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# STUBBORN FACTS OF HISTORY—THE VESTIGES OF PAST DISCRIMINATION IN SCHOOL DESEGREGATION CASES

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In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist.<sup>1</sup>

## *Abstract*

*In Board of Education v. Dowell,<sup>2</sup> the United States Supreme Court pronounced that in order for a school district previously found liable for intentional segregation of students by race to be released from court supervision, it must comply in good faith with a remedial decree and eliminate the vestiges of past discrimination*

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1. *Freeman v. Pitts*, 112 S. Ct. 1430, 1448 (1992). Importantly, Justice Kennedy's opinion for the majority continues:

But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied.

*Id.*

2. 498 U.S. 237 (1991).

to the extent practicable. This Article examines that standard, proposes a test for identifying such vestiges (with attendant burdens of proof), and suggests that one important consequence of the standard is the impetus it may provide for bringing school desegregation cases to negotiated resolution.

## I. INTRODUCTION

IT is difficult to determine precisely how many school districts across the country remain involved in litigation over their constitutional duty to desegregate previously *de jure* segregated public schools, but they number, conservatively, in the hundreds,<sup>3</sup> and include many of the largest districts in the nation.<sup>4</sup> The legal process, which has prompted lengthy congressional hearings,<sup>5</sup> consumed unfathomable legal and judicial resources, embroiled state and local school officials as well as entire communities in controversy, and forever changed America, began, of course, on a national scale in 1954, when the United States Supreme Court, in *Brown v. Board of Education*,<sup>6</sup> stated the now-familiar doctrine that "in the field of public education the doctrine of 'separate but equal'

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3. David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, STAN. L. & POL'Y REV., Winter 1992/93, at 61, 63, (citing KARL TAEUBER, RESEGREGATION OF PUBLIC SCHOOL DISTRICTS, 1968-1986 (working paper 1990), and OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., 1990 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS SURVEY: COURT-ORDERED SCHOOL DISTRICTS).

According to one study, more than 960 districts underwent desegregation from 1968 to 1986. The Office for Civil Rights of the Department of Education lists 256 districts with combined enrollments of over two million students, 46 percent of whom are minority, currently operating under court supervision in cases brought by the Justice Department.

*Id.* (footnotes omitted).

4. See Brief *Amici Curiae* for the Council of Great City Schools, the American Association of School Administrators, and the National Association of Secondary School Principals at 1-3, *Board of Educ. v. Dowell*, 498 U.S. 260 (1991) (No. 89-1080) (stating that the Council "is a coalition of 45 of the largest urban public school districts in the United States. Council members educate 12 percent of the nation's schoolchildren and one-third of the nation's minority children . . . . 13 of the Council's 45 member districts are currently under active federal court supervision . . . . [T]he status of [another] 17 districts is unclear because . . . active supervision of [their] orders has ceased without a declaration of . . . unitariness.").

5. See, e.g., *Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. (1981) (hearings held on March 11, 1981, March 18, 1981, April 1, 1981, and May 4, 1982).

6. *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483 (1954).

has no place. Separate educational facilities are inherently unequal."<sup>7</sup>

One year after its landmark declaration, the Supreme Court took up the somewhat more mundane "consideration [of] the manner in which relief is to be accorded."<sup>8</sup> Acknowledging that "[f]ull implementation of these constitutional principles may require solution of varied local school problems,"<sup>9</sup> and that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems,"<sup>10</sup> the Supreme Court remanded the cases to the respective "District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties [plaintiffs] to these cases."<sup>11</sup>

Since *Brown II*, evolving case law regarding the constitutional imperative to desegregate schools has seen the Supreme Court issue dozens of major opinions which, *inter alia*, affirmed liability in northern school districts where racial segregation was not compelled by state law,<sup>12</sup> mandated the adoption of affirmative plans (beyond "freedom of choice" plans<sup>13</sup>) intended to result in a "speedier and more effective conversion to a unitary, nonracial school system,"<sup>14</sup> approved the use of racial balance requirements as "a starting point in the process of shaping a remedy,"<sup>15</sup> with attendant use of "bus transportation as one tool of school desegregation,"<sup>16</sup> and approved remedial educational programs as part of a desegregation decree.<sup>17</sup>

Notwithstanding this imposing body of jurisprudence, the Su-

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7. *Id.* at 495.

8. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294 (1955).

9. *Id.* at 299.

10. *Id.*

11. *Id.* at 301.

12. *See Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (prima facie case of unlawful segregation where there is finding of intentionally segregative school board actions in meaningful portion of school system; authorities have burden of showing that other segregated schools were not result of intentionally segregative actions).

13. *See Green v. School Bd.*, 391 U.S. 430, 431 (1973) (rejecting school board's freedom of choice plan).

14. *Id.* at 441.

15. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

16. *Id.* at 30.

17. *See, e.g., Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977) (educational remedies deemed necessary to make whole victims of *de jure* racial segregation).

preme Court did not articulate a standard by which such cases should be concluded and court jurisdiction terminated until 1991.<sup>18</sup>

## II. DOWELL—A STANDARD FOR TERMINATION

Prior to *Board of Education v. Dowell*,<sup>19</sup> there was considerable confusion over the use of the term "unitary" as the criterion governing when a school system should be released from court supervision.<sup>20</sup> The Supreme Court noted in *Dowell* that some courts had used "unitary" "to identify a school district that has completely remedied all vestiges of past discrimination," and was thus entitled to have control over educational matters returned to it,<sup>21</sup> while other courts used the term merely "to describe any school district that has currently desegregated student assignments," even if it "nevertheless still contain[ed] vestiges of past discrimination."<sup>22</sup> The Court went on to question the value of "words such as 'dual' and 'unitary,'" in light of the different ways they

18. Note, however, that in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), the Supreme Court ruled that a district court had fully performed its function of remedying *de jure* segregation once it had implemented a racially neutral attendance plan, and that an attempt to impose an annual reassignment requirement to preserve "racial balance" ("no majority of any minority") was an abuse of discretion.

19. 498 U.S. 237 (1991).

20. The Supreme Court introduced the term "unitary" in *Green v. School Bd.*, 391 U.S. 430 (1973): "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . . [I]f there are reasonably available other ways . . . promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable." *Id.* at 436, 441.

The absence of a definition of "unitary" from the Supreme Court was widely noted and commented on. *See, e.g., Keyes v. School Dist. No. 1*, 609 F. Supp. 1491, 1516 (D. Colo. 1985) (stating that the Supreme Court "has never defined 'unitary'"); Owen M. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 697 (1971) (defining unitariness as "the central riddle of the law of school desegregation"); Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 729, 792 (1986) ("The central termination question . . . is what it means to 'accomplish' desegregation and achieve 'unitary' status.") (emphasis added).

For an excellent discussion of the confusion over the meaning of "unitary" published before *Dowell*, suggesting a distinction between "surface vestiges" (*e.g.*, racial segregation of students, faculty and staff, faculty-student ratios), which can be readily eradicated, and "underlying vestiges" that are more difficult to affect (*e.g.*, residential segregation, location and size of schools), see G. Scott Williams, Note, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM. L. REV. 794 (1987).

21. *Dowell*, 498 U.S. at 245 (citing *United States v. Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987); *Riddick v. School Bd.*, 784 F.2d 521, 533 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); *Vaughns v. Board of Educ.*, 758 F.2d 983, 988 (4th Cir. 1985)).

22. 498 U.S. at 245.

had been used, and noted that it was not clear in which sense the district court in *Dowell* was using "unitary."<sup>23</sup>

Accordingly, the Supreme Court declined to overturn the court of appeals' conclusion that the district court's earlier finding of unitary status did not terminate the Oklahoma City school litigation, since its order had not dissolved the desegregation decree, and further explained:

In *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424 (1976), we held that a school board is entitled to a rather precise statement of its obligations under a desegregation decree. If such a decree is to be terminated or dissolved, respondents as well as the school board are entitled to a like statement from the court.<sup>24</sup>

However, saying that a school board and a plaintiff class are entitled to a precise statement of when a remedial decree is to be terminated does not describe the standard by which a court should make such a determination. Accordingly, the Supreme Court rejected arguments that a desegregation decree, like other injunctions, should not be "lifted or modified absent a showing of 'grievous wrong evoked by new and unforeseen conditions,'" and that "compliance alone cannot become the basis for modifying or dissolving an injunction."<sup>25</sup> In determining whether to conclude a school desegregation case and to terminate the court's jurisdiction, "[t]he District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."<sup>26</sup>

While the quality of "good faith" may complicate somewhat the first prong of the test,<sup>27</sup> the receipt and evaluation of evidence

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23. *Id.* at 246. The Supreme Court cited as further evidence of such confusion, the effort to distinguish "between a 'unitary school district' and a district that has achieved 'unitary status.'" *Id.* at 245 (citing *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985) (the latter being a school system which "has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures").

24. 498 U.S. at 246.

25. *Id.* (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)).

26. *Id.* at 249-50.

27. Earlier in the opinion, the Court recited a district court finding that "it was unlikely that the [Board] would return to its former ways" as integral to a conclusion that "the purposes of the desegregation litigation has been fully achieved." *Id.* at 247. Further, a district court does not have to accept the promise of a school board that "has intention-

to determine whether a desegregation decree has been complied with does not, as a judicial inquiry, appear different in kind than a district court determining whether its injunctive decrees have been complied with in other types of cases.

How a district court should determine whether a defendant has met the second prong of the test (*i.e.*, "whether the vestiges of past discrimination [have] been eliminated to the extent practicable"), however, appears a far more novel matter.

To the extent that the remedial decrees entered by district courts in the first instance were intended explicitly to end segregative and discriminatory practices and to eliminate the vestiges thereof,<sup>28</sup> one might surmise that the two prongs of the test in *Dowell* really collapse into a single standard based on defendants' adherence to a remedial decree. Indeed, such an approach has been advocated at the district court level by a school board alleging it had complied with outstanding court orders, thus depriving the district court of authority to order further remedial measures,<sup>29</sup> as well as by a former Solicitor General of the United States.<sup>30</sup> This

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ally discriminated that it will cease to do so in the future. But . . . a school board's compliance with previous orders is obviously relevant." *Id.* at 249; *see also* *United States v. Fordice*, 112 S. Ct. 2727, 2744 (1992) ("Where the State can accomplish legitimate educational objectives through less segregated means, the courts may infer lack of good faith; 'at the least it places a heavy burden upon the [State] to explain its preference for an apparently less effective method.'" (quoting *Green v. School Bd.*, 391 U.S. 430, 439 (1973))).

28. *See, e.g., Green*, 391 U.S. at 439 ("The burden on a school board today is to come forward with a plan that promises realistically to work . . . until it is clear that state-imposed segregation has been completely removed."); *see also Kelley v. Metropolitan County Bd. of Educ.*, 687 F.2d 814, 816 (6th Cir. 1982) (asserting that "the School Board remains under its duty 'to eliminate from the public schools all vestiges of state-imposed segregation'" (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971))).

29. *See Coalition to Save Our Children v. Board of Educ.*, 757 F. Supp. 328 (D. Del. 1991).

30. The Solicitor General advanced this argument even more directly in the United States *Amicus* Brief to the Supreme Court in *Pitts*:

[W]hen the federal courts have entered a comprehensive desegregation decree, that decree and the district's obligation during the pendency of the decree to take all practicable measures to remove the vestiges of any prior invidious discrimination define the scope of the local district's 'affirmative duty' to desegregate its schools . . . . [W]e do not believe that a school district that has complied in good faith with the orders of the federal courts, and has not otherwise violated the Equal Protection Clause, should be subject to additional affirmative duties defined only in the context of a determination whether the school district has become unitary . . . . [I]f the parties to a desegregation decree believe that changed conditions have made the decree ineffective to deal with

effectively would render the second part of the *Dowell* test—whether such vestiges have been eliminated to the extent practicable—without independent significance.

In an opinion issued barely a month after *Dowell*, the district court in *Coalition* disagreed with such an approach, and stated that if compliance with current orders did not “result in progress toward the eradication of the vestiges of prior segregation ‘root and branch,’ the court *can and should order further remedial actions.*”<sup>31</sup> And in *Pitts*, the Supreme Court reiterated that “compliance” was not dispositive with respect to the issue of relinquishing jurisdiction, but was simply “a factor.”<sup>32</sup>

Independent of the question of compliance, however, the precise meaning of the second prong of the *Dowell* test is somewhat problematic. It might be construed as an invitation to district courts to reexamine their decrees to determine if (as in *Coalition*), despite arguably full compliance with prior orders, the intended result—i.e., a fully desegregated school system freed of vestiges—has not been realized. It may be construed even more broadly, as an invitation to district courts to issue further orders to address any remaining “vestiges of past discrimination” that, for whatever reason, were never addressed at the original trial or in the remedial decree.<sup>33</sup> Further compounding such uncertainty is the phrase “to the extent practicable,” the meaning of which has not been elucidated by the Supreme Court, and which presumably represents another aspect of

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the problems at which it was directed, they have the burden to move promptly to seek revision of the decree . . . . After all, a desegregation plan is a final judgement; . . . satisfactory implementation of a judgment normally should discharge a defendant from further obligations.

Brief for the United States as *Amicus Curiae* Supporting Petitioners at 10 n.5, *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) (No. 89-1290). See generally FED. R. CIV. P. 60(b)(5) (regarding relief from a judgment on the basis that it has been satisfied).

31. 757 F. Supp. at 331 (emphasis added); see also discussion of *Pitts*, *infra* notes 46-49 and accompanying text.

32. *Pitts*, 112 S. Ct. at 1449 (“We stated in *Dowell* that the good faith compliance of the district with the court order over a reasonable period of time is a factor to be considered in deciding whether or not jurisdiction could be relinquished.”) (citation omitted); see also *Jenkins v. Missouri*, Nos. 90-2238, 91-3636, 92-3194, 92-3200, 1993 U.S. App. LEXIS 31204, at \*28-29 (8th Cir. Nov. 29, 1993) (“These tests [requiring elimination of vestiges], articulated in *Dowell* and *Freeman*, answer the State’s argument that . . . compliance with the court order is all that is required.”).

33. Indeed, the Supreme Court has instructed district courts to examine “every facet of school operations” before a school district is released from court supervision. *Dowell*, 498 U.S. at 250 (citing *Green v. School Bd.*, 391 U.S. 430, 435 (1973)); see also *infra* notes 106-12.



district court discretion in applying the *Dowell* test.<sup>34</sup>

Lest there be any uncertainty as to the significance of "vestiges" in analyzing the status of a school desegregation case, the Supreme Court's most recent pronouncement on school desegregation, *Freeman v. Pitts*, repeated that "[t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system."<sup>35</sup> Clearly, then, before properly terminating school desegregation litigation, district courts must find that the vestiges of past discrimination have been eliminated to the extent practicable. Accordingly, they will be obliged to identify, at least implicitly, such vestiges.

What are the "vestiges of past discrimination"?

### III. VESTIGES—THE *GREEN* FACTORS AND MORE?

The Supreme Court has never defined the term "vestiges,"<sup>36</sup> except, perhaps, by implication.<sup>37</sup> In *Milliken II*, the Court advised that "federal-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."<sup>38</sup> More recently, and

34. Following the Supreme Court's remand in *Dowell*, the district court therein stated:

[T]he phrase "to the extent practicable" should be taken to limit the duration of a desegregation decree and its busing mandate to a reasonable time frame for what the Supreme Court has said is to be "a temporary measure." [498 U.S. at 247.] Continuing busing for decades and decades until residential segregation is somehow removed is not practicable, because of the extended loss of control school boards would suffer over their own schools, the extended burden that would be imposed on generations of innocent school children, and the inconsistency of such a requirement with the Supreme Court's pronouncement that the decree be "temporary" and "transitional."

*Dowell v. Board of Educ. (Dowell Remand)*, 778 F. Supp. 1144, 1172 (W.D. Okla. 1991).

35. 112 S. Ct. 1430, 1443 (1992). Accordingly, the Court reaffirmed its "formulation in *Dowell* of the duties of a district court during the final phases of a desegregation case." *Id.* at 1446.

36. See *Dowell*, 498 U.S. at 261 (Marshall, J., dissenting) (pointing out that "the Court has never explicitly defined what constitutes a 'vestige' of state-enforced segregation"); *Pitts*, 112 S. Ct. at 1451 (Scalia, J., concurring); *infra* note 39.

The dictionary defines 'vestige,' in pertinent part, as "[a] surviving memorial or trace of some condition, quality, practice, etc., serving as an indication of its former existence." II COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3620 (1971).

37. See *United States v. Fordice*, 112 S. Ct. 2727, 2735 (1992) ("[A] State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation."); *infra* note 111.

38. 433 U.S. at 282.

in the affirmative, the Court stated in *Freeman v. Pitts*: "The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied."<sup>39</sup>

While the Supreme Court in *Swann* authorized district courts to use the "breadth and flexibility . . . inherent in equitable remedies" to eliminate "all vestiges of state-imposed segregation,"<sup>40</sup> its earliest recitation of conditions that may properly be subsumed in the phrase "vestiges of past discrimination" actually came earlier, in *Green*. Therein, the Court noted that racial identification of schools in the district extended not only to student assignments, "but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities."<sup>41</sup> Since then, the so-called "*Green* factors" have been widely recognized as integral to any analysis of whether a school district is entitled to be relieved of federal court supervision.<sup>42</sup> In *Swann*, the Supreme Court reaf-

39. 112 S. Ct. at 1448. Like the foregoing pronouncement from *Milliken II*, this standard describes the *legal* question of what may, as a matter of law, constitute a vestige, in contrast to the *factual* question of what such vestiges are in a particular case. See *infra* text following note 104.

Justice Scalia did not find the *Pitts* majority's guidance helpful:

[T]he effects of unconstitutionally operating a legally segregated school system . . . are uncommonly difficult to identify and to separate from the effects of other causes. But one would not know that from our instructions to the lower courts on this subject, which tend to be at a level of generality that assumes facile reduction to specifics . . . . We have never sought to describe how one identifies a condition as the effluent of a violation or how a "vestige," or a "remnant" of past discrimination is to be recognized. Indeed, we have not even betrayed an awareness that these tasks are considerably more difficult than calculating . . . [e.g., the incremental value of an unconstitutional tax]. It is time for us to abandon our studied disregard of that obvious truth, and to adjust our jurisprudence to its reality.

112 S. Ct. at 1451 (Scalia, J., concurring).

40. 402 U.S. at 15.

41. *Green v. School Bd.*, 391 U.S. 430, 435 (1973). The Court also explained that there was "no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case." *Id.* at 439.

42. See, e.g., *Swann*, 402 U.S. at 18. In *Pitts*, the Supreme Court described the *Green* factors as "various parts of the school system which, in addition to student attendance patterns, must be free from racial discrimination before the mandate of *Brown* is met," and, collectively, as "a measure of the racial identifiability of schools in a system that is not in compliance with *Brown*." 112 S. Ct. at 1443; see also *Pitts v. Freeman*, 887 F.2d 1438, 1445 (11th Cir. 1989) ("A review of these six [*Green*] factors constitutes the best approach for determining whether a school system has eliminated the vestiges of a dual system."), *rev'd* 112 S. Ct. 1430 (1992).

firmed that "existing policy and practice with regard to [the *Green* factors are] among the most important indicia of a segregated system,"<sup>43</sup> a point the Court reiterated in *Dowell*.<sup>44</sup>

Indeed, one might have asked whether there were any conditions *other* than the *Green* factors that, as a matter of law, ought (or could) be considered in determining unitary status. In a footnote to the majority opinion in *Dowell*, the Supreme Court apparently answered the question in the affirmative, albeit implicitly, by acknowledging the possibility that present-day patterns of residential segregation also could constitute a vestige which must be eradicated, and thereupon directed the lower courts to treat such question as new matter, on remand.<sup>45</sup>

Most recently, in *Freeman v. Pitts*, the Supreme Court eliminated any question as to the exclusivity of the *Green* factors:

It was an appropriate exercise of its discretion for the District Court to address the elements of a unitary system discussed in *Green*, to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to insure full compliance with the court's decree.<sup>46</sup>

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43. 402 U.S. at 18.

44. 498 U.S. at 250.

45. *Id.* at 250 n.2.

As noted above, the District Court earlier found that present residential segregation in Oklahoma City was the result of private decisionmaking and economics, and that it was too attenuated to be a vestige of former school segregation. Respondents contend that the Court of Appeals held this finding was clearly erroneous, but we think its opinion is at least ambiguous on this point . . . . To dispel any doubt, we direct the District Court and the Court of Appeals to treat this question as *res nova* upon further consideration of the case.

*Id.*

The phrase, "present residential segregation" evidently was intended to describe something other than the matter of "student assignments," as identified in *Green*. On remand, the district court found that "residential segregation as a vestige of former *de jure* school segregation has been eliminated to the extent practicable." *Dowell v. Board of Educ.*, 778 F. Supp. 1144, 1172 (W.D. Okla. 1991); *see also* *Jenkins v. Missouri*, 1994 U.S. App. LEXIS 3291, at \*2 (8th Cir. Feb. 24, 1994) (following the district court finding "that segregation in KCMSD caused the departure of the whites in the system to private schools and to the suburbs," the court of appeals described "white flight" as a vestige, "resulting in the anomaly of a racially isolated school district in the midst of a population with a far different racial makeup"); *infra* note 71.

46. 112 S. Ct. at 1446.

Even more explicitly, the Court continued: "The District Court's approach illustrates that the *Green* factors need not be a rigid framework. It illustrates also the uses of equitable discretion."<sup>47</sup> On agreement of both parties "that quality of education was a legitimate inquiry in determining [the school district's] compliance with the desegregation decree . . . the trial court found it workable to consider the point in connection with its findings on resource allocation . . . [and retained] supervision over this aspect of the case."<sup>48</sup>

Thus, in its most recent pronouncement on the subject, the Supreme Court seemingly has acknowledged that the "vestiges of past discrimination" may (at least on the parties' concurrence) reach even to "the more ineffable category of quality of education."<sup>49</sup>

#### IV. REMEDIAL DECREES AND POSSIBLE VESTIGES

In addition to the conditions specifically recognized by the Supreme Court as possible vestiges (*i.e.*, the *Green* factors, "present residential segregation," "quality of education"), the term might also be understood to include precisely the things that lower courts' remedial decrees have addressed expressly.<sup>50</sup> Insofar as the scope of a court's remedial authority is coterminous with the scope of the constitutional violation that precipitated its exercise,<sup>51</sup> one may reasonably infer that the conditions addressed by a remedial decree were caused, or at least abetted, by the violation and, therefore, might be viewed as "vestiges" (or at least potential "vestiges") in the respective cases.<sup>52</sup>

47. *Id.* at 1446-47.

48. *Id.* at 1446. The United States, in its *amicus curiae* brief to the Supreme Court, noted that the "quality of education" criterion "appears to be an educational resource consideration closely related to the 'facilities' factor described in *Green*." United States *Amicus Curiae* Brief at 4 n.3, *Freeman v. Pitts*, 112 S. Ct. 1430 (1990) (No. 89-1290).

49. *Pitts*, 112 S. Ct. at 1441. See *infra* note 153.

50. In many instances, of course, these are precisely the conditions specifically recognized by the Supreme Court.

51. "[T]he scope of the remedy is determined by the nature and extent of the Constitutional violation." *Bradley v. Milliken (Milliken I)*, 418 U.S. 717, 744 (1974) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)); see also, *e.g.*, *Pitts*, 112 S. Ct. at 1443-44; *Board of Educ. v. Dowell*, 498 U.S. 237, 248-49 (1991).

52. Arguably, certain aspects of a remedy may not be directed at vestiges per se, but may be devised to contribute to the effectiveness of other parts of the remedy or the remedy as a whole—*e.g.*, community relations activities. See *Reed v. Rhodes*, 455 F. Supp. 569, 602 (N.D. Ohio 1978) (finding defendant's proposal for a "school-community"

The following is a short summary of conditions and remedies that have been recited in the decrees of various courts.<sup>53</sup>

### A. Racial Composition of Student Populations

#### 1. Student Assignments

Since *Brown*, the racial composition of student populations in schools has been the most fundamental consideration in establishing liability in school desegregation cases.<sup>54</sup> Accordingly, it has long been a critical aspect of school desegregation remedies<sup>55</sup> and re-

relations program evidence of defendant's desire to achieve desegregation); *see also* *Bradley v. Milliken*, 402 F. Supp. 1096, 1118 (D. Mich. 1975) (finding a school-community relation liaison an essential aspect of desegregation plan).

53. The following summary is only illustrative, and clearly does not constitute an exhaustive inventory of all conditions addressed by remedial decrees. Moreover, the conditions addressed and remedies ordered in various decrees may not fit readily within a discrete category recited herein. To be clearly understood, the various aspects of a single decree should be taken together. *See Vaughns v. Board. of Educ.*, 742 F. Supp. 1275, 1291 (D. Md. 1990) ("[T]he components of a school desegregation plan are interdependent upon, and interact with, one another . . ."). However, one district court dismissed an argument that the "totality of [non-fatal] deficiencies" in a desegregation plan precludes a finding of unitary status:

We reject the plaintiffs' contention that the totality of deficiencies prevents the . . . [district's] achieving unitary status and requires the court to suspend implementing the *Youngblood* probationary period. If, as in this case, a 'deficiency' is not so serious as to render nonunitary a particular aspect of a district's policies, such as student assignments, then the sum of such non-serious deficiencies, no one or more of which renders a particular aspect nonunitary, will usually not render the overall desegregation plan nonunitary.

*Flax v. Potts*, 915 F.2d 155, 159 (5th Cir. 1990).

Finally, query whether there may also be vestiges that have not been clearly identified in remedial decrees. For example, while reading proficiency has been a prominent part of numerous decrees, *see infra* notes 80-81 and accompanying text, curiously, math proficiency has scarcely been addressed in remedial orders.

54. "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 493 (1954). The Supreme Court answered this question in the affirmative, declaring that separating minority children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

55. In *Green*, for example, a "freedom of choice" student assignment plan approved by the district court was held "unacceptable" as a method of converting the dual system "to a unitary nonracial school system" because it was ineffective in altering the racial identifiability of schools, prompting the Court to instruct the school board to "fashion steps which promise realistically to convert promptly to a system without a 'White' school and a 'Negro' school, but just schools." *Green v. County Sch. Bd.*, 391 U.S. 430, 441-42 (1968).

mains so to date.<sup>56</sup> While the Supreme Court has clearly stated that there is no substantive constitutional right to “any particular degree of racial balance or mixing,”<sup>57</sup> it has recognized that the limited use of “mathematical ratios . . . [as] a starting point” in shaping a remedy, “rather than an inflexible requirement,” is “within the equitable remedial discretion of the District Court.”<sup>58</sup> District courts have, therefore, ordered student assignment plans to effect racial balance in schools,<sup>59</sup> mandated the use of modified attendance zones<sup>60</sup> and “majority-to-minority transfer provisions”<sup>61</sup> to eliminate or reduce the number of one-race schools,<sup>62</sup> and re-

56. *Freeman v. Pitts*, 112 S. Ct. 1430, 1437 (1990).

[W]here the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole. This inquiry is fundamental, for under the former *de jure* regimes racial exclusion was both the means and the end of a policy motivated by disparagement of or hostility towards the disfavored race.

*Id.* at 1437.

57. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1970).

58. *Id.* at 25.

59. *E.g.*, *Reed v. Rhodes*, No. C73-1300 (N.D. Ohio Dec. 7, 1976) (ordering that racial composition of student body of any school not substantially deviate from that of system as a whole).

60. *E.g.*, *Swann*, 402 U.S. at 27 (approving the “frank—and sometimes drastic—gerrymandering of school districts and attendance zones” and the “pairing, ‘clustering,’ or ‘grouping’ of schools” to desegregate their student populations.)

61. *Id.* at 26.

62. According to the Supreme Court:

[T]he existence of some small number of one-race, or virtually one-race, schools . . . is not in and of itself the mark of a system that still practices segregation by law . . . . The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

*Id.*

Courts have used many different percentages to define a school as “one-race.” *See, e.g.*, *Flax v. Potts*, 915 F.2d 155, 161 n.8 (5th Cir. 1990) (NAACP represented that parties had agreed to 80% minority as one-race); *Riddick v. School Bd.*, 784 F.2d 521, 533 n.13 (4th Cir.) (school board defined racially identifiable schools as those with fewer than 30% or more than 70% minority or non-minority students), *cert. denied*, 479 U.S. 938 (1986); *Davis v. East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1431 (5th Cir. 1983) (noting an expert’s use of 90% to define a “predominantly one-race school”; “less than 25% or more than 55%” minority population made the school “racially identifiable”); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 541 F. Supp. 904, 908-09 (S.D. Miss. 1981) (plan “did effectively desegregate the schools to the fullest degree possible” when, for example, “no black students attended an elementary school with more than 90% black enrollment”).

quired other measures to alter racial composition of schools.<sup>63</sup>

In order to remedy prior segregation, some school districts have created magnet schools,<sup>64</sup> which are intended to attract racially balanced student populations voluntarily.<sup>65</sup> Interdistrict student transfer plans have also been used to pursue racial balance objectives.<sup>66</sup>

School districts are not required to take steps to counter the effects of demographic change unrelated to a constitutional violation by reconfiguring their attendance zones.<sup>67</sup> "Neither school authorities nor district courts are constitutionally required to make

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These percentages are generally prophylactic in nature, and not used by courts as hard and fast rules. For example, in *Flax* the court reviewed evidence that seven schools were one-race and found that "[t]he school board's constitutional duty is to cure the continuing effects of the dual school system, not to achieve an ideal racial balance. The 'existence of a few racially homogeneous schools within a school system is not per se offensive to the Constitution.'" 915 F.2d at 160 (citations omitted).

"[O]ne race schools in urban areas with predominantly black student bodies" have been found to be the "product of a preponderant majority of black pupils rather than a vestige of past segregation." *Calhoun v. Cook*, 522 F.2d 717, 719 (5th Cir. 1975) (approving a student assignment plan which projected that 92 out of the 148 schools in the Atlanta school system would continue to be 90% or more black). As the court in *Riddick* noted, however, the burden is on the school board to show that existence of one-race schools are "genuinely nondiscriminatory" and are not "vestiges of past discrimination." 784 F.2d at 535.

63. *E.g.*, *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 431 (1976) (reversing district court order disallowing any school "with a majority of any minority students"). For a discussion of other indices of school segregation, see Charles D. Dziuban & William K. Esler, *Some Relationships Among Indices of School Desegregation*, 20 AM. EDUC. RES. J. 113 (1983).

64. Magnet schools are "public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality." *Missouri v. Jenkins*, 495 U.S. 33, 40 n.6 (1990) (citing Janet R. Price & Jane P. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL'Y REV. 291 (1987)).

65. *See, e.g.*, *Coalition to Save our Children v. State Bd. of Educ.*, 757 F. Supp. 328, 352 (D. Del. 1991). If demand for the school is high enough, presumably the school district can choose a racially balanced student body comprised of students who have volunteered to be transported. "Such programs offer choices for students and parents who might otherwise believe that desegregation may be educationally counterproductive. They assure the community that . . . [those involved] in desegregation planning are as deeply concerned with academic goals as they are with ending discrimination." *Reed v. Rhodes*, 455 F. Supp. 569, 600 (1978).

66. *See, e.g.*, *Jenkins v. Missouri*, 807 F.2d 657, 683 (8th Cir. 1986) (voluntary inter-district plan approved as part of remedy for intradistrict violation), *aff'd*, 491 U.S. 274 (1989).

67. *See, e.g.*, *Freeman v. Pitts*, 112 S. Ct. 1430, 1447 (1992) (school district not obligated to take steps to achieve racial balance "when the imbalance is attributable neither to the prior *de jure* system nor to a later violation by the school district but rather to independent demographic forces").

year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."<sup>68</sup>

## 2. Use of Transportation

Although so-called "busing" (a.k.a. "forced busing," "cross-town busing," "court-ordered busing") has dominated political characterizations and public perceptions of school desegregation in many cases, the need for and use of transportation is clearly derivative of the particular student assignment plan that a school system may employ. Obviously, students assigned to attend schools that are not within walking distance need transportation.<sup>69</sup> Courts have held that the onus of being transported to school should not fall disproportionately on one racial group.<sup>70</sup>

## 3. Residential Segregation

In a footnote in *Dowell*, the Supreme Court acknowledged the possibility that "present residential segregation" could constitute a "vestige of former school segregation."<sup>71</sup> At least one district court

68. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971) (holding that school officials have "no affirmative fourteenth-amendment duty to respond to the private actions of those who vote with their feet"), *accord Pitts*, 112 S. Ct. at 1447; *Flax v. Potts*, 915 F.2d 155, 161 (5th Cir. 1990) (citing *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 225 (5th Cir. 1983), and *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434-35 (1976)). It may be very difficult, however, to judge when such demographic change is not attributable to *de jure* segregation: "Only in rare cases such as [*Pitts*] and *Spangler*, . . . where the racial imbalance has been temporarily corrected after the abandonment of *de jure* segregation, can it be asserted with any degree of confidence that the past discrimination is no longer playing a proximate role." *Pitts*, 112 S. Ct. at 1452 (Scalia, J., concurring).

69. *See Swann*, 402 U.S. at 30 (approving "bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school."). A legal duty to provide transportation in such instances may derive from state law as well as from federal court order. *See, e.g.*, OHIO REV. CODE ANN. § 3327.01 (Baldwin 1992) (defining maximum distance between pupil residence and assigned school beyond which school district "shall provide transportation").

70. *See, e.g.*, *Kelley v. Metropolitan County Bd. of Educ.*, 492 F. Supp. 167, 191 (M. D. Tenn. 1980); *Hoots v. Pennsylvania*, 703 F.2d 722, 727 (3d Cir. 1983).

71. *Board of Educ. v. Dowell*, 498 U.S. 237, 250 n.2 (1991). In light of uncertainty over whether the appeals court had reversed the district court's finding that present residential segregation was too attenuated to be a vestige of former school segregation as clearly erroneous, the Supreme Court remanded the matter to district court with instructions to treat it as *res nova*. On remand, the district court found that residential segregation as a vestige of former *de jure* school segregation had been eliminated to the extent practicable. It cited four independent bases for this conclusion:



has ordered the siting of new public housing units in nonminority areas to mitigate the segregative effect on schools of residential segregation.<sup>72</sup>

### B. Faculty and Staff

Because the racial composition of the faculty at a school may help make the school racially identifiable,<sup>73</sup> the duty to desegre-

1. Current residential segregation in Oklahoma City today is caused by the private choices of blacks and whites, based on such factors as economic status, housing affordability, job location, personal preferences, and social and neighborhood relationships.

. . . . .

2. The pattern of residential segregation . . . [is] so different from the original pattern of segregation caused by the past policies of official, *de jure*, residential segregation that the current segregation cannot be considered a vestige of that prior segregation.

. . . . .

3. Neither the original pattern of residential segregation nor the residential segregation that remains today was in any event caused by past *de jure* segregation in any significant way.

. . . . .

4. The Board does not have the power or capability to redress residential segregation . . . and therefore any such residential segregation that might be considered a vestige of former *de jure* school segregation has in any event been eliminated 'to the extent practicable.' Busing school students clearly does not counter such residential segregation effectively. After 13 years of busing for grades 1-12, and 19 years of busing for grades 5-12, residential segregation persists.

Dowell v. Board of Educ., 778 F. Supp. 1144, 1167-71 (W.D. Okla. 1991), *aff'd*, 1993 U.S. App. LEXIS 28699, at \*44 (10th Cir. Nov. 4, 1993).

72. See United States v. Yonkers Bd. of Educ., 635 F. Supp. 1538 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

In an earlier proceeding, the district court found cause and effect between residential and school segregation:

The disparities in educational opportunities provided in Yonkers public schools have had two significant race-related consequences. First, the disparities in the quality of educational programs and facilities have combined with the school system's racial imbalance to reinforce the already existing residential segregation in the city . . . . This confluence of racial identifiability and relative educational opportunity has served to reinforce the segregative demographic patterns which have evolved in the city.

United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1443-44 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). The court then ordered the city to provide sites for 200 units of public housing in nonminority areas to help remedy the effects of its segregative housing practices on the segregation of schools. *Id.* at 1444; see also *infra* note 129 and accompanying text.

73. See, e.g., Freeman v. Pitts, 112 S. Ct. 1430, 1449 (1992) (observing that student segregation and faculty segregation are often related problems and remanding the case for further proceedings to determine whether faculty assignments could be racially balanced);

gate may include the duty to assign faculty members in a desegregated fashion.<sup>74</sup> "Courts have consistently required school systems to take affirmative steps to assign faculty and staff to dismantle dual school systems."<sup>75</sup> Courts have also held that because all teachers act as role models and pedagogues, teachers of a minority race should possess basic knowledge and skills that are equal to those required of non-minority teachers.<sup>76</sup>

In addition to requiring faculties and staffs to desegregate, court orders have also provided for additional faculty and staff training.<sup>77</sup>

### C. Educational Components

In *Milliken II*, the Supreme Court cited with approval the use of educational remedies "to overcome the built-in inadequacies of a segregated educational system."<sup>78</sup> Some courts have ordered reme-

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Keyes v. School Dist. No. 1, 413 U.S. 189, 201 (1973) (citing segregation of teachers as evidence of a dual school system).

74. See, e.g., *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969) (affirming the district court's order to assign White and Negro faculty members in substantially the same ratios throughout the school system); see also *Keyes v. School Dist. No. 1*, Denver, 895 F.2d 659, 669 n.5 (10th Cir. 1990) (district court ordered that principals, teachers and teacher-aides not be assigned so that "the racial or ethnic composition of the staff indicate that a school is intended for minority students or anglo students"), *cert. denied*, 498 U.S. 1082 (1991); *Reed v. Rhodes*, No. C73-1300 (N.D. Ohio Aug. 30, 1978) (district court ordered racial composition of instructional staff at each school to reflect racial composition of district-wide instructional staff at corresponding grade level, within specified parameters).

75. *Mapp v. Board of Educ.*, 630 F. Supp. 876, 882 (E.D. Tenn. 1986) (school board ordered to take steps necessary to desegregate its schools in accordance with its adopted plan).

76. See *United States v. Lulac*, 793 F.2d 636, 643 (5th Cir. 1986) (examining the potentially discriminatory effect of teacher applicant competency tests).

In *Pitts*, the Supreme Court discussed teacher qualifications as they affect quality of education. The Court noted the district court's finding that despite the superior achievement of minority students on standardized tests (relative to national averages), the school district was not unitary with respect to quality of education because teachers in schools with disproportionately high percentages of white students tended to be better educated and more experienced than their counterparts. 112 S. Ct. at 1442.

77. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 286 (1977) (*Milliken II*); *Reed v. Rhodes*, 455 F. Supp. 569, 601 (N.D. Ohio 1978) (stating that "staff development . . . in human relations is essential if desegregation is to be effective"); see also *Evans v. Buchanan*, 582 F.2d 750, 770 (3rd Cir. 1978) (superintendent of Newark School District testified that "a critical requiremen(t) [sic] for any plan [is] to have good in-service programs underway for teachers, administrators and staff, even the cafeteria staff"), *cert. denied*, 446 U.S. 923 (1980).

78. *Milliken II*, 433 U.S. at 284 (citing *Plaquemines Parish Sch. Bd. v. United States*, 415 F.2d 817, 831 (5th Cir. 1969)).

dies that attempt to close the gaps in performance between racial groups.<sup>79</sup>

### 1. Reading

Reading proficiency has been given special emphasis in remedial orders: "The development of proficient reading skills is perhaps the most essential service a school system provides. Without reading skills, students cannot achieve academic success and will be handicapped in any occupation in the outside world."<sup>80</sup> In order to improve reading skills and reduce racially identified disparities, one remedial order required a "study to determine the nature and extent of disparities in the reading skill test scores of minority and white pupils," as well as the institution of an "affirmative reading skills program."<sup>81</sup>

### 2. Curriculum

"Multi-ethnic studies are essential elements of the curriculum of any outstanding school system; desegregation serves only to emphasize the need for inclusion of these studies."<sup>82</sup> Classes which "ignore the contribution of racial and ethnic groups are antithetical

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79. See *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 809 (6th Cir. 1980). The circuit court acknowledged "the disparity between the achievement of black students and white students is at the heart of the lawsuit," but concluded that there was insufficient evidence to support the district court's "conclusion that the disparity in achievement . . . was caused by an unconstitutional condition as to which [defendants] have been found to be responsible." *Id.* at 817; see also *infra* note 153; cf. *Reed*, 455 F. Supp. at 599 (in order to improve reading skills and reduce the disparity between the reading comprehension scores of African American and White students, remedial order required an affirmative reading skills program); *Evans*, 447 F. Supp. at 1015-16 (school board "directed to institute an affirmative reading and communication skills program which does not resegregate pupils"), *aff'd*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980); see also *Tasby v. Wright*, 630 F. Supp. 597, 601 n.25 (N.D. Tex. 1986) (increasing reading, math, science, social studies and language test scores of minority pupils was a goal of the remedial desegregation plan, which also included the establishment of remedial schools with smaller student-teacher ratios, a longer school day, and specially trained teachers).

80. *Reed*, 455 F. Supp. at 598 (citing *Bradley v. Milliken*, 402 F. Supp. 1096, 1138 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977)); see also *United States v. Board of Sch. Comm'rs*, 506 F. Supp. 657, 673 (S.D. Ind. 1979) ("It is obvious that the development of proficient reading skills is the most essential educational service a school system can deliver. Likewise of great importance is the ability to communicate verbally in readily understood English."), *aff'd in part and vacated in part*, 637 F.2d 1101 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980).

81. *Reed*, 455 F. Supp. at 599.

82. *Bradley*, 402 F. Supp. at 1144.

to the successful implementation of a viable desegregation plan.”<sup>83</sup> Courts have considered the extent to which school districts have addressed problems of racial bias in their traditional coursework, and have specifically included the elimination of racial bias in classes as a portion of their remedial orders.<sup>84</sup>

### 3. Early Childhood Education

Remedies in a few school districts have created preschool programs and all-day kindergarten to aid children as young as four years old.<sup>85</sup>

### 4. Testing and Grouping

Because tests administered to students should be free of racial; ethnic and cultural bias, courts have ordered school districts to desegregate all aspects of testing. As one court pointed out, “Black children are especially affected by biased testing procedures. As a result of such procedures, they may find themselves segregated in classrooms for slow learners, which will thereafter impede their educational growth. Moreover, the discriminatory use of tests results can cause resegregation.”<sup>86</sup>

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83. *Board of Sch. Comm'rs*, 506 F. Supp. at 672.

84. *Berry v. School Dist.*, 515 F. Supp. 344, 373-74 (W.D. Mich. 1981) (district court ordered school districts to adopt a policy that textbook selection “be monitored and approved for lack of racial bias and depicting black participation in all aspects of American learning, society and culture”), *aff'd and remanded*, 698 F.2d 813 (6th Cir.), *cert. denied*, 464 U.S. 892 (1983); *Board of Sch. Comm'rs*, 506 F. Supp. at 672 (ordering assessment of curricular offerings for evidence of cultural bias); *Evans*, 447 F. Supp. at 1016 (ordering board to provide curriculum offerings and programs which emphasized and reflected the cultural pluralism of the students, and to ensure that all instructional materials, texts, and other curriculum aids were “free of racial bias”).

85. *See Plaquemines Parish Sch. Bd. v. United States*, 415 F.2d 817, 831 (5th Cir. 1969) (kindergarten required for all students); *see also Flax v. Potts*, 567 F. Supp. 859, 873 (N.D. Tex. 1983) (early childhood centers—pre-kindergarten through first grade—created to begin educating four year olds); *Liddell v. Board of Educ.*, 567 F. Supp. 1037, 1050 (E.D. Mo. 1983) (approving a settlement which included all-day kindergarten and preschool centers, along with compensatory and after-school remedial programs), *aff'd in part, rev'd in part and remanded*, 731 F.2d 1294 (8th Cir. 1984).

86. *Bradley*, 402 F. Supp. at 1142.

Because of such dangers, one court has held that a school district that “has not been formally declared fully unitary or has a recent history of unlawful discrimination” is “prohibited from employing achievement grouping as a device for assigning students to school or classrooms.” *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F. Supp. 487, 497 (N.D. Miss. 1987) (citations omitted) (allowing achievement grouping only after de facto finding of unitariness), *aff'd*, 854 F.2d 127 (5th Cir. 1988).

At least one court has distinguished between “achievement grouping,” which is “designed to measure a student’s present performance and how proficient he has become in

Accordingly, school districts have been ordered to develop, administer and score all tests in a nondiscriminatory manner, and not to use ability grouping where it would result in segregated classrooms.<sup>87</sup>

#### D. Extracurricular Activities

Remedial decrees have required that "extracurricular activities [be] carried out in a nondiscriminatory manner,"<sup>88</sup> and that efforts be undertaken to inform students of opportunities to participate in extracurricular activities.<sup>89</sup>

#### E. Guidance and Counseling

"School districts undergoing desegregation inevitably place psychological pressures upon the students affected. Counselors are essential to provide solutions to the many problems that result from such pressures."<sup>90</sup> Accordingly, remedial decrees have required that counseling programs be administered by trained counsellors in a nondiscriminatory manner.<sup>91</sup>

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mastering certain skills," and "ability grouping[, which] is based upon IQ tests results, as opposed to standardized achievement tests, and predicts a student's future performance." *Anderson v. Banks*, 520 F. Supp. 472, 501 (S.D. Ga. 1981). The court held that if classroom segregation is the result of a facially neutral tracking system (based on classificatory test results), tracking plans will not be permitted until a unitary system has been established, and the district has been unitary for several years. *Id.*

87. *See, e.g., Reed v. Rhodes*, 455 F. Supp. 569, 598 (N.D. Ohio 1978); cases cited *supra* note 79.

For cases discussing the consequences of "tracking" students, see *McNeal v. Tate County Sch. Dist.*, 508 F.2d 1017, 1019 (5th Cir. 1975) (noting that neutral track assignments may result in resegregation where students who are victims of past dual systems still wear the "badge of their old deprivation—underachievement").

88. *Reed v. Rhodes*, No. C73-1300 (N.D. Ohio Oct. 16, 1978). A subsequent order in the same case called for the use of "focused recruitment" to assure student participation reflective of the racial composition of a given school. No. C73-1300 (Feb. 11, 1981).

89. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 42 (N.D. Cal. 1983) (approving a decree that ordered, *inter alia*, a plan "to monitor extra-curricular activities and to inform students of the equal access opportunities in this area"). *But see Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 805, 816 (6th Cir. 1980) (vacating district court order to insure, *inter alia*, that every student has opportunity to participate in extracurricular activities).

90. *Bradley*, 402 F. Supp. at 1143.

91. *E.g., Reed*, 455 F. Supp. at 599 (where racially imbalanced classes were partly the result of stereotyped counseling practices and course offerings that varied from school to school, the school district was ordered to "institute an effective nondiscriminatory counseling and career guidance program . . . [in which] students are counselled on a racially nondiscriminatory basis as to opportunities in employment or higher education and as to vocational and other special educational programs").

### F. Discipline

Finding that African American students were being suspended in numbers disproportionate to their population, one district court ordered the school district to "adopt and disseminate a Code of Student Rights, Responsibilities and Discipline, together with a list of policies and procedures for standardized systemwide implementation" and to maintain detailed records of disciplinary actions taken.<sup>92</sup>

As a prophylactic measure, student rights codes have been ordered that "assure that disruptions in the school or classroom will be dealt with in every instance, and . . . protect the students against arbitrary and discriminatory exclusions, suspensions, or expulsions."<sup>93</sup>

### G. Facilities

In *Swann*, the Supreme Court found that "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to . . . the quality of school buildings and equipment . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown."<sup>94</sup> After comparing the condition and age of buildings, playground space, educational

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92. *Id.* at 602; *see also* *Hawkins v. Coleman*, 376 F. Supp. 1330, 1337-38 (N.D. Tex. 1974) (racial bias was found to be the cause of a disproportionate number of suspensions and higher incidence of the use of corporal punishment against "Black" students; the court, therefore, ordered the school board to formulate an affirmative program to redress this imbalance).

93. *United States v. Board of Sch. Comm'rs*, 506 F. Supp. 657, 672 (S.D. Ind. 1979), *aff'd in part, vacated in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 830 (1980); *see also* *Coalition to Save Our Children v. State Bd. of Educ.*, 757 F. Supp. 328, 333 (D. Del. 1991) (ordering a plan for addressing problems of dropouts, minority suspensions, absenteeism, low achievement scores, matriculation to college, and other racial disparities in performance and disciplinary problems). Plaintiffs in *Penick v. Columbus Bd. of Educ.* argued that statistical disparities in disciplining of black and white children could be a basis for the court to infer that "certain black students are being disciplined unfairly on the basis of race"; however, absent evidence that the disparity was causally related to any "unlawful, improper, or even unprofessional acts or omissions of the Board," the court did not infer that the disparity "resulted from manifested racial bias or remain[s] as a remnant of pre-existing bias." No. C-2-73-248, slip op. at 7 (S.D. Ohio 1985).

94. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971). If the level of maintenance and the distribution of equipment is different for "white" or "Negro" schools, a constitutional violation may also be found. *See, e.g., id.* at 18-19 ("responsibility of school authorities is to eliminate invidious racial distinctions"). In *Pitts*, Justice Souter noted that "portable classrooms" (trailers) were only used at predominantly black southern sections of the school district, and thus may have left the schools racially identifiable. *Freeman v. Pitts*, 112 S. Ct. 1430, 1455 (1992) (Souter, J., concurring).

materials, and library facilities at predominantly "Black" versus "White" schools (50% or more one race), one district court found that "Black" schools were "second-rate," as a result of *de jure* segregation, and ordered the school administration to formulate a plan to eliminate illegal discrimination in maintenance and construction of facilities and in other areas.<sup>95</sup>

#### H. Community Involvement

Whether or not it may properly be termed a "vestige," community involvement has been ordered to aid in desegregation efforts.

##### 1. Cocurricular Activities with Other Artistic and Educational Institutions

Courts have encouraged school districts to involve local institutions in cooperative educational programs because their involvement is viewed as "invaluable in demonstrating to the community that desegregation offers an opportunity to embark on new avenues to academic excellence as well as a chance to end discrimination."<sup>96</sup> Accordingly, on the strength of defendant school officials' own proposals (and without any specific evidence of a constitutional violation in this area), such partnerships were included in a remedy.<sup>97</sup>

##### 2. School-Community Relations

In order to provide "an effective vehicle for true community involvement in all the schools,"<sup>98</sup> to avoid "well-known community resistance to educational desegregation," and to avoid "the turmoil and violence that occurred in [other] desegregation cases,"<sup>99</sup> the creation of school-community relations committees has been ordered by district courts.<sup>100</sup> These committees have included vehicles for parental involvement, and were intended to develop

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95. See *Berry v. School Dist.*, 442 F. Supp. 1280, 1306 (W.D. Mich. 1977).

96. *Reed v. Rhodes*, 455 F. Supp. 569, 600 (N.D. Ohio 1978).

97. *Reed v. Rhodes*, No. C73-1300 (Oct. 16, 1978). A subsequent order in *Reed* required that any such programs and their "results" be "documented." *Id.* (April 24, 1981).

98. *Bradley v. Milliken*, 402 F. Supp. 1096, 1143 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

99. *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 820 (6th Cir. 1980) (vacating, however, the recommendation that a community-wide citizens' committee be established for lack of sufficient evidence to support a finding of intent to discriminate).

100. *United States v. Board of Sch. Comm'rs*, 637 F.2d 1101 (7th Cir.) (affirming a community relations program ordered by the district court), *cert. denied*, 449 U.S. 838 (1980).

partnerships with traditional groups such as parent-teacher associations and local school advisory boards.<sup>101</sup> Even when district courts have not ordered the formation of a community relations committee, they have encouraged school districts to increase participation of parents, students, staff and community in the desegregation process.<sup>102</sup>

### I. Equity Compliance/Monitoring Offices

Courts have created monitoring offices to audit and report on school districts' compliance with desegregation orders,<sup>103</sup> and sometimes to serve a community relations function, as well.<sup>104</sup>

## V. ANALYZING VESTIGES IN THE INDIVIDUAL CASE

The examples from remedial orders in the foregoing cases illustrate the types of conditions which may constitute vestiges of past discrimination. Such general illustrations, however, offer rather incomplete guidance to parties or a district court in the latter stages of a school desegregation case attempting to determine, in that particular case, what the "vestiges of past discrimination" are and whether they have been "eliminated to the extent practicable."

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101. See, e.g., *United States v. Board of Sch. Comm'rs*, 506 F. Supp. 657, 673 (S.D. Ind. 1979) (ordering development of a detailed community relations program which was to achieve maximum community participation by depending upon parental support and cooperation with traditional parent-teacher groups), *aff'd in part, vacated in part*, 637 F.2d 110 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); *United States v. Yonkers Bd. of Educ.*, No. 80 Civ. 6761, 1986 WL 4894, at \*6 (S.D.N.Y. April 22, 1986) (desegregation plan included appointment of a parental coordinator to establish a working relationship with parent organizations in the community).

102. See, e.g., *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 58 (N.D. Cal. 1983) (encouraging community support); *Kelley v. Metropolitan County Bd. of Educ.*, 492 F. Supp. 167, 197 (M.D. Tenn. 1980) (expressing "fervent hope" that a desegregation plan would bring about equal opportunity in education, and commenting that the goodwill and support of the community was critical to the plan's success).

While such a school-community relations component to a remedial order might not, in theory, be essential to desegregate, public relations efforts clearly may help the community more willingly accept the consequences of desegregation.

103. E.g., *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. #1*, 971 F.2d 160 (8th Cir. 1992) (affirming establishment of the Office of Desegregation Monitoring to monitor settlement plans); *Diaz v. San Jose Unified Sch. Dist.*, 633 F. Supp. 808, 824 (N.D. Cal. 1985) (establishing an office to monitor desegregation plan compliance); *Jenkins v. Missouri*, 639 F. Supp. 19, 42 (W.D. Mo. 1985) (establishing a monitoring office to aid monitoring committee selected by the court).

104. E.g., *Reed v. Rhodes*, No. C73-1300 (N.D. Ohio, May 4, 1978) (order establishing monitoring office to report on desegregation to the court and "to foster public awareness and understanding of the desegregation process").



The *Green* factors, as well as factors or conditions that a court's own remedial decree addressed in the first instance, may comprise a ready, if not exhaustive, list of conditions that *might* be identified as "vestiges of past discrimination." But by what analysis should the parties and a district court, in the latter stages of a school desegregation case, determine which of those conditions (or others) *are* remaining "vestiges" that have not been eliminated "to the extent practicable?"

#### A. A Test for Identifying Vestiges

Such "vestiges" as are remediable in school desegregation litigation can be distinguished from all other presently observed conditions by a four-part test.<sup>105</sup> First, such a condition must separate, distinguish, or reflect some measurable difference between population groups by race.<sup>106</sup> Second, the condition must be negative vis-a-vis plaintiffs; the difference between racial group populations must exist to the relative detriment of school desegregation plaintiffs (typically, although not exclusively,<sup>107</sup> African American students).<sup>108</sup> Third, there must be an adequate causal nexus be-

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105. The effort to identify "vestiges" may disclose any number of presently observed conditions that one might wish to rectify. The proposed test attempts to identify only those as to which a legal duty on the part of school officials would exist under the *Dowell* standard.

106. See *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 283 (1977) ("[D]iscriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system."); see also *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 493 (1954) ("[S]egregation of children in public schools solely on the basis of race . . . deprive[s] the children of the minority group of equal educational opportunities."); *id.* at 495 ("Separate educational facilities are inherently unequal.").

107. See, e.g., *Diaz v. San Jose Unified Sch. Dist.*, 861 F.2d 591, 593 (9th Cir. 1988) (plaintiffs included parents of Spanish-surnamed children); *Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349, 350 (9th Cir. 1974) (intervening plaintiffs included parents of students of Chinese ancestry).

108. See, e.g., *Freeman v. Pitts*, 112 S. Ct. 1430, 1443 (1992) ("[T]he principal wrong of the *de jure* system [is] the injuries and stigma inflicted upon the race disfavored by the violation . . ."); *id.* (quoting *Brown I*, 347 U.S. at 494 ("[T]o separate [Black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to *their* status in the community that may affect *their* hearts and minds in a way unlikely ever to be undone.")) (emphasis added); see also *Board of Educ. v. Dowell*, 498 U.S. 237, 260-61 (1991) (Marshall, J., dissenting) ("Although the Court has never explicitly defined what constitutes a 'vestige' of state-enforced segregation, the function that this concept has performed in our jurisprudence suggests that it extends to any condition that is likely to convey the message of inferiority implicit in a policy of segregation.").

tween the prior *de jure* segregated system and the presently observed condition.<sup>109</sup> Finally, in order to provide a basis for continuing or additional equitable relief, such a condition must be susceptible to elimination or further reduction by measures which are "practicable."<sup>110</sup>

Thus, legally remediable vestiges are presently observed conditions that (1) separate or distinguish between population groups by race (2) to the relative detriment of minority plaintiffs, (3) which are causally linked to the Constitutional violation, and (4) which can be eliminated or ameliorated by practicable measures.<sup>111</sup>

An alternative to the first two factors might be that the observed condition is simply "bad" or "undesirable" in some absolute sense, regardless of whether it affects or is manifested in racial group populations differently and to the relative detriment of school desegregation plaintiffs.

Viewing the harm of *de jure* segregation as invidious value inculcation [a belief in the inferiority of African American students] sees the harm resulting from *de jure* segregation as a corruption of the socializing process of public schools. This position is based not so much upon an assumption that *de jure* segregation of public schools left a lasting impact on African-Americans, but rather, that *de jure* segregation left a lasting impact on the socializing process of public schools. By viewing remedies for *de jure* segregation as a remedy to the distortion in the value transmission process of public schools, the meaning attached to desegregation is a corrective measure to eliminate the inculcation of an invidious value.

Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?* 78 CORNELL L. REV. 1, 91-92 (1992).

While there may be broad consensus that the practice of intentional segregation negatively affected public schools as educational institutions, and belief among many that all students were harmed thereby, query if such impacts (*i.e.*, "invidious value inculcation"), taken alone, reach the threshold of an Equal Protection violation under existing constitutional standards. *Cf.* *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) (explaining that a remedy for unconstitutional conditions in school is impermissible if it is addressed to a general improvement in the quality of the local school system); *Keyes v. School Dist. No. 1*, 521 F.2d 465, 483 (10th Cir. 1975) (indicating that a district court ought not act "solely according to its own notions of good educational policy unrelated to the demands of the Constitution"), *cert. denied*, 423 U.S. 1066 (1976).

109. *See, e.g., Pitts*, 112 S. Ct. at 1448 ("The vestiges of segregation that are the concern of the law in a school case . . . must . . . have a causal link to the *de jure* violation being remedied.") (emphasis added); *id.* at 1446 (district court may decline to order further student assignment remedy "where racial imbalance is not traceable, in a proximate way, to constitutional violations"); *Milliken II*, 433 U.S. at 282 ("[F]ederal-court decrees must directly address and relate to the constitutional violation itself[.] . . . decrees exceed appropriate limits if they are aimed at eliminating a condition that does not flow from such a violation."); *supra* text accompanying notes 38-39.

110. *See Dowell*, 498 U.S. at 250; *see also Dowell v. Board of Educ. (Dowell Remand)*, 778 F. Supp. 1144, 1172 (W.D. Okla. 1991).

111. In *United States v. City of Yonkers*, No. 80 Civ. 6761, 1993 U.S. Dist. LEXIS

## A court's analysis of these factors in the context of determin-

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12079, at \*9 (S.D.N.Y. Aug. 30, 1993) (the first published case to address explicitly the meaning of the term, "vestiges," as used in *Dowell*), the district court recited a similar, but distinguishable definition:

Although the Supreme Court has not explicitly stated what the term 'vestige' encompasses, the line of cases beginning with [*Brown I*] and continuing through the recent decision of [*Pitts*] suggests the following definition. A vestige of segregation is a policy or practice which is traceable to the prior *de jure* system of segregation and which continues to have discriminatory effects. A vestige is *not* the lingering effect or consequence of segregation . . . but such an effect or consequence may be evidence that a vestige of segregation exists. (emphasis added.)

The Supreme Court in *United States v. Fordice*, 112 S. Ct. 2727, 2735 (1992), recited the duty to "eradicate policies and practices traceable to the prior *de jure* dual system that continue to foster segregation." See *supra* note 37. By including such policies and practices in, while excluding their effects or consequences from, its definition of vestiges, the *Yonkers* court appears to be focusing on school officials' conduct or behavior, rather than conditions that may result from a myriad of other factors in society.

However, the Supreme Court's recognition that a condition such as "present residential segregation" could constitute "a vestige of former school segregation," *Dowell*, 498 U.S. at 250 n.2, suggests that vestiges need not be confined solely to school system policies and practices *per se*, but may subsume other conditions that flow from such policies and practices. See also *Pitts*, 112 S. Ct. at 1454 ("[W]e must continue to prohibit, without qualification, all racial discrimination in the operation of public schools and to afford remedies that eliminate not only the discrimination but its *identified consequences . . .*") (Scalia, J., concurring) (emphasis added); *Dowell*, 498 U.S. at 260-61 ("a 'vestige' . . . extends to any condition that is likely to convey the message of inferiority implicit in a policy of segregation") (Marshall, J., dissenting). Cf. *Milliken II*, 433 U.S. at 282 (stating that decrees cannot attempt to eliminate a condition which does not flow from a constitutional violation). Moreover, the stated distinction between "a policy or practice . . . which continues to have discriminatory effects" on the one hand, and the "lingering effect or consequence of segregation" on the other appears less compelling when one relies on the latter (e.g., disparities in academic achievement) as proof of the former (i.e., inadequate curriculum, pedagogy and teacher training). See *Yonkers*, 1993 U.S. Dist. LEXIS at \*15, 22. The distinction appears more nebulous still when the putative vestige is essentially the absence of an affirmative policy or practice—i.e., the failure to address effectively a lingering effect or consequence. *Id.* Finally, even if one includes such consequences or effects within the scope of the term vestige, that the duty to eliminate them is limited "to the extent practicable" would appear to perform the function of focusing any remedy on (or confining it to) those matters within the control of school officials (e.g., policies and practices).

Notably, the *Yonkers* opinion devotes little consideration to whether the policies and practices identified (apparently, although not explicitly) as vestiges (i.e., inadequate curriculum, pedagogy, teacher training and facilities) are in fact "traceable to the prior *de jure* system," and expressly states that, at least as to State defendants not previously found liable, the "primary inquiry at this phase is to determine whether discriminatory conditions exist" and "[q]uestions of causation have been deferred." 1993 U.S. Dist. LEXIS at \*15.

The authors respectfully suggest that a presently observed condition cannot properly be characterized as a "vestige" *until* its causal connection to the prior *de jure* system is established, regardless of what party may be held liable therefor. See *Pitts*, 112 S. Ct. at 1448.

ing whether the second prong of the *Dowell* test has been met may closely resemble that employed in the initial construction of a remedy following the trial, in that both occasions require a comprehensive examination of the school district and its practices.<sup>112</sup> Since the identification of vestiges is a question of fact,<sup>113</sup> and the available evidence may not be dispositive, the outcome of a court's analysis is likely to depend to a critical degree on the nature of the relevant burdens and the manner in which they are apportioned among the parties.<sup>114</sup>

### B. *The Burden of Vestiges—Whose?*<sup>115</sup>

Procedurally, the question of whether there are lingering vestiges that have not been eliminated to the extent practicable may arise in a number of contexts.<sup>116</sup> The paradigmatic circumstance would

112. *Pitts*, 112 S. Ct. at 1443 (“[A] school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts’ remedial control ought to be modified, lessened, or withdrawn.”). This approach appears to be contrary to that previously advocated by the Solicitor General. See *supra* note 30.

113. See *Dowell*, 498 U.S. at 250 n.2 (explaining that the district court’s determination that present residential segregation was too attenuated to be a vestige of former school segregation could be reversed only upon a finding that it was “clearly erroneous”); *id.*, Nos. 91-6407, 92-6046, 1993 U.S. App. LEXIS 28699, at \*45 (10th Cir. Nov. 4, 1993) (upholding district court finding that residential segregation today is not a vestige of earlier constitutional violation, noting “that a clearly erroneous standard of review ‘plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because . . . it would have decided the case differently . . . .’”) (citation omitted).

114. See *infra* notes 126-39 and accompanying text. See also Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1206-07 n.5 (1981) (proposing procedural methods to promote a broad national policy against discrimination).

115. For a discussion of the allocation of burdens of proof with respect to post-unitary school board actions that may tend to resegregate, see Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653 (1987). The author of the Note, relying on the works of various commentators, utilizes allocation rationales of “probability,” “fairness,” and “policy” in arguing that even after a finding of unitariness, school authorities should bear the burden of proving that an action which will cause “substantial resegregation . . . did not result from an intent to discriminate.” *Id.* at 669.

The task of apportioning burdens of proof in the context of identifying vestiges goes not to who must prove (or disprove) *intent* with respect to segregative conditions, but largely to who must establish whether a presently observed condition meeting other criteria was *caused* by the prior Constitutional violation. See *infra* note 138.

116. Plaintiffs, presumptively, would be the party most inclined to assert the affirmative position. *But see, e.g.*, *United States v. City of Yonkers*, No. 80 Civ. 6761, 1993 U.S. Dist. LEXIS 12079, at \*1 (S.D.N.Y. Aug. 30, 1993) (defendant Yonkers Board of Education and plaintiff Yonkers Branch NAACP asserted vestiges existed and sought to impose liability on State of New York to help fund an education improvement plan to eliminate

be when defendant school officials come forward to assert that they have met the standard set out in *Dowell*—*i.e.*, by filing a motion seeking a declaration that the school district is “unitary” (or some legally equivalent pronouncement<sup>117</sup>), dismissal of the case and termination of the court’s jurisdiction.<sup>118</sup>

Whether movants or not, defendant school officials bear the burden of proving that the *Dowell* standard has been met.<sup>119</sup> Thus, defendants interested in minimizing such burden may be inclined to present evidence simply to demonstrate their compliance with a remedial decree, implicitly collapsing the latter prong of the

alleged vestiges); Hearing Brief of Defendant Cleveland Board of Education, *Reed v. Rhodes*, No. C73-1300 (N.D. Ohio July 16, 1993) (asserting that vestiges persist, in support of argument to approve new education plan and require defendant State of Ohio to help fund).

117.

The concept of unitariness has been a helpful one in defining the scope of the district courts’ authority, for it conveys the central idea that a school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts’ remedial control ought to be modified, lessened, or withdrawn. But, as we explained last term in [*Dowell*], the term ‘unitary’ is not a precise concept: ‘It is a mistake to treat words such as ‘dual’ and ‘unitary’ as if they were actually found in the Constitution . . . .’ It follows that we must be cautious not to attribute to the term a utility it does not have.

*Freeman v. Pitts*, 112 S. Ct. 1430, 1443-44 (1992); *see also supra* notes 19-23 and accompanying text.

118. *See, e.g., Pitts*, 112 S. Ct. at 1437; *Board of Educ. v. Dowell*, 498 U.S. 237, 241-42 (1991). However, in at least two circuits, courts may also raise the question of unitariness *sua sponte*. *See, e.g., Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1419 (11th Cir. 1992) (stating that the “district court reactivated these cases on its own motion and ordered the parties to show cause why the court should not find that the defendants’ school systems each had achieved and maintained unitary status, and, as a consequence, dismiss the cases”); *Youngblood v. Board of Pub. Instruction*, 448 F.2d 770, 771 (5th Cir. 1971) (explaining that after a three-year reporting period following reversal of the district court’s *sua sponte* dismissal of the school desegregation case, “the District Court should again consider whether the cause should be dismissed”).

119. *See, e.g., United States v. Fordice*, 112 S. Ct. 2727, 2741 (1992) (“*Brown* and its progeny . . . established that the burden of proof falls on the State, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system.” (citing *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 300 (1955)); *accord id.* at 2743-44 (O’Connor, J., concurring); *Lee*, 963 F.2d at 1425 (“Once a court has found a school system to have operated a racially dual system, the defendant school authority has the burden of proving that it has achieved unitary status—that it has eliminated the vestiges of its dual system to the extent practicable.”); *cf. Pitts*, 112 S.Ct. at 1447 (explaining that until the school system is found to have attained unitary status, the defendant has the burden of proving that any current racial imbalance within the school system is not related proximately to the prior violation). *But see infra* notes 123-24 (discussing circumstances which appear to shift the burden of proof).

*Dowell* test (elimination of vestiges) into the former,<sup>120</sup> or even expressly asserting that such compliance has perforce eliminated all vestiges of past discrimination.<sup>121</sup> Thereupon, it would presumably become the burden of plaintiffs asserting (perhaps as a basis for opposing a motion to dismiss) that vestiges persist<sup>122</sup> to come forward and identify such vestiges which had not been eliminated to the extent practicable.<sup>123</sup>

A critical consideration at that stage would be the nature of plaintiffs' burden—specifically, whether something more would be required of plaintiffs than identifying an observed condition and simply asserting that it is a “vestige.”<sup>124</sup> That is, would plaintiffs properly be required, as if at the trial regarding liability, to prove that some observed condition is a “vestige of past discrimination”

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120. See *supra* notes 28-32 and accompanying text (discussing efforts to merge the issue of vestiges into that of compliance).

121. But see *supra* note 116 (defendant boards of education in *Yonkers* and *Reed* assert the existence of vestiges).

122. The following discussion of the apportionment of burdens of proof refers, for the sake of simplicity, to the party asserting the existence of vestiges as “plaintiffs.” In light of cases such as *Yonkers* and *Reed*, the rationale for assigning any such burden to plaintiffs would appear applicable to any party asserting the existence of vestiges.

123. See *Lee*, 963 F.2d at 1423-24 (holding, over plaintiffs' objections, that a district court may employ a summary judgment proceeding to terminate a school desegregation case and that plaintiffs are not entitled to an *evidentiary* hearing so long as they receive notice of a hearing and its purpose (*i.e.*, to decide whether to conclude the case) and “are afforded an opportunity to demonstrate to the court why the case should not be dismissed” and quoting *Freeman v. Pitts*, 755 F.2d 1423, 1426 (11th Cir. 1985), for the proposition that “[t]he plaintiffs should receive notice of the hearing's purpose, and the hearing should give them an opportunity to show why the court should continue to retain jurisdiction.”); see also *Youngblood*, 448 F.2d at 771 (“In no event, however, shall the District Court dismiss the action without notice to the plaintiffs . . . and a hearing providing opportunity to plaintiffs . . . to show cause why dismissal of the cause should be further delayed.”).

124. In order to reconcile the Eleventh Circuit's recitation, in *Lee*, of the obligation of a district court to afford *plaintiffs* an opportunity to show why a school desegregation case should *not* be dismissed, with its assignment, in the same case, of the burden of proof relating to the dismissal of a school desegregation case to *defendant* school officials, 963 F.2d at 1423-25, it may be necessary to view the latter as being invoked only in the event of plaintiffs' opposition. In *Lee*, the court of appeals held that plaintiffs' proffer of evidence raised genuine issues of material fact as to whether defendant school district had achieved and maintained unitary status, thereby precluding a declaration of unitary status on summary judgement. *Id.* at 1425.

Thus, if plaintiffs failed to show cause why a case should *not* be dismissed, *i.e.*, failed to make such a proffer, it is not clear, at least in the Eleventh Circuit, that defendant school officials would, in fact, be obliged to sustain the burden of proving the school system had complied with the *Dowell* test.

For a discussion of the nature of relevant burdens and the effect of presumptions, see *infra* notes 128-53 and accompanying text.

which has not been eliminated "to the extent practicable"?<sup>125</sup>

Answering the foregoing question affirmatively appears, at first blush, to do precisely what Supreme Court case law proscribes, *i.e.*, to shift to aggrieved plaintiffs the burden of showing that a dual school system has *not* been disestablished.<sup>126</sup> To answer in the negative places on defendants the logically impossible burden of proving the negative—*i.e.*, that some presently observed condition cited by plaintiffs is *not* a "vestige of past discrimination."<sup>127</sup> Resolution of this dilemma turns on "the most common problem in school desegregation cases"—causation.<sup>128</sup>

### C. Causation and the Green/Keyes Presumption

Among the factors set out in the test for vestiges proposed above, the critical issue with respect to whether a presently observed condition properly constitutes a vestige is likely, as at the trial stage, to be causation. The problem presented by causation at the initial liability stage arises from the exceedingly complex interaction of defendants' conduct that may affect the racial identification of schools (*e.g.*, the locations, grade structures and capacities of schools, student and faculty assignment patterns), and other actions and decisions, both public and private, that may also affect the racial identification of schools (*e.g.*, residential patterns, other demographic factors, individual enrollment decisions).<sup>129</sup>

125. Cf. Note, *supra* note 115, at 659 (arguing that "plaintiffs challenging a school board action as promoting the reestablishment of the dual system after a finding of unitariness should be required to make a *prima facie* showing that the action will cause a substantial resegregation in the school system . . . [before] the burden should shift to the school authorities to prove that the action did not result from an intent to discriminate") (footnote omitted).

126. See *United States v. Fordice*, 112 S. Ct. 2727, 2741 (1992) (explaining that the burden falls on the state, and not the plaintiffs, to prove that the segregated system has been dismantled); *supra* note 119. But see *supra* notes 123-24 (stating that plaintiffs must demonstrate why case should not be dismissed).

127. See *infra* notes 130-31 and accompanying text (discussing the *Green/Keyes* presumption).

128. Gewirtz, *supra* note 20, at 785 (identifying causation as "the most common problem in school desegregation cases—deciding whether a confusing set of facts establishes that a systemwide segregated pattern was caused by the defendant's segregative acts"). Professor Gewirtz notes that such factual confusion is compounded by alternative constructions of the legal standard for "causation in fact," which range from the more traditional notion of "but for" causation to the somewhat less exacting standard of the conduct at issue being a "substantial factor" in bringing about a harm. *Id.* (comparing RESTATEMENT (SECOND) OF TORTS § 431 (1965) with EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 80.18 (1977)); see also *infra* note 146 (discussing the standard of proof).

129. The complex, mutual interaction between school enrollments and residential patterns

Thus, it is often extremely difficult to sort out the causal story and determine the precise extent to which currently observable segregated patterns are traceable to the defendant's discrimination. The Supreme Court's method of dealing with this empirical uncertainty about the violation's scope has been controversial. The Court has held that once the plaintiff makes a specific threshold showing that the defendant purposefully segregated in at least a substantial part of the school system, it will be *presumed* (rebuttably) that present segregated patterns throughout the school system were caused by the defendant's discrimination.<sup>130</sup>

One Supreme Court Justice has recently criticized the presumption that present segregated conditions were caused by defendants' past discriminatory conduct as being "extraordinary and increasingly counterfactual."<sup>131</sup> Presumably, the passage of time tends to

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has been widely recognized and commented upon by the courts and scholars. *See, e.g., Freeman v. Pitts*, 112 S. Ct. 1430, 1447-48 (1992); *id.* at 1450-52 (Scalia, J., concurring); *id.* at 1454 (Souter, J., concurring); *id.* at 1457-60 (Blackmun, J., concurring); *Board of Educ. v. Dowell*, 498 U.S. 237, 250 n.2 (1991); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979); *id.* at 512 (Rhenquist, J., dissenting) (stating that residential segregation "doubtless result[s] from a mélange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near people of one's own race or ethnic background"); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20 (1970) ("People gravitate toward school facilities . . ."); *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538, 1544-46 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 587-88 (1965); Gewirtz, *supra* note 20, at 785.

130. Gewirtz, *supra* note 20, at 785 (citing *Keyes v. School Dist. No. 1*, 413 U.S. 189, 201 (1973)). The Supreme Court in *Keyes* stated:

[A] finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious . . . and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.

*Keyes*, 413 U.S. at 208; *accord* *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979); *Columbus Bd. of Educ.*, 443 U.S. at 467-68 (1979); *Green v. County Sch. Bd.*, 391 U.S. 430, 441-42 (1968).

131. *Freeman v. Pitts*, 112 S. Ct. 1430, 1454 (1992) (Scalia, J., concurring). In his opinion, Justice Scalia attacked the rationale for the presumption (which he ascribed to *Green*, although its explication came five years later, in *Keyes*):

[J]udicial recognition of an 'affirmative duty' to desegregate [was] achieved by allocating the burden of negating causality to the defendant. Our post-*Green* cases provide that, once state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there arises a presumption, effectively irrebuttable (because the school district cannot prove the negative), that any current



attenuate the causal relationship between prior unconstitutional conduct and any presently observed condition,<sup>132</sup> as does the demonstrated good faith of school officials in remedying the violation.<sup>133</sup> Nonetheless, because the racial composition of student

racial imbalance is the product of that violation . . . . But granting the merits of this approach at the time of *Green*, it is now 25 years later. 'From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination.' . . . At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools . . . . While we must continue to prohibit, without qualification, all racial discrimination in the operation of public schools, and to afford remedies that eliminate not only the discrimination but its identified consequences, we should consider laying aside the extraordinary, and increasingly counterfactual presumption of *Green*.

*Id.* at 1453-54 (citations omitted); *see also* *United States v. Fordice*, 112 S. Ct 2727, 2744-45 (1992) (Thomas, J., concurring):

[O]ur decisions following *Green* indulged the presumption, often irrebuttable in practice, that a presently observed imbalance has been proximately caused by intentional state action during the prior *de jure* era. As a result, we have repeatedly authorized the district courts to reassign students, despite the operation of facially neutral assignment policies, in order to eliminate or decrease observed racial imbalances. Whatever the merit of this approach in the grade-school context, it is quite plainly not the approach that we adopt today to govern the higher-education context.

(citations omitted). For a discussion of how changing judicial attitudes may be affecting the ways that courts treat the issue of causation, see Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J., 863, 865-69 (1993).

132. *See Pitts*, 112 S. Ct. at 1448 ("As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system."); *accord id.* at 1453-54 (Scalia, J., concurring); *cf.* *Oliver v. Kalamazoo*, 640 F.2d 782, 811-12 (6th Cir. 1980) (continuing effect of prior *de jure* system on African American students different for those in grades K-9 who had never attended anything but a majority white school than for those in grades 10-12 who had attended segregated schools). *But see* *Brown v. Board of Educ.*, 978 F.2d 585, 590 (10th Cir.):

The Constitution does not permit the Courts to ignore today's reality because it is temporally distant from the initial finding that the school system was operated in violation of the constitutional rights of its students. Temporal distance matters only to the extent that changes across that time period, unconnected to the *de jure* system's lingering effects, are responsible for what is observable today.

*cert. denied*, 113 S. Ct. 2994 (1993); *cf.* *Keyes*, 413 U.S. at 210-11 (rejecting the relevance of remoteness in time: "If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional'"); *Brinkman v. Gilligan*, 583 F.2d 243, 249 (6th Cir. 1978) (same).

133. *See Pitts*, 112 S. Ct. at 1448 ("The causal link between current conditions and the

bodies in schools is so fundamental in school desegregation cases,<sup>134</sup> the *Green/Keyes* presumption continues to be applied, at least as to that condition, even well after liability has been established and a remedial plan instituted.<sup>135</sup> Obviously, the presumption most readily applies to those factors most directly affecting or manifesting the racial identifiability of schools—*i.e.*, student and faculty assignments<sup>136</sup>—since evidence of racial identifiability of schools will, by definition, be part of the record for any school district previously held liable for *de jure* segregation.

Whether such a presumption is applicable in the later stages of a school desegregation case with respect to *other* presently observed conditions would determine who bears the burden to present evidence tending to prove (or disprove)<sup>137</sup> that such conditions

prior violation is even more attenuated if the school district has demonstrated its good faith.”).

134. See *id.*, at 1437 (“[T]he degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole . . . is fundamental, for under the former *de jure* regimes racial exclusion was both the means and the end . . .”); *supra* notes 54-63 and accompanying text.

135. See *Pitts*, 112 S. Ct. at 1447 (“The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.”); accord *id.* at 1457 n.1 (Blackmun, J., concurring) (“The Court’s cases make clear that there is a presumption in a former *de jure* segregated school district that the board’s actions caused the racially identifiable schools, and it is the school board’s obligation to rebut that presumption.”); *Brown*, 978 F.2d at 590-91:

In the continuing remedial phase of this litigation, then, the district court must impose upon defendants the substantial burden of demonstrating the absence of a causal connection between any current condition of segregation and the prior *de jure* system . . . . It is far easier to demonstrate an absence of segregative intent than it is to rebut the presumed causal connection between current conditions and legally mandated segregation. See *Pitts*, 112 S. Ct. at 1453 (Scalia, J. concurring) (presumed connection is powerful).

(footnote omitted), *cert. denied*, 1993 U.S. LEXIS 4259.

136. See *Pitts*, 112 S. Ct. at 1449 (“We have observed . . . that student segregation and faculty segregation are often related problems.”); see also *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 536 (1979) (“[P]urposeful segregation of faculty by race was inextricably tied to racially motivated student assignment practices.”); *Brown*, 978 F.2d at 589 n.5 (pattern of assigning minority faculty in a manner that reflects minority student assignment may itself reinforce racial identifiability).

137. Such a presumption, of course, is simply “a *procedural* device, designed only to establish an order of proof and production.” *St. Mary’s Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2755 (1993). As such, it “imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.” FED. R. EVID. 301; see also *infra* note 142 and accompanying text (discussing application of and

were caused by defendants' prior unconstitutional conduct and therefore constitute "vestiges" within the purview of *Dowell*.<sup>138</sup> Since the evidence necessary to "prove or disprove complex chains of causation involving historical, sociological, and demographic forces . . . can be difficult to obtain and costly to develop, the party bearing the burden is often at a distinct disadvantage."<sup>139</sup>

#### D. Applying the Presumption to Other Conditions

Should the *Green/Keyes* presumption apply to conditions other than the racial composition of student bodies? Although no court has explicitly decided the issue since *Dowell*,<sup>140</sup> it is virtually cer-

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evidentiary weight accorded such presumption).

138. If a presently observed condition were not found (whether by presumption or direct evidence) to be causally connected to the prior *de jure* system (*i.e.*, not a "vestige"), plaintiffs seeking relief on constitutional grounds presumably would have to prove defendants' racially discriminatory intent, as well as a racially disproportionate impact. See *Village of Arlington Hts. v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact."); see also *Washington v. Davis*, 426 U.S. 229, 239 (1976) (stating that official action without "racially discriminatory purpose" is not "unconstitutional solely because it has a racially disproportionate impact"); *Dowell*, 1993 U.S. App. LEXIS 28699, at \*51. Conversely, "no showing of discriminatory intent would be needed to enable the court to address [a vestige]." *Brown*, 978 F.2d at 593. Notably, the district court's opinion in *United States v. Yonkers*, No. 80 Civ. 6761, 1993 U.S. Dist. LEXIS 12079, at \*13, 14 (S.D.N.Y. Aug. 30, 1993) does not address directly the matter of intent in referring to "a current discrimination" and concluding that "the distinction between ongoing discriminatory conduct and a 'vestige' . . . is of no moment in determining in this phase of the case whether some corrective action is needed."

139. Williams, *supra* note 20, at 810. Justice Scalia was even more emphatic: "[A]llocation of the burden of proof foreordains the result in almost all of the 'vestige of past discrimination' cases." *Pitts*, 112 S. Ct. at 1452 (Scalia, J., concurring).

140. Although the Tenth Circuit may have adopted something approximating such a presumption in assigning to defendants "the substantial burden of demonstrating the absence of a causal connection between any *current condition of segregation* and the prior *de jure* system," *Brown v. Board of Educ.*, 1992 U.S. App. LEXIS 27879, at 11-12 (10th Cir.) (emphasis added), its formulation begs the question of just what constitutes such a "current condition of segregation" or how one is identified, in the first instance. The phrase may simply be a synonym for racial imbalance in student populations or it may be broader. To the extent that "current condition of segregation" is synonymous with "vestige," the unanswered question—What is it?—is precisely the one this article attempts to answer. Similarly, while the *Yonkers* district court stated that at least as to city defendants who were party to the liability and remedy phases of the case, "the burden of proof rests on the defendants to show that any current segregation or discriminatory conditions are not in fact causally related to the prior dual system[.]" 1993 U.S. Dist. LEXIS at \*15, its *a priori* labeling of such conditions as "discriminatory" appears to assume defendants' liability. See *id.* at \*14; *supra* note 138. Moreover, the court stressed that the "primary inquiry at this phase is to determine whether discriminatory conditions exist. . . . Questions of causation have been deferred." *Id.* at \*15.

tain to arise as cases around the country are examined in light of the *Dowell* standard.

At one end of the spectrum, applying such a presumption (*i.e.*, that a given condition was *caused* by the prior *de jure* system) could permit plaintiffs to make a *prima facie* showing of vestiges simply by identifying those presently observed conditions that separate or distinguish between population groups by race to the relative detriment of school desegregation plaintiffs.<sup>141</sup> Thereupon, the presumption that such conditions were caused by (and therefore are, in present manifestation, “vestiges” of) past discrimination would apply and the burden would shift to defendant school officials to produce evidence either to rebut the presumption (*i.e.*, to disprove a causal nexus between such condition in its present manifestation and prior segregative conduct),<sup>142</sup> or to prove that the

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Presumably, the further removed any presently observed condition is from factors directly affecting or manifesting the racial identifiability of schools (*i.e.*, student and faculty assignments), the more tenuous is any inferred causal connection to the prior *de jure* violation.

Even for conditions addressed in a remedial decree, the causal nexus between prior acts of unconstitutional segregation by defendant school officials and conditions other than those that bear directly on the racial identifiability of schools—*i.e.*, student and faculty assignments—may have been less clearly established in the record at trial and less closely scrutinized on appeal. *Cf.* *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 811 (6th Cir. 1980) (“[A]t the inception of a desegregation effort, such as . . . in *Milliken II*, the district court could, in ordering ancillary programs, *presume* that disparity in achievement was related to the segregated schools.”) (emphasis added) (citations omitted).

141. *See* *Vaughns v. Board of Educ.*, 758 F.2d 983, 991 (4th Cir. 1985) (“Because the County’s school system had not attained unitary status, it is settled law that plaintiffs were entitled to a presumption that current placement disparities [black students were overrepresented in special education program and underrepresented in the] talented and gifted program] were causally related to prior segregation and that the burden of proving otherwise rested on defendants.”) (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979)); *United States v. Gadsden County Sch. Dist.*, 572 F.2d 1049, 1050 (5th Cir. 1978) (stating that the burden is on the school board to show racial concentrations from ability grouping are not the result of past segregation); *cf. Oliver*, 640 F.2d at 811 (holding that the district court could presume disparity in achievement related to segregated schools).

142. *See* *Keyes v. School Dist. No. 1*, 413 U.S. 189, 211 (1973) (defendant “can rebut the *prima facie* case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools”). Since disproving causation is literally impossible, *Pitts*, 112 S. Ct. at 1453 (Scalia, J., concurring), defendants’ effort to meet such burden would likely entail presenting evidence to show that factors other than the *de jure* system caused the alleged vestige.

While it is the burden of production and not “the burden of proof in the sense of the risk of nonpersuasion” which would shift to defendants, FED. R. EVID. 301, the precise nature of that burden is not completely clear. The Advisory Committee on the 1972 Proposed Rules of Evidence noted: “The so-called ‘bursting bubble’ theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of

condition had, in fact, been eliminated "to the extent practicable." At the other end of the spectrum, a court might decline to apply this presumption to any condition other than those directly affecting or manifesting the racial identifiability of schools<sup>143</sup>—*i.e.*, student<sup>144</sup> (and perhaps faculty<sup>145</sup>) assignments. This would require plaintiffs to prove,<sup>146</sup> presumably in a new evidentiary proceeding, a causal nexus to the prior *de jure* system in order to label such conditions "vestiges of past discrimination" to which a legal duty attaches.<sup>147</sup> One can also postulate intermediate posi-

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the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too slight and evanescent an effect." FED. R. EVID. 301 advisory committee's note (citation omitted). *But see* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2748 (1993) ("By producing evidence [to rebut a presumption] (whether ultimately persuasive or not) . . . petitioners sustained their burden of production . . . . In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption . . .) can involve no credibility assessment."). Although *Hicks* dealt with the presumption that had been established in earlier case law regarding Title VII discriminatory treatment cases, *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), application of its reasoning to the instant analysis would appear to suggest that defendants' evidence tending to disprove causation need not be persuasive to a fact-finder in order to rebut the proposed presumption. Thereupon, "[t]he presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture . . . , [whereupon] the trier of fact proceeds to decide the ultimate question . . ." *Hicks*, 113 S. Ct. at 2749 (citation omitted), *i.e.*, whether plaintiff has proven that an alleged vestige was caused by the prior *de jure* system.

143. *See, e.g.,* *Oliver*, 640 F.2d at 811, 810 ("[I]t is absolutely inequitable and unrealistic to place the burden of proof on the defendants" to rebut the presumption that "the undisputed disparity in achievement between black students and white students in reading, language, mathematics and science [was] related to a failure to remedy an unconstitutional condition . . .").

144. *See supra* notes 134-35.

145. *See supra* note 136.

146. The standard of proof in these cases is a preponderance of the evidence. *See* Alexander v. Youngstown Bd. of Educ., 675 F.2d 787, 798 (6th Cir. 1982); *see also* Alvarado v. El Paso Indep. Sch. Dist., 593 F.2d 577, 581 (5th Cir. 1979).

147. There must be some causal link between the prior *de jure* system and the putative vestige in order to invoke a legal remedy. *Freeman v. Pitts*, 112 S. Ct. 1430, 1448 (1992). However, *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979) ("caused at least in part by"), *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 n.13 (1979) (school board actions a "contributing cause"), and *Keyes v. School Dist. No. 1* 413 U.S. 189, 211 (1973) ("create or contribute to"), illustrate the Supreme Court's acceptance of a lesser *standard* of causation than "but for" in this setting; *see also* *Pitts*, 112 S. Ct. at 1457 (Blackmun, J., concurring) ("It is not enough, however, for [defendant school board] to establish that demographics exacerbated the problem; it must prove that its own policies did not contribute.") (footnote omitted). For a discussion of alternative standards of causation—*i.e.*, regarding whether the prior unconstitutional conduct was the *predominant* cause or a *contributing* cause of an alleged vestige—*see* Williams, *supra* note 20, at 809 n.86; Gewirtz, *supra* note 20, at 785.

tions on this spectrum that would permit plaintiffs<sup>148</sup> to make some lower threshold showing (*e.g.*, that evidence already in the record connects the given condition to the finding of liability, or that the condition had been addressed in some manner in the remedial decree) in order to make out a *prima facie* case that a given condition is a vestige.<sup>149</sup>

While the analysis of vestiges clearly may reach beyond the *Green* factors,<sup>150</sup> the question of whether to apply the *Green/Keyes* presumption (with the corresponding assignment of burdens) to conditions other than those directly affecting or manifesting the racial identifiability of schools would appear to have rather profound implications. Because of the significance of how the respective burdens are apportioned ("foreordains the result")<sup>151</sup> and the strength attributed to such a presumption ("irrebuttable in practice," "effectively irrebuttable"),<sup>152</sup> its applicability in the later stages of a school desegregation case could determine whether certain presently observed conditions (*e.g.*, disparities in academic achievement by race<sup>153</sup>) are labeled as "vestiges," and thereby

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148. Or more properly "movants." See *supra* note 122.

149. See, *e.g.*, *United States v. City of Yonkers*, No. 80 Civ. 6761, 1993 U.S. Dist. LEXIS 12079, at \*21 (S.D.N.Y. Aug. 30, 1993) ("[I]f we begin as all parties do with the premise that all children can learn and recognize that school occupies as much as it does of a child's life, the [Yonkers Board of Education's] burden of showing that these achievement disparities result from vestiges of segregation is not a heavy one."). The Yonkers Board presented expert testimony to prove "that race is a statistically significant factor in the gap which exists," *id.*, and met its burden as to causation with "largely anecdotal" evidence that such disparities were the result of inadequately trained teachers with "reduced expectations of what minority students can achieve," due to lack of funds (which the action was brought to seek from the state of New York). *Id.* at \*22-23. The court found evidence of the "correlation between achievement test scores and the conduct of Yonkers school officials" to be "'concrete' and persuasive." *Id.* at \*21, n.3.

150. See *Pitts*, 112 S. Ct. at 1446-47.

151. See *supra* note 139.

152. See *supra* note 131 and text accompanying note 139.

153. Whether the foregoing presumption should apply to differences by race in "the more ineffable category of quality of education," *Pitts*, 112 S. Ct. at 1441, as reflected by, *e.g.*, measured disparities in student outcomes (*i.e.*, graduation rates, test scores, etc.) by race seems almost certain to become a prominent issue. See, *e.g.*, *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 810-11 (6th Cir. 1980); *Yonkers*, 1993 Dist. LEXIS 12079, at \*15-16 ("The phenomenon . . . which this court deems to be of paramount importance, is the disparity which exists between majority and minority students [regarding] achievement levels on standard reading and math tests . . . [O]ne looks to achievement results on standardized tests to determine whether equality of educational opportunity has been achieved."); see also *Williams*, *supra* note 20, at 805 n.71 (identifying continuing racial disparities in educational achievement as an "underlying vestige," both "long-lasting" and "difficult to prove or disprove").

whether school districts satisfy the *Dowell* test or bear a continuing Constitutional duty to eliminate such conditions.

Uncertainty over how the *Green/Keyes* presumption may be treated should weigh heavily in the deliberations of school desegregation litigants concerned with how to address the "vestiges" prong of the *Dowell* test.

### E. *The Limits of Litigation*

Analytically, the approach described above may closely resemble that employed in the development of the original remedial decree, in that it essentially redefines the nature and scope of defendants' remedial obligations.<sup>154</sup> However, it is much further removed in time from the events that gave rise to the initial finding of liability upon which the decree was based. The task for the court and parties in divining causation between unconstitutional conduct that recedes ever further into the past and the complex problems of present-day public education (especially in urban America) would be, under any circumstances, a daunting one.

If the matter proceeded on an adversarial basis, plaintiffs might well have to prove causation as to certain alleged vestiges in order to secure *any* relief in such areas. Conversely, defendants, in an effort to avoid further (or continuing) liability, could be obliged to show that past segregation was not a contributing cause of certain observed conditions.<sup>155</sup> One of the grounds on which the *Green/Keyes* presumption has been attacked—that the passage of

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The district and appellate courts in *Jenkins v. Missouri*, Nos. 90-2238, 91-3636, 92-3194, 92-3200, 1993 U.S. App. LEXIS 31204 (8th Cir. Nov. 29, 1993), have taken a somewhat different approach to the matter of quality of education and student achievement: "Segregation has caused a system wide reduction in student achievement in the schools of the [Kansas City School District]," *id.* at \*25 (quoting district court), thereby defining "the system-wide reduction in student achievement" as a "vestige." *Id.* at \*32. Notably, this approach apparently does not rely on the *disparity* between population groups as a basis for defining the condition as a vestige.

154. See *Pitts*, 112 S. Ct. at 1443 ("[A] school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn."); see also *Oliver*, 640 F.2d at 789 ("[T]here is no indication in [*Milliken II*] that such ancillary programs may only be required at the time the system is desegregated."); *Coalition to Save Our Children v. Board of Educ.*, 757 F. Supp. 328, 331 (D. Del. 1991).

155. Defendants' search for other factors that explain measurable differences between population groups by race (in, e.g., academic achievement) could generate considerable controversy in the community, straining both racial harmony and school-community relations.

time attenuates the cause-effect relationship between presently observed conditions and past segregative or discriminatory conduct of school officials<sup>156</sup>—suggests the difficulty the parties would have in definitively proving (or disproving) a causal connection between prior segregative conduct and a presently observed condition. Moreover, for many conditions alleged to be vestiges, the question of a causal link to the prior *de jure* system may well be one of degree, not kind. (*I.e.*, to what extent did the prior *de jure* system contribute to the presently observed condition?)

The demand on scarce resources (monetary, personnel, judicial) in a seriously contested proceeding of this sort obviously would be substantial.<sup>157</sup> The political, social and psychological costs to the institutions and communities involved could be considerable. Moreover, in attempting simply to determine whether a given condition was a “vestige of past discrimination,” all of the effort, activity and cost would be directed, in the first instance, *not* at ways to address the present educational needs of students (especially plaintiff class students), but in assessing liability for the present-day existence of such needs based on transgressions of the past.<sup>158</sup>

If hard cases make bad law, then courts and litigants may do well to refrain from making vestiges the subject of litigation. Those striving to realize the aspirations of *Brown* by better serving the needs of all students may seek another course.

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156. See *supra* notes 131-32.

157. This consideration seems particularly acute in already-overburdened public school systems. By way of illustrating the costs of litigation, in *Reed*, which was filed in 1973, there have been hundreds of days of hearings in court, thousands of meetings outside the courtroom, over 3,400 docket entries, over 500 orders or written pronouncements by the Court and legal costs to the defendants (state and local) for outside counsel alone (including the prevailing plaintiffs' attorneys' fees) of more than \$10 million. Letter from William E. Aldridge, Treasurer, Cleveland Public Schools, to Richard Alston, Office on School Monitoring and Community Relations (Nov. 15, 1993) (on file with author); Ohio Dep't of Education, “Court Ordered Desegregation Costs,” Nov. 17, 1993. This figure does not attempt to reflect the imputed costs of untold thousands of person-hours of school administrators' time engaged in litigation-related activities. See also Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 769 (1993) (describing litigation costs of over \$1 million for DeKalb County School System to secure Supreme Court ruling remanding matter of determining unitariness back to district court).

158. The acrimony likely to ensue in such a scenario could further damage the relationship among parties who, in some manner, must remain involved in the educational enterprise together. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 19-22 (Bruce Patton ed., 2d ed. 1991).



## VI. NEGOTIATING VESTIGES—A MODEST SUGGESTION

Questions regarding the apportionment of burdens, other problems of proof<sup>159</sup> and the social and monetary costs of litigation, as well as an interest in maximizing the efficacy of and voluntary adherence to any "ongoing affirmative regime of conduct,"<sup>160</sup> might persuade a district court and parties to pursue a negotiated rather than an adjudicated resolution of whether the vestiges of past discrimination have been eliminated to the extent practicable, and if not, how they ought to be. The apparent institutional interests of the respective parties,<sup>161</sup> especially insofar as they reflect a concern with the educational outcomes of students affected by school desegregation lawsuits,<sup>162</sup> may, with some encouragement from a court, also militate in favor of such a negotiated resolution.<sup>163</sup>

From the plaintiffs' perspective, a negotiated resolution avoids the difficulty and cost of proving, over defendants' opposition, that an observed condition is, in fact, a "vestige"—*i.e.*, that there is a causal relationship between the past segregative conduct of school officials and the present-day condition or manifestation.<sup>164</sup> As not-

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159. See *supra* text accompanying notes 115-53.

160. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

161. Litigation involving a large, heterogenous class party poses unique problems associated with simply ascertaining what the interests of that party are: "At various points during the course of a suit, responsibility for taking the measure of the interests of class members may either be given to the trial judge or, as is customary in nonclass litigation, delegated to the litigants." *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1475 (1976). "[C]lass members who agree that the defendant has violated their constitutional . . . rights may disagree as to the proper institutional change which the court should order." *Id.* at 1553 (citing *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975) (noting that different associations claiming to speak for Atlanta's African-American parents agreed on liability for past school segregation but split over use of 'busing' remedy)).

In protracted class action litigation, particularly of the 'public law' variety, see Chayes, *supra* note 160, conflicts between the political and personal interests of the parties and their counsel may at times inhibit the goal of serving the parties' best interests. For an examination of such differences between class plaintiffs and their counsel in the school desegregation context, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

162. See *id.* at 477-82 (describing tension between integration goals and educational consequences of racial balance remedies). For a discussion of how school desegregation and school reform can, by focusing on "educational vestiges," be mutually reinforcing, see Tatel, *supra* note 3, at 64.

163. See FISHER & URY, *supra* note 158, at 40-55 (distinguishing between conflicting positions parties adopt as a common tactic in bargaining and underlying interests which may not conflict or which may be reconciled by some alternative approach).

164. See *Freeman v. Pitts*, 112 S. Ct. 1430, 1448 (1992); see also *supra* text accompanying note 38.

ed above, the passage of time between the unconstitutional conduct of school officials, upon which the initial finding of liability was based, and a subsequent proceeding identifying vestiges may add considerably to the difficulty of plaintiffs' task. In addition to securing the protection inherent in federal court jurisdiction during the term of an agreement, plaintiffs might also be able to negotiate for programs or other benefits to the class, the need for which may not easily be demonstrated to be causally connected to the prior violation (*i.e.*, a vestige), but is nevertheless relevant to the effectiveness of a remedy. While plaintiffs may properly insist that their Constitutional right to the elimination of vestiges is not negotiable, the remedial methods chosen (the *means* to that end) may well be, particularly if such negotiations lead to a more enthusiastic remedial effort from defendants.<sup>165</sup>

Conversely, negotiating a resolution might enable defendant school officials to avoid a court's application of the "effectively irrebuttable" presumption of *Green/Keyes*, which would require them to disprove that certain presently observed conditions were caused by the unconstitutional conduct of previous school officials. Defendants could thereby avoid a formal finding that a certain condition is, in fact, a "vestige," and the concomitant legal duty, which continues indefinitely, to eliminate that condition to the extent practicable. Accordingly, defendant school officials may view such negotiation as a method of honoring their constitutional obligations, while confining the scope of their liability<sup>166</sup> and re-asserting control over the operations of their school system more expeditiously.<sup>167</sup>

By negotiating an agreement that directs actions and resources to existing conditions in a manner that is flexible and proportionate to their perceived significance, parties avoid the "all-or-nothing" quality of a court's finding that said condition either is or is not a

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165. One school board attorney has suggested that if plaintiffs "adopt a less confrontational attitude toward school boards . . . in many cases effective compromises could be reached which in the long run would be more effective than they would have been had the plaintiffs succeeded in implementing their own plan." Alfred A. Lindseth, *A Different Perspective: A School Board Attorney's Viewpoint*, 42 EMORY L.J. 879, 887 (1993).

166. Defendants presumably could negotiate an agreement to undertake certain activities while expressly disclaiming that any of the conditions to be addressed thereby constitute "vestiges of past discrimination."

167. See *Pitts*, 112 S. Ct. at 1445 (stating that one of the prerequisites to relinquishment of court control over schools is "that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution").

“vestige.” Beyond the identification of vestiges, parties can also avoid the uncertainty of the manner in which a court might treat the limiting phrase, “to the extent practicable,” with regard to the elimination of such vestiges.<sup>168</sup> In instances where the state educational authority shares some financial responsibility for desegregation activities in a local school district,<sup>169</sup> the common interests of plaintiffs and local school officials in tailoring further remedial efforts to eliminate particularly the putative *educational* vestiges of past discrimination may make it possible for them to agree in ways which preserve the state’s continuing financial support.<sup>170</sup> Conversely, the state authority may be persuaded to trade a sum certain financial contribution for an uncertain, potentially more lengthy and costly future in litigation regarding what is or is not a “vestige,” to which legal duties and financial consequences attach.<sup>171</sup> By negotiating a resolution, the parties may also redirect the considerable resources, personal and financial, that would otherwise be expended on litigation over these matters, to other, presumably more constructive, purposes.

By strongly encouraging negotiations over vestiges, a court can oblige the parties to share responsibility for resolving the intractable issues common to these cases (*e.g.*, the relationship between alleged vestiges and the prior segregated system), thereby maximizing both the prospects of their commitment to support the outcome and the perceived legitimacy that such an outcome may enjoy.<sup>172</sup>

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168. See *supra* note 34. This phrase clearly confers rather broad discretion on the district court: “The Supreme Court has recognized the special role of the district court in school desegregation cases, particularly when the district judge has ‘lived with the case over the years.’” *Dowell v. Board of Educ.*, Nos. 91-6407, 92-6046, 1993 U.S. App. LEXIS 28699, at \*20 (10th Cir. Nov. 4, 1993) (quoting *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 457 n.6 (1979)).

169. See, *e.g.*, *Milliken v. Bradley*, (*Milliken II*), 433 U.S. 267 (1977); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987); *Reed v. Rhodes*, 662 F.2d 1219 (6th Cir. 1981); *Evans v. Buchanan*, 582 F.2d 750 (3rd Cir. 1978), *cert. denied*, 446 U.S. 923 (1980); see also *United States v. City of Yonkers*, No. 80 Civ. 6761, 1993 U.S. Dist. LEXIS 12079 (S.D.N.Y. Aug. 30, 1993) (finding the existence of vestiges and the need to expend additional funds to eradicate them, but deferring the matter of state liability and fiscal responsibility therefor).

170. See *id.* (both defendant Yonkers Board of Education and plaintiff Yonkers NAACP sought to impose upon the State of New York partial responsibility to fund educational improvement plan).

171. In addition, state defendants may be able to exercise greater control and demand a higher level of accountability in the expenditure of funds pursuant to a negotiated agreement.

172. See *White v. National Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993) (“The policy in federal court favoring the voluntary resolution of litigation through settle-

Persistent, even relentless, judicial encouragement (perhaps including steps like, *e.g.*, appointing a mediator to assist the parties) may be necessary, particularly where a long, acrimonious history of litigiousness leaves the parties indisposed to negotiate,<sup>173</sup>

In describing the court's role in what he termed "the emerging model [of] 'public law litigation'" (of which school desegregation cases were cited as a prime example), Harvard law professor Abram Chayes contended:

The negotiating process ought to minimize the need for judicial resolution of remedial issues. Each party recognizes that it must make some response to the demands of the other party, for issues left unresolved will be submitted to the court, a recourse that is always chancy and may result in a solution less acceptable than might be reached by horse-trading. Moreover, it will generally be advantageous to the demanding party to reach a solution through accommodation rather than through a judicial fiat that may be

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ment is particularly strong in the class action context."); *see also* Paul R. Dimond, *Symposium, Brown v. Board of Education and its Legacy: A Tribute to Justice Thurgood Marshall, Panel II: Concluding Remarks*, 61 *FORDHAM L. REV.* 63, 65-66 (1992) (arguing that courts in school desegregation cases should "permit the ultimate remedy to be worked out in a political process in which those who are aggrieved will at least have a continuing claim that the declared wrong cannot be remedied in the courts alone. By now, we should all be mature enough to understand the limits of courts in exercising their countermajoritarian powers . . .") (footnote omitted). *See generally* JOHN H. ELY, *DEMOCRACY AND DISTRUST* 4-5 (1980) (noting the inherently anti-democratic nature of federal courts invalidating the actions of political branches on constitutional grounds: "This, in America, is a charge that matters.").

173. For example, one district court directed that:

[Negotiations among the parties] should constitute the primary means through which you [the parties] move this lawsuit toward its orderly and just resolution.

. . . .

. . . [Y]ou should focus on the improvements in the educational program and changes in the practices of the school district that you believe will effectively eliminate the vestiges of past discrimination to the extent practicable.

. . . .

. . . [I]t is not the Court but you who attend and operate the schools. Thus, it is you who must find and follow the best course.

*Reed v. Rhodes*, No. C73-1300, 1992 U.S. Dist. LEXIS 4723, at \* 7, 8, 12 (N.D. Ohio Apr. 2, 1992); *see also* Transcript of District Court's Remarks at Hearing, Oct. 18, 1993 ("[T]he court takes pains to reiterate publicly that it is incumbent upon . . . the parties in this lawsuit to complete your efforts at reaching an agreement which will move this lawsuit from its present status to its orderly and just resolution."). On February 24, 1994, the parties in *Reed* submitted a memorandum of agreement which contemplates a formal settlement in the near future. Memorandum of Points of Agreement Between the Parties to *Reed v. Rhodes*, No. C73-1300 (Feb. 24, 1994).

performed 'in a literally compliant but substantively grudging and unsatisfactory way.' Thus, the formulation of the decree in public law litigation introduces a good deal of party control over the practical outcome. Indeed, relief by way of order after a determination on the merits tends to converge with relief through a consent decree or voluntary settlement. And this in turn mitigates a major theoretical objection to affirmative relief—the danger of intruding on an elaborate and organic network of interparty relationships.<sup>174</sup>

Obviously, the precise format or structure for such a negotiation process can be tailored by parties and a court to suit the circumstances and ancillary objectives peculiar to the given case.<sup>175</sup> Particularly important is insuring that the wide range of interests implicated by a prospective resolution regarding vestiges are adequately represented in the negotiations.<sup>176</sup> Moreover, even a partial resolution may narrow the dispute and permit partial withdrawal of court supervision.<sup>177</sup>

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174. Chayes, *supra* note 160, at 1284, 1299 (footnotes omitted).

175. Open and creative consideration of alternative mechanisms, *see, e.g.*, Nancy Neslund, *A Matrix of Mechanisms*, 2 J. DISP. RESOL. 217 (1990), and related factors could help school desegregation parties devise an approach for achieving a negotiated resolution regarding vestiges best suited to their and their community's needs.

176. While institutional defendants (*i.e.*, local and perhaps state school authorities) may be presumed to internalize and reflect the interests of their respective constituencies, it may be incumbent upon the trial court to take steps to insure that the range of views of a large and potentially ideologically-diverse plaintiff class are adequately represented in such negotiations. *See Developments in the Law, supra* note 161, at 1474-76. Courts may employ procedural devices to structure negotiations to facilitate the likelihood of a fair resolution (*e.g.*, creation of subclasses, appointing advocates for absentee interests), as well as to keep informed of the evolving terms of any prospective resolution. *Id.* at 1555-62. *See also* Bell, *supra* note 161, at 505-511 (characterizing class action procedures as impediments to dissenting views from class members and asserting, "it is incumbent upon the courts to ensure the fairness of proceedings that will bind absent class members").

177. *See Freeman v. Pitts*, 112 S. Ct. 1430, 1445, 1447 (1992).

[T]he court's end purpose must be to remedy the violation and in addition to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution . . . . A transition phase in which control is relinquished in a gradual way is an appropriate means to this end . . . . By withdrawing control over areas where judicial supervision is no longer needed, a district court can concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated and further action is necessary in order to provide real and tangible relief to minority students.

In sum, the label "vestige" has such profound consequences that both plaintiffs and defendants may find their shared interests better served by negotiating its scope and content, rather than leaving such issues to the vagaries of litigation in an inevitably politically-charged and adversarial environment.<sup>178</sup> Put differently, a resolution regarding vestiges that is mutually acceptable to the parties (and, presumably, to the broader community) may be more likely to result from the parties' (quasi-legislative) negotiations than a court's adjudication.<sup>179</sup>

## VII. CONCLUSION

The Supreme Court has made clear that school officials found liable in school desegregation cases have a duty to "eliminate the vestiges of past discrimination to the extent practicable." Far less clear is the meaning of the term "vestiges." Adjudicating that question in federal courts will raise very difficult procedural and evidentiary issues, particularly with respect to establishing causal connections among exceedingly complex patterns of educational and social (not to mention political) events that may be separated by decades in time.

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178. A court of appeals made the case for the cooperative resolution of school desegregation lawsuits, observing:

After eight appeals to this court, the residents of the . . . School District surely must be conscious of the expense of constant litigation. More importantly, by now there surely must be an awareness of the social costs. Persistent litigation can tear apart the social fabric of the community and threaten the intercultural understanding that is often fragile even in the best of economic times. The court earnestly solicits the interested parties to turn away from further litigation and for the sake of the children and the community strive to make the changes work.

Hoots v. Pennsylvania, 703 F.2d 722, 728 (3d Cir. 1983). Apparently, the parties did not heed the court's admonition; five years later, they were still seeking its guidance. Hoots v. Pennsylvania, 845 F.2d 1012 (3d Cir. 1988) (summary affirmance); see also Bell, *supra* note 161, at 513 ("In school desegregation blacks have a just cause, but that cause can be undermined as well as furthered by litigation.")

179. See Chayes, *supra* note 160, at 1302 (describing formulation of the decree establishing a remedial regime in public law litigation as "*pro tanto* a legislative act"); Dimond, *supra* note 172, at 65. Additionally, see Neslund, *supra* note 175, for a comprehensive synopsis of alternative dispute resolution mechanisms, identifying various system characteristics (e.g., degree of formality, adversariness, coercion) and process considerations (e.g., perception of fairness, relative cost, adherence to social norms) that relate to respective mechanisms (e.g., arbitration, mediation, negotiation). Table 1 therein describes, *inter alia*, "process output" characteristics common to legislation and negotiation (e.g., "consensus, compromise, prospective") in contrast to those ascribed to court adjudication (e.g., "assessment of rights, winner take all").

Negotiations among the parties to school desegregation cases over what constitute such “vestiges” and how to eliminate them can secure for plaintiffs the substantive (especially educational) remedies they seek, while hastening the restoration of state and local control of school administration.

[T]he potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* desegregation [sic] have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility<sup>180</sup>

An amicably negotiated resolution regarding the “vestiges of past discrimination” and, more importantly, how to eliminate them “to the extent practicable,” represents one way for those in control of school desegregation lawsuits to demonstrate such responsibility to the most important client of all—the schoolchildren of America.

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180. *Pitts*, 112 S. Ct. at 1445.