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Remedies and Resistance

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TABLE OF CONTENTS

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I. Introduction

Law mediates between the ideal and the real. American constitutional law, in particular, is a realm of idealization tempered by the claims of a resistant, unruly reality. This is an essay about the mediating nature of American constitutional law, the ambivalence built into an activity that aspires both to give meaning to ideals and to be effective in the real world. Inescapably, this dual aspiration affects both the interpretation of rights and the implementation of remedies when rights are violated, but this essay concerns remedies, the area of judicial activity that most clearly embodies the tension between the ideal and the real.

The function of a remedy is to "realize" a legal norm, to make it a "living truth."[1] While most legal theory concentrates on the ideal, the hard stuff of recalcitrant reality is equally important to jurisprudence. This essay looks towards a jurisprudence of the remedial—which in large measure must be a jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy. My immediate subject is the problem of fashioning judicial remedies for racial segregation in schools, in particular how the courts have faced the problem of white resistance to desegregation decrees. I focus on two moments. The first is 1955, when the Supreme Court of the United States declined to order the immediate desegregation of unlawfully segregated schools, approving instead the imperfect remedy of gradual desegregation under the standard of "all deliberate speed."[2] The second moment is today, when the courts are considering responses to the phenomenon of "white flight," including the possibility of limiting integration remedies in order to encourage whites to remain within a desegregating school system. The intellectual and practical problem posed in each situation is whether and how the law should adjust its remedial aspiration in the face of a resistant reality—in particular, under what conditions and premises, if any, public opposition to a legal rule may properly be the basis for limiting judicial remedies for its violation. It may at first seem wholly illegitimate for courts to take account of resistance, since doing so appears to deny the very right that the court has affirmed. But, as I argue in this essay, resistance cannot be ignored. Among the difficulties—indeed, the anguish—necessarily endured by those seeking to produce change in the world is that at times they must cede ground because of opposition. Remedies for violations of constitutional rights are not immune from that reality.

The problems of remedial limitation considered here involve a particu-

1. Cooper v. Aaron, 358 U.S. 1, 20 (1958) ("Our constitutional ideal of equal justice under law is thus made a living truth.").
2. Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (*Brown II*).

lar remedial instrument, the modern injunction. The very evolution of this extraordinary remedial weapon, now central to the modern conception of judicial power, is inseparable from the desegregation effort and resistance to it. The contemporary character and potency of the injunction emerged along with an increasingly clear understanding, beginning with *Brown v. Board of Education*,[3] of what desegregation meant: the transformation and reorganization of public education in the United States to eliminate the effects of de jure segregation "root and branch."[4] The injunction was both the child and parent of that meaning; while it evolved to carry out the courts' agenda, that agenda could not have emerged and been taken seriously unless an instrument of equity was at hand to help achieve it.[5]

Resistance to *Brown* itself played an enormous role in the evolution of the injunction, both unleashing expansive assertions of equity power and threatening to limit the power unleashed. This resistance took many forms that endangered the vindication of rights: violence; flight from public schools; boycotts; hostility and incitement; foot-dragging by officials legally obliged to desegregate; and new acts of official segregation. It was the relentless refusal of citizens and public officials to accept the meaning of *Brown*—their persistent failure to accept change and to act in good faith to implement the law—that required the courts to intrude with such coercion, with such detail, with such stubborn patience and courage, and with strategic and managerial preoccupations that strained the boundaries of the traditional judicial function. In Thomas Hardy's phrase, these were "desperate remedies."[6] To be sure, there were plenty of good faith disputes about what was required, but judicial remedies became so intrusive largely because public resistance precluded alternative methods for making *Brown* a reality. And yet resistance constrained what it provoked. When resistance pushed judges to assume expansive powers and adopt the role of strategic planners, the strategies considered were often ones to limit losses. Resistance, and the problems of dealing with it, has forced the judge at least to consider taking account of opposition by approving imperfect remedies, remedies that do not fully vindicate rights.

The first part of this essay presents an analytic structure to help examine this darker side of the transition from an abstract legal standard to its approximation in social reality. It distinguishes between two fundamentally different approaches that might be used in ordering equitable remedies and evaluating their imperfections: "Rights Maximizing," which

3. 347 U.S. 483 (1954) (*Brown I*).

4. Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

5. *See* O. FISS, THE CIVIL RIGHTS INJUNCTION 4-6 (1978); Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1313-16 (1982); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2-3 (1979).

6. The phrase is the title of his first published novel (1871).

takes the viewpoint of the victims alone; and "Interest Balancing," which also considers other social interests. From the perspectives of these two approaches, the central part of the essay analyzes the problem of public opposition to desegregation decrees and the resulting pressure upon courts to approve imperfect remedies. While some have argued that courts should ignore resistance, and others have been quick to give way to it, my analysis leads to a more complex position. Both remedial approaches require courts to recognize that resistance can weaken victims' rights and to consider strong measures to prevent or defeat that resistance; under both approaches, however, courts may at times approve limited desegregation remedies because of resistance, although the occasion and scope of appropriate limitations depends upon the approach that is used. The essay next criticizes the courts' frequent failure to be candid when they do limit remedies in response to public opposition. It concludes by discussing some broader questions about rights themselves and about the character of legal scholarship; while for the most part the essay discusses remedies against the background of defined rights, this concluding section suggests that rights are not sharply separable from remedies and that, like remedies, rights will also be affected by public attitudes and resistance.

II. Remedial Limits and Remedial Theory

The core remedial principle repeatedly articulated by the courts in desegregation cases is that "the scope of the remedy is determined by the nature and extent of the constitutional violation."[7] The basic goal of an injunction, we are told again and again, is not simply to enjoin the enforcement of unconstitutional laws and to prohibit new violations, but also to eliminate the continuing effects of past violations.[8] The courts are evasive and inconsistent, however, on the question most relevant here: whether (and to what extent) they will approve injunctive remedies that are less than completely effective in achieving the remedial goal and are therefore imperfect. The Supreme Court has often stated that discrimina-

7. Milliken v. Bradley, 418 U.S. 717, 744 (1974) (*Milliken I*); *see* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977); Milliken v. Bradley, 433 U.S. 267, 280 (1977) (*Milliken II*); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 433-34 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971).

8. A frequently cited formulation is found in Louisiana v. United States, 380 U.S. 145, 154 (1965) ("[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."). *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459-61 (1979); Keyes v. School Dist. No. 1, 413 U.S. 189, 200 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16, 21 (1971); Green v. County School Bd., 391 U.S. 430, 437-38 & n.4 (1968); *cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975) (Title VII's remedial aim).

tion remedies must remove "all vestiges" of the violation;[9] the focus is thoroughly victim-oriented, and there are no limits on the corrective goal. In other instances, however, the Supreme Court has suggested that this principle is not absolute. The Court sometimes modifies the "remove *all* vestiges" goal by stating that remedies must eliminate the violation's effects only to "the *greatest possible* degree . . ., taking into account the practicalities of the situation."[10] At other times, the Court's qualifying language commands a more comprehensive balancing and "reconciling [of] public and private needs,"[11] suggesting that courts may settle for something less than eliminating the effects of the violation to the greatest extent possible, if such extensive remedial efforts would have unduly "burdensome effects" on other interests.[12]

These shifting formulations make clear that there is no simple equivalence between violation and remedy. Sometimes there will be a gap; remedies may fail to completely vindicate rights, even basic constitutional rights. Courts both tolerate remedies that ultimately turn out to be imper-

9. Green v. County School Bd. 391 U.S. 430, 437-438 (1968); *see* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458-59 (1979); Keyes v. School Dist. No. 1, 413 U.S. 189, 200 (1973); Wright v. Council of the City of Emporia, 407 U.S. 451, 460, 463 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

10. Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971) (emphasis added); *see* Milliken v. Bradley, 433 U.S. 267, 280 (1977) (*Milliken II*) (remedies should be "designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct' "); Louisiana v. United States, 380 U.S. 145, 154 (1965) (court has duty "so far as possible" to eliminate discriminatory effects of the past).

11. Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (*Brown II*) ("Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.").

12. Milliken v. Bradley, 433 U.S. 267, 280-81 & n.15 (1977) (*Milliken II*) ("[T]o ensure that federal-court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given to burdensome effects resulting from a decree that could 'either risk the health of the children or significantly impinge on the educational process' " or would unduly interfere with "interests of state and local authorities in managing their own affairs."); *see* Crawford v. Board of Educ., 102 S. Ct. 3211, 3214 n.3 (1982) (although " 'in some circumstances busing will be an appropriate and useful element in a desegregation plan, . . . in other instances its "costs," both in financial and educational terms, will render its use inadvisable' ") (citations omitted).

The same opinion frequently expresses more than one remedial principle. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), expresses all three: equity's aim is "to eliminate from the public schools *all* vestiges of state-imposed segregation," *id.* at 15 (emphasis added), "to achieve the *greatest possible* degree of actual desegregation," *id.* at 26 (emphasis added), and "to correct, by a *balancing* of the individual and collective interests, the condition that offends the Constitution," *id.* at 16 (emphasis added); *see also* Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (*Milliken II*) (remedies "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct' " and must also "take into account the interests of state and local authorities in managing their own affairs") (citation omitted); International Bhd. of Teamsters v. United States, 431 U.S 324, 364, 375 (1977) (suggesting both that courts should provide " 'the most complete relief possible' " and that "in formulating any equitable decree, a court must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims' "); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (remedies for Title VII violation should both "secur[e] complete justice" and "so far as possible eliminate the discriminatory effects of the past").

fect and order remedies that they know will be imperfect. While courts frequently approve imperfect injunctive relief, however, they do not always candidly acknowledge gaps between right and remedy. It is not surprising, therefore, that the courts have not set forth a theory of remedial imperfection or even a framework for thinking about it.

A. *Two Remedial Approaches*

The starting point for such a theory is to distinguish between two fundamentally different approaches to choosing an equitable remedy, each reflected in the courts' inconsistent utterances. Under the approach I shall call "Rights Maximizing," the only question a court asks once it finds a violation is which remedy will be the most effective for the victims, where "effectiveness" means success in eliminating the adverse consequences of violations suffered by victims. The costs of alternative remedies are therefore irrelevant except when such costs actually interfere with a remedy's effectiveness, or when the alternatives are equally effective and a criterion other than maximum effectiveness must be the basis for selection. Under the approach I shall call "Interest Balancing," remedial effectiveness for victims is only one of the factors in choosing a remedy; other social interests are also relevant and may justify some sacrifice of achievable remedial effectiveness. In evaluating a remedy, courts in some sense "balance" its net remedial benefits to victims against the net costs it imposes on a broader range of social interests. Thus, even if a particular remedy would be the most effective in curing the violation, its costs may be sufficiently high that an Interest Balancing court would choose a less effective remedy. These two approaches separate two points of view that frequently are blurred in analyzing equitable remedies: that of victims of the violation who seek to eliminate its effects, and that of persons who bear the costs of remedying the violation and may seek to limit their burdens.[13]

A central fact, however, is that under either approach courts may approve an injunctive remedy that does not eliminate all effects of the violation suffered by the plaintiff-victims. The idea of a perfect remedy is a

13. These two approaches to remedies have parallels in two approaches to rights that have been central in the philosophic tradition. There are certain similarities between Rights Maximizing, which views the legal principle of making the victim whole as an absolute rule against which all remedial steps must be measured, and a "deontological" approach to rights; and there are affinities between Interest Balancing and a "utilitarian" approach to rights. As I indicate below, however, one possible defense of Rights Maximizing's absolutism might be made in rule-utilitarian terms. *See infra* pp. 607-08 (discussing prophylactic argument in favor of Rights Maximizing). Similarly, one version of Interest Balancing—requiring a tradeoff when a constitutional remedial interest conflicts with another constitutional right—might be defended in deontological terms. *See infra* p. 603. Moreover, the conception of Interest Balancing that I embrace in this essay does not permit a de novo utilitarian balance at the remedy stage since it treats the constitutional right and its remedial vindication as values that must be given substantial weight. *See infra* p. 607.

frequent illusion, defied by a resisting, multidimensional world. The occasions for tolerating remedial imperfection differ under the two approaches, however. Under Rights Maximizing, an incompletely effective remedy is acceptable only if a more effective remedy for the victims is impossible to achieve. Under Interest Balancing, an imperfect remedy is also permissible when a more effective remedy is deemed too costly to interests other than providing a remedy for victims. Thus, the two approaches can also be understood in terms of the different sources of remedial imperfection that they admit: Rights Maximizing recognizes only unavoidable limits, while Interest Balancing also permits some tradeoffs with other values.

Both approaches, of course, proceed within boundaries set by basic remedial goals. Most obviously, remedial goals under either approach are limited by a definition of the right—that is, what counts as a violation and as a legally relevant effect. In addition, remedial goals are limited by a general definition of the remedial enterprise—usually an understanding that courts should seek both to prevent new violations and to eliminate effects of prior violations, but should not require steps unrelated to curing violations. These threshold definitions determine what it means for a remedy to be "fully effective," and therefore provide criteria for measuring the relative effectiveness of particular remedies as well as for limiting their permissible scope. In school desegregation cases, for example, the equal protection violation is limited to acts of de jure segregation and does not include de facto segregation;[14] remedial goals, therefore, are limited to preventing and eliminating effects of de jure segregation.[15] Because the

14. *E.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977); *see* Washington v. Davis, 426 U.S. 229, 240 (1976).

15. The violation may be defined not simply as a limited category of unlawful actions but also as a limited category of their effects. For example, longstanding de jure segregation of a community's schools probably adversely affects not only the schools but also the racial composition of neighborhoods and community well-being. If all of these effects were deemed part of the violation and therefore subject to remedial action, the remedial goals might include constructing school attendance patterns that would have existed absent the de jure segregation, eliminating the racial identifiability of segregated schools, furnishing remedial education and eliminating the inferior educational conditions that often exist in traditionally segregated black schools, eliminating dignitary harms from state-imposed segregation, and eliminating the residentially segregative effects of school segregation. Indeed, the goals might also include remedying the adverse consequences of the cycle of inferior jobs, lower incomes, social conditions that perpetuate racial prejudice, and (coming full circle) inferior educational opportunity and achievement in schools. Where the actual effects of de jure segregation ripple outward so extensively, however, the courts might define the violation to include only certain "legally relevant" effects, such as those on the schools themselves. *Cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-23 (1971) ("The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities."). Concepts of legal causation may also impose definitional limits on a defendant's responsibility; for example, the idea of proximate cause restricts a defendant's tort liability to effects that he was under some duty to prevent. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42 (4th ed. 1971). A definitional limit can also arise through rules concerning who has standing to sue, as in the antitrust field. *See* Associated Gen. Contractors v. California State Council of Carpenters, 103 S. Ct. 897, 904-07 (1983); Blue Shield v. McCready, 102 S. Ct. 2540, 2548 (1982).

meaning of particular rights is often vague and even evolving, the discussion of remedies can be a slippery business. Thus, when people disagree in their assessments of the relative "effectiveness" of a particular remedy in curing the violation of a right, they are often disagreeing about how the right itself should be defined.[16] But a court's definition of the "violation" or "right" is usually sufficiently definite to generate real limits on remedial goals, limits that make it meaningful to speak of a "fully effective" remedy as something finite and bounded.[17]

Within remedial boundaries determined by the definition of the particular right at issue, the extent to which a court approves an imperfect remedy depends upon whether the court adopts a Rights Maximizing or Interest Balancing approach. While few competing interests seem to me sufficient to justify limiting remedial effectiveness once a constitutional violation is shown, I have come to accept that social interests other than the victims' interests cannot be totally ignored when a court fashions an injunctive remedy. Thus, I conclude that some form of Interest Balancing should be used, and that remedies should not be evaluated in Rights Maximizing terms alone. Before examining the limits permitted only if one embraces Interest Balancing, however, I first consider remedial limits that may be unavoidable under both approaches, limits that may arise even if one is totally victim-oriented and committed to achieving a completely effective equitable remedy.

B. *Unavoidable Remedial Imperfection*

While it may seem that complete remedial effectiveness for victims is always possible provided a court is prepared to impose the costs of implementing the perfect remedy—that is, while it may seem that remedial imperfection is acceptable only if the judge is an Interest Balancer rather than a Rights Maximizer—the complexities of the remedial enterprise undermine this view. Remedial limits may be unavoidable either because of conflicts arising out of multiple remedial goals or because of practical difficulties in devising means to achieve those goals.

16. Criticism of a remedy, therefore, may reflect criticism of the underlying right. For example, a recent attack on the vision of equity underlying contemporary remedies in school desegregation cases may be partly explained by the author's apparent view that "separate but equal" was constitutional and that *Brown I* was wrongly decided. *See* G. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF AND PUBLIC POLICY 109 (1982).

17. While this essay, following the courts' own language, generally speaks about remedies within a framework of defined rights, I recognize that rights must often be understood dynamically—not as a rigid benchmark, but rather as evolving concepts whose meanings are shaped over time by remedial efforts to actualize them. *See infra* pp. 664-65, 676-79.

1. *Multiple Goals*

Once a right has been violated, particularly if the violation has extended over a long period of time and has had many effects, there may be more than one legally relevant remedial goal.[18] For two interrelated reasons, multiple goals may unavoidably lead to remedial imperfection. First, achieving one remedial goal may be impossible without requiring some sacrifice of another remedial goal. In the case of school desegregation, remedial goals include the elimination of the racial identifiability of schools and the amelioration of educational harms to black children resulting from a long regime of de jure segregation. Mandatory integration achieved by long-distance busing may be the most appropriate remedy to eliminate a school's racial identifiability, but educational changes within a largely one-race setting may conceivably be the most effective way, at least over the short term, to improve black students' academic performance or to ameliorate other effects of decades of de jure segregation.[19] To give another example, the goal of preventing violence against blacks during the desegregation process may be achievable only if massive armed force is introduced to quell the resistance, but as a result other objectives of the desegregation process may be compromised.[20] In these situations, strategies for attaining different goals are incompatible. Such unresolvable and unavoidable conflicts within the remedial aspiration itself make it impossible to achieve a fully effective remedy.

Second, there may be irreconcilable conflicts among the victims.[21] Where the violation affects a group of individuals who bring a class action, a fully effective remedy requires that all victims in the plaintiff class receive relief. Where there are multiple remedial goals, however, imper-

18. *See supra* note 15.

19. There may even be a conflict between the two most commonly stated remedial goals: eliminating the racial identifiability of the schools and recreating the attendance conditions that would have existed absent the violation. Longstanding de jure school segregation may in fact have contributed to residential segregation. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 201-03 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971). Thus, absent school segregation, there might have been more residential integration and therefore more school integration in neighborhood schools. To eliminate racially identified schools and achieve school integration today, long-distance busing may be needed; this makes it impossible to recreate the attendance conditions that arguably "would have existed" absent the violation, that is, integration in neighborhood schools. The remedy can provide neighborhood schools or integration, but not both.

20. *See infra* p. 619.

21. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482-487 (1976); Berger, *Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707, 717, 731-33 (1978); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186-91 (1982); Yeazell, *Intervention and the Idea of Litigation: A Comment on the Los Angeles School Case*, 25 U.C.L.A. L. REV. 244, 249-56 (1977); Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868, 881 (1979). Words like "victims" and "blacks" may therefore be misleading in this context since they suggest more cohesiveness and identity of interests than may actually exist.

fection may be unavoidable because the relief that some plaintiffs want may be impossible to provide if other plaintiffs are to receive what they want. The point is not simply that different victims may want different "benefits" from the court, but that they may have conflicting views about what kind of benefits constitute an effective and appropriate remedy for the violation. These possible clashes of interest multiply in classes that have an evolving membership—for example, plaintiff classes in school desegregation cases that are defined as all black students who are now or who will be enrolled in the school system.[22] Moreover, there may be a clash not simply between the interests of present and future class members, but also between the short-term and long-term interests of individual members of the plaintiff class.

Both sources of unavoidable remedial imperfection require a court to make choices about how to distribute the imperfection; it must decide among different versions of "imperfect effectiveness." If multiple goals cannot all be realized fully, the court must choose which goals to compromise. The judge is therefore compelled to evaluate the relative importance of conflicting remedial goals, a ranking that requires an assessment of the relative evil of various legally relevant effects of the violation. Similarly, if a fully effective remedy cannot be furnished to all members of the plaintiff class, the court must decide which victims' interests to sacrifice. This requires the court to adopt either a substantive or procedural rule for apportioning remedial benefits among the victims.[23]

22. *E.g.*, Armstrong v. Board of School Directors, 616 F.2d 305, 308 & n.2 (7th Cir. 1980); Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732, 743, 749 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972); Brown v. Board of Educ., 84 F.R.D. 383, 394 (D. Kans. 1979); *cf.* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 9 n.6 (1981) (institutionalized retarded persons); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 254 (3d Cir.) (employees in Title VII suit), *cert. denied*, 421 U.S. 1011 (1975); Powell v. Ward, 487 F. Supp. 917, 921-22 (S.D.N.Y. 1980) (prisoners), *modified*, 643 F.2d 924 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981).

23. A number of substantive solutions to this problem are possible. For example, a court committed to furnishing the "most effective" remedy might try to maximize benefits in a utilitarian sense by providing the greatest benefit for the greatest number of victims. Alternative definitions of the "most effective" remedy—definitions that consider the distribution of remedial benefits within the victim class—are possible, however. Thus, one might argue that the most effective remedy is one that provides equal (if not full) benefits for each victim; or one could favor rules of preference among class members, such as a preference for current class members over future ones or a preference for named plaintiffs over others. In addition, if remedies produce different benefits over time and there is a conflict between the short-term and long-term interests of members of the plaintiff class, some time frame must be adopted within which to evaluate a remedy's effectiveness.

In contrast to these substantive solutions to the problem of distributing imperfection, the court might use the class action device to furnish a procedural solution: Let the plaintiffs themselves decide, through their class representative or some other mechanism of class choice. But if there are conflicts among the plaintiffs and if all remedies will be imperfect, no single class representative can appropriately speak for all; nor is any rule of class choice, such as majority rule, self-evidently the correct means for resolving conflicts among victims. The court itself would have to decide among possible procedural rules.

2. *Instrumental Deficiencies*

A second kind of unavoidable remedial imperfection results from instrumental difficulties in achieving remedial goals.[24] Before remedial goals are actually achieved, a judge is no more than a promoter of remedial effectiveness. Even if a proposed decree facially requires a fully effective remedy, it may end up being quite ineffective. This is hardly surprising, given the human and worldly limitations that make it so difficult to devise and implement an ambitious injunction—for example, the imperfection of discoverable knowledge about social institutions, the complexity of strategic judgments about how to change them, the possibility of unanticipated new developments, and the judge's necessary dependence on other social actors who may obstruct the transforming enterprise through inadvertence or resistance.

All of these causes of remedial ineffectiveness cannot possibly be eliminated or avoided at the decree-formulation stage, even by a Rights Maximizing judge committed to full remedial effectiveness at whatever cost. Once actual ineffectiveness becomes apparent, of course, the judge can always enter a new decree designed to be more effective; indeed, a Rights Maximizing judge would be required to do so unless no further remedial effectiveness were possible. But the same forces that initially conspired against full remedial effectiveness would still be likely to constrain the remedy. In any event, the price of the court's initial failure is a period of delay, and delay itself produces remedial imperfection since it allows effects of the violation to continue and new harms to be inflicted. Indeed, if the initial decree is ineffective, the passage of time may produce irreversible changes that preclude further remedial success.

To be sure, while no remedial methods can guarantee success, a judge can take various steps to reduce the risk of ineffectiveness, such as monitoring compliance carefully and imposing sanctions for resistance and noncompliance. Another common step is to issue a specific remedial decree

24. Works examining the practical problems that face courts seeking to change the operation of large government institutions include: D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION (H. Kalodner & J. Fishman eds. 1978); P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983); Berger, *supra* note 21; Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977); Note, *Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement*, 88 YALE L.J. 407 (1978); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). For a prescient discussion of inherent limitations on the equitable powers available to federal courts in contemporary civil rights cases, emphasizing "the lack of [judicial] police power, . . . the consequences of the federal system, and the potential of massive resistance," see B. Marshall, Equitable Remedies as Instruments of Social Change—Civil Rights (1964) (unpublished speech) (on file with *Yale Law Journal*).

rather than require the defendant simply to achieve generally-phrased remedial goals. For example, desegregation remedies frequently require detailed student and faculty reassignment procedures, specific program and curricular changes, and citizen participation in decree implementation.[25] Detailed decrees in these and other institutional reform cases[26] are frequently attacked as exceeding a court's remedial powers, on the ground that they interfere with the defendant's discretion to take steps that would not themselves violate the Constitution.[27] But this criticism confuses violation and remedy. The best way to justify a specific decree is that it reduces the plaintiffs' risk that the remedy will turn out to be ineffective and im-

25. *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (ordering detailed pupil reassignment plan with required black-white ratios); Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1969) (en banc) (establishing rules for discharge of teachers and use of test scores), *rev'd on other grounds*, 396 U.S. 290 (1970); Morgan v. Kerrigan, 401 F. Supp. 216, 265-68 (D. Mass. 1975) (establishing parent and citizen advisory councils), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 654-55 (M.D. Ala.) (prescribing number of black teachers per school, ordering athletic coaches to give recruiting talks at junior high schools, and providing form letter to be sent to potential football players), *aff'd as modified*, 400 F.2d 1 (5th Cir. 1968), *rev'd sub nom.* United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 231-37 (1969) (reinstating district court's specific remedial order).

26. Highly detailed "institutional" decrees are common outside the desegregation area. In a leading case, for example, the trial court required specific water temperatures for showers in a mental hospital whose conditions were found to violate the Fourteenth Amendment. Wyatt v. Stickney, 344 F. Supp. 373, 382 (M.D. Ala. 1972) (ordering 110 degree water for patient use and 180 degree water for dishwasher and laundry use), *aff'd in part sub nom.* Wyatt v. Alderholt, 503 F.2d 1305 (5th Cir. 1974); *see also* Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1976) (prescribing one foot of urinal trough per fifteen prison inmates and enough stationery and postage for each inmate to write five letters per week, and requiring a bachelor's degree in dietetics or the equivalent for supervisor of prison food services), *aff'd as modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part per curiam on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978); Miller v. Carson, 392 F. Supp. 515, 523 (M.D. Fla. 1975) (requiring all inmates to be given toothpaste and soap within twenty-four hours of incarceration), *aff'd in part, modified in part*, 563 F.2d 741 (5th Cir. 1977); Holt v. Sarver, 309 F. Supp. 362, 384 (E.D. Ark. 1970) (requiring subdivision of prison barracks), *aff'd*, 442 F.2d 304 (8th Cir. 1971). The remedial detail that decrees exhibit often seems designed primarily to prevent prior lawbreakers from committing *new* violations in the future, rather than to eliminate continuing effects of the prior violations. *See, e.g.*, City of Port Arthur v. United States, 103 S. Ct. 530, 535-36 (1982) (requiring election rule as a "reasonable hedge" against recurring discrimination); *cf.* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (requiring detailed pre-interrogation warnings).

27. *E.g.*, Hutto v. Finney, 437 U.S. 678, 711-14 (1978) (Rehnquist, J., dissenting); United States v. Board of School Comm'rs, 677 F.2d 1185, 1190-92 (7th Cir.) (Posner, J., dissenting), *cert. denied*, 103 S. Ct. 568 (1982); Glazer, *Should Judges Administer Social Services?*, 46 PUB. INTEREST 64, 66, 68-70, 73-75 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 666, 707-18 (1978); Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1131-71 (1978); *Too Much Law?*, NEWSWEEK, Jan. 10, 1977, at 42. Detailed decrees have also been criticized on the grounds that they are inefficient, require information about the affected institutions that judges may find difficult to secure, and involve policy choices for which judges have little guidance. *See* P. SCHUCK, *supra* note 24, at 150-69 (1983). The argument presented here suggests only why Rights Maximizing judges may justify decree specificity as a means of assuring the most effective remedy for victims, and does not address whether judges should refrain from issuing specific decrees because of concerns other than providing the most effective remedy for victims. A Rights Maximizing judge, of course, might reject a detailed decree if he concludes that, because of information gaps or other unavoidable problems, he cannot devise an effective one.

poses only a degree of detail commensurate with the risk of ineffectiveness.[28] The specific decree is a product of the same judgment that forms part of the justification for injunctive relief rather than damages in the first place—the judgment that the remedy should reduce the risk that the victims will suffer continuing harm.[29] While a generally-phrased decree may promise on its face to be fully effective, its vague commands give the defendant significant opportunity to evade or misinterpret remedial duties; indeed, the likelihood of evasion is increased simply because the predicate for a subsequent contempt action is less clear, and therefore incentives for compliance are less strong. A detailed decree is likely to increase the probability of promptly effective remedial compliance.[30]

While courts undoubtedly can reduce the risk of ineffectiveness if they are willing to impose costly requirements, they cannot make remedial success a certainty. Even armed force may not be able to suppress all resistance to a desegregation decree, and in any event may be counterproductive since it can interfere with other remedial goals. The judge is at most a strategist for effectiveness. If resistance or other practical obstacles threaten a remedy's effectiveness, even a Rights Maximizing court may find some remedial imperfection unavoidable.

C. *Interest Balancing and Avoidable Remedial Imperfection*

Interest Balancing increases the range of situations in which a limited remedy may be approved. Rights Maximizing looks at the world through the victims' eyes alone, permitting only remedial imperfection that occurs

28. In some cases, of course, the specific practice being remedied can itself be understood as part of the violation, and the criticism of the specific decree actually reflects a disagreement about the definition of the violation. Moreover, the violation may have been a cumulation of specific practices (such as insufficient toothpaste) that taken individually would not constitute a constitutional violation (such as cruel and unusual punishment). In this situation, a remedy may seek to eliminate the cluster of practices constituting the violation shown, and this may require remedial detail. In these circumstances, specific elements of the violation and remedy should not be evaluated in isolation.

29. The injunction reduces the plaintiffs' risks not simply because it directly eliminates the unlawful conditions, but also because the prospect of damage actions often will not produce changes in the defendant's practices since: (i) the various victims may not have the will and financial ability to initiate continual damage litigation; or (ii) the defendant (often a complex government institution) may not be sufficiently sensitive to the financial disincentives of successful damage litigation. The courts have never taken seriously the notion that injunctive relief in desegregation cases might be replaced by damage actions, undoubtedly also because of the impossibility and unsuitability of putting a monetary value on the injury in such cases. *See* O. FISS, *supra* note 5, at 76-77. *But cf.* P. SCHUCK, *supra* note 24, at 100-21 (proposing wider use of damages); Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257, 279-82 (same).

30. Professor Fiss justifies specificity not simply "by considerations of efficacy" but also by "general considerations of fairness (such as notice)." Fiss, *supra* note 5, at 50. Since defendants often object to specificity, however, the value of notice itself is probably best seen in terms of remedial effectiveness for victims rather than fairness to the defendant. Seen this way, notice is primarily a way of increasing the incentives for compliance by creating sufficient warning to support a subsequent contempt action for non-compliance. Specificity also facilitates the court's ability to monitor compliance, contributing to the likelihood of remedial success.

in spite of the court's rejection of all claims competing with the interests of victims. Interest Balancing, however, admits the possibility of tradeoffs; some achievable remedial effectiveness may be sacrificed *because of* other social interests. Thus, while both remedial approaches tolerate a gap between right and remedy due to unresolvable conflicts among remedial strategies or unavoidable instrumental difficulties, Interest Balancing also admits a limited remedy when a more effective one is too costly to other interests. Interest Balancing thus tolerates a gap between right and remedy that *could* be closed.

1. *Costs as a Remedial Constraint*

The role of costs is central to the distinction between Rights Maximizing and Interest Balancing. Under Rights Maximizing, costs play a sharply limited role in the choice of an injunctive remedy; the costs that a remedy imposes are relevant only when such costs actually interfere with the remedy's effectiveness or when a court must choose among equally effective remedies. Suppose, for example, that one goal of a remedy is to eliminate stigmatic harms to the victim class. If a remedial strategy itself inflicts stigmatic costs on the victims, the remedy is not fully effective; such costs are therefore relevant in evaluating the remedy's effectiveness. Similarly, if a remedy imposes costs on nonvictims that provoke them to resist in a way that limits the remedy's effectiveness for victims, such "feedback" costs also need to be considered in evaluating the remedy.

Under Interest Balancing, however, the costs of an injunctive remedy may also operate as an independent constraint on the effort to provide an effective remedy. Interest Balancing allows some achievable remedial effectiveness to be sacrificed in order to avoid costs that are deemed unduly burdensome to interests other than those of victims. A variety of costs might conceivably be balanced against remedial goals once a violation of right has been found. In discrimination cases, such costs might include the financial expense of a fully effective remedy, risks to the health and safety of children from school busing, loss of the advantages of neighborhood schools, loss of efficiency from modifying traditional meritocratic criteria, interference with policymaking discretion and autonomy of government institutions, interference with individual free choice, disruption of settled expectations, difficulties of administering and monitoring implementation, and even damage to the institutional position of courts if unpopular judicial decrees are imposed. Interest Balancing admits a possibility that Rights Maximizing forecloses—that some of these costs, some of the time, may justify a remedy that does less than eliminate all effects of the violation.

2. *The Justification for Interest Balancing*

Courts and commentators have apparently embraced Interest Balancing in constitutional cases, although at times they seem reluctant to acknowledge that it is a legitimate remedial approach. In *Swann v. Charlotte-Mecklenburg Board of Education*,[31] for example,[32] the Supreme Court held that busing might be needed to achieve the remedial goal of eliminating one-race schools but openly acknowledged the need for a "reconciliation of competing values in a desegregation case," concluding that "[a]n objection to [busing] may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."[33] Similarly, scholars writing about injunctions frequently affirm that a necessary predicate of a remedial decree is a conclusion that "the harm is sufficient to justify the remedial costs."[34]

31. 402 U.S. 1 (1971).

32. In the school desegregation area, the Court has also invoked Interest Balancing in Milliken v. Bradley, 418 U.S. 717, 741-47 (1974) (*Milliken I*), where it allowed values of "local autonomy" to limit a more fully effective desegregation remedy. *See infra* pp. 645-49 (discussing *Milliken I*); *see also* Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 446 n.13 (1980) (Powell, J., dissenting from dismissal of certiorari) (construing prior desegregation cases to require that "due consideration must be given to other values and interests" in designing desegregation remedies); *supra* note 12 (other desegregation cases that formulate equitable principles in balancing terms). Lower courts also have frequently used Interest Balancing in desegregation cases, *e.g.*, Northcross v. Board of Educ., 489 F.2d 15, 17 (6th Cir. 1973) (approving district court's rejection of greater desegregation because of excessive travel time), *cert. denied*, 416 U.S. 962 (1974); Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123, 1129 (M.D. Ala. 1974) (rejecting greater desegregation because of "excessive and unnecessarily heavy administrative burden"), *aff'd per curiam*, 511 F.2d 1374 (5th Cir.), *cert. denied*, 423 U.S. 986 (1975).

Interest Balancing has also limited the availability of injunctive relief in constitutional cases outside the desegregation area, particularly in cases where federalism concerns are involved. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 378-80 (1976) (restricting availability of injunctive relief against officials of state or local government); Younger v. Harris, 401 U.S. 37, 43-49 (1971) (principles of comity bar issuance of injunction against state criminal prosecution involving violations of constitutional rights except in cases of bad-faith harassment); *cf.* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941) ("public interests" in avoiding "needless friction with state policies" lead federal courts to abstain from immediately adjudicating suit). Interest Balancing is also invoked in the context of equitable remedies for statutory violations. *E.g.*, City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 721-23 (1978) (Title VII); International Bhd. of Teamsters v. United States, 431 U.S. 324, 375 (1977) (Title VII).

33. *Swann*, 402 U.S. at 30-31. While lengthy busing might interfere with the education of blacks as well as whites, *Swann* should not be read as a Rights Maximizing opinion concerned only with providing the most effective remedy to blacks. Since the *Swann* limitation would leave the affected black students in de jure segregated schools—and would not require any alternative remedial benefits for those students—it is hard to see how the *Swann* limitation would fulfill the remedial goals of desegregation more effectively than busing would. *Swann* should be read as its language suggests, as an Interest Balancing case in which "competing values" are balanced against blacks' remedial interests and will sometimes override them.

34. Fiss, *The Jurisprudence of Busing*, LAW & CONTEMP. PROBS., Winter 1975, at 194, 194; *see* P. SCHUCK, *supra* note 24, at 190-91 (costs of injunctive remedy must be counted against any benefits); Goodman, *Some Reflections on the Supreme Court and School Desegregation*, in RACE AND SCHOOLING IN THE CITY 45, 69-70 (A. Yarmolinsky, L. Liebman & C. Schelling eds. 1981) (balancing in desegregation cases); Leubsdorf, *Completing the Desegregation Remedy*, 57 B.U. L. REV. 39, 87-89 (1977) (balancing in desegregation cases); Nagel, *supra* note 27, at 680-81 (separation of powers as source of limit on courts' power "to seek complete correction of the consequences of a constitu-

Other formulations of governing remedial principles, however, suggest an uneasiness about acknowledging that remedial costs may limit the most effective remedy possible for victims of constitutional violations. For example, the Supreme Court's frequent statements that remedies must eliminate "all vestiges" of constitutional violations,[35] or must eliminate a violation's effects "to the greatest *possible* degree,"[36] are the language of Rights Maximizing. The complexity of justifying Interest Balancing may help explain some reluctance to acknowledge its use.

Under Rights Maximizing, the justification for any remedial limit is simple: Nothing more is possible. Since Interest Balancing permits the sacrifice of an *achievable* remedy for the violation of constitutional rights, Interest Balancing is much harder to justify than Rights Maximizing, cer-

tional violation"); *see also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 2.4-2.5 (1973) (general discussion of remedial limits and balancing in equity cases).

It is frequently difficult to characterize a particular commentator as either a Rights Maximizer or an Interest Balancer. Consider, for example, Professor Fiss' elaboration of his views in *The Jurisprudence of Busing*:

> The relevance of remedial costs is often obscured in constitutional litigation. It is commonly asserted that violation of a "constitutional right" must be corrected regardless of the cost. Indeed, vindication-at-any-cost is often thought to be one of the special attributes of a right deemed "constitutional." This conceptualization may be appropriate for a narrow band of constitutional provisions, those that specifically confer a readily discernible right—such as the provision guaranteeing trial by jury—though even then a court may take account of the remedial costs in defining the incidents of the right—such as the number of jurors required or the unanimity requirement. But for constitutional provisions like the due process or equal protection clauses the remedial costs are clearly relevant in determining whether there is a violation. With these provisions, the judiciary has considerable latitude in shaping the contours of a "constitutional right"—in determining whether segregation is to be deemed a denial of the equal protection of the laws and whether blacks have a "constitutional right" to have the system integrated. In making that judgment, the court must not only consider the harmfulness of the particular practice being challenged but also whether it is sufficiently harmful to warrant the costs of eliminating it.

Fiss, *supra*, at 195-96. The passage begins by clearly suggesting that Fiss is an Interest Balancer who believes that remedial costs may be a source of remedial limits once a right is defined, and that a court may properly refrain from ordering a remedy to correct violations of that right if the costs of the remedy are too high. Then (starting with the ambiguous phrase "incidents of the right") the passage begins to plead the relevance of costs in defining the right itself; rights and remedies become blurred. This blurring may be a product of Fiss' view, developed in earlier articles, that segregation (whether de facto or de jure) violates the Constitution whenever the harm of segregation is sufficient to warrant the costs of eliminating it. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3, 16-18, 36-39 (1974); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 583-617 (1965). In this view, which is sharply different from current equal protection doctrine, costs would be relevant at the rights-declaring stage, not necessarily at a separate remedy stage, and there need not be any divergence between right and remedy. In a later article, *The Forms of Justice*, Professor Fiss emphasizes a sharper separation between right and remedy, and yet seems more clearly to be a Rights Maximizer. To the extent that Fiss acknowledges "limiting forces" and limited remedies, he appears no longer to accept cost limits on remedies but only limits arising from forces "beyond the [judges'] control," forces that may lead a judge to "compromise his original objective in order to obtain *as much relief as possible*." Fiss, *supra* note 5, at 54-55 (emphasis added). This is the language of Rights Maximizing. *See infra* pp. 677-80.

35. *See* cases cited *supra* note 9.

36. Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). To the extent such passages acknowledge that remedies may be limited, they invoke practicalities that make greater remedial effectiveness *impossible*, not cost-based limitations.

tainly to the victims of the violation. My own view, reached with difficulty and held with doubt, is that at least some form of Interest Balancing is indeed appropriate in constitutional cases. Competing costs should not always be excluded completely from the remedial calculus. But the justification is by no means self-evident, and Interest Balancing must be used with great caution to assure that the right receives sufficient weight in the balance.

The issue here, it must be emphasized, is not whether costs to other social interests should play any role in limiting how much a plaintiff can extract from a court. Some costs obviously play a role in defining the content of the right itself. Balancing tests of one sort or another are commonly used to determine *whether* a violation of constitutional right has occurred.[37] Infringement of a constitutionally recognized interest does not amount to a violation of a constitutional right if the government has an overriding competing interest. For example, the First Amendment permits government restrictions on expressive activity if there is a clear and imminent danger of serious harm;[38] similarly, the equal protection clause permits gender distinctions if they "serve important governmental objectives and [are] substantially related to achievement of those objectives."[39] Under Interest Balancing, however, competing interests are afforded a second veto at the remedy stage, after a violation of constitutional right is shown. Values apparently insufficient to override constitutional interests at the rights-declaring stage may be allowed at the remedy stage to prevent practical vindication of those rights. Why should costs ever play this limiting role at the remedy stage?

Two possible reasons are simply explanations and not justifications. First, the divergence between right and remedy may simply reflect a mistake in articulating the right. If the right is defined properly (that is, narrowed to give greater weight to competing costs), the divergence between right and remedy disappears, and there is no need for Interest Balancing. Second, the divergence between right and remedy under Interest Balancing may reveal ambivalence and uncertainty about the right itself: Unsure of how broadly to define the plaintiffs' interests, a court states a broadly phrased right but delivers more modest relief. While evasion may sometimes be functional,[40] it is inappropriate to deal with ambivalence about the right by taking antagonistic positions in the separate theoretical realms

37. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 987-1004 (1975); Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

38. *E.g.*, Grayned v. City of Rockford, 408 U.S. 104, 116-21 (1972); Cohen v. California, 403 U.S. 15, 19-20 (1971).

39. Craig v. Boren, 429 U.S. 190, 197 (1976).

40. *See infra* pp. 665-74 (discussing functions of judicial subterfuge).

of rights and remedies, depositing half of one's ambivalence in each realm.

A third argument is that balancing costs and benefits at the remedy stage is an inherent aspect of "equitable" remedies. If the reference to equity is not an appeal to substantive values but instead an appeal to the historic functions and flexibility of equity courts furnishing equitable remedies, this justification is not altogether convincing. Equity evolved in part to ameliorate the rigidities of courts at law that interfered with fully adequate remedial vindication.[41] In any event, notions of equity are not static; history alone cannot justify a refusal to use the most effective method of vindicating constitutional rights.

A fourth reason is persuasive but of limited scope: Some remedial limits are rooted in the Constitution itself. The Eleventh Amendment, for example, has been interpreted to prohibit certain retroactive monetary awards against a state.[42] An injunction that prevented individuals from exercising their constitutional right to travel or to attend private schools would also interfere with what courts have deemed constitutional interests.[43] In general terms, vindicating a constitutional remedial interest may clash with another constitutional interest. While the existence of clashing constitutional interests does not determine which one should prevail, in some cases a limited remedy is justified because a more complete remedy would impose costs that are themselves held to be constitutionally prohibited. Obviously, though, not all Interest Balancing limits are constitutionally required.

41. *See* O. FISS, INJUNCTIONS 10-13, 74-76 (1972); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 1.4 (2d ed. 1977). To be sure, equity also ameliorated rigidities that might produce unfairness for the defendant and evolved defenses that could at times bar plaintiffs from equitable remedies altogether (*e.g.*, adequacy of remedy at law, unclean hands, estoppel, laches). *See* D. DOBBS, *supra* note 34, §§ 2.4-2.5; Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 533-35 (1982). The general appropriateness of injunctive relief in desegregation cases, of course, has never been questioned by the courts. *Cf. supra* note 29 (inadequacies of relying upon damage remedies in desegregation cases). The issue here is whether there is a justification for issuing an injunction that requires something less than the complete elimination of a violation in a case where equitable relief is undoubtedly appropriate. The mere fact that defendants traditionally had certain equitable defenses available—mostly ones that are irrelevant in the typical desegregation case—does not explain why, in a twentieth-century constitutional law case, a judge should order only partial and incomplete equitable relief.

42. Edelman v. Jordan, 415 U.S. 651, 662-71 (1974). Although Eleventh Amendment sovereign immunity seems quite well established in legal doctrine, many judges and commentators have made powerful textual, historical, and policy arguments against the immunity. *See, e.g.*, Employees of the Dept. of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 309-24 (1973) (Brennan, J., dissenting); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pts. 1 & 2), 126 U. PA. L. REV. 515, 1203 (1978).

43. *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 338-42 (1972) (right to travel); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (same); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (right to attend private schools). Some reliance interests of those who would be affected by a remedy may also have constitutional dimension. *See* Pineman v. Oechslin, 494 F. Supp. 525, 546-53 (D. Conn. 1980) (contract clause restricts nature of remedy), *vacated on other grounds*, 637 F.2d 601 (2d Cir. 1981).

Nevertheless, the constitutional provisions directly limiting remedies suggest a fifth and much broader point. However strong remedial effectiveness is as a value, it is not society's only value. Where effective remedies conflict with interests that were not considered at the rights stage—interests that are not relevant to the question of whether a right has been violated—those interests press to be considered at the remedy stage and, on occasion, to override the value of remedying violations of the right. Particularly when the violation was long-lasting and broad in scope, and therefore had widespread effects, the potential scope of an equity decree creates distinctive pressure to accept constraints on relief. Such an injunction usually does more than roll back ill-gotten gains secured by the defendant in violating the victims' rights. To undo the effects of the wrongs in the direct manner that the injunction contemplates, to give the victims effective relief, the court must consider rearranging many pieces that were irrelevant to the question of violation.

Most importantly, as discrimination cases show, an effective remedy is often not possible without imposing significant and direct costs on selected third parties who are nonviolators. Remedial burdens are easiest to justify when the cost-bearer of the remedy is also the wrongdoer who violated the plaintiffs' rights. It is, after all, a " 'basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[44] Remedies for long-standing discrimination, however, often cannot meet that norm, since relief for the defendants' legal wrongs frequently imposes substantial burdens directly on nonwrongdoers—job applicants and employees who did not engage in employment discrimination but are disadvantaged under employment quotas or retroactive seniority requirements,[45] or families subject to a busing remedy because of the actions of government officials to whom they have given neither votes nor support and in whose jurisdiction they may not even have lived during the period of the violation.[46]

44. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

45. *E.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 774-75 (1976); Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256, 287-88 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

46. Austin Indep. School Dist. v. United States, 429 U.S. 990, 995 n.7 (1976) (per curiam) (Powell, J., concurring). To be sure, all private and public enterprise liability, whether it involves damages or injunctive relief, imposes costs that are then passed on to others who may be altogether innocent or innocent except for their current membership or citizenship in the liable entity. Particular pressure to use Interest Balancing for injunctive remedies in this context arises from the size, nature, directness, and selectivity of the remedial costs imposed on people who may not be wrongdoers or distinctive beneficiaries. This points to a more general question: To what extent is the justification for enterprise liability affected by either the character of the relationship between the liable entity and the actual remedial cost-bearer (citizen, taxpayer, customer, employee, applicant, and so forth) or the nature of the costs imposed?

Remedial burdens are also rather easy to justify if they take away benefits that people have received only because of the wrongs of others.[47] But injunctions often go beyond this. School desegregation remedies, for example, do not simply take back benefits unjustly enjoyed by third parties and return those parties to the position they would have occupied absent the violation; instead, to assure that black children receive a desegregated education, it is often necessary to require third parties to accept burdens—such as long-distance transportation—that no one would have had to bear today if the wrongs had not been committed. Similarly, employment discrimination remedies do not necessarily impose costs on those specific job applicants or workers who have distinctively benefited from the defendants' violations. In short, remedies for discrimination frequently place direct costs on persons who are neither wrongdoers nor distinctive beneficiaries of prior wrongs. Indeed, in this respect, the problem posed by many remedies for specific "identified" violations of antidiscrimination laws is the same one posed by voluntary affirmative action programs adopted to overcome effects of past "societal" discrimination: Although intervention is justified in order to rectify prior wrongdoing, innocent third parties selectively bear the costs of rectification.[48]

An adherent of Rights Maximizing, of course, would say that these third party concerns are always properly ignored if necessary to furnish an effective remedy for victims of constitutional violations. For an adherent of Interest Balancing, however, the frequent divergence of law violator from remedial cost-bearer, and the distinctive scope and directness of the injunction's impact on nonviolators, make it appropriate at least to consider certain costs at the remedy stage that are not relevant to the violation stage. An Interest Balancer might generally override these third-party costs because of the extraordinary value attached to providing an effective remedy to victims, but nevertheless allow those costs to justify limiting the remedy in some cases.[49]

47. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 363-66 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part); Franks v. Bowman Transp. Co., 424 U.S. 747, 776 (1976); Sher, *Justifying Reverse Discrimination in Employment*, 4 PHIL. & PUB. AFF. 159, 164-65 (1975).

48. Numerous parallels exist between issues raised by remedies for "identified" racial discrimination (discrimination by specific persons or institutions named as defendants in a lawsuit) and remedies for "societal" racial discrimination (discrimination extending more generally throughout our country's social institutions and throughout its history), particularly when the scope of the "identified" violation is considerable and the remedy commensurate. It should be possible, indeed, to develop a remedial conception of antidiscrimination law that explores the pervasiveness and power of remedial ideas in the field, and that sees these various remedial situations as posing a set of common problems whose difficulties vary according to the temporal and spatial scope of the discriminatory acts being addressed and the breadth of the remedial response. *Cf.* Gewirtz, *Race and Equal Protection of the Laws:* Strauder v. West Virginia, in THE SUPREME COURT AND HUMAN RIGHTS 111, 126-29 (B. Marshall ed. 1982) (noting some common remedial problems).

49. The Supreme Court has also invoked the interests of "innocent third parties" as a basis for

While the existence of certain remedial costs may justify their consideration at the remedy stage *if* they are not part of the definition of the right, it does not explain or justify why these costs are not included as part of the right itself, why the right-remedy gap should not be closed by redefining the right to take such costs into account. One answer is that the court may believe that the constitutional text does not give leeway for such a redefinition of the right; or a court may believe that the very concept of constitutional rights requires that those rights be articulated in a sort of principled and general form that is unaffected by highly context-bound and time-bound factors that might justify restricting a remedy in a particular case. The better answer is that where Interest Balancing's consideration of remedial costs leads to a failure to provide a fully effective injunction, it does not necessarily foreclose other remedies. Even if an injunctive remedy is too costly, other judicial remedies such as damages[50] may be available to eliminate some effects of the violation, or other branches of government may try to vindicate the right in ways that a court believes it should not. Thus, it is meaningful not to redefine the right but to preserve it as an aspiration that may be vindicated in other ways or places.

3. *Balanceable and Unbalanceable Costs*

Interest Balancers reject the view that a remedy's costs may *never* justify limiting a remedy; they must still decide, however, which costs are allowed to limit a remedy, and how much limiting effect to give to those costs. Even under Interest Balancing, some costs must be altogether unbalanceable—that is, they will not be permitted to weigh at all against remedial effectiveness.[51] An example of a cost that should be unbalanceable in formulating a remedy for racial segregation is the "cost" of interfering with white racists' preferences to stay away from blacks because of their race. The objection to recognizing these costs is not simply that doing so would interfere with remedial effectiveness; if it were, all costs would

limiting equitable remedies in statutory discrimination cases. *See, e.g.*, City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 719, 721-23 (1978) (in gender discrimination suit involving city pension fund, retroactive award was inappropriate because it might interfere with solvency of fund and disappoint expectations of persons covered by plan); International Bhd. of Teamsters v. United States, 431 U.S. 324, 375 (1977) ("[E]specially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests.' "). *But see* Franks v. Bowman Transp. Co., 424 U.S. 747, 774 (1976) (to deny remedy "on the sole ground that such relief diminishes the expectations of other arguably innocent employees would if applied generally frustrate . . . 'make whole' objective of Title VII").

50. This essay does not consider the applicability of Interest Balancing to damage remedies. *See supra* note 29 (discussing inadequacy of damages in desegregation cases).

51. *See* Fiss, *The Jurisprudence of Busing*, *supra* note 34, at 196 (court must disregard costs whose "allowance would . . . result in the continued subordination of the racial minority" and whose "existence and magnitude . . . are subject to indirect control").

be unbalanceable. Rather, the rejection of these costs is rooted in their relation to the right. The preferences of white racists are ignored not because such preferences are deemed offensive but because they involve an objection to the right itself. This clarifies the relevant distinction between different remedial costs: *costs of the right*, which are the distributive costs entailed by the end-state vision embodied in the right itself; and *transitional costs of remedies for violations of the right*, which are the costs imposed in order to move from the current situation to that end state. The former should always be unbalanceable; an objection to the right is not an interest that may count as an independent value to be weighed against furnishing a fully effective remedy. But objections to transitional remedial burdens should at least be balanceable.

If a cost is deemed balanceable, the remaining question is whether it is sufficiently weighty to justify limiting a remedy. In general terms, a particular remedy may be rejected under Interest Balancing if its costs "outweigh" or "exceed" the remedial effectiveness it produces. Deciding whether costs outweigh remedial effectiveness requires a cluster of normative judgments: The court must first decide how much to value the provision of various remedial benefits and the avoidance of certain costs, and then compare those values (assuming, perhaps implausibly, that a common scale of valuation can always be devised).[52] Critical to my own conception of Interest Balancing is the view that the social benefit of the right and the interest in undoing effects of its violation must be given exceptional weight in the balance; otherwise the Constitution's allocation of rights would be subject to a de novo utilitarian reevaluation in particular cases. This weighting places a significant burden of justification on any decision to accept a cost tradeoff and sacrifice some achievable remedial effectiveness.

A danger of rejecting Rights Maximizing is that Interest Balancing will be misapplied if it is legitimated in any form—that judges will come to accept Interest Balancing tradeoffs beyond what my rather stringent conception would find acceptable. The point is both political and psychological. Politically, rejecting Rights Maximizing may lead the courts to approve a general conception of Interest Balancing that undervalues the importance of vindicating rights, or may open the way for judges hostile to the right to dilute its force by excessively diluting the remedy in particular cases; psychologically, judges may systematically undervalue individual

52. Quite obviously, a "procedural" solution that would "let the victims decide" upon the preferred remedy is implausible under Interest Balancing, even if plausible under Rights Maximizing, *see supra* note 23; since the claims of victims and cost-bearers are each relevant under Interest Balancing, some substantive choice among their interests by a neutral third party (the court) is unavoidable.

rights if allowed to balance them against broad social interests.[53] Therefore, even if one believes that Interest Balancing is the best approach in theory, concern about possible abuses in its application might lead to renunciation of the approach altogether: better to insist upon Rights Maximizing, even if it sometimes will lead to inappropriately sweeping remedies, since the greater danger is that legitimating any form of Interest Balancing will lead to inappropriately narrow remedies. This objection to Interest Balancing is prophylactic, reflecting a view that judges are unwilling or unable to apply Interest Balancing correctly in enough cases to be entrusted with the task. This is an unacceptable and inaccurate working view about judges, however. Prophylactic rules—*Miranda v. Arizona*[54] is a good example—are appropriate when decisionmakers have demonstrated that they cannot be entrusted with a substantively preferable rule. But there is no reason yet to doubt the general capacity of judges to reject improper cost justifications for limiting remedies under an Interest Balancing approach. When defendants press too far,[55] judges themselves must resist.

D. *The Place of Resistance in Remedial Theory*

The remainder of this essay discusses one deeply troubling source of remedial imperfection—public resistance to judicial remedial action—and focuses on the various roles that resistance plays under the two remedial approaches. Whether one adopts Rights Maximizing or Interest Balancing, resistance based on opposition to the right should be deemed unbalanceable and have no independent moral weight. As elaborated below, however, resistance may nonetheless be the basis for limiting a remedy in at least three ways, each leading a court to provide less complete relief than it would absent resistance.

First, whether a court uses Rights Maximizing or Interest Balancing, resistance itself can interfere with the effectiveness of the remedy. While strategies to quiet resistance may sometimes be available, a court may not be able to tame the opposition completely, and a limited remedy might be

53. *See* C. Black, *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 63, 66; H. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 878–79 (1960). Analogous concerns are reflected in an argument that even though judges may properly behave as Interest Balancers, they should not admit to the public (or perhaps even to themselves) that they are not Rights Maximizers. *See infra* pp. 665-74 (discussing judicial candor).

54. 384 U.S. 436 (1966).

55. A recent example of an excessive invocation of Interest Balancing appears in the U.S. Department of Justice's amicus curiae brief supporting the school board's petition for certiorari in the Nashville schools case. *See* Brief for the United States as Amicus Curiae in Support of Petitioners at 11-14, Metropolitan County Bd. of Educ. v. Kelley (calling for cost-benefit analysis at remedy stage that seems to give no distinctive weight to interests of victims), *cert. denied*, 103 S. Ct. 834 (1983) [hereinafter cited as U.S. Amicus Brief].

the most effective remedy possible, justifiable even under Rights Maximizing. Indeed, the most effective remedy may be one that a court limits at the outset. Second, resistance may be based on opposition to transitional remedial costs that a court *does* consider balanceable. While a Rights Maximizing court would refuse to allow such costs (and the opposition that invokes them) to be independent counterweights in devising a remedy, an Interest Balancing court might limit the remedy if these balanceable costs are sufficiently great. Third, resistance itself may impose costs on social interests other than those of the victims, including the costs of attempting to tame the opposition as well as costs of failing to tame it. While Rights Maximizing requires that these costs be borne if they will yield a more effective remedy for victims, Interest Balancing allows these costs to be considered as part of the remedial balance and at times to limit the remedy that provokes the resistance.

The next two parts of this essay examine the enduring problem of resistance to school desegregation remedies. The first part, which discusses the remedial delay that *Brown* itself tolerated because of resistance, focuses on the possibility of justifying remedial imperfection in Rights Maximizing terms. The second part, which considers contemporary limitations on the scope of integration decrees in response to possible "white flight," applies the remedial approaches more fully, and examines the ways in which both Interest Balancing and Rights Maximizing deal with resistance and remedial imperfection.

III. 1955: "All Deliberate Speed" and the Expense of Time

In the school segregation cases known as *Brown*, transitional questions of remedy were as prominent as fundamental questions of rights. The Supreme Court not only had to decide whether the equal protection clause prohibited "separate but equal" public schools, but also what was the appropriate remedy for deeply entrenched segregation. The Supreme Court's opinions sharply separated these questions. A year after *Brown I* declared that "[s]eparate educational facilities are inherently unequal,"[56] the Court in *Brown II* addressed "the complexities arising from the transition to a system of public education freed of racial discrimination."[57] The seven-paragraph opinion in *Brown II* left open many questions—for example, it described the remedial goals of the transition only vaguely—but the Court made clear that this transition would not have to be immediate. *Brown II* approved an imperfect remedy—delayed desegregation—and did so because of feared white resistance.

56. Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (*Brown I*).
57. Brown v. Board of Educ., 349 U.S. 294, 299 (1955) (*Brown II*).

In its famous and controversial last paragraph, *Brown II* instructed the district courts to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[58] The phrase "all deliberate speed" is an unusual rhetorical construction: The words "deliberate" and "speed" connote different things, and "all" only intensifies the ambiguity. Style in this case is inseparable from substance. Internal documents now available confirm that the Court intended to signal flexibility,[59] and this apparently was how the opinion was perceived by the Court's various publics.[60] The Court was not requiring immediate desegregation. Rather, taking account of "a variety of obstacles in making the transition to school systems operated in accordance with . . . constitutional principles," the Court was allowing delay and a gradual transition to a nondiscriminatory school system.[61] Moreover, the opinion set no specific deadlines for full compliance. Desegregation was

58. *Id.* at 301.

59. *See* R. KLUGER, SIMPLE JUSTICE 736-44 (1975); Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 52-57 (1979). Kluger traces the phrase "all deliberate speed" to Justice Frankfurter, who borrowed it from Justice Holmes, *see* Virginia v. West Virginia, 222 U.S. 17, 19-20 (1911), who in turn attributed it to English chancery cases but who may, some speculate, actually have learned it from a poem by Francis Thompson, "The Hound of Heaven." R. KLUGER, *supra*, at 686, 742-44; *see* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 253 (1962).

60. The *New York Times*, perhaps a public in its own right, reported the decision with the following headlines: "High Court Tells States to End Pupil Segregation Within 'Reasonable' Time," "No Deadline Set," "Southerners React Quietly, Although Some Are Defiant," "Court Ruling Brings Feelings of Relief—Tensions Reduced by the Absence of Desegregation Time Limit." N.Y. Times, June 1, 1955, at 1, cols. 6-8. The newspaper also reported that the Court's ruling gratified officials of the Eisenhower Administration and that: "Congressional reaction, for the most part, indicated relief that the Court had not ordered a summary end to segregation under a rigid mandate. By permitting a gradual transition from segregated to integrated school systems, many felt, serious repercussions probably had been avoided." *Id.* at 1, col. 8. Although its lead headline used the phrase "within 'reasonable' time," taking the word "reasonable" out of the specific context used by the Court ("prompt and reasonable start toward full compliance"), the *Times* also reprinted an extraordinary story from the Associated Press captioned " 'With Deliberate Speed' is the Coming Phrase":

> WASHINGTON, May 31 (AP)—The Supreme Court in its opinion today said school desegregation must be ended "with all deliberate speed"—a phrase likely to keep lawyers arguing for a long, long time. Under one dictionary definition of "deliberate" the phrase is self-contradictory. This definition is: "slow in action; unhurried." It seems likely, however, that the high tribunal did not have this definition in mind. Others include: Arrived at, or determined upon, as a result of careful thought and weighing of considerations. Carried on coolly and steadily. Careful in considering the consequences of a step. Characterized by reflection; dispassionate; not rash. In the coming legal struggles in district courts, opponents of school integration are likely to put a lot of emphasis on the "deliberate" part of the Supreme Court's language; foes of segregation are expected to lay more stress on the word "speed."

Id. at 28, col. 5.

61. Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (*Brown II*). While the commentary on *Brown II* has focused on the gradualism and "deliberateness" allowed by the Court, the opinion also contained passages embellishing "speed": Defendants must make a "prompt and reasonable start toward full compliance," and "[t]he burden rests upon the defendants to establish that [additional] time [for compliance] is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Id.*

carried out under the permissive "all deliberate speed" formula until 1964, when the Supreme Court proclaimed that "[t]he time for mere 'deliberate speed' has run out."[62] At that point, only 1.2% of the nearly three million black students in the South attended school with white students.[63]

The text of *Brown II* justified gradualism and delay by reference simply to administrative problems "arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units . . ., and revision of local laws and regulations which may be necessary in solving the foregoing problems."[64] No mention was made of time for psychological or political adjustments. Indeed, "it should go without saying," the Court said, "that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[65] It seems clear, however, that the Justices were chiefly concerned about white opposition,

62. Griffin v. County School Bd., 377 U.S. 218, 234 (1964). Indeed, it was not until 1968 that the Court began to insist that desegregation plans must "promise[ ] realistically to work *now*." Green v. County School Bd., 391 U.S. 430, 439 (1968); *see also* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam) (refusing time extension for desegregation of Mississippi schools). And it was not until 1971 that the Court began to provide relatively comprehensive standards for measuring whether a plan "worked." *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

Prior to 1963, when the Supreme Court began to express its impatience with the pace of gradualism under the "all deliberate speed" standard—*see* Goss v. Board of Educ., 373 U.S. 683, 689 (1963); McNeese v. Board of Educ., 373 U.S. 668, 674 (1963); Watson v. City of Memphis, 373 U.S. 526, 529-30 (1963)—the Supreme Court gave plenary consideration to only a handful of school desegregation cases. *See, e.g.*, Shuttlesworth v. Birmingham Bd. of Educ., 358 U.S. 101 (1958) (per curiam) (affirming district court's rejection of facial challenge to Alabama's pupil placement law); Florida *ex rel.* Hawkins v. Board of Control, 350 U.S. 413 (1956) (per curiam) (ordering immediate admission of black students to previously segregated graduate school); *infra* pp. 626-28 (discussing *Cooper v. Aaron*). The Court left standing a significant number of lower court decisions that assured only the most minimal desegregation. *E.g.*, Kelley v. Board of Educ., 270 F.2d 209 (6th Cir.) (allowing grade-by-grade desegregation), *cert. denied*, 361 U.S. 924 (1959); Covington v. Edwards, 264 F.2d 780 (4th Cir.) (requiring exhaustion of state administrative remedies), *cert. denied*, 361 U.S. 840 (1959); Hood v. Board of Trustees, 232 F.2d 626 (4th Cir.) (per curiam) (same), *cert. denied*, 352 U.S. 870 (1956); Slade v. Board of Educ., 252 F.2d 291 (4th Cir.) (per curiam) (upholding pupil placement laws), *cert. denied*, 357 U.S. 906 (1958). But the Supreme Court also left standing a number of Courts of Appeals decisions insisting upon more effective desegregation steps. *E.g.*, Evans v. Ennis, 281 F.2d 385 (3d Cir. 1960) (requiring full integration of all grades in public schools), *cert. denied*, 364 U.S. 933 (1961); School Bd. v. Atkins, 246 F.2d 325 (4th Cir.) (striking down administrative appeal requirement and ordering nondiscriminatory admissions), *cert. denied*, 355 U.S. 855 (1957); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir.) (denying stay of desegregation plan), *motion for stay denied*, 364 U.S. 500 (1957).

For discussion of Southern intransigence and footdragging after *Brown II*, see H. RODGERS & C. BULLOCK, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES 69-111 (1972); J. WILKINSON, FROM BROWN TO BAKKE—THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 61-127 (1979); Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV 193 (1964); McKay, *"With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. REV. 991 (1956).

63. U.S. COMM'N ON CIVIL RIGHTS, FULFILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS 4 (1976).

64. 349 U.S. 294, 300-01 (1955).

65. *Id.* at 300.

not administrative adjustments.[66] Fully aware that they were commanding a sweeping transformation of long-standing and entrenched practices and customs, the Justices wished to project a flexibility that would reduce intransigence and promote flexibility among whites.[67] In addition, the Court sought to protect itself as an institution by avoiding orders that would be successfully defied. As Justice Black put it in conference, Southern resistance inevitably would make the implementation of *Brown* a gradual process; to avoid undermining its own authority, the Court "should not issue what it cannot enforce."[68] Thus, the Court explicitly approved flexible implementation schedules, but did not make explicit that it was allowing this remedial delay because of white opposition.[69] The Court's refusal to admit candidly what it was doing in *Brown II* began a pattern of judicial deception about the link between remedies and resistance.[70]

My earlier discussion of remedial theory provides a coherent perspective from which to evaluate the delay approved in *Brown II*. "All deliberate speed" authorized and yielded an imperfect remedy; the delay that it permitted resulted in a failure to implement fully the rights and substantive remedial goals stated (albeit vaguely) in *Brown I*.[71] This delay meant not only that effective relief for some members of the plaintiff class would be postponed[72] but also that some members of the plaintiff class would fail to receive relief at all since they would graduate before any desegregation would actually occur. The issue is whether this remedial imperfection is justifiable under either of the two remedial approaches set out above. For the sake of simplicity, I focus here only on the appropriateness of *Brown II*'s basic decision to permit *some* significant remedial delay rather than to require immediate desegregation, and not on the Court's ultimate toler-

66. *See* A. BICKEL, *supra* note 59, at 250-53; R. KLUGER, *supra* note 59, at 737-44; E. WARREN, THE MEMOIRS OF EARL WARREN 288-90 (1977); Hutchinson, *supra* note 59, at 53-54.

67. Such concerns had also influenced the substance and tone of the *Brown I* opinion, which Chief Justice Warren said he prepared "on the theory that [it] should be . . ., above all, non-accusatory." Hutchinson, *supra* note 59, at 42.

68. R. KLUGER, *supra* note 59, at 740.

69. Justice Frankfurter, the source of the phrase "all deliberate speed," had urged that the Court's opinions "take due, even if not detailed account of . . . what are loosely called 'attitudes,'" in addition to administrative factors, Hutchinson, *supra* note 59, at 53; but Chief Justice Warren opposed "mentioning 'psychological' or 'sociological' attitudes" in the opinions, and Warren's view prevailed. *See* R. KLUGER, *supra* note 59, at 739. Justice Frankfurter went public on this issue in his separate opinion in Cooper v. Aaron, 358 U.S. 1, 25 (1958) (Frankfurter, J., concurring) (desegregation "not an easy, overnight task" given "deep emotions" involved; "[o]nly the constructive use of time" can achieve desired end).

70. *See infra* pp. 665-74 (discussing judicial candor).

71. On delay as a form of remedial ineffectiveness, see *supra* p. 596.

72. The cases in *Brown* were all brought as class actions under Federal Rule of Civil Procedure 23(a)(3). *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954); *see also* Supplemental Memorandum for the United States on the Further Argument of the Questions of Relief at 1-5, Brown v. Board of Educ., 349 U.S. 294 (1955) (discussing applicability of class action rules to *Brown* litigation).

ance of an extended period of delay lasting through the early 1960's (which seems more clearly inappropriate) or its failure to establish a deadline for gradual compliance in the *Brown II* opinion itself.

Much of the criticism of "all deliberate speed" views it as an inappropriate accommodation of white feelings. This criticism finds the correct principle governing the relationship between remedies and resistance in the text of *Brown II* itself—"constitutional principles cannot be allowed to yield because of disagreement with them"[73]—but views "all deliberate speed" as the Supreme Court's approval of just such a yielding. Although he proposed something less than immediate and complete desegregation,[74] Thurgood Marshall's oral argument in *Brown II* posed this basic challenge in particularly powerful terms:

> [T]he argument [to postpone enforcement of a constitutional right] is never made until Negroes are involved.
>
> And then for some reason this population of our country is constantly asked, "Well, for the sake of the group that has denied you these rights all of this time," . . . to protect their greatest and most cherished heritage, that the Negroes should give up their rights.[75]

Broader versions of this challenge have been made recently by Dean Derrick Bell, Professor Alan Freeman, and Judge Robert Carter, who argue that in *Brown* and other Supreme Court decisions the Court balanced black rights against white interests and chose the latter.[76]

In effect, this criticism sees "all deliberate speed" as an application of what I have called Interest Balancing, and Interest Balancing of a particularly indefensible sort. To these critics, the Court furnished a limited

73. 349 U.S. 294, 300 (1955). Similar principles are articulated in United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972); Cooper v. Aaron, 358 U.S. 1, 7, 16 (1958); Buchanan v. Warley, 245 U.S. 60, 80-81 (1917).

74. The Brief filed by the NAACP Legal Defense Fund proposed that the desegregation process begin during the 1955 fall term and be completed by the following fall term. Brief for Appellants on Further Reargument at 10-11, 23, Brown v. Board of Educ., 349 U.S. 294 (1955) [hereinafter cited as Appellants' Brief on Reargument]. On the division among plaintiffs' counsel about the position to take concerning the remedy, see R. KLUGER, *supra* note 59, at 721-23, 726. Following the Court's decree, co-counsel Thurgood Marshall and Robert Carter expressed their satisfaction with the Court's formulation. Carter & Marshall, *The Meaning and Significance of the Supreme Court Decree*, 24 J. NEGRO EDUC. 397 (1955).

75. *Reprinted in* ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–55, at 525 (L. Friedman ed. 1969).

76. D. BELL, RACE, RACISM AND AMERICAN LAW 381-84 (2d ed. 1980); Bell, *supra* note 29, at 272-74; Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 241, 244-46 (1968); Freeman, *Legitimating Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1065-76 (1978) [hereinafter cited as Freeman, *Legitimating Racial Discrimination*]; Freeman, *School Desegregation Law: Promise, Contradiction, Rationalization*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 70, 75-83 (D. Bell ed. 1980); *see* Steel, *Nine Men in Black Who Think White*, in THE SUPREME COURT UNDER EARL WARREN 82, 82-92 (L. Levy ed. 1972).

remedy because it gave independent weight to remedial costs and viewed interference with the sensitivities and interests of white opponents of *Brown* as a balanceable cost that trumped the remedial interests of black victims. There is an altogether different possibility, however: The failure to order immediate desegregation may have served the interests of blacks even while it accommodated the opposition of whites. Indeed, the Court's initial tolerance of at least some remedial delay might be defended under Rights Maximizing, as promising the most effective remedy that could be provided to black victims of the violation. Doing less may be doing more.

A. *The Relevance of Resistance to Remedial Effectiveness*

Even the most adamant critic of "all deliberate speed" would have to concede the appropriateness of authorizing at least some remedial delay. Remedies often involve unavoidable administrative problems. In desegregation cases, the typical remedy requires redrawing attendance lines, arranging for any needed pupil transportation, adjusting programs and facilities, and reassigning teachers. The very achievement of an effective remedy requires that remedial orders allow time for planning and effectuating their own implementation. In a sense, such delay is an extension of the delay caused when courts take time to consider the remedy issue after finding a violation of right. (In *Brown*, that was a full year.) During this period of planning and implementation, when instrumental deficiencies make immediate relief impossible, unlawful conditions continue and the interests of at least some plaintiffs are sacrificed. While a full remedy could be *ordered* into effect immediately, either delay would follow anyway or a self-defeating chaos would result. Thus, an imperfect remedy in the form of a somewhat delayed remedy may be the most effective one possible, and therefore defensible even under Rights Maximizing.[77] Obviously, though, the substantially delayed remedy of "all deliberate speed"

77. The Supreme Court had before it several examples of remedial decrees that allowed delay to insure orderly implementation. *E.g.*, New Jersey v. City of New York, 283 U.S. 473, 483 (1931) (four-year delay allowed in refuse-dumping case for construction of incinerators and funding of alternative waste-disposal facilities); United States v. American Tobacco Co., 221 U.S. 106, 187-88 (1911) (eight-month delay to allow orderly dissolution of monopoly); Standard Oil Co. v. United States, 221 U.S. 1, 81-82 (1911) (six-month delay to allow dissolution of monopoly and transfer of stock); Georgia v. Tennessee Copper Co., 206 U.S. 230, 239 (1907) (*Gaseous Nuisance Cases*) (nine-year lapse during which decrees concerning noxious emissions were formulated and implemented). As institutional litigation has become more prevalent, delays to allow for effective implementation have become increasingly common. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 335 (M.D. Ala. 1976) (22 months allowed for Alabama prison facilities to meet U.S. Public Health Service sanitary standards), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Costello v. Wainwright, 397 F. Supp. 20, 38-39 (M.D. Fla. 1975) (one year allowed for Florida prison to reduce unconstitutional levels of overcrowding), *vacated and remanded*, 539 F.2d 547 (5th Cir. 1976) (en banc), *rev'd per curiam*, 430 U.S. 325 (1977); *cf.* Reserve Mining Co. v. EPA, 514 F.2d 492, 538, 541 & n.1 (8th Cir. 1975) (mill permitted to continue dumping sludge for a "reasonable time" until alternative disposal scheme implemented).

cannot be explained by unavoidable administrative problems. Administrative restructuring of a school system would have justified no more than a brief postponement in implementing a remedy.[78]

The troubling fact about *Brown II* is that the Court's actual reason for allowing delay was largely to accommodate opposition to its decision. It is one thing for the courts to say that conditions declared unlawful may persist for a while because there are practical administrative problems that must be solved to make a remedy effective; it is quite another to say that conditions declared unlawful may persist because people believe that those conditions should be lawful and do not accept their illegality. In the former case, the right is unquestioned and its most effective realization is sought. In the latter case, the court is deferring to opposition to the very right it has proclaimed.

Brown, however, demonstrates that such a distinction is too sharp. The remedial goal of *Brown* was to dismantle a discriminatory school system and vindicate the equal protection rights of the plaintiff class; this remedial task required the participation and cooperation of whites, and therefore their attitudes could not be ignored.[79] Even if white attitudes rested exclusively on blunt opposition to the right, and were therefore completely uncognizable as an independent interest to be balanced against remedial effectiveness for victims, those offensive attitudes might well have been relevant to effectiveness itself. White hostility was relevant because a remedy that imposed costs on hostile whites might have triggered a range of actions interfering with the decree's effectiveness. Public officials whose cooperation was necessary to carry out a decree might have dragged their feet or actually incited popular opposition; private citizens might have engaged in violence or boycotts that would have made effective desegregated education impossible. Some white opposition would undoubtedly have existed no matter what the court did, but the terms of a remedy may have affected the extent of that opposition and therefore the extent of the decree's ultimate effectiveness. If ordering full and immediate desegregation in *Brown* would have exacerbated white resistance, a remedy that was delayed to minimize that resistance might ultimately have been the most effective from the point of view of the victims themselves.

In short, to say that a remedy may not be limited "because of" white

78. As my colleague Joseph Goldstein has pointed out, alternative school facilities are in place almost immediately when a natural disaster destroys a school building and scrambles a town. The administrative obstacles to compliance with the constitutional mandate of *Brown* were surely no greater.

79. In this respect, the problem of resistance and school desegregation is analogous to other classic remedial problems in which remedial success depends upon the cooperation of parties whose cooperation is not easily secured. *See* Lumley v. Wagner, 1 DeG., M. & G., 604, 42 Eng. Rep. 687 (Ch. 1852).

hostility (as *Brown II* professed) blurs the critically important distinction between taking account of white attitudes as an independently balanceable cost of the remedy and taking account of those attitudes in order to maximize the effectiveness of the remedy for the victim class. To deal with the opposition as a regrettable given—not as people whose moral claims compete with the moral claims of the victims to an effective remedy, but as people whose concerns must be considered simply because they have the power to undercut remedial effectiveness—may be in the victims' interests. Indeed, if some remedial imperfection is unavoidable, the imperfection produced by delay may be justifiable under Rights Maximizing. The relevant question, of course, is *whether* the Court in *Brown* could have achieved more effective results for the victims without approving delay, which depends in part on whether white resistance could have been prevented or reduced by methods that would not have compromised remedial effectiveness as much as delay did.[80] Those questions cannot be answered, however, simply by asserting that white hostility must always be irrele-

80. A number of commentators have criticized the "all deliberate speed" formula on the instrumental ground that it was ineffective in facilitating desegregation and may in fact have stimulated evasion. *E.g.*, L. MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 351, 356 (1966); R. WILKINS, STANDING FAST 218, 231-33 (1982); Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 22 (1970); Carter, *supra* note 76, at 243-44. Justice Hugo Black is reported to have thought in retrospect that "all deliberate speed" was a mistake and had become an excuse for Southern footdragging. B. WOODWARD & S. ARMSTRONG, THE BRETHREN 38 (1979). The NAACP Legal Defense Fund's brief in *Brown II* argued that "gradualism, far from facilitating the process, may actually make it more difficult . . . . Our submission is that this, like many wrongs, can be easiest and best undone, not by 'tapering off' but by forthright action." Appellants' Brief on Reargument, *supra* note 74, at 17; *see supra* note 74.

Both the school district defendants and the Solicitor General supported some form of gradualism as the best way to achieve effective desegregation. *See* R. KLUGER, *supra* note 59, at 723-27. In his memoirs, Chief Justice Warren reaffirmed his belief that "all deliberate speed" was the sensible course. *See* E. WARREN, *supra* note 66, at 288-93. Perhaps the best defense of "all deliberate speed" to date, however, was offered by Alexander Bickel. *See* A. BICKEL, *supra* note 59, at 244-54. Bickel argued that "all deliberate speed" was both expedient and consistent with "the unique function of judicial review in the American system." *Id.* at 254. First, desegregation raised many problems of administrative reorganization that varied from place to place and that required a flexible response. Second, since opposition and resistance could be anticipated, and "the task of law . . . was not to punish law breakers but to diminish their number. . . ., it may not [have been] prudent to force immediate compliance." *Id.* at 251. He suggests that this view was widespread at the time. *Id.* at 253. Third, since the Court might need the assistance of the federal executive branch to enforce its judgment, flexibility might be politically helpful in drawing the executive onto the Court's side. *Id.* at 251-52; *see* A. BICKEL, POLITICS AND THE WARREN COURT 7-15 (1965). Professor Bickel's defense is illuminating, but it furnishes no analytic framework for evaluating remedial compromise in particular cases; as a result, many of the most important issues raised by resistance are unexplored. A more recent instrumental defense of "all deliberate speed" has been made by J. WILKINSON, *supra* note 62, at 68-77 (concluding that Court erred in "implementing and monitoring" all deliberate speed "but not in formulating it"); *see also* M. SHAPIRO & D. HOBBS, AMERICAN CONSTITUTIONAL LAW: CASES AND ANALYSES 540 (1978) (Court's decision "was one that any reasonable and prudent group of men might have made"); Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 354-56, 364-70 (defending *Brown II* as a method of "leading fundamentally alienated combatants toward their pursuit of mutual accommodation").

vant or that taking account of it is always an (improper) application of Interest Balancing.

B. *Doing Less as Doing More: The Case for Remedial Delay*

I do not propose in this essay to answer the ultimate question whether the Supreme Court could in fact have achieved a more effective remedy for blacks without approving any delay in *Brown II*. My primary purpose, to illuminate how resistance fits into different remedial approaches, will be satisfied by showing the structure and premises of a Rights Maximizing rationale for the delay approved in *Brown II*, and by explaining why such a rationale may be plausible.

"All deliberate speed" involved an imperfect remedy: Delay may have been a means to quiet one source of remedial imperfection (resistance), but delay itself was a form of remedial imperfection. An imperfect remedy can be defended under Rights Maximizing only if other alternatives would be no more effective in achieving remedial goals. Thus, to defend remedial delay in Rights Maximizing terms, one must: (i) identify the relevant remedial goals against which effectiveness is measured; (ii) identify the alternatives to remedial delay, and conclude that none of them could, in fact, fully achieve the remedial goals; (iii) define what "most effective" remedy means; and (iv) conclude that some remedial delay in fact would produce the "most effective" remedy. One must, in other words, resolve normative questions concerning standards for evaluating effectiveness as well as empirical questions concerning how well a particular remedial strategy in fact meets the standard.[81]

1. *The Goals*

Although *Brown II* left remedial goals rather vaguely defined (for example, it did not clearly state if and when systemwide integration would be required), it did make clear that a fully effective remedy would achieve a "racially nondiscriminatory school system," including a "system of determining admission to the public schools on a nonracial basis," and would achieve these goals for all victims of de jure segregation.[82] An effective desegregation remedy presumably should also address certain harms

81. It is also important to keep separate three different types of criticism that might be made of "all deliberate speed": (i) "all deliberate speed" involved a misjudgment about which strategy would provide the most effective relief for victims; (ii) "all deliberate speed" involved an inappropriate balancing of victim interests and white sensitivities; and (iii) the strategic judgment reflected in "all deliberate speed" was an inappropriate exercise of the judicial function, either because courts have no business making strategic sorts of judgments or because, in Charles Black's words, the Court's action suggested that "something could be unlawful, while it was nevertheless lawful to continue it for an indefinite time." Black, *supra* note 80, at 22.

82. 349 U.S. 294, 300-01 (1955).

imposed by de jure segregation that were identified in *Brown I*—that such segregation both "denot[es]" and "generates a feeling of inferiority as to [Negroes'] status in the community" and (or therefore) denies black children equal educational opportunities.[83] In addition, where white resistance might undercut the effective achievement of these remedial goals, preventing or quieting such resistance should be seen as an interrelated goal. Truly effective desegregation does not mean a situation in which white parents, children, and school officials stand outside previously all-white schools shouting as blacks enter empty "desegregated" buildings; nor does it mean racial violence or icy hostility producing racial isolation within "desegregated" schools. Similarly, a remedy that would lead to the closing down of the public schools in a community (or the adoption of a constitutional amendment overruling *Brown* at the national level) could not be deemed an "effective" remedy.[84]

2. *The Imperfections of Alternatives*

Whatever remedial path the Court took, significant remedial imperfection was surely unavoidable. The most plausible alternative to "all deliberate speed" was to require full and immediate desegregation for all members of the plaintiff class following a short, specified period for administrative reorganization of previously segregated systems. On its face, such a decree would have ordered a more fully effective remedy than "all deliberate speed," but ordering a full remedy would not have meant that all victims actually would have received one. Because of the reality of white opposition and the ways in which it was likely to have slowed down or blocked the effectiveness of any remedial command, a requirement of immediate desegregation might have yielded as much imperfection as "all deliberate speed" explicitly tolerated, and might well have provoked much greater resistance and ineffectiveness.

Moreover, remedial imperfection might have been inevitable even if a simple command of immediate desegregation was supplemented by an aggressive deployment of judicial power to address opposition directly. To be sure, the district courts could have used their powers in an entrepreneurial fashion to try to coax immediate compliance from public officials and the citizenry, perhaps by encouraging public participation in shaping the de-

83. 347 U.S. 483, 494 (1954).

84. The possibility of a constitutional amendment actually raises some subtle issues. In light of the fact that a constitutional amendment extinguishes the right itself, it is only partly true that remedies provoking such an amendment would be "ineffective" in vindicating the "right" in question. Moreover, since the amendment process is the very means that the Constitution provides for the public to register resistance to an existing right, some might think it inappropriate for courts to structure remedies to try to prevent resistance that would produce this sort of "ineffectiveness."

cree or, as the Solicitor General's office had suggested,[85] by including race-relations programs in the decree. Or the courts could have tried to coerce compliance by using their contempt powers and other sanctions or by summoning force of arms from the political branches.[86] While a success story was imaginable—stern orders from the Supreme Court, followed by stern orders from the district courts, followed by perhaps a very brief period of some dissonance, and then the rapid emergence of a spirit of cooperation and full compliance—there are strong reasons to doubt that such successful remedies were possible.

First, instrumental deficiencies may have prevented the Supreme Court from completely controlling all the forms of possible resistance. Since the district judges in the South were largely unsympathetic to *Brown*[87]—a state of affairs that itself raised a prospect of resistance relevant to the Supreme Court's remedial strategy—heroic efforts to implement an immediate desegregation command might not even have been attempted. Even if they had been, we cannot simply assume that the local and national political branches would have been willing to deploy their police powers to impose the terms of judicial remedies by force. In any event, coercion might not have been effective in stopping boycotts or other forms of resistance; indeed, aggressive methods might have simply stiffened or increased resistance at the local or even national level.

Second, and more interesting, even if resistance could be controlled, the methods of control might themselves have interfered with other remedial goals. Desegregation has not been achieved effectively if it can be sustained only at the point of a marshal's gun. The fact of resistance may have made a conflict between remedial strategies unavoidable: Efforts to eliminate one source of remedial imperfection, resistance, may have produced remedial imperfection of another sort, poor educational conditions.[88]

3. *The Concept of "Most Effective" Remedy*

Since resistance would almost certainly have made a fully effective remedy for all victims impossible in *Brown*, the Supreme Court faced a choice among imperfectly effective remedial alternatives. An argument that the imperfect remedy of "all deliberate speed" was the most effective

85. Brief for the United States on the Further Argument of the Questions of Relief at 21-22, Brown v. Board of Educ., 349 U.S. 294 (1955).

86. *See* O. FISS, *supra* note 41, at 625-31, and cases cited therein; Leubsdorf, *supra* note 33, at 60-64; Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class*, 44 U. CHI. L. REV. 111, 114-66 (1976).

87. R. KLUGER, *supra* note 59, at 740 (quoting Justice Hugo Black).

88. Indeed, trying to suppress resistance through armed force may not only impose costs that interfere with remedial effectiveness, but may also impose sufficiently high "balanceable" costs to other social interests that an Interest Balancing judge might reject using armed force for that reason.

among these imperfect alternatives, and therefore justifiable under Rights Maximizing, must rest on a normative conception of what "most effective" means in this context. As suggested earlier, this may require both a ranking of multiple remedial goals and, most significant here, criteria for comparing different allocations of remedial benefits to different individuals in the plaintiff class.[89] Desegregation cases like *Brown* are class actions; when a fully effective remedy cannot be furnished to all victims in the plaintiff class, each remedial alternative will sacrifice individual rights of some of these victims. In *Brown*, different remedial alternatives would probably have secured a different distribution among present and future students affected by the defendants' violations. While delay in *Brown* forestalled full relief for the named plaintiffs and other currently enrolled black students, delay may have ultimately facilitated a more complete remedy for some of these students and for other members of the plaintiff class. (Critics of *Brown* who contend that the Court sacrificed individual rights to promote "racial" or "group" rights seem to ignore the fact that every imperfect alternative would have sacrificed some class members' rights and that the beneficiaries of delay might have included individual rights-holders in the plaintiff class.[90]) The question is which distribution would have produced the "most effective" remedy for the class members.

Most obviously, perhaps, the "most effective" remedy might be defined as one that maximizes benefits in a utilitarian sense by providing the greatest benefit for the greatest number of victims in the plaintiff class. But alternative conceptions of the "most effective" remedy are certainly possible, conceptions that take account of the distribution of remedial benefits within the victim class. One might argue, for example, that the "most effective" remedy is one that favors named plaintiffs.[91] This possibility poses a serious challenge to the delayed remedy of "all deliberate speed," and also illustrates differences in the kinds of arguments available under Rights Maximizing and Interest Balancing. Priority for named

89. *See supra* pp. 594-95.

90. Professor Louis Lusky, for example, has criticized "all deliberate speed" on the ground that it reflects a premise that Negroes "possess rights as a race rather than as individuals"; for Lusky, *Brown II*'s delay in vindicating "established rights" of some individual blacks is "inexplicable except on the premise that it was justified by the great benefit that the decision conferred on the Negro race as a whole." Lusky, *The Stereotype: Hard Core of Racism*, 13 BUFFALO L. REV. 450, 457-59 (1964); *see* Carter, *supra* note 76, at 243-44. Given that the *Brown* litigation was a class action involving large numbers of present and future black students in Topeka, however, any tradeoff of some individuals' rights required by "all deliberate speed" might well be "explicable" and justified by recognizing that delay may have been able to vindicate the *individual rights of other members of the plaintiff class*, not simply benefit "the Negro race as a whole." Lusky would be right only if the interests of the plaintiff classes before the Court were sacrificed to benefit *other* blacks; in that case the Court's action could not be justified in Rights Maximizing terms.

91. One might also argue that current class members should stand in a position of priority over future class members, since the current members' injuries are immediate and certain. *See supra* note 23.

plaintiffs may rest, first, on their distinctive moral position as victims who took the public risk of bringing litigation to vindicate their claims and the claims of other victims. While we have become accustomed to class actions and "structural" relief, the notion of a lawsuit as a dispute that at its core concerns some visible, identifiable individuals dies hard. A remedy that fails to benefit the named plaintiffs might be deemed "less effective" than a remedy that eventually benefited a greater number of other members of the plaintiff class. A preference for named plaintiffs may also reflect a second interest: By rewarding those who bring such lawsuits, it encourages other rights-vindicating litigation in the future. This incentive is a benefit cognizable only under Interest Balancing, however, since it justifies a remedial apportionment on grounds other than remedial effectiveness for *this* victim class.

A Rights Maximizing defense of "all deliberate speed" probably requires defining "most effective" in utilitarian terms. A utilitarian standard is congenial to a defense of remedial delay since it accepts the sacrifice of the interests of some present victims, including named plaintiffs, in order to provide greater benefits for present and future individuals in the plaintiff class as a whole. But while the utilitarian standard is certainly an appropriate way to understand "effectiveness," it is not the only way.

4. *The Expense of Time*

If the "most effective" remedy is defined in utilitarian terms, the empirical question remains whether "all deliberate speed" constituted the most effective remedy possible given resistance and the imperfections likely under all available alternative remedies. Especially where there may be conflicting remedial interests within the plaintiff class, a court cannot totally abdicate such a question to plaintiffs' counsel (who in *Brown II* opposed gradualism);[92] the court must decide the matter itself. If "all deliberate speed" was a strategy in the service of effectiveness rather than a sell-out to white interests, it was a strategy to expend time as a weapon instead of using authority and force alone. In allowing delay, the Supreme Court promised time for social adjustment, as its own direct way of trying to secure public cooperation (including the cooperation of the lower courts); it also gave the lower courts time to use their powers and strategies to try to defuse public opposition in their communities. The issue under Rights Maximizing is whether this advance approval of some remedial delay and imperfection was likely to produce less remedial delay and imperfection in the end than an order insisting on immediate desegregation that might have been defied and have stimulated additional unquel-

92. On the position of plaintiffs' counsel in *Brown*, see *supra* notes 74, 80.

lable resistance of its own. The answer does not turn simply on the fact that an order requiring immediate desegregation would have posed only a probability of substantial remedial imperfection and that an order permitting "all deliberate speed" promised substantial remedial imperfection on the face of the decree. That is a real difference, of course: In the former case, the Court may be prepared ultimately to accept remedial imperfection if the world resists its commands, but the Court at least insists upon full compliance; in the latter case, the Court explicitly accepts some imperfection in advance. For a Rights Maximizing court, however, the issue is not which remedial course demands the most from the public, but which course will actually secure the most effective remedy for black children. And this question cannot be answered by looking only at the words used in the decree.

The fact that advance approval of some remedial delay assuredly produces an imperfect remedy is relevant, of course, to the empirical question of which remedial course was likely to benefit blacks the most. The clearest price of "all deliberate speed" was that it bargained away some remedial effectiveness at the outset. Before a court approves an assuredly imperfect remedy, it must have strong reasons to believe that the alternatives will actually end up being even less effective. There are obviously many uncertainties in making such an assessment,[93] but against the background of credible and palpable white resistance, a Rights Maximizing court committed to furnishing the most effective remedy to blacks could not view the risks of ordering immediate desegregation as a legal irrelevance; it would at least have to attempt to make the empirical and strategic judgment, with the burden of justification on any course that required less than immediate compliance.

Before one could say that delay produced more effective desegregation than would have been achieved by an order of immediate desegregation, however, one must take account of all the expenses that time incurred. Beyond the remedial ineffectiveness implicit in the initial approval of some remedial delay, the most obvious expense of delay was that accommodating white resistance may have encouraged future resistance, producing more delays and further eroding the effectiveness of remedies.[94] Additional resistance may have been encouraged either because remedial flexibility undercut the solemnity and firmness of the principle being ut-

93. Among the many difficulties is the fact that the public attitudes to which a court looks before deciding upon its remedial course of action may themselves be changed by the course of action the court decides upon; thus, a court cannot ignore the possibility that its own uncompromising remedial action might inspire greater public cooperation, just as it cannot ignore the possibility that inflexibility might provoke greater resistance.

94. Thurgood Marshall had a blunter way of saying why the gradualists should not be accommodated: "They don't mean go slow. They mean don't go." R. WILKINS, *supra* note 80, at 231.

tered, or because the Court's willingness to accommodate resistance provided an incentive to resist. In *Brown II*, this effect may have been muted because the Court did not candidly admit that it was willing to delay remedies because of white resistance. I doubt this, but the issue of judicial candor is sufficiently complex that I treat it separately below.[95]

Second, "all deliberate speed" may have had an effect on the Court itself that parallels the effect on white resistance just noted. Rationalizing delay in 1955 may have produced within the Court a frame of mind that made it easier to rationalize further and excessive delay. The Court's failure to insist upon full desegregation for more than a decade after *Brown II* may have reflected this dynamic. Even if *some* significant period of delay would have produced more effective desegregation, it is hard to conclude, at least in retrospect, that the extraordinarily long delay eventually tolerated by the Supreme Court under the rubric of "all deliberate speed" was justifiable in Rights Maximizing terms. The Supreme Court probably could have secured workable remedies earlier—although it must be remembered that, while it took a decade for the Court to jettison "all deliberate speed,"[96] it also took almost a decade for a sufficient national consensus to emerge for the political branches of the national government to ratify the civil rights movement and undertake responsibility for the systematic implementation of *Brown* (Congress through the Civil Rights Act of 1964[97] and the Elementary and Secondary Education Act of 1965,[98] and the executive branch through enforcement of those laws). This excessive delay may have been predictable once the initial decision to accept some delay was made in *Brown II*. Delay once tolerated must be terminated, but termination may be particularly difficult once a basic psychology of delay is in place, especially when it enables judges to postpone hard decisions.

Third, accommodating white resistance may have imposed dignitary harms on blacks. Accomodation, like the segregation condemned in *Brown I* itself, may have been "interpreted as denoting the inferiority of the negro group."[99] Since eliminating dignitary harms is a remedial goal, a

95. See *infra* pp. 665-74.

96. *See supra* pp. 610-11.

97. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000a-2000h (1976 & Supp. V 1981)).

98. Pub. L. No. 89-10, 79 Stat. 27 (1965) (currently codified in various sections of 20 U.S.C. (1976 & Supp. V. 1981)).

99. Brown v. Board of Educ., 347 U.S. 483, 494 (1954); *see* Strauder v. West Virginia, 100 U.S. 303, 308 (1880). The possibility of stigma arising from remedial action has been considered in "affirmative action" cases. The Justices have generally found such stigma either so minimal or nonexistent that it does not undermine the programs' effectiveness or lawfulness. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 517-22 (1980) (Marshall, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 373-76 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part); *cf.* Califano v. Webster, 430 U.S. 313, 317, 320 (1977) (per curiam) (preferential treatment of women).

remedy that imposes stigmatic harms impairs its own effectiveness. It is not clear, however, that taking account of white resistance imposes such harms. Although the white opposition itself may be an affront, it may also be a phenomenon that the court cannot immediately eliminate. A decision to accommodate this opposition in order to achieve the most effective remedy possible is not necessarily an insult to blacks; it does not legitimate the opposition. Indeed, to ignore the opposition, and thereby undermine the effectiveness of the decree, may itself reflect a lack of concern for the victims' interests. In short, there is a difference between recognizing and condoning. The harder questions are whether people will recognize or understand the difference in a particular case, and whether courts can act in a way to make that difference understood.

Finally, accomodating resistance may also have had an effect on the Court parallel to any dignitary harms suffered by blacks: Delaying a remedy to accomodate opposition risks injuring the stature of the Court itself. If the Court *were* harmed by a perceived gap between rights and remedies, this would clearly have been an Interest Balancing cost of "all deliberate speed." Harm to the Court, however, might also be a relevant consequence under Rights Maximizing. A court's remedial role in a desegregation case is likely to extend over time, and a court that compromises its authority may be less able to extract compliance over time.

C. *"All Deliberate Speed" as a Failed Simile*

While we cannot know for sure whether requiring immediate desegregation in *Brown II* would have been more effective than tolerating at least some remedial delay, the Court's decision—and its possible misjudgment about the benefits of giving time for compliance—may be explained by a linkage that scholars have ignored. In resolving the *Brown* cases, the Court gave itself extraordinary time for decision, and found that, with time, sharp internal division had yielded to unanimity. It may therefore have quite readily concluded that time would have a similar effect on the country.

Thus, after having heard argument on the *Brown* cases during the 1952 Term, and facing sharp division in its conference meetings, the Court set the cases for reargument the following Term. While specific questions for the reargument were propounded, it appears that the Court postponed decision beyond the 1952 Term primarily to buy time to reconcile continuing sharp differences among the Justices and to find a way to achieve a unified position if possible.[100] When Earl Warren replaced Fred Vinson

100. R. KLUGER, *supra* note 59, at 614-15.

as Chief Justice, he was careful not to rush the internal deliberations, put a time limit on debate, or set a date by which the Court's opinion had to issue. Rather, he was content to launch a process of prolonged consultation and discussion. "We decided not to make up our minds on that first conference day," Warren recollected, "but to talk it over, from week to week, dealing with different aspects of it—in groups, over lunches, in conference. It was too important to hurry it."[101] Indeed, the step-by-step process by which the Court had considered the school segregation question in various contexts, beginning with graduate school cases in the years preceding *Brown*, indicates the pervasive use of gradualism as the Court's mode of attack in this area.[102] The members of the Court seem to have believed that gradualism and time were primarily responsible for the Court's ultimate unanimity in *Brown*. In a letter written in 1957, Justice Frankfurter emphasized this role of time and tended to downplay the personal influence of Chief Justice Warren in achieving internal accord and unanimity on the Court:

> [T]he wise use of time in the Court's dealing with the problem of segregation under the Fourteenth Amendment was probably the chief factor in the ultimate decision. . . . No doubt Warren had a share in the outcome, but the notion that he begot the unanimous Court is nonsense.[103]

Chief Justice Warren himself emphasized the link between the achievement of unanimity and the fact that his colleagues "had a long time to think about" the issues; Justice Burton's papers record similar views.[104]

"Deliberate speed," said Frankfurter in another context, "takes time. But it is time well spent."[105] Believing that the expense of time produced harmony out of discord within the Court itself, the Justices may understandably have concluded that giving the country time to adjust to *Brown* would also reduce discord and therefore be "time well spent."

101. *Quoted in id.* at 683; *see also* Hutchinson, *supra* note 59, at 39 (first conference framed as "exploratory," with no formal vote, to avoid producing rigid positions).

102. Plaintiffs' counsel in these cases, the NAACP Legal Defense Fund, had itself employed an incremental approach by paving the way for *Brown* with narrower challenges to state segregative practices. *See* J. GREENBERG, CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION 587-89 (1977).

103. Letter from Justice Frankfurter to Grenville Clark and C.C. Burlingham (Apr. 15, 1957), *quoted in* Hutchinson, *supra* note 59, at 35; *see also* Cooper v. Aaron, 358 U.S. 1, 24 (1958) (Frankfurter, J., concurring) (characterizing *Brown*'s requirements as "the unanimous conclusion of a long-matured deliberative process").

104. Hutchinson, *supra* note 59, at 35 & n.277.

105. First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152, 188 (1946) (Frankfurter, J., dissenting) (arguing that applicants for Federal Power Commission licenses could be required to follow state procedural requirements and that, even though this might delay project approval, the measure of "justice" was "deliberate speed").

This analogy, however, does not justify—although it may help explain—the Court's tolerance of remedial delay. There should have been many reasons to question whether a process that was productive within a small group of highly intelligent and rational judges, united by common institutional affiliation and similar broad purposes, would also be productive if applied to the country at large. To those participating in a shared deliberative process, time may allow reason and common aspiration to replace personal will and power. But for those subject to an external command, time may be one of the few remaining instruments of power, the power to resist external power through delay—not simply because delay creates the opportunity to rally forces to reverse the command, but because buying time is all that the vanquished may have the power to purchase.

D. *The Limiting Case:* Cooper v. Aaron

Even before it proclaimed that "[t]he time for mere 'deliberate speed' has run out"[106] in 1964, the Supreme Court revealed its sensitivity to at least some of the expenses of postponing relief for victims and marked a limit on its willingness to accommodate opposition. The occasion was the dramatic case of *Cooper v. Aaron*, decided by the Court in an extraordinary special session during the summer of 1958.[107] Whether or not some remedial delay in *Brown II* is defensible in Rights Maximizing terms, *Cooper* is the limiting case in which the argument for delay was properly rejected.

In *Cooper*, the Governor of Arkansas and other state officials led a drive to block the implementation of a gradual desegregation plan adopted by the Little Rock school board and approved by a federal district court. Forcible obstruction, community defiance, and threats of violence against blacks followed. After President Eisenhower sent in Army troops to maintain order, the school board sought to suspend its plan altogether for more than two years. Speaking as a chorus to affirm the Court's basic authority, the nine Justices asserted that public "hostility to racial desegregation" would not justify the suspension of desegregation:

> The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature . . . [L]aw and order are not here to be preserved by depriving the Negro children of their

106. Griffin v. County School Bd., 377 U.S. 218, 234 (1964).

107. 358 U.S. 1 (1958). The factual background of the case is described in A. LEWIS, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 46-69 (1964); B. MUSE, TEN YEARS OF PRELUDE: THE STORY OF INTEGRATION SINCE THE SUPREME COURT'S 1954 DECISION 122-45 (1964); J. WILKINSON, *supra* note 62, at 88-95.

> constitutional rights. . . . Our constitutional ideal of equal justice under law is thus made a living truth.[108]

The Court's firm action and stern rhetoric of authority seem to be a strong counterpoint to *Brown II*'s offer to bargain. *Cooper*'s insistence that desegregation proceed may seem in tension with *Brown*'s tolerance of delay; indeed, taken out of context, the Court's language suggests that resistance to vindication of the victim's constitutional rights may not count at all. But *Cooper* marked only a limit on *Brown II*, not a repudiation of it. The school board's plan that *Cooper v. Aaron* reinstated actually permitted desegregation to take place over an *eight-year* period.[109] Gradualism of this sort—a gradualism itself made necessary by fear of the public hostility that speedier desegregation might inflame—was precisely what *Brown II* allowed and *Cooper* preserved.

To have suspended a declared remedy in response to the government officials' active attempt to encourage resistance, however, would have gone far beyond *Brown II*'s accommodation of preexisting white attitudes and would surely have been hard to justify in Rights Maximizing terms. First, because community defiance was clearly being encouraged and led by government officials themselves, the Court reasoned that such disruption could also "be brought under control by state action."[110] Since, in the Court's view, white hostility preventing even gradual desegregation could be reduced, complete suspension of the remedy could not be in the victims' interests. Second, while gradualism at least sets in motion a dynamic that plausibly leads toward ultimate remedial success, the complete suspension of the desegregation plan in *Cooper* would have stopped progress cold—indeed, set it back—and made ultimate remedial effectiveness more difficult to attain. Third, the official defiance was a dramatic assault on the institutional authority of the Court. Postponement of a remedy because of open resistance to a decree *already issued* damages a court's authority far more than delay *within a decree itself* in anticipation of resistance. Open official defiance followed by a highly visible Supreme Court retreat would have risked unleashing broader resistance that could have postponed relief indefinitely.

To protect blacks' interests and its own, the Court in *Cooper* under-

108. 358 U.S. at 16, 20. In the portion of the opinion ostensibly summarizing *Brown*, the Justices said that "a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children." *Id.* at 7.

109. Aaron v. Cooper, 143 F. Supp. 855, 859-61 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957), *cert. denied*, 357 U.S. 566 (1958).

110. 358 U.S. at 16. The Court viewed the defendant local officials who *were* directly subject to the decree "as the agents of the State." *Id.*

standably tried to speak in tones of authority and to limit the corrosive force of resistance. Yet the opinion has an air of desperation about it, hyperactively marshalling rhetorical and symbolic resources to combat the tumultuous world described in the statement of facts.[111] For good reason: The Court must have known how limited its powers actually were. A court can never assure that its words are the last word. The next chapters of the Little Rock story are rarely remembered. In spite of the Supreme Court's action and the earlier deployment of federal troops, the Governor of Arkansas successfully closed down the Little Rock public schools for the entire academic year after *Cooper v. Aaron*. And when the schools were reopened, at judicial demand, little desegregation occurred for a decade.[112] Only by struggling with a powerfully insistent reality was our constitutional ideal of equal justice "made a living truth"—and the living truth was an imperfect one.

IV. 1983: "White Flight" and the Expense of Partial Integration

The transitional problem of remedying discrimination in the face of white resistance has continued to haunt the enterprise of school desegregation and pose a challenge to remedial theory. Today the courts' definition of remedial goals in school desegregation cases is considerably clearer than at the time of *Brown II*: Where there is a finding of systemwide de jure segregation, a race-conscious integration remedy to eliminate one-race schools is generally required, with busing often used as a remedial tool.[113] The phrase "white flight" captures the mode of resistance central to this remedial enterprise today.

111. To this reader, at least, there is irony and even poignancy in the famous massing of names at the head of the opinion, captioned "Opinion of the Court by the Chief Justice, Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas, Mr. Justice Burton, Mr. Justice Clark, Mr. Justice Harlan, Mr. Justice Brennan, and Mr. Justice Whittaker." *Id.* at 4. By emphasizing that the opinion is "by" nine *individuals*, the strategy of the caption backfires. If the institution is only nine men, what chance does it have against the mob in Little Rock? How much more imposing is the caption in *Brown I*: "Chief Justice Warren delivered the opinion of the Court," Brown v. Board of Educ., 347 U.S. 483, 486 (1954)—which invokes the authority of the Court alone, the institution, not nine identified individuals. The caption in *Cooper* suggests the Court's ultimate weakness, not its strength. The inability of Justice Frankfurter to restrain his eagerness to write a separate opinion in his own name, in spite of the Court's obvious attempt to mass behind a single caption, also emphasizes the individualities within the institution.

There is a similar quality to the report in the last paragraph of *Cooper v. Aaron* that the "three new Justices" who joined the Court after *Brown* are "at one with the Justices still on the Court who participated [in *Brown*] as to its correctness . . . ." *Id.* at 19. The very act of trying to reaffirm the authority of *Brown* undercuts it by personalizing the decision, by emphasizing that *Brown* is the product of a few transient individuals who believed in it, but who well might not have.

112. The subsequent history of the Little Rock desegregation effort is described in Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark.), *aff'd per curiam*, 361 U.S. 197 (1959); Clark v. Board of Educ., 369 F.2d 661, 664-65 (8th Cir. 1966); J. WILKINSON, *supra* note 62, at 94-95. For recent developments, see Clark v. Board of Educ., 705 F.2d 265 (8th Cir. 1983).

113. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

White flight, like forcible obstruction, can perpetuate segregated patterns, but flight is resistance by retreat and abstention rather than resistance by direct obstruction. Whites who object to integration in a city's public schools and who have the flexibility and the resources may decide to "flee" by sending their children to private schools or by choosing to live in another community. While some research has questioned the extent to which flight occurs because of school desegregation—an empirical issue to which I return—it is now widely agreed that school desegregation typically does accelerate white departures from the public school system above the "normal" loss.[114] The degree to which white flight occurs in a school

114. An explosion of scholarly studies of white flight followed the publication of J. COLEMAN, S. KELLEY & J. MOORE, TRENDS IN SCHOOL SEGREGATION, 1968–73 (1975) (concluding that decline in white enrollments in schools in heavily black inner cities is significantly accelerated when desegregation occurs, especially where white suburbs exist). For a survey of the ensuing controversy, which was partly methodological, see Armor, *White Flight and the Future of School Desegregation*, in SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 187, 187-96 (W. Stephan & J. Feagin eds. 1980); Pettigrew & Green, *School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis*, 46 HARV. EDUC. REV. 1 (1976); Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of Desegregation Plans?*, 12 J. LEGAL STUD. 69, 80-94 (1983) [hereinafter cited as Rossell, *Applied Social Science Research*].

The dispute has now faded considerably. Recent work shows increasing agreement on the basic point that although white movement away from central cities is a general demographic trend, mandatory school desegregation remedies will significantly increase enrollment loss, particularly in the first year. *See* Rossell, *Applied Social Science Research*, *supra*, at 80-94, 105-106 (summarizing numerous white flight studies and their general agreement that school desegregation does accelerate white departures). Much of this work is conveniently collected and summarized in two recent volumes of Congressional hearings. *See School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 160 (1982) (statement of G. Orfield); *id.* at 205-06 (statement of D. Armor); *id.* at 217-18 (statement of C. Rossell) [hereinafter cited as *House School Desegregation Hearings*]; *Court-Ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 193 (1982) (statement of J. Ross); *id.* at 210 (statement of C. Clotfelter); *id.* at 232 (statement of R. Farley) [hereinafter cited as *Senate School Busing Hearings*]. Indeed, at least one prominent scholar who had previously criticized *Trends in School Segregation*, *see* Rossell, *School Desegregation and White Flight*, 90 POL. SCI. Q. 675, 686-88 (1975), has subsequently published studies agreeing with the basic white flight thesis. *See* Rossell, *Applied Social Science Research*, *supra*, at 81-94, 105-106.

Among the cities that have provided strong evidence of white flight following court-ordered busing are Boston, Los Angeles, and Memphis. In the five years following Judge Garrity's desegregation decree in Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976), 60% of Boston public school families avoided participation in the plan either by moving or enrolling their children in parochial schools. *Senate School Busing Hearings*, *supra*, at 198-99 (statement of J. Ross). In Los Angeles, where enrollment fell from 37% white to 24% white between 1976 and 1980, one study shows that the decree caused half that loss. *House School Desegregation Hearings*, *supra*, at 207, 214 (statement of D. Armor). In Memphis, it has been estimated that white enrollment dropped by more than half because of school desegregation. *See* Noblit & Collins, *School Flight and School Policy: Desegregation and Resegregation in the Memphis City Schools*, 10 URB. REV. 203, 206 (1978). A recent study of the Cleveland desegregation program shows that it contributed no more than 36% of the decline in the white enrollment that occurred between 1978 and 1980, leaving 64% to be explained by other factors. OFFICE ON SCHOOL MONITORING & COMMUNITY RELATIONS, ENROLLMENT DECLINE AND SCHOOL DESEGREGATION IN CLEVELAND: AN ANALYSIS OF TRENDS AND CAUSES 23 (1982). Other cities where the evidence suggests that busing significantly affected white flight are Denver, Detroit, Pasadena, San Francisco, Dallas, Oklahoma City, Chattanooga, Birmingham, Dayton, Omaha, and Seattle. *See House School Desegregation Hearings*, *supra*, at 207, 214 (statement of D. Armor) (asserting that busing plans have been responsible for between 30% and 70% of the loss of white students in all these cities).

system depends upon the proportion of black enrollment in the schools as well as other variables. If the proportion of blacks in the schools is greater than some "tipping point," it is commonly believed that white flight significantly escalates, and the schools may become or remain identifiably black. A tipping point has typically been estimated to occur when the proportion of blacks is between twenty-five and fifty percent, with the actual point and the extent of flight in any particular situation affected by such factors as the extent to which pupil reassignments shift white students to formerly black schools, the perceived disruptions of busing and changes in educational quality, the strength of whites' racial prejudice, the degree of official support for desegregation, the nature of media coverage, the financial and other costs of fleeing, and whites' ability to bear those costs. A tipping point and flight therefore put a limit on achievable integration. Court-ordered integration in which the black presence exceeds the tipping point will precipitate extensive white departures[115] from a school system and thus to a significant extent be self-defeating. The very transition from segregation to integration sets in motion a movement towards resegregation.

The question that concerns me here is whether, under either a Rights Maximizing or Interest Balancing approach, a court's fear of white flight and self-defeating remedies may properly lead it to limit the scope of an integration decree. Consider a situation in which there is a finding of systemwide de jure segregation and established Supreme Court precedent would authorize an integration order that reassigns pupils and requires some busing. Suppose that a court concludes that full implementation of such a remedy will result in significant white flight and the reemergence of racial concentration within particular schools. May the court limit the amount of required integration to something less than would be ordered if

Despite the growing consensus that busing produces white flight, there remains disagreement on the degree of flight, the extent to which flight subsides after the first year of desegregation, and the extent to which specific variables influence the degree of flight. For some representative views on these issues, see *House School Desegregation Hearings*, *supra*, at 160 (statement of G. Orfield); *id.* at 230 (discussion by C. Rossell & D. Armor); *Senate School Busing Hearings*, *supra*, at 193 (statement of J. Ross); Giles, Cataldo & Gatlin, *White Flight and Percent Black: The Tipping Point Re-examined*, 56 SOC. SCI. Q. 85 (1975); Rossell, *Applied Social Science Research*, *supra*, at 80-94 (summarizing studies).

For discussions of the impact of residential integration on white flight from neighborhoods, see Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 AM. SOC. REV. 425 (1979); Goering, *Neighborhood Tipping and Racial Transition: A Review of the Social Science Evidence*, 44 J. AM. INST. PLANNERS 68 (1978); Schelling, *The Process of Residential Segregation: Neighborhood Tipping*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 157 (A. Pascal ed. 1972).

115. I focus here primarily on departures from a school system. Because many systems already contain a high proportion of black students at the time a desegregation decree is formulated, however, the achievement of integration can also be frustrated by the unwillingness of whites to enter a school system.

white flight were not an anticipated problem? In particular, may the court deliberately preserve some virtually all-black schools for the purpose of preventing white flight from the school system, in effect putting a *ceiling* on the percentage of blacks that it will order enrolled in other schools so as to stabilize integration there and prevent tipping? To give a simplified numerical example, suppose that a school system has 120,000 students, fifty percent white and fifty percent black, and that they have been intentionally segregated in one-race schools. Suppose that, absent white flight, a court would redraw attendance zones to produce a racial mix of fifty percent white and fifty percent black in each school, fully curing effects of the violation. Also suppose that flight will significantly escalate if the black presence exceeds forty percent (the tipping point), and that the consequence of ordering the "full" remedy would be that blacks would generally wind up attending mostly-black schools again. May a court faced with this prospect order an imperfect remedy that leaves, say, 20,000 black students in their one-race schools and, with respect to the remaining 100,000 students, redraws attendance zones to create a mix of sixty percent white and forty percent black in "integrated" schools?

This issue is before the courts today. In a 1980 dissent from dismissal of certiorari in the Dallas schools case, *Estes v. Metropolitan Branches of the Dallas NAACP*,[116] Justice Lewis Powell (joined by two other Justices) argued that the lower courts should have approved a desegregation remedy preserving one-race schools, in spite of its imperfections, since he saw the alternatives themselves as "imperfect" and "self-defeating" remedial steps that would "incit[e] resegregation" and therefore not be "effective." "[P]erfect solutions may be unattainable," Justice Powell counseled; "[o]ut of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems."[117] The United States Department of Justice has recently taken a similar position in the Nashville and Baton Rouge desegregation cases,[118] and numerous lower courts, often without candidly acknowledging what they are doing, have in fact approved imperfect remedies that preserve one-race schools so as to avoid white flight.[119]

116. 444 U.S. 437 (1980) (Powell, J., joined by Stewart & Rehnquist, JJ., dissenting from dismissal of certiorari).

117. *Id.* at 448-50.

118. In the Nashville case, the Department of Justice asked the Supreme Court to uphold a district court remedy that preserved one-race schools in part to prevent white flight. U.S. Amicus Brief, *supra* note 55. In the Baton Rouge case, the Department sought to set aside a district court order that mandated reassignment of students from one-race schools on the ground that the remedy had produced white flight, *see* Davis v. East Baton Rouge Parish School Bd., 514 F. Supp. 869 (M.D. La. 1981), and suggested in its place a plan that provided incentives for pupils to choose to attend integrated schools. N.Y. Times, Dec. 11, 1982, at A8, col. 1.

119. *See infra* pp. 637-38.

Moreover, while the issue considered here involves judicial remedies, an analogous legal issue has arisen in the context of voluntary attempts by school officials to promote integration and prevent white flight from particular schools by limiting black enrollment.[120]

Although evaluating remedial imperfection in the present context is complicated by persistent confusion about what a fully effective desegregation remedy is,[121] the remedial issue presented by white flight and racial ceilings is directly analogous to the issues presented by "all deliberate speed." In both situations, resistance, a source of remedial imperfection, tempts a court to approve a remedy that is itself imperfectly effective (something less than would be ordered if resistance did not exist). In the context of white flight, however, my position is more complex. Using racial ceilings to prevent flight as part of an intradistrict desegregation decree cannot be defended either under Rights Maximizing or under a proper application of Interest Balancing. Given remedial constraints that have been imposed by an Interest Balancing Supreme Court, however, using racial ceilings may now produce the most effective desegregation remedy available.

A. *The Legal Significance of White Flight*

The contemporary remedial dilemma that has led some courts to consider approving limited remedies to prevent flight starts with a recognition

120. Three Circuits have upheld limits on black enrollment in this context. Johnson v. Board of Educ., 604 F.2d 504, 516 (7th Cir. 1979), *vacated on other grounds*, 449 U.S. 915 (1980), *reaff'd on remand*, 664 F.2d 1069 (7th Cir. 1981), *vacated and remanded*, 102 S. Ct. 2223 (1982); Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 719-20 (2d Cir. 1979); Higgins v. Board of Educ., 508 F.2d 779, 794-95 (6th Cir. 1974); *cf.* Otero v. New York City Housing Auth., 484 F.2d 1122, 1140 (2d Cir. 1973) (racial ceilings to promote integration in public housing might be permissible in some instances).

The legal literature discussing issues raised by white flight in the context of desegregation remedies is quite small. Representative works include: J. WILKINSON, *supra* note 62, at 177-83; Clotfelter, *The Implications of "Resegregation" for Judicially Imposed School Segregation Remedies*, 31 VAND. L. REV. 829 (1978); Levin, *School Desegregation Remedies and the Role of Social Science Research*, 42 LAW & CONTEMP. PROBS., Autumn 1978, at 1, 8-25; Sedler, *The Constitution and School Desegregation: An Inquiry into the Nature of the Substantive Right*, 68 KY. L. J. 879, 958-60, 964-66 (1979-1980); Note, *White Flight as a Factor in Desegregation Remedies: A Judicial Recognition of Reality*, 66 VA. L. REV. 961 (1980). Most of the literature on racial ceilings to prevent tipping addresses the problem outside the context of remedies for proven violations of the Constitution, and addresses residential rather than school integration. *See, e.g.*, Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 19-21 (1976); Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30 (1960); Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891; Note, *Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration*, 93 HARV. L. REV. 938 (1980); Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L.J. 377 (1980).

121. *See infra* pp. 644-45.

of the pivotal role that individual whites play in the remedial process. Although ordinary white citizens are generally not defendants in a desegregation suit (the equal protection "violation" is generally limited to discriminatory acts of the government), the relief sought will affect their lives and thus may lead them to flee the transformation; reciprocally, the absence of whites affects a court's ability to achieve a legally required integration remedy.

1. *Why Whites Flee*

To understand the judicial response to the problem of flight first requires an understanding of why individual whites may decide to flee, a process that has more facets than often acknowledged. While whites may leave (or not enter) a locality or its public school system for a number of reasons, the flight important here is action taken in response to perceived costs of a desegregation remedy. Some whites may view the remedy as too costly because it interferes with their belief in white supremacy or their unwillingness to associate with blacks because of their color; this would be an objection to what I earlier called costs of the right,[122] since it insists upon an end state vision that *Brown* rejects. This basis for flight is surely common, and is even more readily attributable to the resistance after *Brown*. But whites might also flee because they object to transitional costs of particular desegregation remedies.[123] For example, because of residential segregation, itself often exacerbated by de jure school segregation, court-ordered school integration may require long-distance busing, with resulting transportation costs—expense of time and money, possible safety risks to children, and the loss of other advantages of neighborhood schools. In addition, by bringing together groups of blacks and whites already scarred by the legacy of past discrimination, integration may also impose educational and other costs. Because of their previous racial isolation and backgrounds, students in a newly integrated setting may interact poorly with each other (and with their teachers), contributing to a strained or hostile atmosphere and poorer education; parents of both races may even fear violence. Education might also be impaired by the possibility that, after long years of discrimination, black students as a group may have lower educational achievement levels or more negative attitudes to school. Moreover, the quality of the traditionally black schools to which a court assigns white students may be significantly worse than the quality of tra-

122. *See supra* pp. 606-07.
123. *See id.*

ditionally white schools; improvements may be made, but they take time.[124]

These perceived remedial costs may be evaluated by a court in deciding whether to order a remedy, but the critical point here is that such remedial costs are also evaluated by individual whites, the cost-bearers, in deciding upon their response to the remedy. The Supreme Court has made clear that it uses Interest Balancing in desegregation cases,[125] but generally speaking the courts have not deemed remedial costs sufficient to justify limiting a desegregation remedy, even when the cost-bearers are third-party nonviolators; if there is to be progress, after all, if the victims are to receive an effective remedy for the violation, some people must bear even balanceable costs of change. The decision to flee, however, is made when private individuals conclude that the net costs of the remedy to them, as *they* perceive and evaluate the remedial costs, exceed the net costs of fleeing. Even if a court has concluded that a remedy's costs to competing interests are of an improper character or insufficient weight to limit the remedy, the cost-bearers make their own assessment—and their judgment, at least concerning their particular situation, may be different from the court's judgment and totally indifferent to judicial categories of analysis.

Most obviously, resistance and flight may occur because whites give weight to remedial costs that the courts would deem unbalanceable. But the moral complexity of flight today results from the fact that not all white flight can be characterized this way. Resistance and flight may also result from an objection to educational or transportation costs that the courts deem balanceable but simply not sufficiently weighty or compelling in a particular case to trump the remedial interests of victims. The courts must impose these costs as a necessary and proper price of change, but an objection to such costs does invoke legitimate values and concerns.

The poignancy of the present moment is that costs to which whites object may themselves be a result of past discrimination. Desegregation remedies introduce the races to the adverse effects that prior discrimination itself has had on each racial group and may entail dislocations and burdens that no one would have to bear today if not for this past oppression. Whites who want to flee from adverse educational consequences of wrongs that they did not commit do not necessarily deny that a wrong was committed. They might be willing to send their children to integrated schools *once* the effects of past discrimination have been eliminated, but

124. Another possible basis for objecting to desegregation is a preference for maintaining ethnically cohesive groups in a pluralist society; to a considerable extent, however, this ethnicity seems to have roots in discrimination or to overlap with other objections to desegregation.

125. In Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30-31 (1971), for example, the Court suggested that certain costs of busing are balanceable and at some point may be sufficiently weighty to justify limiting the relief for victims by leaving some one-race schools intact. For other desegregation cases applying Interest Balancing, see *supra* notes 12, 32; *infra* p. 647.

they resist sending their children to those schools while the effects of prior wrongs are still felt. In many situations, of course, such concerns may be voiced simply to mask a racist unwillingness to associate with blacks. In addition, prejudice may exaggerate whites' assessment of the adverse consequences and costs of integration, and may blind whites to whatever gains integrated schools may produce for them. But to deny that integration is likely to impose some genuine and unavoidable burdens on the newly integrated students is to deny that past discrimination has had any harmful effects.[126]

Whether whites flee because of racism or a reluctance to endure real transition costs, their behavior gives rise to a painful dilemma. One purpose of school integration is to overcome the attitudinal, educational, and even residential effects of racial oppression, but *until* these effects are overcome whites may resist sending their children to integrated schools.[127] The point can be put in temporal terms. Integration takes time to be effective, and whites often do not want to give it time; if integration were instantly effective in achieving its goals, it could be more easily obtained and maintained. White flight is an example of a characteristic problem of transitional efforts to transform our racial situation: The very effects of past discrimination may undercut efforts to correct those effects.

2. *Why White Flight Is Legally Relevant*

Beyond its practical significance, white flight should be deemed legally relevant: Its occurrence interferes with a remedy's effectiveness in eliminating the consequences of the violation, and, as a result, it should bear on the remedies that courts order. The law here, however, is currently very confused and barely more articulated than it was when the Supreme Court considered parallel problems in *Brown II* twenty-eight years ago.

126. The fact that both whites and blacks often object to an integration remedy because of the characteristics, attitudes, and insensitivities of the other group as a *group* may seem to be an offensive feature that such opposition shares with typical race-based conduct, but one difference should be noted. In making adverse judgments about individuals based on perceived characteristics of their racial groups, race-based distinctions typically ignore opportunities to individualize, to treat individuals as individuals; they are offensive in considerable part because they consider people simply as members of an undifferentiated racial mass in spite of more discriminating alternatives. But integration in a school building or classroom does not only bring blacks and whites to each other individually; integration also delivers the races to each other in groups. To a significant extent, individualization is impossible in the social and educational setting of a school. Current characteristics of the racial groups as *groups* will affect the "new" conditions under integration—including where members of the group live, the attitudes of the group as a whole, their educational achievements, and the educational qualities of the schools traditionally serving members of the group. While racism can exaggerate assessments of the extent to which these group differences actually exist, some are likely to exist at the time of integration and to have at least some short-term effects that cannot be eliminated by individualization.

127. Indeed, the inequalities and differences that exist at the time integration begins may initially reinforce or even shape negative attitudes of white and black students towards each other. *See* Armor, *The Evidence on Busing*, 28 PUB. INTEREST, Summer 1972, at 90, 102-05.

Although the Supreme Court has not directly addressed the contemporary problem of white flight, language in a few cases from the late 1960's and early 1970's suggests that the fear of white flight may never justify any limit on a remedy for a constitutional violation. In *Monroe v. Board of Commissioners*,[128] for example, the Court (invoking *Brown II*) said, "We are frankly told in the Brief . . . that white students will flee the school system altogether [if the free transfer plan is not adopted]. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.' "[129] In *United States v. Scotland Neck City Board of Education*,[130] the Court stated that "[w]hile [white flight] may be cause for deep concern to the [school board], it cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system."[131] These Supreme Court cases were summed up by the district court in *Bradley v. Milliken*: "The Supreme Court has stated on several occasions that white flight is not justification for limiting the degree of desegregation; nor will it justify a school board's refusal to desegregate."[132]

The Court has never explained or elaborated upon its brief utterances, and they may, like the similar statements in *Brown II*, simply mask the Court's willingness to accommodate resistance in some situations. In any event, it seems reasonable to limit these utterances to their contexts. The situations in which the Supreme Court has rejected white flight as a reason for limiting a desegregation remedy were all cases in which the school boards invoked white flight as the reason for proposing extreme steps, such as secession of part of the school system or a freedom of choice plan, in circumstances suggesting that the defendant was not acting in good faith. The proposed steps would apparently have operated to prevent feasible integration, and also seemed to reflect the school boards' intent to limit desegregation because of their opposition to *Brown*.[133] The rejection

128. 391 U.S. 450 (1968).

129. *Id.* at 459 (quoting Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (*Brown II*)).

130. 407 U.S. 484 (1972).

131. *Id.* at 491. Perhaps recognizing that its earlier utterances were a bit too sweeping, the Court has not mentioned such notions in any subsequent majority opinion.

132. 402 F. Supp. 1096, 1130 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977) (*Milliken II*).

133. In Monroe v. Board of Comm'rs, 391 U.S. 450 (1968), for example, the "free transfer" plan enacted by the school board had been administered in a discriminatory manner. According to the Court, the board had "systematically denied Negro children . . . the right to transfer from their all-Negro zone schools to schools where white students were in the majority, although white students seeking transfers from Negro schools to white schools had been allowed to transfer," *id.* at 454, and had gerrymandered attendance zones to exclude black children from certain schools, *id.* at 454-57. In Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), the city attempted to withdraw from the county school system two weeks after the district court ordered the adoption of a pairing plan that would have produced substantial integration. *Id.* at 456-57. "Only when it became clear—15 years after our decision in *Brown v. Board of Education*—that segregation in the county system was finally

of the white flight argument in these cases should not be understood as an absolute principle necessarily governing situations where school boards are not recalcitrant objectors to *Brown* rights.

In the absence of greater guidance from the Supreme Court, the lower courts have acted inconsistently. Pressed by reality, a number of lower courts have sought to limit the Supreme Court's statements to their context,[134] suggesting that flight itself limits the effectiveness of the remedy[135]

to be abolished, did Emporia attempt to take its children out of the county system." *Id.* at 459 (citation omitted). In United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972), the legislation authorizing the creation of the new (and substantially white) district was passed only after the State Department of Public Instruction recommended a desegregation plan that would have left a white majority in only one school. *Id.* at 486-87. "[T]he only proper inference to be drawn from the facts of this litigation" was that the state was "creating a refuge for white students seeking to escape desegregation" and was "hinder[ing, not] further[ing,] the process of school desegregation." *Id.* at 489. In all three cases, the Supreme Court should be understood as reacting to recalcitrant local authorities' persistent attempts to avoid desegregation.

Moreover, in one sense at least, *Scotland Neck* and *Emporia* support the proposition that white flight is legally relevant. These cases prohibited the revision of school district lines in order to prevent the loss of white students whose absence would restrict possibilities for desegregation. Since this attempted withdrawal of part of the school system might be viewed as "corporate" white flight, the Supreme Court's holdings in *Scotland Neck* and *Emporia* suggest that flight does impair the effectiveness of a decree and is therefore legally relevant. *See* Ross v. Houston Indep. School Dist., 583 F.2d 712, 715 (5th Cir. 1978).

For this latter point, as for so much else in the preparation of this essay, I am grateful to my exceptional research assistant, Pam Karlan.

134. *See* United States v. DeSoto Parish School Bd., 574 F.2d 804, 816 (5th Cir.), *cert. denied*, 439 U.S. 982 (1978); Stout v. Jefferson County Bd. of Educ., 537 F.2d 800, 802 (5th Cir. 1976); Hart v. Community School Bd. of Educ., 512 F.2d 37, 52-53 (2d Cir. 1975); Tasby v. Wright, 520 F. Supp. 683, 700, 705 (N.D. Tex. 1981); Smiley v. Vollert, 453 F. Supp. 463, 470 (S.D. Tex. 1978), *modified sub nom.* Smiley v. Blevins, 514 F. Supp. 1248 (S.D. Tex. 1981); *see also* Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 449 n.15 (1980) (Powell, J., dissenting from dismissal of certiorari) (given "context" of Court's "passing reference" to resegregation, "*Scotland Neck* affords no guidance for the more usual desegregation case").

135. Valley v. Rapides Parish School Bd., 646 F.2d 925, 937 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982); *Stout*, 537 F.2d at 802; *Blevins*, 514 F. Supp. at 1257 n.22; Kelley v. Metropolitan County Bd. of Educ., 492 F. Supp. 167, 189-190 (M.D. Tenn. 1980), *aff'd in part, rev'd in part*, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 834 (1983); Arthur v. Nyquist, 473 F. Supp. 830, 848 (W.D.N.Y. 1979); United States v. Board of School Comm'rs, 368 F. Supp. 1191, 1198 (S.D. Ind.), *aff'd*, 483 F.2d 1406 (7th Cir. 1973); Cook v. Hudson, 365 F. Supp. 855, 860 (N.D. Miss. 1973), *aff'd per curiam*, 511 F.2d 744 (5th Cir. 1975), *cert. dismissed*, 429 U.S. 165 (1976). Three recent Justices of the Supreme Court have also adopted this view. *See* Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 450 (1980) (Powell, J., joined by Stewart & Rehnquist, JJ., dissenting from dismissal of certiorari). In addition, the United States Department of Justice, as part of its argument against mandatory school busing as a remedial method, has recently taken the position that white flight undercuts remedial "effectiveness": "The measure of any desegregation decree is its 'effectiveness' . . . . A desegregation remedy intended to eliminate one-race schools that drives large numbers of students out of the system can hardly be reckoned effective." Memorandum in Support of Motion by the United States to Stay Further Proceedings in the Court of Appeals at 2, 4, Davis v. East Baton Rouge Parish School Bd., No. 81-3476 (5th Cir. filed Aug. 6, 1982). A majority of the Supreme Court may have laid the groundwork for accepting this view last year when it stated that a California constitutional amendment limiting the authority of state courts to order busing may have been legitimately motivated by a concern that mandatory busing was producing white flight and therefore "was aggravating rather than ameliorating the desegregation problem." Crawford v. Board of Educ., 102 S. Ct. 3211, 3221 (1982); *see also* S. 951, 97th Cong., 2d Sess., 128 CONG. REC. S393 (daily ed. Feb. 4, 1982) (Senate finding, as part of Helms-Johnston Amendment, that court-ordered busing frequently produces flight and is "ineffective remedy").

and in certain situations apparently shaping and even limiting their own decrees (sometimes using racial ceilings) so as to prevent flight.[136] In con-

136. From the starting point that white flight limits remedial effectiveness, lower courts have moved in various directions. A few have sought to prevent flight by employing expansive methods, such as ordering interdistrict relief. While such relief was rejected in Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*), several lower courts have subsequently imposed it. *See, e.g.,* Morrilton School Dist. No. 32 v. United States, 606 F. 2d 222, 227-30 (8th Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980); Evans v. Buchanan, 416 F. Supp. 328, 352-58 (D. Del.), *appeal dismissed,* 429 U.S. 973 (1976); United States v. Board of School Comm'rs, 419 F. Supp. 180, 183-86 (S.D. Ind. 1975), *aff'd,* 541 F.2d 1211 (7th Cir. 1976), *vacated sub nom.* Metropolitan School Dist. v. Buckley, 429 U.S. 1068 (1977), *on remand,* 456 F. Supp. 183, 188-90 (S.D. Ind. 1978) (reaffirming finding of interdistrict violation and order for interdistrict remedy), *aff'd in part, vacated and remanded in part,* 637 F.2d 1101 (7th Cir.), *cert. denied,* 449 U.S. 838 (1980).

Most courts that have acknowledged the remedial imperfection caused by white flight, however, have tried to counter it by limiting their remedial decree to something less extensive than they would have ordered absent the threat of white flight. Some courts have adopted racial ceilings, limiting the percentage of black students assigned to certain schools to something lower than a perceived tipping point that would accelerate white flight, even though the consequence is that all-black schools remain in the system. *See, e.g.,* Clark v. Board of Educ., 705 F.2d 265, 269-72 (8th Cir. 1983) (to prevent white flight and stabilize integration in a system that is 65% black, district court may "reduce the black population" in some integrated schools and thereby maintain a number of all-black schools); Adams v. United States, 620 F.2d 1277, 1291-97 (8th Cir.) (to prevent white flight in school system with 75% black enrollment, desegregation plan need not reassign additional black children to schools with at least 30% black enrollment even though all-black schools remain), *cert. denied,* 449 U.S. 826 (1980), *on remand sub nom.* Liddell v. Board of Educ., 491 F. Supp. 351, 356 (E.D. Mo. 1980) (adopting plan), *aff'd,* 667 F.2d 643 (8th Cir.), *cert. denied,* 454 U.S. 1081 (1981); Bradley v. Milliken, 620 F.2d 1143, 1151-53 (6th Cir. 1980) (in 90% black Detroit system, schools with at least 55% black enrollment exempt from further reassignment of black students), *cert. denied,* 449 U.S. 870 (1981); Tasby v. Wright, 520 F. Supp. 683, 711-13 (N.D. Tex. 1981) (in district with 75% minority enrollment, schools with at least 25% minority population sufficiently desegregated even though all-minority schools remain); *cf.* Lee v. Macon County Bd. of Educ., 616 F.2d 805, 809 (5th Cir. 1980) (decree permitting one-race black schools permissible if plan "effect[s] the maximum degree of stable desegregation"); Armstrong v. Board of School Directors, 616 F.2d 305, 311 n.8, 321 (7th Cir. 1980) (upholding settlement agreement that defined schools with 75% white enrollment as desegregated and that permitted some all-black schools to remain in system with 46% minority enrollment); Calhoun v. Cook, 522 F.2d 717, 718-19 (5th Cir. 1975) (system with 85% black enrollment declared unitary when every school had at least 30% black enrollment even though all-black schools remained); Brunson v. Board of Trustees, 429 F.2d 820, 821-23 (4th Cir. 1970) (Craven, J., concurring and dissenting) (arguing that integration within 90% black district can be accomplished only if vast majority of blacks remain in all-black schools). In other cases, courts have preserved one-race black schools to prevent flight by white students in nearby racially-mixed schools, but only after concluding that *Swann*-type tradeoffs make it improper to transfer students to or from predominantly white schools farther away. *See, e.g.,* Stout v. Jefferson County Bd. of Educ., 537 F.2d 800, 801-02 (5th Cir. 1975); *Tasby,* 520 F. Supp. at 711-13; Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123, 1132-34 (M.D. Ala. 1974) (busing limited to promote "stable" desegregation), *aff'd per curiam,* 511 F.2d 1374 (5th Cir.), *cert. denied,* 423 U.S. 986 (1975). In some cases, courts have approved limited desegregation plans that permit integration on a voluntary basis, on the theory that whites will leave the system if they are mandatorily reassigned to black schools. *See, e.g.,* United States v. Board of Educ., 554 F. Supp. 912, 918-20, 924-26 (N.D. Ill. 1983) (approving consent decree that allowed minority enrollment of no greater than 30% in some schools and that permitted use of voluntary measures instead of busing to achieve desegregation and minimize flight in 75% minority Chicago system); Smiley v. Blevins, 514 F. Supp. 1248, 1257, 1259-60 (S.D. Tex. 1981) (continuing not-altogether successful "freedom-of-choice" plan with "magnet" features to desegregate all-black schools because it promised "maximum degree of stable integration practicable"); *cf.* Arthur v. Nyquist, 547 F. Supp. 468, 470-72 (W.D.N.Y. 1982) (discussing successes of plan that minimized flight and secured desegregation by relying on choices rather than mandatory busing).

Other courts, while acknowledging that remedies may be shaped to take account of white flight, deny that they would *limit* a remedy because of flight. Thus, in United States v. DeSoto Parish School

trast to this context-specific approach to white flight, however, the First Circuit in *Morgan v. Kerrigan*[137] and other lower courts[138] have argued that white flight producing "resegregation" after the entry of a desegregation decree simply has no legal significance, an approach that would preclude taking account of white flight at all:

> White flight is an expression of opposition by individuals in the community to desegregation of the school system. From the inception of school desegregation litigation, accommodation of opposition to desegregation by failing to implement a constitutionally necessary plan has been impermissible. . . . [A]ppellants' claim that white flight destroys the effectiveness of the school desegregation plan, because of "resegregation" of the school system, founders on the constitutional definition of unlawful segregation. . . . What the layman calls "resegregation" is not constitutionally recognized segregation. It is racial isolation imposed by historic school district boundaries, or by individual choices to attend private institutions.[139]

A proper legal analysis of the white flight problem must begin by rejecting the First Circuit's conclusion that white flight and resegregation

Bd., 574 F.2d 804 (5th Cir.), *cert. denied*, 439 U.S. 982 (1978), the Fifth Circuit quotes *Scotland Neck* approvingly, but then adds: "This is not to say that a school board or Court must ignore a likely danger of an exodus of white students from a school system. '[I]n choosing between various *permissible* plans a chancellor may . . . elect one calculated to minimize white boycotts.' " 574 F.2d at 816 (quoting *Stout*, 537 F.2d at 802).

Analysis of the courts' responses to white flight is complicated by their own ambivalence and lack of candor. While courts sometimes candidly acknowledge the imperfection of their remedies, *see, e.g.*, *Clark*, 705 F.2d at 271-72; *Adams*, 620 F.2d at 1296, they sometimes maintain that a full remedy has been provided even though they preserve some all-black schools because of flight, *e.g.*, *Stout*, 537 F.2d at 803; *Calhoun*, 522 F.2d at 719. Some courts straddle the fence, *e.g.*, *Tasby*, 520 F. Supp. at 712-13; *Smiley*, 514 F. Supp. at 1259-61. This tension between the Supreme Court's apparent command that lower courts ignore white flight and press for a full remedy and the lower courts' own sense that the fullest remedy may be one that is limited is captured in the district court's opinion on remand from *Milliken I*:

> It is true that "white flight," like the degree of community resistance to a desegregation order, is not one of the "practicalities" to be considered in formulating a just, feasible and workable plan. . . . The Supreme Court has stated on several occasions that white flight is not a justification for limiting the degree of desegregation . . . . On the other hand, it is unreasonable to expect the Central Board to administer a large school system in a vacuum. . . . The Board was justified in considering the "phenomenon of resegregation" in devising its plan for desegregation [which preserved a number of one-race schools and sought to achieve a "stable" racial mix] . . . . A white and middle class black exodus will assuredly result if, as a result of a desegregation order, the school district became chaotic and hostile to intellectual achievement. It was these "practicalities" that were considered by the Board in attempting to achieve a degree of racial stability, and we find that it is constitutionally permissible to take practicalities into account.

Bradley v. Milliken, 402 F. Supp. 1096, 1129-30 (E.D. Mich. 1975), *remanded*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977) (*Milliken II*).

137. Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

138. *E.g.*, Mapp v. Board of Educ., 525 F.2d 169, 171 (6th Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); Brunson v. Board of Trustees, 429 F.2d 820, 823-27 (4th Cir. 1970) (Sobeloff, J., concurring).

139. Morgan v. Kerrigan, 530 F.2d at 420, 421-22 (citations omitted).

have no legal bearing on "the effectiveness of the school desegregation plan." The First Circuit confuses issues of violation with issues of remedy. It is true that the Constitution does not condemn segregated patterns that arise when the government, never having segregated, uses a racially neutral assignment scheme in a community where whites have previously chosen to live in "white neighborhoods" or to attend private schools.[140] But the analysis must be different once de jure segregation is shown and a remedy is required to eliminate legally cognizable effects of the violation. As conventionally understood, the two main objectives of a desegregation remedy are the elimination of (i) the attendance pattern effects of the school board's segregative practices[141] and (ii) the racial identifiability that attaches to largely one-race schools because of the defendant's purposeful segregation.[142] White flight interferes with both objectives.

First, white flight itself is an effect of the original de jure segregation, and therefore segregated attendance patterns resulting from flight are an effect of the original violation. Bluntly, the defendant's segregation requires the issuance of a judicial decree; the decree causes the white flight. A somewhat subtler analysis of causation leads to the same result. Because long-standing segregation may well have contributed to the conditions and attitudes that make whites want to flee the public school system, white flight can be characterized as an effect of the original segregation for which the defendant is responsible. Whites who flee are often seeking to avoid conditions that the government's de jure segregation helped to create, and to replicate racial patterns to which the government's own de jure segregation has accustomed them.[143] While *Morgan v. Kerrigan* suggests

140. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971).

141. *See, e.g.,* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (remedy should redress difference between "the racial distribution of the school population as presently constituted" and "what it would have been in the absence of . . . constitutional violations"); Keyes v. School Dist. No. 1, 413 U.S. 189, 211 (1973) (violation and remedy may be limited "by evidence supporting a finding that a lesser degree of segregated schooling . . . would not have resulted even if the Board had not acted as it did").

142. *See, e.g.,* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 460-61, 462 n.11, 465-68 (remedy must eliminate "racially identifiable student bodies"); Green v. County School Bd., 391 U.S. 430, 442 (1968) ("[B]oard must be required . . . to convert promptly to a school system without a 'white' school and a 'Negro' school, but just schools.").

143. *Cf.* Armstrong v. O'Connell, 463 F. Supp. 1295, 1309 (E.D. Wis. 1979) (school segregation substantial cause of residential segregation, not only because it racially identified neighborhoods, but also because it "taught lessons of prejudice and hostility which molded and reinforced prejudicial attitudes [that] influenced . . . housing decisions," and school desegregation remedy properly seeks to cure reciprocal effects of this housing segregation on school attendance patterns). While the causal hypothesis discussed in the text seems plausible, the causal relation may more accurately be described as one of mutual reinforcement; the defendant's de jure segregation and other public and private discrimination encourage and reinforce each other, thereby producing attitudes and conditions that

that white flight reflects individual choices untainted by the government's violation, the First Circuit's use of the word "*re*segregate" underscores the weakness of this view. Thus, courts should address the problem of white flight and the resulting segregated patterns as part of their broad remedial authority to eliminate effects of the violation. A remedy that fails to eliminate the reemergence of segregated patterns caused by white flight is to that extent an ineffective remedy.

A second reason that white flight is legally relevant reflects a more powerful remedial theory of integration, and avoids these causation issues. Unlawful de jure segregation creates racially identifiable schools, affirming that schools are "for" students of a particular race, and white flight prevents the effective elimination of the schools' identity as "black" or "white." This racial identifiability persists as long as racial concentration continues unbroken, and it also survives a quick progression from segregation, to momentary court-ordered integration, and then to resegregation. While a court is neither obliged nor permitted to require integration indefinitely,[144] it must dispel the schools' racial identifiability; only by achieving integration and then maintaining it for a period of years can the court alter the public's perception.[145] White flight has constitutional significance, therefore, because it recreates a school system with racially identified one-race schools, a school system in which effective desegregation has not been accomplished. The fact that white flight may involve individual choices to attend private schools or to change residences—themselves constitutionally protected interests[146]—does not bear on whether flight undercuts the effectiveness of the remedy. At most, it bears on what the courts can do to counteract white flight and secure a more effective remedy.

To recognize that white flight interferes with the effectiveness of a de-

result in flight. In any particular case, of course, significant white movement to private schools or to other neighborhoods may have occurred even in the absence of de jure segregation and the decree, but to the extent that causation remains a matter of empirical speculation, it seems appropriate to presume (rebuttably) that the government, already a proven segregator, is responsible for the white flight that recreates its design. *Cf.* Keyes v. School Dist. No. 1, 413 U.S. 189, 201-14 (1973) (presumption that defendant who purposefully segregated one part of district is legally responsible for all segregation observed); Adams v. United States, 620 F.2d 1277, 1290-91 (8th Cir.) (same), *cert. denied*, 449 U.S. 826 (1980); Tasby v. Wright, 520 F. Supp. 683, 706 (N.D. Tex. 1981) (same).

144. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 433-37, 440 (1976).

145. As one court has put it, where achieving a unitary system is the concern, "[o]ne swallow does not make a spring." Lemon v. Bossier Parish School Bd., 444 F.2d 1400, 1401 (5th Cir. 1971); *see also* Adams v. United States, 620 F.2d 1277, 1296 n.31 (8th Cir.) (requiring "short period of mandatory stabilization"), *cert. denied*, 449 U.S. 826 (1980); Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1241-42 (9th Cir. 1979) (concluding that nine years is sufficient); Steele v. Board of Pub. Instruction, 448 F.2d 767, 767-68 (5th Cir. 1971) (three years may be enough); Singleton v. Jackson Mun. Separate School Dist., 541 F. Supp. 904, 914-15 (S.D. Miss. 1981) (ten years); United States v. Corinth Mun. Separate School Dist., 414 F. Supp. 1336, 1339-40, 1345 (N.D. Miss. 1976) (five years).

146. *See* cases cited *supra* note 43; *infra* pp. 650-52.

segregation remedy in a legally relevant way is the starting point for sensible legal analysis of the remedial problem it poses. Recognition means that the measures of remedial effectiveness—the remedial goals—must include the prevention of flight that would recreate one-race schools and undercut the achievement of desegregation.[147] To paraphrase the distinction emphasized in the discussion of "all deliberate speed," even though a court may not take account of white flight in order to satisfy opposition to *Brown* rights as a value in itself, a court should take account of white flight because it undermines remedial effectiveness.[148] To ignore flight—to suggest that it is legally irrelevant or that it never exists—does not promote the victims' interests. This highlights one aspect of what is so confusing about the Supreme Court's statement in *Scotland Neck* that white flight "cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system."[149] Although the passage might be read to require that courts ignore white flight, the failure to prevent flight will itself be a reason why a remedy will have achieved something less than "complete uprooting."

Since white flight results in an incomplete remedy, the prospect of its occurrence is relevant to devising a remedy under both Rights Maximizing and Interest Balancing. Under Rights Maximizing, as the Supreme Court has said when using the language of this approach, the courts must achieve "the greatest possible degree of school desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness."[150] Whether the flight is motivated by objection to the right or objection to transitional costs, flight must be considered like any other "practicality" that might undercut a remedy's "effectiveness." Under Rights Maximizing, the courts must try *both* to achieve integration *and* to prevent white flight. If flight can be prevented without compromising remedial effectiveness, it must be prevented—even if that means expanding the relief beyond what would be ordered if flight were not a problem.

Under Interest Balancing, which is the Court's primary remedial approach, white flight may also be relevant for other reasons. Even where effective integration remedies that prevent flight exist, the balanceable costs of preventing flight may be too great; remedies that are less effective may be deemed preferable. In addition, white flight itself may impose balanceable costs, such as erosion of a community's tax base, that must enter

147. *See supra* p. 618.

148. *See* United States v. Board of Educ., 554 F. Supp. 912, 924-25 (N.D. Ill. 1983) (Chicago) (distinguishing between "catering to bias" and seeking "to minimize parent resistance and thereby serve [the] larger goal").

149. United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972).

150. Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971).

the Interest Balancing calculus. Interest Balancing permits taking account of certain remedial costs of both achieving integration and preventing flight, and, in that sense, may sometimes allow approval of a limited remedy "because of" white flight.

B. *Preventing Flight: Racial Ceilings as the Last Alternative*

This framework indicates how to analyze remedies that preserve some one-race schools and use racial ceilings to prevent flight. While racial ceilings are a way of preventing the remedial imperfection that results from white flight, this strategy for preventing flight itself guarantees an imperfect remedy: In order to accommodate resistance, it fails to desegregate some black schools and therefore fails to give a remedy to some black children. Although in some cases a desegregation remedy preserving one-race schools may not in fact be imperfect (the schools' segregated condition may be unrelated to the violation),[151] or may be imperfect for reasons other than preventing white flight (the court may have made the Interest Balancing tradeoff suggested in *Swann*, concluding that the travel time and distances necessary to desegregate those one-race schools are too great), the situation considered here involves an imperfect remedy that preserves some one-race schools and limits racial mixing in other schools to prevent flight. Absent the prospect of flight, courts in this situation would order a further reduction of racial concentration at one-race schools.

As with "all deliberate speed," there is only one possible Rights Maximizing justification for approving an assuredly imperfect remedy that preserves one-race schools and limits integration—all alternative remedies are likely to yield even greater imperfection. As elaborated below, I doubt that this will be the case. Using racial ceilings is not justifiable simply because they might be more effective than a systemwide integration order that, standing alone, would produce massive white flight. There are other remedial alternatives that would generally be more effective in reducing the number of one-race schools and reducing flight without significantly interfering with the remedy's effectiveness in other ways—most clearly, interdistrict relief that would add whites from adjacent school districts.

Nor can ceilings generally be defended under a proper conception of Interest Balancing since, in my judgment, interdistrict relief would not impose sufficiently high balanceable costs to justify sacrificing its use. In

151. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971). Once de jure segregation is shown in a substantial part of the school system, the burden is on the defendants to establish that any one-race schools are "not the result of present or past discriminatory action on their part." *Id.* That burden is a heavy one. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 207-09 (1973).

Milliken v. Bradley,[152] however, an Interest Balancing Supreme Court rejected interdistrict relief. The contemporary pressure to accept remedies that deliberately preserve one-race schools to prevent flight is largely a product of the *Milliken I* tradeoff that sacrificed a generally more effective remedy because of its costs. Given *Milliken I*, however, we may now be driven to accept racial ceilings as part of the remedy, either because other available alternatives will yield even less effective relief or because those alternatives will themselves be deemed so costly and impractical that additional Interest Balancing tradeoffs will be made.

In what follows I seek to demonstrate this by comparing various remedial strategies that might stabilize integration to prevent tipping and flight, each responsive to reasons whites might have for fleeing: (i) adding whites (interdistrict relief); (ii) raising the tipping point by affecting whites' incentives to attend integrated schools; and (iii) deliberately preserving some one-race schools and imposing ceilings at other schools. Comparison of the relative effectiveness and imperfection of these remedial alternatives is complicated by continuing uncertainty about what the Supreme Court means by full "desegregation" when a long-standing systemwide violation has been found, and in particular what degree of integration is necessary in specific schools to eliminate the effects of systemwide violations. Even the most limited understanding of those remedial requirements, however, includes the elimination of one-race schools as a measure of remedial effectiveness.[153] Tipping and substantial white flight undermine the effectiveness of any decree, since they promptly recreate many racially identified black schools. Thus, a proportion of whites sufficient to prevent tipping and flight is needed, not because this ratio is *itself* necessary to eliminate a school's racial identity (a lower ratio might be sufficient for that), but because failing to achieve that ratio will produce tipping and flight, and the *resulting* absence of whites will leave effects of the violation uncorrected.[154] Theories of an appropriate desegregation remedy often focus on other racial ratios as the measure of effective "desegregation," of course.[155] The measure under any theory of an effective

152. Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*).

153. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537-40 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 461-63 (1979); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971); Lee v. Macon County Bd. of Educ., 616 F.2d 805, 811 (5th Cir. 1980).

154. For example, even if sustaining a 65% black presence for a few years would yield a level of integration sufficient to eliminate the racial identity of previously all-black schools in Detroit, tipping may occur unless a higher white ratio is achieved, and therefore it would be impossible to secure even the 35% white presence that would be sufficient to cure the violation. Put another way, a racial mix that would be sufficient to cure the violation if the mix were stable may require a black presence that exceeds the tipping point and will produce white flight. This problem generally arises because the black presence in the school system at the time relief is ordered exceeds the tipping point.

155. For example, effective desegregation might be said to require a racial mix in particular schools that roughly approximates the racial distribution in the district as a whole. (Swann v. Char-

remedy nonetheless requires the prevention of flight that would recreate one-race schools.

1. *Increasing the Pool of Whites Through Interdistrict Relief*

The critical legal development that now requires us to take racial ceilings seriously is the Supreme Court's 1974 decision in *Milliken v. Bradley*,[156] which rejected the most obvious strategy to prevent white flight and secure a more effective remedy for victims of segregation. Where a remedy for de jure segregation within a city's school system seems likely to produce substantial flight because the percentage of blacks in the system exceeds the tipping point, the clearest way to prevent that flight is to increase the pool of whites within the scope of the remedy. This could be done by ordering interdistrict or metropolitan relief that draws into the school system a sufficiently large pool of white suburban students so that the racial mix in the schools prevents the tipping point from being reached. Moreover, whatever basis whites might have for objecting to desegregation, interdistrict relief would also remove an incentive for flight, since fleeing from city to suburbs to avoid school integration would be ineffective.

Milliken I essentially foreclosed interdistrict relief. The district court had found that both the city of Detroit and the state of Michigan had engaged, for many years, in systemwide de jure segregation within Detroit. At the time of trial, the school system within Detroit had a majority black student body, and whites and blacks were generally concentrated at separate racially identified schools. If the remedy simply redistributed white and black children throughout the Detroit system, the schools would be predominantly black and, as the district court found, would probably become virtually all-black because many of the remaining whites would

lotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971), suggests that this is an appropriate "starting point" for the remedy.) Or it may require a racial mix that roughly approximates the racial distribution in the metropolitan area, *see infra* pp. 646-47. Or it may require some other racial distribution. For example, eliminating attendance pattern effects of the violation may lead a court to try to achieve a racial mix that removes precisely the "incremental segregative effect" of the violation. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977). *But see* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458 n.7, 465-68 (1979) (limiting applicability of *Dayton*, at least on burden of proof). Alternatively, eliminating a school's racial identity may require the presence of some different quantum of other-race students sufficient to change public perceptions of a school. *See* Bradley v. Milliken, 620 F.2d 1143, 1151-53 (6th Cir.), *cert. denied*, 449 U.S. 870 (1980); Brunson v. Board of Trustees, 429 F.2d 820, 820-23 (4th Cir. 1970) (en banc) (Craven, J., concurring and dissenting); Sedler, *supra* note 120, at 880 n.3. Another quantum theory of desegregation holds that integration can be a successful educational and psychological experience for newly integrated minority-race students only if their numbers reach some critical mass. *See* Adams v. United States, 620 F.2d 1277, 1296 n.30 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980); Tasby v. Wright, 520 F. Supp. 683, 712 (N.D. Tex. 1981); Crain & Mahard, *How Desegregation Orders May Improve Minority Academic Achievement*, 16 HARV. C.R.-C.L. L. REV. 693, 699 (1981).

156. 418 U.S. 717 (1974) (*Milliken I*).

flee.[157] By a vote of 5-4, however, the Supreme Court held that interdistrict relief was impermissible absent an "interdistrict violation."[158]

The majority opinion in *Milliken I* is confusingly written. At times, the Court suggests that its conclusion is consistent with Rights Maximizing. The Court invokes the principle that "the scope of the remedy is determined by the nature and extent of the violation," and suggests that an intradistrict decree would completely eliminate all effects of the violation within Detroit and "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[159] In seeking interdistrict relief, the Court implies, plaintiffs were trying to eliminate conditions unrelated to the city and state's de jure segregation, such as de facto segregation between city and suburban school systems.[160] Such conclusions, however, seem to me clearly false and an implausible way to understand the case. In this situation, Rights Maximizing would have comfortably accommodated a remedy that secured integrated Detroit schools by including other Michigan public schools (those in the Detroit suburbs) within the remedial plan.

Even if links between intentional housing discrimination and the segregated schooling patterns in the metropolitan area were ignored,[161] metropolitan relief might have been ordered based on at least two distinct theories, each fully consistent with the principle that the remedy should do no more than eliminate effects of the defendants' violations. Most clearly, even assuming a narrow view of what desegregation requires, there were not enough whites in Detroit to desegregate the schools because whites were likely to flee as a result of a purely intradistrict remedy and this flight would undermine the effectiveness of the decree.

Alternatively and more broadly, quite apart from the likelihood of any new flight, desegregation required a higher ratio of white to black students than could be achieved by an intradistrict remedy. Once racially identified by deliberate segregation, black schools do not lose their racial identifiability if the remedy simply sprinkles a few whites among them and leaves their racial composition largely black and vastly more black than schools in the surrounding metropolitan area. Thus, in a school district like Detroit, where at the time of judgment a high proportion of the

157. Bradley v. Milliken, 484 F.2d 215, 243-44 (6th Cir. 1973) (quoting district court's findings of fact).

158. Milliken v. Bradley, 418 U.S. 717, 745 (1974) (*Milliken I*).

159. *Id.* at 744, 746.

160. *Id.* at 728 n.7, 738-41, 745-47; *id.* at 755-56 (Stewart, J., concurring).

161. The district court relied on this link as one of its reasons for ordering interdistrict relief. *Id.* at 728 n.7 (majority opinion); *see also* Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of* Milliken v. Bradley, 21 WAYNE L. REV. 751, 757-76 (1975) (discussing how metropolitan school remedy might be based on housing violations).

students were black, desegregation requires metropolitan relief to assure that blacks do not attend racially identified schools. In addition, longstanding de jure school segregation within Detroit quite plausibly helped to create a cycle of inferior black education, black unemployment and poverty, depressed social conditions, and racial polarization, that all contributed to white departures from Detroit and the resulting higher percentage of blacks within the public school system.[162] Therefore, a remedy based on the racial mix of students in the district at the time the decree was implemented would not eliminate the attendance pattern effects of the violation. In short, given the nature and scope of the violation, a rule generally prohibiting interdistrict relief promises a remedy that will be incomplete.[163]

What appears to explain *Milliken I* is not that a within-Detroit remedy would fully eliminate effects of the violation, but rather that an interdistrict remedy that would clearly have been more effective was thought to impose costs that were too great. The costs were not the practical problems of implementing an interdistrict decree; as Justice White's dissent demonstrated, the distances that students would have had to travel under an interdistrict decree would have been no greater than those required under many intradistrict decrees, nor would the administrative burden have been significantly greater.[164] Rather, the Court appears to have given overriding weight to the suburbs' interest in "local autonomy,"[165] and this value was allowed to trump the plaintiffs' interest in a more effective remedy.[166] *Milliken I*, in other words, is an example of Interest Balancing, a fact that becomes even clearer in the Supreme Court's later characterizations of the case.[167] A Rights Maximizing court

162. *See* Milliken v. Bradley, 418 U.S. 717, 779-80 (1974) (White, J., dissenting) (*Milliken I*); *supra* note 143.

163. On remand from *Milliken I*, the court of appeals was blunt about the legal significance of the Supreme Court's action: "[G]enuine constitutional desegregation cannot be accomplished within the school district boundaries of the Detroit School District." Bradley v. Milliken, 540 F.2d 229, 240 (6th Cir. 1976), *aff'd*, 443 U.S. 267 (1977) (*Milliken II*).

164. *Id.* at 767-68 (White, J., dissenting).

165. *Id.* at 741-42 (majority opinion).

166. In this respect, *Milliken* is not an isolated case. Local autonomy and other federalism values have often played a role in shaping remedies in constitutional cases, whether or not those values have constitutional stature. *E.g.*, Hills v. Gautreaux, 425 U.S. 284, 293 (1976); Rizzo v. Goode, 423 U.S. 362, 377-80 (1976); Younger v. Harris, 401 U.S. 37, 43-46 (1971); Hans v. Louisiana, 134 U.S. 1, 9-19 (1890).

167. In *Milliken II*, for example, the Court observed:

> [F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, *or* if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in *Milliken I* . . . .

433 U.S. 267, 282 (1977) (citation omitted) (emphasis added). The "or" seems to concede that *Milliken I* gave weight to the value of local autonomy even though, as a result, the decree did not eliminate the legally relevant effects of the violation. This view is reinforced by the Court's suggestion that "the

would have approved interdistrict relief; the *Milliken I* court, however, sacrificed remedial effectiveness to protect another value, local autonomy.[168]

Although I am a supporter of Interest Balancing, I think that *Milliken I* was wrongly decided; particularly since the state of Michigan itself was found responsible for the violation, the value of "local autonomy" for suburban subdivisions created by the state seems too weak an interest to override a more effective remedy in this case. First, while control of a school system by a specific "local" administrative unit may sometimes contribute to innovative education, parental participation, and community self-definition, it often is simply an administrative or political artifact. Even if interdistrict relief in certain instances might so undermine exceptional advantages of this local autonomy that an effective desegregation remedy should be sacrificed, *Milliken I*'s flat rule drawing the remedial boundary at the district line is extremely overbroad and gives insufficient weight to the equal protection remedial interest. Second, and even more important to *Milliken* itself, a state or state instrumentality certainly should not be allowed to prevent desegregation by invoking the state's own delegation of autonomy to local school boards when the state has used its very power over localities to facilitate segregation.[169]

Moreover, in school systems where long-standing de jure segregation is found and there are presently a high proportion of blacks, the consequences of this Interest Balancing tradeoff are striking. To be sure, interdistrict relief would not necessarily have solved all the problems of desegregation and white flight. For example, at some point the distances necessary for students to travel from one district to another to achieve integration might be deemed too great, and a sufficient racial mix to achieve full desegregation in all schools might be unattainable. In addition, some whites might still perceive the costs of integration as too great and they would still have the option of fleeing to private schools or even

interests of state and local authorities in managing their own affairs" are a separate "factor" to be taken into account by an equity court in shaping a remedy, *id.* at 280-81. *See also* Hills v. Gautreaux, 425 U.S. 284, 293-94 (1976) (*Milliken I* based on "limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities").

168. While *Milliken*'s rule generally barring interdistrict relief cannot be justified by the remedial principle that the court invokes—that the scope of the remedy is determined by the nature and extent of the violation—a general refusal to allow interdistrict relief might reflect an altogether different principle: that the *source* of the remedy is determined by the *source* of the violation. Such a principle might generally bar bringing the suburbs into a remedy when the only source of the violation was the city. In a case like *Milliken* itself, however, where the state (and not simply the city) is a violator, this principle does not suggest that the source of relief should be limited to the city; the remedy could properly include the state and its local subdivisions. *See infra* note 169.

169. More generally, even if state officials have not directly discriminated, there is much to be said for the propositions that the state is constitutionally responsible whenever any local unit that it has the power to control violates the Fourteenth Amendment, and that the state through any of its local units may appropriately be ordered to remedy such violations.

beyond the suburbs.[170] By foreclosing interdistrict relief, however, the *Milliken I* tradeoff forecloses the most obvious and most obviously effective way to prevent flight and reduce or eliminate one-race schools.[171]

The fact that Justice Powell himself provided the swing vote in favor of *Milliken I*'s Interest Balancing reveals the hollowness of his later dissent from the dismissal of certiorari in *Estes*—the Dallas schools case—which is written as if he were a victim-oriented Rights Maximizer.[172] Joined by Justices Stewart and Rehnquist, Justice Powell defends the district court's decision to preserve many one-race schools in *Estes* and argues that such a remedy was the most effective possible in light of white flight.[173] Justice Powell chastises other lower courts for approving "self-defeating remedies"[174] that have shown "little concern . . . for the question of effectiveness" and for the "impact a remedy is likely to have on resegregation."[175] Calling for greater realism about "the imperfect nature of court action in schools cases," he blames the "unattainab[ility]" of "perfect solutions" on the "complexities of modern urban communities."[176] The unavailability of

170. Thus, even the availability of interdistrict relief would not necessarily have guaranteed fully effective desegregation remedies that both achieved integration and prevented flight. It is therefore possible that the other remedial strategies to prevent flight that are considered below might have to be considered (including deliberately preserving some one-race schools). The unavailability of interdistrict relief, however, almost certainly makes it harder to desegregate the schools and increases the amount of remedial imperfection (such as the number of one-race schools) that must be tolerated.

171. Scholars with a variety of opinions on the merits of school busing and its impact on white flight agree that metropolitan remedies significantly reduce white flight. *See House School Desegregation Hearings, supra* note 114, at 160-61, 210, 216 (statements of G. Orfield, D. Armor & C. Rossell); *Senate School Busing Hearings, supra* note 114, at 232 (statement of R. Farley); G. ORFIELD, MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY 97-101 (1978); Rossell, *Applied Social Science Research, supra* note 114, at 89. Interdistrict relief also has at least two other advantages. First, because there are frequently wealth disparities between city and suburb, interdistrict relief would generally promote greater contact among students from different social classes, which is thought to be important to improving blacks' educational achievement levels. *See* ON EQUALITY OF EDUCATIONAL OPPORTUNITY 22-25, 71, 86-88, 153-65 (F. Mosteller & D. Moynihan eds. 1972); Crain & Mahard, *supra* note 155, at 696-97. Second, there is at least the possibility that, over time, patterns of residential segregation between suburb and city would be reduced as families move closer to their childrens' schools. *See House School Desegregation Hearings, supra* note 114, at 192-94, 198-203 (statement of D. Pearce); Rossell, *Applied Social Science Research, supra* note 114, at 102-04 (net migration is into white neighborhoods).

Since *Milliken I*, several lower federal courts have ordered interdistrict relief, invoking the exception for "interdistrict violations" stated in the *Milliken* opinion. *See supra* note 136. There is no indication, however, that *Milliken*'s basically restrictive force has abated.

172. Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437 (1980) (Powell, J., dissenting from dismissal of certiorari). Justice Powell also reveals that he is an Interest Balancer in his separate opinions in Keyes v. School Dist. No. 1, 413 U.S. 189, 217-53 (1973) (Powell, J., concurring in part and dissenting in part) and Austin Indep. School Dist. v. United States, 429 U.S. 990, 995 n.7 (1976) (per curiam) (Powell, J., concurring).

173. *Estes*, 444 U.S. at 440-44, 448-52 (Powell, J., dissenting from dismissal of certiorari). Justice Powell also suggested that the district court should be affirmed because there had not been sufficient evidence connecting the remaining one-race schools to the violation. *Id.* at 445-48.

174. *Id.* at 439.

175. *Id.* at 445, 449.

176. *Id.* at 448.

a remedy more effective than one preserving so many one-race schools, however, was a consequence not simply of modern urban "complexities" but of the Court's Interest Balancing in *Milliken I* itself; it was the result of Justice Powell's own vote to sacrifice achievable remedial effectiveness in the name of interests that he decided to value more. As the district court explicitly stated on remand in the Dallas case, if the remedy "were enlarged to take in the outlying suburban school districts with their overwhelming anglo enrollment, it would be possible to diminish the inevitable limitations on the task of eliminating racially identifiable schools in the district. But . . . [that] possibility . . . has already been foreclosed . . . by *Milliken I*."[177] Justice Powell is to be credited for recognizing that the measure of remedial effectiveness includes the prevention of white flight, but his willingness to prevent flight by accepting continued one-race schools and limited relief for blacks, rather than requiring the more effective relief possible through interdistrict remedies, cannot be defended in Rights Maximizing terms.

2. *Affecting Whites' Incentives*

Given the unfortunate constraints of *Milliken I*, there may be no available remedy that will eliminate all one-race schools in a district containing a relatively high percentage of black students, and none more effective than a remedy deliberately preserving some one-race schools and using ceilings. Within the *Milliken I* constraints, the most plausible alternative to ceilings is a remedy that attempts to raise the tipping point by changing whites' assessment of the costs and benefits of integration as compared to flight, thereby making it more likely that whites will stay in schools that have a high proportion of black students. But while a court is obliged to consider this alternative, a remedy that tries to raise the tipping point either may be less effective than a remedy using ceilings or may itself impose unacceptably high costs.

a. *Punishing Flight*

With interdistrict relief foreclosed, one possible way to raise the tipping point and prevent flight is to impose an intradistrict integration remedy that bars white families in the public school system from sending their children to private schools or changing neighborhoods; threats of contempt or other sanctions would provide incentives for compliance. By keeping whites in the system, this alternative might well be more effective than remedies that allow whites to flee or that deliberately preserve some one-

177. Tasby v. Wright, 520 F. Supp. 683, 711 (N.D. Tex. 1981).

race schools.[178] While the remedial principle empowering courts to eliminate effects of the violation might point this far, the suggestion is startling, and for good reason: As currently interpreted, the Constitution itself protects the right to attend private schools and the right to travel.[179] While the fact that a constitutional remedial interest clashes with another constitutional interest hardly means that the remedial interest must give way, one can readily predict the outcome of this particular clash; courts would almost surely read the Constitution to allow nondefendants to live where they want and to send children to private school, even if these actions interfered with an effective remedy for a Fourteenth Amendment violation.[180] This too should be seen as a form of Interest Balancing. Values unrelated to remedial effectiveness (here, constitutional values) lead the courts to forego a remedial strategy that might well produce more effective relief for blacks. Courts do have the power to enjoin private parties from interfering with desegregation in some instances[181] and may even have the power to influence access to private schools or the suburbs indirectly,[182] but they probably lack the power to block flight directly.

178. The qualification derives in part from the fact that the coercion required to effectuate this unlikely remedial alternative might undermine its effectiveness. *See supra* p. 619. Moreover, the comparative effectiveness of this alternative depends upon how "desegregation" is defined and upon the black-white ratio in the district. Thus, if 90% of a district is black, a remedy that creates a number of schools with a 50% black enrollment, but leaves numerous all-black schools, might be deemed "more effective" than a remedy that secures a stable 90% black-10% white ratio in all schools.

179. *See* cases cited *supra* note 43.

180. *See* Valley v. Rapides Parish School Bd., 646 F.2d 925, 944 (5th Cir. 1981) (desegregation plan may not "restrain [students] from choosing to attend a private school"), *cert. denied*, 455 U.S. 939 (1982).

181. For example, in Kasper v. Brittain, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957), the district court enjoined interference with its order desegregating the county's schools. In affirming a judgment of criminal contempt against a leader of demonstrations to prevent desegregation, the Sixth Circuit rejected a First Amendment defense, stating that "the right to speak is not absolute and may be regulated to accomplish other legitimate objectives," including "protect[ing] rights safeguarded by the Constitution." *Id.* at 95; *see also* United States v. Hall, 472 F.2d 261, 264-68 (5th Cir. 1972) (court has power to enjoin non party from interfering with desegregation plan); United States v. Farrar, 414 F.2d 936, 939 (5th Cir. 1969) (no First Amendment protection for harassment of blacks who chose to attend previously white schools, and court is "empowered and obliged" to enjoin such conduct); Brewer v. Hoxie School Dist. No. 46, 238 F.2d 91, 102 (8th Cir. 1956) (court did not violate First Amendment in enjoining "type of speech" that would obstruct desegregation); *cf.* Faubus v. United States, 254 F.2d 797, 806-08 (8th Cir.) (upholding order enjoining governor from using National Guard to interfere with desegregation), *cert. denied*, 358 U.S. 829 (1958).

182. For example, quite apart from their remedial powers deriving from the duty to eliminate effects of de jure public school segregation, courts may enjoin private schools from discriminating on the basis of race without offending the constitutional right to attend private schools, Runyon v. McCrary, 427 U.S. 160 (1976), and courts may bar various types of government support of discriminatory private schools, Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (city may not allow segregated private schools to have temporary exclusive use of public recreational facilities); Norwood v. Harrison, 413 U.S. 455 (1973) (state may not loan textbooks to students attending segregated private schools); *cf.* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) (under Congressional statute, Internal Revenue Service may not grant charitable tax exemption to racially discriminatory private schools). Such judicial action would have the effect of reducing the appeal of private schools as escape hatches for flight from the public schools.

b. *Providing Educational Incentives*

A more plausible way for courts to reduce flight within the constraints of *Milliken I*, without deliberately preserving one-race schools and imposing ceilings, is to try to raise the tipping point by improving whites' assessment of integration. While whites' evaluation of integration may well be improved by supportive and active community leadership,[183] by limiting the distance of busing, or by minimizing the extent to which whites are reassigned to previously black schools,[184] probably the most promising

Moreover, once a court has found de jure segregation in the public schools, the court should have enhanced power to affect access to private schools in the name of providing a more effective desegregation remedy—whether or not the private schools themselves engage in racial discrimination. Even though the constitutional right to attend private schools may well be a balanceable interest that constrains this remedial power, an Interest Balancing court should take steps to reduce incentives for flight to private schools when the competing interests are less weighty—for example, when the remedial action does not actually block access to private schools and therefore does not block the exercise of a constitutional right. Thus, a court might enjoin the government from providing tax subsidies to private schools that serve as an escape hatch. (Mueller v. Allen, 103 S. Ct. 3062 (1983), a recent Supreme Court case upholding tax deductions for private school attendance, did not arise in the context of racial discrimination or remedies for racial segregation, and should not be read as foreclosing restrictions on tax subsidies in this context.) *See also* Cook v. Hudson, 365 F. Supp. 855, 859-60 (N.D. Miss. 1973) (school board's discharge of teachers who enrolled their own children in private schools constitutionally permissible where rationally related to aim of overcoming "serious obstacle to effective desegregation" posed by white flight), *aff'd per curiam*, 511 F.2d 744 (5th Cir. 1975), *cert. dismissed*, 429 U.S. 165 (1976).

Regardless of what the courts may require, of course, the private schools themselves might take initiatives to limit flight. This is not an altogether fanciful prospect. The Cleveland Archdiocese, for example, has an announced a policy of not accepting into its parochial schools students who it determines are fleeing from public school desegregation. Telephone interview with Leonard Stevens, Director of Office on School Monitoring and Community Relations, Cleveland, Ohio (Mar. 11, 1983).

183. A spirit of cooperation and confident optimism from the school board, for example, may produce similar reactions from white residents. *See, e.g.*, R. CRAIN, THE POLITICS OF SCHOOL DESEGREGATION 295-301 (1968); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 63, at 91-102. *But see* Rossell, *Applied Social Science Research*, *supra* note 114, 77-78, 92 ("no conclusive evidence"). Even if courts can encourage such a spirit, however, they surely cannot order it.

184. While courts can and do try to minimize the distance of student travel under a desegregation decree, residential segregation may make it impossible to achieve integration unless there is significant busing. Studies do suggest that "greater white flight occurs . . . when whites are reassigned to minority schools rather than when minorities are reassigned to white schools." Rossell, *Applied Social Science Research*, *supra* note 114, at 87. Therefore, to minimize white resistance and flight, courts might require that blacks rather than whites bear most of the burdens of reassignment and busing to new schools in new neighborhoods. Asymmetrical busing, however, would not solve the white flight problem. While it may reduce flight by those whites who resist integration when it requires travel to black neighborhoods, it will not reduce flight by whites who object primarily to a large black presence in a school. The tipping point may be higher when blacks are reassigned to a previously white school than when whites are reassigned to a previously black school, but stable integration may still be impossible to achieve. Moreover, depending upon the enrollment capacity of the schools, reassigning black students to formerly white schools without also reassigning many white students to formerly black schools may be altogether impractical. "[M]andatory reassignment of white students is necessary in order to desegregate most school districts effectively." *Id.* at 104. At most, asymmetical reassignment would be only a partial and incomplete strategy to achieve integration and reduce flight. Indeed, if a decree deliberately preserves one-race black schools to avoid white reassignments that are likely to provoke widespread flight, the decree raises problems virtually identical to those of racial ceilings.

Even were it able to provide a desegregated setting for all blacks, asymmetrical busing would raise

step courts can take to improve whites' assessments of desegregation is to try to improve the quality of integrated schools. Possibilities for improving educational quality include curricular enhancements, better teacher training, remedial education, increased capital expenditures, and the establishment of "magnet schools" (schools offering exceptional educational opportunities).[185] To some extent, such remedial measures might be rationalized as direct compensatory relief for blacks, simply eliminating inequalities among schools and students attributable to de jure segregation.[186] But the more sweeping requirements, such as magnet schools, are best seen as efforts to make the integration remedy effective by providing "sweeteners" to whites to keep them in the school system.[187] To the extent that white flight reflects concern about educational quality under desegregation, these remedial measures seek to overcome that basis for resistance; but whatever whites' reasons for flight, including out-and-out racism, exceptional educational opportunities such as magnet schools provide incentives for whites to stay in or even enter a school system with a substantial black enrollment. These unusual educational settings may be offered to students as part of a desegregation plan that relies on pupil choice or they might be part of a mandatory pupil reassignment plan; either way, educational ex-

many normative and legal problems similar to those created by ceilings. For example, it would distribute benefits and burdens unequally according to race and might impose dignitary harms. The courts have responded in various ways to desegregation plans calling for asymmetrical busing. Sometimes they state that an extremely lopsided burdening of one racial group would be unconstitutional. *See* Kelley v. Metropolitan County Bd. of Educ., 687 F.2d 814, 824 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 834 (1983); Hoots v. Pennsylvania, 539 F. Supp. 335, 343 (W.D. Pa. 1982), *aff'd* 703 F.2d 722 (3d Cir. 1983); Moss v. Stamford Bd. of Educ., 350 F. Supp. 879, 881-82 (D. Conn. 1972). In other cases, however, even a significantly unequal distribution of burdens has been tolerated—usually not for the explicit purpose of preventing flight, but in the interest of furthering other remedial objectives, such as improving educational quality and "community cooperation," that are certainly conducive to reducing flight. *See, e.g.*, United States v. Board of School Comm'rs, 637 F.2d 1101, 1114 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); Higgins v. Board of Educ., 508 F.2d 779, 793-95 (6th Cir. 1974); Arvizu v. Waco Indep. School Dist., 495 F.2d 499, 504-07 (5th Cir. 1974); Norwalk CORE v. Norwalk Bd. of Educ., 423 F.2d 121, 124 (2d Cir. 1970); United States v. Board of Educ., 554 F. Supp. 912, 923-24 (N.D. Ill. 1983) (Chicago).

185. The leading case on the appropriateness of requiring educational improvements in a desegregation remedy is Milliken v. Bradley, 433 U.S. 267, 279-88 (1977) (*Milliken II*). Post-*Milliken II* remedial decrees often contain such requirements in addition to pupil reassignment provisions. *See* cases cited *infra* notes 186, 187.

186. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 282 (1977) (*Milliken II*); Morgan v. Kerrigan, 530 F.2d 401, 427-30 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Tasby v. Wright, 520 F.Supp. 683, 741-43 (N.D. Tex. 1981); Liddell v. Board of Educ., 491 F.Supp. 351, 357 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1091 (1981); United States v. Board of School Comm'rs, 506 F. Supp. 657, 671-72 (S.D. Ind. 1979), *aff'd in part, rev'd in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

187. *See* Arthur v. Nyquist, 547 F. Supp. 468, 470 (W.D.N.Y. 1982); Tasby v. Wright, 520 F. Supp. 683, 744-50 (N.D. Tex. 1981); Berry v. School Dist., 515 F. Supp. 344, 365-67, 382-83 (W.D. Mich. 1981), *aff'd and remanded*, 698 F.2d 813 (6th Cir. 1983); Smiley v. Blevins, 514 F. Supp. 1248, 1252, 1259-60 (S.D. Tex. 1981); Liddell v. Board of Educ., 491 F. Supp. 351, 357 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1091 (1981); Coleman, *New Incentives for Desegregation*, HUM. RTS., Fall 1978, at 10.

cellence is supposed to encourage whites to attend integrated schools. Put bluntly, these "sweeteners" are bribes in the form of educational offerings. At great expense to the defendant, they can be made very sweet indeed—every Central and South Central High School turned into a School of Athens, or at least a Bronx High School of Science. Indeed, if a court's only objective were to achieve integration by keeping whites in the system, it might simply order the defendant to pay whites to stay.[188]

While both a Rights Maximizing court and an enlightened Interest Balancing court should require some educational sweeteners if doing so would reduce the number of one-race schools, this strategy presents two problems: It may be sufficiently ineffective in securing stable integration so that using racial ceilings might yield a more effective remedy, and it may be sufficiently costly so that an Interest Balancer might reject its widespread use.

It is by no means clear that educational sweeteners, even at some high level of sweetness, can make the desegregation plan sufficiently attractive to secure an effective remedy—that is, both to achieve integration and prevent white flight. "Freedom of choice" desegregation plans have been notoriously unsuccessful in yielding student choices that make much of a dent in one-race schools, particularly those identified as black schools, and the courts have long rejected such plans.[189] The strategy of introducing magnet schools as part of the choice system, an approach that the Reagan Administration has recently promoted,[190] has also generally proven unsuccessful as a means of securing integration.[191] Providing sweeteners as part

188. For example, the Department of Justice suggested that tuition scholarships to the University of Missouri be given to students who choose to attend other-race schools in a voluntary interdistrict plan to desegregate the St. Louis public schools. *See* Williams, *A New Incentive for Busing*, NEWSWEEK, May 18, 1981, at 49.

189. *See* Green v. County School Bd., 391 U.S. 430, 437-42 (1968).

190. *See* N.Y. Times, Dec. 11, 1982, at 8, col. 1 (Baton Rouge desegregation case).

191. Courts and researchers generally agree that voluntary techniques using magnet schools have been of only limited value in desegregating schools. *See, e.g.*, Adams v. United States, 620 F.2d 1277, 1295 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980); Lee v. Macon County Bd. of Educ., 616 F.2d 805, 810 (5th Cir. 1980); Lee v. Marengo County Bd. of Educ., 588 F.2d 1134, 1135-36 (5th Cir. 1979); Morgan v. Kerrigan, 530 F.2d 401, 410, 423 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Hoots v. Pennsylvania, 539 F. Supp. 335, 342-43 (W.D. Pa. 1982), *aff'd*, 703 F.2d 722 (3d Cir. 1983); Tasby v. Wright, 520 F. Supp. 683, 746-47 (N.D. Tex. 1981); Smiley v. Blevins, 514 F. Supp. 1248, 1260 (S.D. Tex. 1981); Davis v. East Baton Rouge Parish School Bd., 514 F. Supp. 869, 873 (M.D. La. 1981); *House School Desegregation Hearings*, *supra* note 114, at 125-34, 144-45, 166 (statement of G. Orfield); *id.* at 806, 830-34, 837-41 (reprinting Center for Educ. & Human Dev. Policy, Institute for Pub. Policy Studies, Vanderbilt Univ., Strategies for Effective Desegregation: A Synthesis of Findings (1981)); Rossell, *Applied Social Science Research*, *supra* note 114, at 91; Rossell, *Magnet Schools as a Desegregation Tool*, 14 URB. EDUC. 303 (1979). *But see* Hart v. Community School Bd., 512 F.2d 37, 54-55 (2d Cir. 1975) (citing examples of successful magnet school programs); United States v. Board of Educ., 554 F. Supp. 912, 924-25 (N.D. Ill. 1983) (approving voluntary desegregation measures in consent decree); Arthur v. Nyquist, 547 F. Supp. 468, 470-72 (W.D.N.Y. 1982) (six one-race schools remained, but voluntary plan generally successful); Armor, *supra* note 114, at 223-25. Researchers do suggest that magnet schools are more successful in securing stable integration when they are supplements to mandatory student reassignment plans. *See* Rossell, *supra*, at 314.

of a mandatory reassignment scheme may not prevent white flight. For one thing, if the reluctance to choose or the wish to flee an integrated setting reflects a concern about educational quality under integration, even the expenditure of vast sums for extraordinary programs may not make a school "good enough" quickly enough to overcome whites' concerns, particularly if integration increases the proportion of educationally disadvantaged students in the school. In addition, since racial prejudice, and not concern about educational quality, is often the reason for opposing integrated schools, whites may systematically undervalue the worth of educational sweeteners offered in the context of a majority-black school. In short, educational sweeteners may not be able to raise the tipping point sufficiently so that whites will accept the degree of racial mixing necessary to "desegregate" schools throughout the district.

Furthermore, there is another reason to question the effectiveness of educational sweeteners: Their fiscal expense may itself undermine remedial success.[192] Even if these fiscal costs are imposed on the defendant-wrongdoer, they are ultimately borne by the citizens of the jurisdiction through higher taxes. Such tax increases could in turn lead these citizens to flee the jurisdiction, thereby re-creating the problems of flight.[193]

Moreover, even if highly expensive educational sweeteners would secure an effective remedy, the Supreme Court might not allow the lower courts to impose such expensive requirements on defendants. There is no doubt that courts do have the legal power to order some "educational quality" features beyond traditional requirements concerning pupil and faculty reassignments. In *Milliken II*,[194] decided three years after *Milli-*

192. Partial funding for such sweeteners may be available from federal or state sources, but these external funds are likely to be inadequate to fund a completely effective desegregation effort. Indeed, the Emergency School Aid Act of 1978, 20 U.S.C. §§ 3191–3207 (Supp. V 1981), which previously had provided assistance to school districts implementing desegregation plans, was repealed and consolidated into block grants by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 95-35, § 587(a), 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 357, 480. Fiscal considerations recently led the East Baton Rouge school board to reject a magnet school program proposed by the United States Department of Justice in lieu of traditional busing remedies. Telephone interview with J. Harvie Wilkinson, Deputy Ass't Att'y Gen., Civil Rights Div., U.S. Dept. of Justice (Mar. 9, 1983).

193. There are other reasons to question the effectiveness of educational sweeteners. First, they often require time-consuming construction and program development, and therefore can lead to delay in remedial implementation. *See* Adams v. United States, 620 F.2d 1277, 1295 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980). Second, sweeteners, like monetary bribes, may undermine the dignitary goals of the remedy even though numerical integration goals are achieved. Moreover, magnet schools also pose significant policy questions. They create quality education for some students but not for others, and they tend to separate the most talented and enterprising students from their peers. *See* Rosenbaum & Presser, *Voluntary Racial Integration in a Magnet School*, 86 U. CHI. SCHOOL REV. 156, 177 (1978). Such incentives to prevent flight may also divert funds "into services appealing to middle-class white parents at the expense of sacrificing compensatory and human relations programs meeting minority needs." Crain & Mahard, *supra* note 155, at 707.

194. Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*).

ken I barred interdistrict relief, the Supreme Court affirmed a district court decree ordering several "educational components" designed to facilitate whatever intradistrict desegregation was possible within Detroit.[195] The scope of *Milliken II*, however, is unclear. The only educational components before the Supreme Court were a remedial reading and communications skills program "to eradicate the effects of past discrimination" in educating minority students, a teacher training program "to cope with the desegregation process," a counseling program, and a modification of pupil testing procedures; while these components were hardly inexpensive, more costly steps, such as requiring the creation of numerous magnet schools, were not before the Court.[196] Thus, consistent with *Milliken II*, courts might simply deem it too costly to require objecting defendants to furnish particularly expensive educational sweeteners, even if they would help to keep whites in the school system.[197] Put another way, an Interest Balancing court might conclude that, at some point, financial expense to the defendant is a sufficiently weighty balanceable cost to trump remedial effectiveness for victims. And at some extremely high level of expense, I might agree. Keeping down extraordinary fiscal cost to the defendant would be added to *Milliken I*'s protection of local autonomy as a basis for sacrificing some achievable effectiveness and adopting a less effective remedy.

c. *Reducing the Appeal of Escape Hatches*

Courts might also try to raise the tipping point by reducing the attractiveness of escape hatches for white flight. If whites knew that flight would not have its desired effects, they would be less likely to flee. For example, a court might impose a systemwide integration plan and assert the power to redraw attendance zones and reestablish integration if white

195. Bradley v. Milliken, 402 F. Supp. 1096, 1132-45 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

196. *Milliken II*, 433 U.S. at 272-73, 275-76, 276-77 n. 11. The cost of the components before the Court was about $12 million. 433 U.S. at 293 (Powell, J., concurring in the judgment).

197. There are other reasons to be uncertain about *Milliken II*'s scope. First, *Milliken II*'s theory for upholding the educational requirements was limited. Although the district court had justified the educational components as necessary both to provide compensation for educational deficiencies suffered by the black victims of segregation and to minimize the possibility of resegregation, 402 F. Supp at 1102, 1133-34, the Supreme Court opinion appears to invoke only the former remedial theory. Thus, while *Milliken II* is clear authority for the view that courts may order educational components to provide direct compensatory relief for prior educational deficiencies or to upgrade the quality of traditionally black schools in order to eliminate inequalities caused by unlawful discrimination, it is less clear authority for ordering educational improvements designed primarily to make the integration order effective by offering whites sweeteners to stay in the school system. Second, the city defendants (the school board) favored the decree, and the only issue was whether the state defendants could be ordered to help subsidize these educational components. Third, the Court may have felt distinctive pressure to approve some remedy for Detroit's black children, since it had just rendered the highly controversial decision in *Milliken I*, which barred substantial integration.

flight occurs. But this hardly seems a realistic solution to the white flight problem.

The courts probably do have the legal power to redraw attendance zones *within* a public school district if white flight occurs in response to the initial decree. Redrawing attendance zones after flight would not restrict the constitutional rights of fleeing whites as would a direct restriction on flight, since no one within a school system has a constitutional right to attend the public school of his choice.[198] To be sure, the Supreme Court's decision in *Pasadena City Board of Education v. Spangler*[199] holds that "once the affirmative duty to desegregate [is] *accomplished*" a district court has no further power to issue or revise remedial orders;[200] but *Spangler* certainly does not suggest that the mere entry of an initial decree constitutes "accomplishment."[201] Indeed, the Court states:

> There was . . . no showing in this case that [the] changes in the racial mix of some Pasadena schools which were focused on by the lower courts were in any manner caused by segregative actions chargeable to the defendants. *The District Court rejected petitioners' assertion that the movement was caused by so-called 'white flight' traceable to the decree itself.*[202]

The opinion explicitly leaves open the possibility that a trial court, as part of its broad remedial authority to eliminate all effects of a violation, could (and perhaps must) revise its original decree to overcome the effects of any white flight produced by the decree.[203]

It is doubtful, however, that intradistrict decree revisions could recapture enough whites to make this strategy effective. Whites will always remain free to flee any revision, and they will have clear routes for unmolested flight so long as courts lack the power to reach into private schools or other nearby school districts. Even whites who flee within the school district may not be recapturable: At some point, particularly if

198. *See* Valley v. Rapides Parish School Bd., 646 F.2d 925, 942 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

199. 427 U.S. 424 (1976).

200. *Id.* at 436 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971)).

201. In *Spangler*, the Supreme Court understood the trial court to have asserted the authority to maintain a particular racial balance in the schools *indefinitely* and, to that end, revise its decrees repeatedly in light of shifts that might occur *after* the affirmative duty to desegregate was accomplished. *Id.* at 434.

202. *Id.* at 435 (emphasis added).

203. Lower courts have reaffirmed that accomplishing desegregation may require revision of the initial decree. Several courts have specifically indicated that flight unleashes a decree-revision power. *See, e.g.*, Valley v. Rapides Parish School Bd., 646 F.2d 925, 937 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982); Lee v. Macon County Bd. of Educ., 616 F.2d 805, 809-10 (5th Cir. 1980). *But cf.* Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 449 (1980) (Powell, J., dissenting from dismissal of certiorari) (*Pasadena* establishes that "once resegregation occurs without state action courts have no power to impose an additional remedy").

white flight exacerbates residential segregation, the geographic distances may make busing to reestablish integration too costly for both whites and blacks. (Indeed, the very activity of "chasing" after whites may end up being degrading to the black children the court is trying to benefit, and thereby interfere with remedial effectiveness.) The clear advantage of decree revision is that it holds out the prospect of overcoming flight without requiring the courts to engage in before-the-fact speculation about whether flight will actually occur; it does not create the risk that the courts will limit the remedy unnecessarily to prevent white flight that never would have materialized. But a court's initial failure to take strategic steps to prevent white flight makes the victims assume the risk of *irreversible* reemergence of one-race schools and remedial failure, since once white flight has occurred, many whites will be irretrievable.

Theoretically, other remedial strategies directed at escape hatches might reduce incentives for flight.[204] For example, since a necessary condition for flight is the existence of places to which whites can flee without encountering "too many" blacks, the court might in theory consider remedies that tried to affect discriminatory conditions in those places. While it is possible that plaintiffs in a school desegregation case could join as defendants those responsible for unlawful racial discrimination in the relevant escape hatches, courts have not looked favorably on efforts to rope in so much of the world in a single lawsuit.[205] Moreover, desegregating those enclaves would require eliminating not only present discrimination but also overcoming the economic and social disadvantages resulting from society-wide discrimination that would still leave many blacks unable to enter those enclaves.

There is a deeper point here, I think—a point that also summarizes the discussion thus far. Some critics have pointed to the extravagant breadth and coerciveness of integration decrees as the cause of white flight.[206] To the contrary: White flight is a product of judicial modesty and limited judicial power. Judicial remedies are much too narrow in scope to eliminate all the factors that make white flight possible and likely—the attitudes and conditions that make individual whites want to flee, and the existence of white enclaves to which they can flee—even when those factors are rooted in racial discrimination. Remedies in school segregation cases are only a partial and slow-acting response to our country's legacy of racial discrimination. They do not immediately eliminate all effects of

204. Some possibilities with respect to private schools are indicated *supra* note 182.

205. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22 (1971) ("One vehicle can carry only a limited amount of baggage.").

206. *See* L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 16-17, 277-83 (1976).

the defendant's own discrimination that contribute to whites' desire and ability to flee. They do not generally address the consequences of private discrimination or the effects of community-wide or society-wide discrimination, even though the success of remedies for the defendant's discrimination can be thwarted by the effects of the discrimination of others. The limited nature of judicial remedies may doom even limited remedial efforts. School segregation is simply a small part of our deplorable racial past, but to provide truly effective remedies for even that part, it often seems that an entire world must be remade.

3. *Limiting Black Enrollment*

This narrative establishes that an intradistrict remedy preserving one-race schools to prevent flight can be justified, if at all, only after sacrificing some achievable desegregation. It cannot be defended in Rights Maximizing terms, most obviously since interdistrict relief is likely to be more effective. Since all remedies less effective than interdistrict relief necessarily incorporate *Milliken I*'s Interest Balancing tradeoff, a defense of ceilings must be made in *Milliken I*'s Interest Balancing terms. Believing that *Milliken I* was incorrectly decided, I conclude that in most situations racial ceilings are inappropriate and that a more effective interdistrict integration remedy should be ordered. Indeed, now that the consequences of *Milliken I* are clear, the Supreme Court should overrule it.

But a district court judge today has no such power. He cannot disregard *Milliken I* nor can he disregard white resistance and flight. Because of the requirements of precedent and judicial hierarchy, the judge's decisions must reflect the Interest Balancing of *Milliken I*; and they must reflect restrictions on judicial remedial powers entailed by constitutional decisions that guarantee citizens the right to attend private schools and to live where they wish. Within these constraints, a district judge will be driven at least to consider ceilings.

In a school district where the black presence exceeds the tipping point, the remedial imperfection produced by racial ceilings might be justified on either of two grounds. First, given the imperfection of all available remedies, a remedy that helps to prevent flight by using ceilings may produce a more effectively desegregated school system than other remedial alternatives. Second, even if other remedies such as educational sweeteners may raise the tipping point sufficiently to permit the elimination of more one-race schools, a court may decide that the costs of such alternatives are too high.

In light of the first possibility, a failure to consider the option of racial ceilings seriously may further diminish the strength of *Brown* rights, even while seeming to defend them. Professor Alan Freeman, for example, at-

tacks racial ceilings as an example of the law's assuring that the "dominant group's desire for integration supersedes the victim group's demand for relief":

> The purpose of such a quota is to keep the number of black people below the level where . . . the white majority, presumably motivated by racism, will leave the area . . . . Such a quota admits a token number of black people to a more desirable condition of existence, thereby illustrating progress toward the integrated society, while making sure they remain outnumbered by the whites so as to be powerless and nonthreatening. And at the same time the deprivation imposed on those blacks who are denied admission is rationalized as being in everybody's interest since an integrated society is the goal to be attained.[207]

While some racial ceilings may fit this description, Professor Freeman does not adequately take account of the true dilemmas facing any single institution, with limited power, as it confronts the legacy of our racial past. Professor Freeman appears to be an absolutist with respect to the rights of victims to relief, refusing to agree that any forces in tension with full rectification deserve our attention. But if absolutism is impossible, Professor Freeman is a defeatist. While he does not contest the empirical fact of white flight, he counts it simply as unfortunate racist behavior. By ignoring the consequences of white flight on the remedy, Professor Freeman in effect maintains that even limited achievement of the integration ideal is less important than revealing the dynamic of racism and giving the social critic an opportunity to accuse the judiciary of maintaining white domination. I doubt this is the route to greater racial justice. Although grappling with imperfection may be difficult, it is part of the difficulty of the remedial problem, of translating ideals into something real that makes the world somewhat better for at least some people. To reject the imperfect may preserve the horrible.

The current remedial moment presents not a choice between absolutism and the imperfect, but a choice among the imperfect. Faced with resistance, courts should neither ignore it nor immediately capitulate to it. In considering racial ceilings, the first and most important issue is how effective they are compared to other post-*Milliken I* alternatives. Remedies must be compared in light of their potential for securing stable desegregation—that is, both achieving integration and preventing flight. While racial ceilings assure some one-race schools, they also stabilize integration at other schools and may therefore yield fewer one-race schools than alterna-

207. Freeman, *Legitimating Racial Discrimination*, *supra* note 76, at 1075, 1076.

tives do. Thus, a remedy mandating full systemwide integration may end up being less effective if it provokes very extensive flight (although even after flight, it must be remembered, interracial contact in such school districts is likely to be considerably greater than it would have been if no desegregation had been ordered at all).[208] A freedom-of-choice remedy may prevent flight, but may produce sharply limited integration, even with magnet school components; indeed, a choice remedy, like one using racial ceilings, may itself be seen as a limited remedy whose *objective* is to prevent flight by producing limited integration—but it may yield less overall desegregation than a mandatory reassignment plan that uses ceilings. These and other imperfect alternatives must be compared, but a court committed to achieving the greatest degree of prompt and stable desegregation might well restrict the amount of required integration to something less than would be ordered if white flight were not an anticipated problem, and might conclude that a remedy using racial ceilings is now the most effective among the imperfect alternatives available.

Whether using racial ceilings will actually produce the greatest desegregation depends upon the extent to which white flight and integration really will occur under alternative remedial schemes. This empirical question highlights a serious problem with ceilings: Unlike other strategies to avoid tipping, ceilings assure remedial imperfection on the face of the decree. Alternative remedies raise only a probability of remedial imperfection, and imperfection of uncertain dimension. While the premise of ceilings is that white flight must be addressed, realism can be a dangerous aspiration for people, such as judges or law professors, who are often accused of not being realistic enough. Newly initiated into a jurisprudence of limitation, judges may become too "realistic," taking reality to be more resistant than it is. Before ordering an assuredly limited remedy in order to prevent flight, a court must have a strong basis for concluding that white flight actually will be provoked by a more extensive desegregation decree and inhibited by the less extensive one.

The empirical issue is surely a complicated one.[209] The question is not only whether there is strong enough evidence that permanent white flight in response to desegregation decrees has actually occurred; the evidence seems rather convincing that it frequently has. The question is whether, before the event, such flight can be predicted in a way that is provable in court. To the extent that the evidence will be nebulous, there is potential for abuse, mistake, and unwarranted compromise of black children's rights. The available evidence, however, does not support a view that the

208. *See Senate School Busing Hearings, supra* note 114, at 232 (statement of R. Farley); Rossell, *Applied Social Science Research, supra* note 114, at 94, 106.

209. *See supra* note 114.

empirical question will invariably be impossible to answer. Moreover, the dangers surely cut both ways. Failure to take account of white flight can compromise victims' rights too—and if flight occurs, the losses may be irreversible. The victims of segregation are not helped by denying the existence of a palpable reality that can yield self-defeating remedies.

Beyond these basic questions about the comparative effectiveness of ceilings in eliminating one-race schools, the courts must also be sensitive to how ceilings might interfere with remedial effectiveness in more subtle ways. First, a rule allowing courts to limit the scope of integration to prevent resistance and flight would give whites incentives for exaggerated displays of resistance. Second, remedies that limit racial mixing because whites will not tolerate a greater amount may inflict dignitary harms on black children and therefore interfere with the remedy's overall effectiveness.[210] Third, use of a racial criterion in a way that deprives some blacks of a wanted benefit, despite the benefit to other blacks, might be seen to violate the norms of the equal protection clause.

In these last two respects, a racial ceiling that preserves one-race schools falls somewhere between a typical race-conscious integration remedy (or other "affirmative action") and an invidious racial classification. In order to benefit some blacks, it fails to benefit others. It is now settled that race-conscious affirmative action is constitutional in at least some "remedial" contexts.[211] Racial ceilings should similarly satisfy the Constitution in those cases where their use provides the most feasible remedy for school segregation. In those situations, the most important element of traditionally invidious discrimination—group harm—seems not to be present. Group harm seems unlikely if ceilings provide desegregated schooling to more blacks than other remedies would, particularly since ceilings do not deprive any blacks of public schooling itself. (Racial ceilings in the context of public housing might harm blacks more, since such housing is usually a scarce resource.) Moreover, the status of black children may be enhanced, not reduced, when the courts undertake a good faith effort to promote integration; as noted in the discussion of "all deliberate speed," an affront to blacks as a group is unlikely when the courts acknowledge white resistance as a given and attempt to develop feasible remedies. The individual's claim not to be deprived of a benefit because of his race is obviously a strong one; if no available remedy will produce the benefits of integration for all blacks, however, an analysis of the plaintiff class'

210. *See* Brunson v. Board of Trustees, 429 F.2d 820, 824-27 (4th Cir. 1970) (Sobeloff, J., concurring); United States v. Board of Educ., 554 F. Supp. 912, 920 n.9 (N.D. Ill. 1983) (Chicago) (quoting memorandum filed by Urban League); Brest, *supra* note 120, at 18-19.

211. *See* cases cited *supra* note 99; *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-25 (1971) (approving racial ratios as starting point in desegregation remedies).

"group" benefit or stigma is appropriate, even though a racial criterion is used.

For all the problems with racial ceilings, none is sufficiently great to justify a conclusion that ceilings may never be used. Because a remedy that deliberately preserves some one-race schools is an assuredly limited remedy, however, and because it may use a racial criterion as a limiting mechanism, the defendant should have a heavy burden of justification. It should be required to establish either that preserving one-race schools is necessary to maximize integration (that is, white flight would otherwise actually occur and no more effective remedy is available);[212] or that even though more effective alternatives do exist (magnet schools, for example), their costs are so exceptionally burdensome that a tradeoff beyond *Milliken I* should be made.

Moreover, if a court does adopt a remedy preserving some one-race schools to prevent white flight, its plan must carefully avoid compromising blacks' interests beyond the amount necessary to justify the limitation. First, even though educational sweeteners by themselves may be unable to raise the tipping point sufficiently to eliminate one-race schools and prevent flight, court-ordered sweeteners are likely to mitigate some of the remedial limitations of ceilings. By raising the tipping point somewhat, sweeteners may permit the use of somewhat higher ceilings and therefore reduce the number of one-race black schools; if so, they should be required as part of a decree permitting ceilings. Second, the remedy must assure that black children excluded from one integrated school because of a credible fear of white flight have the opportunity to attend any integrated school in the system where flight is not a problem.[213] There is no excuse for denying some black children the benefits of an integration remedy if a practical assignment scheme could provide an integrated setting for them. Third, fair criteria must be developed for deciding which black children must remain in one-race schools.[214] Finally, for those black

212. *See* Brest, *supra* note 120, at 19-21; *cf.* Otero v. New York City Hous. Auth., 484 F.2d 1122, 1135-37 (2d Cir. 1973) (racial ceilings in public housing).

213. Such schools may well exist if the court has made *Swann*-type tradeoffs, declining to *mandate* reassignments to certain schools because of distance and travel time. Just as flight may occur when individuals weigh balanceable costs more heavily than the court does, voluntary transfers might occur when individuals weigh such costs more *lightly*. To some extent, majority-to-minority transfer provisions (allowing students to transfer from schools where their race is a majority to schools where their race is a minority) may be based on this assumption. *See* Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123, 1139-40 (M.D. Ala. 1974), *aff'd*, 511 F.2d 1374 (5th Cir.), *cert. denied*, 423 U.S. 986 (1975).

214. In Adams v. United States, 620 F.2d 1277 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980), the court approved a plan that sought to rotate the group of black children assigned to all-black schools so that every pupil would have at least some of his or her education in an integrated setting. *Id.* at 1293. Other methods of making assignments are imaginable but none is completely satisfactory: individual choice (at least as part of the assignment process), a lottery, minimizing travel time or distance, or designating a class representative to make the assignments.

children who cannot enroll in an integrated school, the court should insure that the one-race setting is at least equal to the integrated settings in all respects other than student racial composition, including facilities, faculty, and expenditures. Beyond that, consideration might be given to providing additional compensatory features in lieu of the benefits that integration itself would presumably have provided.[215]

Returning to Justice Powell's opinion in the Dallas schools case is instructive at this point, since it illustrates some of the problems with racial ceilings and the need for caution in approving them. Justice Powell, it will be recalled, urged the reinstatement of a district court decree that preserved many one-race schools and invoked white flight as a justification.[216] But his call for realism was much too facile. As the Fifth Circuit said in reversing the district court's judgment, the trial judge had simply asserted that further dismantling of one-race schools was impractical and had not considered obvious alternatives (such as greater use of magnet schools) or made adequate findings about the impracticality of more integrative pupil reassignments.[217] Allowing one-race schools to exist may be a last resort, but it is only a *last* resort; it is a step needing careful justification, based on findings of fact and a considered rejection of more effective alternatives. In the event, after the Supreme Court dismissed the petition over Justice Powell's objection, a different district judge did approve a remedy preserving some one-race schools, but only after requiring more complete integration than Justice Powell had so casually assumed was possible.[218]

Finally, remedial theory must accommodate an important feature of the current moment—the erosion of support, even among blacks, for the idea that integration is the proper remedial goal once de jure segregation has been shown. This essay began by noting that remedial "effectiveness" is meaningful only when measured against defined rights and remedial goals. There were many possible ways to define the remedial goals of a desegregation decree;[219] the courts chose integration of previously segregated schools as the centerpiece of the remedial enterprise. Both whites

215. *Cf.* Liddell v. Board of Educ., 667 F.2d 643, 648-49 (8th Cir.) (although "not possible to fully integrate every school in system," plan affirmed because it provided "enhanced educational opportunity for students remaining in the predominantly black schools"), *cert. denied*, 454 U.S. 1091 (1981); Tasby v. Wright, 520 F. Supp. 683, 741 (N.D. Tex. 1981) (in predominantly black schools "beyond the reach of effective desegregation tools," enriched educational components required to promote "equal education opportunity" and "to overcome the built-in inadequacies of a segregated educational system").

216. Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 438 (1980) (Powell, J., dissenting from dismissal of certiorari); *see supra* p. 631.

217. Tasby v. Estes, 572 F.2d 1010, 1014 (5th Cir. 1978), *cert. dismissed*, 444 U.S. 437 (1980).

218. Tasby v. Wright, 520 F. Supp. 683, 749-50 (N.D. Tex. 1981).

219. *See supra* pp. 592-93.

and blacks have increasingly criticized this established legal doctrine as the costs and apparent difficulties of achieving integration have increased and confidence in the educational benefits of integration has decreased.[220] Among blacks themselves, the weakening of support for integration remedies often reflects a certain anger and despair about unyielding white resistance and flight, and the resulting need either to chase after whites (who frequently are able to find escape hatches anyway) or to cater to their racial feelings by one strategy or another. If integration must be pursued in this way, with so little assured success in the end, then why not just abandon integration as the remedial goal?

The recent criticism of integration as the remedial ideal reveals what may be a deeper point—the existence of an ultimate constraint on remedial doctrine: Remedial goals are not simply chosen and fixed for all time. They may in fact evolve. The very process of change may well transform the goals of change. Experience—the experience of white resistance, for example—may change some people's basic concept of the appropriate remedial goal in a desegregation case, of what "desegregation" means, of what the "right" itself is.

For now, though, integration remains the central remedial goal. Improvement of educational quality is also a goal; as a priority, however, remedies must seek to eliminate the unlawful *segregation* that may produce educational problems, not the educational problems that exist within an unlawfully segregated setting that is itself preserved. Perhaps integration will eventually be replaced by other goals, such as educational quality. But the courts today may not abandon feasible remedial integration and replace it with something else. Only when integration is unfeasible, and only for those students for whom integration is unfeasible, is some other remedy appropriate in its place.

V. Doing and Saying: Remedial Limits and Judicial Candor

The remedial dilemmas created by resistance do not end with the substantive decision to delay or otherwise limit a remedy. Linked to that decision is the question of whether judges should candidly say that their remedies are affected by resistance. As noted earlier, judges have often not been candid on this subject. First, they have often failed to acknowledge a gap between rights and remedies. Second, even when acknowledging a gap, they have sometimes failed to admit that they were permitting an imperfect remedy because of white resistance. This lack of candor has been evident in the courts' articulation of general remedial principles,[221] in the

220. *See* D. BELL, *supra* note 76, at 411-31.
221. *See supra* pp. 589-91.

Supreme Court's refusal to admit that its reason for permitting delay in *Brown II* was to address the problem of white resistance,[222] and in some courts' failure to acknowledge that the scope of a desegregation remedy may be limited in order to prevent white flight.[223] This gap between doing and saying, like the substantive compromises it hides, may itself reflect an attempt to mediate between the ideal and the real. But while the courts may properly accept some right-remedy gaps and may sometimes accommodate resistance, their lack of candor about these issues, I believe, is inappropriate.[224]

A. *The Presumption for Candor in Judicial Opinions*

Although candor is generally presumed in judicial discourse, it is not a moral absolute. A relevant example, since it involves the judicial process of achieving change, is that judges are frequently dishonest in the reading of prior cases and the treatment of precedent; judges such as Cardozo are often praised for their ability to secure change in legal doctrine through a "creative"—but not fully candid—reading of precedent.[225] Candor, however, plays a distinctive role in the judicial process, a fact that is highlighted by comparing this example of creative dishonesty with Harold Bloom's analysis of analogous dishonesties that facilitate change within the literary culture. Bloom argues that creative figures in literature, in order "to clear imaginative space for themselves," often misread and trivialize the accomplishments of past writers, and make exaggerated claims for the originality of their own efforts. Only by such dishonest (though not necessarily willful) distancing from the past can these creative figures free themselves sufficiently from the inevitable and potentially suffocating influence of the great texts and thereby make their own, unavoidably small progress.[226]

222. *See supra* pp. 611-12.

223. *See supra* note 136.

224. I am assuming throughout this section, of course, that the courts *are* being less than candid. While this is clearly so with respect to the courts' treatment of resistance, there is another possibility when a court says that a remedy fully cures a violation and an observer says that there is an unacknowledged right-remedy gap: The court may be working with narrower (but perhaps only vaguely expressed) concepts of the right and the remedial goals. In such a case, there may actually be no gap at all between right and remedy.

225. *See* E. LEVI, AN INTRODUCTION TO LEGAL REASONING 6-7 (1948); K. LLEWELLYN, THE BRAMBLE BUSH 56-69 (1930); Lipson, *The Allegheny College Case*, YALE L. REP., Spring 1977, at 8, 10-11; *cf.* Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553, 1583-84 (1974) (creation of precedent shaped by recognition of ways future will use it). Of course, to say that an earlier case is "misread" assumes a certain notion of what "properly" reading that case means and what the doctrine of precedent requires. A development of these issues is beyond the scope of this essay, but most readers will agree readily enough that change in the common law is often secured by giving precedent a highly strained reading.

226. H. BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY 5 (1973); *see* H. BLOOM, A MAP OF MISREADING 83-105 (1975).

While courts also make progress by occasionally misreading prior texts, reading Bloom reminds us how distinctive legal discourse is. For one thing, because of the distinctive norms of the legal culture, the rhetorical strategy of any dissembling is different; rather than exaggerate the novelty of his actions, the creative judge emphasizes the extent to which he is simply doing what has always been done, simply applying established case law. The reason, of course, is that the law's very methods enshrine the past through the doctrine of precedent. Although the creative judge sometimes candidly discards prior cases, the doctrine of precedent pressures the judge to secure progress without visibly tearing the fabric of continuity, by seeming to carry forward the past as he is actually breaking from it. While this lack of candor seems a questionable transfer of a lawyer's argumentative strategy to the judge's craft, the legal culture tolerates and approves some amount of it. Some misreading of prior cases is used to create room for doctrinal change while preserving not only the form of adherence to precedent, but also the degree of continuity that adherence to the form requires and that the norms of the legal culture generally insist upon. Indeed, the boundary of incremental change perhaps can be predicted as the degree of misreading of precedent that will be tolerated.

This suggests a more general and more important point: Candor has a distinctive normative status in law. When poets misread or distort the past as part of the creative process, moral condemnation is inappropriate, absent outright plagiarism. The poetic result is generally self-justifying; we may be enlightened by understanding the process that produced the result, but the quality of the result usually ratifies the process. Law is different; process counts a great deal. Law involves power, and power is justified and limited by process. Candor and sincerity are part of the distinctive process that legitimates judicial power—a process of decisionmaking and discourse whose requirements include writing opinions and giving reasoned justifications.[227] These constraints help to promote the public accountability of judges and to stimulate judicial reflection and self-control. Without a requirement of candor, the constraints would be meaningless. Thus, misreading and other dishonesties in judicial opinions are generally more than craft flaws; candor in judicial reasoning is part of the morality of craft. Candor is not an absolute, but as Guido Calabresi has written in the course of defending occasional judicial dishonesties, "too much use of

227. This is to be contrasted not only with literary life but also with political life, where candor and subterfuge are frequently used instrumentally. Attorney General John Mitchell captured a basic truth about American politicians when he once counselled, "[I]nstead of listening to what we say . . . watch what we do." *Quoted in* W. SAFIRE, BEFORE THE FALL 265 (1975).

[subterfuge] by courts destroys their credibility" and may destroy their fundamental commitment to honesty.[228]

Because of the value attached to candor in executing the judicial function, there must be a powerful presumption that candor is preferable to deception or evasion. Not only must very strong values be interposed to justify judicial subterfuge, but a strong burden of proof must be placed on those seeking to establish the factual premises that would bring those counter-values into play. Given this presumption, I conclude that there are no sufficiently persuasive reasons to justify a lack of candor about a right-remedy gap or the role of resistance in creating it. In particular, subterfuge cannot be justified by arguments that it either serves the victims' interests in an effective remedy or promotes the courts' interests or broader social interests.

B. *The Effect of Candor on Remedial Effectiveness*

Words are deeds, and what courts "do" may turn out differently depending on what they give as an explanation. One possible justification for subterfuge about the place of white resistance in limiting remedies is that it will contribute to remedial effectiveness. Candor, whatever its other virtues, may exacerbate the remedial limitations that result from taking account of resistance—specifically, dignitary harms to blacks and incentives for greater resistance. Concealment might avoid these harms.

1. *Possible Dignitary Harms*

For a court to admit that it is taking account of white resistance might produce dignitary harms if the court is perceived as endorsing white attitudes that lead to resistance and flight. Whether courts would be perceived that way is an empirical question whose answer depends upon a number of variables affecting communication between the courts and the public, only some of which judges control. On the one hand, a carefully written opinion candidly acknowledging the role of white resistance and flight might not be perceived as insulting at all. In a case such as *Brown II*, the Court could state clearly that remedial steps accommodating resistance are being approved reluctantly and only to enhance the remedy's effectiveness. Such a careful explanation would display respect, not disrespect, for the

228. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 175, 180 (1982). Scholarship itself is not immune from this tension. Is recognition to be secured by meticulously collecting and candidly acknowledging all prior utterances that count as influence (thereby inevitably weakening one's own claim to notice) or by exaggerating one's originality (thereby displaying less scholarship and less fidelity to reporting the truth)? Most of us would quickly say that we should and do aspire to the former—but most of us also know that creative leaps, recognition, and influence can often be more easily achieved by exaggerating our originality, and we occasionally succumb. On the subject of candor and dishonesty, see generally S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978); G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1978); L. FULLER, LEGAL FICTIONS (1931).

victims. On the other hand, the dynamic that produces a dignitary affront may be subtler than lawyerly drafting can control. The public, whose reactions are the ones that determine whether there has been an insult, may fail to understand a distinction between accommodating white opposition to maximize remedial effectiveness and legitimating white opposition for its own sake. The mere acknowledgement of white resistance and flight may produce dignitary harm simply by highlighting offensive private conduct.

Moreover, there are two wild cards that complicate the courts' relationship to the public and make it difficult to predict the impact of what a court says. First, since the public rarely reads judicial opinions, its reaction to a court's decision depends on the description and interpretation of that decision by the press; the indispensable and unavoidable role of the press is one of the greatly neglected subjects in debates about the impact and perceived legitimacy of judicial action. Second, it is possible that the manner in which a court justifies a particular remedy will make no dignitary difference at all. We who live by the lamp may exaggerate the importance of words.[229] Reasoned explanations in opinions may promote judicial self-control or provide a basis for external control through criticism by others within the legal profession; the laity, however, may "read" an event a certain way quite apart from the words printed about it. When *Brown II* failed to order immediate compliance, were many people actually misled about the reasons? Did blacks doubt that the reason concerned the prospect of white resistance? Would elaborate words from court or press—whether candid or deceptive—have made any difference?

2. *Possible Incentives for Resistance*

Subterfuge might also be thought to enhance remedial effectiveness because candid acknowledgment of the place of resistance in limiting remedies might create incentives for more resistance.[230] With respect to *Brown II*, the argument might be this: While some white resistance was inevitable, an announcement that the Court was permitting delay to accommodate feared opposition would have invited more opposition by those who wanted to pressure lower courts to extend the period of delay. The point is obviously not trivial, but its empirical predicate is very uncertain, turn-

229. *See* I. BERLIN, THE HEDGEHOG AND THE FOX 24 (1953); McClosky, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

230. *See supra* p. 622. An analagous concern was once noted by Judge Harold Leventhal in explaining why judges should not explicitly instruct juries that they could disregard and "nullify" the governing law in the interests of justice: Some jury nullification was inevitable and even desirable, but explicitness by the judge would encourage nullification beyond the optimal level. United States v. Dougherty, 473 F.2d 1113, 1133-37 (D.C. Cir. 1972).

ing on how the Court would have explained the role of resistance, whether it would also have indicated time frames for white adjustment, and how the court-public relationship discussed above actually would have developed. But it is hard to believe that the Court's failure to acknowledge the true reasons for "all deliberate speed" produced less resistance than a candid and careful explanation would have.

There are analogous but even weaker arguments for subterfuge in the white flight cases. The most interesting possibility is that a candid explanation by the courts that they might limit remedies because of feared white flight would encourage anti-integrationist whites to demonstrate an *exaggerated* likelihood of their flight, and lead courts to order more limited remedies than actually necessary to keep whites from fleeing. The point here really concerns information. A court needs accurate information about the likelihood of flight in order to know whether to limit the remedy; candor might distort the information flow by provoking highly magnified (and socially damaging) threats of resistance. If so, subterfuge (the courts' "secret flight" from resistance, to be literal) might produce less cautious and more effective remedies, premised on more accurate information.

In any event, before concluding that subterfuge serves remedial effectiveness, one must recognize that subterfuge itself also imposes costs on victims. For example, if a court dishonestly says that its partial integration remedy fully cures the violation, it would have to apply that conclusion consistently; being consistent would prevent it from providing supplementary remedies such as damages, which by definition could be awarded only if the violation had not been completely cured. More generally, subterfuge carries a serious risk that the boundaries of any compromise of victim rights will be blurred. Candor helps to prevent slippage—that is, judicial action that ends up allowing a gap between right and remedy beyond what is justified and beyond what was initially thought reasonable. By requiring everyone to face up to the remedial compromise, candor facilitates the control and limitation of compromise.

Overall, then, arguments that subterfuge promotes remedial effectiveness do not seem strong enough to override the powerful presumption for candor. Indeed, given that presumption, the very fact that the empirical basis for such arguments seems so uncertain should be sufficient reason to favor candor.

C. *The Effect of Candor on Judicial and Social Interests*

Even if subterfuge neither enhances nor undercuts remedial effectiveness in a particular case, it may serve the institutional interests of the courts. Some deception may be needed, for example, to forge a majority

opinion (or, as in *Brown II*, a unanimous one).[231] This use of subterfuge might serve an external function, such as promoting public acceptance of some judicial action. Moreover, subterfuge may have no external purpose at all, but may be agreed upon early in deliberations solely to maintain an internal harmony on the court which sustained and candid discourse would disrupt.

A related reason for dishonesty is that a court may be trying to protect either its remedial function in a particular case or its institutional position more generally. It might be thought, for example, that the prestige and authority of courts would suffer if they were to admit candidly that the public sometimes resists their judgments and that they sometimes provide less than full remedies because of such resistance. Even if that were true, though, the courts' prestige also depends on their honesty and candor. Undetected, of course, judicial dishonesty will not harm the courts' public image. But dishonesty always creates the risk of its detection, and, with detection, harm to the courts' stature that may exceed any losses that result from candidly acknowledging limited power.

Lower courts that deny they are limiting remedies because of possible flight may have a different institutional reason for doing so: As inferior courts obliged to follow appellate court precedent, they may believe it necessary, or at least prudent, to invoke Supreme Court language that seems to bar remedial limitation, even if they do not in fact obey that language. As suggested earlier, Supreme Court decisions do not flatly prohibit limiting remedies to take account of white flight;[232] their language should be understood either as a subterfuge itself (in which case its invocation by lower courts raises essentially the same issues as the Supreme Court's own subterfuge) or as a rejection of the white flight limitation only in the particular kinds of fact situations involved in those cases[233] (in which case lower courts are not obliged to apply it more broadly). There is no justification, however, for lower courts' departing from Supreme Court precedent by means of a subterfuge. Even if one believes that at times the lower courts may not only indicate disagreement with appellate courts but also attempt to innovate, it is hard to see how legal rules can evolve in a sensible and orderly way if innovative lower courts conceal what they are doing and thereby make it hard for appellate courts to review the innovation. Whatever justification there may be for a court's creative

231. The subterfuge yielding a majority opinion might be an *ambiguity* that masks differences among judges or an *unambigous* formulation included as the price a judge exacts in return for joining the opinion. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 350 (1974); Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1310-13 (1960).

232. *See* cases cited *supra* note 133.

233. *See supra* pp. 636-37.

"misreading" of its own precedents, lower courts must either follow appellate precedent or candidly reveal their disagreement.

A final possible justification for subterfuge is the "tragic choices" argument that Professor Calabresi has invoked in other contexts. Where fundamental values conflict and courts must choose between them, a subterfuge that conceals the conflict may be "ideal-preserving," whereas candor might erode the ideal. Subterfuge may "hide a fundamental value conflict, recognition of which would be too destructive for a particular society to accept," and thereby may "allow society to hold to two conflicting ideals" without abandoning either.[234] In order to evaluate whether subterfuge might in fact preserve ideals in the context of desegregation remedies, we first must clarify why the courts should seek to preserve an ideal that they choose not to vindicate.[235] After all, while candid acknowledgment of a conflict in ideals would lead to an explicit tradeoff that reduces the "value" of one of the ideals, the reduced value might seem a truer measure of what our values actually are and what our ideal presently is. One possible reason to affirm an ideal in exaggerated form is simply the stability or comfort furnished by illusion; what courts would preserve is not an ideal but the illusion that some norm is our ideal. But there is a better reason: Even though we may not vindicate a norm today, it is not necessarily an exaggeration to affirm that norm as an ideal if we understand the ideal as an aspiration—as something that we hope to be able to vindicate more fully in the future.[236] Preserving the ideal maintains a tug towards a more ideal world.

At least in the context of desegregation remedies, however, I would turn the "tragic choices" justification on its head, and argue that candor itself, and not subterfuge, better preserves ideals against a reality that can erode

234. G. CALABRESI, *supra* note 228, at 172-73; *see* G. CALABRESI & P. BOBBITT, *supra* note 228, at 78-79; Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 428-30 (1979); *cf.* Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REG., Jan./Feb. 1981, at 33, 40 ("[T]he argument against making the process [of valuing life] explicit is . . . that the very act of doing so may serve to reduce the value of those things.").

235. Calabresi distinguishes the "ideal-preserving, conflict-denying, tragic choice" subterfuge from another type that is justified by a more directly functional argument that "sometimes use of indirection and of 'technically incorrect' language [such as phrasing a nonabsolutist rule in absolutist language] can bring us closer to the desired result than would the use of more precise language." G. CALABRESI, *supra* note 228, at 173. This latter "more accurate results" justification would also provide a reason for preserving an ideal that the court chooses not to vindicate. To invoke this justification here, however, would collapse the different types of subterfuge; it would make the "tragic choices" argument dependent on the "more accurate results" argument, not separate from it. Thus we need an explanation for the "ideal-preserving" theory that goes beyond the "more accurate results" rationale.

236. This is clearly true for limited remedies adopted under Rights Maximizing—the right accurately states our norm, and the courts will fully vindicate it whenever it is possible to do so. But even where the courts sacrifice presently achievable versions of a norm because of costs and competing values under Interest Balancing, we can still say that our rights are something more than the net result of the tradeoff between the "right" and other valued "interests" because other forms of remedy are still available.

them. Making explicit both the right and any remedial shortcoming is the best way to preserve the right. A subterfuge that compromises an ideal without saying so creates a risk that the ideal will be weakened, that people will come to think that the ideal *means* only what has been imperfectly realized. By candidly acknowledging that they are providing something less than a full remedy, courts leave the unfulfilled right as a beacon. This leaves open the possibility that at some point the courts themselves will be able to furnish a more complete remedy, or that other branches of government may take action that the court regrettably declares itself unable to do; and it empowers the holders of what has been declared a "right" with moral and legal authority to press for the right's fuller realization. Pretending to have provided a full remedy may remove pressure for a truly full remedy.[237]

Indeed, there is a danger that subterfuge might be used intentionally to serve that function. "Critical" legal scholars have focused attention on the use of "legitimating" devices in the law—ways in which the law seeks to deceive certain social groups that our society is really delivering its ideals, to mask the existence of contradictory norms, and therefore to promote stability and the interests served by the status quo, such as the interests of whites instead of blacks.[238] The tragic choices subterfuge might be seen as such a legitimating device. When used to avoid acknowledging the reality of social conditions that are "too damaging to admit,"[239] this subterfuge bears a striking resemblance to legitimating strategies that critical scholars argue are primarily "damaging" to the underclass and are used for that

237. A third possibility must be acknowledged, however: The courts' words about the nature of their remedies (whether candid or dishonest) may be irrelevant. Once the ideal has been expressed—which is the important step—reality may "speak" for itself about whether the ideal has been implemented. This may be one of the points of the following passage at the end of Roy Wilkins's recent autobiography:

> An enormous discrepancy exists between the way we talk about equality in the abstract and the value as translated into law and practice. History offers us a peculiar irony: the idea, the value of equality is probably nurtured most by the protests of the very people who do not have it. Without us, without our struggle, the country would have foundered in moral emptiness long ago. . . . We have sought justice, only to be thwarted by old hatreds, obstacles that white people have not had to overcome. But we have never given up—never quit. We have believed in our country. We have believed in our Constitution. We have believed that the Declaration of Independence meant what it said. All my life I have believed these things, and I will die believing them. I share this faith with others—and I know that it will last and guide us long after I am gone.

R. WILKINS, *supra* note 80, at 342-43. I suspect that the autonomous tug of the ideal is greatest when the gap between reality and the ideal is so stark that people cannot readily dispute the existence of a gap. What the present moment reveals, however, is that as the most obviously unjust conditions disappear, disputes may emerge about what the ideal of equality really means.

238. *See* Freeman, *Legitimating Racial Discrimination*, *supra* note 76, at 1051-52, 1102-03, 1107-14; Freeman, *School Desegregation Law: Promise, Contradiction, Rationalization*, *supra* note 76, at 75-88.

239. G. CALABRESI, *supra* note 228, at 173.

reason.[240] Stripped of its accusatory garb, the descriptive core of the critical argument seems valid here: Subterfuge functions to weaken the force of the ideal rather than strengthen it.

I see only one significant danger in insisting upon a candid acknowledgment of a right-remedy gap. If judges come to feel freer about separating issues of remedy from issues of right, they might articulate rights too broadly, by removing from their deliberations about the right certain practical constraints that properly play some role in defining those rights.[241] Put another way, if rights-declaring becomes too idealized, is too much of a beacon, the statement of rights may be exaggerated and the difference between what is promised and what is delivered exacerbated. In fact, however, the pressures are all in the other direction: Judges will always be reluctant to advertise that they are delivering less than the "right," and therefore will be far more likely to trim the right to fit the remedy than to exaggerate the right.[242]

In summary, any gap between right and remedy, between the ideal embodied in our rights and the reality of what courts can deliver in a particular case, should be candidly acknowledged rather than concealed by subterfuge. In making that gap visible, we not only preserve ideals but also foster conditions for giving those ideals greater force in the world.

VI. Beyond Remedies

This essay has focused on the problem of resistance at the remedial stage of litigation, arguing that remedies must take account of resistance from the world they hope to transform and that in some cases courts may properly make compromises and limit remedies because of this resistance. What is at stake here, however, concerns rights as well as remedies, and my argument about remedies would be incomplete without suggesting, albeit briefly, its relevance to the constitutional function more generally—and to the activity of legal scholarship itself.

A. *The Domain of Constitutional Law*

My argument is relevant to constitutional rights in two ways. First, the pressure of particular acts of resistance will also inform the scope of rights in particular cases, and at times lead courts to limit the scope of those rights. For example, First Amendment speech rights can be limited in some cases by the so-called "hecklers' veto." While the police must ordi-

240. Indeed, one of Calabresi's examples, terrible jail conditions that society is unwilling to improve, *id.*, points to a concealment that critical scholars would undoubtedly find useful for their thesis.

241. *See infra* pp. 676-80.

242. *See* Fiss, *supra* note 5, at 54-55.

narily move against a hostile crowd that opposes an individual's right to speak, in extreme cases where the police cannot otherwise control the crowd, the police may remove the speaker; his right to speak is limited by the ugly forces of opposition.[243] In the area of sex discrimination, the Supreme Court has upheld a state's refusal to employ female prison guards in an all-male prison because male prisoners might assault them and thereby disrupt prison security.[244] Here, rights to nondiscriminatory employment were compromised because of a threat of violence that had no independent moral weight (to say the least) but that, in the Court's judgment, had to be appeased. In a few cases, lower courts have qualified the rights of white police officers to be treated without racial discrimination by upholding affirmative action plans preferring blacks on the ground that they would do a better job than white police officers in black communities distrustful of or hostile towards white officers.[245] Finally, and most obviously related to this essay, some lower courts have circumscribed individual blacks' rights to nondiscrimination and upheld *voluntary* attempts by school officials to promote stable integration and prevent white flight by limiting the percentage of black students that may be enrolled at particu-

243. Feiner v. New York, 340 U.S. 315 (1951). In *Feiner*, the speaker's First Amendment rights were limited not to maximize the vindication of those rights but to protect public security. If *Feiner* can be justified, the rationale is that the police on the scene had made a reasonable factual judgment that it was impossible to prevent imminent disruption by trying to arrest the crowd of hecklers instead of the speaker. *But cf.* Cox v. Louisiana, 379 U.S. 536, 550-51 (1965) (insufficient showing of imminent violence because of hostile crowd); Edwards v. South Carolina, 372 U.S. 229, 236-37 (1963) (same); Buchanan v. Warley, 245 U.S. 60, 81 (1917) ("[I]mportant as is the preservation of the public peace [by preventing racial conflicts], this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."). One difference between the "hecklers' veto" situation and the desegregation cases suggests why the problem of resistance is particularly difficult in the latter context. A speaker's First Amendment rights can be fully vindicated if the resisting hecklers are simply carted off; in the school desegregation cases, however, white resisters are often needed for a remedy to be effective, and therefore their affirmative cooperation is necessary.

244. *See* Dothard v. Rawlinson, 433 U.S. 321, 334-36 (1977).

245. *See* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); Minnick v. California Dep't of Corrections, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979), *cert. dismissed*, 452 U.S. 105 (1981). This so-called "operational needs" argument is to be distinguished from the more traditional justification for affirmative action—that it reduces an underrepresentation of blacks in the employer's workforce attributable to past discrimination.

A related line of cases involves so-called "customer preferences." An employer or proprietor denies that *it* has discriminatory goals but claims that its customers prefer whites (or some other group) and that it will suffer loss of business or other harm unless allowed to satisfy *their* discriminatory preferences. Customer preferences are generally not allowed to justify discriminatory action. *See, e.g.*, Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (rejecting argument that refusal of defendant's South American clients to deal with female employee justified failure to promote her); Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir.) (striking down airline's policy of refusing to hire stewards despite customers' purported preference for stewardesses), *cert. denied*, 404 U.S. 950 (1971); Wilson v. Southwest Airlines, 517 F. Supp. 292, 298-304 (N.D. Tex. 1981) ("love airline" cannot refuse to hire males because of their lesser sex appeal). *But see* Ward v. Westland Plastics, 651 F.2d 1266, 1269 (9th Cir. 1980) (request of customer to be only woman at meeting allowable defense against exclusion of female employee).

lar schools.[246] Without necessarily defending the results in these particular cases, I believe that their basic message is correct and directly analogous to my discussion of remedies: At least at some point, attitudes of objection and resistance that we disapprove of are properly treated as "regrettable givens" and allowed to limit the scope of rights in particular cases.

The analysis of remedies and resistance is relevant to rights in a deeper and more general sense, however. At stake is not simply a way of understanding remedies, but a way of understanding law—rights as well as remedies—and a way of thinking about the legitimacy of the judicial function in constitutional cases. While judges must carry out their tasks with an idealizing aspiration and reflective detachment different from other political actors, and while rights may be more idealized than remedies, the adaptive strategies and compromises with practicalities considered in this essay pervade all aspects of law. First, just as judges may take account of public attitudes and public resistance at the remedy stage, they may take account of prevailing beliefs and even resistance at the rights-declaring stage as part of the cluster of factors that influence the meaning of our rights and the evolution of their meaning. Second, instrumental and strategic considerations are relevant not only when fashioning remedies but also when defining rights. *Brown II*, the remedy opinion, took account of public attitudes and likely resistance, but so did *Brown I*, the rights opinion. The Supreme Court's understanding of what the textual requirement of "equal protection" meant undoubtedly reflected its judgment that the country was ready for *Brown*, that its abandonment of the "separate but equal" doctrine would at least be able to *generate* sufficient public assent to become a "living truth." The right declared in *Brown I* was not simply an abstract "ideal" in the sense of a utopian possibility; it became the sort of ideal that we call a legal right only because the courts were convinced that it was an ideal that could become real in our society. Moreover, in giving birth to *Brown I*, the Court took account of strategic factors much as it did in thinking about remedies in *Brown II*. Before deciding *Brown I*, the Court strategically prepared the country through a gradual erosion of "separate but equal," and in the end it even *delayed* a decision in *Brown I* to secure greater judicial consensus, a purely instrumental strategy designed to promote public acceptance of the rights in question.[247]

246. *See supra* note 120.

247. The Court ordered reargument of the *Brown* cases at the close of the 1952 Term to address a series of questions that it propounded. *See* Brown v. Board of Educ., 345 U.S. 972 (1953); R. KLUGER, *supra* note 59, at 614-16. The apparent reasons for posing these questions were strategic: to buy time to resolve internal disagreements on the Court, *id.*; to learn the views of the new Eisenhower administration on which the Court would be dependent for enforcement of a decision barring segregation, *id.* at 601-02; and, as Justice Frankfurter wrote to his colleagues, "[i]nsofar as the questions

The essence of constitutional law is that it is an idealizing activity. It involves a text that reflects not simply a commitment to certain vaguely defined norms but a commitment to the *idea* that we are a society with norms that stand above the hurly-burly tradeoffs of day-to-day public life. Its custodians are judges whose oath of office requires them to take the idealizing aspiration as their inner frame of mind, and whose role and craft require them to be detached from the political arena and to follow processes conducive to reflection and reason. Indeed, the enduring sense of the legitimacy of judicial review rests upon the public's acceptance of the idea that our society is nourished by giving both speech and power to this idealizing mode as one among many insistent forces that clash in our public life. But the idealizing mode in law is always tempered by the reality it serves. A good society needs voices that speak the language of utopian idealism, but constitutionalism is not such a voice; it is a curious sort of idealism that is bound to the *Zeitgeist*—and if it drifts off too far, it is borne back ceaselessly to the real.

In interpreting a constitutional text, courts do not and should not simply "read the election returns"—that would deny the essence of constitutionalism as an idealizing activity, as an activity that offers norms whose source transcends mere popular preference. But courts read the text illuminated by the world outside judicial chambers. They read the Constitution, as Justice Frankfurter once said, with the "gloss which life" puts upon it.[248] And they read the Constitution knowing that they must at least generate assent to the norms that they affirm, or else life will corrode their interpretations. The claims of reality are felt starting at the rights stage, and simply continue, more insistently, at the remedies stage. In short, all realms of constitutional law struggle with the tension between the ideal and the real, the duality of aspiration and compromise. Pervasively, the enterprise involves both idealization and the need to take reality into account, including compromises with the reality of resistance and public opposition; pervasively, the nature of the enterprise includes strategic and instrumental considerations, along with elaboration of principles. This is what the judicial function in constitutional cases is, and, as best as I can determine, always has been. Considerations of the legitimacy of this function must take this description of the function as a starting point.

Other constitutional scholars have appreciated and explored the duality of constitutional adjudication, but at times their approaches appear to reflect an understanding of constitutional law quite different from mine. In

dealing with remedies may indicate that a decision against segregation has been reached by the Court," to allow "an adjustment [to] be made in the public mind to such a possibility," *id.* at 615.

248. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

The Forms of Justice,[249] for example, my colleague Owen Fiss agrees that constitutional adjudication is both idealizing and adaptive, but for him the tension between the ideal and the real is embodied in a sharp dichotomy between rights and remedies: "Rights operate in the realm of abstraction, remedies in the world of practical reality"; they constitute "the world of the ideal and the world of the practical."[250]

This characterization of the right-remedy dichotomy is not simply descriptive; for Fiss, the very legitimacy of judicial action depends upon judges' keeping their adaptive relationship with reality cordoned off in the separate realm of remedies. The rights-declaring stage is where a judge who must be "objective" and "independent"—independent of politics and unaffected by the will, the beliefs, and the moral preferences of the general public—searches to "discover the true meaning of our constitutional values," whose existence Fiss presumes.[251] The remedy stage is a separate realm of "instrumental" and "adaptive" judgments, where the judge seeks to give that meaning a reality and "to be efficacious in a world in which his power is limited" and social forces may be "unyielding."[252] Remedy supplying requires judges to be strategic and at times to "accept the reality of . . . limits and compromise [their] original objective in order to obtain as much relief as possible"; it requires judges "to enter the world of politics" and, in the end, "to surrender some of their independence."[253] Pure rights, dirty remedies.

I disagree with Fiss' view for several reasons. First, as a description of actual judicial behavior, Fiss' distinction between rights declaring as "the world of the ideal" and remedy supplying as "the world of the practical" is much too sharply drawn. All dimensions of the law are affected by the world of the practical, the real, the subjective, the political—in short, "the world" as we know it.[254] The duality of the ideal and the real exists, but it pervades the judicial function. The two-sidedness is not conveniently deposited in the separate categories of right and remedy. The practicalities cannot be cordoned off into a separate domain to keep rights-declaring purely "ideal." There is a permeable wall between rights and remedies:

249. Fiss, *supra* note 5. Other writings that reflect a particularly strong sense of a similar duality include: A. BICKEL, *supra* note 59; E. ROSTOW, THE IDEAL IN LAW 1-12, 72-73 (1978); Burt, *supra* note 80; Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982).

250. Fiss, *supra* note 5, at 52, 58. Most of the descriptive phrases used in this and the following paragraph are taken from Fiss' article.

251. *Id.* at 11-17, 51-52, 58.

252. *Id.* at 54, 57.

253. *Id.* at 46, 54-55, 57.

254. Elsewhere, in fact, Fiss has stated that the courts' "understanding of [public] values . . . is necessarily shaped by the prevailing morality." Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 753 (1982). The prevailing morality of a society is inseparable from the practicalities, feasibilities, and political realities of that society.

The prospect of actualizing rights through a remedy—the recognition that rights are for actual people in an actual world—makes it inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.[255] In fact, as the desegregation problem illustrates, experience with remedies may lead people over time to change their understanding of the underlying rights.

Nor does Fiss' sharp bifurcation of rights and remedies solve the problem of legitimacy. For Fiss, the bifurcation of functions protects the legitimacy of the judicial enterprise by isolating at least one activity, rights-declaring, that operates in "the world of the ideal" and therefore can satisfy his austere standards for judicial legitimacy: independence and objectivity.[256] Having isolated and legitimated the pure rights-declaring function, he then tries to leverage in the impure remedy-supplying function like a tied product. But given Fiss' own premises of legitimacy, the tie-in, the "unity of functions" as he calls it,[257] is hard to defend. If legitimacy is undercut when judges behave adaptively and compromise with realities, then this behavior undercuts legitimacy at whatever "stage" it occurs. The problem cannot be solved by the bifurcation of rights and remedies.[258]

I doubt that the legitimacy problems can be solved starting from Fiss' premises. One must either require judges to give up certain adaptive behavior at the remedy stage, or recognize that certain kinds of adaptiveness

255. Indeed, in an earlier work, Professor Fiss himself noted that "[a] judgment about violation should reflect, and in fact does reflect, a judgment about remedy." O. FISS, *supra* note 5, at 55-56.

256. Fiss, *supra* note 5, at 12-14, 51-53.

257. *Id.* at 52.

258. Fiss recognizes legitimacy problems, but insists on preserving the judicial remedy function. Thus, Fiss himself acknowledges that at the remedy stage a judge is involved in matters concerning which he has "no special claim of competency" and his independence is compromised. *Id.* at 51-55. While this alone seems a rather devastating admission given Fiss' premises of legitimacy, the more serious danger for Fiss—"the core dilemma" as he calls it, *id.* at 53—is that pressures from reality that lead a judge to view his remedial task politically or to compromise the remedy will spill over to the *rights-declaring* stage. "[D]istortion will be felt in the realm of rights, too . . .," writes Fiss, and the judge "will tailor the [substance of the] right to fit the remedy." *Id.* at 55. Fiss notes certain "palliatives," but also their limitations, and ends up concluding that the judge must "live with" the dilemma. *Id.* at 55-58.

Professor Fiss' main argument against a division of functions is that it "necessarily creates the risk that the remedy might distort the right, and leave us with something less than the true meaning of the constitutional value." *Id.* at 53. I do not doubt that a separate remedial agency may create some risks of remedial compromise since it might be less sympathetic to the right than the court that declared it; yet, as Professor Fiss recognizes at another point in his discussion, the prospect that a remedy will "compromise" the right and "leave us with something less than the true meaning of the constitutional value" is centrally a consequence of the limiting social forces that will affect any remedy-supplying agency, including courts. *Id.* at 54-55. It is hard to believe that a division of functions would compromise the actualization of rights so much more than unity of functions that we should accept the price that follows from Fiss' premises—corruption of the very legitimacy of judicial action at both the right and remedy stages. If Fiss' conditions for establishing judicial legitimacy are correct, the courts should abandon the remedy-supplying function. For another critique of Professor Fiss' position, see P. SCHUCK, *supra* note 24, at 173-78.

do not undercut the necessary conditions for legitimacy. My own view is the latter; Fiss has created his own dilemma, I think, by insisting on concepts of judicial independence and objectivity that are far too extreme. A necessary task, of course, is to establish boundaries on the instrumental, the political, and the "real" in the judicial realm. But my critical point for present purposes is that once one appreciates the necessary duality of constitutional adjudication, problems of judicial legitimacy are not solved by segregating rights from remedies, or by shifting the problems to the theoretically separate realm of remedies. The legitimacy of constitutional adjudication rests in large part on its idealizing aspirations, but it cannot be defended by the pure idealism of any "stage" of adjudication. If constitutional adjudication as we know it is to be deemed legitimate, the conditions of legitimacy must accommodate both the idealizing and adaptive nature of the enterprise and the pervasiveness of the duality.

B. *The Domain of Legal Scholarship*

To view law's characteristic role as mediating between the ideal and the real also has implications for legal scholarship itself. Indeed, by its very preoccupation and mode, this essay is a response to two emerging trends in legal scholarship. The first trend, largely shaped by persons well read in philosophy or economic theory, involves the articulation of ideal theories of justice or idealized models of economic behavior. For these scholars, messy reality seems almost to be an intrusion into otherwise perfect theories, at most the occasion for last-page acknowledgement of "some problems" with the models and theories they have articulated. To be *of the law*, as opposed to philosophy and economic theory, however, one must take reality as the primary realm of activity. Law moves beyond articulation to implementation, and legal scholarship therefore must address the complexities of acting within an imperfect, resisting, often vulgar real world. In law, reality is not a footnote to theory or an appendix to the ideal. The claims of reality are a central intellectual imperative as much as a practical one.

The second trend in legal scholarship that I resist is one that largely developed out of the radical politics of the late 1960's and that involves a dismissal of idealistic conceptions of law. For these scholars—I have in mind at least one strand of the critical legal studies movement—the reality of social and class relationships are the determinants of judicial power.[259]

259. In the field of antidiscrimination law, the best example is Freeman, *Legitimating Racial Discrimination*, *supra* note 76. The critical legal studies movement is diverse, however, and other strands do accept significant transforming possibilities. *See, e.g.*, Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243 (1978); *see also* E.P. THOMPSON,

For them, the task of legal scholarship is to unmask the way that law legitimates power relationships preexisting in society. Just as I resist the first trend because it constructs overly idealized theories and models, I resist this second trend because it exaggerates the constraints of reality. It trivializes the idealizing dimension and transforming possibility of law, and deprives actors in the legal system of their deserved sense of triumph in having utilized that idealizing aspiration to transform reality. Law can be adequately understood only by recognizing how the ideal and the real influence it simultaneously.[260] Law expresses principles that are shaped by the social reality that those principles are also able to shape.

My discussion of resistance to desegregation decrees is obviously not intended as a direct refutation of either trend in legal scholarship, but it does illustrate some complexities that each ignores: that law is nothing without reality, that law can and does pursue the ideal, and that the distinctive drama of legal life is that it requires living well with both.

WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 265 (1975) (legal rules "may disguise the true realities of power, but, at the same time, they may curb that power"). *See generally* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982) (collecting essays by various critical legal scholars).

260. *See* Underwood, *Against Dichotomy*, 90 YALE L.J. 1004 (1981).

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