal distribution of teachers). One court even allowed the exclusion of "schools which serve a specialized student population," although all schools are required to be desegregated according to the Supreme Court. United States v. Bd. of Pub. Instruction, 977 F. Supp. 1202, 1216 n.4 (S.D. Fla. 1997) (St. Lucie County).

152. *See, e.g.*, Hoots v. Pennsylvania, 118 F. Supp. 2d 577, 585–86 (W.D. Pa. 2000) (Woodland Hills Schools District); Reed v. Rhodes, 1 F. Supp. 2d 705, 727–30 (N.D. Ohio 1998) (Cleveland City School District), *aff'd*, 215 F.3d 1327 (6th Cir. 2000).

also overrepresented in the student body.[153] Likewise, if the school had an overrepresentation of white educators, then white students were also overrepresented in the student body.[154] In no instance was an overrepresentation in the faculty not matched by an overrepresentation of the same racial group in the student body. The racial identifiability of the schools continued. A "close-enough" standard was employed, even though that was not the standard of the Supreme Court.[155] The Supreme Court allows continued disparities when it is not practicable to eliminate them or when the disparities are not traceable to the defendants' actions.[156] At no point, however, did a court discuss whether it would be practicable to eliminate the continued racial identifiability of teacher and staff assignments, nor whether the disparity was due to the defendants' conduct. Rather, there was a simple acceptance that the standards were largely met and this was enough.

The Supreme Court has consistently held the assignment of faculty and staff to be an area to be desegregated,[157] and the area is relatively straightforward. Yet, district courts have excused the continual racial identifiability of the assignment of faculty and staff. In sum, even when the Supreme Court requires desegregation and even when practicality concerns should be minimal, district courts allow segregation to continue.[158] After decades of implementation, one would expect that the distribution of teachers would take a race-neutral pattern, so long as race is not a factor in the assignment. Yet courts have excused defendants from the responsibility for redressing

153. *See, e.g.*, United States v. Unified Sch. Dist. No. 500, 974 F. Supp. 1367, 1378–79 (D. Kan. 1997) (noting "significant progress," but continuing to allow overrepresentation of minority teachers in predominately minority schools and dismissing the lawsuit); Stell v. Bd. of Pub. Educ., 860 F. Supp. 1563, 1573–74, 1576 n.23 (S.D. Ga. 1994) (City of Savannah and County of Chatham) (awarding unitary status even though predominantly African-American schools were disproportionately African-American in their teaching staffs). *But see, e.g.*, Lee v. Lee County Bd. of Educ., No. CIV.A.70-T-845-E, 2002 WL 1268395, at *8 (M.D. Ala. May 29, 2002) (declaring unitary status even though two disproportionately African-American schools had disproportionately high African-American teaching staffs).

154. *See, e.g.*, Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d 1359, 1365–66 (M.D. Ala. 2002) (declaring unitary status although predominantly white school had a slightly disproportionately low African-American teaching staff).

155. *See* Tushnet, *supra* note 125, at 767.

156. *See* Missouri v. Jenkins, 515 U.S. 70, 101 (1995) (requiring a causal link between the remedy and the violation and requiring practicality in any remedy).

157. This rule began in *Green* in 1969 and has continued in the Court's three most recent Supreme Court opinions. *See Jenkins*, 515 U.S. at 88; Freeman v. Pitts, 503 U.S. 467, 492 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (Oklahoma City, Oklahoma); Green v. County Sch. Bd., 391 U.S. 430, 435 (1968) (New Kent County).

158. *See supra* notes 145–49.

disparities in teacher distribution, even though the defendants created these disparities.

The courts' disinterest in requiring desegregation of faculty and staff may reveal that no party is very interested in the issue. In fact, in no opinion approving the continued disparities in teacher and staff assignment did the court note any party's argument that this segregation should not be allowed. Plaintiffs (and defendants) may actually desire, for good reason, the overrepresentation of minority educators in schools with a predominately minority student body. Yet the facts remain that the Supreme Court has ordered this area to be desegregated to the extent practicable, the district courts have entered orders requiring a specific racial distribution of educators, and ultimately the district courts have excused the defendants' failure to comply fully with those orders. Further, the Supreme Court has specifically held that schools cannot consider race on the theory that minority students would benefit from the "role model" of minority teachers.[159] If the parties support the concept of continued segregation of school personnel, then that principle conflicts with the law and cannot stand.

The Supreme Court once placed an affirmative duty on district courts to ensure effective remediation, particularly when the defendants failed to desegregate.[160] The district courts, however, seem less and less interested in this duty. Echoing the Supreme Court,[161] district courts understandably appear overwhelmed with the task of desegregation and of the pendency of the litigation.[162] Long

159. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275–76 (1986) (plurality opinion) (holding that it is not a compelling interest for a school district to prefer minority teachers so that they can serve as role models to minority students).

160. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system."); *Green*, 391 U.S. at 439 ("The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation.").

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

162. *See, e.g.*, Liddell v. Bd. of Educ., No. 4:72CV100SNL, 1999 WL 33314210, at *9 (E.D. Mo. Mar. 12, 1999) (City of St. Louis, Missouri) ("The courts are equipped to say what the law is, and to order that it be obeyed; they are ill-equipped to implement, especially in fields such as education where judges have no expertise."); Mills v. Freeman, 942 F. Supp. 1449, 1464 (N.D. Ga. 1996) (DeKalb County School System) ("Nothing this court has done—and nothing this court could do were it to retain jurisdiction indefinitely—can erase the indelible scar on our nation's history left by the legal sanctioning of segregated school systems."); Keyes v. Cong. of Hispanic Educators, 902 F. Supp. 1274, 1307 (D. Colo. 1995) (Denver School District No. 1) ("What has been demonstrated most clearly is that courts using the adversary system were not designed to accomplish institutional reform."); Coalition to Save Our Children v. State Bd. of Educ.,

gone are the days of judges being deemed "unlikely heroes."[163] Instead, judges seem exhausted from their decades-long effort and anxious to terminate their jurisdiction.

B. *The Alabama Exception*

The abdication of responsibility by district court judges in school desegregation cases is not universal. Two judges in Alabama have taken a unique, proactive approach to their pending school desegregation dockets. Their approach demonstrates the ability to be faithful to the Supreme Court's school desegregation jurisprudence *and* to effectuate meaningful change.

Starting in 1963, the State of Alabama and each Alabama school district were sued for de jure segregation.[164] Thirty-plus years later, the overwhelming majority of the cases in the Middle District of Alabama were still pending, many with little or no recent activity.[165] In response, Chief Judge (then Judge) W. Harold Albritton, III and Judge (then Chief Judge) Myron H. Thompson, both of the Middle District of Alabama, began in 1997 to issue orders that required parties in desegregation cases to examine in detail what steps were necessary to make the transition to a unitary school district.[166]

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901 F. Supp. 784, 823 (D. Del. 1995) (Red Clay Consolidated School District) ("The evidence further demonstrates, however, that the delivery of certain aspects of the court-ordered ancillary relief has changed in character and scope over the ensuing years.").

One judge went so far as to develop a standard based on Kosovo and Northern Ireland—that the situation in the school district was acceptable because it "beats by a mile what this courts hears and reads about the situations in Kosovo and Northern Ireland." Although this unpublished opinion was reversed on appeal, it speaks to what courts deem possible within the context of school desegregation—only a better cooperation than the situations found in war ravaged countries. *See* Miller v. Bd. of Educ., No. 63-AR-574-M, slip op. at 9 (N.D. Ala. Mar. 21, 2000) (Gadsden, Alabama), *rev'd*, Miller v. Bd. of Educ., No. 00-12224 (11th Cir. Aug. 8, 2001) (per curiam) (on file with the North Carolina Law Review).

163. *See generally* JACK BASS, UNLIKELY HEROES (1981) (recounting the influential role of Southern Republican judges in school desegregation).

164. Alabama school desegregation litigation began as one statewide suit. *See* Lee v. Macon County Bd. of Educ., 231 F. Supp. 743, 745–46 (M.D. Ala. 1964) (per curiam). In 1970, the statewide suit was divided into individual suits for each school district. *See* Lee v. Lee County Bd. of Educ., 963 F. Supp. 1122, 1126–27 (M.D. Ala. 1997).

165. Only two of the approximately forty school desegregation cases in the Middle District of Alabama had previously been dismissed. *See* Carr v. Montgomery County Bd. of Educ., No. 2072-N, Civil Docket for Case (M.D. Ala. May 28, 1993) (on file with the North Carolina Law Review); United States v. Lowndes County Bd. of Educ., No. 2328, Civil Docket for Case (M.D. Ala. Mar. 13, 1991) (on file with the North Carolina Law Review).

166. Such orders were issued in all cases not already the subject of active litigation. Cases which were not subject to formal show cause orders have still followed the process used for handling the show cause orders.

The orders resulted in thorough discovery regarding a wide range of issues, including almost every facet of the schools.[167] The judges actively promoted the idea of settlement.[168] Magistrate Judge Charles Coody closely managed the discovery process and resulting settlement discussions.[169] Soon after discovery, all school districts but one were declared partially unitary by agreement.[170] Along with

167. *See* Franklin v. Barbour Bd. of Educ., No. 66-CV-2458, Docket for Case (M.D. Ala.) (last updated Oct. 11, 2001) (on file with the North Carolina Law Review); Harris v. Bullock County Bd. of Educ., No. 64-CV-2073, Docket for Case (1st entry) (M.D. Ala.) (last updated June 22, 2001) (on file with the North Carolina Law Review); Lee v. Andalusia Bd. of Educ., No. 70-CV-3105, Docket for Case (M.D. Ala.) (last updated May 16, 2001) (on file with the North Carolina Law Review); Lee v. Chambers County Bd. of Educ., No. 70-CV-844, Docket for Case (136th entry) (M.D. Ala.) (last updated Nov. 26, 2001) (on file with the North Carolina Law Review); Lee v. Chilton County Bd. of Educ., No. 70-CV-3100, Docket for Case (143d entry) (M.D. Ala.) (last updated May 13, 2002) (on file with the North Carolina Law Review); Lee v. Coffee County Bd. of Educ., No. 70-CV-1054, Docket for Case (M.D. Ala.) (last updated May 13, 2002) (on file with the North Carolina Law Review); Lee v. Coosa Bd. of Educ., No. 2:70cv3101, Docket for Case (M.D. Ala.) (last updated Feb. 4, 2002) (on file with the North Carolina Law Review); Lee v. Dale County Bd. of Educ., No. 70-CV-1055, Docket for Case (M.D. Ala.) (last updated Feb. 12, 2002) (on file with the North Carolina Law Review); Lee v. Daleville City Bd. of Educ., No. 70-CV-1059, Docket for Case (M.D. Ala.) (last updated Jan. 28, 2002) (on file with the North Carolina Law Review); Lee v. Dothan City Bd. of Educ., No. 70-CV-1060, Docket for Case (M.D. Ala.) (last updated Sept. 24, 2001) (on file with the North Carolina Law Review); Lee v. Elba City Bd. of Educ., No. 70-CV-1061, Docket for Case (M.D. Ala.) (last updated Feb. 5, 2002) (on file with the North Carolina Law Review); Lee v. Enterprise City Bd. of Educ., No. 70-CV-1062, Docket for Case (M.D. Ala.) (last updated Jan. 29, 2002) (on file with the North Carolina Law Review); Lee v. Eufaula City Bd. of Educ., No. 70-CV-3106, Docket for Case (M.D. Ala.) (last updated Feb. 12, 2002) (on file with the North Carolina Law Review); Lee v. Geneva County Bd. of Educ., No. 70-CV-1056, Docket for Case (M.D. Ala.) (last updated Jan. 31, 2002) (on file with the North Carolina Law Review); Lee v. Henry County Bd. of Educ., No. 70-CV-1057, Docket for Case (M.D. Ala.) (last updated Feb. 11, 2002) (on file with the North Carolina Law Review); Lee v. Houston County Bd. of Educ., No. 70-CV-1058, Docket for Case (M.D. Ala.) (last updated Jan. 29, 2002) (on file with the North Carolina Law Review); Lee v. Opp City Bd. of Educ., No. 70-CV-3108, Docket for Case (M.D. Ala.) (last updated Mar. 13, 2002) (on file with the North Carolina Law Review); Lee v. Pike County Bd. of Educ., No. 70-CV-3104, Docket for Case (M.D. Ala.) (last updated May 20, 2002) (on file with the North Carolina Law Review); Lee v. Tallassee City Bd. of Educ., No. 70-CV-3109, Docket for Case (M.D. Ala.) (last updated Oct. 11, 2001) (on file with the North Carolina Law Review); Lee v. Troy City Bd. of Educ., No. 70-CV-3110, Docket for Case (M.D. Ala.) (last updated May 20, 2002) (on file with the North Carolina Law Review). The cases were subject to almost identical discovery requests served by private plaintiffs and the Department of Justice.

168. *See* cases cited *supra* note 167. The judges held frequent status conferences that would concern many of the cases at the same time. At these conferences, each case's progress toward settlement was discussed.

169. *See* cases cited *supra* noted 167. Judge Coody managed the processes of all the cases cited in *supra* note 167.

170. Tallapoosa County Board of Education is an exception. *See* Lee v. Tallapoosa County Bd. of Educ., No. 849-E, at 9 (M.D. Ala. July 22, 1998) (consent decree) (on file

these declarations of partial unitary status, the parties entered into consent decrees covering areas yet to be desegregated. The decrees specified the necessary steps to eradicate continuing disparities in these areas, with the expectation that compliance with the terms of the consent decree would entitle the defendants in three years to dismissal of judicial supervision over these areas as well.[171] The consent decrees went beyond the traditional methods of determining desegregation, such as student assignment, faculty and staff assignment, facilities, transportation, and extracurricular activities.[172] They also included a thorough examination of many aspects of school administration, including student assignment to classrooms (i.e., tracking and ability grouping); special education, including gifted and talented education; discipline; resource allocation; salary; curriculum; drop-out prevention; and graduation rates—the quality-of-education concerns that the Supreme Court in *Freeman v. Pitts*[173] found permissible to examine as well.[174] For the promise of eventual

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with the North Carolina Law Review). Some school districts were granted unitary status only in narrow areas. *See, e.g.*, Lee v. Phenix City Bd. of Educ., No. 854-E, at 10 (M.D. Ala. Sept. 16, 1998) (consent decree) (on file with the North Carolina Law Review) (declaring unitary status in transportation); Lee v. Lee County Bd. of Educ., No. 845-E, at 10 (M.D. Ala. Aug. 14, 1998) (consent decree) (on file with the North Carolina Law Review) (holding unitary status only in transportation). Others were deemed unitary in more substantial areas. *See, e.g.*, Lee v. Dothan City Bd. of Educ., No. 70-CV-1060, Docket for Case (M.D. Ala.) (last updated Sept. 24, 2001) (on file with the North Carolina Law Review) (holding unitary status in facilities, transportation, hiring and assignment of faculty, and student assignment across schools in June 12, 2000 consent decree); Lee v. Autauga County Bd. of Educ., No. 3098-N, at 5–6 (M.D. Ala. June 18, 1997) (consent decree) (on file with the North Carolina Law Review) (granting partial unitary status for transportation, facilities, discipline, and salary supplements).

171. The consent decrees each had very similar language based on the concept that compliance would ensure a declaration of unitary status. For example, in *Lee v. Alexander City*, a typical case, the consent decree stated that "[t]he School Board is committed to the suggested approaches to achieve unitary status in the identified areas and has negotiated with [t]he plaintiff parties to develop policies and procedures to obtain this objective over a three (3) year period." Lee v. Alexander City, No. 850-E, at 5 (M.D. Ala. May 20, 1998) (consent decree) (on file with the North Carolina Law Review). The consent decree also specified the procedure whereby unitary status would be determined at the end of the three-year period. *See id.* at 23–24; *see also* Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d 1359, 1363 (M.D. Ala. 2002) (describing the process in the cases as "represent[ing] 'a roadmap to the end of judicial supervision' " (quoting NAACP v. Duval County Sch., 273 F.3d 960, 963 (11th Cir. 2001))).

172. These are the so-called six *Green* factors, named after the Supreme Court case in which they were identified. *See* Green v. County Sch. Bd., 391 U.S. 430, 435 (1968) (New Kent County).

173. 503 U.S. 467 (1992).

174. *See id.* at 492. In *Freeman*, the Court allowed an examination into quality-of-education issues "to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to ensure full compliance

dismissal, the school districts were willing to implement a wide range of programs designed to address disparities in education.

The remedial plans are now starting to come to an end. Most school districts have been declared fully unitary as a result of these plans,[175] while other school districts necessitated an additional consent decree to address continuing vestiges of discrimination before being declared fully unitary.[176]

These cases reveal the following. First, the process appears to have had a more positive impact on desegregation issues than is typical of school desegregation cases. The cases have led to a comprehensive examination of the education afforded minority school children. Data are a powerful tool for social change because information is a natural beginning point. As a result of the thorough discovery on educational services, the consent decrees focused more on quality-of-education concerns than with the racial makeup of schools.[177] In some areas, disparities continued.[178] Improvements

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with the court's decree." *Id.* For more analysis of this case, see Parker, *supra* note 36, at 1168–72; Ryan, *supra* note 32, at 1372–73.

175. *See, e.g.*, Lee v. Russell County Bd. of Educ., No. CIV.A.70 T-848-E, 2002 WL 360000, at *8 (M.D. Ala. Feb. 25, 2002) (declaring unitary status); Lee v. Auburn City Bd. of Educ., No. 70-T-851-E, 2002 WL 237091, at *9 (M.D. Ala. Feb. 14, 2002) (same); Lee v. Opelika City Bd. of Educ., No. 70-T-853-E, 2002 WL 237032, at *9, (M.D. Ala. Feb. 13, 2002) (same); Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d at 1368 (same); Lee v. Ozark City Bd. of Educ., No. 70-CV-1063, Docket for Case (111th entry) (M.D. Ala.) (last updated Jan. 28, 2002) (on file with the North Carolina Law Review) (same); Harris v. Bullock County Bd. of Educ., No. 64-CV-2073, Docket for Case (33d entry) (M.D. Ala.) (last updated Aug. 18, 1999) (on file with the North Carolina Law Review) (same).

176. *See, e.g.*, Lee v. Geneva County Bd. of Educ., No. 70-CV-1056, Docket for Case (M.D. Ala.) (last updated Jan. 31, 2002) (on file with the North Carolina Law Review) (second consent decree entered Feb. 13, 2001); Lee v. Opelika City Bd. of Educ., 2002 WL 237032 (second consent decree entered Aug. 30, 2000); Lee v. Phenix City Bd. of Educ., No. 70-CV-854, Docket for Case (M.D. Ala.) (last updated Apr. 9, 2002) (on file with the North Carolina Law Review) (second consent decree entered Jan. 24, 2000).

177. For example, to address participation in extracurricular activities, the Auburn City Board of Education undertook the following: providing notice about activities to students and parents, recruiting black faculty members to be sponsors, and monitoring the participation of black students in extracurricular activities. The district developed a plan for encouraging minority participation in special programs and extracurricular activities (golf, tennis, soccer, cheerleading, wrestling and volleyball) including developing a comprehensive extracurricular activities survey at the high school level. Among the district's extracurricular initiatives were diversity and sensitivity training, the establishment of a First Generation College Club, and enrichment activities that encourage black students to take part in school activities. Lee v. Auburn City Bd. of Educ., 2002 WL 237091, at *7.

178. *See* Lee v. Lee County Bd. of Educ., No. CIV.A.70-T-845-E, 2002 WL 1268395, at *8 (M.D. Ala. May 29, 2002) (noting continuing racial identifiability in faculty and student assignment at one elementary school and one high school); Lee v. Auburn City Bd. of Educ., 2002 WL 237091, at *6 (remarking that, despite efforts to recruit minority faculty,

were most notable for quality-of-education issues, particularly the increases of minority students in honors and advanced programs and the decrease of minority students subject to suspensions.[179] While the schools are far from perfect, their improvements indicate that school desegregation litigation can change schools for the better.

Second, the judges' actions were entirely consistent with Supreme Court precedent. They focused the parties on the desired end of the lawsuit: dismissal, but dismissal only after a thorough examination of the school district and desegregation to the extent practicable, as the standards require. The primary difference with the methods employed by judges to handle their cases was that the judges exercised strict oversight of the *process* of desegregation. This started with the issuance of the show cause orders and continued with the active use of Magistrate Judge Coody to supervise discovery and assist in settlement.[180] The judges held frequent status conferences for detailed status reports.[181] Detailed, written, and frequent progress and status reports allowed the identification and resolution of implementation issues.[182] The judges largely confined themselves to shepherding the process of desegregation, with involvement in the substance of the settlements, whether it be the areas covered by or the specific terms of the consent decrees, apparently confined to being receptive to what the parties agreed.[183] The judges were merely requiring that the parties actively litigate the lawsuit—to identify and resolve issues with the expectation of both desegregation and dismissal. Through the use of settlement, the judges were also able to

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there was no increase in minority faculty hires); Lee v. Opelika City Bd. of Educ., 2002 WL 237032, at *5–*6 (finding a one percent increase in minority faculty hires, despite efforts to recruit minority faculty).

179. *See* Lee v. Russell County Bd. of Educ., 2002 WL 360000, at *6 (finding discipline rates to be racially proportionate, according to 15% benchmark); Lee v. Auburn City Bd. of Educ., 2002 WL 237091, at *6–*7 (noting an increased participation in advanced placement classes and the international baccalaureate program for all students and a dramatic decrease in the disparity in suspension rates); Lee v. Opelika City Bd. of Educ., 2002 WL 237032, at *7 (finding increased minority participation in honor classes and advanced diploma program); Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d at 1366 (same).

180. *See supra* note 169.

181. For example, in *Lee v. Alex City Board of Education*, a typical case, the court held four status conferences in the year 2000. *See* Lee v. Alex City Bd. of Educ., No. 70-CV-850, Docket for Case (entries 85–86, 87–88, 90–91, 104–05) (M.D. Ala.) (last updated May 17, 2002) (on file with the North Carolina Law Review).

182. For example, the parties in *Lee v. Alex City Board of Education* filed seven status or progress reports in the year 2000. *See id.* (entries 84–85, 87, 89, 93–94, 103).

183. *See* Lee v. Lee County Bd. of Educ., 2002 WL 1268395, at *11–*12; Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d at 1368; Lee v. Opelika City Bd. of Educ., 2002 WL 237032, at *9–*10.

avoid the unanswerable question of causation.[184] Further, the consent decrees avoided the problem of judges managing school districts and greatly minimized the separation-of-powers and federalism concerns associated with detailed judicial orders. In sum, district courts *can*, if they so *choose*, have a positive impact on school desegregation issues. Exceptions to the passivity demonstrated by the written opinion study certainly exist.

CONCLUSION

The written opinion study revealed a great deal of timidity by district court judges in school desegregation cases. They are willing to let the parties, particularly the defendants, control the process and outcome of these lawsuits. While this posture may allay some of the criticisms of the power of judges in school desegregation, the judges' deference to defendants has come at the cost of plaintiffs' right to desegregation to the extent practicable and, at times, at the cost of less than full compliance with Supreme Court precedent. As the Alabama judges demonstrate, district court judges can use school desegregation litigation to fulfill plaintiffs' rights, as defined by the Supreme Court, if they so choose. Further, the Alabama judges' actions demonstrate not tyranny, but a simple requirement that parties actively move their cases toward both desegregation and dismissal. The experience of the Alabama judges suggests that the current failure in effectuating school desegregation is due in part to the choices of district court judges.

184. *See supra* notes 133–37 and accompanying text.