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Dismantling Desegregation: Uncertain Gains, Unexpected Costs

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ARTICLES

DISMANTLING DESEGREGATION: UNCERTAIN GAINS, UNEXPECTED COSTS

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I. INTRODUCTION

Some observers viewed the Supreme Court's decisions in *Board of Education v. Dowell*[1] and *Freeman v. Pitts*[2] as the end of the era of mandatory school desegregation. They perceived that "unitary" districts would be able to rapidly resume local control, dismantle desegregation plans, and return to neighborhood schools, thus making the situation much like that which existed outside the South before the desegregation era.[3] Courts would recognize that once-discriminatory districts had rectified their problems and the disruption of normal practices that began with *Brown v. Board of Education*[4] would come to an end in the 1990s. With the courts out of the way, racial issues would be set aside and the focus could be on improving education for everyone without the controversy or costs of desegregation plans. Believing that the door to dismantling is now open, many school boards are considering filing unitary status motions.

The belief that there is a clear and certain path back to neighborhood schools, however, goes far beyond the courts' actual decisions. The experiences of districts that have decided to dismantle their desegregation plans illustrate a variety of troublesome problems that suggest the need for fur-

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[1] 498 U.S. 237 (1991).

[2] 112 S. Ct. 1430 (1992).

[3] *See, e.g.*, Nat Hentoff, *Back to Separate but Equal*, WASH. POST, Apr. 11, 1992, at A25; Ruth Marcus, *Court Cuts Federal Desegregation Role: Schools' Anti-Bias Obligations Eased*, WASH. POST, Apr. 1, 1992, at A1 (predicting *Pitts* would "prompt many of the several hundred school districts now operating under federal court orders to seek removal from court control").

[4] 347 U.S. 483 (1954).

ther reflection. Political momentum has persuaded many districts to adopt dismantling policies without critically examining the evidence supporting their assumptions. This Article will assess the possible limitations of the assumptions, exploring available data and experience. The evidence shows that a number of widely prevalent assumptions may be incorrect.

The fundamental reason for the difficult and uncertain results of the dismantling efforts is that the legal standards for a court finding that a school district has purged its constitutional violation and become unitary have very little to do with whether the district has actually provided equal education to minority youths for a long enough time to overcome the cumulative impact of generations of unequal opportunity. In fact, the standards require no showing that gaps in educational opportunity have actually narrowed.

In a society in which inequality is growing outside the schools, educational attainment has become even more critical for economic success in the United States. High school graduates now earn twice as much as dropouts, and college graduates earn over 50% more than high school graduates. As education becomes even more decisive in students' lives, schools segregated by race and income continue to offer very different educational opportunities. This means that continued conflicts over issues of race and education are virtually inevitable. Since local political leaders seldom face these issues forthrightly, strategies to return to the courts to obtain equal opportunities are very likely. To the extent that the courts conceive of racial inequality as a problem to be solved by a few years of student reassignment, they are simply incorrect.

This Article examines not only the current state of desegregation law, but also the assumptions underlying local dismantling initiatives. It argues that the law is far less clear than many believe and that significant legal roadblocks to neighborhood schools remain. The United States Supreme Court, instead of establishing clear standards, has granted vast discretion to federal district courts to determine the good faith of school systems, the adequacy of their compliance with desegregation orders, and any ongoing responsibilities the district may have for educational inequities or for school actions that have caused housing segregation. Winning the right to re-establish neighborhood schools may be a difficult and risky enterprise; even a victory does not give a district any long-term assurance of freedom from judicial control on many other issues of equity for minority students.

School boards and superintendents decide to pursue termination of judicial supervision on the basis of certain expectations about political and educational benefits for their systems. The final part of this Article explores a number of these expectations, assuming that administrators sincerely believe that there will be educational benefits for students as well. The Article suggests that these expectations are unsupported. The ideas, for example, that political conflict will diminish and that non-judicial mechanisms can assure equity in the resegregated minority schools are not supported empirically in several districts. Local commitments to special programs for resegregated schools last only a limited time. Furthermore, the assumption that we now know how to provide equal education in segregated schools has not proved true in spite of considerable efforts. Costs are not likely to decline. In some districts, racial tensions and legal disagreements across racial lines have continued at a high level. The hoped-for end of white flight and the return of white students have not materialized at all in some systems and have been far below predictions in others.

This Article suggests that school districts should consider a fundamentally different approach to ending their mandatory school desegregation plans. Experience in several districts suggests that there may be opportunities to gradually increase the number of naturally integrated neighborhood schools and remove them from the busing plan as the reality of integration becomes more widely accepted in a community. At the same time, a phased transition from a mandatory plan to one heavily based on choice and educational opportunities for all students may be easier because there are no stereotyped minority schools in fully integrated systems where all schools are similarly integrated and where families are accustomed to dealing with transportation and interracial education. The way to end the onerous parts of a desegregation plan may be to move powerfully toward the next stage of integration, in which much less coercion may be needed, if managed skillfully, and in which much less long-term conflict will occur. Investment in policies within schools that can maximize the educational benefits of desegregation can increase gains from desegregation.

A. Doctrines and Realities

This Article does not primarily analyze the logical structure and doctrinal elements of the Supreme Court's jurisprudence in the dismantling cases. It is an exploration of the relationship between elements of the deci-

sions, the public and political reaction to the issues raised by the decisions, and the actual experience of communities attempting to end court supervision and dismantle all or part of their desegregation plan. Local leaders cannot assess the impact of the court decisions or the costs and benefits of a litigation strategy aimed at dismantling without considering these relationships.

B. The Shifting Legal Framework

The determination that a school system is no longer a racially defined dual system but rather a single unitary system assumed new importance after unitary status became the foundation for the Fourth Circuit Court of Appeals ruling that Norfolk, Virginia could dismantle part of its desegregation plan.[5] Despite its central role in the termination of judicial supervision and the dismantling of desegregation plans, the concept of unitary status remains unclear and the various prescriptions for how to attain it are rife with ambiguous terms.[6] In *Pitts* and *Dowell*, the Supreme Court expressly refused to define "unitary"[7] and noted that "the term 'unitary' does not have fixed meaning."[8] The Court's admonition that "unitary" is not a term found in the Constitution[9] has not dissuaded the lower courts from simply incorporating the Court's new standards into their continued use of the label.[10] Rather than reconciling or clarifying differences in interpretation, *Pitts* and *Dowell* may actually increase the confusion in this area of law. Although unitary status has not been clearly defined, practice has established some guidelines for determining if it has been achieved.

The Court first used the term "unitary" in *Green v. New Kent County*

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[5] Riddick v. School Bd., 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

[6] *See generally* Martha McCarthy, *Elusive Unitary Status*, 69 W. EDUC. L. REP. 9 (1991); Jonathan A. David, Note, *Replacing Confusion with Compromise: The Supreme Court's New Standard for Dissolving Desegregation Decrees in* Board of Education v. Dowell, 2 SETON HALL CONST. L.J. 337 (1991).

[7] The *Dowell* Court made the unhelpful observation that the term " 'unitary' describe[s] a school system that has been brought into compliance with the command of the Constitution," thus avoiding any substantive discussion of what compliance might require. Board of Educ. v. Dowell, 498 U.S. 237, 245 (1991).

[8] Freeman v. Pitts, 112 S. Ct. 1430, 1444 (1992).

[9] *Dowell*, 498 U.S. at 245.

[10] See Lee v. Etowah County Bd. of Educ., 963 F.2d 1416 (11th Cir. 1992), and Lee v. Talladega County Bd. of Educ., 963 F.2d 1426 (11th Cir. 1992), for examples of post-*Pitts* cases incorporating the Court's new standards into determinations of unitariness.

School Board.[11] There the Court identified six indicia of a dual system: racial identification of students, faculty, staff, transportation, extracurricular activities, and facilities.[12] These so-called "*Green* factors" have become the most commonly utilized guides in determining whether a school district is unitary. The Court in *Green* further established the goal of eradicating racially identifiable schools to create a "system without a 'white' school and a 'Negro' school, but just schools."[13] The Court subsequently described a unitary system as one "within which no person is to be effectively excluded from any school because of race or color."[14] Under *Green*, judges had normal discretion concerning factual determinations, but upon finding a constitutional violation their choices were limited to options that "promise[] realistically to work *now*."[15] *Green* saw the remedy as a means to achieve a nonracial system, not a temporary punishment which could soon be replaced once again by segregated schools.

Shifting the focus away from unitary status, the Supreme Court in *Dowell* and *Pitts* attempted to articulate a new standard for dissolving court decrees and allowing partial dismantling of desegregation plans. Court control should be relinquished if, looking to all facets of school operations with the *Green* factors as a guide, the court determines that school districts have complied with desegregation plans in good faith for a reasonable period of time and have eliminated vestiges of de jure discrimination to the extent practicable.[16] The *Pitts* Court endorsed the inclusion of quality of education in the list of factors to consider and allowed the incremental dissolution of judicial control.[17]

Far from clarifying the old confusion over unitariness, these cases offer vague terms and expand the discretion of district court judges. In a way, this marks a return to the situation that existed right before the Supreme

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[11] 391 U.S. 430 (1967).

[12] *Id.* at 435.

[13] *Id.* at 442. One commentator has identified the existence of racially identifiable schools, along with the effects of school placement and the effects of school segregation on housing patterns, as three types of lingering effects that are particularly relevant to the Court's rulings. Brian K. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789, 819 (1988).

[14] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969).

[15] *Green*, 391 U.S. at 439 (emphasis in original).

[16] *Dowell*, 498 U.S. at 250.

[17] *Pitts*, 112 S. Ct. at 1445-46.

Court in *Green*, *Swann*,[18] and *Alexander* gave lower courts clear marching orders.

C. *Ambiguous Standards and Judicial Discretion*

According to the Fourth Circuit Court of Appeals, the "factual findings of the district court in school desegregation cases are entitled to great deference on review when the presiding judicial officer has lived with the case for many years."[19] This discretion is particularly broad given the Court's failure to clarify the terms used to describe the legal standards such as "good faith" and "vestiges of discrimination."[20]

The incorporation of the term "practicable" into standards for dissolving decrees creates a major ambiguity as used in *Dowell* and *Pitts*.[21] Since few cases have applied this standard in the school desegregation context, the latitude courts will allow in determining practicability is unclear. Given the deferential review standards, however, determinations of practicability will be highly discretionary and district court decisions will be difficult to overturn. This discretion will bring widely varying sets of constitutional standards to different districts. On remand in *Dowell*, Oklahoma City was found to have eliminated all vestiges of discrimination to the extent practicable.[22] No such determination has been made yet in *Pitts*, concerning DeKalb County.

The inclusion of quality of education provides another broad playing field for the exercise of judicial discretion. Issues of educational quality have been considered before by lower courts,[23] but courts have little guid-

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

[19] School Bd. v. Baliles, 829 F.2d 1308, 1313 (4th Cir. 1987).

[20] Justice Marshall noted that "vestiges of discrimination" have never been defined by the Court. *Dowell*, 498 U.S. at 260-61 (Marshall, J., dissenting).

[21] The *Pitts* Court stated that DeKalb County's "desegregation decree was designed to achieve maximum practicable desegregation," attributing the new "practicable" standard to the much earlier district court decision. *Pitts*, 112 S. Ct. at 1447. For earlier descriptions of the purposes of decrees, compare *Green*, 391 U.S. at 437-38 (holding that school districts are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch") with Brown v. Board of Educ., 892 F.2d 851, 859 (10th Cir. 1989) (stating that a school district must "eliminate[] all traces of past intentional segregation to the maximum feasible extent").

[22] Dowell v. Board of Educ., 778 F. Supp. 1144 (W.D. Okla. 1991).

[23] *See, e.g.*, *Baliles*, 829 F.2d at 1312 (holding that "comparative dropout rates, graduation rates, and scores on standardized tests" could be considered in making the determination of whether a sys-

ance in making determinations of quality. Because of the range of debate among educators as to what constitutes quality education and how quality can be measured, the inclusion of this element becomes a tool of broad discretion for district courts.

The legal standards applied by district courts became even murkier with the Supreme Court's decision in *Pitts*, holding that courts may relinquish their jurisdiction over aspects of a school district's operations in increments. Under *Pitts*, full compliance with one aspect of a decree may lead to dismissal of judicial supervision of that aspect. No court has tried to reconcile this piecemeal approach with *Dowell*'s mandate to consider all facets of operation in determining good faith compliance with desegregation plans. Necessary judicial conclusions about the independence or interrelatedness of aspects of a school's operation provide further opportunity for the exercise of broad discretion.

It remains to be seen how much of a shift *Dowell* and *Pitts* will create on a case-by-case basis after filtering through the lower courts. By allowing the courts to relinquish their jurisdiction incrementally despite remaining vestiges of de jure segregation, the Court has taken a step backwards from its earlier mandate that segregation be removed root and branch.[24] In DeKalb County, the various components of a desegregated school system established by *Green* were never present simultaneously in the district for even a single school year. With the Court's focus on past constitutional violations rather than current educational equities, it has shifted the nature of desegregation decrees from ongoing assurances of equality to short-term punishments to leave behind as soon as possible. Where *Green* recognized the need to uproot the many interrelated facets of a school system divided by race, *Dowell* and *Pitts* conceptualize the remedial process as a checklist of minimal time periods of formal compliance. These decisions, however, allow any judge to maintain an entire plan upon a finding that the separate portions have a necessary interrelationship and that the school district has not fulfilled requirements, thus failing to demonstrate good faith.

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tem is unitary).

[24] *Green*, 391 U.S. at 437-38.

D. Legal Uncertainties and District Choices

Unitary status judgments have been central in decisions to relinquish judicial control and allow the dismantling of desegregation. In addition to the diversity of practice in assigning the unitary label, the various approaches taken by different courts have contrasted sharply in their interpretations of the subsequent impact of unitary status. Some courts have maintained that a finding of unitary status is synonymous with a finding that a district has completely eliminated all vestiges of de jure desegregation and is thus starting with a clean slate.[25] Other courts have used the term only to mean that a district has operated in compliance with constitutional mandates for a certain period of time, often three years.[26] Recent cases have adopted the former usage,[27] but even a consensus in labeling would not clarify the ambiguity of pre-existing findings of unitariness. At a recent conference on school desegregation featuring advocates of dismantling,[28] the vast majority of school district representatives did not know whether their districts were unitary. Among those who knew that their districts had been declared unitary, most did not know what interpretation of unitariness guided those declarations.

Although local control achieved through unitary status is considered important as a prerequisite to dismantling a desegregation plan, it has become a paramount goal in its own right because it is believed that local control frees school districts from litigation and allows them to return to neighborhood schools.[29] As the *Pitts* majority writes, "the court's end purpose must be to remedy the violation and *in addition to restore state and local authorities to the control of a school system . . .*."[30] Administrators

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[25] *See, e.g.*, Price v. Austin Indep. Sch. Dist., 945 F.2d 1307 (5th Cir. 1991); Riddick v. School Bd., 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

[26] *See* Landsberg, *supra* note 13, at 812 ("[U]nitariness adds to the connotation of a formerly dual system which has sucessfully and in good faith implemented a constitutionally sufficient desegregation plan. . . . Unitariness says nothing, however, about [the connotation] that all effects of past discrimination have permanently been extirpated.").

[27] *See, e.g.*, Lee v. Etowah County Bd. of Educ., 963 F.2d 1416, 1419 n.3 (11th Cir. 1992).

[28] Desegregation Conference Sponsored by George Mason University's Institute for Public Policy, Washington, D.C. (Oct. 23, 1992).

[29] Emphasizing local control, former Solicitor General Kenneth Starr characterized both *Dowell* and *Pitts* as cases "about democratic theory." Kenneth Starr, Keynote Address at Desegregation Conference Sponsored by George Mason University's Institute for Public Policy, Washington, D.C. (Oct. 23, 1992).

[30] *Pitts*, 112 S. Ct. at 1445 (emphasis added). For a discussion of the Court's emphasis on local

see unitary status as the key to achieving local control, prompting a closer look at the possibilities and potential pitfalls.

Achieving unitary status is important in determining the burdens of proof that parties will bear in future litigation. In general, a district which is not unitary bears the burden of proving that any current segregation is not the result of prior constitutional violations. A nonunitary system must not take "any action that would impede the process of converting to a unitary system. . . . The board is under a heavy burden of showing that any action it takes that continues the effects of the illegal dual system serves a legitimate end."[31] Districts under court supervision cannot take action that has the foreseeable effect of harming minority students without a significant risk of court intervention. Following a finding of unitariness, however, the burden shifts to the plaintiffs to show new discriminatory intent motivating the action.[32] Since few contemporary school authorities admit that they have intentionally discriminated, the burden of proof is difficult to meet.

In practice, unitary status and the accompanying shift in the burden of proof may be the difference which allows a system to dismantle a desegregation plan. For example, in Texas, the Austin Independent School District ("AISD") was declared unitary in 1983 and the court relinquished all control in 1986. In 1987, the school board was forced to defend its decision to redraw attendance zones in an attempt to create neighborhood schools. Under the district's 1987 plan, "nearly one-third of AISD's elementary schools had a minority enrollment of greater than eighty percent."[33] The trial court allowed these racially identifiable schools as prod-

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control as an ultimate end, see Lisa Stewart, *Another Skirmish in the Equal Education Battle*—Freeman v. Pitts, 28 HARV. C.R.-C.L. L. REV. 217 (1993).

[31] Riddick v. School Bd., 784 F.2d 521, 535 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986). The court further stated that "[r]ecission of a voluntary desegregation plan itself may be found to be an act of segregation for a school board which has been found to have practiced de jure segregation and has not completed the transition from a dual to a unitary school system." *Id.*; *see also* NAACP v. Lansing Bd. of Educ., 559 F.2d 1042 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977).

[32] In circuits where unitary was defined as current compliance, a finding of unitary status does not necessarily correspond to the ending of judicial supervision. Where unitary status has been used synonymously with recognition that all vestiges of discrimination are eliminated, a unitary declaration forecloses future challenges based on past discrimination. Price v. Austin Indep. Sch. Dist., 945 F.2d 1307, 1314 (5th Cir. 1991).

[33] Theodore Karatinos, Price v. Austin Independent School District*: Desegregation's Unitary Tar Baby*, 77 W. EDUC. L. REP. 15 (1992); *see also* Price v. Austin Indep. Sch. Dist., 729 F. Supp.

ucts of the demographic trend even though student reassignments under the plan created racial imbalance in fourteen of the nineteen imbalanced schools.[34] In contrast, a plan in pre-unitary Dallas was rejected because it caused too many one-race schools.[35]

While unitary status may make it easier in some instances to dismantle desegregation plans, dismantling should not be confused with a guaranteed end to all litigation. Although unitary status makes it more difficult for plaintiffs to prevail on a desegregation issue, the same group of students can raise many other kinds of legal issues. As long as inequalities continue and elected officials are unresponsive, creative plaintiffs will pursue other avenues even if the path to desegregation seems closed. The experience of Austin is again illustrative: it demonstrates the potential for ongoing, protracted litigation following a declaration of unitary status and an initial ruling in favor of the school district on the dismantling front. Plaintiffs have challenged AISD's treatment of bilingual teachers, allocations of resources, bond issues, and access to budget information. In short, there is no indication that the declaration of unitary status has in any way diminished the school district's litigation. In some cases attempts to attain unitary status possibly will wake up sleeping plaintiffs and bring renewed suspicion and conflicts to school districts where race issues had been relatively dormant.[36]

Any plaintiff can bring a new discrimination case on any purported violation at any time, opening up a wide range of seemingly settled issues. Less than a decade after Los Angeles dismantled a large state court busing order in 1980, the district faced both a federal desegregation case (settled out of court) and a state court case on unequal education, raising many of the same issues that had motivated the initial legal battle. Although the Los Angeles case was not a federal unitary status case, there was the same assumption that the district's 1981 victory had ended a long legal struggle. The battle simply moved to new arenas. Civil rights lawyers elsewhere also are seeking new ways to pursue desegregation; some now are explor-

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533, 539 (W.D. Tex. 1990).

[34] Karatinos, *supra* note 33, at 20.

[35] Tasby v. Wright, 713 F.2d 90 (5th Cir. 1983).

[36] Telephone Interview with Norma Cantu, Counsel for the Mexican-American Legal Defense and Education Fund (Feb. 10, 1993). Cantu is now Assistant United States Secretary of Education for Civil Rights.

ing the possibility of desegregation orders pursuant to state constitutional rights, particularly in the metropolitan Hartford case.[37]

Systems contemplating filing for unitary status should consider that decisions allowing dismantling usually will not be acquired without a fight. The DeKalb County School System's decision to seek a declaration of unitary status resulted in years of litigation and costs which surpassed a million dollars before arguments on remand from the Supreme Court.[38] Now, after a "victory" at the Supreme Court, the case is back in the district court for hearings on many of the same issues that were litigated in the initial attempt to gain unitary status.[39] Some of the data in the case are now over a decade old and the entire county has changed drastically while the case has been pending. Given the potentially enormous costs of litigation and the fact that nonunitary districts carry the burden of proving that they deserve unitary status, many districts are leery about entering the fray. Some districts believe that they could ultimately win release from court control, but decide it is not worth the effort and expense.[40]

School districts should further consider the potential loss of court-ordered funding, often called *Milliken II* funding,[41] in deciding to file for declarations of unitary status. The St. Louis and Kansas City cases, for example, each resulted in *Milliken II* funds of over one billion dollars. Since *Milliken II* assistance is intended to remedy the persisting harms of segregation, a district's success in obtaining a ruling that it has successfully become a unitary, non-racial system may work directly against its interest in obtaining this state aid. The Richmond School Board encountered this problem when it sued the state for additional funding to address the special needs found in urban area schools. The Fourth Circuit Court of Appeals ruled that since "we have found no vestiges of state-mandated segregation . . . following a finding of unitary status, we affirm the court's

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[37] *See* Sheff v. O'Neill, 609 A.2d 1072 (Conn. Super. Ct. 1992).

[38] Gary Samms, Counsel for the DeKalb County School System, Remarks at Desegregation Conference Sponsored by George Mason University's Institute for Public Policy, Washington, D.C. (Oct. 23, 1992).

[39] *See* Freeman v. Pitts, 112 S. Ct. 1430 (1992).

[40] Such considerations may have influenced the El Paso, Texas, Independent School District's decision not to file for unitary status in 1987. Similar concerns may be preventing the State of Texas from appealing a statewide desegregation order currently in effect. Telephone Interview with Norma Cantu, Counsel for the Mexican-American Legal Defense and Education Fund (Feb. 10, 1993).

[41] *See* Milliken v. Bradley, 433 U.S. 267 (1977).

refusal to order state funding of remedial and compensatory programs."[42] The DeKalb County School System is now in court trying to obtain *Milliken II* funding, despite their concurrent efforts to end judicial supervision. Many districts, including Yonkers, New York, are now exploring the possibility of major new sources of state assistance through *Milliken II* orders. The district court ruled for Yonkers on August 30, 1993.

The uncertain legal standards, the high cost of initial litigation, and the reality of continuing challenges in the courts should be carefully weighed before districts proceed with efforts to dismantle. If the underlying inequalities have not been resolved, there is no way to assure an end to court intervention, and the vagueness of the legal standards preclude confident predictions of litigation in any case.

II. Expectations and Realities

Local school officials enter a dismantling battle and agree to bear the costs because they expect real net advantages. This part of the Article examines how things actually have worked out in some cases, but it is not intended to be a comprehensive study. This part illustrates some of the unexpected results associated with dismantling decisions. It describes the battles that came with dismantling efforts in some districts, battles that often continued after such decisions.

A. Do Resegregated Schools Reverse White Flight?

Districts often attempt to end busing primarily because they believe that the continual rise in the proportion of minority students is caused by white flight from desegregated schools. In other words, local leaders and courts often believe that desegregation plans are not stable and that the dismantling of desegregation plans can produce an end to white flight or even a return of the white population. This argument has proven to be persuasive to some courts, although others have rejected similar evidence on an issue that deeply divides scholars. In many dismantling cases the school districts hire experts versed in this theory to conduct studies or testify about white flight.

Often the decisions to dismantle desegregation plans are related to as-

[42] School Bd. v. Baliles, 829 F.2d 1308, 1314 (4th Cir. 1987).

sertions that the decline in white enrollment in a school district is caused by a busing plan. School districts argue that they have done everything practicable but the remedies have failed because of white flight and housing changes. Thus, ending busing will lead to a return of white students. White flight research, after all, shows that when there is significant flight, most of the families affected do not leave the area, but only transfer their children to private schools.

Local school officials and courts often attribute the total decline in the proportion of white students to the desegregation plan. Federal courts also make this error. For example, the first major dismantling of a federal court desegregation order, in Norfolk, Virginia,[43] followed a district court decision in which the judge attributed the entire change in the district's enrollment to the school desegregation plan. The court gave no consideration to changing birth rates, the pattern of white suburbanization that existed long before the busing plan, or the large declines in white enrollment that took place in other similar central cities with neighborhood schools.[44] The court reached an extreme conclusion which none of the experts on either side would have supported. The press and local school officials frequently express exactly the same conclusion.

Neighborhood school plans, however, are not stable. The DeKalb County School System, the subject of the *Pitts* decision, was one of the nation's least stable districts, even though it was operating under a neighborhood school plan and never employed any significant busing for desegregation. The school district changed from 95% white in 1967 to 49% white in 1986. Among the nation's sixty largest school districts, it ranked fourth in decline in proportion of white students and second in increase in proportion of black students.[45] This decline in the percentage of white population was not caused by the neighborhood school system. It is unlikely that court decisions limiting desegregation will fundamentally alter this pattern which has been continuing throughout the progress of the case. If the DeKalb County School System eventually prevails, it will end up with a plan designed to preserve white enrollment in a district where

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[43] *See* Riddick v. School Bd., 627 F. Supp. 814 (1984), *aff'd*, 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

[44] Gary Orfield & Franklin Monfort, Racial Change and Desegregation in Large School Districts (1989) (unpublished manuscript, on file with the National School Boards Association).

[45] *Id.* at 10-11.

the great majority of whites have already left in spite of a neighborhood school policy that always protected whites from busing.

The demographic shift is rooted in a large housing change and a pattern of massive black migration into DeKalb County. This pattern, which was used as a defense against a desegregation order is, in fact, very strong evidence that attributing racial change in a school district to white flight from a desegregation plan is a radical oversimplification. The need for a much closer look by courts and researchers at the white flight issue is apparent, as is the need to examine the causes of the spreading segregation in the housing market.

The white flight issue is usually raised, of course, in communities with a history of mandatory desegregation on which the instability is blamed. The Norfolk decision,[46] the first major dismantling case in the federal courts, was deeply influenced by expert witness testimony about white flight. Subsequently, however, studies by other researchers revealed serious errors in the expert witnesses' projections on which the court relied. Researchers systematically examined what actually happened in the school district—both before the dismantling, when the court said that large-scale white flight was occurring, and after dismantling, when whites were expected to return. Stating that "[t]his Court gives credence to these predictions"[47] of white flight if busing continued, the court's decision expressed the hope that "the present ratio of black students and white students . . . might be narrowed with the school board's neighborhood elementary schools in place."[48]

Norfolk's efforts to return to neighborhood schools were supported by the Reagan Administration and the Justice Department. In a 1984 speech to the National Association of Neighborhood Schools, for example, Assistant Attorney General W. Bradford Reynolds told an anti-busing group that "the experiment with forced busing as the principal . . . remedial tool to desegregate a public school district is largely over."[49] Reynolds blamed the flight from urban public schools on desegregation orders and told of the Justice Department's battles to convince judges that "[i]t is high-time

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[46] Riddick v. School Bd., 627 F. Supp. 814 (1984), *aff'd*, 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

[47] *Riddick*, 627 F. Supp. at 822.

[48] *Id.* at 821.

[49] United States Department of Justice Press Release (Aug. 10, 1984).

that our Federal courts released their hold on school districts that have been in compliance for some time with comprehensive desegregation decrees."[50]

The Court's reliance on expert predictions makes close scrutiny concerning the accuracy of these predictions even more important. David Armor, one of the most active witnesses in dismantling cases and efforts to block urban desegregation orders, testified in the Norfolk case. He has said that its holdings were crucial to similar dismantlings in other cities.[51] Armor testified in 1981 that the school district had lost about 8,000 white students due to its busing plan and that it would lose another 8,000 to 10,000 white students between 1981 and 1987, making the district 75% black.[52] Armor predicted that the school district would gain significant numbers of white students if neighborhood schools were reinstated and the district court agreed.

Researchers at Norfolk's Old Dominion University reported that the end of busing produced increased segregation in thirteen white schools and ten black schools, most of which were near housing projects. Yet, even before dismantling began, the researchers found that Armor's projections were incorrect. In the four years following the 1981 prediction—while mandatory busing was still in place—the number of white students declined by less than one-fourth the predicted level. Also, beginning in 1983, the system began to experience a modest *increase* in the number of white students even though busing continued. In 1984, evidence that white enrollment in grades planned for resegregation was actually rising was presented to the district court to challenge the basic premise of dismantling. The court, however, did not acknowledge this data. Researchers Leslie Carr and Donald Zeigler conclude that "when busing ended in 1986, it was ended in an elementary school system that was stable and showing a modest gain in the enrollment of white students. The system was not plunging toward resegregation as the result of white flight."[53]

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[50] *Id.*

[51] David J. Armor, *Response to Carr and Zeigler's "White Flight and White Return in Norfolk,"* 64 SOC. OF EDUC. 134-39 (1991).

[52] The court gave credence to the possibility that the black student population could rise to as high as 90%. *Riddick*, 627 F. Supp. at 822.

[53] Leslie G. Carr & Donald J. Zeigler, *White Flight and White Return in Norfolk: A Test of Predictions*, 63 SOC. OF EDUC. 272, 277 (1990).

Armor responded that the gain in white enrollment during these years resulted from the hope that neighborhood schools would be restored.[54] Theories of "anticipatory flight" and "anticipatory return" are frequently introduced into these cases but are without substantial basis in research.

Armor had predicted that the end of busing would produce a 7% annual increase of white enrollment. In fact, the growth during the first four years averaged about 3%, peaking in the second year before dropping. The growth was less than 2% higher than the trend established the three years before resegregation.[55] In the fourth and fifth years, 1989 and 1990, the white gains—.3% and .2% respectively—fell well below the level existing in the years before the neighborhood school plan was implemented.[56] Thus, the white flight record was not consistent with the claims adopted by the court. The return to segregation brought about only a small and temporary change in the previous trend.

Other districts which dismantled desegregation orders or decided not to pursue them because of the white flight issue often failed to achieve stability. After Los Angeles dismantled its mandatory plan in 1981, it continued to experience a significant drop in the proportion of white students, even in the first year. Atlanta leaders negotiated a compromise to drop busing litigation in 1973, but then a large number of whites left, followed by a significant number of middle-class black students.[57] Among the nation's large central cities, Atlanta experienced the largest growth in its proportion of black enrollment from 1967 to 1986, when it was 92% black, in spite of its anti-busing compromise.[58]

These statistics do not show that there is no white flight. They do show, however, that it is an error to blame white enrollment declines totally or even largely on desegregation plans. Further, it is erroneous to expect that ending the plans and operating neighborhood schools will produce stability or large white enrollment returns.

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[54] Armor, *supra* note 51, at 137-38.

[55] Carr & Zeigler, *supra* note 53, at 277-79.

[56] Leslie G. Carr, *Reply to Armor*, 64 SOC. OF EDUC. 223, 226 (1991).

[57] GARY ORFIELD & CAROLE ASHKINAZE, THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY, ch. 5 (1991).

[58] Orfield & Monfort, *supra* note 44, at 10.

B. Achieving Stability and Desegregation

While some districts dismantling their plans experienced continuing loss of white students, others voluntarily maintained large-scale busing or devised new complex forms of integration and educational improvement in the 1980s while maintaining a stable proportion of white students. Current data shows, in other words, that certain forms of desegregation plans were associated with less white flight in the 1980s than many neighborhood school plans.

Districts now filing for unitary status are seeking to obtain freedom from court orders and thus return to a neighborhood school system where desegregation is no longer a concern and attention can return to normal educational issues. In general, however, unitary status does not end this serious battle over racial inequality in the courts because resegregation creates visible inequalities. As a result, a number of the largest districts without court-mandated desegregation plans have voluntarily chosen to maintain desegregation policies long after court supervision ended. These communities have experienced much less controversy except when major changes in their plans were under discussion. Some have been able to move from mandatory to voluntary approaches without returning their schools to segregation.

In Louisville, Kentucky, the Jefferson County School District was released from court jurisdiction in 1980 while maintaining metropolitan-wide desegregation. The district enjoyed far more stability than most large systems with neighborhood schools. The overall percentage of black students in Louisville rose only 1.8% in a decade while, even more surprisingly, the percentage in early grades showed almost no change (see Table 1). This indicates long-term stability for the system. Even in the district which experienced considerable white flight when the bitterly fought 1975 metropolitan plan began, extraordinary stability was achieved a few years later.

TABLE 1
Enrollment, Metropolitan Louisville, Kentucky
Fall 1981-Fall 1991

Year	Total Students	Black Students	Overall % Black	Grades 1-5 % Black
1981	93,955	26,580	28.3	29.6
1983	90,962	26,689	29.3	30.3
1985	90,579	27,448	30.3	31.3
1987	89,284	27,184	30.4	31.2
1989	87,768	26,581	30.3	30.7
1991	90,070	27,141	30.1	29.8

Source: Jefferson County Enrollment Statistics

During the 1980s, two other models showed considerable potential for maintaining stability. The St. Louis model, with large scale city-suburban transfers and city magnet schools, left the city district with a stable proportion of white students after many decades of decline. After experiencing a rapid decline in the proportion of white students for decades, St. Louis experienced a slight *increase* in its proportion of white students in the city system between 1980 and 1992. In Kansas City, a massive upgrading of the city school facilities and huge investments in magnet schools produced a similar result, although there was little integration.

Because it was the site of the first major busing order in the nation, Charlotte-Mecklenburg, North Carolina might be expected to be a leader in resegregation and neighborhood schools. However, the district continued to implement its desegregation plan even after Judge McMillan dropped court supervision. The large metropolitan system has now partially replaced mandatory assignments with magnet schools which have met their desegregation goals in the first year. Like Louisville, the continuing voluntary affirmation of integration has avoided a return to court and avoided the return of ghetto schools.

C. Costs and Voluntary Plans

School districts should not enter into unitary status proceedings with the expectation of large cost savings. This is particularly true if the district is committed to voluntary approaches or major upgrading of inner-

city schools as an alternative to the mandatory plan the district wishes to dissolve. Very few districts wish to simply embrace segregated education; most want to maintain the opportunity for desegregation for those most strongly wishing to transfer. Districts wishing to maintain some form of desegregation plan need to realize that they have more legal authority to take positive steps to support integration when they are under a court order, and they are less likely to receive external funding if they are found unitary.

A new national study of magnet schools shows that they cost more than non-magnets. Over two-thirds received "additional staffing allowances, which were most frequently used for additional teachers or instructional aides."[59] Furthermore, starting new magnet schools often requires the purchase of new equipment, modification of school facilities, and retraining of teachers.[60] To offer a genuine alternative, the magnet school needs to make the investment required to provide the program. In addition, transportation to magnet schools is far more expensive than mandatory transportation. Mandatory transportation picks up from a concentrated area and drops students at a single school; voluntary transportation must go from dispersed pick-up places to dispersed destinations. This creates long and overlapping bus routes. If there is a major magnet plan, it is very possible that a school district's costs will be significantly raised.

However, these additional expenditures for magnet schools did not lower the rate of long-term white flight, which was not significantly different from the rate in districts with mandatory busing.[61] Therefore, the result may be a difficult combination of rising costs and persisting white decline.

D. Protecting Little Children: Segregating Primary Grades

In a number of the existing dismantling plans, the goal has been to end all or some of the desegregation in the early grade levels but not desegregation altogether. The basic idea is that desegregation is a difficult and traumatic process, particularly when it requires transporting students

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[59] AMERICAN INSTITUTES FOR RESEARCH, MAGNET SCHOOLS AND ISSUES OF DESEGREGATION, QUALITY AND CHOICE at x (1993).

[60] *Id.* at xi.

[61] *Id.* at xvi.

away from their neighborhoods. Proponents reason that if it must be done, the youngest children should be spared the stress. In cities such as Norfolk, Austin, and Oklahoma City, the school boards have followed this reasoning and ended desegregation of the earliest primary grades. Dallas and Los Angeles (when it had a mandatory plan) excluded students in kindergarten through grade three.[62]

This practice has a variety of drawbacks that deserve careful consideration in devising plans. The most fundamental is that desegregation is easiest, and, according to a significant body of research, most beneficial, at the earliest grades. Robert Crain and Rita Mahard's review of ninety-three studies showed that desegregation beginning in first grade or kindergarten and continuing through later years produced much better results in terms of achievement gains than desegregation beginning at higher grade levels.[63] Young children have little concept of race, few stereotypes, and begin with smaller educational gaps. Desegregation seems normal to small children and not a difficult change. Accordingly, handling a desegregated classroom at this age does not require many special skills.

The real concern about desegregation at an early age is among adults who believe that it is a much more difficult process than it actually is. Their fear creates political problems and demands that operate independently of, and even in direct contradiction to, the most beneficial situations for their children. Proposals to end desegregation in the earliest grades require the most careful examination not only by courts but also by school boards and administrators, since they are likely to increase the difficulty and conflict and diminish the benefits of the desegregation process. Later initiation of desegregation confronts teachers with much more complex and difficult problems of developed racial stereotypes, different school experiences, and larger achievement gaps.

Ten Louisville teachers wrote a letter to the local paper in 1991 on the costs of restoring segregated grade schools:

> Over the years we began to notice some remarkable changes. Our students—white, black, disadvantaged and middle-class—came to us with acceptance, or at least a tolerance, for one another that had not existed in busing's early years. Consequently, we can spend more of

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[62] WILLIS D. HAWLEY ET AL., STRATEGIES FOR EFFECTIVE DESEGREGATION 54 (1983).
[63] *Id.* at 53.

> our school time attending to the work of schools: teaching and learning. If students attend elementary schools that are not racially balanced, we fear a return to the situations we encountered in the late '70s . . . .[64]

E. Equalizing Segregated Schools

A constant refrain in the arguments for ending judicial supervision of school districts is the claim that dollars spent on getting students to desegregated schools could be better spent within the minority schools and that sensitive educators could use that money to produce more educational gains within the segregated context. This argument has been made since busing plans began more than two decades ago. The Effective Schools model, for example, was widely presented by its originator, Ron Edmunds, as an effective alternative to desegregated education. As minority superintendents assumed control of many of the highly segregated large city school systems since the early 1970s, many variations of programs emphasizing high expectations and highly focused teaching claimed that they could bring segregated schools to the national norm or above. Intense national attention has focused on remarkable inner-city schools or teachers. Movies telling the stories of Marva Collins' school on Chicago's West Side[65] and Jaime Escalante's calculus class in East Los Angeles[66] show the readiness to celebrate evidence of equalizing segregated schools, even in a single school or classroom.

Many billions of dollars of federal aid have been poured into this effort. The two biggest federal pre-collegiate education programs, Chapter I and Headstart, are both targeted on concentrations of low-income children and channel large sums of dollars into upgrading segregated schools. In contrast to the growth and duration of these efforts during the past three decades, the small program of federal aid to desegregated schools (the Emergency School Aid Act) was eliminated in 1981. Except in a handful of states, there has been no assistance, apart from court orders, to make desegregation work.

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[64] Claudia Runge et al., *Teachers Fear "Tragic Reversal,"* LOUISVILLE COURIER-J., Oct. 10, 1991, at A13.

[65] *The Marva Collins Story* (CBS television broadcast, Nov. 31, 1981).

[66] STAND AND DELIVER (Warner 1988).

Although there are some successful segregated schools, particularly at the elementary level, no district has produced equal education on a large scale in segregated African-American or Hispanic schools. There is an extremely powerful relationship between segregation by race and income and the educational achievement levels of schools. These relationships become even more intense and have even fewer exceptions at the secondary school level.[67]

There is very little evidence that this pattern of achievement is related to the overall level of school spending. Numerous studies show that simply shifting dollars to low-income schools will not produce solutions. For example, even when discounting for inflation, average spending by urban school districts increased substantially in the 1980s, without a corresponding significant rise in achievement. There is, however, positive evidence for the benefits of some targeted school interventions in the early years. Unfortunately, there is insufficient evidence to date documenting the educational benefits of court-ordered remediation.

The idea that money could overcome the history of inequality caused by segregation was a basic element of the Supreme Court's decision in *Milliken II*.[68] After denying city-suburban desegregation, the Court approved an order by a district court for state funding of remedial programs designed to overcome the "harms of segregation." Those programs began in Detroit in the late 1970s and were abandoned when the court ended supervision in 1989. There was no evidence that these programs achieved equal educational achievement. In fact, after nearly two decades of these programs, the school district showed the same kind of inequalities that prompted the initial litigation.

A generation after the Supreme Court's failure to desegregate metropolitan Detroit, the inequalities between city and suburban school districts remain striking. Fifty-four percent of the city's students are poor, but only

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[67] *See* PHILLIP BURCH, THE DROPOUT PROBLEM IN NEW JERSEY'S BIG URBAN SCHOOLS: EDUCATIONAL INEQUALITY AND GOVERNMENT INACTION (Bureau of Government Research, Rutgers University, 1992); Gary Orfield & Lawrence Peskin, *Metropolitan High Schools: Income, Race, and Inequality*, *in* EDUCATION POLITICS FOR THE NEW CENTURY (Douglas E. Mitchell & Margaret E. Goertz eds., 1991); DOUG MACIVER & JOYCE EPSTEIN, HOW EQUAL ARE OPPORTUNITIES FOR LEARNING IN DISADVANTAGED AND ADVANTAGED MIDDLE GRADES SCHOOLS? (1990) (Report No. 7, The Johns Hopkins University, Center for Research on Effective Schooling for Disadvantaged Students).

[68] Milliken v. Bradley, 433 U.S. 267 (1977).

8% of suburban students are poor. The average family income in the suburbs is $46,200, compared to $23,600 in the city. Furthermore, the average taxable wealth per student is four times higher in the suburban ring. The city graduation rate was only 62% of the suburban rate and per pupil spending averaged 12.5% higher in the suburbs.[69] Unfortunately, the court-ordered compensatory programs are gone. The separate schools are still unequal but the court has given up.

In local educational debate and in some court orders, the dismantling of desegregation plans is legitimized by the argument that separate schools can now be made equal. This, of course, was the promise of *Milliken II*. Since 1979, a number of cities have experimented with remedies to eradicate the harms of segregation. Two of the largest experiments in federal courts have taken place in the St. Louis and Kansas City cases, both of which have produced orders directing the State of Missouri—identified as the "primary Constitutional violator" in decisions that have been appealed to the Supreme Court on numerous occasions—to spend hundreds of millions of dollars to upgrade segregated schools.

The St. Louis desegregation plan contains four elements that have been subjected to a limited evaluation by the district court. For students within the city, the goal of the 1980 plan was to enroll all white students and as many black students as possible in schools desegregated at the fifty-fifty level. Some of these schools were neighborhood schools with mandatory reassignment and others were magnet schools. A recruitment center was established to help inform families about their choices. The plan left a substantial number of all-black schools since there were three black students for every white student. Students from these schools were allowed to transfer to magnets or to other schools. Later, when a city-suburban lawsuit was settled with a voluntary transfer plan, city black students also obtained the right to enroll in suburban schools.

A January 1992 evaluation showed that, among black students, the city magnets attracted the highest achieving group, the suburban transfer the next highest, and the neighborhood schools the lowest achieving group. When the scores were adjusted statistically to control for initial levels of

[69] Valerie E. Lee et al., Parental Choice of Schools and Social Stratification in Education: The Case of Detroit (1992) (unpublished paper prepared for School Choice and Family Policy Seminar, Harvard Graduate School of Education, on file with author).

achievement, the levels of achievement growth were similar in the various types of schools. The only exception was at the high school level (tenth grade), where growth was present only in the suburban schools.[70]

In Kansas City, a committee appointed by the district court has monitored the impact of a vast $1.4 billion program to upgrade the city schools. In the case, the district court explicitly rejected an effort by the plaintiffs to obtain city-suburban desegregation. The court ruled that under *Milliken v. Bradley*,[71] the suburbs could not be compelled to participate. However, the court ordered renovation of the city's severely deteriorated schools, lowered the class size, and required compliance with state standards because of serious constitutional violations. The fundamental policy, however, was a massive experiment in upgrading education and increasing integration through the most extensive magnet school plan in the nation. The report of the court-appointed monitoring committee disclosed very limited academic gains. Under the order, the committee reported that the district "has financial resources available which greatly exceed resources available to other K-12 educational programs in the Kansas City metropolitan area." However, test scores showed only "modest incremental improvements," primarily in the earliest grades.[72] Over the seven-year period the gaps between local and state average test scores had not closed significantly.[73]

A court-ordered review of the consent decree in San Francisco included an evaluation of different types of expensive efforts to upgrade low-income schools with large concentrations of black and Hispanic students. An evaluation of eight years experience under the San Francisco consent decree desegregation program showed that there had been no gain for black or Hispanic students who transferred to low-income schools that were given hundreds of thousands of dollars in supplemental funds each year to upgrade their programs. In fact, many black students transferred from bad schools to worse schools and actually achieved at lower levels than those

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[70] ROBERT W. LISSITZ, ASSESSMENT OF STUDENT PERFORMANCE AND ATTITUDE: ST. LOUIS METROPOLITAN AREA COURT-ORDERED DESEGREGATION EFFORT (1992) (Report to Voluntary Interdistrict Coordinating Council).

[71] 418 U.S. 717 (1974).

[72] REPORT OF THE DESEGREGATION MONITORING COMMITTEE FOR THE PERIOD JULY 1, 1991 - JUNE 30, 1992 (Missouri v. Jenkins, 495 U.S. 33 (1990)).

[73] *Id.* at 20.

remaining at home.[74] Thus, even a great deal of money and control at the school site level clearly does not guarantee gains.

The report to the court, agreed to by experts representing all the parties, showed that there were no gains associated with giving schools large sums of money without totally reorganizing the schools. There were clearly measurable gains for schools in low-income communities where the principal and the entire faculty were replaced with a new staff, hired outside of normal union procedures and committed to creating a new type of education. Low-income minority students who transferred to schools with increased funding showed no academic gains. Those who transferred to the fully reconstituted schools showed significant gains. But those who transferred to high achieving schools that had received no money for special programs under the decree had by far the highest gains.[75] This study was the first court-ordered study to follow students who had actually attended various types of schools for several years to assess effects. If these findings were to be sustained in other studies, it would suggest that extremely far-reaching changes would be needed to achieve in isolated schools the benefits that could be found in high achieving middle-class schools.

The basic assumption of those endorsing the theory that a school district has overcome its history of racial discrimination is that a school district can be expected to treat minority students fairly without court supervision because there are no longer racial barriers. The hope for such efforts has been incorporated in the plans for schools after dismantling in some districts. In Los Angeles, the segregated minority schools were supposed to be uplifted by the Racially Isolated Minority Schools ("RIMS") program which expended hundreds of millions of dollars. Almost a decade after the plan had been adopted, however, the district was sued in litigation showing the persistence of a pattern of extreme inequality between minority and white schools. That case ended in a settlement in which the district conceded that it had not produced the necessary opportunities for low-income minority schools. The additional funds requested from the state, however, to implement the settlement were not forthcoming.

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[74] GARY ORFIELD ET AL., DESEGREGATION AND EDUCATIONAL CHANGE IN SAN FRANCISCO: FINDINGS AND RECOMMENDATIONS ON CONSENT DECREE IMPLEMENTATION (1992) (Report to Federal District Court).

[75] *Id.*

Six years after Norfolk's return to neighborhood schools for the elementary grades, about four thousand students were enrolled in eleven schools that were almost entirely black. These schools were promised and received extra resources. A monitoring committee operated for five years to assure special attention. Black members of the school board won better paid teachers and smaller class sizes for these schools as well as special parent education programs and computerized reading centers. The special programs attracted virtually no white transfer students. Test scores were low and the special programs did not close the gap. Joseph Lindsay, who headed the oversight panel until it was dissolved, said that the isolation and poverty were damaging, stating "[t]here is a pervasive attitude in many of the target schools . . . a sense of isolation and hopelessness . . . that can't help but have an effect on academic achievement."[76] Dr. Lucy Wilson, black school board chair, said in 1991 that busing had helped black children see that they were "as good as . . . youngster[s] of the other race" but that "neighborhood schools diminish that perception."[77]

One of the fundamental problems with the promise of separate but equal schools is that it fails to address the most important ingredient of a good school—classmates prepared to learn and connected to real opportunity in the society. Students' motivation is not within the power of the school district to provide in resegregated schools. Nor is it possible to guarantee long-term provision of special programs. The very words of the Austin school board's resolution resegregating its elementary schools reflected the problem. The board identified some special programs and promised "to provide these educational efforts for a period of five years to ensure that students in the sixteen schools named herein have the finest education available in the Austin Independent School District."[78] Nothing was said about what would happen after the five years.

F. Division at Home

Busing has been attacked so intensely for a lengthy period of time that local leaders, their attorneys, and the local establishment often believe at the outset that the change is unlikely to produce real conflict because

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[76] Andrew Wolfson, *Norfolk's Busing Solution Off 'Target,'* LOUISVILLE COURIER-J., Oct. 20, 1991, at A1, A14.

[77] *Id.*

[78] Resolution of Board of Trustees, Austin Independent School District (Apr. 13, 1987).

neighborhood schools enjoy general support within the community. Often there have been very widely publicized criticisms of the desegregation plan and its persisting inequalities by some visible minority leaders in the community. Most residents see desegregation as "an experiment that failed." In fact, however, the risks of serious local political division are much greater and there has been severe conflict in some districts. Even within the white community, deep divisions have developed in some communities considering dismantling plans.

One of the least known facts of the Reagan-Bush era is that both minority and white support for busing increased significantly during twelve years of conservative critiques of the plans. In 1966, when busing was first discussed, the Harris Survey found only 17% in favor, but the overall number was up to 41% by 1988. A number of Harris Surveys showed a large and growing majority of both minority and white parents of bused children who believed that the system was working out well. The General Social Survey of the University of Chicago's National Opinion Research Center found that only 13.5% of whites supported busing in 1972, the year after the first Supreme Court decision on the subject, but the level of support increased to 32.1% in 1991. Throughout the 1980s and early 1990s, the large national surveys of first-year college students—many the products of busing plans—showed majorities favoring busing. The most recent national survey, published by the *Boston Globe* in 1992, showed that 80% of Americans preferred integrated schools and that 53% would support busing if it was "the only way to make sure children attend school with classmates of different racial and ethnic backgrounds."[79] Busing is not a popular policy, but school integration has wide support and busing is gaining support over time, particularly among those who have experienced it. Local assumptions about attitudes may be wrong.

The school superintendent of Jefferson County in metropolitan Louisville, Kentucky, proposed to dismantle the elementary school desegregation policy in 1991, eleven years after the district was released from court supervision. Little controversy was expected since the change had been endorsed by the school board's only black member and some other community leaders. Following the announcement of the plan, however, a very intense controversy began.

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[79] Larry Tye, *U.S. Sounds Retreat in School Integration*, BOSTON GLOBE, Jan. 5, 1992, at 15.

The plan was announced on September 23 and scheduled for action within a month. Shortly thereafter, community groups began to demand a delay in changing the plan. The system's teachers association was one of the first groups to call for a delay.[80] The local human relations commission, the regional office of the National Conference of Christians and Jews, and the city's newspaper soon joined the teachers association. The Presbyterian Church's national Executive Director, Donald Stoner, wrote that "the elimination of busing will be perceived as a racially biased backward step" which would harm the area. He added, "I am certain that the Presbyterian Church would not have moved its national offices to Louisville had the elimination of busing been on the school agenda at the time."[81]

Black leaders were divided. Reverend Kevin Cosby, a black supporter of dismantling, said "[m]ost parents are not concerned with integration, because we don't believe anymore . . . that sitting next to a white kid is going to make my child any more academically astute."[82] Cosby claimed that black students had not solved their problems through integration and that black parents were less able to follow their children's schooling because of the distance from the desegregated schools. Other leaders insisted, with the backing of several elected black officials, however, that separate was unequal.

The Louisville Courier-Journal conducted a survey of residents of the metropolitan area that showed that 36% of those expressing an opinion opposed ending the busing plan. Twenty-nine people thought that education would be better in white schools after resegregation for every person who thought that it would be better in the black schools. Fifty-four percent believed that the schools would be equally good.[83]

The attitudes of blacks in a community which had experienced massive and unequal busing for sixteen years were strongly opposed to a return to

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[80] Scott Wade, *NAACP, Teachers Union Seek Delay of Busing Vote*, LOUISVILLE COURIER-J., Oct. 9, 1991, at A1.

[81] Lawrence Muhammad & Sheldon Shafer, *Presbyterian Executive's Letter Denounces Plan to End Busing*, LOUISVILLE COURIER-J., Oct. 16, 1991, at B1.

[82] Jim Adams, *Division of Blacks over Busing Is Ironic*, LOUISVILLE COURIER-J., Oct. 8, 1991, at B1.

[83] Stan McDonald & Scott Wade, *Whites Divided Over Plan to End Forced Busing*, LOUISVILLE COURIER-J., Oct. 27, 1991, at A1.

neighborhood schools. According to the poll, 69.9% of blacks opposed the proposal while 23.6% supported it. Further, 52.5% of blacks thought that the education would be better in the white schools after resegregation. Only 1.8% expected it to be better in the black schools. Those who thought education had improved for black students under the busing plan outnumbered those who thought it had deteriorated by a six to one ratio.

One of the striking results of the survey was that the pressure for change was not coming from the parents of children who were bused. For black parents of bused children, 81% said that the experience had been satisfactory and only 7% said it was not satisfactory. Among white parents, the division was 53% to 46%.[84]

The attitudes in 1991 were in striking contrast to the early days of the plan, which had been implemented with great strife and very little local leadership. Whites interviewed at the end of the first year of desegregation reported only 6% in favor of the busing plan. The following year it was down to 5%. More than nine-tenths were opposed and only 2% were uncertain. Among blacks, 61% were in favor the first year and 57% the second year. Furthermore, 35% of blacks were opposed the first year and the number rose to 40% the second year.[85] In Louisville, the experience of desegregation obviously changed the attitudes of the community, creating considerably more support for desegregation and suspicion of resegregation plans.

The division in the community in 1991 produced angry meetings and eventually led to a modification of the plan. The resulting compromise included a decision for a magnet school plan for the elementary grades, and the school district guaranteed that mandatory reassignment would be resumed if needed to maintain integration. That plan succeeded in maintaining elementary school integration when implemented in the fall of 1992.

The lesson of the Louisville conflict is that desegregation may have strong support, even when it is not apparent on the surface. In Louisville, a large majority of black parents disagreed strongly about the desirability

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[84] *Id.*

[85] John B. McConahay & Willis D. Hawley, Reactions to Busing in Louisville: Summary of Adult Opinions in 1976 and 1977, at 9 (1979) (unpublished study, on file at the Center for Policy Analysis, Duke University).

of returning to all-black schools and most believed that their children had gained under the desegregation plan. There was even a significant fraction of the white community that favored maintaining the plan. The political costs and community divisions that emerged in the battle were, obviously, much more serious than the school district leaders had expected. In fact, the highly regarded local superintendent, Don Ingwerson, left his job later in the school year, reportedly because of the conflict caused by his resegregation proposal.

Even if there is unity at the outset, local leaders would be foolhardy to believe that consensus will persist if the neighborhood schools become increasingly unequal. For example, a few years after Norfolk's well-regarded black superintendent promised to make the segregated schools successful, the system's black school board chairman criticized the inequality of the segregated black neighborhood schools.

III. Conclusion: Toward a Positive End to Judicial Mandates

Desegregation is a difficult and often painful change in the long-standing racial practices of school systems and communities. Many minority families fight for integrated schools so intensely because they believe their children have been given an inferior education and will not have equal opportunities as adults. It should not be surprising that proposals for returning to segregation often arouse intense conflicts in a society where there are no major examples of large school systems where separate schools are equal. Communities considering a return to segregated neighborhood schools by fighting for unitary status should carefully weigh actual experiences of other cities and the real costs and risks in reaching decisions on strategies for unitary status cases. They should also consider the benefits and perceived costs of their existing desegregation plans and determine whether problems can be addressed through modifications rather than endings of decrees. If a plan has produced substantial and reasonably stable desegregation, their time might be better spent dealing with the "second generation" problems of creating equity, excellent education, and positive relationships within genuinely integrated schools. Much of the dissatisfaction with orders stems directly from failure to seriously address these issues of in-school inequalities after the initial transition period.

Many district officials are not aware that obsolete decrees can be improved by negotiations with the civil rights organizations that brought the cases in the first place. Consent decrees and plan modifications have been negotiated in a number of large urban systems. As representatives of the minority children, the plaintiffs have a strong interest in ending ineffective or counterproductive plan components and improving on the beneficial ones. At least some of the problems encountered by local school boards and administrators may be resolved in this manner, at very low costs and with no disruptions.

In those communities determined to pursue the end of court supervision, some of the more successful local experiences of the 1980s suggest considering an alternative model to the end of a desegregation order. The first step is to recognize that the racial inequalities and conflicts will not go away whatever a court might do and that these conflicts threaten educational progress. The long-run goal of a plan recognizing this fact might be the development of more naturally integrated neighborhood schools without busing, utilizing a growing share of voluntary choices for desegregation. Denver, Colorado, and Palm Beach County, Florida are among the communities that have developed plans in cooperation with housing institutions to increase neighborhood integration. Such plans reduce the long-term burdens on school systems without raising issues of racial division or educational inequity.

Voluntary plans that actually maintain integration may be far easier in communities with no segregated schools and a generation of experience with integration than in communities where the voluntary approach is implemented in a rigidly segregated setting with strong negative stereotypes among whites about the minority schools. If eliminating mandatory desegregation is the goal of the effort to achieve unitary status, that goal may possibly be achieved in stages without facing either the costs and risks of a unitary status proceeding or the other forms of legal battles which inevitably follow the recreation of segregated and unequal schools for minority students.

It was never the goal of civil rights litigators to bus students permanently; busing was approved as an admittedly difficult means to a very important goal. Giving up mandatory transportation in favor of stable, integrated communities with integrated schools, or popular integrated magnet schools, may be a reasonable approach if the school district guar-

antees that additional steps will be taken to integrate the schools should the choice process fail. If a magnet school approach is chosen, however, the school authorities must be committed to the necessary expenditures for programs and transportation and to policies offsetting the tendency of magnet programs to produce stratification within a district.

This Article raises serious questions about the assumptions made by courts and local policymakers pursuing dismantling of desegregation plans. There may be far fewer gains and far larger costs than have been previously recognized in pursuing the restoration of segregated neighborhood schools. This does not mean that plans cannot be improved and the degree of judicial control cannot be greatly diminished over time. Jurists and educators may, however, be much more likely to find that path by keeping their eyes on the prize of *Brown* rather than by turning again down the blind alley of *Plessy*.