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Experience is the Life of the Law

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I. INTRODUCTION

In August 1970, I and other students in the Eupora School System located in Webster County, Mississippi, were preparing to begin another school year. We were entering the ninth grade. Our entry into school that year, however, would be vastly different from those of the preceding classes in the Eupora School District for one reason. For the first time, blacks and whites would be going to school together in an integrated system as opposed to attending separate schools completely segregated by race. The same historic occurrence was also happening throughout the state of Mississippi.

One would have to be a complete stranger to the history of the South and of Mississippi to fail to recognize and acknowledge the significance of integration of schools as a major, historic shift in the life of the state and of the South in general. Though school segregation was also widespread in the northern states, it was in the South that it was identified with "our way of life." In Mississippi, whites and blacks were legally mandated to live in separate worlds with regard to schools, drinking fountains, and practically all other aspects of life. Though some of the barriers had begun to fall in some areas such as transportation and voting rights due to the direct action of civil rights protestors and intervention through the federal courts and through federal legislation, segregation of the races remained the dominant mind set of white Mississippi. With the massive integration of the Mississippi schools in 1970, the children of the state were put on the leading edge of the battle to change the mores of our society.

Practically every Mississippian coming of age at that time was affected by the decision to integrate public education. Those students and families, both black and white, that remained in the public schools were forced for the first time to deal on a regular basis with people of the opposite race in the school context. I, as a white person, personally can still remember my awkwardness, curiosity, and suspicion on the first day of class. Contrary to the stereotype of southern white and black children growing up and playing together, I had never, that I can remember, played with a black child or had a black child as a friend. Quite literally, it was a new world for me. I suspect the same was true for many other classmates, both black and white.

Those who did not remain in the Mississippi public school system, by far predominately whites, abandoned the public school system and set up new private

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institutions.[1] The lives of these Mississippians were also radically altered as a result of the choices they made or that they felt were forced upon them by integration.

For practically all Mississippians in school or with children in school at the time, the change was radical, often tumultuous, sometimes intimidating and laced with the fear of uncertainty, but nevertheless very real. Those students and families involved, both white and black, can rightly claim that they were leading actors, whether willingly or unwillingly, in an extraordinary time in the history of Mississippi.

The purpose of this Article is to focus on the two converging forces that culminated in the extraordinary event of school integration in Mississippi and other places in the South. These two forces were: (1) the history of resistance to school integration and to the whole concept of civil rights for blacks in the South, with Mississippi as the prime example; and (2) a line of Supreme Court decisions implementing the seminal case of *Brown v. Board of Education*,[2] wherein the doctrine of "separate but equal" in public education was declared unconstitutional.

First, I shall review the major Supreme Court cases leading up to and culminating in *Brown*. Then I shall briefly review the resistance to *Brown* in the South using the Mississippi experience as an illustrative example. Next, I will examine how the Supreme Court directed that *Brown* be implemented in the face of the resistance with particular focus on *Green v. County School Board*[3] where the Court struck down freedom of choice systems and held, in essence, that the remedy for state mandated segregation was state mandated integration "now." The philosophy of Green was adamant in tone and substance that the goal of eliminating segregation "root and branch" required forced integration without much regard to other societal values. Such was probably necessary at the time considering the massive resistance to *Brown*. The reality was that local and state governments were not going to implement *Brown* in good faith if they were given any discretion whatsoever.

I then shall examine the recent Supreme Court case of *Freeman v. Pitts*[4] where the Court has strongly indicated that the time period of "now" does not mean forever and that federal court remedies in the 1990s must take into account the realities of today, not just the realities of a time past. I suggest that such an approach is appropriate and is a return to the original purpose of *Brown*. Just as the early

1. According to a report by Mr. Garvin Johnson, State Superintendent of Education in Mississippi in 1970, there was approximately an eight percent drop in the enrollment of public schools in the state for the 1970-71 school year as compared to the previous school year. 2 A HISTORY OF MISSISSIPPI 413 (Richard Aubrey, ed. 1973). In some school districts, however, there was massive white flight to private academies. In Noxubee County, Mississippi, for example, white enrollment in the public schools fell from 705 to 71 between January 1970 and September 1970, and in grades nine through twelve, there were only twenty-three white students in 1970. *See* COLIN CRAWFORD, UPROAR AT DANCING RABBIT CREEK: BATTLING OVER RACE, CLASS AND THE ENVIRONMENT 91-93 (1996). In some parts of Mississippi, including Noxubee County, the situation remains essentially the same in the 1990s. In Noxubee County during the 1992-93 school year, again as an example, there was one white student at the public high school. CRAWFORD, *supra* at 91-93.

2. 347 U.S. 483 (1954).

3. 391 U.S. 430 (1968).

4. 503 U.S. 467 (1992).

cases implementing *Brown*, with their dominant focus on forced integration as the cure to forced segregation, used a necessary and proper remedy considering the times, current reality counsels a return to a more balanced approach that respects the motive and intents of local and state governments. Simply put, a lot can and has changed in forty-two years, and it is totally appropriate and necessary that the change include the law for implementing the *Brown* definition of what is constitutionally "right and wrong" in the area of racial school policy.

Oliver Wendell Holmes, the great American jurist, wrote in his book, *The Common Law*:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.[5]

This Article is one writer's attempt to show how Holmes' description of the law has played out and continues to do so in Supreme Court desegregation decisions.

II. CHANGING THE DEFINITION OF RIGHT AND WRONG: *Brown v. Board of Education*

Undoubtedly the most important decision in the twentieth century concerning government authority in race relations in general, and more specifically in public education, is that of *Brown v. Board of Education*.[6] *Brown* established that it was not constitutionally permissible under the Equal Protection Clause of the Fourteenth Amendment for states to prohibit children from going to school together just because the children were of a different race, even if the schools provided that the schools for each separate group of children were equal in all tangible factors such as buildings, equipment, funding, and staffing. Put another way, Brown held that the "separate but equal" doctrine with regard to public education was constitutionally impermissible, a holding directly reversing, as opposed to merely modifying, established Supreme Court precedent. For this reason, to understand Brown, it is necessary to first go back and examine the decision that Brown overruled, *Plessy v. Ferguson*.[7]

A. Plessy v. Ferguson

Plessy was not a school integration case at all. Instead, *Plessy* dealt with the constitutionality of a Louisiana statute providing for separate railroad carriages for white and colored races.[8] The petitioner before the Supreme Court, Plessy,

5. OLIVER W. HOMES, THE COMMON LAW 1 (1881).
6. 347 U.S. 483 (1954).
7. 163 U.S. 537 (1896).
8. *Id.*

was 7/8th Caucasian and 1/8th African blood.[9] The reason he was before the Court was because he had violated Louisiana law requiring blacks and whites to ride in separate rail cars.[10] When Plessy had attempted to ride on a passenger railroad car in Louisiana, and had insisted upon sitting in the coach reserved for whites, the conductor on the coach assigned him to a seat in the car reserved for "persons . . . of the colored race."[11] When Plessy refused to comply, he was forcibly ejected and imprisoned for violating the Louisiana statute mandating "equal but separate accommodations of the white, and colored races."[12]

Plessy attacked the constitutionality of the Louisiana statute requiring separation of the races on the grounds that it was inconsistent with both the Thirteenth and Fourteenth Amendments.[13] The Court quickly dismissed the Thirteenth Amendment argument on the basis that this Amendment outlawed slavery or involuntary servitude, but that "[a] statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude."[14]

With regard to the Fourteenth Amendment argument, the *Plessy* Court also rejected Plessy's claim by first reasoning that, though the Fourteenth Amendment was designed to enforce the "absolute equality of the two races before the law," the equality mandated was only "political equality" and did not extend to "social equality."[15] To illustrate the difference, the Court cited prior precedent holding that a state could not prohibit people of the "colored race" from sitting on a jury because such a prohibition "implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility."[16] The Court rejected this implication with regard to the use of railroad cars by passengers, however, on the basis that the exercise of the police power to provide separate but equal railroad cars was reasonable in that it promoted the public good and was not intended for the oppression of a particular class.[17] To buttress its "reasonable" argument, the Court noted that even the Congress of the United States required separate schools for colored children in the District of Columbia.[18]

The Court further reasoned that the state of Louisiana, through the enforced separation of the two races, was not stamping the colored race with a "badge of inferiority," but instead, if members of the colored race felt such a stamp, it was they themselves as opposed to the state of Louisiana that was imposing the stamp.[19] The Court flatly rejected the argument that "equal [social] rights cannot be secured to the negro except by an enforced commingling of the two races."[20]

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9. *Id.* at 541-42.
10. *Id.* at 538.
11. *Id.*
12. *Id.* at 537. The Louisiana statute in question was cited in *Plessy* as Acts 1890, No. 111, p. 152.
13. *Plessy*, 163 U.S. at 542.
14. *Id.* at 543.
15. *Id.* at 543-44.
16. *Id.* at 545. The prior precedent cited was *Strauder v. West Virginia*, 100 U.S. 303 (1879).
17. *Plessy*, 163 U.S. at 546-47.
18. *Id.* at 545.
19. *Id.* at 551.
20. *Id.*

Plessy came to stand for the proposition that a state could segregate school children according to race as long as the facilities in question being provided by the state were provided to both races equally.

B. Between Plessy *and* Brown

Plessy was not a school integration case, but its doctrine that legally mandating separate but equal facilities, in the provision of services provided by the state for separate races, was constitutionally permitted, became the legal basis for separate school systems in the years that followed. The *Plessy* standard of separate but equal was explicitly extended to public schooling by the Supreme Court in *Gong Lum v. Rice*.[21] Between *Gong* and the *Brown* decision in 1954, the court battles over school segregation focused primarily on whether states were complying with the equality portion of the separate but equal doctrine rather than on whether the separate but equal doctrine itself was inherently unconstitutional. In two cases decided four years prior to *Brown*, for example, the Supreme Court made it clear that the equality had to be genuine or the separation was unconstitutional.[22] The Court in these cases did not, however, address the validity of the separate but equal doctrine itself. Instead, the focus was on the factual inquiry as to the element of equality.[23]

C. Brown v. Board of Education

In *Brown v. Board of Education*,[24] the Court did address directly the constitutional validity of the separate but equal doctrine in a decision which has come to be regarded as one of the most significant decisions in the twentieth century. The *Brown* case arrived at the Court from four separate states: Kansas, South Carolina, Virginia, and Delaware.[25] The four cases were consolidated under the name of the Kansas case, not only because it was the first of the four cases the Justices had decided to hear, but also because using the Kansas case's name would give the appearance that the Court's action in the case was not directed only at the South.[26]

In each of the separate cases, the black plaintiffs had been denied admission to schools attended by white children under state laws requiring segregation according to race.[27] Each lower court had adhered to the validity of the separate but equal doctrine; the issue in each was whether the black schools were truly equal.[28] In the Kansas, South Carolina and Virginia cases, the lower court had

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21. 275 U.S. 78, 85-86 (1927).

22. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

23. Significantly, though, for the first time, the Justice Department filed an *amicus* brief in both the *McLaurin* and *Sweatt* cases, arguing that *Plessy*'s doctrine of separate but equal was wrong and the Supreme Court should overrule the same. The Justice Department action was a radical step at the time. *See* JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965 17 (1987).

24. 347 U.S. 483 (1954).

25. *Id.* at 487.

26. WILLIAMS, *supra* note 23, at 31.

27. *Brown*, 347 U.S. at 487.

28. *Id.*

denied the plaintiffs' requested relief by either finding that the black and white schools were substantially equal or by ordering the defendants to equalize the conditions.[29] In the Delaware case, the lower court had ordered the plaintiffs admitted to the white schools upon a finding of inequality because of the superiority of the white schools to the black schools.[30]

The *Brown* Court used these facts to lay the predicate for finding the issue of the validity of separate but equal "ripe" for decision, or put another way, the necessity for the court to address the constitutionality of the separate but equal doctrine itself as opposed to merely applying the doctrine. The Court noted that there had been six cases since *Plessy* involving the separate but equal doctrine in the field of public education where either the validity of the doctrine itself was not challenged,[31] or where inequality was found in the specific benefits afforded negro students as opposed to white students and relief was granted to the negro students based upon the inequality.[32] With the facts before the Court in *Brown*, however, the Court specifically noted that the negro and white schools involved in three of the lower court decisions had been found to be either equal or were in the process of being equalized with respect to "tangible factors" such as buildings, curricula and teaching staffs,[33] and with the fourth lower court decision (i.e. the Delaware case), the lower court adhered to the *Plessy* doctrine, and admitted the black students to the white school based upon a finding of inequality.[34] Even in the Delaware case, however, the Delaware appeals court had indicated that the issue might be revisited if the equalization program, then in progress, was accomplished.[35] The Court accepted these factual findings, and in so doing, laid the necessary predicate for reconsidering the validity of the *Plessy* separate but equal holding itself rather than comparing the "tangible factors" in the negro and white schools involved in each of the cases to determine if they were equal.[36]

To address this question, the Court first looked at the history behind the Equal Protection Clause of the Fourteenth Amendment to see if the answer could be found by reference to the purpose of the Amendment itself.[37] The Court found the history to be inconclusive because "[w]hat others in Congress and the state legislatures had in mind [at the time of the Amendment's adoption] cannot be determined with any degree of certainty,"[38] especially since public education was not a common facet of American life when the Amendment was passed.[39]

Because the history of the Amendment was inconclusive, the Court had to look elsewhere to find a basis for its opinion. The Court chose as its basis the unequal

29. *Id.* at 487 n.1.
30. *Id.*
31. *Id.* at 491 (citing Cumming v. Board of Education, 175 U.S. 528 (1899), and Gong Lum v. Rice, 275 U.S. 78 (1927)).
32. *Id.* (citing McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Oklahoma, 332 U.S. 631 (1948); and, Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)).
33. *Brown*, 347 U.S. at 492.
34. *Id.* at 487 n.1, 492 n.9.
35. *Id.*
36. *Id.* at 492.
37. *Id.* at 489.
38. *Id.*
39. *Id.* at 489-90.

effect of segregation itself, from a developmental standpoint, on black children when public education was considered in 1954: as "perhaps the most important function of state and local governments;" as a requirement for "performance of our most basic public responsibilities;" as the "foundation of good citizenship;" and as the "principal instrument" in developing cultural values and teaching a child to "succeed in life."[40] The Court thus set the stage for attacking the separate but equal doctrine. In other words, considering public education's importance in twentieth century America, it was undoubtedly a denial of equal opportunity by the state if state funded separate schools were inherently unequal by virtue of their separateness. The Court presented the issue as follows: "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 or the minority group of equal educational opportunities?"[41]

The Court's answer to this question was direct and to the point: "To separate them [i.e., 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."[42] As justification for this holding, the *Brown* Court adopted a finding of fact from the Kansas lower court:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[43]

The *Brown* Court then proceeded explicitly to overrule *Plessy*:

> Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding [of the Kansas Court that separating the races denotes inferiority and retards the educational and mental development of negro children and deprives them of benefits] is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.[44]

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40. *Id.* at 493.
41. *Id.*
42. *Id.* at 494.
43. *Id.*
44. *Id.* at 494-95. The social science data the *Brown* Court relied upon for its statement about "modern authority" is set forth in note 11 of the opinion. The data relied upon by *Brown* and cited in note 11 of the opinion has since been strongly criticized. *See* Missouri v. Jenkins, 115 S. Ct. 2038, 2064 n.2 (1995)(Thomas, J., concurring). The *Brown* opinion may well have been stronger if the Court had merely followed the lead of Justice Harlan's dissent in *Plessy* where Justice Harlan found the fundamental problem with "separate but equal" facilities was that the doctrine impermissibly interferes with "personal liberty" and is a "badge of servitude" in and of itself. *Plessy*, 163 U.S. at 263-65 (Harlan, J., dissenting). At least one current Supreme Court Justice has stated that "Brown I itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the government cannot discriminate among its citizens on the basis of race." Missouri v. Jenkins, 115 S. Ct. 2038, 2064 (1995)(Thomas, J., concurring).

The Court concluded its opinion with the following very strong statement:

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[45]

III. THE REACTION TO *Brown*

Brown, in holding that separate but equal was inherently unequal in the educational context, was a watershed decision that changed the definition of "right" and "wrong" from a constitutional perspective. However, stating what is "right" and what is "wrong" is one thing; implementing the right when the wrong has been in place for a long period of time is entirely another matter. Unlike the *Plessy* decision which condoned and upheld the status quo, *Brown* held that the underlying philosophy upon which the status quo had been built with law, physical facilities, and personnel had to be dismantled. The *Brown* Court's courage in redefining "right" and "wrong" was the first major step, but an even more difficult task lay ahead in implementing the change. To understand how difficult the change would be, it is necessary to have some insight into the public and official reaction to the decision, especially in the South. The attitudes and actions of white Mississippians during the years following *Brown* provide an illustrative example of the immensity of the task and the ferocity of the battle that the courts would be undertaking in implementing the holding of *Brown*.

Simply put, the reaction to *Brown* in the South was one of outrage and defiance,[46] and Mississippi is perhaps the best example. Mississippi in the 1950s had two separate societies, one black and one white. Such was not unusual in America at the time, but it is unarguable that Mississippi was one of the states most dedicated and devoted to segregation. Intermarriage between the races was prohibited. Public facilities, such as waiting rooms, were segregated. By law and practice, blacks had long been relegated to an inferior position in both the economy and society of the state. In 1950, for example, only five percent of black Mississippians were registered to vote, the lowest rate in the United States, despite the fact that forty-five percent of the population of the state was black, a higher percentage than in any other state.[47]

The term "Jim Crow" labeled the legal apparatus in place in the South at the time to separate blacks and whites. One writer has summarized what the term meant and the extremes to which it was taken:

> Jim Crow described a far reaching, institutional segregation that affected every aspect of American life. Schools, restaurants, trains and all forms of transporta-

45. *Brown*, 347 U.S. at 495.

46. *See generally* WILLIAMS, *supra* note 23, at 38-39; *See also* ERLE JOHNSTON, MISSISSIPPI'S DEFIANT YEARS 1953-1973 (1990).

47. WILLIAMS, *supra* note 23, at 208.

> tion, theaters, drinking fountains—virtually all public and many private facilities practiced total separation of the races. The state of Florida went so far as to require "Negro" and "white" textbooks, and in South Carolina black and white cotton-mill workers were prohibited from looking out the same window.[48]

Southern whites in Mississippi considered *Brown* as an attack on the values they held most dear. In response to the decision, an organization named the Citizens' Council was organized in Mississippi with a goal of creating a grass roots organization that could influence public opinion and inspire the Supreme Court to reverse its decision.[49] The Citizens' Council organization flourished with membership including state legislators, state officials, and professional and business people.[50] In 1956, published reports claimed there were 50,000 members of the Citizens' Council in Mississippi alone, with the organization spreading to other southern states.[51] Deemed the "white collar klan" by civil rights activists at the time, the Citizens' Council, comprised of urban, middle class whites, implemented an aggressive speaking program to preach against integration and sought to control blacks through economic reprisal.[52] The purpose was "'to make it difficult, if not impossible, for any Negro who advocates desegregation to find and hold a job, get credit, or renew a mortgage.'"[53] Moderation was not considered; the stakes were all or nothing. This philosophy is summarized in the speech used by Citizens' Council speakers at the time. The speech is worth quoting at length because it conveys well both the logic and emotion of the opposition to *Brown*.

> "We have seen how a Negro organization called the National Association for the Advancement of Colored People has prevailed on the United States Supreme Court to declare that segregated schools violate the 14th Amendment to the U.S. Constitution. Yet there has been no change in the Constitution, and Congress has enacted no new law requiring integration. They talk about the 14th Amendment but they refuse to admit the Congress that adopted the 14th Amendment and submitted it to the states was the same Congress that set up the segregated school system in Washington, D.C.! We are not going to let nine old men originate their own law and try to cram it down the throats of true, red-blooded Southerners!
>
> We are in one of our greatest crises since Reconstruction. Our forefathers handled that situation effectively; now it is up to us to do the same. We believe in our Constitution. But the Tenth Amendment to the Bill of Rights asserts specifically that powers not delegated to the federal government are reserved to the states respectively.

48. WILLIAMS, *supra* note 23, at 12-13.
49. JOHNSTON, *supra* note 46, at 12.
50. JOHNSTON, *supra* note 46, at 14.
51. JOHNSTON, *supra* note 46, at 15.
52. WILLIAMS, *supra* note 23, at 39.
53. WILLIAMS, *supra* note 23, at 39.

> This means that control of the schools and suffrage are left to the people of the sovereign states. We will not abide by this legislative decision by a political court. School integration is the first step toward racial intermarriage. Wherever white men infused their blood with the Negroes, white intellect and white culture perished. It happened tragically in Egypt, Babylon, Greece, Rome, India, Spain and Portugal. When the NAACP petitioned the Court for integration, it was to open the bedroom doors of white women to Negro men.
>
> Now I want to see if all of you are willing to stand up and be counted. I want to know if you will join me, to make this organization one of the most powerful in the United States, approving total segregation only, and frowning on the moderates and pussy footers who think that the Supreme Court edict is an inevitable way of life that we must crawl on our knees and accept!"[54]

Beyond economic reprisal and rhetoric, white Mississippians also undertook legal and political action to oppose the decision. For instance, Walter J. Simmons, a leader and spokesman in the Citizens' Council, proposed to then Mississippi Governor Hugh White in a letter dated May 23, 1954, that the *Brown* decision be opposed at every level, through the courts, and through the Legislature so "'that the present public school system be continued without alteration but if any attempt is made to enforce racial integration in any school by federal police power, that school should be closed for the duration of the enforcement effort.'"[55] Though public schools were never actually closed, the voters of the state did approve a resolution in December 1954, by a two to one majority, giving the state legislature authority to abolish Mississippi's public schools if it appeared integration was actually going to occur.[56] Mississippi would aggressively fight desegregation through the courts right up until the end of the battle when the Supreme Court finally ordered massive desegregation in Mississippi to begin with the 1970-71 school year.[57]

Mississippi media leaders, politicians, and religious leaders flamed the passion of the people on the race issue. The editor of the *Jackson Daily News* wrote that "No matter what delayed plan the Supreme Court may propose for enforcement of its decision, that plan is not going to be acceptable in Mississippi."[58] The editor then called for a popular referendum in each state to declare the "Supreme Court racial amalgamation edict to be null and void within the boundaries of these states."[59] United States Senator James Eastland of Mississippi said on May 27, 1954 on the floor of the Senate:

> "What the Supreme Court has done is legislate civil rights which admittedly were not authorized by the Constitution or by Congress. The Court has overturned a great principle of law and has made illegal the acts of states, which the great judges who heretofore have composed the Court had held for generations

54. JOHNSTON, *supra* note 46, at 14.
55. JOHNSTON, *supra* note 46, at 10.
56. JOHNSTON, *supra* note 46, at 23-24.
57. JOHNSTON, *supra* note 46, at 366-69.
58. JOHNSTON, *supra* note 46, at 10.
59. JOHNSTON, *supra* note 46, at 11.

did not violate the 14th Amendment. The amendment could not have one meaning in 1896, when the court decided *Plessy v. Ferguson*, and a different meaning to the present Court."

"Let me make this very clear. The South will retain segregation!"[60]

For the next several years, successful politicians used the pro-segregation, anti-integration theme as a means to election.[61] Those politicians that counseled moderation were defeated.[62] A leading Mississippi clergyman, Reverend G. T. Gillespie, President Emeritus of Belhaven College in Jackson, wrote that there was "considerable data" in the Bible in support of the "general principle of segregation as an important feature of the Divine purpose and Providence throughout the ages."[63] By equating segregation with God's plan, any act opposing desegregation was both justified and necessary; no middle ground was acceptable.[64]

In 1956, the Citizens' Council efforts were supplemented by the formation of a state-funded agency used to gather information on civil rights workers and generally to support the state of Mississippi's stand against desegregation.[65] The agency, called the Sovereignty Commission, was not dissolved until 1973.[66] The purpose of the Commission in part was to conduct surveillance on civil rights leaders.[67]

The opposition to racial integration of schools and empowering blacks in Mississippi went far beyond rhetorical economic, legal, or legislative action. Violence was used often and brutally. When James Meredith entered the University of Mississippi in 1962, 2 men died, 160 federal marshals were injured, and 28 marshals were shot, in what has been called the last battle of the Civil War.[68] The infamous Emmett Till case showed that it was de facto not a crime in Mississippi state courts in 1955, in the wake of *Brown*, for a white man to kill a black boy for merely looking at a white woman.[69] Three young men were killed for trying to register people to vote in 1964, and the men arrested were never tried in state court.[70] In 1967, Medgar Evers, the State NAACP Director, was gunned down in cold blood in his driveway in Jackson, Mississippi.[71] Though many of these violent acts (and numerous others) centered on issues other than school integration (e.g., access to public facilities, voting rights, etc.), they all

60. JOHNSTON, *supra* note 46, at 16-17.
61. *See generally*, JOHNSTON, *supra* note 46, at 28-33, 222-25.
62. One elected official who did take a middle ground by disapproving the *Brown* decision but nevertheless urging calm and urging the people to obey it was Congressman Frank Smith, elected to represent the Third Congressional District of Mississippi in 1950. When congressional districts were combined in 1962, Congressman Jamie Whitten defeated Congressman Smith in what was viewed a conservative versus liberal battle with views on segregation as being the decisive issue. *See* JOHNSTON, *supra* note 46, at 410.
63. *See generally*, JOHNSTON, *supra* note 46, at 25-26.
64. JOHNSTON, *supra* note 46, at 25-26.
65. JOHNSTON, *supra* note 46, at 48-52.
66. JOHNSTON, *supra* note 46, at 379.
67. JOHNSTON, *supra* note 46, at 383.
68. WILLIAMS, *supra* note 23, at 217.
69. *See* WILLIAMS, *supra* note 23, at 39-57.
70. WILLIAMS, *supra* note 23, at 234-35.
71. WILLIAMS, *supra* note 23, at 221-25.

derived from the same nucleus of resistance to federal efforts to insure the civil rights of blacks.

The foregoing is not by any means an exhaustive recount of the history of that time period in Mississippi following *Brown* until approximately 1970, but it does demonstrate that adamant, almost hysterical, resistance to the *Brown* decision was the norm in Mississippi. The same was also true in other parts of the South.[72] It is only with this knowledge in mind that one can accurately understand the leading Supreme Court decisions implementing the *Brown* decision in the 1960s and early 1970s.

IV. IMPLEMENTING *Brown*

The Court, in the next term after *Brown* was decided, took the first step toward the implementation of *Brown* in a second decision commonly referred to as *Brown II*.[73] In *Brown II*, the Supreme Court set forth the guidelines district courts were to use in implementing *Brown*.[74] The Court held, in remanding the *Brown I* cases to the lower courts, that the lower courts should be guided by equitable principles that took into account the personal interest of the plaintiffs and the public interest.[75] All defendants had to make a prompt and reasonable start toward full compliance, but the lower courts could authorize additional time if necessary to carry out an effective ruling.[76] Factors that the Court could consider in making this determination included administrative problems, facility problems, transportation problems, personnel problems, the need to revise school districts in attendance areas, and the need to revise local laws and regulations.[77] Lower courts were to "take the necessary and proper actions, based upon their equitable power, to insure that black children were allowed to go to school without regard to their race."[78] The timing of these actions was to be with "all deliberate speed,"[79] a vague standard that gave virtually unlimited discretion to lower courts to act or not to act.

Unfortunately, but not necessarily surprising considering the opposition that *Brown* sparked in the South, "all deliberate speed" meant no speed as to actual elimination of segregation in many areas. An often used remedy in Mississippi, so-called "freedom of choice" plans, where students in a district could choose where they wanted to attend, often resulted in essentially no decrease in segregation in terms of black/white ratios.[80] The Supreme Court's tolerance of the delay ended in 1968 with the case of *Green v. County School Board*.[81] *Green* modified

72. For example, federal troops were necessary to desegregate the Little Rock, Arkansas schools. WILLIAMS, *supra* note 23, at 92-119.
73. 349 U.S. 294 (1955).
74. *Id.* at 298.
75. *Id.* at 300.
76. *Id.*
77. *Id.* at 300-301.
78. *Id.* at 301.
79. *Id.*
80. *See infra*, text at note 122; *see supra* note 1.
81. 391 U.S. 430 (1968).

both *Brown* and *Brown II* by enlarging their holdings to shift the emphasis from merely eliminating state sponsored segregation to eliminating all vestiges of segregation "root and branch"[82] and mandating that it be done "now."[83]

The question before the Court in *Green* was whether a "freedom of choice" plan was a constitutionally sufficient remedy to satisfy *Brown* and *Brown II*'s mandate to achieve a "racially, nondiscriminatory school system" in all respects, including administration, transportation, local laws, personnel, and admission of students.[84] The school district in question was New Kent County located in rural eastern Virginia.[85] Approximately half of the county's population of 4,500 were black, with persons of both races residing throughout the county.[86] The school system had two schools, one on the east side and one on the west side of the county, with both schools serving the entire county.[87] Overlapping bus routes for the two separate schools still went over the entire county.[88] The school on the east side was white, and the school on the west side was black.[89] The segregated system had originally been set up under Virginia constitutional and statutory provisions that the Supreme Court had struck down as unconstitutional in *Brown*.[90]

Following the *Brown* decision, the school district had continued to operate segregated schools, though the state had acted to allow students to seek enrollment through the direction of the State Board of Education at other schools.[91] By September 1964, not a single black pupil had applied for admission to the white school and not a single white student had applied for admission to the black school.[92] In 1965, the school board, in order to remain eligible for federal financial aid, adopted a "freedom of choice plan" for desegregation under which pupils in the first through eighth grades could choose each year whether they wanted to go the white school or the black school, with pupils not making a choice being assigned to the school they previously attended.[93] In the first three years of operation of the "freedom of choice plan," not a single white child had chosen to go to the black school, and eighty-five percent of the black children still attended the black school.[94]

The Court, in addressing these facts, acted strongly in an opinion, the tone of which clearly indicates the impatience of the Court. The Court interpreted *Brown II* as "a call for the dismantling of well-entrenched dual systems"[95] and replacement of them with "unitary, non racial system[s]."[96] Though *Brown*'s

82. *Id.* at 437-38.
83. *Id.* at 439 (emphasis added).
84. *Id.* at 437.
85. *Id.* at 432.
86. *Id.*
87. *Id.*
88. *Id.* at 434.
89. *Id.*
90. *Id.* at 432. One of the four cases before the *Brown* court was a Virginia case. See discussion at note 32.
91. *Id.* at 433.
92. *Id.*
93. *Id.* at 433-34.
94. *Id.* at 441.
95. *Id.* at 437.
96. *Id.* at 436.

principal focus was giving black children a place in white schools,[97] this was only the first step. The goal, as interpreted by *Green*, was a "system without a 'white' school and a 'Negro' school, but just schools."[98] Despite the flexibility contemplated by *Brown II* to allow district courts to deal with the problem that transition from a dual system to a unitary system might entail, these problems could not stand in the way of action.[99] Instead, regardless of what problems might be encountered, *Green* was a mandate to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[100] Delays were "no longer tolerable."[101] The "necessary and proper" action, left undefined in *Brown II*, was defined in *Green* in emphatic terms: "to come forward with a plan that promises realistically to work, and promises realistically to work now."[102] The time for "deliberate speed" was over.[103]

Though not categorically ruling out freedom of choice as an effective remedy against desegregation, the Court struck down the freedom of choice plan before it in *Green* as unacceptable.[104] The Court specifically noted that the plan had been in effect for three years of operation, but not a single white child had chosen to attend the black school and only fifteen percent of the black students had chosen to attend the white school.[105] The decision made it clear that the permissibility of a freedom of choice plan would be governed by how well it worked in creating a "unitary" system. Unitary clearly meant schools that were racially mixed (i.e., a "system without a 'white' school and a 'Negro' school, but just schools").[106] The Court specifically rejected the idea of "freedom of choice as being the objective, even if there was true 'freedom.'"[107] The objective was an integrated system,[108] and the burden of responsibility to meet the goal was that of the school officials, not the parents.[109] The means to be used was to be the speediest of the available alternatives.[110]

Green is the classic case of the Court doing what is necessary under the circumstances to be effective, or in the words of Holmes quoted at the beginning of this Article, reacting to the "necessities of the time."[111] The Court noted specifi-

97. *Id.* at 435-36.
98. *Id.* at 442.
99. *Id.* at 436-38.
100. *Id.* at 437-38 (emphasis added).
101. *Id.* at 438.
102. *Id.* at 439 (emphasis added).
103. *Id.* at 438. The Court had actually said that the time for "deliberate speed" was over as early as 1964 in the case of Griffin v. School Board, 377 U.S. 218 (1964). *Green*, however, is the case that is generally recognized as the turning point in the Court's remedy for *Brown*. With regard to Mississippi, it is the case that finally promoted aggressive action to implement integration. *See*, United States v. Hinds County School Bd., 417 F.2d 852 (5th Cir. 1969) discussed *infra*.
104. *Green*, 391 U.S. at 441.
105. *Id.*
106. *Id.* at 442.
107. *Id.* at 440.
108. *Id.*
109. *Id.* at 441-42.
110. *Id.* at 441. (In *Green*, the Court suggested zoning as the way to go).
111. *See* HOLMES, *supra* note 5.

cally that the "freedom of choice plan" was not adopted until eleven years after *Brown* and ten years after *Brown II*.[112] The Court characterized this delay as a "deliberate perpetuation of the unconstitutional dual system." [113] The Court obviously did not feel there had been any true "good faith compliance"[114] contemplated by the highly discretionary *Brown II* standard of all "necessary and proper actions" in "all deliberate speed." Instead, the Green Court decided that, from a practical standpoint, the standard necessary to counter the resistance and deliberate delay was to integrate "now" using the quickest means available. In decisions that followed *Green*, it became clear that the Court's power to fashion remedies was indeed broad and that the court would use extraordinary means in response to extraordinary resistance. By way of example, in subsequent decisions the Court approved busing to achieve racial quotas,[115] approved the desegregation of faculties according to specific mathematical ratios,[116] and approved the use of remedial or compensatory education programs paid for by the state.[117]

Considering the facts of *Green* and the general resistance to *Brown* in the South, the adamant tone and the holding of the *Green* decision is not surprising. Under different circumstances, one would have to question a decision that took away individual choice as a remedy for the state not allowing blacks to choose to go to school with whites in the first place. There is a fine, yet distinct, difference between the state forcing children to be separate and the state forcing children to be together. In the context of the resistance to the *Brown* decision that the Court faced at the time, however, this distinction was probably not significant. Thus, it is only when *Green* is viewed in the context of the times that it can be properly understood. Given the times, it was not unreasonable to assume that the freedom of choice plan considered in *Green* allowed true freedom in name only.

V. *Green* APPLIED TO MISSISSIPPI

After the *Green* case was decided, the change in the constitutional remedy for dual school systems set forth in *Green* was quickly applied by the Court of Appeals for the Fifth Circuit to Mississippi and affirmed by the Supreme Court in such a manner that desegregation plans were implemented on a statewide basis starting in 1970.

The Mississippi case which gave the Supreme Court an opportunity to address the Mississippi situation was that of *United States v. Hinds County School Board*.[118] The case involved twenty-five school desegregation cases that had been consolidated on appeal from an *en banc* decision of the United States District Court for the Southern District of Mississippi.[119] The issue in the case,

112. *Green*, 391 U.S. at 438.
113. *Id.*
114. *See id.* at 436 (quoting Brown II v. Board of Education, 349 U.S. at 299 (1955)).
115. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Davis v. Board of School Comm'rs, 402 U.S. 33 (1971).
116. United States v. Montgomery County. Bd. of Educ., 395 U.S. 225 (1969).
117. Milliken v. Bradley, 433 U.S. 267 (1977).
118. 417 F.2d 852 (5th Cir. 1969).
119. *Id.* at 854.

as in the *Green* case, was whether freedom of choice plans met the constitutional standard for an adequate remedy to dual school systems segregated on the basis of race which had been outlawed in *Brown*. As the Fifth Circuit presented the question: "These cases present a common issue: whether the District Court erred in approving the continued use by these school districts of freedom of choice plans as a method for the disestablishment of the dual school systems."[120] The test as to whether the freedom of choice plans were constitutionally adequate was a test based strictly upon the racial make-up of the schools. As stated by the court: "If in a school district there are still all-Negro schools or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities, then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green*."[121]

The court then proceeded to strike down the freedom of choice plans being used in the Mississippi school districts as constitutionally inadequate on the basis that no white students had chosen to attend traditionally negro schools and the percentages of negro students choosing to attend white schools ranged from a low of zero percent to a high of sixteen percent, an inadequate amount in the court's judgment, since such was "a degree of desegregation held to be inadequate in Green v. County School Board."[122] The court ordered that the defendant school boards, in collaboration with the Federal Department of Health, Education and Welfare, come up with a plan to dismantle the dual school systems with regard to faculty assignment, school bus routes, all facilities, all athletic and other school activities, and all school location and construction activities, and that the plan be implemented with the beginning of the 1969-70 school year.[123]

The *Hinds County School Board* case was immediately appealed to the United States Supreme Court, and the Supreme Court issued a per curiam opinion with regard to the case in a decision styled *Alexander v. Holmes County Board of Education*.[124] In *Alexander*, the Court, citing *Green*, upheld the Fifth Circuit decision and refused to allow extra time for the transition. The Court stated that the explicit prior holdings of the Supreme Court required "every school district . . . to terminate dual school systems at once and to operate now and hereafter only unitary schools."[125] *Green*'s mandate to eliminate school segregation "root and branch" through integration "now" had been applied in full force to Mississippi. Mississippi schools integrated in 1970, less than a year after the *Alexander* decision was decided.

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120. *Id.*
121. *Id.* at 855(quoting Adams v. Matthews, 403 F.2d 181, 188 (5th Cir. 1968)).
122. *Id.*
123. *Id.* at 858.
124. 396 U.S. 19 (1969).
125. *Id.* at 20.

VI. A Personal Observation

Whether integration was successful in Mississippi depends upon one's view. Some feel the change destroyed public education by causing whites to leave, while others feel it made public education real and available for all Mississippians, both white and black.

My view is more personal. Based upon my experience as a member of the freshman class at Eupora High School when desegregation occurred, I believe it was a success. At the time that my class entered high school, I can personally remember there were many naysayers that said we would not succeed. All of us, black and white, almost certainly felt the same emotions from time to time. After all, we were children of the South. When we started classes in the fall of 1970, we were essentially two separate classes, one black and one white, even though we were attending school in the same building. At the end of the four years of high school, however, when we were all sitting together on the football field during graduation, I was very proud to know that the naysayers, at least with regard to our class, had been wrong. We had succeeded.

Though there had been bumpy places along the road, our class of blacks and whites had largely bonded together into a group with one common identity as the Eupora High School Class of 1974. We were the first class to hold an integrated ten year class reunion. Though I am aware that other school systems did not have as easy a transition and that racial problems still trouble many school districts, I am confident in saying, based upon my own experience, that those who predicted that desegregation per se would not be a success were just flatly wrong. I personally am glad the Supreme Court decided *Green* as it did, for I feel that I am a better and more complete Mississippian by going to school with black Mississippians. If *Green* had been decided differently, such would not have occurred.

VII. Looking to the Future

Forty-two years have come and gone since the *Brown* decision in 1954. A great deal can change in forty-two years. Such is certainly true in Mississippi. Though race is still a major factor in the daily lives of Mississippians, one would strain credibility to argue that the racial atmosphere in the state is anywhere near the defiant atmosphere of the 1950s and 1960s. To the extent that any given Mississippi public school remains predominantly black or predominantly white, it almost certainly is a result of other factors such as demographic change, population shifts, and other private choices, some admirable and some not, as opposed to official state policy.

Mississippi is apparently not isolated in this aspect, for the recent Supreme Court decisions dealing with school desegregation clearly indicate that the Court is moving in a direction that recognizes the limits of judicial capacity and authority to run local school systems indefinitely through the equitable power of federal courts in those school districts where the federal courts have intervened. A good example of how the Court's approach to the issue has changed with the

times is the 1992 case of *Freeman v. Pitts*[126] in which the Court refused to focus solely on student black/white ratios as the measure of constitutional correctness and emphasized the imperative to return school systems to local political authorities as soon as practical.[127]

In *Freeman*, the Court held that a lower federal court in an ongoing desegregation case has the discretion to withdraw its supervision over those areas of a school district in which there has been a court ordered desegregation plan, even if other aspects of the system remain in non-compliance.[128] The criteria that a district court is to use is three-part. First, the district court should consider whether there has been full and satisfactory compliance with the desegregation decree in those aspects of the system where supervision is to be withdrawn.[129] Second, the court should consider whether judicial control is necessary or practical to achieve compliance with the decree in other facets of the school system.[130] Third, the district court must consider whether the affected school district has demonstrated to the public and the parents of the students of the disfavored race the district's good faith commitment to hold to the court's decree and to federal law serving as the predicate for judicial intervention.[131] Based upon these criteria, the *Freeman* Court upheld the district court's determination that the school district in question was "a unitary system with regard to student assignments, transportation, physical facilities and extracurricular activities," and that as such, no further relief would be ordered in these areas even though the district court retained jurisdiction in the areas of teacher and principal assignments, resource allocations, and quality of education where compliance had not been achieved.[132]

The plaintiffs in the *Freeman* case were black school children and their parents who brought suit within two months of the Supreme Court's 1968 *Green* decision.[133] The district court, for the 1969-70 school year, entered a consent order abolishing the freedom of choice plan that had been in effect and adopting the neighborhood school attendance plan that closed all the former black schools and reassigned their students among the remaining neighborhood schools.[134] Between implementation of the new plan and the school district's motion for a dismissal of the litigation on the basis that the school district had satisfied its duty to eliminate a dual education system, only minor changes were made in the plan. The amount of judicial involvement was limited and infrequent.[135]

From 1969 when the suit was initially filed until the time a motion to dismiss the case was filed in 1986, the racial make-up of the school district had changed dramatically. In 1969 when the black plaintiffs initially filed their suit, the white

126. 503 U.S. 467 (1992).
127. *Id.*
128. *Id.* at 485.
129. *Id.* at 491.
130. *Id.*
131. *Id.*
132. *Id.* at 474.
133. *Id.* at 472-73.
134. *Id.*
135. *Id.* at 473-74.

school system had only 5.6% black enrollment.[136] By 1986, the percentage of black students was forty-seven percent.[137] In 1970, there were 7,615 non-whites living in the northern part of the county where the school district was located, while there were 11,508 non-whites in the southern part of the county. By 1980, the numbers had changed dramatically, with 15,365 non-whites living in the northern part of the county, and 87,583 non-whites living in the southern part of the county. In short, the black population in the southern part of the county had experienced tremendous growth while the white population did not, and the white population in the northern part of the county experienced tremendous growth while the black population did not.[138]

Although forty-seven percent of the students in the school system were black in 1986, fifty percent of the black students attended schools that were over ninety percent black, sixty-two percent of all black students attended schools that had more than twenty percent more blacks than the system-wide average, twenty-seven percent of white students attended schools that were more than ninety percent white, fifty-nine percent of white students attended schools that had more than twenty percent more whites than the system-wide average.[139] Five of the twenty-two high schools were more than ninety percent black, while another five were more than eighty percent black. Of the seventy-four elementary schools, eighteen were over ninety percent black, and ten were over ninety percent white.[140]

Though the statistics recited above do show significantly more racial balance overall in the school system when compared to the racial balance in the system in 1969-70, the statistics clearly demonstrate, borrowing the definition of "unitary" stated in *Green*, that there existed in 1986 many schools in the system that nominally would be identified as "black" schools or "white" schools, as opposed to just "schools." Nevertheless, the Supreme Court upheld the trial court's finding of "unitariness" in student assignments in the face of these statistics.[141] Contrary to the rigid and narrowly focused approach of *Green* to the concept of unitariness, the *Freeman* case did not focus solely on racial percentages in its evaluation of the term "unitary" but instead took a broader approach that allows district courts to look more at the total picture. Rather than a fixed meaning based upon racial percentages, a unitary school system, according to *Freeman*, is a school system in "'compliance with the command of the Constitution,'"[142] and further than that, the term "does not have fixed meaning or content."[143] Though racial imbalances may exist, they must be causally linked to a constitutional violation by the state before they are constitutionally impermissible.[144] The court agreed with the lower court that the racial make-up of the school population was the

136. *Id.* at 475.
137. *Id.* at 475-76.
138. *Id.*
139. *Id.* at 477-78.
140. *Id.* at 478.
141. *Id.* at 474.
142. *Id.* at 487 (quoting Board of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 246 (1991)).
143. *Id.* at 487.
144. *Id.* at 494-95.

result of changing residential patterns that in turn were the result of private, not state, choices.[145] As such, it was not within the Court's authority to address the racial make-up of the student population further.[146] In essence, the Court held that "unitary" is more a function of the reason racial imbalance exists than whether it does or does not exist.

The change that has taken place between the approaches of *Green* and *Freeman* is perhaps best explained by Justice Scalia in his concurring opinion in *Freeman*. While acknowledging that the affirmative duty to desegregate set forth in *Green* incorporated and used a presumption "extraordinary in law but not unreasonable in fact"[147] to fashion an effective remedy to the longstanding and formerly constitutional practice of state sponsored segregation, Justice Scalia opined that the country (and the Court) was close to the time to go back to ordinary principles whereby a plaintiff "must prove intent and causation and not merely the existence of racial disparity"[148] to justify a court's intervention on constitutional grounds.[149] In other words, the presumption of bad faith on the part of local authorities is no longer factually justified, and the law must change accordingly.

Just as significant, and very much related to the new concept of unitary used by *Freeman*, is the *Freeman* Court's emphasis on the importance of returning the school districts to the control of local authorities.[150] The Court emphasized that judicial supervision of school systems was to be temporary in nature,[151] and a major factor to be considered in determining whether the system could be returned to local authorities is evidence of "good faith commitment" on the part of local authorities.[152] In the more recent case of *Missouri v. Jenkins*,[153] where the Supreme Court ordered the *Freeman* test be applied, the Court went even further and stated that a co-equal goal (i.e., "end purpose") of court ordered remedial action, in addition to remedying the violation, is to restore local control.

In summary, the *Freeman* opinion, both in tone and substance, strongly indicates that the Supreme Court recognizes that federal constitutional law with regard to school integration must take into account the changing circumstances of the times. Though racial imbalance in schools in the 1950s and 1960s in the South and other parts of the country undoubtedly was the result of state policy, the same is not necessarily true in the 1990s, some twenty-five to thirty years after the *Green* decision mandating that dual systems be eliminated "now." As such, the Supreme Court is now approaching cases in a more flexible manner

145. *Id.*
146. *Id. See also* Missouri v. Jenkins, 115 S. Ct. 2038, 2051 (1995)(holding that pursuit of "desegregative attractiveness" is beyond the scope of the court's remedial authority). *Jenkins* further held that "white flight" is not something to be remedied by the courts, even if it results from court desegregation orders.
147. *Freeman*, 503 U.S. at 506 (Scalia, J., concurring).
148. *Id.*
149. *Id.*
150. *Id.* at 489-90.
151. *Id.*
152. *Id.* at 499.
153. 115 S. Ct. 2038, 2055 (1995).

that does not assume that the racial imbalance in schools in any given school district is the result of state policy.

VIII. CONCLUSION

Law students often debate the question of whether the law shapes society or whether society shapes the law. The broad trends in Supreme Court jurisprudence discussed in this Article concerning school desegregation issues indicate that both phenomena occur. In *Brown*, the Court established a new definition of right and wrong that would completely transform American public school education. In *Brown II*, the Court set forth a very flexible equitable remedy designed to give courts and local school districts flexibility in implementing the new definition of "right" and "wrong." When the *Brown II* remedy did not work due to resistance to *Brown*'s new definition of "right" and "wrong," the Court changed the remedy in its *Green* decision, a change that directly affected almost all Mississippians. However one views the *Green* decision, its mandate that the proper remedy for segregation was integration "now" made the standard of *Brown* a reality, despite fierce, even vehement, opposition on the part of people in the South. In the 1990s, however, forty-two years after *Brown* was decided, things have changed, and Supreme Court integration law has likewise changed to accommodate the new reality. No longer is segregation presumed to be a result of state action. Instead, traditional notions of equity and the requirement of state action are again being used as the appropriate standard.

One of my law professors was fond of saying that when the reason for the rule no longer exists, the rule should no longer be followed. The Supreme Court has indicated that something like that has happened now in the 1990s with regard to the *Green* remedy designed in 1968 to eliminate state mandated school segregation. The important question now is whether the change the Court seems to be accommodating is real; in other words, has the Court made a wise judgment by backing off its *Green* standard and returning to a more flexible approach? To answer this question is beyond the scope of this Article, but the answer will undoubtedly require not only insight into our society, but also into the evolution of the law. As Holmes said, in concluding the passage set forth at the beginning of this Article regarding the nature of the law:

> We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.[154]

154. HOLMES, *supra* note 5, at 1.