The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities

by

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Introduction

Not too long ago, the most talked-about school desegregation case was Brown v. Board of Education.¹ What was its promise, its guarantee for our public school children?² Today that honor belongs to Missouri v. Jenkins,³ and the conversation has changed from...
defining the meaning of Brown I to criticism of the expansiveness (and expensiveness) of the school desegregation remedy for Kansas City, Missouri. How can a school desegregation remedy properly require a 3,500 square-foot, dust-free mechanics' room and a Model United Nations meeting hall wired for language translation? At a staggering cost of $2,000,000,000 over thirteen years, the Jenkins remedy has included a local property tax, a systemwide magnet school program, multiple compensatory education programs, and extensive capital improvements and has affected all facets of school administration—student assignment, faculty assignment, transportation, facilities, curriculum, staff development, and educational programs. The Supreme Court has considered the case


The dialogue generated by the example of this case is not confined to dark lecture halls or Supreme Court opinions or even enlightened law review articles. The case has invaded public thought. Multiple newspaper articles and editorials and even Sixty Minutes have examined the case. See, e.g., Affirmative Reaction II, WALL ST. J., June 13, 1995, at A18; Carole Ashkinaze, Kennedy's Boneheaded Dissent, CHI. SUN-TIMES, April 24, 1990, at A29; Court-Ordered Taxation, WASH. POST, April 20, 1990, at A26; Dennis Farney, Fading Dream? Integration Is Faltering In Kansas City Schools as Priorities Change, WALL ST. J., Sept. 26, 1995, at A1; James J. Kilpatrick, King Numbers Rules Supreme in Kansas City Schools, ATLANTA JOURNAL-CONST., Aug. 17, 1989, at A17; Charles E.M. Kolb, Kansas City Judge Needs Lesson in Federalism, WALL ST. J., Jan. 5, 1988 at A24; George F. Will, The Imperial Judiciary, WASH. POST, April 26, 1990, at A23.

Of course, underlying the discussion over the Jenkins remedy lurks a question over the rights at issue. See Frank H. Easterbrook, The Limits of Judicial Power in Ordering Remedies: Civil Rights and Remedies, 14 HARV. J.L. & PUB. POL’Y 103, 103 (1991) (“When we hear an objection to the remedy, it is almost always a disguised objection to the definition of what is due, and not to the methods used to apply the balm.”); Paul Gewirtz, Remedies and Resistance, 92 YALE L.J. 585, 593 & n.16 (1983) (“Criticism of a remedy ... may reflect criticism of the underlying right.”); Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 GEO. L.J. 1355, 1382 (1991) (“At least some of the debate over the court’s proper remedial role is a thinly veiled attack on the prevailing interpretation of the Constitution.”).


6. See Jenkins, 639 F. Supp. at 26-43
three times, and the district court and court of appeals have issued between them scores of opinions.

In an ironic coincidence, just across the river in Kansas City, Kansas, there exists a felicitous alternative example of a federal court's remedial powers. That school desegregation case, although lasting almost twenty-four years, involved a limited, hands-off remedy. The remedy directly involved only student and faculty assignment. After the district court ordered the remedy in 1981, the case only produced one formal status conference, one unopposed hearing, and a single published opinion. The lawsuit ended in 1997, without opposition from the plaintiff and without national fanfare.

The different remedial processes in the two cases are stunning. Some commentators would argue that one or both of the cases, like other public law litigation, illustrates federal courts overstepping their limited powers and effectively running local school systems. Others might use the cases to evaluate the competency of courts as agents of social change or to declare one court's remedy superior.


8. For example, from August 1997 to August 1998, the court of appeals issued eight separate opinions. See Jenkins v. Missouri, 133 F.3d 560 (8th Cir. 1997); Jenkins v. Missouri, 133 F.3d 559 (8th Cir. 1997); Jenkins v. Missouri, 131 F.3d 716 (8th Cir. 1997); Jenkins v. Missouri, 128 F.3d 1201 (8th Cir.), vacated, 133 F.3d 560 (8th Cir. 1997); Jenkins v. Missouri, 127 F.3d 709 (8th Cir. 1997); Jenkins v. Missouri, 124 F.3d 1310 (8th Cir. 1997); Jenkins v. Missouri, 122 F.3d 588 (8th Cir. 1997); Jenkins v. Missouri, 121 F.3d 712 (8th Cir.), vacated, 133 F.3d 560 (8th Cir. 1997). In 1996, the Eighth Circuit noted that it had heard appeals in the case more than 20 times. See Jenkins v. Missouri, 78 F.3d 1270, 1272-73 (8th Cir. 1996).


10. See id. at 1386.


This Article takes a different approach to analyzing public law cases and suggests that the two Kansas City cases are remarkable not for their differences, but for their similarities. In both cases, defendants chose, to a large extent, their different remedies and drove the remedial process. The district courts exercised very little direction and control, and the plaintiffs had an effective voice only to the extent allowed by defendants.

This occurred because the district courts behaved as they are directed: follow Supreme Court precedent. The Supreme Court's approach to school desegregation in particular and public law remedies in general has prevented lower court judges from undertaking principled, well-grounded remedial processes and has ceded too much remedial power to the defendants, the alleged or adjudicated wrongdoers. Thus, this Article seeks to shift the debate over public law remedies from a vigorous discussion of the propriety and competency of federal courts in public law cases to a recognition of a judicial system that cedes to defendants a remarkable degree of remedial authority, at the plaintiffs' expense. To rectify the plaintiffs' disadvantage in school desegregation cases, this Article proposes that judges define more precisely plaintiffs' rights, focus


13. This Article uses the phrase "public law" to refer to cases challenging the operation of public institutions, i.e., school desegregation, the rights of institutionalized persons, public housing discrimination, and voting rights. See Sturm, supra note 4, at 1357 n.1; see also Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1284 (1976); Yoo, supra note 4, at 1122 n.6. This type of litigation is also referred to as "institutional reform litigation" and "structural reform litigation." See Carl Tobias, Public Law Litigation and the Federal Rules of Civil Procedure, 74 CORNELL L. REV. 270, 279 (1989); Sturm, supra note 4, at 1357 n.1. This Article uses the terms "public law," "institutional reform," and "structural reform" interchangeably, although some distinguish the terms. See Tobias, supra, at 280. For citations to key scholarship on public law, see Richard H. Fallon, Jr., Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U. L. REV. 1, 1 n.1 (1984); Barry Friedman, When Rights Encounter Reality: Enforcing Federal Remedies, 65 CAL. L. REV. 735, 736 n.4 (1992).

14. See supra authorities cited in footnotes 11-12. As Professor Owen M. Fiss has described, the debate about public law remedies often speaks of a particular judge, rather than of the "law." See OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 28 (1978) ("[W]hen we speak of the decisional authority in the injunctive process we often talk not of the law or even of the court, but of Judge Johnson or Judge Garrity.").
more particularly on the prospective aspects of the remedy, and recognize their own remedial discretion.

Part I of this Article tells the tale of the two cities and their school desegregation lawsuits. It chronicles the constitutional violations and the multifaceted remedies in these two school districts to demonstrate their shared remedial weaknesses. Despite more than four decades of school desegregation law conducted throughout our country, neither court had a meaningful definition of the desired end result of the lawsuit. The courts approached the remedy as primarily a reparative task—to eliminate the continuing segregative effects of the past violations—but their approach depended on a fruitless proximate cause analysis. This created in both cases unacceptable remedial ambiguity. In turn, the ambiguity allowed defendants, who have a high degree of control over the particular means of the remedy, to define the desired end result and, to a certain extent, the plaintiffs’ rights themselves. Finally, the cases placed an increased importance on returning school districts to “local control,” which dominated the later stages of the remedy because of the imprecision of the other remedial goals. Taken together, these principles ensured that the defendants, more than the plaintiffs or even the district court, would drive the remedial process.

These problems are not unique to the Kansas City metropolitan area, but are present in most pending school desegregation cases, which number in the mid-to-high hundreds, and in the hundreds of

15. See infra Parts II.B.1.b, II.B.2.c (arguing that proximate cause in crafting the public law remedy provides little guidance for it is almost impossible to define the present day effects of defendants’ unlawfulness).

16. The United States alone is a party in pending cases governing approximately 400 school districts. See U.S. Dep’t of Just., Civil Rights Division, Educational Opportunities Section Docket Sheet as of March, 1997 (on file with author). Approximately 100 of these school districts operate under “general” orders to desegregate, with the case placed on the inactive court docket. The majority of the United States’ cases are in southern states, although a great number of northern school desegregation cases (where the Justice Department has had minimal involvement) remain open. One school desegregation expert estimates that approximately 695 schools districts (educating 3.9 million school children) currently operate under formal school desegregation plans. See DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 166 (1995). School districts may under-report their operation under school desegregation decrees. Only 256 school districts, with student enrollment exceeding two million, reported in 1990 to the Department of Education that they were subject to school desegregation orders. See David S. Tatel, Desegregation Versus School Reform: Resolving the Conflict, 4 STAN. L. & POL’Y REV. 61, 63 n.20 (1993) (citing OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUC., 1990 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS SURVEY: COURT-ORDERED SCHOOL DISTRICTS (1990)); see also David I. Levine, The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo, and Freeman, 20 HASTINGS. CONST. L.Q. 579, 584 n.30 (1993) (counting 500 pending school desegregation lawsuits).
other public law remedies that continue to influence America’s housing, prisons, mental hospitals, and work places.17

Part II turns to identifying why the defendants have the most control over the remedial process and argues that the cause of the problem is the Supreme Court. The Supreme Court, after a decade of almost complete silence, has decided since 1991 seven cases concerning public law remedies. Four cases, Lawyer v. Department of Justice,18 Lewis v. Casey,19 United States v. Virginia,20 and Missouri v. Jenkins,21 concern the scope of the remedy (i.e., what the remedy can seek to achieve). Rufo v. Inmates of Suffolk County addresses how a public law remedy may be modified.22 Finally, two cases, Freeman v. Pitts,23 and Board of Education v. Dowell,24 provide when and how the lawsuits may be terminated.

This is the first article to examine these seven cases as a group. It attempts to synthesize the separate stages of the public law remedy (initial remedy, modification, and termination) and the two main types of public law remedies (injunctive relief and consent decrees) to define comprehensively the Supreme Court’s conception of public law remedial power and all opportunities for judicial relief.25


The cases reflect five principles that, taken together, result in excessive remedial authority being yielded to the defendants. Specifically, the Court has maintained consistently that:

1. The scope of the violation determines the scope of the remedy;
2. Defendants deserve deference;
3. Federalism counts;
4. Through consent decrees parties can circumvent the limits on injunctive relief; and
5. Effectiveness is sometimes too difficult to achieve.

These five principles, taken together, guarantee little opportunity for redressing plaintiffs' rights. Part III argues that three changes in the Supreme Court's approach to public law remedies must occur if school desegregation plaintiffs are to have a meaningful opportunity for an effective remedy. The school desegregation right, almost completely retarded in its development, must be further defined. Further, school desegregation remedies should focus on barring current and future discrimination. School districts should have to justify (either on practicality or educational grounds) or redress any policy or practice that causes racial disparities. Finally, judges should recognize the choices inherent in public law remedies and their own role, not just the role of the defendants, in making those choices.

I. The Tale Of Two (Kansas) Cities

Almost twenty years after the Supreme Court declared in Brown v. Board of Education that "separate but equal" had no place in the Topeka, Kansas public schools, school desegregation traveled 60 miles due east to Kansas City, Kansas and Kansas City, Missouri. The two cities are primarily separated by a state line, a road for the greater part. While the two cities are separate political units and the


26. 347 U.S. 483, 495 (1954) (Brown I). Brown I considered four school districts: Topeka, Kansas; Clarendon County, South Carolina; Prince Edward County, Virginia; and New Castle County, Delaware. See id. at 486 n.1.
Missouri city is approximately three times as large as the Kansas one, the two cities have similar racial makeups and socioeconomic populations.27

Before and after Brown I, the two cities separately operated public school systems segregated by race. A Kansas statute permitted the establishment and maintenance of a dual school system—^—one for African-American students and one for white students—and the Kansas City, Kansas school district operated "a formal, statutorily sanctioned dual system."29 In Missouri, the state constitution required that public elementary and secondary schools be segregated

27. Census data from 1970, the decade in which both suits were filed, and from 1990 indicate similar racial makeups in both cities. In 1970, the white to black ratio in the Kansas city was .793 to .204, see BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1970 CENSUS OF THE POPULATION, KANSAS, Table 6, at 690-701 (1970) [hereinafter 1970 KANSAS], while in the Missouri city it was .775 to .221. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1970 CENSUS OF THE POPULATION, MISSOURI, Table 6, at 714-25 (1970) [hereinafter 1970 MISSOURI]. In 1990, the ratio changed to .65 to .293 in the Kansas city, see BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1990 CENSUS OF THE POPULATION, KANSAS, Table C at 734-45 (1990) [hereinafter 1990 KANSAS], and .668 to .296 in the Missouri city. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1990 CENSUS OF THE POPULATION, MISSOURI, Table C at 770-81 (1990) [hereinafter 1990 MISSOURI]. In 1970 the unemployment rate in both cities was 3.8%. See 1970 KANSAS at 692; 1970 MISSOURI at 716. In 1990, a small gap in unemployment rates emerged, with the Kansas city having a rate of 8.9% and the Missouri city having a rate of 7.3%. See 1990 KANSAS at 741; 1990 MISSOURI at 777. In 1970, the median income of all families for the Missouri and Kansas cities was $9,904 and $9,162, respectively. See 1970 KANSAS at 693; 1970 MISSOURI at 717. In 1990, the gap widened a little to $32,969 and $28,082, respectively. See 1990 KANSAS at 738; 1990 MISSOURI at 774.

Differences between the cities certainly exist. The Missouri side is considered to be more cosmopolitan; the Kansas side, more blue collar. The Missouri city has more commercial and service industry, while the Kansas side is more industrial. Another difference between the two cities is in education levels. In 1970, the Missouri city had 10.1% of its population 25 years and older having attended four or more years of college while the Kansas city had only 6.6%. See 1970 KANSAS at 691; 1970 MISSOURI at 715. In 1990, the Missouri city had 22.0% of its population 25 years and older having that level of education while the Kansas city had only 10.1%. See 1990 KANSAS at 738; 1990 MISSOURI at 774.

28. See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, 610 F.2d 688, 689 (10th Cir. 1979).

29. Id. The Supreme Court had already analyzed the constitutionality of the Kansas state statute in Brown I, 347 U.S. at 495 n.1. The student and faculty at the elementary schools were segregated pursuant to Kansas Laws of 1867, Ch. 49, § 7 from 1886 until 1954, which permitted cities with a population of more than 15,000 to establish and maintain public elementary schools segregated by race. That statute did not apply to secondary schools, and until 1905, the Kansas City, Kansas school district maintained integrated secondary schools. In 1905, however, the defendants sought and received special legislation which permitted the Kansas City, Kansas schools to operate segregated high schools as well. See Kansas General Statutes § 72-1729 (1949). See generally Graham v. Board of Educ., 114 P.2d 313 (Kan. 1941) (ruling that Topeka, Kansas junior high was separate and unequal).
by race, and the Kansas City, Missouri school system complied. The public schools in the two cities were segregated by race at the time of Brown I, and continued to be segregated school systems even after Brown I. To complete the parallel, both school districts also experienced "white flight" starting in the 1950's, and had segregated housing patterns.

Since Brown I, the Supreme Court has often considered how to redress unlawful school segregation. For example, the scope of the remedy should be determined by a three-part test developed in the Detroit, Michigan school desegregation case of Milliken v. Bradley II. The Milliken II test provides that:

[1] the nature of the ... remedy is to be determined by the nature and scope of the constitutional violation ...;

[2] the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible to restore the victims ... to the position they would have occupied in the absence of such conduct; and ...

[3] the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

A case concerning the remedy for unconstitutional prison

30. See MO. CONST. Art. IX, § 1(a) (1945) (rescinded 1976); MO. REV. STAT. §§163.130, 165.117 (repealed 1957). The provision was removed from the Missouri Constitution in 1976. See Jenkins v. Missouri, 593 F. Supp. 1485, 1490 (W.D. Mo. 1984). The State had, however, issued a statement in 1954 that the Missouri Constitution and statutes mandating school segregation were unenforceable. See id.; see also Adams v. United States, 620 F.2d 1277, 1280-81 (8th Cir.) (discussing history of school segregation in Missouri in considering the St. Louis school desegregation case); Joondeph, supra note 4, at 617-18 (discussing Missouri's history of school segregation).

31. See GARY ORFIELD & SUSAN EATON, Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education 244 (1996) (noting that the Kansas City, Missouri school district lost 67,000 white persons and gained 64,000 African-American persons between 1950 and 1970); United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 33 (D. Kan. March 18, 1981) (second order holding defendants liable and setting the remedy; finding that since 1954 the white student population had decreased by 73.8% and the African-American student population had increased by 25%).

32. The standards are generally applicable to all types of public law, not just school desegregation. The high ambiguity of the standards is discussed infra Part II.


34. Id. at 280-81 (internal quotation marks deleted). The first two elements of the Milliken II test are discussed in detail infra Part II.B. The third part of the Milliken II test is discussed in detail infra Part II.C.
conditions, *Rufo v. Inmates of Suffolk County*, provides the test for deciding whether a public law remedy, including a school desegregation remedy, may be modified:

(1) courts may grant requests for modifications based upon a change in fact or law that was not formerly anticipated by the parties,

(2) so long as the proposed change "is suitably tailored to the changed circumstance."36

Finally, the Supreme Court in *Board of Education v. Dowell*, the Oklahoma City school desegregation case, devised a three-part test for evaluating when the school desegregation case should end. That test provides that defendants must prove that they:

(1) have "complied in good faith with the desegregation decree since it was entered";

(2) have eliminated "the vestiges of past discrimination . . . to the extent practicable"; and

(3) "would not return to [their] former ways."38

As the two Kansas City cases demonstrate below, however, the tests provide little guidance for judicial involvement in the remedial process and afford defendants the opportunity, largely unfettered, to choose their remedies.

A. The Constitutional Violations

(1) Kansas City, Kansas

The Kansas suit began small, in 1973 when the United States, through the Nixon Justice Department, filed suit and alleged that the school district for Kansas City, Kansas—Unified School District No. 500, Kansas City (Wyandotte County), Kansas (hereinafter "USD No. 500")—and USD No. 500's school board and superintendent had unlawfully segregated their faculty by race.39 Judge Earl E.
O'Connor, in his second year as a federal judge, was assigned the case, and the United States eventually expanded its allegations to include systemwide racial segregation of both faculty and students.\textsuperscript{40} Judge O'Connor held that the school district engaged in intentional segregation in only five predominately African-American schools.\textsuperscript{41} The other fifty schools were either deemed segregated (but not as a result of defendants' actions), or integrated.\textsuperscript{42} The district court also held that the school district had not desegregated its faculty.\textsuperscript{43} The district court's extremely limited liability holdings (it is quite rare for only parts of a school district to be declared unlawfully segregated) rejected plaintiff's claim of systemwide de jure segregation.\textsuperscript{44} The district court also rejected defendants' requests to add as defendants suburban, predominately white school districts and local and federal housing authorities.\textsuperscript{45} The United States did not

\textsuperscript{40} See \textit{USD No. 500}, 974 F. Supp. at 1370.
\textsuperscript{42} Specifically, the district court held that the defendants had proven that segregation in part of the system was caused by demographic changes and housing discrimination for which the defendants had no legal responsibility. \textit{See id.} at 70, 91-93. Remarkably, even if the defendants' student assignment practices had contributed at one point to the concentration of African-American students in a school, the court would not have held the defendants liable, on the grounds that demographic changes in housing patterns would have eventually resulted in the same level of school segregation. \textit{See id.} at 93.
\textsuperscript{43} The district court actually made its liability decisions twice. After the first liability ruling in 1977, the United States appealed. The Tenth Circuit remanded for reconsideration in light of recent Supreme Court cases. \textit{See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, 610 F.2d 688, 693 (10th Cir. 1979).} The district court on remand reaffirmed its earlier liability decisions. \textit{See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 1 (D. Kan. March 18, 1981).} The Department of Justice again appealed, but then subsequently withdrew its appeal. The withdrawal of the appeal can only be explained by a change in school desegregation policy due to a change in Presidents. Jimmy Carter was president when the appeal was filed; Ronald Reagan, the president when the appeal was withdrawn. The Reagan Administration substantially changed the Department of Justice's approach to school desegregation cases. \textit{See ORFIELD \& EATON, supra} note 31, at 4, 16-19, 339-43; Levine, \textit{supra} note 16, at 582 n.15.
\textsuperscript{44} \textit{De jure} school segregation is the product of discriminatory actions by state authorities and is unlawful. \textit{De facto} school segregation, on the other hand, is any segregation that is not the result of discriminatory actions by state authorities (i.e., discrimination by private individuals) and is not unlawful. Specifically, the district court rejected plaintiff's allegations of discrimination in transportation, \textit{see United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 78-79, 97-98 (D. Kan. March 18, 1981)}; site selection and new school construction, \textit{see id.} at 88, 107-08; attendance zones, \textit{see id.} at 71; staff assignment, \textit{see id.} at 83-84, 102; student transfers, \textit{see id.} at 80, 82; and athletic programs. \textit{See id.} at 86.
\textsuperscript{45} USD No. 500 argued that if the court held a violation, an effective remedy could only be achieved by joining the surrounding school districts because of the extensive white
raise any concerns with quality of education, and the district court noted that it was "greatly impressed by the apparent high quality of educational programs" provided. In short, the liability findings were minimal.

(2) Kansas City, Missouri

The Kansas City, Missouri case, by contrast, began big, but the district court also rejected substantial portions of plaintiffs' allegations. In 1977, the Kansas City Missouri School District (KCMSD) itself, along with a class represented by four minor children of KCMSD school board members, sued for desegregation. The school district claimed its efforts to desegregate were unlawfully impeded by more than thirty-five defendants classified into three groups: the Kansas defendants, the Missouri defendants, and the federal defendants.

The plaintiffs alleged that the various defendants had unlawfully discriminated in the Kansas City metropolitan area (acting within and beyond the borders of the school district) in the fields of housing, education, and transportation to cause a high concentration of African-American students in KCMSD and of whites in the surrounding school districts. The plaintiffs contended, in other
words, that the defendants’ wrongdoing was of an interdistrict nature, as opposed to intradistrict. The case was assigned to Judge Russell G. Clark, in his first year as a federal judge.

Not surprisingly, the first published opinion in the case begins with the statement that “[t]his school desegregation action is truly a case of first impression.” Yet, the district court quickly relegated the case to its traditional, intradistrict components. KCMSD was realigned as a nominal defendant, and the remaining plaintiff class had most of its case rejected. The district court denied the claims of an interdistrict violation involving the surrounding suburban school districts and of housing discrimination. Judge Clark held only KCMSD and the State of Missouri in violation of the Fourteenth Amendment because of the continued operation of segregated school buildings.

The plaintiffs, State, and KCMSD all appealed to the Eighth Circuit, which heard the appeals en banc. The court, either by a bare majority or an equal division, affirmed all liability determinations.

In sum, the violations in the two Kansas City cases at their core involved segregated school buildings within one school district. Both courts rejected the legal responsibility of surrounding white school districts and local and federal housing authorities to desegregate predominately African-American school districts with concentrated pockets of African-American housing. USD No. 500, with twelve of its fifty-five school buildings overwhelmingly African-American, was held to have intentionally segregated only five of its schools.

had caused an erosion in the taxing potential of KCMSD, which faced high operating costs because of the high number of disadvantaged students. See id. at 428. 49. Id. at 426. 50. See id. at 441-42. The district court held that KCMSD lacked standing to proceed as a plaintiff and could not adequately represent the school district’s school children. 51. The district court dismissed the claims against the Kansas defendants, see id. at 445; federal defendants, see Jenkins v. Missouri, 593 F. Supp. 1485, 1488, 1506 (W.D. Mo. 1984) (HUD); Jenkins v. Missouri, 807 F.2d 657, 661 n.5 (8th Cir. 1986) (DOT & one suburban school district); and the Missouri suburban school districts. See id. at 661-62; Jenkins, 593 F. Supp. at 1488. 52. As of the 1983-84 school year, when the school district’s overall student population was 27.3% white and 67.7% African-American, 24 of the school district’s schools were 90% African-American. See Jenkins, 593 F. Supp. at 1493, 1495. 53. With a vote of 5-3, the court affirmed the district court’s dismissal of the suburban school districts on the ground that no interdistrict violation involving the suburban school districts had been proven. See Jenkins, 807 F.2d at 661. On a vote of 4-4, the court affirmed the district court’s holding that plaintiffs had also failed to prove an interdistrict housing violation. See id. The court focused on the importance of deference to the district court’s factual findings, while acknowledging the “oftimes contradictory record.” See id. at 667-68; see also id. at 706 (Lay, J., dissenting). 54. See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 94-95 (D. Kan. March 18, 1981).
KCMSD, on the other hand, was held responsible for systemwide segregated school buildings, with twenty-five of its sixty-eight school buildings predominately African-American.55

B. The Remedy

After liability is determined, the court's next step is to determine the remedy. Generally, the public law remedy is intended to accomplish three tasks: enjoin ongoing violations, redress the present day effects of past violations, and prevent future violations.56

To accomplish these goals, the remedial phase typically includes three stages. At the first stage of the initial remedy, the district court usually either orders injunctive relief or approves a proposed consent decree.58 Monetary relief is unusual.59 Implementation of

55. See Jenkins, 593 F. Supp. at 1495.


57. Court-ordered relief in public law cases often takes the form of a prospective injunction detailing the steps defendant must take to comply with the constitutional or statutory law at issue. The injunction imposes affirmative duties on defendants and is designed to remedy continuing effects of past violations and to end current unlawful policies and practices. Professor Owen M. Fiss has defined such an injunction as a "structural injunction." Fiss, supra note 14, at 7 (structural injunction "seeks to effectuate the reorganization of an ongoing social institution"). A negative injunction ordering defendant to cease unlawful behavior is generally considered to be ineffective. See Sturm, supra note 4, at 1362-63, 1378 ("[T]he underlying causes of the legal violation disable the defendants from complying with a general directive to cease violating the law."); Chayes, supra note 13, at 1293, 1295 ("Negative orders directed to one of the parties—even though pregnant with affirmative implications—are often not adequate.") (footnote omitted).

58. A consent decree is a settlement agreement of the parties that is approved by the court and is judicially enforceable. See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992).

59. Monetary relief for violations of public law rights is rare and considered to be generally inadequate as a remedy. See Fiss, supra note 14, at 75 n.25, 87 (noting that the civil rights "experience is a conception of rights that denies their reducibility to a series of propositions assuring the payment of money to the victims"); Friedman, supra note 13, at 759 n.68 (describing why some scholars prefer injunctions instead of compensatory damages and explaining why author disagrees); Gewirtz, supra note 4, at 598 n.29 (discussing the problems with damages); Doug Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction, 33 U. FLA. L. REV. 346, 352 (1981) (characterizing damages as "administratively unsound because they are both more expensive and less precise."); Sturm, supra note 4, at 1361 & n.18, 1361-62 & n.20, 1378 & n.126 (noting that "damage awards ... do not provide adequate relief in the context of much public law litigation"). Immunity law is an obvious practical obstacle to monetary damages. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1073-76 (4th ed. 1996); Fletcher, supra note 11, at 652 n.51 (listing the "considerable" unanswered legal questions regarding the availability of damage remedies). Plaintiffs in statutory employment and housing discrimination cases may seek compensatory damages. See 42 U.S.C. § 1981a(b)(1999) (providing for unlimited punitive damages and limited compensatory damages for employment discrimination); 42 U.S.C. §
the remedy often takes years, if not decades. Second, modification of the initial remedy is almost always needed. The parties may discover that particular terms of the remedy are ineffective; or, through the passage of time, other terms may need modification in response to changed factual conditions or legal standards. Finally, termination of the remedy is itself a separate third stage. At that time, the court considers whether the remedy has served its purpose and whether jurisdiction over the defendants should end.

(1) The Initial Remedy

(a) Kansas City, Kansas

Like its liability determinations, the remedy in Kansas City, Kansas was relatively straightforward, although it required a significant change for the school district. At the district court’s request, the defendants filed a plan to desegregate the five intentionally segregated schools (the “liability schools”). In 1977, the district court approved that plan, with very minor modifications. The defendants’ plan was not expected to produce actual desegregation in the three elementary liability schools, but only to...

3613(c)(1)(1999) (allowing actual and punitive damages for discriminatory housing acts).

60. One exception is voting rights. Restructuring public institutions is an ongoing process, usually far from immediate result. The voting rights remedy, on the other hand, usually involves the drawing of new voting districts or setting up a revised voting system. As a result, the voting rights remedy can be immediate, with little need for continuing judicial oversight. Thus, the issues of modification and termination are not as important in redistricting and single-member district litigation as in other public law litigation.

61. See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 23 (D. Kan. Oct. 6, 1977) (entry of judgment). Pursuant to the defendants’ plan, the school district closed the liability junior and liability senior high schools, reassigned those students to surrounding schools, converted the senior high school into a magnet program, and adopted a majority-to-minority (“M-to-M”) transfer program for elementary students in the three liability elementary schools. An M-to-M transfer program permits students who are attending a school in which their race is in the majority to transfer to a school in which their race is in the minority. The transfer program applied to the three liability elementary schools and six surrounding predominately white elementary schools. See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 3, 6 (D. Kan. June 8, 1977) (ruling upon various remedial motions). An M-to-M transfer program is typical of school desegregation plans, although almost always ordered along with other methods of achieving desegregation.

62. For example, noting that the proposed letter to parents for the M-to-M program “could scarcely be worded in a manner more calculated to discourage exercise of that option,” the district court required that the letter be changed. United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 23 (D. Kan. June 8, 1977). The district court rejected the plaintiff’s proposed changes to the defendants’ plan.
produce the opportunity for students to have an integrated elementary school experience.63

Perhaps recognizing that the Supreme Court had long held that the mere opportunity for an integrated school experience was an insufficient remedy, the district court subsequently granted in part plaintiff's request for additional desegregative means at the elementary level.64 The district court ordered the defendants to devise a plan so that grades three through six in the three elementary schools would be within plus or minus fifteen percentage points of the racial makeup of the districtwide elementary school population.65 Given that the three elementary liability schools were at least ninety percent African-American, this order necessarily involved non-liability schools as well.66

63. For a description of the plan for elementary schools, see supra note 61. The district court held that the “opportunity” for an integrated education was more important than any particular racial balance. United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 4 (D. Kan. June 8, 1977). The district court expected no elementary school to achieve racial balance; the school superintendent testified that the impact on the three liability elementary schools would be “negligible.” Id. at 16. The court held that mandatory desegregation would be “unwise by a number of legitimate educational considerations.” Id. at 20. In approving only an “opportunity” for an integrated elementary school experience, the court held that a court must examine the school district as a whole to determine remedial compliance with the Fourteenth Amendment. This is completely contrary to the court's approach to liability, which was done on a school-by-school basis, and resulted in extremely limited liability holdings. See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 27-28 (D. Kan. March 18, 1981).

64. The district court apparently changed its mind about the necessity of actual desegregation, which is not surprising given that the M-to-M plan was clearly inadequate according to Green v. County School Board, 391 U.S. 430, 439 (1968). The district court held that the M-to-M plan had proved “inadequate to accomplish any significant degree of integration.” United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 2 (D. Kan. March 18, 1980)(order requiring defendants to produce a desegregation plan for the liability elementary schools). No white child had transferred to any liability, predominately African-American elementary school, and in 1979-80 only 160 African-American school children had transferred from the liability, predominately African-American elementary schools. See id.


66. If the remedy were confined solely to these three schools and the children within them, no student assignment remedy could possibly have produced an integrated student population. There were simply no white children in the liability schools with which to desegregate. Instead, the remedy would need to be limited to compensatory education programs within the schools, as some courts have ordered for majority African-American school districts and majority African-American schools. See, e.g., Milliken v. Bradley, 433 U.S. 267, 284 (1977) (Milliken II).
The defendants proposed to desegregate grades three through six through pairing and clustering schools and by voluntary student transfers. After modifying which non-liability schools would be involved in the plan, the district court approved the defendants' plan.

The only violation other than student assignment was faculty assignment on the basis of race. The district court issued only a general order to desegregate faculty assignment, with no timetables or measurements included.

(b) Kansas City, Missouri.

The remedial process in Kansas City, Missouri began as it did for USD No. 500: the district court directed both defendants (the State and KCMSD) to prepare a desegregation plan. The district court set forth some very general, hardly controversial, directives for the defendants to consider in devising their plans. Subsequently, the State and school district submitted separate remedial plans to which the plaintiffs responded.

In a 1985 remedial order, the district court made several findings regarding the vestiges of segregation in the school district. In addition to maintaining segregated school buildings, the defendants were also held liable for an inferior education that had led to a "system wide reduction in student achievement" and "literally rotted" school buildings. Although the district court held previously

67. Pairing and clustering are traditional school desegregation methods. In pairing, two schools combine their respective student attendance zones and then the combined school children attend one grade at one school and another grade at the other school. See ARMOR, supra note 16, at 162. Under clustering, more than two schools are involved in combining student attendance zones, typically three. See id. Thus, under clustering, children from three different elementary attendance zones may attend together one school for the fourth grade, another for fifth grade, and a third school for the sixth grade.


69. See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, 974 F. Supp. 1367, 1378 (D. Kan. 1997). The school district had previously adopted a goal of assigning faculty to within plus or minus five percentage points of their racial makeup in the school district.


71. See id. Specifically, the court directed that the defendants concentrate on schools with student enrollment more than 90% African-American, use neighborhood schools to the extent compatible with school desegregation, and be sensitive to financial and quality of education issues. See id.


73. See Jenkins v. Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987), aff'd in part, rev'd in part on other grounds, 855 F.2d 1295 (8th Cir. 1988), mandate recalled in part on other
no interdistrict violation, it found that segregation had caused white flight to private and suburban schools.\textsuperscript{74}

Regarding the systemwide decline in student achievement, the State and KCMSD both proposed extensive quality of education programs. With one exception, the district court ordered only the components found in both plans.\textsuperscript{75} Regarding the particular plans to implement the components, the district court generally approved the school district’s plans.\textsuperscript{76}

The defendants also both proposed remedying the inadequate school facilities. Here the proposals differed greatly in their cost. The State’s plan totaled $20,000,000, while the estimate of the school district’s plan ranged from $55,000,000 to $70,000,000.\textsuperscript{77} The district court ordered the school district to devise a capital improvement plan

\textbf{grounds}, 864 F.2d 1454 (8th Cir. 1989). The district court held that the conditions of the schools adversely affected the learning environment and discouraged parents from enrolling their children in KCMSD. The school conditions also decreased the chance of effectiveness of the quality of education programs. See \textit{Jenkins}, 639 F. Supp. at 39-40. Remarkably, at one point, the district court disavowed any relevancy of proximate cause: “The State’s argument that the present condition of the facilities is not traceable to unlawful segregation is irrelevant.” \textit{Id.} at 40.

\textsuperscript{74} \textit{See Jenkins v. Missouri}, 855 F.2d 1295, 1300 (8th Cir. 1988). As the Supreme Court noted in \textit{Jenkins} III, the district court was not entirely consistent in its findings regarding the interdistrict effects of the defendants’ unlawful actions. See \textit{Missouri v. Jenkins}, 515 U.S. 70, 94-95 (1995)(\textit{Jenkins} III); \textit{infra} notes 249-50 and accompanying text.

\textsuperscript{75} Both defendants proposed the following quality of education programs to redress the systemwide decline in student achievement: attainment of AAA status, reduction of class size, summer school, full day kindergarten, tutoring, early childhood development programs, and staff development. See \textit{Jenkins}, 639 F. Supp. at 26-33. AAA status is the highest rating a school can receive from the Missouri State Department of Elementary and Secondary Education, which rates schools based upon their quality and quantity of educational programs and services, including teacher qualifications, class size, instructional equipment, library resources, and instructional materials. See \textit{id.} The district court also approved the school district’s proposal to have an effective schools program whereby schools would be given a budget with which to choose and implement the school’s chosen achievement programs. See \textit{id.} at 33-34.

\textsuperscript{76} See \textit{id.} at 26-33. The district court at times changed particular details of the defendants’ proposals. For example, the district court rejected KCMSD’s and the State’s proposals on how to select the schools for the tutoring program, and held that the program would be offered “in at least ten schools where participation is of a sufficient level to operate the program efficiently, economically and effectively.” \textit{Id.} at 32; see also \textit{id.} at 31-32 (changing the number of schools to be included in the full day kindergarten program). Another example concerns the achievement of AAA status, which required a certain amount of planning time for teachers. The State had proposed the teachers share recess supervision loads to ensure the requisite planning time, while the school district proposed the hiring of 62 additional teachers. See \textit{id.} at 27. Here the district court required that the school district hire 31 teachers and 31 teaching assistants to provide the needed planning time. See \textit{id.}

\textsuperscript{77} See \textit{id.} at 40.
at a cost of $37,000,000.78

In one area—student assignment to desegregate school buildings—the district court completely rejected defendants’ proposals because of its concern with both achieving desegregation and avoiding white flight.79 Even here, the court did not order its own plan, but instead required the defendants to submit additional plans for student assignment. Specifically, the court ordered the defendants to study the feasibility of decreasing the African-American enrollment in the schools with a student population of ninety percent African-American,80 the school district to submit a budget for the three magnet schools already in operation and a plan for additional magnet programs,81 and the State to develop and maintain a voluntary interdistrict transfer plan whereby surrounding suburban school districts would allow its students to transfer to KCMSD and accept KCMSD transfer students.82 The Eighth Circuit affirmed the remedy, with a few modifications concerning the school district’s financial responsibility for the remedy and the voluntary interdistrict transfer plan.83

78. The court directed the school district to focus on “(1) eliminating safety and health hazards; (2) correcting those conditions existing in the KCMSD school facilities which impede the level of comfort needed for the creation of a good learning climate; and (3) improving the facilities to make them visually attractive.” Jenkins v. Missouri, 639 F. Supp. 19, 41 (W.D. Mo. 1985), aff’d as modified, 807 F.2d 657 (8th Cir. 1986). After implementation of this plan, the district court would consider a plan to make the facilities comparable to those of the surrounding suburban school districts. See id.

79. See id. at 36-37. The school district proposed to continue the current student assignment policy which required that no school have enrollment of less than 30% minority for grades 1-12. See id. The State requested that all schools reflect the districtwide African-American percentage of 68% which would have required massive cross-town busing. See id. Before requiring additional busing to achieve its goal, the State proposed first analyzing whether additional voluntary student transfers could achieve the goal. See id.

80. See id. at 38.
81. See id. at 34-35.
82. See Jenkins, 639 F. Supp. at 38-39. To educate the public on the remedy, the district court ordered the hiring of a public information specialist. See id. at 41. The final remedial component was a monitoring committee which would conduct evaluations, collect information, and make recommendations for modifications of the plan. See id. at 41-43.

83. Specifically, the Eighth Circuit ordered that the two defendants share the costs equally for decreasing class size, the effective school programs, and capital improvement costs. See Jenkins v. Missouri, 807 F.2d 657, 684-86 (8th Cir. 1986). The Eighth Circuit thereby increased the school district’s financial responsibility. The Eighth Circuit, while acknowledging the deference afforded to district courts in school desegregation cases, noted the lack of stated reasons for not imposing the costs equally for the reduction in class size and the effective schools program. See id. at 685. The Eighth Circuit relied on the district court’s findings in concluding that the defendants should share the costs of the capital improvement costs. See id.
In considering both Kansas City cases, at the stage of the initial remedy the two cases diverge most starkly—the Missouri remedy is clearly expansive and expensive, while the Kansas one is notably narrow in its scope. Yet, even at this stage, similarities exist. In both cases, it is the defendants who are proposing the remedies, and the district courts generally approved the defendants' plans. The district courts typically only changed details in the defendants' proposed plans—for example, the wording of the letter to parents about a program or how teachers would be afforded planning time. Even when the courts rejected wholesale the defendants' proposals (as both courts did with the proposals for student assignment, on the grounds of efficacy), the courts requested the defendants to propose another, more acceptable plan, rather than ordering the courts' own view of an acceptable remedy. The district courts only set forth general directives, with very general prescriptive capacity, for the defendants to follow.

One could attempt to explain the differences in the two remedies by arguing that KCMSD was the cause of the differences. Specifically, because KCMSD was only a nominal defendant and could expect additional state funding to cover part of the remedy, KCMSD had the incentive to propose unnecessarily expensive and intrusive remedies. While this argument certainly has some merit, it cannot be overlooked that the State, a true defendant, was also at this stage proposing extensive remedies.

(2) Modification

A hallmark of public law litigation—explicitly recognized by the Supreme Court in Brown II, its first decision concerning a public law remedy—is that jurisdiction over the suit continues after the remedy is ordered. During implementation of the remedy, parties are often confronted with changes in the legal and factual conditions underlying the remedy or with remedial approaches that prove

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The Eighth Circuit also ordered changes in the voluntary interdistrict transfer program. First, the program should comply with a similar remedy ordered in the St. Louis, Missouri school desegregation case. Specifically, the program should include a citizen committee to monitor and assist the program and should use a particular system for state funding. See id. at 684; Liddell v. Missouri, 731 F.2d 1294, 1302 (8th Cir. 1984). Further, the district court should consider the legality of including Kansas schools in any voluntary interdistrict plan. See Jenkins, 807 F.2d at 686.

84. See supra notes 62, 76.
85. See infra note 368 and text following note 108.
86. For example, the State's plan included a wide range of quality of education programs, a $20,000,000 capital improvement plan, and possible widespread cross-town busing. See supra notes 77, 79 and accompanying text.
87. 349 U.S. 294, 300 (1955) (Brown II).
ineffective with time. Thus, it is not surprising that throughout public law litigation parties request and receive changes in the initial remedy. The two Kansas City school desegregation cases are no exception.

(a) Kansas City, Kansas.

In Kansas, the parties immediately involved Judge O'Connor in the details of administering the remedy, and the scope of the remedy increased over time. Soon after ordering the first remedy, for example, the district court approved the school district's proposed plans and curriculum guide for the magnet school and approved the parties' proposed consent decree regarding the admissions criteria to a magnet school.

Thereafter, the defendants filed numerous requests for approval of matters beyond the scope of liability and the initial remedy. By so doing, the defendants increased the involvement of the district court. For example, although only one high school was held to be unlawfully segregated and converted to a magnet school, the district court granted a joint motion to establish magnet programs at four other high schools. Furthermore, at the defendants' requests, the district court approved the placement of grade six in the middle schools and of grade nine in the high schools, various changes in attendance zone lines, school closings, and new school construction. The defendants' motions for modification were routinely granted wholesale by the district court, with little (if any) opposition from the United States. In fact, many of the motions are properly considered to be proposed consent decrees, for the motions were made by the defendants with

88. See Diver, supra note 11, at 63; Jost, supra note 25, at 1103-04; Fiss, supra note 11, at 27-28 (describing the remedial phase as "concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself").
90. See id.
92. The defendants also filed annual reports beginning in 1978 documenting their desegregative efforts, which the district court "approved," again with little (if any) opposition from the United States. The annual reports covered more than compliance with the remedial order, reaching other areas of school administration as well. See, e.g., United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, 1991 WL 75552, at *1 (D. Kan. 1991).
the agreement of the United States. 93

The district court, acting on its own, imposed no modifications on the plan, even if the district court thought a modification necessary. For example, rather than ordering a middle school magnet program, the district court "urged" the defendants to consider one. 94 Other than requiring annual reports, 95 the district court largely confined itself to approving defendants' motions.

(b) Kansas City, Missouri.

The requested modifications in Kansas City, Missouri were generally of the same type as in Kansas, but of a greater magnitude because of the scope of the initial remedy and the litigiousness of the parties.

The school district proposed that the student body be desegregated through a systemwide magnet school program whereby all high and middle schools and half the elementary schools would be converted to magnets. 96 Faced with the State's decision to object but not to propose another method of desegregating student assignment, the district court approved the school district's proposal. 97 Likewise, the district court approved the school district's long range capital improvement plan, after finding the State's proposal wholly inadequate. 98 The most controversial ruling was that involving the local property tax levy. So that the school district could fund its portion of the increasingly expensive remedy, the district court was allowed, for all practical purposes, to impose a property tax levy on the local residents. 99 The school district further made scores of


95. See supra note 92.

96. Magnets have been criticized for creating a two-tiered school system—with the magnet tier providing superior education to the non-magnet tier. The school district proposed a systemwide magnet program to avoid the two-tiered system. The State opposed the system, but offered no alternative.

97. The district court approved the systemwide plan to avoid a two-tiered system and to attract white students into the system. See Jenkins v. Missouri, 855 F.2d 1295, 1303-04 (8th Cir. 1988); Orfield & Eaton, supra note 31, at 248-49.


99. See Missouri v. Jenkins, 495 U.S. 33 (1990) (Jenkins II). The Supreme Court held that the district court could "authorize KCMSD to submit a levy to the state tax collection authorities and . . . enjoin the operation of state laws hindering KCMSD from adequately funding the remedy." Id. at 43; see also id. at 52-58. The district court could not impose the tax increase itself. See id. at 52.
implementation proposals, and the district court also generally approved the school district’s proposals (some of which gained all parties’ approval), mandating only minor changes or modifications.100

The State at this stage continually challenged the school district’s particular implementation strategies in the hopes of reducing the financial tab borne by the State. For example, the State sought judicial intervention on many relatively minor issues including: whether asbestos abatement was a desegregation expense,101 whether the State could have a court reporter at Desegregation Monitoring Committee meetings,102 whether a magnet school should have a ten-meter diving platform,103 whether the district should use an identification system for security purposes,104 and whether a high school should get additional coaches.105 The State was continually appealing the district court’s decisions, even those costing only a few thousand dollars,106 and usually losing.107 The case was in constant litigation, which adversely affected the school district’s available time

100. See, e.g., Jenkins v. Missouri, No. 77-0420-CV-W-4, 1991 WL 538841, at *10-11 (W.D. Mo. 1991) (approving school district’s proposal for spending in the upcoming year, except for the request for coaches at Central High, tuition assistance for paraprofessionals, and parts of the library budget); Jenkins v. Missouri, No. 77-0420-CV-W-4, 1990 WL 515176, at *3 (W.D. Mo. 1990) (approving KCMSD’s proposed budget for upcoming year, except for request for five additional patrol officers); Jenkins v. Missouri, 672 F. Supp. 400, 407 (W.D. Mo. 1987) (changing architect and engineering fee from eight percent to six percent on capital improvement plan and requesting information on furniture request, but otherwise approving school district’s request for a $194 million capital improvement plan), aff’d in relevant part, rev’d in part, 855 F.2d 1295 (8th Cir. 1988).

101. See Jenkins v. Missouri, 931 F.2d 470, 479 (8th Cir. 1991) (holding that the condition of facilities, including asbestos removal, was a factor in overall success of plan, in attracting non-minority enrollment, and in increasing quality of education).

102. See id. at 482 (affirming the district court for rejecting a proposed diving platform).

103. See Jenkins, 1991 WL 538841, at *6 (approving the security plan, but requesting that the school district attempt to involve the police department in security issues).

104. See id. at *7 (denying the request for more coaches, but allowing future individual motions to be filed requesting coaches for specific sports).

105. For example, the State appealed the cost of tuition costs for two KCMSD students participating in the voluntary transfer program to suburban school districts. The parties had agreed that the costs would be $5,000, but the State wanted to modify this amount to the actual cost of $3,672.74. See Jenkins v. Missouri, 965 F.2d 654, 655-56 (8th Cir. 1992). The Eighth Circuit denied the request and noted the great deference afforded to district courts. See id. at 656-57.

106. See, e.g., Jenkins v. Missouri, 122 F.3d 588, 600 (8th Cir. 1997) (rejecting State’s appeal of denial of unitary status for the entire system); Jenkins v. Missouri, 103 F.3d 731, 738 (8th Cir. 1997) (denying State’s requests regarding particular programs in the 1996-97 desegregation budget); Jenkins v. Missouri, 931 F.2d 470, 483 (8th Cir. 1991) (rejecting all five bases of State’s appeal). But see Jenkins v. Missouri, 38 F.3d 960, 964 (8th Cir. 1994) (agreeing with State that district court had exceeded its remedial powers).
for effective implementation.108

Throughout both the Kansas and Missouri cases, modifications increasing the reach of the remedy were sought by USD No. 500 and KCMSD and occurred through consent decrees and motions, which were generally approved with minor changes, if any. As a result, the scope of both remedies increased over time, and the remedy reached more and more facets of school administration. Critically, the district courts were involved in the litigation almost exclusively through the requests of the defendants. USD No. 500 and KCMSD were continually seeking judicial approval of remedial approaches, and the State of Missouri often requested (albeit usually unsuccessfully) the district court to limit KCMSD’s remedies. Except for their assent to consent decrees, the plaintiffs are notably absent in the requests for modifications. In short, the defendants drove the involvement of the judiciary.

Yet, this conclusion begs the question of whether a true defendant, i.e., KCMSD, was allowed to set the remedial process in Jenkins. Unlike its behavior at the initial remedy hearing where the State (like KCMSD) sought expansive judicial remedial remedies, the State now almost always lost its attempts to limit the remedy. Furthermore, KCMSD was originally a plaintiff, worked closely with the plaintiff class, and was only a nominal defendant. KCMSD also had the incentive to seek costly judicial involvement, knowing that the State (or a court-ordered property tax levy) would finance the program. Yet, it is inconceivable that the expansive remedy in Jenkins could have occurred without KCMSD’s active request and support. Federal courts, after all, recognize school districts’ special expertise in school administration and in the particularities of the individual school district—even if only a nominal defendant. A non-school district plaintiff on the other hand, is comparable in expertise to the judge. Further, given that the State of Missouri generally refused to propose specific remedies, most notably for student assignment, the district court was left with the option of

108. See Jenkins v. Missouri, 942 F.2d 487, 492 (8th Cir. 1991) (problems with implementation caused in part by “protracted” litigation); Jenkins v. Missouri, 959 F. Supp. 1151, 1172 (W.D. Mo.) (noting that “the State has been more litigious than necessary and the remedy may have achieved better results had the State chosen to be more cooperative”), affd, 122 F.3d 588 (8th Cir. 1997).

Judge Clark described the State’s position in an interview: “[T]he state’s policy of ‘total opposition’ [was] counterproductive and politically motivated.” ORFIELD & EATON, supra note 31, at 249. Further, “[a]ccording to... former director of desegregation services for the Missouri Department of Elementary and Secondary Education (DESE), in the late 1980’s, the governor and attorney general discouraged DESE from taking an active role in monitoring the plan and chose to appeal even those components of the remedy that DESE favored.” Id. at 256.
either approving KCMSD’s proposals or crafting its own, and the court generally decided to defer to KCMSD.

(3) Termination

Although school desegregation and other public law remedies routinely last more than twenty years, court jurisdiction does not operate into perpetuity. In a public law suit, court jurisdiction ends when the defendants prove that the remedy has served its purpose. In school desegregation, this has occurred when the defendants prove that the school district is no longer dual, but “unitary.” A school district is unitary when it no longer discriminates on the basis of race and when it has eliminated, to the extent practicable, the “vestiges” of discrimination.

The Supreme Court has never defined specifically what it means by vestiges, but it most certainly involves six factors: student assignment, faculty assignment, staff assignment, facilities, transportation, and extra-curricular activities. These are the six Green factors, named after the case of Green v. County School Board. In that 1968 case, the Supreme Court ruled that the adoption of race-neutral admission policies, highly unsuccessful in desegregating student bodies, was an insufficient remedy. Rather, the school district must desegregate the six areas to the extent practicable. Courts often consider other factors, most notably quality of education as a vestige of discrimination.

(a) Kansas City, Kansas

The United States and school district engaged in an extensive and “unprecedented collaborative” process to produce, with the active involvement of the community, a Desegregation Exit Plan. Throughout the process, the district court held informal, off-the-record status conferences and expressed its support of the cooperative effort. The plan, covering all aspects of the school administration and all schools, was “designed to improve the state of the District’s educational opportunities by improving facilities and

111. See id. at 439.
112. The Supreme Court has noted that it was not an abuse of discretion for a district court to examine “quality of education” in assessing unitary status. Freeman v. Pitts, 503 U.S. 467, 492-93 (1992); see also Milliken v. Bradley, 433 U.S. 267, 281-82 (1977) (Milliken II) (approving the use of compensatory education programs for Detroit, Michigan, which could not practically desegregate its student body).
programs for the students,"114 which "may be achieved, in part, by and through schools that are racially balanced."115 The Desegregation Exit Plan was expected to increase slightly the level of integration within the school district.116

Thereafter, and after 408 docket entries over twenty-four years, the Kansas district court terminated its jurisdiction over USD No. 500, at the defendants’ request and with the United States’ approval.117 In holding unitary status, the court made findings on all six Green factors—student assignment, faculty assignment, staff assignment, facilities, transportation, and student extra-curricular activities—even though liability was based on only two of the factors (student assignment and faculty assignment).

Regarding student assignment, the court found “considerable progress” in reducing the racial identifiability of the five liability schools118 and held the defendants not responsible for current imbalance in the non-liability schools.119 Segregation certainly remained, however. Roughly two-thirds of the elementary schools were racially imbalanced.120 The court concluded “that there are no

114. Id. at 1383 (quoting the Desegregation Exit Plan).
115. Id. (quoting the Desegregation Exit Plan).
116. The plan was expected to increase from 36% to 38% the percentage of elementary schools that are racially balanced; from three to five the number of junior highs to be racially balanced; and from two to three the number of high schools to be racially balanced. See Motion of Defendants Unified School District No. 500, Kansas City, Wyandotte County, Kansas, Members of the Board of Education and Superintendent of Schools of Said District for Declaration of Unitary Status and Order of Dismissal at 38, United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, 974 F. Supp. 1367 (D. Kan. 1997)(No. KC-3738).
117. See USD No. 500, 974 F. Supp. at 1368.
118. See id. at 1375. The three liability elementary schools had a student population for grades three through six that mirrored the school district’s elementary school population by a plus or minus 10% standard over a three-year period, except for one school’s white population with a variance of plus or minus 15% for one year. See id. at 1375-76. The variances were greater when grades one and two, which were desegregated only by voluntary transfers, were included. See id. at 1375. Then the variances ranged from 11% to 25%. See id. The one liability junior high was closed, so the court looked at the four junior high schools where the students in the closed school were reassigned. See id. at 1376. These four schools had variances from the junior high African-American population as a whole ranging from 0.2% to 21.2%. See id. at 1376. The high school, converted to a magnet, had a variance of 20%. See id. at 1375.
119. See id. at 1376 ("[A]ny racial imbalance existing at [the non-liability] schools either in 1977 or today has been caused by independent factors such as demographics. There is no evidence that the District has contributed either directly or indirectly to the demographic changes in the area.").
120. For example, using a plus or minus 15% standard, 36% of the elementary schools were racially balanced, three of the eight middle schools were racially balanced, and two of the five high schools were racially balanced. See Motion of Defendants Unified School District No. 500, Kansas City, Wyandotte County, Kansas, Members of the Board of
other practicable measures to achieve further desegregation," although the court noted that the school district's Desegregation Exit Plan would increase slightly the level of student desegregation.

Regarding faculty assignment, the defendants had voluntarily adopted a strict plus or minus five percent standard, which required that the faculty's racial proportion at each school be within plus or minus five percentage points of the overall faculty population at the school district. The district court ruled that the defendants had desegregated its assignment of faculty to the "extent practicable," noting "significant progress in achieving faculty racial balance." For the remaining Green factors, the district court noted the absence of any racial disparities, albeit with little analysis. Interestingly, the district court refused to analyze quality of education issues, although both the United States and the school district had addressed quality of education in their respective motions. The court

Education and Superintendent of Schools of Said District for Declaration of Unitary Status and Order of Dismissal at 38, United States v. Unified Sch. Dist. No. 500 Kansas City (Wyandotte County), Kansas, 974 F. Supp. 1367 (D. Kan. 1997)(No. KC-3738). Looking at schools with 75% or more African-American population, it appears that the school district in 1997 was as segregated as it was in 1977. In 1977, 11 out of 55 schools had more than a 75% African-American student population. One of those schools was subsequently closed. In 1997, nine out of 46 schools had more than 75% African-American student population. This can be explained in part by the increase in the overall African-American student population from 41% in 1977 to 54% in 1997.

121. USD No. 500, 974 F. Supp. at 1376.
122. See supra notes 116-20 and accompanying text.
123. See USD No. 500, 974 F. Supp. at 1383-84.
124. See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, 974 F. Supp. 1367, 1378 (D. Kan. 1997). Further, the school district would deem particular faculties in compliance with the plus or minus five percent standard if the addition or subtraction of one or two teachers would place the faculty within the 10-point goal. See id.
125. See id at 1379. In reaching this conclusion, the court focused on the racial population of faculty at nine schools that had at the time of unitary status a student population of 75% or more African-American. See id. at 1378. Four of the nine schools met the plus or minus five percent standard; three others met a plus or minus 15% standard. See id. at 1378-79. One school had a variance of 21.8%, but was less than its variance in 1977 of 28.9%. See id. at 1379. Of the remaining 46 schools, 40 schools either met the plus or minus five percent standard or would meet the standard with the addition of one or two African-American faculty. See id. Desegregation of faculty is discussed further infra Part II.F.
126. Transportation and extra-curricular activities were governed by non-discrimination policies. See id. at 1371. Facilities in white neighborhoods and African-American neighborhoods had no "discernible" differences. Id. at 1382. USD No. 500 had made "substantial progress" in increasing the number of minority staff. Id. at 1379. The court did not examine whether racial disparities in participation in extra-curricular activities existed or whether staff was assigned on the basis of race. Further, the district court did not analyze whether the burden of busing was shared equally between African-American and white school children.
noted the absence of earlier liability allegations or holdings regarding quality of education and the existence of findings in 1977 and 1981 that the court was "greatly impressed" with the quality of education of the school district.\textsuperscript{127} The court concluded that examination of quality of education was therefore "unnecessary."\textsuperscript{128} The district court failed to explain why it examined Green factors for which no liability had been held, but refused to examine quality of education on the ground of an absence of liability.

On the basis of this proof, the district court declared USD No. 500 to be a unitary school district and "dissolved" all outstanding injunctions.\textsuperscript{129} In so doing, the court emphasized the importance of returning school districts to "local control."\textsuperscript{130}

(b) Kansas City, Missouri

Across the river in Kansas City, Missouri, jurisdiction continues, but the focus has recently shifted from expanding the remedy to curtailing and ending it. The Jenkins district court has explicitly recognized the importance of ending jurisdiction. A mere eight years after the initial remedy was ordered—an incredibly short time for any school desegregation remedy—the district court ordered that the school district devise transition plans to end the litigation.\textsuperscript{131} The district court so ordered in response to the State's request to be dismissed from the lawsuit.

Next, in Missouri v. Jenkins, the Supreme Court mandated significant limits on particular remedial programs when it ruled impermissible the goal of attracting white students outside of KCMSD school district lines to attend KCMSD (one of the reasons for the magnet program and capital improvements plan and the only justification for the voluntary interdistrict transfer program) and when it held that the district court had used impermissible reasons for requiring the State to continue funding the quality of education programs.\textsuperscript{132} KCMSD and the State eventually entered into a

\textsuperscript{127.} Id. at 1371-72.
\textsuperscript{128.} Id. at 1372.
\textsuperscript{129.} Id. at 1386.
\textsuperscript{130.} Id. at 1372.
\textsuperscript{132.} See Missouri v. Jenkins, 515 U.S. 70, 72 (1995)(Jenkins III). Jenkins III is discussed in detail below. See infra notes 202 & 242-52 and accompanying text. The defendants can still implement programs to encourage students living within KCSD, but attending private or parochial schools, to enroll in KCMSD. See Jenkins v. Missouri, 103 F.3d 731, 741 (8th Cir. 1997). Professor Richard A. Epstein has argued that Jenkins III will not
settlement agreement whereby the State of Missouri would be dismissed in exchange for a cash settlement. In his last decision before stepping down from the case, Judge Clark approved the settlement. The Eighth Circuit, calling the issue "close," affirmed.

As part of its approval of the settlement agreement, the district court set forth steps the school district must take to achieve unitary status and found that the steps should be achievable within two to three years, and the Eighth Circuit also affirmed this order. The areas left to be desegregated included five of the six Green factors and a gap in achievement scores between African-American and white students. Both the district court and the court of appeals ensure an end to the lawsuit. See Epstein, supra note 4, at 1117 ("The standard that [the Court] ultimately adopted recognized the formal possibility that supervision could end, but at the same time made it highly unlikely that this desirable outcome could ever be achieved.").

133. On December 3, 1998, the State fulfilled its financial obligation under the settlement agreement, seven months ahead of schedule. See Blair, supra note 5.

134. Discussions between KCMSD and the State that led to the settlement began in February 1995, before the Supreme Court decided Jenkins III. See ORFIELD & EATON, supra note 31, at 251. The district court increased the settlement payment, to take into account another remedial order, by $6 million to $320 million. See Jenkins v. Missouri, 959 F. Supp. 1151, 1169 (W.D. Mo.) aff'd. 122 F. 3d 588 (8th Cir. 1997). KCMSD was to receive the money over three years and spend the money over five years. See id. at 1169-70. The district court judge now handling the case is Judge Dean Wipple.

135. See Jenkins v. Missouri, 122 F.3d 588, 605 (8th Cir. 1997) ("Many aspects of the agreement and its effects are troublesome, and we remain deeply concerned about the future of the KCMSD. The issue of whether the district court erred in approving the agreement is a close one."). The district court approved the agreement in part because of its recognition that the Supreme Court's opinion in Jenkins III severely limited the remedy itself and the expectation of continued state funding and that the payment of $320 million to the school district was more than the school district could expect from continued litigation. See Jenkins, 959 F. Supp. at 1169. But the district court also emphasized that the district court hoped that approval of the settlement agreement would allow KCMSD to eliminate the constant litigation of the case so that KCMSD could concentrate on implementation of the remedy and that approval would increase cooperation between the State and school district. See id. Further, the school district would still have ample funds at its disposal with the settlement. See id. at 1172.

136. See Jenkins, 959 F. Supp. at 1165-69; Jenkins, 122 F.3d at 599-600.

137. For student assignment, the remaining concern was the minority enrollment given the recent loss of 1476 white transfer students in response to the Supreme Court's order that the remedy could no longer attempt to attract non-minority students outside of KCMSD. Here, the school district was to ascertain the effect of this loss on the enrollment statistics. See Jenkins, 959 F. Supp. at 1167. For faculty and staff assignment, the court required that the school district "attempt to achieve by all practicable measures, a plus or minus range of 15% in faculty assignment at 80% of elementary schools." Id. at 1168. For facilities, the school district was ordered to complete already ordered facilities upgrades within two years, and to prepare a transition plan for facilities given the expected decline in funding. See id. For transportation, continued court supervision was needed because of expected changes in the magnet programs (which would affect transportation) and in the
openly questioned whether KCMSD would be able to achieve these goals within three years.138

Yet, the case is certainly heading toward dismissal, due in large part to the new-founded cooperation between the defendants, the Missouri state government, the Missouri voters, and the widespread dissatisfaction with the systemwide magnet program.139 Pursuant to the defendants' settlement agreement, the district court dismissed the case against the State.140 Yet, the State has committed itself to continue extra funding of the KCMSD, beyond that required by the settlement agreement. Legislation increased state monies to KCMSD to replace more than one-third of the State's previous annual desegregation subsidies.141 Even Missouri voters—anxious apparently to end the suit against KCMSD—passed a constitutional amendment to alleviate the effects of the expected end of the court-ordered property tax levy.142 Finally, and most significantly, the

budget. See id. No party protested partial unitary status for extra-curricular activities, which the district court granted. See id. The district court rejected the school district's claim of a “financial vestige”—KCMSD's inability to raise sufficient funding because of past state discrimination. Id. at 1169.

138. See Jenkins, 122 F.3d at 604 (noting “substantial obstacles” to the KCMSD's satisfying its obligation to provide quality education); Jenkins, 959 F. Supp. at 1178 (observing that problems in KCMSD's administration make achievement of unitary status difficult and that KCMSD needs outside assistance). In addition, both the district court and Eighth Circuit noted that significant administrative problems have plagued the school district, which in the last nine years has had ten different school district superintendents. See Jenkins, 122 F.3d at 604-05; Jenkins, 959 F. Supp. at 1173. Thereafter, the tenth superintendent was fired after a court-appointed committee issued a report challenging his leadership capabilities. See Karen L. Abercrombie, Mo. School Chief Voted Out, EDUC. WK., Oct. 28, 1998, at 4. The district court also severely criticized the school district for its implementation of the remedy: “The District's recent performance has been dismal at best.” Jenkins, 959 F. Supp. at 1173. For example, the school district had astronomical operating costs, yet the school district's teacher-student ratios failed to satisfy state standards. See id. at 1174.

139. Magnets are viewed as a conservative alternative to the much maligned mandatory busing; yet, this magnet program is the subject of intense conservative criticism. See, e.g., Epstein, supra note 4, at 1102-05; Yoo, supra note 4, at 1125-28. More recently, even liberals have criticized KCMSD's magnet program. See Caroline Hendrie, Falling Stars, EDUC. WK., Feb. 25, 1998, at 39 (“National experts on school desegregation who disagree on nearly everything else can find common ground on this: Kansas City simply went overboard when it came to magnet schools.”)

140. See Caroline Hendrie, St. Louis, Kansas City Move Closer to End of Desegregation Cases, EDUC. WK., Feb. 10, 1999 at 10.


142. See Jenkins v. Missouri, 158 F.3d 984, 985 (8th Cir. 1998). The constitutional amendment allows KCMSD to set the property tax levy one penny less than the court-ordered property tax levy. See id. A constitutional amendment, which required a simple majority, was considered to be an easier way to maintain the property tax levy than a local vote on the tax levy, which required a two-thirds majority. See Jessica L. Sandham,
school district plans to convert half of the nearly sixty magnet schools in 1999.143 A unitary status hearing is set for January 3, 2000.144 In sum, although jurisdiction in Jenkins continues, the focus now is ending the lawsuit, although district court and court of appeals have questioned the school district’s ability to manage the process effectively.

At the point of termination, the defendants in both cases continued to lead the remedial process. USD No. 500 requested and received unitary status, even though disparities remained in student and faculty assignment, and with little thorough judicial analysis of what the lawsuit was particularly expected to achieve. In Jenkins, the State has successfully re-oriented the suit to termination, admittedly with assistance from the Supreme Court’s decision in Jenkins III and the school district’s acquiescence, and the district court and parties are now directing their efforts toward termination. Yet, the expected outcome (other than eventual termination of the suit) remains unclear.

C. The Problems

The divergent remedial processes in the two cases are easy to spot; the scope and judicial involvement could not be more different. The Kansas suit involved traditional approaches to student assignment and a general order to desegregate the assignment of faculty. In Kansas, the parties had almost no conflict after 1981 and judicial involvement was continuous but limited largely to approving defendants’ uncontested motions. Although USD No. 500 involved a more limited remedy and few post-liability party disputes, the suit lasted twenty-four years. School children across the river in Missouri, however, had a desegregation plan that at its core included magnets in all junior and high schools and half the elementary schools; capital improvement plans in the nine figures; and substantial quality of education programs. The State of Missouri funded part of the remedy with 1.2 billion dollars, and the funding created the school district’s financial dependence on continued court supervision. The Missouri lawsuit had active and continuous court involvement and, for much of the litigation, serious intraparty conflict. In Jenkins, however, the district court requested, in response to the State’s motion, a plan for ending court jurisdiction after only eight years of overseeing the remedial plan.

Amendment’s Passage Stabilizes Funding for Kansas City Schools, EDUC. WK., April 15, 1998, at 26.

143. See Hendrie, supra note 139. In addition, the school district plans to close five schools, including three high schools.

144. See Hendrie, supra, note 140.
Despite the extreme differences at both a macro and micro level in the remedial processes, the two remedies demonstrate four common analytic problems. First, school desegregation remedies seem to suffer from indeterminacy—the scope of the school desegregation suit in both cases appears limitless and what remedy children receive appears to depend more on what side of a river they were born than on the actual violation. Second, to the extent determinacy exists, it exists for the benefit of the defendants, who exercise a high degree of control over the remedial process. Third, and relatedly, local control is becoming increasingly important, at the expense of meaningful desegregation. Fourth and finally, the idea of effective desegregation appears illusive. Taken together, these factors result in a remedial process largely driven by the defendants, with the occasional judicial involvement limited to remedial details unresolvable by the parties and with plaintiff participation when provided by the defendants. Further, the factors seriously impede plaintiffs' opportunity for an effective school desegregation remedy.

In Part II, I further define these four problems and argue that the Supreme Court's approach to public law remedies is their cause.

II. Recent Supreme Court Analysis of Public Law Remedies

This part analyzes Supreme Court precedent to argue that the Court is contributing to the four problems identified in the two Kansas City cases. In doing so, this Article must shift from school desegregation to public law in general because the Supreme Court's approach to public law remedies is generally transsubstantive—principles developed in one area of public law are applied in other areas as well.145

Part II considers seven cases, decided since 1991, that address public law remedial power, and identifies five principles that cause the four problems identified above. In analyzing these seven cases,
Part II examines in particular their impact on school desegregation, but many aspects of the analysis apply equally to other public law areas.

Generally, I argue that the cases prevent a principled way for courts to decide the scope of school desegregation injunctions (as opposed to consent decrees) in particular and in all likelihood the scope of all public law injunctions. The resulting remedial ambiguity is resolved most often by the defendants, who are afforded deference throughout the remedial process, and leaves courts with little means with which to control the terms of the remedy. Only through consent decrees, which require the assent of the defendants, are plaintiffs truly afforded input into the remedial process. Because of the lack of a meaningful definition of the right and because the defendants are largely defining the remedy, plaintiffs have little guarantee of an effective remedy.

A. Public Law Remedies

The Supreme Court began its analysis of public law remedies in 1955 with Brown v. Board of Education,146 and until 1979, the Supreme Court regularly decided cases implicating public law remedial power.147 This took place primarily, but not solely,148 in the context of school desegregation cases.149

From 1980150 until 1990, the Court had, however, remarkably

146. 349 U.S. 294 (1955) (Brown II).
little to say about remedial power in public law cases and nothing to say about school desegregation remedies.\textsuperscript{151} Public law remedies in the 1980's were principally affected by legal developments in non-remedial areas such as immunity, standing, and the constitutionality of race-conscious relief.\textsuperscript{152}

In 1990, the Court accepted for review two school desegregation cases with comprehensive remedies challenged by the defendants, but decided both cases on narrow grounds regarding enforcement powers, rather than evaluating the remedies themselves.\textsuperscript{153} Then in

from denial of certiorari) (arguing that Supreme Court should have accepted for review the question of whether the school desegregation case was moot). For dissents from earlier denials of certiorari in school desegregation cases, see Medley v. School Bd., 482 F.2d 1061 (4th Cir. 1973), \textit{cert. denied}, 414 U.S. 1172 (1974) (White, J. and Powell, J., dissenting), and Goss v. Board of Educ., 482 F.2d 1044 (6th Cir. 1973), \textit{cert. denied}, 414 U.S. 1171 (1974) (White, J. and Powell, J., dissenting).

151. The most significant development in the Supreme Court regarding public law remedial power in the 1980's was a decision holding that a court could approve a consent decree that imposes relief beyond that compelled by the Constitution. \textit{See} Local Number 93, \textit{Int'l Ass'n of Firefighters v. City of Cleveland}, 478 U.S. 501, 515 (1986). The Court also held that the effect of any public law remedy on innocent parties must be “minor” or “ancillary.” \textit{See} \textit{General Bldg. Contractors Ass'n v. Pennsylvania}, 458 U.S. 375, 398-402 (1982).

Other than \textit{Local Number 93} and \textit{General Building Contractors}, the Supreme Court had surprisingly little to say about the general scope of remedial power in public law cases in the 1980's. The issue was mentioned, of course, but little development in the law occurred. \textit{See}, e.g., \textit{City of Los Angeles v. Lyons}, 461 U.S. 95, 111-13 (1983) (noting that even if plaintiff had standing to seek injunctive relief, plaintiff failed to demonstrate likelihood that defendants would use unlawful choke holds in future police stops and noting that “[i]n exercising their equitable powers, federal courts must recognize [t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law” (quoting \textit{Stefanelli v. Minard}, 342 U.S. 117, 120 (1951)); \textit{City of Rome v. United States}, 446 U.S. 156, 201 n.12 (1980) (Powell, J., dissenting) (noting “the importance in a democratic society of preserving local control of local matters”).


153. \textit{See} Missouri v. Jenkins, 495 U.S. 33, 50-51 (1990) (\textit{Jenkins II} ) (refusing to consider the scope of an extensive school desegregation remedy but holding that a federal court could require a defendant to levy taxes in excess of state limits to fund a constitutional remedy); \textit{Spallone v. United States}, 493 U.S. 265, 280 (1990) (noting that the issue of the
1991, the Supreme Court returned to the public law remedial power and, in the subsequent six-year period, decided seven cases implicating public law remedies. The cases concern all three remedial stages: the initial remedy, modification, and termination. Although the seven cases involve different subject matters—school desegregation, higher education (both race and gender), prisons, and voting rights—the remedial approaches in each case generally apply to other types of public law.\textsuperscript{154}

Four cases of the seven cases addressed the initial remedy. Three cases concerned the scope of a structural injunction in response to a proven violation: \textit{Lewis v. Casey},\textsuperscript{155} \textit{United States v. Virginia},\textsuperscript{156} and \textit{Missouri v. Jenkins}.\textsuperscript{157} The fourth case, \textit{Lawyer v. Department of Justice},\textsuperscript{158} examined when a court may approve a proposed consent decree without holding defendants liable.

Another case addressed modification issues. \textit{Rufo v. Inmates of Suffolk County}\textsuperscript{159} determined when and how a consent decree may be modified in response to changed circumstances.\textsuperscript{160} Two other cases, \textit{Freeman v. Pitts}\textsuperscript{161} and \textit{Board of Education v. Dowell},\textsuperscript{162} answered the question of how to terminate a pending public law remedy, whether it be a structural injunction or a consent decree.\textsuperscript{163}

Through the seven cases, the Supreme Court has developed five principles to guide the public law remedial process, and those

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154. For the remedial approaches unique to particular public law subjects, see \textit{supra} note 145.\textsuperscript{154}

155. 518 U.S. 343 (1996).\textsuperscript{155}

156. 518 U.S. 515 (1996).\textsuperscript{156}

157. 515 U.S. 70 (1995) (\textit{Jenkins III}).\textsuperscript{157}

158. 521 U.S. 567 (1997).\textsuperscript{158}

159. 502 U.S. 367 (1992).\textsuperscript{159}

160. The Supreme Court recently applied the \textit{Rufo} test to an injunction concerning the use of public Title I funds in private religious schools in \textit{Agostini v. Felton}, 521 U.S. 203 (1997). \textit{See infra} notes 271-72.\textsuperscript{160}

161. 503 U.S. 467 (1992).\textsuperscript{161}

162. 498 U.S. 237 (1991).\textsuperscript{162}

163. Another case that should also be noted is \textit{United States v. Fordice}, 505 U.S. 717 (1992), in which plaintiffs challenged Mississippi's efforts to desegregate its public colleges and universities. In that case, the Supreme Court held that the State had not fulfilled its Fourteenth Amendment duty to desegregate its dual college and university system with its adoption of race-neutral admission policies. \textit{See id.} at 728. Because the Court primarily approached the issue as one of liability, rather than as one of remedy, the case provides little guidance on the scope of public law remedial power. Where appropriate, however, this Article discusses \textit{Fordice. See infra} notes 228, 366, & 408.\textsuperscript{163}
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principles contribute to the four problems identified in the Kansas City cases.

The five principles are as follows:

1. the scope of the violation determines the scope of the remedy;
2. defendants deserve deference;
3. federalism counts;
4. through consent decrees parties can circumvent the limits on injunctive relief; and
5. effectiveness is sometimes too difficult to achieve.

B. The Right-Remedy Connection

The overwhelmingly dominant test for determining the scope of an injunction (as opposed to a proposed and approved consent decree, which is discussed below),164 is a traditional private law remedial principle.165 The test can be stated in one of two ways: the scope of the remedy is determined by the scope of the violation; or the remedy is to place the plaintiffs in the position they would have occupied but for the violation (referred to herein as the "rightful position" doctrine).166 The analysis presumes that victims can be "made whole," meaning returned to their pre-violation status. This Article will use the phrase the "right-remedy connection" to refer to both formulations, for under either the right determines the remedy.167

The Supreme Court firmly adopts the right-remedy connection in the recent cases. The ideas of the right determining the remedy and the rightful position doctrine appear in Lewis v. Casey (prison conditions),168 United States v. Virginia (gender discrimination in

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164. Consent decrees are considered infra Part II.E.
165. This Article uses the term "private law" to refer to litigation that is bipolar, retrospective, self-contained, party-initiated, and party-controlled, with the right and remedy interdependent. See Chayes, supra note 13, at 1282-83.
166. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 16 (2d ed. 1994).
167. It is unclear how the two elements differ from each other. See id. at 291. Both are founded on corrective justice. The remedy should be compensatory, to be gauged by what duty the defendant violated and its effect on the plaintiff. The remedy is not designed to punish defendant, as punitive damages are, nor is the remedy a vehicle for the judge to address more than the proven violation. Rather, the court is to confine the remedy to correcting the legally recognizable harm caused by defendant.
168. The entire Court adopted the right-remedy connection in Lewis v. Casey, 518 U.S. 343, 357-60 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established."); id. at 397 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (arguing that the district court's remedy exceeded the scope of the violation held); id. at 409 (Stevens, J., dissenting) ("[T]he relief ordered by the District Court was broader than necessary to
higher education), and Missouri v. Jenkins (school desegregation). Not only does the Supreme Court articulate the standard, but the standard is actually deciding cases.

(1) Criticisms of Right-Remedy Connection

The right-remedy connection is a traditional approach to private law remedies and the Supreme Court began using it for public law cases in 1971. The Supreme Court’s recent adoption and application of the right-remedy connection can be viewed, therefore, as a straightforward application of stare decisis. Yet, the Supreme Court’s approach is actually quite remarkable because the right-remedy connection has been the subject of substantial criticism—from both the left and the right. The two Kansas City cases, in

redress the constitutional violations identified in the District Court’s findings.

169. In Virginia, the seven Members of the Court considering the remedy all agreed that the right-remedy connection was the appropriate standard. See United States v. Virginia, 518 U.S. 515, 547-48 (1996) (“A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of (discrimination).”) (internal quotations marks and citation omitted); id. at 565 (Rehnquist, C. J., concurring in the judgment) (arguing that the right-remedy test allows either gender-neutral admission policies or comparable colleges for both men and women).

170. In Jenkins III, the entire Court adopted the right-remedy connection, but the dissent advocated a looser connection between the right and remedy than the majority. Missouri v. Jenkins, 515 U.S. 70, 88 (1995) (Jenkins III) (stating both the rightful position and the rule that the scope of the violation determines the scope of the remedy); id. at 153-55 (Souter, J., dissenting) (stating and applying the right-remedy connection). The Supreme Court also stated the right-remedy connection in Rufo v. Inmates of Suffolk County Jail, a case concerning modification of the public law remedy. 502 U.S. 367, 389 (1992).

171. The Court adopted the doctrine to limit the remedy in Lewis to two prison facilities. See Lewis, 518 U.S. at 360. The Court employed the doctrine also to rule that the State’s program for women in Virginia was inadequate. See Virginia, 518 U.S. at 548. Further, the Court used the doctrine to rule “desegregative attractiveness” an impermissible school used goal. See Jenkins III, 515 U.S. at 100. The application of the right-remedy connection by the Supreme Court is discussed further infra notes 198-202 and accompanying text.

172. See Wicker v. Hoppock, 73 U.S. 94, 99 (1867) (“The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. . . . The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.”).


174. See, e.g., Abram Chayes, The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 HARV. L. REV. 4, 55 (1982) (suggesting that the Court has “more or less given up the effort” of forming any “systematic substantive limitations on the scope of relief”); Fiss, supra note 11, at 46-48 (characterizing the right-remedy as a test that “fundamentally misleads” and “gives us an impoverished notion of remedy”); Friedman, supra note 13, at 747 (arguing that the right-remedy test is “vague and
which the judges followed the right-remedy connection, likewise demonstrate problems with the right-remedy connection, as do \textit{Casey}, \textit{Virginia}, and \textit{Jenkins}. The right-remedy test leaves district courts with almost no framework from which to rule on remedial orders, creating remedial ambiguity and a gap in judicial remedy authority. This Article argues that the right-remedy connection achieves this result through its extreme indeterminacy and its failure to recognize the special role of proximate cause and group rights in public law litigation.

(a) Indeterminacy

The first problem is the test’s indeterminacy.\textsuperscript{175} Stating that the scope of the injunction will be defined by the scope of the violation and will be confined to restoring the victims to their rightful place reveals very little about what the remedy should be. This loose standard does not logically compel a particular result, thus permitting a great deal of unrestricted discretion. This indeterminacy arises from the standard’s presumption that the right is definable—without reference to its remedies—and that a right-remedy connection exists in public law cases.

\textsuperscript{175} The law of remedies, perhaps by definition, suffers from some indeterminacy. Professor Paul Gewirtz has defined remedies as “a jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy.” Gewirtz, \textit{supra} note 4, at 587; \textit{see also} Richard H. Fallon, Jr. \& Daniel J. Meltzer, \textit{New Law, Non-retroactivity, and Constitutional Remedies}, 104 HARV. L. REV. 1731, 1778 (1991) (“[T]he law of remedies is inherently a jurisprudence of deficiency.”). Others have declared that “[t]o think of remedies necessarily plunges us into a study of uncertainty.” Leubsdorf, \textit{supra} note 174, at 133.
(i) The Public Law Right

Public law rights are largely defined through their remedies. By way of contrast, first consider private law rights and remedies. Private law rights are typically definable without reference to their remedies. For example, to declare that individuals have the right to be free of battery is relatively straightforward: a person should be free from unwanted, intentional touching.\(^{176}\) The definition of the right is by its terms definite and self-contained. Courts need say nothing about the remedy for battery and still fully explain the right involved.\(^{177}\)

Public law rights are quite different. Their definition has depended in large part on how the court defines the remedy. For example, the Supreme Court in Brown I concluded, pursuant to the Fourteenth Amendment, "that in the field of public education the doctrine of 'separate but equal' has no place."\(^{178}\) Knowing that the Fourteenth Amendment prohibits states from establishing "separate but equal" schools based on race tells us little about the nature of the right.\(^{179}\) What does it mean to be free from racial discrimination in public schools? Do children have a right to attend an integrated school; or a more limited right to attend an integrated school to the extent feasible using the students within the school district lines; or an even more limited right to attend schools with race-neutral attendance zones? In addition, does the right include anything other than student assignment? At a minimum, the establishment of separate school systems included unequal facilities, assignment of teachers and principals on the basis of race, and unequal funding. These questions go unanswered in Brown I, with its pronouncement of the right, to be answered (somewhat) in subsequent remedial decisions. In short, the Supreme Court has used the remedy to define, in part, the school desegregation right.

Another way to approach the issue is to argue that the public law right is easily manipulated, and the right-remedy test allows courts to manipulate their definition of the right to produce the desired remedy.\(^{180}\) Consider United States v. Virginia.\(^{181}\) At issue was the all-

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177. Whether that right has much meaning independent of its remedy is another matter altogether, but what the right affords is clear without reference to its remedies.
179. The meaning of the right declared in Brown I, for example, has been the source of continuing debate. See, e.g., the articles cited supra at note 2.
180. See Fletcher, supra note 11, at 659-60 ("[T]he even more formidable—perhaps impossible—task facing courts is to design remedies that enforce a particular right rather than, in effect, create different rights depending on which remedy is chosen."). See generally Goldstein, supra note 147.
male admission policy for Virginia Military Institute (VMI), a public college. While most of the opinion was devoted to holding that the Commonwealth of Virginia discriminated against women by operating VMI, part of the opinion addressed defendants' remedy for the violation—a separate program exclusively for women, the Virginia Women's Institute for Leadership (VWIL), located at a private school for women, Mary Baldwin College.\footnote{182}

The seven members discussing the scope of the remedy all agreed that the remedy must place the victims in the position they would have been in “but for” the violation (the rightful position).\footnote{183} Yet, the articulated remedial standard depended on the application of a very uncertain term—what were the rights of the women denied admission to VMI?

Justice Ginsburg, for the Court, defined the violation as the exclusion of women who were interested in VMI's special program. To remedy this exclusion, these women should be afforded the opportunity of admission into VMI. The scope of the violation would then equal the scope of the violation.\footnote{184}

Chief Justice Rehnquist disagreed. He defined the violation as “not the ‘exclusion of women’... but the maintenance of an all-men school without providing any—much less a comparable—institution for women.”\footnote{185} Thus, the remedy for Chief Justice Rehnquist need not necessarily be women cadets at VMI or an all-women VMI-like program. The remedy instead could be a separate, but comparable, school for women,\footnote{186} a standard which Mary Baldwin failed.\footnote{187} In sum, given the uncertainty over the right to be free from gender discrimination (and the meaning of most public law rights), courts can manipulate their definition of the right to produce any desired remedial options.

The Kansas City school desegregation cases also demonstrate how the right, and thus the remedy under the right-remedy connection, lacks definition and is subject to manipulation. In the

182. \textit{See id.} at 526.
183. \textit{See id.} at 547-48; \textit{id.} at 565 (Rehnquist, C.J., concurring in the judgment).
184. \textit{See id.} at 550-51 (“It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit, a decree that will ‘bar like discrimination in the future.’”) (footnote omitted) (quoting United States v. Louisiana, 380 U.S. 145, 154 (1965)). The Court compared the VWIL approach to that of the State of Texas when Herman Sweatt sued to gain admission to the University of Texas School of Law and the State of Texas established the Texas State University for Negroes. \textit{See id.} at 553-54.
185. \textit{See id.} at 565 (Rehnquist, C.J., concurring in judgment).
186. \textit{See id.}
187. \textit{See id.}
Kansas suit the remedy included nothing about quality of education,\textsuperscript{188} while Missouri school children received extensive quality of education remedies. The difference in the remedies can be explained on the grounds that the Kansas district court judge found no fault with the educational offerings of USD No. 500, while the Missouri district court judge found a causal relationship between \textit{de jure} system and achievement scores. Yet, this justification begs the question of why the district courts reached different conclusions about the connection between unlawful school segregation and achievement.

The difference can best be explained by the differences in initial litigation strategy. No party in the Kansas suit even alleged inequities in quality of education, while every party in \textit{Jenkins} argued such disparities. Yet, it is hardly plausible that the Missouri \textit{de jure} system had an impact on student achievement but the Kansas \textit{de jure} system did not. The hallmark of unlawful school systems was the unequal treatment of children according to their race, which surely had an impact on student achievement. The different remedial categories in the two Kansas city cases suggest that the school desegregation right is manipulable by the parties, and thus so is the school desegregation remedy. Children on the Missouri side of the Kansas River received a wide range of programs designed to increase their achievement: a systemwide magnet program, attainment of AAA status, reduction of class size, summer school, full day kindergarten, tutoring, early childhood development programs, staff development, and effective school programs, while students on the Kansas side received nothing.\textsuperscript{189} As a result, it appears that what remedy a student receives depends more on where the student lives, and what the parties request and the court grants, than on the actual violation and its effects.\textsuperscript{190}

\textsuperscript{188} See supra Part I.B.1.a.
\textsuperscript{189} See supra Part I.B.1.
\textsuperscript{190} It is true that the judge in \textit{USD No. 500} found the quality of education “impressive,” and that the plaintiff in \textit{USD No. 500} made no claims regarding quality of education in the liability phase, while the judge in \textit{Jenkins} found inequities based upon the presented evidence. It is also true that no nationwide model of \textit{de jure} segregation exists. In fact, differences should be expected. No school desegregation suit is the same: different lawyers, patterns of housing segregation, white flight, facilities, school boards, and community groups prevent a cookie cutter approach to school desegregation. \textit{See Milliken v. Bradley}, 433 U.S. 267, 287 (1977) (\textit{Milliken II}) (recognizing that no school district remedy can be a “blueprint” for another, factually different school district); \textit{Green v. County Sch. Bd.}, 391 U.S. 430, 439 (1968) (noting in school desegregation case that “there is obviously no one plan that will do the job in every case”). The same is true for any type of institutional reform litigation. Different facts produce different remedies. \textit{See Fiss, supra} note 11, at 51 (“Such a varying remedial pattern has, in fact, emerged, but it does not seem to me to be objectionable, for these may well be differences between the various
The Connection between Right and Remedy

Related is the issue of the connection between public law right and remedy. The right-remedy test and the rightful position both presume a close connection—that the remedy flows logically from the right. This connection would in fact enable judges to demonstrate that they were exercising appropriate judicial behavior, and not making policy decisions better left to other governmental entities. Yet, even proponents of public law remedies readily concede the loose connection between the public law right and public law remedy. For example, declaring that school children have a right not to be separated by race in public schools says little about how to remedy past segregation or how to ensure future compliance with the Equal Protection Clause. That right also does not answer the question of whether the appropriate remedy is race-neutral admission standards or cross-town busing. In part, this is not surprising given the lack of definition of the right. Even the facts proving a violation are of little assistance in determining the appropriate remedy.

The right at issue is not, however, irrelevant in determining the communities that justify the different treatment. Yet, the essence of de jure segregation must include some impact on quality of education. Students were segregated according to their race into schools with unequal resources, and resources are important only because of their impact on quality of education and student achievement.

191. See Chayes, supra note 13, at 1293-94, 1298-1302 (1976) ("The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc."); Diver, supra note 11, at 50 ("Pronouncing [public law] rights, however, does nothing to illuminate the remedy."); Fiss, supra note 11, at 47 (acknowledging only a loose connection between right and remedy); Goldstein, supra note 147, at 4-5 ("In public law litigation, there has been a deepening bifurcation of the liability and remedy stages of the lawsuit, with the result that once a right and violation have been found, the judge may exercise broad discretion to order a wide range of innovative, experimental, and intrusive remedies.").

192. See Fletcher, supra note 11, at 652 (describing the choices to desegregate schools as "virtually limitless"). Professor Susan Sturm makes a similar point about the Eighth Amendment's prohibition against cruel and unusual punishment:

Should the court order the defendants to hire more guards, reduce the prison population, establish screening and training programs for guards, eliminate the inmate trustee system, introduce work and educational programs, improve the classification system, restrict the movement of inmates in the prison or require unit management? There is no single correct remedial approach dictated by the eighth amendment [sic].

Sturm, supra note 4, at 1363. Likewise, the right to be free from employment discrimination does not reveal whether the remedy should be achievement of a particular ratio of employees (by race, national origin, or gender) or whether the remedy should be achievement of non-discriminatory hiring and employment system. See Thomas W. Bergdall, A Practitioner's Guide to Injunctive Civil Rights Settlements and Consent Decrees, 531 PLJ/LIT 305, 342-43 (1995); see also Fiss, supra note 11, at 48 (arguing that the right-remedy test "obscures the need for a choice, and the fact that the remedial phase of a structural suit is largely devoted to making that choice").

193. Sturm, supra note 4, at 1364.
remedy. Public law right and remedy are connected; but the remedy
does not arise solely from the right. Public rights "provide only the
goals and boundaries for the remedial decision."194 The right is
defined in part by the remedy, and the remedy is defined in part by
the right. In other words, there is no line clearly separating the two;
the two are not separate categories, but are overlapping.

The two Kansas City cases, which "applied" the right-remedy
connection, demonstrate the loose connection between right and
remedy.195 In neither case did the court define the right separate
from the remedy. The violations were defined generally—i.e., the
establishment of de jure schools and, in the case of Jenkins, the
provision of unequal resources—but not in a concrete way to lead to
the remedy. Rather, the liability rulings only established the
categories of relief to be considered. In Kansas, the liability holdings
on student and faculty assignment meant that the remedy would focus
on these two categories.196 Likewise, in Missouri, the broad range of
vestiges determined in the remedy hearing ensured that the remedy
would focus on the identified vestiges.197 But other than identifying
the categories to consider, the right provided little guidance on the
actual remedy to be afforded.

The recent Supreme Court cases also demonstrate that the test
can be used only to include or exclude particular categories of relief
and provides little other guidance.

For example, at issue in Lewis v. Casey198 was the access to courts
afforded to Arizona prisoners, a right protected by the due process
clause of the Fourteenth Amendment, as the Supreme Court had
made clear in the earlier case of Bounds v. Smith.199 The Supreme
Court held that the district court's systemwide remedy covering all
Arizona prison facilities exceeded the violation because the violation
concerned only two particular prison facilities.200 But the right-
remedy connection gave no guidance on what the remedy in the two

194. Sturm, supra note 4, at 1364, 1377; see also Gewirtz, supra note 4, at 678-79
("There is a permeable wall between rights and remedies.").
195. The major remedial order in each case relied upon the right-remedy connection.
See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas,
No. KC-3738, at 7 (D. Kan. June 8, 1977); Jenkins v. Missouri, 639 F. Supp. 19, 23 (W.D.
Mo. 1985), aff'd in relevant part, 807 F.2d 657 (8th Cir. 1986).
196. See supra Parts I.A.1, I.B.1.a.
197. See supra Parts I.A.2, I.B.1.b.
199. 430 U.S. 817, 828 (1977) (holding that "the fundamental constitutional right of
access to the courts requires prison authorities to assist inmates in the preparation and
filing of meaningful legal papers by providing prisoners with adequate law libraries or
adequate assistance from persons trained in the law"). Specifically, in Lewis, plaintiffs
complained of their access to legal research materials. See 518 U.S. at 346-47.
200. See Lewis, 518 U.S. at 360 n.7.
institutions should include or on how specifically compliance with Bounds can be achieved. Likewise, in United States v. Virginia, the Court reveals little about what the admission of women to VMI should actually entail. The details of the admission to women to VMI are critical; yet, the right-remedy test provides no guidance.

In sum, the standard of the scope of the right determining the scope of the remedy depends on a definable right, separate from any remedy, and also a connection between right and remedy. For once the right is not definable apart from its remedy, then the scope of the right is not determining the remedy. Further, if the connection between right and remedy is loose, then the right cannot determine the remedy. As a result, factors other than the definition of the right must be considered in determining the remedy. The right-remedy connection, although it appears to permit little “choice” in crafting the remedy, actually allows a great deal of choice because of its indeterminacy.

(b) Causation

The right-remedy connection is also problematic because it depends on a causation analysis that is all but impossible in the public law case. The dependence on proximate cause is most clearly demonstrated by the rightful position doctrine: that the remedy is to place the plaintiffs in the position they would have occupied but for the violation. In a breach of contract case, for example, it is usually possible to ascertain the position the buyer would be in “but for” the

201. 518 U.S. 515 (1996); see supra notes 181-87 and accompanying text.
202. In admitting women to VMI, the district court, for example, had to decide whether separate bathrooms would be established, how the physical safety of women cadets would be provided, what physical standards would be imposed on women, and whether different grooming standards would be afforded. See Robert O'Harrow, Jr., VMI Report Sets Rule for Women; Jewelry, Makeup, Crew Cuts Covered, THE WASH. POST, May 29, 1997, at D3 (discussing VMI's proposal on how to modify its programs for enrollment of women).

The doctrine was also used to exclude a category of relief in the Kansas City, Missouri school desegregation case. The Supreme Court held that the remedial goal of “desegregative attractiveness” was impermissible under the right-remedy test. The state defendants had challenged the salary increases ordered for almost all school district employees. See Missouri v. Jenkins, 515 U.S. 70, 81 (1995) (Jenkins III). The salary increase was ordered partially on the grounds of “desegregative attractiveness”—the goal of attracting white students into the majority African-American school system, thereby increasing the level of integration in the school district. See id. at 81. The Court (per Chief Justice Rehnquist) held that the remedial goal of desegregative attractiveness exceeded the scope of the violation. The violation held by the district court was deemed to be purely intradistrict (i.e., the violation was confined within the borders of the KCMSD boundary lines), while “desegregative attractiveness” was an interdistrict remedy (i.e., the goal of the remedy exceeds the borders of KCMSD school district). See id. at 91-92. For an argument that the remedy was not interdistrict, but intradistrict, see Joondeph, supra note 4, at 630-36.
seller's breach. With public law, such reconstruction of a but-for-position provides, however, little meaningful information.

For example, courts cannot possibly know what a school district would look like absent de jure segregation. Determining all the effects of segregating students by race—the effects on the school district, on all individual school children, and on private actors—is an insurmountable task. It is even less clear how a court could magically create a world free of all the unlawful effects of defendants' discrimination.

203. This is not to suggest that proximate cause is always easy in a private law case. The argument is more narrow: proximate cause is often useful in determining the private law remedy.

204. Justice Scalia readily admitted the limits of proximate cause in Freeman v. Pitts, a school desegregation case. See 503 U.S. 467 (1992) He argued that “[r]acially imbalanced schools are . . . the product of a blend of public and private actions, and any assessment that they would not be segregated, or would not be as segregated, in the absence of a particular one of those factors[,] is guesswork.” Id. at 503 (Scalia, J., concurring); see also Epstein, supra note 4, at 1111-15 (arguing that “the inability to disentangle the remote causes of the present situation renders unworkable the traditional causal inquiries”). The difficulties of proximate cause in school desegregation is further explored supra Part II.B.2.c.

205. One law review article described the problem well:
First, it makes an evidentiary assumption that social science can construct a precise model of what the world would have looked like if the discriminatory conduct had not occurred. This requires a district court to construct complex causal chains . . . . But, even if such chains could be developed in some instances, the moral effects of illegal government activity on private behavior could hardly be factored into sociologist's multivariate equation. Second, the Court's analysis depends on a peculiarly narrow conception of 'cure' in matters of complex social change. The Court's notion of 'make-whole relief' assumes that reconstruction of a previous condition, the status quo ante, is possible. The idea that cure involves neither growth nor change but merely restoration is unrealistic. For cure requires new adaptions and wholeness demands response to new conditions. Goldstein, supra note 147, at 42. The causation problem remains, even if the Supreme Court had ordered in Brown II to desegregate now, rather than with "all deliberate speed." Brown v. Board of Educ., 349 U.S. 294, 301 (1955)(Brown II). Although the causation analysis would have been simplified by the smaller gap in time between the unlawful system created by state or local law and the beginning of the remedial process, the problem of defining all the effects and "re-creating" a world without the effects of de jure segregation remains. See LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 112 (1996) (noting that "it is not readily apparent" what baseline the courts should use in evaluating compliance with Brown); Richard Thompson Ford, Geography and Sovereignty: Jurisdictional Formation and Racial Segregation, 49 STAN. L. REV. 1365, 1388 (1997) ("As a matter of causation, one cannot neatly sever 'private choice' from government imposition, since government helped to create the context in which the private choices occur."); Leubsdorf, supra note 174, at 135-37 ("Plainly, such questions cannot be answered with any reliability except by those possessing a time machine."); Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 GEO. L.J. 279, 280-81 (1997) ("Our current and past discrimination deprive us of the kind of
As discussed below, the two Kansas City cases demonstrated the futility of a meaningful causation analysis. In short, the right-remedy test depends on a knowable and ascertainable proximate cause connection between the violation and its effects, but proximate cause is rarely a useful concept in public law litigation.

(c) Group Rights

A third criticism of the right-remedy connection is that it presumes that the relief is directed at individual plaintiffs. The rightful position doctrine focuses on restoring particular victims of the unlawful behavior to their rightful position, but public law remedies are typically directed at groups. Individual plaintiffs may not receive any remedy, or individuals may benefit from the remedy even though they are not victims of the violation. For example, in school desegregation children receive no remedy if the remedy is ordered after they graduate, drop-out, or transfer from the school. Further, the remedy provides benefits to those who were not the victims of the defendant's unlawful acts. Children who transfer into a school district undergoing school desegregation, for example, are not excluded from the remedy; white children regularly receive benefits as well. Thus, some individualized harms are ignored altogether, while other individuals receive a remedy even though by definition they are outside of the victim class.

This, in fact, further complicates the proximate cause analysis required by the rightful position doctrine; the victims of the initial violation are different from those receiving the remedy. Further, the right-remedy test requires that courts misconceive the very nature of information that would be necessary to evaluate the reality of a nondiscriminatory world.

206. See infra notes 372-96 and accompanying text.

207. See Fiss, supra note 11, at 19 ("The victim of a structural suit is not an individual, but a group."); Yoo, supra note 4, at 1136 ("The injured plaintiff was replaced by social groups."). Brown I has been identified as particularly concerned with group rights. See SEIDMAN & TUSHNET, supra note 205, at 104-6 (1996). This concept of group rights is increasingly at odds with the Supreme Court's recent interpretation of the Equal Protection Clause in affirmative action cases, which focuses on the rights of the individual, not the group. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

208. See Friedman, supra note 13, at 743, 746-47 (noting that prospective orders “often take years to achieve and thus do absolutely nothing to compensate the high school student who brought the suit”).

209. See Missouri v. Jenkins, 515 U.S. 70, 110-11 (Jenkins III)(O'Connor, J., concurring) (noting that “some who did not suffer under—and, indeed, may have even profited from—past segregation” were beneficiaries of the Jenkins remedy); Epstein, supra note 4, at 1113 (noting that in Jenkins “none of the current beneficiaries of the [remedy] fall into even the most capacious definition of the injured class”); Fiss, supra note 11, at 21 (“In the structural context . . . the victims and beneficiaries need not be coextensive.”).
what the public law right requires. The test instructs a focus on an
individual in devising a remedy, when the presence of the individual
right is the exception rather than the rule.

In sum, the right-remedy test provides little guidance for the
contours of the remedy, for it presumes an independently definable
right that also defines the remedy and a causation analysis that are
rarely present in public law litigation. Further, the test is oriented
toward individual harms, but public law rights and remedies are
directed toward groups.

(2) Supreme Court's Commitment to the Right-Remedy Connection

In light of the widespread criticism and obvious indeterminacy of
the right-remedy connection, it is surprising that the Supreme Court
has continued to employ the test to "decide" the scope of the
injunction. Yet, not only has the right-remedy connection survived,
the Supreme Court has actually strengthened the principle in three
ways. First, the Court has extended the connection's "make-whole"
premise—that the victims can be restored to their "whole" pre-
violation state—to the test for termination. The other two ways
concern the Court's treatment of judicial discretion and proximate
cause. To argue that the right-remedy connection has been
"strengthened" does not mean that the right-remedy has actually
 gained in its prescriptive capacity. Rather, the Supreme Court's
treatment of judicial discretion and proximate cause has added to the
reach of the right-remedy connection, but the principle still does not
help decide the remedy.

(a) Termination Standards

Two school desegregation cases concerning when to terminate
the public law remedy are premised upon principles underlying the
right-remedy connection. The standard for termination, although
developed in the context of school desegregation, has been applied to
other types of institutional reform litigation.\(^2\) In Board of Education
v. Dowell,\(^2\) the Supreme Court considered whether the school
desegregation lawsuit against the Oklahoma City school district could
end. The school district had operated under a school desegregation

\(^{210}\) See Johnson v. Heffron, 88 F.3d 404, 407 (6th Cir. 1996) (prison conditions);
United States v. City of Miami, 2 F.3d 1497, 1505 (11th Cir. 1993)(employment
discrimination); Consumer Advisory Bd. v. Glover, 989 F.2d 65, 67 (1st Cir.
1993)(conditions at state institution for mentally retarded); Youngblood v. Dalzell, 925
F.2d 954, 960-61 (6th Cir. 1991) (employment discrimination).

\(^{211}\) 498 U.S. 237 (1991). For a detailed examination of Dowell, see Brown, supra note
2, at 21-25, and for a description of the drafting of Dowell based on Justice Thurgood
Marshall's papers, see SIEDMAN & TUSHNET, supra note 205, at 511-12.
decree requiring busing for thirteen years. The defendants argued that jurisdiction in the case had already ended and that they could operate, without judicial permission, “neighborhood” schools. The Court held that the lawsuit could end, even if the schools remained segregated or would become segregated after compliance with the courts’ orders ended. To terminate court supervision, defendant must prove, among other factors, that it has eliminated “the vestiges of past discrimination... to the extent practicable.” In Freeman v. Pitts, the school desegregation case for DeKalb County, Georgia, the Supreme Court re-affirmed Dowell’s test for terminating the public law suit.

Requiring the elimination of vestiges of discrimination is founded on the same premise of the right-remedy connection: that plaintiffs are entitled to and can receive “make whole” relief—meaning that the remedy should strive for returning the plaintiffs to the position they would have occupied but for the violation. When this occurs, the plaintiffs are made whole. This approach requires, in part, that the present day effects of the past violation be both identifiable and redressable so that the plaintiffs are returned to their rightful position.

The termination test, by requiring the elimination of the vestiges of the prior unlawful activity, assumes the availability of make whole

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212. See Dowell, 498 U.S. at 242.
213. See supra notes 37-38 and accompanying text (articulating the three-part test for termination).
214. Dowell, 498 U.S. at 250. Before, the Court had directed defendants to achieve “the greatest possible degree of actual desegregation.” Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971). To achieve dismissal of the suit, a defendant must also prove that it has “complied in good faith with the desegregation decree since it was entered” and that it would not “return to its former ways,” and if defendant so proved, it was no longer a dual school system, but had achieved “unitary status.” Dowell, 498 U.S. at 247-50. In considering the appropriate standard for terminating relief, the Supreme Court had to consider the application of the “grievous wrong” standard of United States v. Swift & Company, 286 U.S. 106 (1932). The court of appeals had held that the school desegregation remedy remained in effect until a school district could show “grievous wrong evoked by new and unforeseen conditions.” Dowell v. Board of Educ., 890 F.2d 1483, 1490 (10th Cir. 1989)(quoting United States v. Swift & Co., 286 U.S. 106, 119 (1932)), rev’d, 498 U.S. 237 (1991). The Supreme Court rejected the grievous wrong standard as inconsistent with the temporary nature of institutional reform litigation and with “the allocation of powers within our federal system.” Dowell, 498 U.S. at 248. Likewise, in Rufo, the Court rejected the grievous wrong standard for determining when a modification should be afforded. See Rufo v. Inmates of Suffolk County, 502 U.S. 367, 393 (1992); infra note 269.
216. See Freeman, 503 U.S. at 491; see also Missouri v. Jenkins, 515 U.S. 70, 89 (1995)(Jenkins III) (stating the three-part test from Dowell).
relief. For the suit to end, defendants must prove the absence of (or impracticability of redressing) present day effects of their past unlawful acts. For if the effects of the violation continue, then the remedy should continue. The test, in other words, depends on the remedy being able to make whole the victims of the violation and the defendants’ ability to define and redress the present day effects of the past violation, as with the rightful position. In this crucial respect, the termination test presumes the impossible, the availability and definability of make-whole relief.  

(b) Judicial Discretion

Through the treatment of judicial discretion, the Supreme Court has further demonstrated its commitment to the right-remedy connection. Prior to cases decided in the 1990's, the Supreme Court judged the scope of an injunction not just by the right-remedy connection, but also according to the idea of equitable discretion and with appellate court deference to district courts. These additional tests limited the reach of the right-remedy connection because they legitimized and protected district courts’ making of judicial, remedial choices. The right-remedy connection, on the other hand, presumes a legally compelled result, reachable by any court through impartial, judicial logic. Recently, however, the Supreme Court has all but disavowed equitable discretion and deference to district courts, and thus has increased the reach of the right-remedy connection. Before 1990, the Supreme Court often held that in determining the scope of injunctive relief, a court was to be guided by “broad” equitable discretion. According to the equitable discretion analysis, public law remedies have inherent “breadth and flexibility,” and it is the judge’s equitable discretion that guides the choice in determining the remedy. The court is not confined to a definition of the right at issue, or even to the concerns of the parties before it: “In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . . .” Through their equitable discretion,

217. See supra Part II.B.1 (discussing the significant weaknesses of the right-remedy connection).
220. Lemon v. Kurtzman, 411 U.S. 192, 201 (1973) (Lemon II); see also id. at 200
courts can weigh the competing interests presented by the case and determine the appropriate remedy.\textsuperscript{221}

Throughout the 1970's, sometimes even within the same opinion, the Supreme Court would apply the right-remedy connection to rule a remedy excessive and also apply equitable discretion to uphold a remedy that on its face violated the right-remedy connection.\textsuperscript{222} As a result, Supreme Court opinions were noted for their "confusion"\textsuperscript{223} and inconsistencies.\textsuperscript{224}

Relatedly, the Supreme Court in the past has required deference to district court judges. Specifically, appellate courts were required to afford a district court's remedy some unspecified level of deference, apart from the clearly erroneous standard applied to factual

\textsuperscript{221}See Teamsters, 431 U.S. at 372 ("Because the class of victims may include some who did not apply for line-driver jobs as well as those who did, and because more than one minority employee may have been denied each line-driver vacancy, the court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members.").


Professor Gewirtz explains the inconsistency as depending on what sorts of interests are determinative for the court. He defines the two approaches as Rights Maximizing and Interest Balancing. See Gewirtz, supra note 4, at 588-89. Rights Maximizing focuses exclusively on providing the most effective remedy possible for the plaintiff; all other matters must yield to providing a most effective remedy for the plaintiff. See id. at 591-92. Interest Balancing, on the other hand, considers not just remedial effectiveness for the plaintiffs, but also other "social interests . . . [that] may justify some sacrifice of achievable remedial effectiveness." Id. at 591. Professor Gewirtz further explains that "[t]hese two approaches separate two points of view that frequently are blurred in analyzing equitable remedies: that of victims of the violation who seek to eliminate its effects, and that of persons who bear the costs of remedying the violation and may seek to limit their burdens." Id.

Professor Laycock makes a related point about the different approaches in all types of injunctive cases— one tradition of focusing on the rightful position, another tradition focusing on achieving "equity." He explains that the "two traditions can fairly be thought of as poles on a single continuum describing the extent of the trial judge's discretion." LAYCOCK, supra note 166, at 271.

\textsuperscript{223}Yudof, supra note 147, at 87.

\textsuperscript{224}See Goldstein, supra note 147, at 26-43.
findings. The trial judges not only heard the evidence first hand but, more importantly, they lived with the cases over a long period, thereby developing expertise. This deference to district court judges, like the equitable discretion analysis, recognized and legitimized the idea of judicial discretion guiding the remedial process. Thus, choices were to be made, and courts, particularly district courts, were permitted explicitly to make these choices.

Interestingly, since 1991, the ideas of equitable discretion and district court discretion have had a negligible impact on the remedial calculus. The idea of judicial choice is no longer recognized. As a result, the right-remedy connection, with its presumption of legally compelled remedies, has an even stronger reach in determining the remedy.

In five of the seven recent cases addressing public law remedial power—Lawyer, Lewis, Virginia, Rufo, and Dowell—the concepts of equitable discretion and district court discretion deserved no mention in the majority opinions, although they occasionally arose in non-majority opinions. Further, the Supreme Court readily rejected

225. See, e.g., United States v. Paradise, 480 U.S. 149, 184 (1987) (Brennan, J., plurality opinion); see also id. (noting a district court’s “firsthand experience with the parties [which makes it] best qualified to deal with the ‘flinty, intractable realities of day-to-day implementation of constitutional commands’” (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1, 6 (1971))); Hutto v. Finney, 437 U.S. 678, 688 (1978) (“[T]he exercise of discretion in this case is entitled to special deference because of the trial judge’s years of experience with the problem at hand and his recognition of the limits on a federal court’s authority in a case of this kind.”); Lemon II, 411 U.S. at 200 (“In shaping equity decrees, the trial court is vested with broad discretionary power, appellate review is correspondingly narrow.”); Wright v. Council of Emporia, 407 U.S. 451, 466 (1972) (determining that the school desegregation remedy “is a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district judge”); Brown v. Board of Educ., 349 U.S. 294, 299 (1955) (Brown II) (“Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.”). Part of the reason for discretion to lower courts has been described as “inescapable... [because] unlike the relief granted in most traditional lawsuits, the appropriate remedy in institutional actions generally cannot be derived directly from the nature of the defendant’s unlawful conduct.” Fallon, supra note 13, at 41.

226. Likewise, the Supreme Court has curtailed the reach of equity in public law cases by its decisions concerning non-remedial areas as well, i.e., abstention, standing, implied rights of action, and party joinder devices. See generally Thomas D. Rowe, Jr., No Final Victories: The Incompleteness of Equity’s Triumph in Federal Public Law, 59 LAW & CONTEMP. PROBS. 105 (1993).

227. The clearest support for equitable discretion can be found in Justice O’Connor’s concurring opinion in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 393 (1992). There she argued that “the District Court took too narrow a view of its own discretion,” and emphasized a particular need for appellate deference to district courts judges who have “effectively been overseeing a large public institution over a longer period of time.” Id. at 394-35 (O’Connor, J., concurring). Equitable discretion also arose in two non-
district courts' remedial orders, affording them no particular deference. Even when approving a district court, the Court placed little, if any, importance on equitable discretion or deference to district courts.

Equitable discretion was deemed worthy of mention in only two school desegregation cases. In Freeman, the Supreme Court affirmatively afforded equitable discretion to the district court.

...
Specifically, the Court held that the district court appropriately exercised equitable discretion—even in a case already lasting twenty-three years—to order new remedies in areas not covered by the original remedy.\(^{231}\)

More recently, however, in *Jenkins* III, the Court specifically stressed the limited role of equitable discretion and afforded no deference to the district court. While recognizing the equitable discretion thread of public law remedial analysis, the Court emphasized that the concept has always had limits.\(^{232}\)

In short, the equitable discretion and deference to district court lines of analysis have all but disappeared from recent Supreme Court jurisprudence, leaving the Court firmly committed to the right-remedy connection as the only recognized measure of the scope of the injunction.

(c) Proximate Cause and School Desegregation

The Supreme Court has also begun to use proximate causation as a limit on school desegregation cases, thereby increasing the reach of the right-remedy connection in this area. The application of proximate cause may appear unremarkable (perhaps even obvious), but before 1991, proximate cause had a very minor role in school desegregation remedies because the Court had established two powerful causation presumptions for school desegregation. First, systemwide discrimination was presumed (absent persuasive proof to the contrary) from discrimination in a substantial part of the system.\(^{233}\) Second, and more importantly in the later stages of

\(^{231}\) See id. at 492.

\(^{232}\) See *Jenkins* III, 515 U.S. at 86. To explain the limited nature of remedial discretion, the Court quoted at length from *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-23 (1971). Relying on *Swann* for the limited nature of equitable discretion is ironic given the universal conclusion that the case stands for the Supreme Court taking the concept of equitable discretion to extremes. See, e.g., Fiss, *supra* note 11, at 46 n.94 (characterizing the remedy in *Swann* as "the most untailored remedy imaginable"); Yudof, *supra* note 147, at 90 (describing *Swann* as "an enigmatic opinion that can be cited for virtually any proposition").

\(^{233}\) See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455-58 (1979) (*Columbus II*)("Proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board . . . ."); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973) ("[A] finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions."); *see also* Joondeph, *supra* note 4, at 610-12 (tracing the presumptions to *Green v. County School Board*, 391 U.S. 430 (1968)). *But see* *Dayton Bd. of Educ. v. Brinkman*, 433 U.S.
litigation, once a violation was held, any current disparity was presumed to be caused by the defendant’s unlawful actions, unless the defendant proved that their actions in no way contributed to the disparity.234 Through the causation presumptions, defendants were essentially held responsible for all current disparities, with little use of proximate cause to determine the effects of defendants’ unlawful actions.

The almost complete absence of proximate cause from the remedial calculus greatly weakened the prescriptive capacity of the rightful position doctrine because the causation presumptions effectively established the rightful position. The causation presumptions presumed that, had defendants not unlawfully segregated the schools, the schools would have been race neutral and integrated.235 In other words, through the causation presumptions, the rightful position was defined as the absence of racial disparities throughout the school system. The rightful position doctrine had little prescriptive capacity because the causation presumptions already defined plaintiffs’ rightful position (a world absent racial disparities) or a world of racial equality/integration—unless the defendants proved otherwise. Further, because of the causation presumptions, parties had little incentive to develop a record of the contours of the violation and its effects. The plaintiffs had the benefit of the presumptions, and the defendants were placed in the almost

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234. See Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979) (Dayton II) (holding the defendants responsible for current segregation if the segregation was “caused at least in part by [the defendants’] prior intentionally segregative official acts . . . .”); Keyes, 413 U.S. at 211 n.17 (holding that “the burden becomes the school authorities’ to show that the current segregation is in no way the result of those past segregative actions”).

impossible position of proving what the world would look like absent their wrongdoing.

Recently, the Supreme Court has limited the reach of the presumptions and has used proximate cause in considering school desegregation remedies. By doing so, the Supreme Court has imposed significant limits on the reach of the school desegregation remedy through the right-remedy connection and the termination standard.

In 1992 in *Freeman v. Pitts*, the Supreme Court considered whether the DeKalb County school district had desegregated its student assignment practices and policies. Although significant segregation remained in the school buildings, the Court held that the current segregation was not the result of defendants' unlawful actions, but the result of demographic changes in housing patterns and racial population changes over which the defendants had no control. The Supreme Court reached this conclusion by applying the causation presumptions—the defendants had to prove that any current disparity was not the result of their unlawful actions—and by making the "rare" holding that the defendants had met that burden.

Yet, the Supreme Court predicted a future decline in the applicability of the causation presumptions:

As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.

In *Missouri v. Jenkins*, that prediction came true, when the Supreme Court failed even to mention the causation presumptions and applied an "incremental effects" approach to causation in school desegregation. Part of this school desegregation remedy included

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237. See id. at 476-77; see also id. at 509 (Blackmun, J., concurring) ("The majority of 'black' students never have attended a school that was not disproportionately black.").
238. See id. at 494-95.
239. See id. at 494 ("The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.").
240. Id. at 503 (Scalia, J., concurring) (describing the defendants' ability to rebut the causation presumptions as "rare"); see also supra note 204 (explaining further Justice Scalia's approach to proximate cause).
241. *Freeman*, 503 U.S. at 496.
243. See id. at 101. In doing so, the Supreme Court returned to the causation standard articulated in *Dayton I* (not be confused with *Dayton II*, which adopted the causation presumption). See Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (*Dayton I*)
redressing through quality of education programs the systemwide reduction in achievement that the district court had found at the time of the initial remedy.244 Subsequently, the State challenged its continued responsibility for redressing the gap in achievement scores between African-American and white school children.

The Supreme Court held the district court in error for not determining the portion of the achievement gap due to the defendants’ unlawful activities.245 To the extent the gap in achievement scores was the result of factors other than de jure segregation, the remedy was not to address those effects, and the defendants were not responsible.246 The Court directed the district court on remand to determine what incremental effect defendants’ unlawful actions had on the achievement gap and only hold the defendants responsible for that portion.

The incremental effects standard was not only applied to a defined vestige of de jure segregation (the systemwide reduction in achievement), but also to the student population as a whole. The Court noted that some students had attended KCMSD schools operating under a school desegregation order for up to eight years and questioned whether these children were in need of any future, court-compelled compensatory education.247 This strongly suggested a time limit on certain school desegregation remedies, regardless of any continuing discrimination or racial inequities and regardless of the effectiveness of the remedy.

The Court's application of proximate cause was exacting. Another issue considered in Jenkins III was the remedial goal of desegregative attractiveness.248 This goal sought to increase the white student population of KCMSD by attracting white students living both within and outside the KCMSD boundary lines through the systemwide magnet programs and voluntary interdistrict transfers. In

(holding that lower courts “must determine how much incremental segregative effects these violations had on the racial distribution... as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations”). The incremental effects standard greatly lessened the reach of the pro-plaintiff aspects of Freeman v. Pitts, particularly the holding that it was acceptable to examine quality of education in determining unitary status. 503 U.S. 467, 492-93 (1992); infra Part II.B.2.c.

244. See supra Part I.B.1.b.
245. See Jenkins III, 515 at 100-01.
246. See id. at 101 (noting that the District Court had never identified “the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs”); see also id. at 102. (“So long as these external factors [beyond the control of the defendants] are not the result of segregation, they do not figure in the remedial calculus.”).
247. See id. at 102.
248. Desegregative attractiveness was first discussed supra note 202.
ruling that desegregative attractiveness (defined as an *interdistrict* remedial goal) exceeded the purely *intradistrict* violation, the Supreme Court had to consider the proximate cause between white flight and the violation. For if the violation caused white flight outside the school district boundary lines, then the remedy could likewise reach outside the school district boundary lines.

In considering the link between the violation and white flight, the Supreme Court required direct proof and held that white flight was not proximately caused by the violation. The district court’s factual findings on these matters were deemed contradictory.\(^{249}\) The Supreme Court essentially chose the fact findings by the district court of no interdistrict violation (meaning no violation with “substantial” effects outside the boundaries of KCMSD) and declared the idea of white flight as being part of the violation inconsistent with these findings. For defendants to have to redress white flight, the plaintiffs would have had to prove that the white flight was caused by the segregation, for example that white parents fled the school district because of disrepair in facilities. Plaintiffs in *Jenkins* III failed to demonstrate this. Significantly, the Court refused to consider white flight due to efforts to desegregate to be part of the original violation.\(^{250}\) The Supreme Court’s approach froze the effects of the violation to the time of the violation itself and failed to acknowledge that the effects of the violation can include effects caused by the remedy itself (i.e., white flight caused by the efforts to desegregate).\(^{251}\)

Under the causation presumptions, the Court assumed a world free of segregation if state discrimination and its effects were eliminated. Under the incremental effects standard, however, the Court allowed the possibility of segregation for which state and local officials are not legally responsible. In other words, the Court


\(^{250}\) The majority flatly ignored factual findings by the district court that defendant’s actions had caused the white flight. See Ford, supra note 205, at 1387; Joondeph, supra note 4, at 647-53.

\(^{251}\) The dissent, on the other hand, viewed white flight as an effect of *de jure* segregation. See *Jenkins* III, 515 at 161-64 (Souter, J., dissenting). White flight could be caused by *de jure* segregation or by the desegregation remedy itself. Both instances included causation by *de jure* segregation because the desegregation remedy only arises because of the *de jure* system. The dissent reasoned that this was not inconsistent with the district court’s finding of no interdistrict violation. For an interdistrict violation to occur, there must be a segregative effect in the districts surrounding KCMSD. Given that the predominately white schools, not part of any historical exclusion of students by race, were receiving more white students did not cause a violation in the receiving school districts. These “unitary school districts,” not a school district of “black” schools and “white” schools, incorporated these former KCMSD white students into their already unitary, predominately white school system. These additional students did not change the existence of a unitary school district. See *id.* at 161.
presumed that the world would not necessarily be free of segregation if official discrimination and its effects ended.

In sum, it is no longer enough for the unlawful actions to be a factor in the disparity for the defendants to be responsible for the entire disparity. Nor does the Supreme Court presume that any current segregation is the result of defendants' unlawful actions unless they prove otherwise. Defendants are only responsible for the incremental effects of their action, which will be narrowly analyzed. As a result, the right-remedy connection should have increasing importance in school desegregation cases. Before the rise of incremental effects analysis, in the heyday of causation presumptions, defendants were held responsible for all current disparities for which defendants could not prove their lack of responsibility; thus, the right-remedy connection had a minor role in determining the scope of the school desegregation remedy. The plaintiffs' "rightful position" was presumed to be a race-neutral or integrated world; the right-remedy connection had a negligible impact on the remedy. The incremental effects standard, on the other hand, is not premised on a race-neutral or integrated world, absent governmental discrimination, and holds the defendants responsible only for their contribution to present racial disparities. In this situation, the right-remedy connection should become increasingly "important" for the courts are now truly charged with determining the plaintiffs' rightful position—what the world would look like absent the effects of defendants' unlawful actions.

(3) A Recap of the Right-Remedy Connection

The right-remedy connection has long faced substantial criticism. In public law cases, the principle offers little guidance for determining the remedy because it depends on a right definable apart from its remedy and on a remedy arising from the right. Further, the right-remedy connection presumes a meaningful role for proximate cause and a remedy directed toward individuals, neither of which are present in public law cases. The standard of "make-whole" relief is unsatisfactory both at the stage of the initial remedy and at the termination phase. The Supreme Court has responded to this

252. Under both the incremental effects standard and the causation presumptions, the defendants can be attempting the same proof—the portion, or absence, of their responsibility for racial disparities. Yet, the standards are not identical. Under the presumptions, when defendants fail to prove that portion of the racial disparity for which they are responsible or fail to prove the absence of their responsibility for the racial disparities, the defendants are then presumed to be the cause of the entire racial disparity. Under the incremental effects standard, defendants' similar failures of proof would leave the court with no means with which to hold defendants responsible for any portion of the racial disparity.
criticism by adopting the principle in its current cases (including extending it to the termination phase) and by changing other principles that limited the role of the right-remedy connection. The Court has eliminated its reliance on equitable discretion and deference to district courts in devising the remedy. Further, the Court has subjected school desegregation to proximate cause.

C. Deference to Defendants

The Supreme Court's recent cases reaffirm another traditional principle: throughout the remedial process, state and local government defendants deserve deference. In doing so, the Court has adopted what Professor Susan Sturm defines as the "deferrer model of the judicial role." Specifically, courts should afford the defendants the first opportunity to propose the initial remedy, should afford that proposal deference, and should defer to the defendants when considering motions to modify the remedy. Although courts certainly exercise some judicial discretion in crafting the remedy, and although public law remedies depend in large part of discretionary choices, despite the Supreme Court's directives to the contrary, the only explicit allowance for discretion in the remedial process is now held and exercised by the defendants. Given that important remedial choices must be made—for no public law remedy is legally and logically compelled—and that courts have no meaningful standards with which to evaluate a remedy, deference to defendants cedes to the defendants exceptional control.

253. Reference to the deference to defendants in institutional reform litigation is first found in Brown v. Board of Education, 349 U.S. 294, 299 (1955) (Brown II) (stating that "school authorities have the primary responsibility for elucidating, assessing, and solving these problems"). The deference to defendants is designed to take into account the federalism concerns raised by public law remedies. The remedy, whether it is a relatively general order or a highly detailed order, will have an impact on local or state policy and fiscal matters. Even though the order is entered in response to proven violations of the law, the law recognizes that the local and state authorities still have a valid concern in managing their own affairs, and the remedy should take this concern into account. Deference to defendants is also based on competency concerns—that the defendants have more expertise than federal courts in devising appropriate remedies and will more effectively implement a remedy for which they had a role in drafting. See infra notes 355-56 and accompanying text.


255. The actual exercise of judicial discretion is discussed infra Part III.
Recent Supreme Court Cases

Deference to defendants was strictly enforced in Lewis v. Casey, the case concerning the right of access to the courts afforded to Arizona prisoners. The Supreme Court unanimously concluded that the remedial process failed to afford the defendant the appropriate level of deference and that this failure alone was reason enough to remand. In his dissenting opinion, Justice Stevens, however, placed more blame on the defendants for the faulty process. Specifically, the district court erred in appointing a special master to propose a remedy based on an order in an earlier, similar case involving the same defendants and a different prison facility. Instead, the district court should have afforded defendants the "first opportunity" to propose a remedy for the district court's consideration. Defendants' proposed remedy was then entitled to an unspecified level of deference as well.

The details of the district court's order also failed to show proper deference to the defendants. The Court held that "[o]ne need only

257. This case is first discussed infra Part ILB.1.a.
258. See Lewis, 518 U.S. at 363 ("The State was entitled to far more than an opportunity for rebuttal, and on that ground alone this order would have to be set aside."); id. at 398 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("[I] would remand simply because the District Court failed to provide the State with an ample opportunity to participate in the process of fashioning a remedy..."); id. at 410-11 (Stevens, J., dissenting) ("I also agree that the failure in that process 'alone' would justify a remand in this case.").
259. See id. at 411 (Stevens, J., dissenting) ("I emphatically disagree, however, with the Court's characterization of who is most to blame for the objectionable character of the final order. Much of the blame for its breadth, I propose, can be placed squarely in the lap of the State.").
260. See id. at 347, 363; see also Lawyer v. Department of Justice, 521 U.S. 567, 576-77 (1997)(emphasizing the importance of affording voting rights defendants the first opportunity to propose a remedy and of accepting that proposal so long as it is constitutional); Gluth v. Kangas, 773 F. Supp. 1309, 1309 (D. Ariz. 1988), aff'd, 951 F.2d 1504, 1512 (9th Cir. 1991)(setting forth the remedy used by the district court in Lewis). The defendants were the same in the two cases, and the Ninth Circuit had affirmed the earlier remedy. In the past, use of special masters in devising the remedy was relatively common. See, e.g., Chayes, supra note 13, at 1300-01; Sturm, supra note 4, at 1371-73.
261. See Lewis, 518 U.S. at 362-63. The Court held that "[t]he strong considerations of comity... also require giving the States the first opportunity to correct errors made in the internal administration of their prisons." Id. at 362 (quoting Preiser v. Rodriguez, 411 U.S. 475, 492 (1973)). The only possible limit on this opportunity is perhaps "obstructive tactics" by defendants, which did not occur in this case. See id. at 363 n.8.
262. See id. at 362-63.
263. See id. at 347-48. The 25-page remedial order was replete with details on what sort of library, legal assistance, and access was to be afforded the Arizona prisoners. The Supreme Court noted that the order specified "the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week),
read the order... to appreciate that it is the *ne plus ultra* of what our opinions have lamented as a court’s ‘in the name of the Constitution, becom[ing]... enmeshed in the minutiae of prison operations.”264

In *Rufo v. Inmates of Suffolk County Jail*,265 the Court established the standard for modifying the public law remedy and also emphasized the deference due to defendants, but again without specifying what the deference entails.266 In *Rufo* plaintiffs contested the constitutionality of the conditions of confinement afforded to pre-trial detainees.267 Of particular significance was whether the pre-trial detainees would be housed in single or double cells. The parties had entered into a series of consent decrees guaranteeing a new facility of single cells, and the district court had denied the defendants’ motion to modify the consent decrees, a motion filed after an increase in prison population, to house two pre-trial detainees in some of the single cells.268

The Supreme Court held that the district court’s legal standard...
for denying the proposed modification was in error, and the Court adopted a "flexible," two-step standard for allowing modifications.\textsuperscript{269} The first step entails examining the reason for the modification. Courts can grant requests for modifications for one of two reasons.\textsuperscript{270} Either a significant change of fact\textsuperscript{271} or law\textsuperscript{272} would support a modification.\textsuperscript{273} In examining the alleged change in fact or law, the court must determine whether the change was actually anticipated by the parties. If the change was anticipated, the alleged change would not be an appropriate basis for modification.\textsuperscript{274}

The second step consists of the party seeking modification demonstrating that the "proposed modification is suitably tailored to the changed circumstance."\textsuperscript{275} At this step, the defendants are entitled to deference.\textsuperscript{276} More specifically, the Court required that a

\textsuperscript{269} Id. at 380-81. The Supreme Court rejected the lower courts' use of the "grievous wrong" standard of \textit{United States v. Swift & Co.}, 286 U.S. 106, 119 (1932). As discussed supra note 214, the Court had likewise rejected the grievous wrong standard for determining when an institutional reform suit should end.

\textsuperscript{270} The Court developed a different standard for "minor changes in extraneous details... (e.g., paint color or design of a building's facade)... [that] are unrelated to remedying the underlying constitutional violation." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383-84 n.7 (1992). These changes should be made, in absence of party agreement, if "the moving party has a reasonable basis for its request." Id. at 383 n.7.

\textsuperscript{271} The Supreme Court set forth three instances when a change in facts may warrant a modification: "[w]hen changed factual conditions make compliance with the decree substantially more onerous... [;] when a decree proves to be unworkable because of unforeseen obstacles... ; or when enforcement of the decree without modification would be detrimental to the public interest... ." Id. at 384 (citations omitted). In \textit{Agostini v. Felton}, the Supreme Court held that the cost of complying with the original order was not an adequate factual change for modification because the parties and the courts had anticipated the costs of compliance at the time of the order. 521 U.S. 203, 216 (1997).

\textsuperscript{272} Two changes in the law warrant modification: when the law has changed to make legal what decree was designed to prevent or when an agreement was based on a misunderstanding of the underlying law. See Rufo, 502 U.S. at 390. A change in law can occur after an injunction is issued, even within the same case, when the legal principle upon which the injunction is based is no longer good law. See Agostini, 521 U.S. at 216-17.

\textsuperscript{273} See Rufo, 502 U.S. at 383.

\textsuperscript{274} See id. at 385; Agostini, 521 U.S. at 216. If the parties had anticipated the changed conditions, a party could still seek modification. If the moving party had "agreed to the decree in good faith, made a reasonable effort to comply with the decree," the moving party had the "heavy burden" of proving that the party "should be relieved of the undertaking under Rule 60(b)." Rufo, 502 U.S. at 385.

\textsuperscript{275} See Rufo, 502 U.S. at 391.

\textsuperscript{276} See id. at 392 n.14. Regarding deference, the Court noted that "the public interest and [c]onsiderations based on the allocation of powers within our federal system require that the district court defer to local government administrators, who have the primary responsibility for elucidating, assessing, and solving the problems of institutional reform, to resolve the intricacies of implementing a decree modification." Id. at 392 (internal citations and quotation marks omitted). In her concurring opinion, Justice O'Connor argued that "[d]eference to one of the parties to a lawsuit is usually not the surest path to
defendant's financial situation, which cannot affect whether a violation has in fact occurred, should be considered.\footnote{277}{See \textit{id.} at 392-93.}

Critically, the concept of deference has a different tone in the recent cases when compared to earlier cases noting deference to defendants. While earlier cases were written in terms of defendants' responsibilities to provide effective remedies,\footnote{278}{See \textit{Davis v. Board of Sch. Comm'rs}, 402 U.S. 33, 37 (1971); \textit{Brown v. Board of Educ.}, 349 U.S. 294, 299 (1955) (\textit{Brown II}).} \textit{Lewis} and \textit{Rufo} contain no such obligation on the defendants. Instead, deference now appears founded primarily on federalism and competency. Previously deference carried with it the responsibility for enduring an effective remedy, a responsibility practically ignored in the recent cases.

In sum, the Supreme Court has clearly instructed lower courts—both through its rhetoric and actions—that defendants are entitled to deference in determining the scope of the remedy, at the stage of both the initial remedy and of modification. That deference does not appear to come at the cost of affirmative responsibility for meaningful remediation.

\textit{(2) The Two Kansas City Cases}

The district courts in the two Kansas City cases followed Supreme Court precedent and afforded defendants great deference throughout the remedial process. As a result, defendants were able to exercise a great deal of control throughout the remedial phase.

In both Kansas City cases, the district courts requested that defendants propose their own remedies, and the defendants' proposed remedies were afforded great deference. In Kansas City, Kansas, the district court approved, with minor modifications, the defendants' proposed initial remedy.\footnote{279}{See \textit{supra} Part I.B.1.a.} In Missouri, the district court was certainly more involved in devising the initial remedy. But here, too, it was the defendants (both KCMSD and the State of Missouri) taking the lead in proposing the initial remedy.\footnote{280}{See \textit{supra} Part I.B.1.b.} The school district and State at the outset proposed much of the quality of education programs approved by the district court. Likewise, both defendants recognized the need for capital improvements, and KCMSD was directed to devise a specific plan. Finally, rather than imposing the court's own plan after rejecting the defendants' student assignment plan, the district court required the school district to develop a plan for desegregating the student body.

Further, in later remedial stages, both Kansas City courts were
primarily responding to the defendants' requests for modification. Although the courts in fact changed defendants' proposals at times, the proposals generally set the particular approaches to be decided, with the judge modifying particular details, usually in the name of efficacy. Thus, the district court judges occasionally became enmeshed in the details of the remedy, but most remedial decisions were made by the defendants.

In USD No. 500, the district court's involvement after the initial remedy was primarily limited to granting the defendants' unopposed motions for modifications. The defendants drove the remedial process and actively sought judicial involvement in the details of school administration that most directly affected student assignment throughout the district, even though only five schools were held to be unlawfully segregated. Rather than requiring particular remedial approaches, the district court would ask that the defendants consider a remedy.

In Jenkins, although the district court and Eighth Circuit were almost constantly involved in the modifications, most of that involvement was confined to either approving the school district's proposal or to revising details of the remedy—the presence of a ten-meter diving board, asbestos removal, and the like.

The Kansas City, Missouri case admittedly presented unusual incentives for the defendant school district. KCMSD, only nominally a defendant, had at one point developed a "friendly" relationship with the plaintiffs and was able to request remedies with the understanding that the state defendants would bear some financial responsibility (and that the district court would adjust the property tax levy to ensure payment of KCMSD's portion). Even with these incentives, however, it is still a defendant, not the court or the plaintiffs, that had a great deal of remedial power—even at times when a defendant has the incentive to propose expensive programs. The plaintiff class, acting alone, would never have been able to secure the remedial options KCMSD was able to achieve. Nor is it likely that a district court, acting on its own initiative, would have ordered such remedies.

D. Federalism

The Supreme Court's recent public law remedial decisions

281. See supra Part I.B.2.a.
282. See supra note 94 and accompanying text.
283. See supra Part I.B.2.b.
evidence a third principle: federalism counts. Most prominently, federalism is shown through the deference afforded to defendants, but federalism appears elsewhere in the remedial calculus.

(1) Local Control

For example, in the three cases concerning school desegregation remedies, Jenkins III, Freeman, and Dowell, the Supreme Court made "local control" an explicit remedial goal of school desegregation remedies. The Court has defined the "end purpose" of the suit as both the elimination of the violation and also the return of local control to school authorities. In one sense, the idea of local control can be entirely consistent with that of providing plaintiffs an effective remedy. The Supreme Court has not eliminated effective remediation from the remedial calculus, it has only added local control. In that sense, effective remediation and local control can occur at the same time. Once the remedy has achieved its remedial goal of eliminating the present day effects of past violations, then the case may end and local control can be restored. If that is the use of local control, then there is no limit on what a school desegregation remedy should do.

But by making the goal of local control explicit, rather than a natural consequence of a completed remedy, one assumes that the Supreme Court had something in mind other than providing that a case can end once the plaintiffs are afforded their remedy. By making the "end purpose" of the suit the return of local control, federalism becomes part of the remedial calculus.

Further, the other components of the remedial calculus,

285. By doing so, the Supreme Court has further committed itself to the approach defined by Professor Paul Gewirtz as "Interest Balancing." See Gewirtz, supra note 4, at 600 n.32; supra note 222.

286. But see Yoo, supra note 4, at 1133, 1176 (arguing that until Lewis the Supreme Court did not use federalism as a real constraint on public law remedial power).


288. Jenkins III, 515 U.S. at 89, 102 (holding that redressing the violation and returning local control should be the "end purpose" of the litigation); Freeman, 503 U.S. at 489 ("We have said that 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 that is operating in compliance with the Constitution . . . . Although this temporary measure has lasted decades, the ultimate objective has not changed—to return school districts to the control of local authorities.")

289. If this were the case, presumably the court would have said so rather than making local control a goal of the remedy. Justice Marshall's dissent in Dowell argued that making local control the goal of a remedy was wrong because it would be used to trump effective remediation. 498 U.S. at 267 (Marshall, J., dissenting). He believed that local control should only be relevant when examining feasibility. See id.
particularly the aim of eliminating the vestiges of segregation, are
difficult to access and attain, while local control is easy to attain. One
needs only to eliminate federal court jurisdiction. This strengthens
the possibility that local control will more readily be granted at the
expense of the other remedial goals.

In Jenkins III, the idea of local control was one reason for
striking down the remedial goal of “desegregative attractiveness,” the
goal of attracting white students to enroll in KCMSD. As
explained above, desegregative attractiveness had supported many
expensive remedies funded partially by the State of Missouri and by a
court-ordered property tax levy, and the school district became
dependent on court-ordered funding as a result. The school district
thus became dependent on continued court jurisdiction, and the
Supreme Court maintained that the goal of desegregative
attractiveness was therefore inconsistent with local control.

The use of federalism as a limit on particular remedial goals
should not, however, be overstated. Federalism has not been used
alone as a reason for mandating or excluding a particular remedy.
In Jenkins III, other justifications existed for striking down the
remedial goal of desegregative attractiveness—namely that the
remedy exceeded the scope of the violation. The private law
principle of the right-remedy connection has been more readily
employed to limit particular remedial goals, as discussed above.

Yet, because of the weakness of other school desegregation
remedial goals, defining the return to local control as an explicit goal
foretells a meaningful limit on remedial power, to the extent school
districts seek termination, as demonstrated in the two Kansas City
cases.

attractiveness is also addressed supra notes 202, 248-51 and accompanying text.
291. See supra Parts I.B.2.b, I.B.3.b.
292. See Yoo, supra note 4, at 1133 (“The Court does not appear to have ever
invalidated a structural remedy on the ground that it improperly intruded upon the proper
authority of state and local institutions.”). Yet, federalism is not ignored— in City of Los
Angeles v. Lyons, the Court, after holding that plaintiffs had no standing, further rejected
the availability of injunctive relief on the grounds of equity, comity, and federalism. 461
U.S. 95, 112-13 (1983); see also Rizzo v. Goode, 423 U.S. 362, 378 (1976) (noting the
“important considerations of federalism” as a reason to reject plaintiffs’ request for a
police complaint board to investigate police misconduct). It should also be noted that the
Court has used federalism in non-remedial areas such as immunity and abstention to
curtail the availability of public law relief. See Rowe, supra note 226, at 117; Gene R.
Shreve, Federal Injunctions and the Public Interest, 51 GEO. WASH. L. REV. 382, 406-10
(1983).
293. Jenkins III, 515 U.S. at 100.
294. See supra Part II.B.1.a.
(2) The Two Kansas City Cases

In both Kansas City school desegregation cases, the courts emphasized that the remedies should ensure the return of local control, which is easily more definable (and attainable) than eliminating the vestiges of discrimination, the other primary goal of school segregation.

In the Kansas suit, the district court appears from the beginning of the lawsuit to have been quite respectful of local control issues. The district court kept its intrusion on local control to a minimum throughout the duration of the case and terminated the suit when requested to do so, even though, as discussed in detail below, it was far from clear that desegregation had been achieved.

More telling is that even in Jenkins, the district court has focused its energies on ending the suit. The district court directed the school district to devise a plan for achieving termination—a mere eight years into the remedy and even before the Supreme Court decided Jenkins III. Local control was a driving force behind the approval by the district court and Eighth Circuit of the settlement agreement that guaranteed the dismissal of the State of Missouri in exchange for a sum certain. Both courts approved the agreement because of the need to discontinue school district reliance on state funding and to achieve local control quickly. Yet, the school district was in turmoil, with fundamental problems in its administration and in its curriculum and teaching. That the courts would focus so heavily on providing an end of the lawsuit—in face of judicially-recognized, extreme implementation problems caused by the defendants and the scope of what remains to be accomplished—suggests that school desegregation cases in active litigation will focus on termination, no matter what the status of implementation of the remedy.

E. Consent Decrees

While injunctive relief is guided by the right-remedy connection, the decline in equitable discretion, the deference afforded to defendants, and federalism, the Supreme Court's fourth principle of

295. In both the original liability and the final decision, the district court specifically emphasized the importance of respecting local control. See United States v. Unified School District No. 500, Kansas City (Wyandotte County), Kansas, 974 F. Supp. 1367, 1372 (D. Kan. 1997); United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 7 (D. Kan. June 8, 1977).
296. See infra Part II.F; see also supra Part I.B.3.a.
297. See supra Part I.B.3.b.
298. See id.
299. See Jenkins v. Missouri, 959 F. Supp. 1151, 1167-69 (W.D. Mo.), aff’d, 122 F.3d 588 (8th Cir. 1997); supra notes 135, 137.
public law remedial power allows parties to circumvent these limitations. The Court has continued to impose almost no limits on consent decrees (perhaps because the federalism concerns inherent in consent decrees are less than the federalism concerns in injunctive relief). As a result, consent decrees remain a powerful tool for redressing public law violations, and are plaintiffs’ most promising opportunity to have an effective voice in the remedial process.

Once the consent decree is held to fulfill mainly procedural considerations, a consent decree can mandate a broad range of activity. A consent decree is not confined to the minimum requirements of the decisional law at issue, and thus the parties can agree to terms that the court could not have ordered after establishing liability. The parties’ agreement provides the basis for the court’s authority to approve a consent decree. The parties may explicitly disagree about the defendant’s liability and still enter into a decree. Once a court approves a consent decree, it becomes judicially

300. Federalism concerns continue, of course, because federal court jurisdiction places state and local government defendants in the position of needing settlement. The Prison Litigation Reform Act (PLRA) has attempted to curtail the ability of parties in prison condition cases from resolving disputes via consent decrees. PLRA requires that any consent decree meet the same standard for injunctive relief. Defendants in prison condition cases can no longer deny liability but enter into a judicially enforceable settlement agreement. PLRA’s standards extend to existing consent decrees addressing prison conditions as well. See 18 U.S.C. § 3626(b)(2), (c) (1999); Mark Tushnet & Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 DUKE L.J. 1, 49-52 (1997). For analysis of the impact of federalism on consent decrees, see generally Jeremy A. Rabkin & Neal E. Devins, Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government, 40 STAN. L. REV. 203 (1987); Alan Effron, Note, Federalism and Federal Consent Decrees Against Governmental Entities, 88 COLUM. L. REV. 1796 (1988).

301. One noted public law proponent, Professor Owen M. Fiss, has been quite vocal in his opposition to consent decrees. See Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984). For those disagreeing, see, e.g., Peter M. Shane, Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion, 1987 U. CHI. LEGAL F. 241, 277-78; Laycock, supra note 25, at 1012-13; Sturm, supra note 25, at 982 n.7; Sturm, supra note 4, at 1390.

302. Before a court may even consider whether to approve a proposed consent decree, the decree must be deemed to have arisen from and attempted to resolve a dispute within the court's subject matter jurisdiction. See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986). Furthermore, the decree must be related to the case as pled, must be consistent with the intent of the law under which the complaint was made, and may not mandate illegal activity. See id. Courts of appeals have also developed a whole host of factors to consider when evaluating a proposed consent decree. See, e.g., Leverso v. Southtrust Bank, 18 F.3d 1527, 1531-34 (11th Cir. 1994). If the case is a class action, the court must also consider the fairness of the settlement pursuant to Federal Rule of Civil Procedure 23(e). FED. R. CIV. P. 23(e).


304. See Local No. 93, 478 U.S. at 522.
enforceable.

Two recent Supreme Court cases demonstrate the Court's continued commitment to allowing parties to circumvent the limits of injunctive relief. In Rufo, the prison condition case addressing the standard for modification, the Court protected remedial efforts that required more than that compelled by the Constitution by holding that the "proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." Further, the Court has continued to allow defendants to deny liability and still enter into a consent decree. Such ability is critical for defendants willing to undertake remedial actions but unwilling to admit guilt publicly. In Lawyer v. Department of Justice, the Court, in a 5-4 decision, re-affirmed the option of contesting liability but seeking a judicially enforceable remedy. In Lawyer, plaintiffs challenged the constitutionality of a voting district for a Florida state senate seat under the Equal Protection Clause. During pretrial proceedings, the defendants and defendants-intervenors, without the plaintiffs, entered into a settlement agreement. The settling parties "concurred that 'there is a reasonable factual and legal basis for plaintiffs' claim,'" but the district court did not enter liability findings; nor did the defendants make admissions as to liability. After holding that the proposed redistricting plan was constitutional, the district court approved the settlement.

The Supreme Court affirmed. The majority rejected the plaintiffs' argument that the district court should have first deemed the challenged voting district unconstitutional and then afforded the State the opportunity to devise a constitutional district. The Court agreed that the State should first be given the opportunity to devise the voting district (the result of which must be upheld so long as the plan is constitutional), but the majority characterized the State's decision to enter into a settlement agreement as that opportunity.

305. This case is first discussed supra Part IIC.1.
307. Congress has mandated differently in prison condition cases. See supra note 300.
308. 521 U.S. 567 (1997). The five-member majority was unusual. Justice Souter authored the majority opinion, and he was joined by Chief Justice Rehnquist and Justices Breyer, Ginsburg, and Stevens.
309. Plaintiffs were residents of a county partially covered by the challenged voting district. See id. at 571. Defendants and defendants-intervenors included the State of Florida, the state attorney general, the U.S. Department of Justice, the State Senate, the State House of Representatives, the incumbent state senator for the contested senate seat, and a group of black and Hispanic voters in the contested senate district. See id. at 571-72.
310. Id. at 572 (quoting the district court settlement agreement).
311. See id. at 575-78.
312. See id. at 578 (Since the State, through its attorney general, has taken advantage of the option . . . to make redistricting decisions in the first instance, there are no reasons
The majority also noted that the Attorney General and the lawyers representing the State House and Senate had authority to enter into the settlement agreements. Interestingly, four Justices would have ruled differently.

With injunctive relief, courts are directed to grant defendants deference. No such obligation arises at the consent decree phase. All parties to the proposal must be in agreement for the court to approve the proposal. Thus, with consent decrees plaintiffs have a direct

in those cases to burden its exercise of choice by requiring a formal adjudication of constitutionality.

313. Further, the majority held that the district court need not first hold liability before approving the proposed consent decree when a plaintiff does not agree to settle. Plaintiffs' consent was not necessary for the district court to have authority to order approval of a consent decree. The agreement did "not impose duties or obligations on an unconsenting party or 'dispose' of [plaintiffs'] claims . . ." Id. at 579 (citing Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986)). A court's ability to approve and enforce a settlement agreement is not dependent on a holding of liability. Rather, the court's authority comes from the parties' agreement, so long as the jurisdiction/procedural requirements are present. See id. at 579 n.6 Finally, the majority noted that a holding of liability would put the plaintiffs in their present position—the defendants and defendants-intervenors would be able to enter into the settlement agreement and the plaintiffs would have the opportunity to voice their objections to the plan. See id. at 580.

314. The dissent characterized the majority as allowing an "unprecedented intrusion upon state sovereignty." Id. at 583 (Scalia, J., dissenting). In some respects, the dissent's argument was factually narrow. The dissent focused on the lack of settlement authority held by the lawyers representing the state parties. This lack of authority of the parties to the settlement agreement meant that the district court lacked the authority to make the settlement agreement judicially enforceable. The dissent argued that the parties could not have made a contractually binding settlement agreement because the Florida Constitution vested redistricting authority in the state legislature and state supreme court, not in the state attorney general and not in private citizens. See id. at 585-86. Further, the dissent argued that the state attorney general did not have settling authority in the absence of liability and that it was not clear that the attorneys representing the state house and state senate had settlement authority. See id. at 586-87. As a result, the parties' agreement was not a binding contract, enforceable on a breach of contract claim. See id. at 586. The dissent's argument also went further. Justice Scalia argued that "[e]ven an authorized private agreement cannot serve as the basis for a federal apportionment decree." Id. at 587. Rather, to enter the settlement, the lower court should have first held a violation of federal law. The dissent further contended that the process that produced the settlement in the case was not the appropriate way to give the state legislature the first opportunity to devise a constitutional redistricting plan. Rather, the "normal legislative process[ ]" is the only way to afford the voting rights defendants their proper regard and deference. Id. at 589 ("The 'opportunity to apportion' that our case law requires the state legislature to be afforded is an opportunity to apportion through normal legislative processes, not through courthouse negotiations attended by one member of each House, followed by a court decree."). This aspect of the dissent's argument on its face is limited to the voting rights context. The dissent emphasized a particular need for careful attention to the judicial power to order a remedy in the voting rights context, where district courts only draw the voting boundaries as "a last resort." Id. at 586.
ability to influence the terms of the remedy, an ability significantly greater than that held by the plaintiffs with injunctive relief.

Yet, the plaintiffs' role should not be over-estimated. The consent decree option only arises if the defendants assent. Further, the defendants realize, both before and during consent decree negotiations, their options of foregoing the consent decree approach and of seeking injunctive relief, a process in which they receive deference.

In the Kansas City school desegregation cases, the parties often resolved disputes through consent decrees.315 The parties to the Kansas suit resolved almost all their remedial issues through consent decrees or motions by agreement for the last thirteen years of the suit. Even when the parties were contesting the extent of the defendants' liability, the parties in USD No. 500 were still able to resolve some issues through consent decrees. In Missouri, the parties also utilized consent decrees, but deep divisions between the State and KCMSD resulted in many issues being put before the district court. Yet, many issues were resolved via consent decree, including the highly significant agreement between the State and school district allowing the State's dismissal from the lawsuit. In short, the parties in the two Kansas City school desegregation cases found consent decrees to be a useful device for resolving remedial disputes. Further, only through consent decrees were the plaintiffs able to exercise much control over the remedial process.

F. Public Interest/Effectiveness

A fifth principle arises from the Supreme Court's recent treatment of public law remedial power: the interests of the public and plaintiffs are subordinate to defendants' interests.

In earlier public law remedy cases, the Supreme Court would consider, through the idea of equitable discretion, the impact of the remedy on the public interest.316 Public law cases by definition impact

315. See supra Parts I.B.2, I.B.3.
the public at large, thus they raise the question of how any public law remedy will address the public interest. Likewise, in the early stages of the two Kansas City cases, both district courts examined the impact of the remedy on the public. More recently, the idea of the public interest arose in only three cases, Rufo, Freeman, and Dowell, but in each of the three instances the public interest was expressed in terms of avoiding judicial interference with the defendants' operations. Thus, the public interest today is expressed as a federalism concern and is otherwise absent from the remedial calculus. The Kansas City cases demonstrate this as well. To the extent public interest was recognized in later stages, it was in terms of returning the school district to "local control," which is essentially a federalism issue.

One may wonder where the concern for an effective remedy—plaintiff's viewpoint—fits into the remedial calculus. Effectiveness, prominent in earlier public law remedial power cases, gets one

Board of Educ., 349 U.S. 294, 300 (1955) (Brown II) ("Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner."). But see Schenck v. Pro-Choice Network, 519 U.S. 357, 393 (1997) (Scalia, J., concurring in part; dissenting in part) (calling it unprecedented and "dangerous" to consider public interest as a basis for injunctive relief). Granted, the public's interests can be used to counter the interests of the plaintiffs. The current role of equitable discretion is discussed supra Part II.B.2.b.

317. For example, in the Kansas suit, the district court considered in the original remedial order the impact of the remedy on the community at large and on education. See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, No. KC-3738, at 8-9 (D. Kan. June 8, 1977); Jenkins v. Missouri, 639 F. Supp. 19, 45 (W.D. Mo. 1985), aff'd in relevant part, 807 F.2d 657, 712 (8th Cir. 1986) (noting the importance of the public interest in ensuring an effective remedy).

318. See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 381 (1992) ("[T]he public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.") (quoting Heath v. De Courcy, 888 F.2d 1105, 1109 (6th Cir. 1989)). The Court in Rufo also noted that while parties may agree to do more than the constitutional floor in a consent decree, a court should recognize the public interest in the litigation when ruling on a modification request based on changed conditions making it "more onerous to abide by the decree." Id. at 392. Further, the idea of the public interest appears in the termination cases, Freeman and Dowell, in that the Court notes the need to respect the impact of school desegregation on the public's interest in education. Freeman v. Pitts, 503 U.S. 467, 490 (1992) ("When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry . . ."); Board of Educ. v. Dowell, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.").

319. See supra Part I.B.3.

320. See, e.g., Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (Dayton II) ("[T]he measure of the post-Brown I conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."); Davis v. Board of Sch.
single mention in these recent cases. Only in *Freeman* does the Court speak directly of the need to ensure effective remediation for the plaintiffs.\(^{321}\) There, the Court noted with approval the lower court’s examination of quality of education, which took place years into the remedial process, on the grounds that inquiry into quality of education proved necessary to ensure that the plaintiffs are in fact afforded a meaningful remedy.\(^{322}\)

Further, although the Supreme Court’s approach to public law remedies is generally transubstantiate, the Supreme Court appears particularly impatient with the continued presence of school desegregation cases. The Court seems struck by the longevity of the remedies (since 1990 it has always begun its school desegregation opinions by stating the age of the lawsuit),\(^{323}\) despite the longevity of the violation and the usual delays in ordering and implementing the remedy.\(^{324}\) Significantly, the Court’s impatience is not demonstrated by concerns with a delay in providing plaintiffs an effective remedy, but by concerns with a delay in the return to local control. In this sense, it appears that the Court is “giving up” on the quest for desegregation.\(^{325}\)

As demonstrated in the two Kansas City cases, lower courts have heeded the message of the need to terminate school desegregation


\(^{322}\) Yet, to the extent *Freeman* opened the door to including quality of education and remedial approaches absent from the original order, *Jenkins* III’s approach to proximate cause set forth a significant limit with its incremental effects approach to current disparities. See supra Part II.B.2.c.

\(^{323}\) See, e.g., Missouri v. Jenkins, 515 U.S. 70, 73 (1995) (Jenkins III) (“This school desegregation litigation enters its 18th year.”); *Freeman*, 503 U.S. at 471 (“DCSS has been subject to the supervision and jurisdiction of the United States District Court for the Northern District of Georgia since 1969.”); *Dowell*, 498 U.S. at 240 (“This school desegregation litigation began almost 30 years ago.”); see also Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863, 864 (1993) (“Courts, which by their nature are used to finite projects with a definite beginning and a certain, usually prompt end, are increasingly uncomfortable with school desegregation, which appears to have no end.”).

\(^{324}\) See Jenkins III, 515 U.S. at 175 (Ginsburg, J., dissenting) (“The Court stresses that the present remedial programs have been in place for seven years. But compared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent.”).

\(^{325}\) Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1014 (1994) (“*Dowell* and *Freeman*, and especially their emphasis on returning schools to local control, indicate that the Court is declaring victory over the problem of school inequality and simply giving up.”).
lawsuits,\textsuperscript{326} even at the expense of effectiveness. This is most easily demonstrated with the treatment of faculty. To establish the racial identifiability of schools, school districts not only assigned children on the basis of race, but faculty as well. Thus, white students would attend schools to be taught by white teachers, and African-American students would attend schools to be taught by African-American teachers. To erase the racial identifiability of schools, both students and faculties had to be desegregated, and both Kansas City district courts so ordered.

In both Kansas and Missouri, substantial progress has been made in redressing the racial identifiability of a school caused by racial identifiability of its faculty. Yet, by no means has the remedy been entirely effective, and neither district court exhibited any concern with completely redressing the situation. In the Kansas City, Kansas case, for example, twenty-four out of forty-six schools did not meet the school district's self-imposed standard (plus or minus five percent) of what would constitute a desegregated faculty.\textsuperscript{327} Although most of the twenty-four schools would have met a plus or minus fifteen percent standard, it is telling that for all twenty-four schools, the schools with a disproportionate number of white teachers were majority white schools and the schools with a disproportionate number of African-American teachers were majority minority schools.\textsuperscript{328} The three schools that would have failed even a forty-point permissible range of deviation all had a highly disproportionate number of African-American faculties teaching student populations ranging from seventy-eight percent to ninety-nine percent African-American.\textsuperscript{329} Yet, the district court in Kansas ordered no additional efforts to desegregate the faculty.

Even in the Kansas City, Missouri case, where the court has been much more proactive, the defendants are held to a "close enough" standard. In 1997, the district court required that only eighty percent of the elementary schools meet a plus or minus fifteen percent

\textsuperscript{326} See supra Part I.B.3.


\textsuperscript{328} See id.

\textsuperscript{329} The school with the student population of 78\% African-American had a mandatory student reassignment plan for grades three through six; otherwise the school would have been even more racially segregated. See United States v. Unified Sch. Dist. No. 500, Kansas City (Wyandotte County), Kansas, 974 F. Supp. 1367, 1375-76 (D. Kan. 1997).
standard. Thus, twenty percent of the elementary schools have no mandated desegregation of faculty, and the remaining eighty percent of the elementary schools have a thirty-point span within which to desegregate their faculty. Remarkably, the degree of segregation in elementary faculty has actually increased in the recent years, exhibiting a diminished school district commitment to a desegregated faculty.

The lack of commitment to full faculty desegregation is telling. First, a faculty’s racial makeup sends a clear message to the community at large whether the school is “white” or “African American.” Second, the lack of desegregation cannot be explained or justified as beyond the control of the defendants. Unlike achievement or student assignment, which depend on a number of non-school district factors, school systems have complete control over where to assign their faculty. Even Justice Thomas, a vocal opponent of public law remedies, has noted the relative simplicity of faculty desegregation. The problem instead is one of commitment to desegregation in the face of the need for local control.

III. Directives for School Desegregation Remedies in the Twenty-First Century

Overall, the Supreme Court has taken a quite cautious approach to public law remedies. It continues to rely on standards articulated in the 1970’s. No member of the Court has heeded Justice Thomas’ call for jurisdiction to end as the remedy is ordered. Nor has the Court joined Justice Thomas’ claims that public law remedies should be rejected or severely limited because the judiciary lacks competency or because the remedies violate federalism, separation

331. See id. at 1166, 1168.
332. Justice Thomas has argued that remedies addressing student assignment, transportation, staff assignment, resource allocation, and activities are “fairly straightforward and [have] not produced many examples of overreaching by the district courts. It is the ‘compensatory’ ingredient in many desegregation plans that have produced many of the difficulties in the case before us.” Missouri v. Jenkins, 515 U.S. 70, 136 (1995) (Jenkins III) (Thomas, J., concurring). For Justice Thomas’ criticisms of public law remedies, see infra notes 333-335 and accompanying text.
333. Justice Thomas has argued that courts should terminate jurisdiction after ordering the remedy because continued jurisdiction “inject[s] the judiciary into the day-to-day management of institutions and local policies—a function that lies outside of our Article III competence.” Jenkins III, 515 U.S. at 135 (Thomas, J., concurring); see also Lewis v. Casey, 518 U.S. 343, 392 (Thomas, J., concurring) (arguing that the Court’s continued jurisdiction in public law litigation expands the federal judiciary’s power beyond Article III).
334. See Lewis, 518 U.S. at 386 (Thomas, J., concurring) (“The judiciary is ill equipped
of powers, or the Eleventh Amendment.\textsuperscript{335}

That caution should not, however, be mistaken for a Supreme Court committed to ensuring an effective public law remedy. Through five approaches, the Court has laid the groundwork for a very limited public law remedial power for the federal judiciary (with the possible exception of the Supreme Court itself), which works to the detriment of the plaintiffs.

First, the Supreme Court is limiting the role of lower courts in the remedial process. The Court no longer recognizes any meaningful equitable discretion to be exercised by any federal court in crafting the remedy and has ceased affording district courts appellate deference for their remedial decisions.\textsuperscript{336} This explicit limit is coupled with a hidden limit on lower courts' remedial authority. The right-remedy connection also limits the role of lower courts in the remedial process. The connection leaves lower courts with almost no guidance on how to craft the remedy.\textsuperscript{337} The test can reveal categories of relief,\textsuperscript{338} but even this can be manipulated through the definition of the right.\textsuperscript{339} Yet, the public law remedy clearly involves choice.

Given the indeterminacy of the right-remedy connection, some lower court judges may, at times, respond with remedies reflecting their personal viewpoint;\textsuperscript{340} the right-remedy connection can justify almost any remedy. That choice may or may not benefit plaintiffs' interests in an effective remedy and may or may not harm the defendants' legitimate interests in autonomy.

Certainly, both Kansas City courts ordered remedies arguably exceeding the scope of the violation. The court in \textit{USD No. 500}, for example, involved non-liability schools in the plan to desegregate to make [judgments over state programs and budgets], and the Framers never imagined that federal judges would displace state executive officials and state legislatures in charting state policy."; see also id. at 385 (noting that states cannot set necessary long-term goals or exercise flexibility to make reasonable short-term judgments because of structural injunctions); Jenkins III, 515 U.S. at 131 (Thomas, J. concurring) ("Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems.").

\textsuperscript{335} See \textit{Lewis}, 518 U.S. at 385-93 (Thomas, J., concurring); Jenkins III, 515 U.S. at 131-33 \& n.5 (Thomas, J., concurring). In Jenkins III, Justice O'Connor noted, among other points, some agreement with Justice Thomas' arguments regarding federalism and separation of powers. See \textit{id.} at 112-13 (O'Connor, J., concurring) ("The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills.").

\textsuperscript{336} See supra Part II.B.2.b.

\textsuperscript{337} See supra Part II.B.1.

\textsuperscript{338} See supra notes 194-202 and accompanying text.

\textsuperscript{339} See supra notes 180-90 and accompanying text.

\textsuperscript{340} See Fiss, \textit{supra} note 11, at 11, 51.
elementary schools and approved the defendants' request to place magnet programs in non-liability high schools. In *Missouri v. Jenkins*, the Supreme Court explicitly ruled that the lower courts had exceeded the scope of the violation with the remedial goal of "desegregative attractiveness," although in this case it was harder for a remedy to exceed the scope of such a broadly defined violation.

A second point, however, effectively restricts district courts as a general rule from imposing their own viewpoints. The Supreme Court has ruled that the lower courts should not craft the remedy, but should allow defendants first to propose the remedy and defer to the defendants whenever possible. Given the ambiguity of the right-remedy connection and absence of a meaningful remedial standard for judges to evaluate a remedy, lower courts are left with only one prescriptive standard from which to govern the remedy—let the defendants decide, except perhaps when it comes to details. As a result, most judicial "choice" is in fact the approval of the defendants' proposals, with at most minor changes.

The deference to defendants is a significant modification of traditional remedial principles, is unique to public law, and suggests a lack of commitment to the underlying substantive rights. Deference to the wrongdoer elevates the defendants' interests to an explicit part of the remedial calculus, rather than keeping the remedy focused on redressing the rights of the victims.

The Supreme Court has provided almost no guidance on what exactly deference to defendants entails. In *Lewis*, the Supreme Court was equally evasive in earlier school desegregation cases. In *Fletcher*, supra note 11, at 653 ("[T]he presence in the background of a court with the power to impose a decree if the parties are unable to agree almost necessarily affects the nature of the plan to which the parties are willing to consent."). Yet, the level of deference actually afforded to defendants' proposals greatly limits how much the defendants will craft their proposal to fit their predictions of the court's preferences.

341. See *supra* Parts I.B.1.a, I.B.2.a.
343. See *supra* Part II.C.
344. See *Fletcher*, supra note 11, at 664. Professor William A. Fletcher explains:

In crude summary, the greater the importance the Court has attached to a constitutional value, the more judicial remedial discretion it has been willing to tolerate as a consequence of its definition of the right that gives effect to that value. As a corollary, the Court has tried to reduce the role of discretion by its formulation or choice of legal rule, so that in those areas where it has been able effectively to eliminate or reduce remedial discretion the Court has been more willing to recognize constitutional rights than it might otherwise have been.

*Id.*

345. Granted, defendants' proposal can be influenced by what the defendants think the court will find acceptable. See *Fletcher*, supra note 11, at 682 and n.148 (noting that the Court "has not spoken significantly to permissible means of solicitation of and selection among [school]...."
Court noted with approval the approach of the district court in *Bounds v. Smith*, where the district made “minor changes” to the defendants’ proposed remedy. Logically the deference to be afforded defendants would surely cover minor details. Only items of particular significance would necessitate saying “no” to the defendants. Yet, under the regime of deference, “minor” matters may be changed—presumably the matters that are not that important—while “major” matters may not be changed—unless they conflict with the law. It is these non-“minor” matters that matter a great deal and should receive a high level of scrutiny, particularly given that the defendants are alleged or adjudicated violators of the law.

The limited role of judicial choice is reflected in the two Kansas City cases. For example, the choices made in the Kansas City, Missouri case reached a wide scope—the level of the property tax levy, expansive capital renovations, the number of additional teachers to staff the desegregation plan—but the orders, to a large extent, reflected the defendants’ (particularly the school district’s) remedial choices. The orders were not purely judicial choices. In the Kansas suit, the district court approved uncontested or joint motions and imposed no discretion or choice contrary to the defendants’ for the last sixteen years of the suit. The two district courts rarely changed overall remedial approaches, instead confining their analysis to particular remedial details (i.e., the number of schools to be included in a particular program or the letter sent to parents regarding the transfer program).

In sum, most judicial choice consists of approving defendants’ proposals. Not only are defendants explicitly afforded deference, but the lower courts have no meaningful standards with which to judge the proposals. Thus, the courts are rarely imposing their own views on the remedy, with the possible exception of details, but instead are usually approving the defendants’ views.

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349. See supra Parts I.B.1.b, I.B.2.b.
350. See supra Parts I.B.1.a, I.B.2.a.
351. See supra note 76.
352. See supra note 62.
353. By taking this approach “[t]he current Court appears motivated primarily by a desire to avoid judicial value imposition, a philosophy that makes judicial invalidation of government decisions problematic.” Chemerinsky, supra note 254, at 96. Thus, no longer can judges be accused of “designing and superintending major changes in institutions.” Diver, supra note 11, at 44; see also Fletcher, supra note 11, at 641 (describing the role of
Additionally, one hidden and significant consequence of this deference is the power it cedes to the defendant to define the right at issue. The contours of public law rights are greatly affected by the parameters of the remedy.\textsuperscript{354} In other words, it is through their remedies that public law rights have gotten their meaning. Thus, by deferring to defendants in the remedy, courts are granting some authority to the defendants to define the right.

This is particularly troublesome. On the one hand, good reasons to defer to defendants in the remedial process exist. Defendants may have expertise in determining the best way to restructure their organizations to comply with the statutory or constitutional law at issue.\textsuperscript{355} Defendants, the parties charged with implementation, may also more effectively implement a remedy that is not imposed unilaterally.\textsuperscript{356} But for no reason should defendants be afforded deference to define, even in part, plaintiffs' rights.\textsuperscript{357}

The defendants' remedial power is strengthened by their opportunity to articulate first the remedy. To afford defendants the first opportunity to propose a remedy cedes a significant power to the defendants. As a strategic matter, the first chance to persuade the judge and to set the agenda for discussion cannot be overemphasized. The proposal will likely set the tone for the entire remedial process, putting the plaintiffs in the position of asking for more, rather than putting the defendants in the position of explaining why they cannot undertake a particular task.

\textsuperscript{354} See supra Part II.B.1.a.i.
\textsuperscript{355} But see Diver, supra note 11, at 83.
\textsuperscript{356} See Anderson, Implementation, supra note 25, at 727; Diver, supra note 11, at 90; Sturm, supra note 4, at 1399 n.237.
\textsuperscript{357} But see Fletcher, supra note 11 at 694 ("The only legitimate basis for a federal judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body.").
Given that the defendants violated the law, one cannot assume that their requested remedy will be the best one to vindicate plaintiffs' rights. The defendants operate in the environment that permitted the violation in the first place, so one cannot safely presume that the proposed remedy will be principally concerned with vindicating plaintiffs' rights.

Recall also that the defendants, outside of the proposed consent decree context, usually have not admitted liability. Even if held liable, however, defendants may still believe that their policies and practices are lawful or—more commonly—that the policies and practices only need minor refinements. Yet, this is not always the case or even presumably so in the majority of cases. For this reason as well, defendants are less likely to propose a fully effective remedy.

A third result of the Supreme Court's approach further enhances the authority of defendants. Courts have little opportunity to articulate the end purpose of the lawsuit. Through the right-remedy connection and the deference to defendants, district courts are largely placed in the role of issuing negative injunctions (i.e., "do not violate the law"), plus very general orders regarding the requisite categories of relief. The courts then generally defer to defendants' remedial proposals, with the possible exception of courts questioning and countering particular details of the remedy. Through this process, courts typically approve the defendants' proposed remedial terms. But at no point is a court required to articulate specifically, for the benefit of the parties and the community at large, what the remedy is seeking to achieve. And defendants' plans are rarely so outcome-oriented. Even in the Kansas City, Missouri case, the district court never stated with precision the remedial goals.

Given the complexity of public law remedies, courts should not rely solely on the terms of a remedy as the definition of the goals of the remedy. Compliance with particular remedial terms guarantees only that a particular process has been followed, and not necessarily that the violation has in fact been cured. In fact, the difficulty of redressing the violation strongly suggests that modifications of particular remedial terms will prove necessary. Restructuring organizations is a process, and how to restructure successfully can rarely be predicted in advance of beginning that process.

The failure to define the specific goals of the remedies orients the lawsuit towards compliance with a remedial decree that may or

358. See Diver, supra note 11, at 83 ("The defendants will avoid considering any options that severely threaten established institutional routines or arrangements.").

359. See ORFIELD & EATON, supra note 31, at 255 ("Judge Clark indicated no plan of standards of improvement for academic achievement test scores, attendance, or dropout rates, nor did he specify any numerical targets for desegregation.").
may not be effective (both from the plaintiffs' and defendants' respective viewpoints). In addition, the failure to articulate expected outcomes allows the articulated expected outcome of local control to dominate the remedial process. This leaves parties confined, at best, to compliance with terms devised largely by defendants and to an eventual return of local control.

The standards for modification and termination on their face seek to ensure compliance with more than remedial terms, i.e. the objectives of the remedy. Yet, in practice, neither remedial stage provides a meaningful opportunity to define the purpose of the lawsuit. The modification standards can involve the judiciary in ensuring an effective remedy because they allow change if a remedy is ineffective in achieving its goal. Yet, the modification standards do not compel a court to state the precise goals of the lawsuit and presume that the court reviewing the requested modification already has an idea of the end purpose of the lawsuit.

The three-part termination standard likewise gives little assurance of an effective remedy. The termination standard explicitly (and rightly) inquires as to whether the end purpose of the lawsuit has been fulfilled, but given that the end purpose is never described, this requirement alone imposes little. Courts could use the termination stage as an opportunity to articulate what the lawsuit should achieve, but few have.

This leaves the other two elements of the termination standard, neither of which focus on effective remediation. For the lawsuit to be terminated, defendants must also show their good faith commitment to future compliance with the law, but proof of this good faith commitment often collapses with the third element: compliance with the terms of the remedy. Compliance with the remedy, in other words, is often taken as adequate proof of defendants' good faith commitment to complying with the law. Yet, compliance with the remedy is not akin necessarily to fulfilling the end purpose of the lawsuit. Defendants in large measure devised the remedy. Even if one would presume that the defendants had the incentive to propose and implement a truly effective remedy, the complexity of providing an effective remedy requires more than compliance with a set of static terms to ensure a successful remedy. Yet, the termination standards generally offer plaintiffs only a guarantee of "good faith" compliance.

360. See supra notes 265-77 and accompanying text.
361. The termination standards are discussed supra Part II.B.2.a.
362. In school desegregation cases, the termination standard asks whether the vestiges of discrimination have been eliminated. See Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991). In other public law areas, courts directly inquire as to whether the "end purpose" of the suit has ever been achieved. See supra note 210 and cases cited therein.
with the terms of remedial decrees, with little in-depth analysis of the achievement of the purposes of the lawsuit.

A fourth consequence of the Supreme Court's approach must also be noted. The Supreme Court has actually allowed itself to impose its viewpoint onto the scope of the remedy. The Court has done so by limiting the role of equitable discretion, emphasizing the right-remedy connection, while imposing on itself no obligation to defer to defendants' proposed remedies. Given that discretion most certainly exists, that the right-remedy test compels no particular result and that district courts are generally afforded no particular discretion on appellate review, the Supreme Court (or the final decisionmaker in the case) is given (although not explicitly) the discretion to impose its sentiment, so long as it need not defer to the defendants.\(^3\)

The Supreme Court itself has had no difficulty in rejecting defendants' proposed remedies. The Supreme Court rejected the remedies proposed by the defendants in *United States v. Fordice*\(^3\)

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363. See Chemerinsky, *supra* note 254, at 100 (describing the Supreme Court in 1988 as “appear[ing] to have avoided value choices by deferring to the political process, when in reality it has made a value choice in choosing such deference”).

364. Justice Souter argued in both *Lewis* and *Jenkins III* that the majority reached issues beyond that accepted for review, to the detriment of the parties supporting the remedies. Casey v. Lewis, 518 U.S. 343, 393-94 (1996) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (contending that by considering standing, the majority “reach[ed] out to address a difficult conceptual question that is unnecessary to resolution of this case, was never addressed by the District Court or Court of Appeals, and divides what would otherwise presumably have been a unanimous Court”); Missouri v. Jenkins, 515 U.S. 70, 139 (1995) (*Jenkins III*) (Souter, J., dissenting) (“[T]he Court's failure to provide adequate notice of the issue to be decided (or to limit the decision to issues on which certiorari was clearly granted) rules out any confidence that today's result is sound, either in fact or law.”); *see also* Jenkins v. Missouri, 959 F. Supp. 1151, 1153 (W.D. Mo.) (contending that “the Supreme Court strained legal reasoning to examine both the scope of the remedy and the voluntary interdistrict remedy prescribed by this Court”), aff'd, 122 F.3d 588 (8th Cir. 1997).

365. As discussed above, *supra* Part II.C, when reviewing public law remedies, the Supreme Court has afforded district courts no equitable discretion nor any deference from appellate courts. The Supreme Court also has had no difficulty rejecting remedial decisions made by lower courts. *See supra* note 228.

366. 505 U.S. 717, 729 (1992). Because the Supreme Court analyzed this case as one of liability and not remedy, *see id. at* 727-28, this case is not considered in the group of cases concerning the Supreme Court's concept of public law remedial power. Yet, the decision
(race neutral admission policies for Mississippi’s public colleges and universities), in *United States v. Virginia* [367] (the Mary Baldwin program for women interested in a state-funded military-style college), and in *Jenkins III* [368] (salary increases in school desegregation suit), without any discussion of deference to the defendants.

That the Supreme Court rejected particular remedies proposed by defendants should not, standing alone, be indicative that the defendants’ proposals are not entitled to deference. If most remedies originate with the defendants, then the class of considered cases will be dominated by remedies proposed by defendants. Yet, the Supreme Court’s own willingness not to defer to defendants suggests that perhaps the Supreme Court expects lower courts to defer to defendants, as demonstrated in *Lewis* and *Rufo*, [369] but that the Supreme Court holds no similar expectation for itself.

The viewpoint imposed by the Supreme Court is one of at least attempting to restrain the scope of public law remedies. The Supreme Court is tightly restricting judicial discretion; public law cases are not an opportunity for a judge to “do justice,” but to address only the exact violation proven—a concept with little prescriptive power other than the remedy should not appear to reach beyond the areas identified in the violation. More specifically, the message for school desegregation cases is that the cases have too long interfered with local control. Significantly, the Supreme Court has been able to effectuate a speedier return to local control not by emphasizing the need for an immediate, effective remedy, but by increasing the

does have some remedial implications, one of which is that the Supreme Court does not refrain from rejecting defendants’ remedies. In *Fordice*, the Supreme Court held that race-neutral admission policies, defendants’ requested remedy, were insufficient to desegregate Mississippi’s public colleges and universities. See *id.* at 729.


368. 515 U.S. at 100. The American Federations of Teachers and KCMSD sought the increase in salary. See *Jenkins v. Missouri*, 11 F.3d 755, 766 (8th Cir. 1993), rev’d, 515 U.S. 70 (1995). *Jenkins III* raises the question of whether a nominal defendant is entitled to the same level of deference afforded to other defendants. See *supra* text following note 108. One reason for deference—the specialized expertise of the defendants—is clearly applicable to even nominal defendants. But the other reason for deference—that our system of federalism vests primary responsibility in the area in state and local entities and officials—is not so neatly applicable to nominal defendants. The school district in *Jenkins III* sought federal judicial intervention; the district court had realigned the school district from plaintiff to defendant at the outset of the litigation. See *supra* notes 47-50 and accompanying text. In other situations, the nominal defendant may have started as the defendant, but in either instance, the defendant is not adverse to federal court intervention and supervision. But this lack of aversion does not alone answer the federalism issues presented in public law litigation. The Supreme Court did not reach this issue, instead failing to mention deference to the defendants at all.

369. See *supra* Part II.C.
importance of local control in the remedial process.\textsuperscript{370}

The Supreme Court has imposed significant limits on public law remedial power in a fifth way specific to school desegregation. The Court's incremental effects standard\textsuperscript{371}—that defendants are only responsible for continuing racial disparities to the extent their unlawful actions contributed to the disparities—foretells a time limit on school desegregation remedies.

The incremental effects standard in some respects makes sense: why should defendants be responsible for all current disparities in their school systems, given that the many disparities are multivariate in origin? School desegregation concerns eradicating the \textit{de jure} systems and their effects, but explicit exclusionary or segregative policies ended decades ago. Further, most pending school desegregation cases have already lasted decades. Thus, the causation presumptions appear to lessen in validity over time, thereby necessitating a shift to the incremental effect standard.

The problem, however, is with applying the incremental effect standard at the midpoint, or endpoint, at the litigation. Given the strong causation presumptions, parties had little reason to develop the record on the immediate effects of the violation, as demonstrated in both Kansas City cases, more than simply proving the types of effects encountered (i.e., facilities, achievement, faculty assignment).\textsuperscript{372} Rather than developing a record of the precise effects of the violation, the parties and courts focused on redressing all disparities, which were presumed (under applicable Supreme Court precedent) to be caused by the violation. Yet, a record of the precise effects of the violation at the time liability was determined (when the time period at issue was smaller) would be helpful in assessing the current effects of the unlawful system. To now determine the precise effects of the violation, usually at least a decade after the violation, is a quite difficult task, if not impossible\textsuperscript{373}—and unfair to plaintiffs who reasonably relied on the presumptions.

\textit{Jenkins}—in which the district court applied the incremental effects standard to the gap in achievement scores—aptly demonstrates the difficulty and potential unfairness of the incremental effects approach. The district court had initially held that the \textit{de jure} system had caused a systemwide reduction in achievement scores, but the court did not determine the precise reduction caused by the violation.\textsuperscript{374} Under the presumptions, the defendants were

\begin{itemize}
  \item \textsuperscript{370} See supra Part II.E.
  \item \textsuperscript{371} See supra Part II.B.2.c.
  \item \textsuperscript{372} See supra Parts I.A.1, I.A.2.
  \item \textsuperscript{373} See supra note 205.
  \item \textsuperscript{374} The district court's approach, in fact, was entirely in line with the causation
\end{itemize}
responsible for the entire disparity in achievement scores between African-American and white children, unless the defendants proved that their actions in no way contributed to the disparity.

Subsequently, the district court, at the direction of the Supreme Court in Jenkins III, had to determine the exact proportion of the existing disparity due to defendants’ unlawful actions. In some respects, the lack of definition of the violation at hand impeded this effort. If the Supreme Court had required the incremental effects standard at the time of liability ruling, then the Court would have had to define the exact effect defendants’ actions had on achievement scores, i.e., that defendants’ unlawful actions had caused, say, fifty percent of the gap in achievement scores. Then the present task would be to determine whether the defendants had eliminated half of the achievement gap. Although determining the original figure itself would be complicated by the change in students, the analysis would be easier than determining the connection between disparities in 1998 with violations held in 1983 because of the closer connection in time between the original violation and its immediate effects.

In other words, the incremental effects approach would make more sense if baseline data were available. The experts in Jenkins, presumably recognizing the lack of data to undertake the above described analysis, took a different, but flawed, approach. The experts determined what portion of the achievement gap was due to differences in socioeconomic status (SES) between white and African-American school children. The portion that could not be explained by SES was declared to be the result of race (hereinafter the “race percentage”). But it was not clear that the race percentage, or what part thereof, was the result of unlawful activity by the defendants. The district court, accepting the school district expert’s testimony, defined the race percentage as four percent to nine

presumptions. Under the presumptions, if the unlawful activity is a contributing factor for the disparity, the entire disparity is deemed to be the result of defendant’s unlawful activity, unless the defendants proved otherwise. See supra notes 233-34 and accompanying text.

375. See supra notes 242-52 and accompanying text.

376. Granted, determining that the achievement gap had been reduced in half would not necessarily prove that the defendants had redressed their half of the achievement gap. Other factors that contributed to the other half of the achievement gap may have abated, thus producing the reduction in the achievement gap. Further, the analysis in some respects is counterintuitive because the school children for which 50% of the gap was attributed to the defendants are not the same school children for which the reduction in 50% is assessed. Thus, proximate cause in general suffers in public law litigation because of the group nature of the rights at hand. See supra Part II.B.2.c.

percent of the achievement gap.\textsuperscript{378} In addition, the district court found an impact on achievement due to low teacher expectations connected to the violation—two percent to four percent of the gap—but failed to explain the connection between the low teacher expectations and the violation, other than stating that a connection existed.\textsuperscript{379} The district court then took the high end of both figures and defined thirteen percent of the gap as due to defendants’ unlawful actions. Finally, the district court noted that the gap in achievement generally increased the longer the students were in school and found that the defendants were responsible for the increase in the achievement gap over time.\textsuperscript{380} The district court therefore increased from thirteen to twenty-six the portion of the achievement gap for which defendants were responsible.\textsuperscript{381} The court failed to explain why the race percentage should be doubled and again failed to explain why the defendants’ unlawful activities (past or present) caused the gap generally to increase with the length of time the students are in the school system.

Although this type of analysis falls short of providing any reasonable assurance of how defendants’ past and present unlawful actions incrementally impacted on the achievement differences between African-American and white schoolchildren, it is questionable whether any better analysis exists. In all likelihood, the precise gap in achievement due to defendants’ unlawful actions is unknowable at this point (and perhaps at any point), even by the standard of preponderance of the evidence. The question who bears the burden is therefore crucial.

Yet, it is highly probable that the defendants’ unlawful actions impacted present day achievement in Missouri.\textsuperscript{382} First, the plaintiffs in \textit{Jenkins} presented evidence demonstrating an intergenerational effect on student achievement.\textsuperscript{383} Through a survey of parents who attended only KCMSD segregated schools and who had children currently enrolled in KCMSD, plaintiffs demonstrated a “significant relationship” between their parents’ segregated KCMSD experience

\textsuperscript{378} See id. at 1164.
\textsuperscript{379} See id.
\textsuperscript{380} See id. at 1164-65.
\textsuperscript{381} See \textit{Jenkins v. Missouri}, 122 F.3d 588, 598 (8th Cir. 1997); \textit{Jenkins}, 959 F. Supp. at 1165 (“It seems reasonable to this Court that the ‘race effect’ plays just as substantial a role in the increase that it did in creating the original gap.”).
\textsuperscript{382} \textit{But see} Epstein, \textit{supra} note 4, at 1115 (“We have long passed the time when corrections at an institutional level bear any relationship to the commission of any wrong to any individual victim.”).
and the students' achievement scores. Granted, correlation does not prove causation, but given the almost universal conclusion that parents' educational level affects their children's educational attainment, it appears quite likely that a parents' segregated, inferior education would impact on their children's achievement.

Further, KCMSD is clearly a troubled school district and misses the cornerstones of effective learning: the school has no district-wide core curriculum, some teachers have documented low expectations of African-American students, and teachers receive only "fragmented" staff development. Further, the school district has exceedingly high administrative costs and has had a remarkable number of superintendents in nine years—no less than ten, with the number continuing to increase. In short, KCMSD is clearly a troubled school district, and its children suffer as a result. This raises the question of whether the difficulties faced by KCMSD are the result of the de jure system. Certainly the school district demonstrates that money alone is not the path to educational achievement. But the abandonment of the school district by a majority of the city's population (demonstrated by the white flight and by the local electoral defeat since 1969 to increase the property tax levy) is certainly tied to de jure segregation, and this abandonment certainly has affected the effectiveness of KCMSD as a school district.

The attempt of the district court judge in Jenkins to apply the incremental effects standard demonstrates the difficulty of proximate cause in general. For no matter what the standard, connecting past discrimination with current disparities is difficult. The causation presumptions therefore place a difficult burden on defendants to prove their lack of responsibility for any current disparities. Most courts, in fact, barely attempt to begin to utilize proximate cause. Courts typically approach proximate cause as the court did in the Kansas City, Kansas case—stating the correct proximate cause standard, but not even attempting to engage in the required analysis. In terminating the suit over USD No. 500, for example, the district court in Kansas ostensibly placed on defendants the burden to prove that current disparities were not the result of their unlawful actions, which was consistent with causation presumptions, and that they had desegregated the school system to the extent practicable. Although

384. Id.
385. See id.
386. See id. at 1162.
387. See id. at 1160.
388. Id. at 1173.
389. See id.
390. See supra note 138.
391. See supra Part I.B.3.a.
USD No. 500 may have fulfilled this high burden, the district court actually applied a different standard. The district court concluded with little analysis that any current disparity was not the result of defendant's unlawful actions and emphasized the progress in producing desegregation (rather than desegregation to the extent practicable).

Because of the limits of proximate cause in school desegregation, the reparative aspect of the right-remedy connection—the idea that the remedy is to "make whole" the plaintiff—is increasingly difficult. Before the incremental effects standard, the causation presumptions defined the rightful position as a world free of racial disparities (absent defendants' proof to the contrary). The incremental effects standard, on the other hand, accepts a reality of racial disparities that defendants need not attempt to redress. If the defendants' role in creating the racial disparity cannot be proved by a preponderance of the evidence, a real possibility, then the defendants have no legal responsibility for any portion of the disparity.

Yet, plaintiffs are put in a unique position with the adoption of the incremental effects standard because they relied on the causation presumptions adopted by the Supreme Court. They therefore devoted little effort to define precisely the impact of defendants' unlawful actions, and that information today would be helpful in applying the incremental effects standard. In other words, it appears unfair to change the standards in a way detrimental to the plaintiffs. Nor does it appear clear that the presumptions have no foundation in reality.

This Part proposes changes to the Supreme Court's transsubstantive approach to public law remedies to improve the chances for effective remediation of de jure school segregation. For the proposed changes to be grounded in empirical reality, three facts must be recognized. First, the Supreme Court will not change the

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392. For the difficulties with proximate cause in public law litigation, see supra notes 203-06 and accompanying text.
393. See supra Part I.B.3.a.
394. See supra Part II.B.2.c.
395. See Ford, supra note 205, at 1387 ("Rather than attempt to create integrated institutions no one wants, the new segregationist asserts, the state must recognize the desire of its citizens to live and congregate in racially separate sphere."); Selmi, supra note 205, at 334 (arguing that the Supreme Court "has seen discrimination only when there are formal barriers predicated on race or when ostensibly neutral practices have led to the total, or near total, exclusion of African-Americans").
396. See supra notes 382-90 and accompanying text.
397. See Gewirtz, supra note 4, at 680 (contending that "legal scholarship... must address the complexities of acting within an imperfect, resisting, often vulgar real world"); Peter H. Schuck, Public Law Litigation and Social Reform, 102 YALE L.J. 1763, 1764 (1993) (arguing that "empirical reality must inform the normative theories that we
right-remedy connection. The Court has responded to the decades-old criticisms of the test by increasing its reach. Any proposal that seeks implementation must recognize that it must take place within the right-remedy connection. Second, school desegregation remedies will concern only modification and termination in the twenty-first century; the filing of new lawsuits is almost unimaginable. Thus, effective change should focus on these remedial stages. Third, for the reasons stated above, proximate cause provides little information today on the appropriate reach of the remedy. Recognizing these realities, I contend that changes can take place to provide a plaintiff with a stronger opportunity for a meaningful remedy.

The first change that must take place is a stronger definition of the school desegregation right—to what are plaintiffs entitled? If the right-remedy connection is to remain and, given that it is now too manipulable to guarantee vindication of plaintiffs' rights, one way to concentrate attention on effective remediation is to state clearly the expected outcomes of the lawsuit.

The present school desegregation right is too ambiguous to provide the expected outcomes. Brown I in 1954 held that public school children cannot be segregated by race, and Green in 1968 further held that Brown I meant more than race-neutral assignment policies. But since then, little further development of the school desegregation right has occurred. Other early school desegregation cases, although slow in imposing any immediacy on school desegregation remedies, paid little attention to the nature of the right at hand, jumping instead to considering the remedy. Further, the causation presumptions meant the court and parties could pay little attention to defining the exact contours of the violation and its effects.
in individual school desegregation cases. This is reflected in later school desegregation cases. To the extent the right has been defined, it has taken place almost entirely in the context of the remedy, a process over which defendants exercise a great deal of control. That the defendants should define, even partially, the rights of those victimized by their wrongdoing suggests weaknesses in any resulting right. The difficulties of proximate cause, compounded by the longevity of most suits, further complicates the ambiguities of the school desegregation right. In short, the development of the meaning of the school desegregation right, separate from remedial concerns, has been limited. Because of this, the right-remedy connection is especially troublesome in school desegregation; both the right and remedy can easily be manipulated under the right-remedy connection test, leaving plaintiffs with little concrete protection. The unique retardation of the development of the school desegregation right should require courts to develop further the contours of the school desegregation right, particularly if the right-remedy test is to continue.

As it now stands, courts often proceed with only a limited understanding of what the lawsuit is supposed to achieve. Courts have an understanding of the terms of the remedial decrees. But to the extent the remedy concerns not only a process and compliance with particular terms but also a particular result, there is confusion as to the desired result, except for the return of local control. The courts have little understanding of the actual degree of desegregation that should be achieved. The limits of proximate cause make a precise statement of the result difficult, if not impossible. The lack of clarity about the level of desegregation expected allows desegregation to be sacrificed for local control.

A clearer definition of what the lawsuit should achieve would enable courts to apply the modification and termination standards so that they are geared toward effective remediation. Both standards ask the right questions. Modification allows the remedy to change in the face of ineffectiveness, which is critical for success. The test for termination goes beyond compliance with a decree and inquires as to whether the suit has been successful. By its terms, the test is quite searching and is focused on the ultimate outcome of the action. The problems that arise with the modification and termination phases rest instead on the lack of a definable expected outcome (other than the return of local control). This allows deference to defendants and the return of local control to dominate modification and termination.

405. See Goldstein, supra note 147, at 28 (noting that the presumptions "enabled the Court to proceed directly from the violation to the remedy without clarifying the nature of the right involved").
Stating that a more concrete understanding of the desired outcome of the law suits raises a more difficult question: how should the expected outcome be defined? The existing approach, to the extent one exists, focuses on eliminating the vestiges of discrimination to the extent practicable. But that approach attempts to create a school district that cannot be legally defined, much less achieved and leads to frustration. The concept of "make whole" relief simply does not work.

Rather than applying a reparative approach to school desegregation, the remedial goal should be more prospective in its orientation. The outcome should be defined, throughout the modification and termination stages, in terms of barring discrimination today and in the future. These two goals can be justified on the past unlawful behavior; yet, the goals avoid the futility of proximate cause present in the reparative function of eliminating the vestiges to the extent practicable.

Focusing on eliminating current and future discrimination would require that defendants justify any current practice or policy that has a segregative effect or any disparity between African-American and white school children. Permissible justifications would include practicality and sound educational policy.

Stating the expected outcomes would be different than requiring compliance with a particular set of steps. Plaintiffs should be entitled

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406. See Chayes, supra note 13, at 1298-1302 (arguing that the public law remedy "seeks to adjust future behavior, not to compensate for past wrong"); Fiss, supra note 11, at 23 ("The structural suit seeks to eradicate an ongoing threat to our constitutional values and the injunction can serve as the formal mechanism by which the court issues directives as to how that is to be accomplished.").

407. Proof of intentional discrimination should not be necessary. The original violation provides the requisite intent.

408. This is similar to the liability standard articulated in United States v. Fordice, 505 U.S. 717, 729 (1991). In Fordice, the plaintiffs challenged Mississippi's attempts to desegregate its colleges and universities with the adoption of a race-neutral admission policy. Id. at 725. The Supreme Court held that race-neutral policies were an insufficient remedy and held that the defendants had to justify—either on practicality or educational grounds—current policies and practices that had a segregative effect and that were founded in the de jure system. See id. at 729. My proposal includes policies and practices that were not necessarily present in the de jure system. At the primary and secondary level, educational programs are continually changing from year to year; few (if any) programs and practices from the de jure system exist today. One major exception, of course, is the concept of "neighborhood" schools. That educational programs change should not negate the strong possibility of continuing discrimination. Further, the chance of being able to demonstrate that a policy or practice was present pre-1954 is slim forty-plus years later.

409. For example, bilingual programs certainly have a segregative effect, but such programs can be justified on the grounds that they are the best means of teaching English to non-English or limited-English speaking students.
to an effective remedy, not compliance with a set of inputs which are more or less chosen by the defendants. Thus, the court would state particularly what the remedy is supposed to produce, with input from the parties, but no obligation to defer to one party.

Doing so can easily take place in pending lawsuits and would involve all district courts overseeing pending school desegregation cases to devise the expected outcomes. To a certain extent, the district court in Jenkins undertook similar measures when approving the settlement agreement between the State and the school district.\textsuperscript{410} Then it set forth what it expected the school district to achieve in the next three years, and the expectations were expressed in terms of outcomes.

Finally, district courts should recognize their own role in exercising choices that are inherent in school desegregation remedies, rather than completely ceding that deference to the defendants.\textsuperscript{411} Courts certainly exercise discretion, but that discretion presently focuses primarily on the details of the remedy, as demonstrated in the two Kansas City cases. By doing so, courts cede too much control over the remedy. Although there may be reasons to defer to defendants as to the details of the remedy, there is no reason to defer to defendants in setting the expected outcomes of the lawsuit. Court systems currently have the responsibility of informing the parties and the public what the judiciary is attempting to accomplish through its jurisdiction—not the defendants.

In the two Kansas City cases, this approach would have changed the remedial process so that it more clearly focused on remediating plaintiffs' rights, which is the proper foundation for all remedies. In the Kansas suit, \textit{USD No. 500}, the district court would have stated during the modification and termination the lawsuit's expected outcomes. This would be done on a prospective basis: what characteristics should the school district achieve? This would expand the focus of the remedial process from the school district's compliance with the decree to include the attainment of the needed outcomes.

In the Missouri suit, Jenkins, the district court was clearly interested in outcomes until recently. This proposed new approach would reorient the court to ensuring that the desire for local control does not come at the expense of effective remediation.

Remedial uncertainly in the two Kansas City cases would still

\textsuperscript{410} See supra note 137.

\textsuperscript{411} See Fallon, supra note 13, at 46 ("Standards of remedial propriety probably never should be cast as determinate rules; trial court discretion seems unavoidable within the law of remedies."). For a discussion of the benefits of judicial oversight of constitutional issues, see Chemerinsky, supra note 254, at 85-86.
remain. School desegregation remedies will continue to reflect choice in the above approach, particularly when defining the expected outcomes of the lawsuit and in determining whether disparities can be justified on the grounds of practicality or sound educational policy. Yet, given the increasing importance of local control and almost meaningless current definition of plaintiffs’ rights, plaintiffs must be afforded a firmer foundation or their rights will never be vindicated.412

By requiring courts and parties to engage in a process by which the expected outcomes are explicitly stated, plaintiffs’ rights, as expressed in the expected outcomes, will be harder to discount in the name of local control. Further, the expected outcomes will focus the defendants’ efforts toward what needs to be achieved. This in turn would create attention on outcomes, rather than compliance with particular remedial terms. Thus, remedial decrees would not take on a life of their own, whereby compliance occurs despite obvious educational or effectiveness concerns. This will encourage defendants to evaluate their progress toward goals, rather than applying outdated remedial terms. Finally, this approach will lessen the need for judicial involvement in the details of the remedy. Previously, the details of the remedy were critical because the lawsuit focused on compliance with the terms of the decree; therefore, the number of teachers, the cluster configurations, and the like were critical because the decisions were often the only real opportunities to impact desegregation. When setting goals that are actually enforced, plaintiffs and courts can monitor the defendants’ progress, and can certainly critique that progress, but it would remain the defendants’ responsibility to achieve the goals. Additional remedial devices would need to be considered to the extent defendants failed to meet their goals.

Justice Marshall in *Board of Education v. Dowell* expressed understandable concern with not focusing remedial attention on eliminating the vestiges of discrimination to the extent practicable.413 Yet, focusing on present disparities effectively achieves what the causation presumptions required—defendants must explain any current disparities. The end result is decidedly the same, but the method of arriving there through this Article’s proposal is more

412. Or at least if the rights are not to be vindicated, that the courts be forced to acknowledge that the goals of the remedy will be limited. As it stands now, rights may not be vindicated, but that reality is obscured by discussions of local control or by senseless proximate cause analysis.

413. 498 U.S. 237, 261 (1991) (Marshall, J., dissenting) (“By focusing heavily on present and future compliance with the Equal Protection Clause, the majority’s standard ignores how the stigmatic harm identified in *Brown I* can persist even after the State ceases actively to enforce segregation.”).
honest, and thus offers plaintiffs stronger protection. It is more honest because it does not pretend the "make whole" relief is possible or that proximate cause actually reveals much in school desegregation litigation.

Moreover, placing the burden on defendants appears appropriate because they created the de jure system that causes some of the current remedial uncertainty, because they have the requisite evidence and knowledge to examine current disparities, and because school districts should never accept racial disparities. For by accepting racial disparities, school districts would be implicitly stating that education can have no impact on increasing achievement or achieving racial balance in school buildings and school classrooms. In other words, defendants would have to abandon their very function in our society.

This is not to argue, however, that a school district can only achieve dismissal of the lawsuit by actually achieving racial parity. Granted this proposal takes as a presumption that in a race neutral world striking disparities would not exist. But the argument does not assume that the defendants can create a race neutral world, only that judicial attention should focus on requiring explanations of inequities, rather than excusing inequities in the name of local control.

In crafting a prospective definition of the end purpose of the lawsuit, courts must also recognize that the issues surrounding school desegregation necessarily will touch upon almost every conceivable aspect of school administration. Thus, in a sense it is not surprising that in both Kansas City cases, the remedy's scope grew after the initial remedy and included a wide cross-section of school administration.

For example, in Kansas, although the initial remedy was quite limited, through defendants' requested modifications the remedy reached grade configuration, magnet curriculum, redrawing of attendance lines, changes in clusters and pairs, school closing, new school construction and sale of real property. The court in Jenkins likewise was involved in a wide range of matters: asbestos abatement and school security are the matters that appear most tangentially related to school desegregation. Even matters directly related to the initial remedy have a broad reach. The Missouri district court, for example, had to decide whether Central High School needed a ten-foot meter diving board and an additional coach to support the

414. This is consistent with the compensatory damage rule that defendants are responsible for uncertainty in the extent of damages caused by their unlawful actions. See LAYCOCK, supra note 166, at 135.
415. See supra Parts I.B.1.a, I.B.2.a.
416. See supra Parts I.B.1.b, I.B.2.b.
school's Classical Greek magnet theme, which includes an athletic emphasis and which was ordered to increase achievement and attract non-minority students to KCMSD.\footnote{See id.}

The range of remedies should not be mistaken for a lack of remedial focus. Even the most limited school desegregation plan will touch upon a wide cross-section of school administration.\footnote{See Fiss, supra note 11, at 3 ("In time it was understood that desegregation was a total transformational process in which the judge undertook the reconstruction of an ongoing social institution."); Leubsdorf, supra note 174, at 82 ("Removing discrimination and its effects from a complicated school system is a task so diverse that many measures can be justified as promoting it.").} For example, deciding that a school should operate a magnet program to desegregate schools raises the following questions: what curriculum or magnet theme will best desegregate the school; what changes in facilities are necessary to accommodate the curriculum and magnet theme; how should teachers and administrators be selected for the magnet program; how should the magnet program be funded; how should students be recruited to apply for admission; how should students be selected for admission; should the school employ racial quotas; how should students be transported to the magnet school; and to what school should children currently enrolled in the proposed magnet be sent (the answer to which depends on current and anticipated facilities, current and anticipated student enrollment patterns, current and anticipated traffic patterns, and current and anticipated student housing patterns).

The answers to the questions will continually change, as particular approaches prove ineffective from the standpoint of desegregation, practicality, or educational excellence. The answers will also change as the school district changes facets of its operation in response to changes in educational theory or demographic changes. For example, as demonstrated in Kansas City, Kansas, a decision to change grade configuration of middle schools will necessarily involve changes in a desegregation plan involving the grades and facilities at issue.

In short, school desegregation remedies will necessarily involve a wide variety of school administration. School desegregation remedies may falsely appear to suffer a lack of focus, to be touching upon every conceivable facet of school desegregation. Yet, the reality of school administration compels that even straightforward remedial goals will reach a wide cross section of issues.

**Conclusion**

Approximately one out of ten school districts presently operate
under school desegregation court orders.\footnote{See Armor, supra note 16, at 166 (estimating that 13% of public schools operate under court-ordered school desegregation plans in 1991-1992 school year).} Within these orders, strong race conscious remedies continue to be possible. Existing school desegregation decrees also influence social policy, reaching beyond the idea of integrating student bodies.\footnote{For example, a federal district court ruled that Proposition 227, which limits bilingual education in the State of California, conflicts with outstanding remedial orders in the San Jose school desegregation suit. The court therefore held that Proposition 227 could not be implemented in the San Jose public schools. See U.S. Judge Rejects English-Only Measure, Wash. Post, Aug. 19, 1998, at A18.} The Supreme Court is attempting to limit substantially the reach of school desegregation remedies, in ways detrimental to the victim class, through its conception of public law remedial power. Solving this problem will be far from easy. To begin that process, this Article seeks to unmask the remarkably well hidden power that defendants have in the remedial process and to provide practical directives for building a stronger foundation for affording plaintiffs an effective school desegregation remedy.

Specifically, this Article argues that the expected outcomes of the school desegregation suit should be clearly articulated. This will make it more difficult to allow local control to trump the need for effective remediation and will advise the community at large as to what are the reasonable expectations from the litigation. As the process now stands, plaintiffs are provided only a promise of a “close enough” compliance with remedial terms chosen by the defendants, which may or may not be effective. This Article places on the courts the duty to articulate the expected outcomes, for it is a clear role of the judiciary to state the objectives of any remedial decree. Finally, this Article seeks to have the outcomes defined in a meaningful fashion—that our school districts, operating under court order, justify (either on practicality or on educational policy) any practice that segregates school children.