Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status

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TABLE OF CONTENTS

I. Introduction ............................................. 283
II. Exposition ............................................. 291
   A. Jenkins III ........................................ 291
   B. Overview of Desegregation Scholarship: Discretion, Capacity, and Legitimacy .... 295
III. The Evolution of Equity .................................. 300
   A. English Equity .................................... 302
   B. American Equity .................................. 306
   C. Equity and Desegregation ......................... 313
IV. Rights and Interests .................................... 318
   A. Introduction ...................................... 318
   B. Hohfeld .......................................... 326
   C. Interest Theory of Rights ........................ 333
   D. Rights Theory Applied ........................... 337
V. Conclusion .............................................. 354

I. INTRODUCTION

Brown v. Board of Education (Brown I) was decided almost a half
century ago, but there has been renewed interest in desegregation jur-
risprudence in recent years. In the 1990s, the Supreme Court de-
cided a trilogy of cases, all of which dealt with standards for terminating desegregation decrees. These cases purported to explic- 
icate the standards to be used by district courts in determining whether and to what extent a desegregation order could be termi-
nated; yet, these standards continue to be difficult to interpret and apply. At the same time, members of the Supreme Court have shown increasing frustration with the length, complexity, and seemingly endless nature of these remedies. This raises the possibility that the near half-century attempt to remedy the effects of *de jure* school segregation might come to an end because the Court has finally had enough, and not because of a consensus that the ongoing effects of seg-
regation have been substantially eliminated.

Currently, there are well over 100 school districts in the United States under court-ordered desegregation decrees. The purpose of desegregation was clearly remedial when the Supreme Court first mandated it in 1954; yet, as this Article will argue, after its landmark decision in *Brown v. Board of Education*, the Court was never clear about what exactly was being remedied. As a result, there is no coherent theory to cover the current problem of figuring out when “unitary” status has been achieved and a district court can withdraw its supervision of a school district. The notion of unitary status is now little more than an assertion, as opposed to a description of either a state of affairs that must be attained or a procedure for identifying that state of affairs. This means not only that district judges have little guidance, but also that litigants and potential litigants have little ability to predict how a district judge will rule on the issue of unitary status.

Although the Supreme Court has insisted for nearly fifty years that the scope of the violation in desegregation cases must determine the scope of the remedy, it has not clearly delineated what the scope of

4. See, e.g., Jenkins III, 515 U.S. at 121 (Thomas, J., concurring); Freeman v. Pitts, 503 U.S. 467, 500-01 (1992) (Scalia, J., concurring).
5. Cf. Tushnet, supra note 2, at 767.
6. Parker, supra note 2, at 1157.
7. See Jenkins III, 515 U.S. at 123. As Wendy Parker has cogently argued, “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.” Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 Hastings L.J. 475, 555 (1999).
that violation is. Is it racial isolation? Is it stigma? Is it the provision of unequal educational opportunity? Or is it, as some have argued, the opportunities lost without the networking support of a white community? The Court's ambivalence about what harm desegregation was actually remedying doomed desegregation by exposing it to future claims of illegal affirmative action. Put another way, if the Court cannot articulate the purpose of desegregation and what it is intended to remedy, then trial court judges do not have the necessary information to know when the remedy is achieved and termination is appropriate. Nor can they properly judge whether any particular program, whether court-ordered or voluntary, is properly remedial or still based on an illegal classification of race. As it stands now, the Supreme Court's affirmative action jurisprudence, and the presumption of invalidity that accompanies the application of strict scrutiny, tends to tilt the balance against desegregation programs. One way to approach this conundrum is to argue, as many have, that diversity is a compelling state interest. Another way is to try to refine what we mean by remedial in the context of desegregation by more carefully and specifically articulating what exactly the relevant, remediable effects of segregation are or ought to be. This Article adopts the latter approach.

There are two ways in which desegregation efforts are currently being challenged in the courts that raise this remedial conundrum. In some cases, either parents or school districts themselves petition the court for termination of existing court-ordered desegregation decrees on the grounds that the remedy has been completed and the district

9. See, e.g., Balkin, supra note 2.
10. See, e.g., Richard A. Epstein, The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri, 84 CAL. L. REV. 1101, 1118 (1996) ("[D]esegregation cases have long since passed the point where they can usefully be described as remedial.").
has achieved "unitary status." In order to demonstrate unitary status, the petitioning party has to demonstrate that "the vestiges of segregation have been eliminated to the extent practicable," and that the school board has demonstrated good faith compliance with the desegregation decree. The primary issue in these cases is identifying whether any vestiges of segregation remain and whether a school district has achieved "unitary" status.

In the other cases, plaintiffs claim that voluntary efforts to desegregate school districts—efforts which often have their origin in policies developed while the district was under a desegregation order and then continued after termination of the order—are unconstitutional because they involve the State in making classifications based on race. A number of these types of cases have been brought by children who were unable to get into the public schools of their choice, usually magnet or other special public schools, because of continuing desegregation policies in their school districts. These cases have heralded the convergence of desegregation jurisprudence with affirmative action jurisprudence. Because judges, following the Supreme Court's current standard for reviewing governmental use of racial classifications (in the absence of a court order), are required to apply strict scrutiny to a school district's use of race in student assignments, a district court reviewing a voluntary plan to desegregate a public school district must be persuaded that the racial classifications serve a compelling state interest. As a result, in the cases where there is no ongoing desegregation order, the courts have grappled with the question of


15. Id. at 492.


whether diversity can qualify as a compelling state interest. The courts which have addressed this in the context of elementary schools have mostly taken a discrete pass, although a few courts have been receptive to the argument that diversity and racial balance are compelling state interests.

The Court's failure to articulate a clear standard for terminating desegregation decrees has left each court hearing a unitary status claim to figure out for itself what a vestige of segregation is and whether it is still present in the school district. A recent example of this is Belk v. Charlotte-Mecklenburg Board of Education, the Fourth Circuit's en banc review of Capacchione v. Charlotte-Mecklenburg School District, which was the termination case that reopened the 1971 Swann case in which the Supreme Court for the first time approved busing as a remedy for segregation. The plaintiff in Capacchione was a girl of Hispanic and Caucasian origin who was denied admission to a magnet school on the basis of race. The magnet school was opened by the school district without seeking court approval and clearly used racial preferences, even quotas, in its admissions deci-

19. See Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999), cert. denied, 529 U.S. 1019 (2000); Hunter ex rel. Brandt v. Regents of Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).
20. See Wessmann, 160 F.3d at 790; Eisenberg, 197 F.3d at 123.
22. 269 F.3d 305 (4th Cir. 2001), cert. denied, 122 S. Ct. 1538 (2002).
23. 57 F. Supp. 2d 228 (W.D.N.C. 1999).
The plaintiff claimed that because the magnet school was not approved by the court supervising the district’s desegregation efforts, the magnet school’s admissions program was outside of the then-operating desegregation decree, and thus violated her right to equal protection. Capacchione’s challenge to the admissions program at the magnet school led to the reopening of the *Swann* case and the question of whether termination of the *Swann* order was required. Thus, Capacchione had two potential factual bases for her claim: that the admissions program was beyond the scope of existing orders and therefore subject to strict scrutiny because it was not remedial, or alternatively, that the district had achieved unitary status and any continuation of racial preferences in school assignments was therefore subject to strict scrutiny.

The district court addressed the plaintiff’s claims by using what has come to be known as the *Green* factors. The *Green* factors are six areas that any desegregation order should address: student assignments, faculty, staff, transportation, extra-curricular activities, and facilities. The *Capacchione* court’s analysis of these factors centered on the question of racial balance (i.e., had racial balance been accomplished as to these factors). The question of how racial balance vindicated an interest previously violated by segregation was not addressed. The district court’s analysis in *Capacchione* illustrates how, in the termination cases, as in the original desegregation cases, simplicity of the racial balance test still encourages courts to use it without explaining how it serves to restore the plaintiffs to their rightful position, even while admitting, as the *Capacchione* judge did, that “[a] court must constantly anchor itself in the constitutional violation and must not get caught up in bean-counting.” The *Capacchione* court did not attempt to explain why the existence of racial balance would vindicate the rights and interests of the victims of segregation.

Based on its analysis of the *Green* factors, the *Capacchione* court found that the school district had complied with the court-ordered desegregation plan, which had been in force for almost thirty years, and had eliminated the vestiges of discrimination to the extent practicable. Having determined that the school district had achieved unitary status, the court went on to find that the admissions program for the magnet school could not survive strict scrutiny because, even if diversity were a compelling state interest, the way in which the district operated its magnet school admissions policy was not narrowly tailored.

26. *Id.* at 243 (citing *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968)).
27. *Id.* at 244.
28. *Id.* at 290.
On appeal, a panel of the Fourth Circuit reversed the district court's rulings on the issues of unitary status and the use of strict scrutiny in reviewing the magnet school's admissions program; however, the Fourth Circuit then vacated the panel opinion and subsequently heard the case en banc. This time, the Fourth Circuit affirmed the district court's unitary status finding.

The most contested portion of the district court's opinion involved the first Green factor: whether the current racial imbalance in some of the district's schools was a vestige of segregation or whether it was caused by what the court viewed as independent factors, such as changing demographics.

The panel opinion in Belk had held that the racial isolation of certain schools in the district was a vestige of segregation, thereby preventing termination of the desegregation order:

Uniformity in the racial composition of a given school was the hallmark of official discrimination, "for under the former de jure regimes racial exclusion was both the means and the end of a policy motivated by disparagement of, or hostility towards, the disfavored race." Court-ordered desegregation was designed to meet the enemy head on; the long-term stability of attempts at racial balancing in student assignment is often seen as the most conspicuous indication of the courts' success (or lack thereof) in combating the underlying societal evil.

The en banc court saw the question of the imbalanced racial composition of some of the schools differently:

Long periods of almost perfect compliance with the court's racial balance guidelines, coupled with some imbalance in the wake of massive demographic shifts, strongly supports the district court's finding that the present levels of imbalance are in no way connected with the de jure segregation once practiced in CMS [Charlotte-Mecklenburg Schools].

As to the second issue of whether the magnet school's admissions program was unconstitutional, a majority of both the panel and en banc courts drew a bright line distinction between school districts subject to ongoing court orders and school districts that had been declared by a court to have achieved unitary status. In the former districts, racial classifications in student assignments, if they were in furtherance of desegregation, were presumptively within the scope of the

31. Belk, 233 F.3d at 251.
32. Id. at 254 (quoting Freeman v. Pitts, 503 U.S. 467, 474 (1992)). This is an historical, not a legal argument. It simply states that fifty years ago, racial isolation was clear evidence of racial discrimination with all its accompanying malicious intent and effects, and then assumes that racial imbalance today has the same causes and effects.
33. Belk, 269 F.3d at 322.
court order and were therefore, by definition, remedial. The court distinguished those districts from districts that had never been under court order, or had been held to have achieved unitary status. For unitary districts, any assignments based on race would be subject to strict scrutiny.

Although inadequate attention has been paid to how the theoretical issues involved in equitable remedies might inform the substance of desegregation jurisprudence, there is a noteworthy exception. One of the most thoughtful assessments of these issues came from a vociferous opponent of court-ordered institutional reform, Supreme Court Justice Clarence Thomas. In Missouri v. Jenkins (Jenkins III), Justice Thomas, in a concurring opinion, set out his concerns about desegregation remedies at some length. Although this author believes that his analysis was fundamentally flawed, Justice Thomas placed the focus exactly where it should be by asking basic questions about the power of the federal courts to order these remedies and the nature of the constitutional right at stake in desegregation cases. Because these arguments address the relevant issues in refreshingly stark language and could form the basis for the Court's future approach to desegregation, they need to be evaluated. As such, this Article is organized around the questions posed by Justice Thomas.

In Part II, this Article sets out those questions in more detail and reviews the background debate that has dominated discussion of desegregation remedies up until this time. Parts III and IV explore Justice Thomas' concerns. Part III explores the history of equity in order to understand the historical nature of the equitable power of the federal courts and how that might inform a theory of desegregation remedies. Part IV discusses rights theory and how it might promote a productive approach to understanding the nature of the constitutional violation at issue in desegregation cases. Part V offers some concluding thoughts.

34. Id. at 307. This also contradicts some language in the district court opinion in Capacchione which stated that, even if the district had not been ruled unitary, the magnet school admissions program would not be presumed remedial because the "change in the student assignment process was a material departure from the Swann orders." Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228, 287 (W.D.N.C. 1999).
II. EXPOSITION

A. Jenkins III

On June 12, 1995, the Supreme Court handed down its third opinion in Missouri v. Jenkins, a case initiated in 1977 to desegregate the Kansas City, Missouri school district. By 1995, the district court judge supervising the case had ordered, among other remedies, over $500 million in capital improvements and over $220 million for quality education programs for the school district. The goal, according to the district court, was to increase student achievement and attract non-minority students to the Kansas City school district. In Jenkins III, the Supreme Court struck down aspects of the desegregation remedy and remanded the case to the district court for further proceedings regarding the question of whether the State had achieved sufficient compliance with its remedial decree such that the district court could end its supervision of at least some aspects of the operation of the school district and thereby “restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.”

Jenkins III was greeted by many scholars and the press as signaling the end for school desegregation because it accelerated the process of limiting the scope of these remedies without offering a principled, legal reason for limiting them. Whether or not that is true, the result was predictable because it continued the Court’s modern desegregation jurisprudence which places emphasis on the central importance.

37. Id.
40. Jenkins III, 515 U.S. at 99 (quoting Freeman v. Pitts, 503 U.S. 467, 489 (1992)).
of local control over school districts and castigates what it characterizes as overreaching district court judges.\textsuperscript{42}

What made \textit{Jenkins III} particularly noteworthy was a concurring opinion written by Justice Clarence Thomas. In that concurrence, Justice Thomas argued that it was time to “put the genie back in the bottle” and return the Court’s desegregation jurisprudence to first principles.\textsuperscript{43} He identified three fundamental aspects of the Court’s current jurisprudence that had “gotten out of the bottle”: the Court’s analysis of the constitutional violation that gives rise to a desegregation remedy, the Court’s analysis of the scope and availability of desegregation remedies, and the capacity of the federal courts to implement those remedies. Thomas’ critique took for granted the Court’s time-honored principle that the scope of the violation determines the scope of the remedy, but he insisted that “[i]n order to evaluate the scope of the remedy, we must understand the scope of the constitutional violation and the nature of the remedial powers of the federal courts.”\textsuperscript{44}

Having identified the fundamental issues that must be addressed in order to evaluate the propriety of a school desegregation remedy, Justice Thomas argued that the Court’s current jurisprudence was misguided as to all three issues: First, the Court’s conception of the constitutional violation involved in desegregation cases was premised on a theory of black inferiority; second, the Court’s conception of the remedial powers of the federal courts was not consistent with the history of the equitable powers of federal courts in the United States; and, finally, the courts simply lacked the capacity to implement complex desegregation remedies.

As to the nature of the violation with which desegregation cases were concerned, Justice Thomas argued that it was not psychological harm to black children that formed the basis for finding segregation unconstitutional. Instead, Justice Thomas argued that \textit{Brown v. Board of Education (Brown I)}, the 1954 Supreme Court decision finding state-mandated segregation unconstitutional, established the principle that the “government cannot discriminate among its citizens on the basis of race” and therefore must treat its citizens as individuals, not as members of specific groups.\textsuperscript{45} It was this principle, he contended, based on the Equal Protection Clause of the Fourteenth Amendment,\textsuperscript{46} that made segregation unconstitutional and caused

\begin{itemize}
  \item \textsuperscript{43} Jenkins III, 515 U.S. at 123 (Thomas, J., concurring).
  \item \textsuperscript{44} \textit{Id.} at 114.
  \item \textsuperscript{45} \textit{Id.} at 120. This view stands in stark contrast to Justice Thurgood Marshall’s view that psychological harm is highly relevant to the constitutional violation.
  \item \textsuperscript{46} “No State shall . . . deny to any person . . . the equal protection of the laws.” \textsc{U.S. Const. amend. XIV, § 1} \end{itemize}
the Brown I Court to conclude that "in the field of public education the doctrine of 'separate but equal' has no place." Thus, the scope of the violation, according to Justice Thomas, was intentional segregation by the State in school assignments.

Justice Thomas further contended that because courts often use racial imbalance in a school district as evidence of past intentional segregation, even in the absence of current discrimination, they were implicitly saying that black was inferior. Thomas supported this incendiary remark by noting that it was essentially impossible to prove that intentional segregation in 1954, when Brown I was decided and intentional segregation was outlawed, caused racial imbalance in public schools decades later. This causation problem has been noted by Justice Kennedy, among others. But Justice Thomas went one step further, stating that even if the link between intentional segregation and later racial imbalance in schools could be proven, the resulting racial isolation of blacks was not a harm because to say that it was a harm was to say that blacks were inferior and needed to be mixed with white kids in order to succeed in school. Justice Thomas insisted that the psychological effects on black school children of being separated from whites were irrelevant to finding a violation of the Equal Protection Clause and only injected "the unnecessary and misleading assistance of the social sciences" into the Court's adjudication of constitutional issues.

By defining the violation narrowly, and refusing to acknowledge any remediable harm to black children that resulted from that violation (or, at least, refusing to acknowledge the types of effects recognized by the Brown I Court), Justice Thomas, by implication, also limited the scope of the remedy. If there were no legally cognizable effects on black children as a result of isolating them through segregation, and social science evidence to the contrary is "unnecessary and misleading," then there is no need to provide a remedy for that isolation, beyond simply telling the State to stop segregating by race.

In addressing the second prong of his argument about the need to limit remedies, Justice Thomas could have simply argued that since the right was so narrowly defined, such that there were no remediable

48. See Jenkins III, 515 U.S. at 114 (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior."); Kevin Brown, Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?, 78 CORNELL L. REV. 1, 6 (1992).
49. See Freeman v. Pitts, 503 U.S. 467, 496 (1992) (Kennedy, J.) ("It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a de jure violation."").
50. See, e.g., Parker, supra note 7, at 519-21.
51. Jenkins III, 515 U.S. at 121.
effects, then logically a very limited remedy would follow it. But Justice Thomas again went further, arguing that most desegregation remedies were improper because they exceeded the remedial powers of the federal courts. According to Justice Thomas, this exercise of equitable power was "unprecedented" (although it has now been going on for over forty years), and the district courts have had "little regard for the inherent limitations on their authority." 52 There are, in Justice Thomas' view, "certain things that courts, in order to remain courts, cannot and should not do." 53

Justice Thomas based this claim on an analysis of equity jurisprudence in the eighteenth century, citing Blackstone's view of equity and the ratification of the United States Constitution in 1789. Justice Thomas argued that the available evidence indicates that the Framers of the Constitution, specifically Alexander Hamilton, intended to bestow equity jurisdiction on the federal courts in the same form that it was exercised in England (i.e., as a set of particular remedies for particular claims). The key to equity at that time was that it was governed by rules and precedents that prevented judges from using unbridled discretion to achieve particular results. Yet, even if his brief and selective historical discussion accurately portrays the Framers' intent, Thomas failed to take into account any effects on the equitable power of the federal courts that may have come about as a result of the importation of equity into a vastly different political environment than existed in England; the ratification of the Fourteenth Amendment after the Civil War; and the overhaul of federal court procedure that occurred in 1938 with the promulgation of the Federal Rules of Civil Procedure, which included the merger of law and equity.

Interestingly, and despite these shortcomings, this aspect of Justice Thomas' opinion has been hailed as both original and sophisticated. 54 This Article attempts to show that although it has tremendous merit for its distillation of the critical issues, Justice Thomas' opinion is, at best, incomplete and misleading, and at worst, just wrong.

Yet, Justice Thomas' overriding concern that judges need to have specific and knowable limits on their powers remains valid and unanswered by the Court. In Justice Thomas' words: "If the standard reduces to what one believes is a 'fair' remedy, or what vaguely ap-

52. Id. at 126. John Yoo, who was serving as Justice Thomas' law clerk at the time Jenkins III was decided, has argued elsewhere that this issue of "institutional authority," more than capacity, is the primary barrier to the propriety of school desegregation remedies. Yoo, supra note 41, at 1121.
54. See, e.g., David N. Mayer, Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment, 25 CAP. U. L. REV. 339, 340 (1996) (discussing how Mayer considers Thomas "the most interesting and original Justice on the Court").
pears to be a good ‘fit’ between violation and remedy, then there is little hope of imposing the constraints on the equity power that the Framers envisioned and that our constitutional system requires.55

As Justice Thomas suggests, if we are to understand the scope of the equitable power of courts, we should start with an analysis of the historical record. And if the remedy is meant to address the violation of a particular right, then one aspect of the definition of the courts’ remedial powers must derive from the definition of the right that those powers are exercised to vindicate.

B. Overview of Desegregation Scholarship: Discretion, Capacity, and Legitimacy

Justice Thomas’ Jenkins III concurrence can be understood as a recent contribution to a long running debate about the general propriety of institutional reform litigation. Critics have focused on various problematic aspects of institutional reform, whether it be the capacity of courts to implement these remedies,56 the legitimacy of courts in reorganizing public institutions,57 or the general uneasiness with judicial involvement in cases that look so different from “traditional” adjudication.58 What all of these critiques of the remedial process in institutional reform litigation have in common is a fundamental concern with the use of discretion by judges and an assumption that the more principled and limited judicial discretion is, the more legitimate judicial action is.59

At the remedial stage of desegregation litigation, the primary judicial principle guiding the courts is that the relief ordered must remedy the constitutional violation. In Milliken v. Bradley (Milliken II), the

56. See infra note 58.
57. See DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 18 (1977); see also William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 694 (1982) (contending that judicial discretion in institutional reform litigation is presumptively illegitimate unless there is a “demonstrated unwillingness or incapacity of the political body” to correct the constitutional violation); Paul Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949, 951 n.7 (1978) (suggesting a separation of powers argument based on the structure of the Constitution).
58. See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978). “[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.” Id. at 364.
59. This proposition has been voiced by many throughout Anglo-American legal thought. See e.g., BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (1969); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Edward Fry, Life of John Selden, in TABLE TALK OF JOHN SELDEN 177 (Frederick Pollack ed., 1927).
Supreme Court identified three factors for the exercise of equitable discretion: (1) "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation"; (2) "the decree must . . . be remedial in nature, that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct"; and (3) the courts must "take into account the interests of state and local authorities in managing their own affairs." These guidelines have proven difficult to apply, and when appellate courts attempt to define the limits of discretion, they often simply repeat vague, open-ended terms, such as "fairness" and "reasonableness."

Judge William Fletcher, when he was a law professor, argued that for this reason remedial discretion in institutional reform litigation, because it is "inevitably political in nature," is also "presumptively illegitimate." The illegitimacy stems from the fact that there is no control over the judge's discretion: "The specificity of the decree and the indeterminacy of the norms that guide its drafting make the trial judge's remedial discretion more difficult to control, and hence more threatening, than the discretion inherent in judicial rulemaking." The reason that judicial rulemaking is less threatening is that it is formulated "according to the rules of reason and justice," and once announced it takes on a regularity whereby it is visible and applied as a general rule until properly overruled. Judge Fletcher further noted that "internal controls may also be lacking, for these may simply be insufficient legal norms to guide a conscientious trial judge in the discretionary formulation of the remedy." Thus, the court must "rely largely on its own ingenuity in discovering the likely consequences of its remedial decree."

This concern with the expansiveness of the court's power has been voiced by many others. Donald Horowitz, for example, acknowledged the foundation of equitable discretion in institutional reform lit-

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62. Fletcher, supra note 57, at 637.
63. Id. at 644.
64. Id. at 643 n.29 (quoting Judge Henry Friendly, Judicial Control of Discretionary Administrative Action, 23 J. LEGAL EDUC. 63, 64 (1970)).
65. Id. at 645.
66. Id. at 640. Paul Mishkin has argued that if a federal judge does not show extreme restraint in institutional cases, he will be tempted to eradicate every evil he sees in the situation, rather than being limited to remedying the violation of a particular right. Mishkin, supra note 57, at 960.
igation in the English tradition, but argued that judges do not have the institutional capacity to effectively exercise this discretion in the context of the remedial stage of institutional reform litigation.

While those who disapprove of court involvement in institutional remedies usually state their arguments in terms of how those remedies differ from traditional legal remedies, those who approve of judicial involvement in institutional reform litigation generally focus their arguments on the aspects of institutional reform litigation that are similar to traditional adjudication. Abram Chayes grounded his approval in the notion that the legitimacy of the judiciary depends on its response to "the deep and durable demand for justice in our society," yet he noted that "the American legal tradition has always acknowledged the importance of substantive results for the legitimacy and accountability of judicial action."70

Owen Fiss, on the other hand, argues that the legitimacy of court involvement in institutional reform litigation is the same as in traditional litigation: to give meaning to public values.71 Institutional reform litigation, such as school desegregation, often involves some of the most sensitive issues of public values and is thus most appropriate for judicial review. The legitimacy of court involvement in restructuring organizations to comply with individual rights comes not from the ultimate success of the remedy, but from the fact that in deciding those types of cases, judges are doing what they always do: giving meaning to public values through adjudication of claims of individual rights. The remedy is the actualization of the right and therefore, since both must exist in order to express a constitutional value, the judge must not only declare the value, but oversee its implementation.72 In the context of institutional reform, Fiss saw a particular necessity for judicial oversight:

In this social setting, what is needed to protect the individual is the establishment of power centers equal in strength and equal in resources to the dominant social actors; what is needed is countervailing power. A conception of adjudication that strictly honors the right of each affected individual to participate in the process seems to proclaim the importance of the individual, but actually leaves the individual without the institutional support necessary to realize his true self. In fact, the individual participation axiom would do little more than throw down an impassable barrier—polycentrism—to the one social process that has emerged with promise for preserving our constitutional values

68. Horowitz, supra note 57, at 11-12.
69. Id. at 255-98.
70. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1316 (1976); see Abram Chayes, Foreward: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4 (1982).
and the ideal of individualism in the face of the modern bureaucratic state-structural reform.\textsuperscript{73}

It is noteworthy that those who contend that the courts are legitimately involved in institutional reform litigation focus primarily on the rights phase of the litigation, emphasizing that the impetus for the court’s later involvement in institutional change is individual constitutional or statutory rights. By contrast, those who contend that courts should not be involved in institutional reform litigation, whether for capacity or legitimacy reasons, focus on the remedial phase of the litigation, as this is where judicial involvement strays from its traditional role.\textsuperscript{74} Critics do not suggest that substantive constitutional rights should not be enforced.\textsuperscript{75} On the other hand, proponents of institutional reform litigation do not come to terms with the fact that the creation of the remedy in institutional reform litigation is almost entirely a discretionary process.\textsuperscript{76} Regardless of how one characterizes judicial action in institutional reform litigation, the “tremendous issue” of what constraints there are for judicial action remains.\textsuperscript{77}

\textsuperscript{73} Fiss, supra note 71, at 44.

\textsuperscript{74} There are some exceptions to this generalization. In Theodore Eisenberg & Stephen C. Yeazell, \textit{The Ordinary and the Extraordinary in Institutional Litigation}, 93 HARV. L. REV. 465 (1980), Eisenberg and Yeazell contend that the remedies employed in institutional reform litigation are not new, but the enforcement of the specific rights involved in this type of litigation, rights of groups and individuals as opposed to property rights, is novel. As such, “old remedies are implementing new rights.” \textit{Id.} at 511. Jennifer Hochschild, on the other hand, acknowledges the complexity and uniqueness of these cases, but argues that courts are usually quite capable of dealing with this complexity. \textit{Jennifer Hochschild, The New American Dilemma} 139-41 (1984).

\textsuperscript{75} See Eisenberg & Yeazell, supra note 74, at 487 (arguing that “if the facts establish the underlying [constitutional] claim, the burden of proof should be on those who suggest that courts should not attempt fully to remedy the constitutional violations.”). Daryl Levinson attributes this to what he calls “rights essentialism”: the conception of constitutional rights as entirely independent of their remedies. Daryl J. Levinson, \textit{Rights Essentialism and Remedial Equilibration}, 99 COLUM. L. REV. 857, 933-34 (1999).

\textsuperscript{76} See, e.g., Abram Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 HARV. L. REV. 1281, 1296 (1976). One broad justification for this discretion is that courts serve as the last resort and exercise this type of discretion only after other branches of government have failed in their responsibilities. \textit{See, e.g., Jethro K. Lieberman, The Litigious Society} 143-146 (1981). The exception to this is MALCOLM M. FEELEY & EDWARD L. RUBIN, \textit{Judicial Policy Making And The Modern State} (1998). Feeley and Rubin come to terms with this process by reconceptualizing the process as legitimate and rejecting as outdated and outmoded the classic arguments against it, such as federalism, separation of powers, and the rule of law. \textit{See also Judith Resnik, Managerial Judges}, 96 HARV. L. REV. 374, 412 (1982) (contending that there are significant constraints on judges during post-trial management because of the need to respect the defendant’s interest in local autonomy, the complexity and difficulty of micromanaging compliance, misgivings about overuse of the contempt power, and some sanguinity about the breadth of plaintiff’s requested relief).

\textsuperscript{77} Feeley & Rubin, supra note 76, at 147.
This Article is an effort to bridge that gap by recognizing that the legitimacy of the entire enterprise depends on the ability to articulate the nature of the substantive right at stake, which in turn will delineate the proper limits on the nature and scope of the remedy.

Justice Thomas’ concurrence in Jenkins III contributed to this debate by offering a fresh and provocative analytical approach, and he applied this approach to the most current and vexing issue in desegregation jurisprudence, the termination of longstanding decrees. Rather than just asking whether the courts are legitimately involved in these cases or whether they have the capacity to implement remedies, Justice Thomas broke the issue down into its component parts and insisted that we ask more fundamental questions about what exactly was being remedied in desegregation cases, and what inherent powers the federal courts possess that permit them to provide a remedy. Thus, Justice Thomas’ opinion could be understood as an attempt to answer Chayes’ call nearly thirty years earlier for “improving the performance of public law litigation . . . by a more systematic professional understanding of what is being done.”

The value of Justice Thomas’ concurrence is that he understood this as the key issue for the Court at this time, even though his analysis of the issue fell far short of providing the necessary structure for analysis and change. For example, Justice Thomas was correct in asserting that whether there was intentional segregation violative of the Fourteenth Amendment is a factual question that courts are competent to answer without the help of social science evidence about the effects of that violation on black school children. What he failed to acknowledge was that simply identifying the violation from the perspective of the perpetrator does not begin to adequately address the fundamental issue of remedy. In order to determine the scope of the remedy, one must not only know what the violation was, but also what the relevant effects of that violation were. The Brown I Court understood psychological damage and feelings of inferiority to be relevant effects. Justice Thomas, by focusing on the violation solely from the point of view of the State, failed to acknowledge that the effects of

78. Chayes, supra note 76, at 1313.
80. See Joondeph, supra note 41, at 71 (“[H]arms caused by de jure segregation do not immediately cease once a school district abandons intentional discrimination.”). This analytical error will be described later in Part III as an attempt to squeeze the complexities of the school desegregation issues into a strictly Hohfeldian analysis, where rights and remedies are exact correlatives.
the violation, although perhaps not relevant to identifying the violation, are key to remedying it.\textsuperscript{81}

In order to address Justice Thomas' concerns, it is necessary to explore two subjects: equity and rights theory. The history of equity and its adaptation in the United States give us clues about the power of the courts to issue broad, complex desegregation remedies. Rights theory helps to clarify the nature of the harm caused by the constitutional violation, which then forms the basis for, and the ultimate goal of, the remedy. Hopefully we can learn something from history and theory that will shed light on the difficulty facing courts in terminating desegregation decrees.

III. THE EVOLUTION OF EQUITY

Equity is A Roguish thing

—John Selden\textsuperscript{82}

One of the concerns raised by Justice Thomas in his \textit{Jenkins III} concurrence was that the federal courts lack the inherent authority to order complex remedies that involve them in the reorganization of public institutions. Justice Thomas grounded this view in a fairly meager discussion of English equity practice and a small sampling of political writing around the time of the ratification of the Constitution.\textsuperscript{83} This raises a critical question, for if the current exercise of equitable power to remedy school segregation cannot be reconciled with its history, then that would provide strong evidence for those who view this exercise of judicial power as illegitimate. If the power to order these remedies is illegitimate, then the duty to terminate them becomes essential. This however is not the case. The historical record teaches us that when the concept of equity was incorporated into the Constitution, it was by necessity, though perhaps unwittingly, reinvented to serve the needs of the new democratic polity.

Justice Thomas' concern about the lack of authority in the courts to order these remedies reflects a concern that dates back to ancient times. There has always been a fear that officials charged with arbitrating disputes would abuse their equitable discretion. Aristotle expressed concern with equitable discretion and struggled with the problem of balancing the fairness of the general application of written laws with the need for discretion in individual circumstances. As to the desirability of general laws, Aristotle believed that "[t]he weightiest reason of all is that the decision of the lawgiver is not particular


\textsuperscript{82} Fry, supra note 59, at 177.

\textsuperscript{83} Missouri v. Jenkins (Jenkins III), 515 U.S. 70, 126-131 (1995).
but prospective and general,” whereas individuals “will often have allowed
themselves to be so much influenced by feelings of friendship or
hatred or self-interest that they lose any clear vision of the truth . . . .
In general, then, the judge should, we say, be allowed to decide as few
things as possible.84 Yet, Aristotle recognized that

the laws speak only in general terms, and cannot provide for circumstances . . . . Hence it is clear that a government acting according to written laws is plainly not the best. Yet surely the ruler cannot dispense with the general principle which exists in law; and this is a better ruler which is free from passion than that in which it is innate. Whereas the law is passionless, passion must ever sway the heart of man. Yes, it may be replied, but then on the other hand an individual will be better able to deliberate in particular cases.85

In the mid-seventeenth century, John Selden articulated this fear
in his now famous aphorism that equity varies like the Chancellor’s foot:

Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to [the] conscience of him [that] is Chancellor, and as [it] is larger or narrower soe is equity Tis all one as if they should make [the] Standard for [the] measure we call A foot, to be [the] Chancellor’s foot; what an uncertain measure would this be; One Chancellor [has] a long foot another A short foot a third an indifferent foot; tis [the] same thing in the Chancellors Conscience.86

And yet, history also teaches us that questions delegated to equitable discretion eventually, through their repeated occurrence, take on the characteristics of legal rules and principles. What was initially a subject matter open to discretionary treatment hardens into law to such an extent that it becomes indistinguishable from other rules of law that did not have origins in the principles of equity.87 Henry Maine describes this “hardening” process in Roman and English law in the following way:

[English and Roman Equity] tended, and all such systems tend, to exactly the same state in which the old common law was when Equity first interfered with it. A time always comes at which the moral principles originally adopted have been carried out to all their legitimate consequences and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal.88

86. Fry, supra note 59, at 43.
Why didn't this hardening occur in the context of desegregation cases? There are two related answers. First, equity, although largely "hardened" into knowable rules in England at the time it was imported to this country, was reinvented here and thus, to some extent, started from scratch on new soil in the eighteenth century. Second, there has never been a workable articulation of the goal of desegregation remedies that would allow judges, faced with either creating or terminating a decree, a yardstick against which to measure whether they were exercising their discretion in a principled manner.

A. English Equity

In England, equity had its origin in the King's Council. Occasionally, when there was no writ to fit a petitioner's complaint, the King and his council would decide a case rather than have his Chancellor issue a writ to the common law court. Eventually the King's Chancellor emerged as the place for extraordinary relief for those claimants for whom the common law courts could not provide relief.

The Chancellor, who was a member of the King's Council, and, until 1529, a member of the clergy, served at the pleasure of the King and obtained his authority from the King's "reserve of justice." The jurisdiction of the court of chancery at this time included "a general authority to give relief in all matters of what nature soever requiring the exercise of the Prerogative of Grace." Thus, the Chancellor was not limited by specific delegation of the King's prerogative in the form of particular writs as were the judges of the common law courts. One could petition the Chancellor by simply writing out a bill stating one's complaint in the vernacular without the encumbrance of specific pleading language required by the common law courts. This general authority given to the Chancellor was derived from the King's prerogative to do justice according to the circumstances of each particular case. As Stephen Subrin put it: "The bill in equity became the procedural vehicle for the exceptional case."

90. Id. George Spence points out, however, that at this time the Chancellor did not have exclusive jurisdiction over matters of Grace: the Great Council (which later became Parliament) and the Privy Council also heard such matters. George Spence, The History of the Court of Chancery, in SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 237 (1908).
91. Garrard Glenn & Kenneth R. Redden, Equity, A Visit to the Founding Fathers, in SELECTED ESSAYS ON EQUITY 12, 21-22 (Edward Domenic Re ed., 1955). By the reign of Edward III in the fourteenth century, the Chancellor had jurisdiction to decide petitions addressed to the Kings. As appeals to the King from complainants too impoverished to afford to sue or fearful that a jury would be hopelessly biased toward their wealthier, more powerful adversaries became more numerous, the King delegated more authority to his Chancellor.
The absence of checks on the Chancellor's discretion was a cause for concern. George Spence notes that there was a fear that the discretion left to the Chancellor, with its decisionmaking dependent on "Honesty, Equity, and Conscience," could destroy the rule of law if not exercised by competent men. There were fears that the Chancellor's discretion and appeal to conscience in making decisions posed a threat to the stability of the common law. This concern was echoed in the seventeenth century by the English Whigs who viewed the Chancellor, serving at the pleasure of the King, as "capable, under the plea that he was promoting justice or equity, of destroying the certainty no less than the formalism of the common law."

There were a number of reasons why the exercise of the Chancellor's power to decide cases and to change the outcome of cases already decided by the common law courts might raise fears of runaway discretion. First, the Chancellor, in making a decree, acted against the person, not in reference to a legal right (i.e., he acted in personam rather than in rem). Thus, at least in theory, the Chancellor did not affect or change the common law rights of litigants by deciding a case that the common law courts would not hear, or in ordering a party who prevailed in the common law courts not to enforce a judgment. Rather, he simply required a certain action of a party, which did not affect anyone else's legal rights and was not binding on anyone else in the future. Yet in practice, the Chancellor had the power to introduce tremendous uncertainty into common law proceedings by interfering with the finality of common law judgments.

Second, up until the seventeenth century, neither the judgments nor the reasoned explanations of the judgments of the court of chancery were written down. Thus, each case that came before the Chancellor was not in principle governed by anything the Chancellor had done before. This arbitrariness, or appearance of arbitrariness, was reinforced by the prevailing view that the Chancellor acted based on

93. Spence, supra note 90, at 238.
94. Id. at 236.
95. A.V. Dicey, Introduction to the Study of the Law of the Constitution 380 (10th ed. 1961). Of course, we must not forget Dickens' perspective:

This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners, who would not give—who does not often give—the warning, "Suffer any wrong that can be done you, rather than come here!"

96. Subrin, supra note 92, at 918.
his conscience which was understood to be a reflection of universal justice and natural law. As such, it was unknowable and unpredictable.

This reveals the fundamental paradox in the powers of the Chancellor, which led inevitably to their hardening into rules of law. The premise of the Chancellor’s power was that the universality of the law made for individual cases where following the law would lead to an injustice. The early Chancellors, until Sir Thomas More, were members of the clergy and could thus appeal to higher law in applying their conscience and the consciences of the parties to decide disputes. The Chancellor was not reforming the law by issuing a decree that seemed to contradict a common law precept; he was correcting the injustices that the application of universal rules to individual cases was bound to produce. If the Chancellor could decide cases according to his conscience, but was not bound to apply that conscience consistently to all cases, then the exercise of power at all by the Chancellor itself could create injustice. S.F.C. Milsom viewed this conceptual problem as follows:

When the legal process is seen as procuring a result which reflects a single absolute justice, it is hard to admit that a result can be properly procured and yet be wrong. And when the legal process is seen as the application of substantive rules, it is equally hard to admit that the substantive rules, properly applied, are somehow wrong.97

Milsom argues that this “secularization of conscience made conflict inevitable” because it meant that one secular institution, the chancery, was interfering with the operation of the other, the common law courts.98

In the end, concerns that existed about the exercise of discretion by public officials in resolving individual disputes were eventually eliminated because the exercise of that discretion slowly took on the attributes of the rule of law. Around the time that there was a change from ecclesiastical Chancellors to lawyers serving as Chancellor, which began with Sir Thomas More in 1529, the practice of writing down and collecting both reports of decisions by the Chancellor, as well as procedure, was introduced.99 In 1617, Lord Bacon appointed a reporter to “sit at his feet,” and by 1660, reporting of chancery cases became regu-
lar practice. As a result, precedents became binding. As J.H. Baker observes:

[T]he preoccupation of the court with matters of property, the high intellectual capacity of the chancellors and the leaders of the Chancery Bar, and the superior quality of the reports taken in the eighteenth century, all combined to render equity as certain and as scientific as law. The process may even have gone too far. Rigor aequitatis set in, and equity almost lost the ability to discover new doctrines.

William Blackstone notes how this change affected the law as interpreted by the Chancellors:

[It] was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law, (being frequently bishops or statesmen), partly from ambition or lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors for now above a century past . . . . But the systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law.

The clearest example of how this happened was in the law of trusts. By the fifteenth century, the Chancellor had already begun to enforce trust arrangements that were not recognized in the common law courts because there did not exist any procedural forms that could recognize and determine the unique relationships among the trustor, trustee, and beneficiary. Because of primogeniture, and the fact that freehold land could not be devised by will, the law required that between a son and a daughter, the son would inherit the father's land. The only way for the father to provide for his daughter was to transfer his property during his lifetime to a third party to hold for his use and then, after he died, to transfer the property to his daughter. Freed from these strict forms of action, however, the Chancellor was able to enforce some trust agreements, for example, merely because in good conscience one ought to abide by a promise.

Thus, the law of trusts and uses developed through recorded precedents into what became an elaborate and fixed body of law. As A.V. Dicey observed:

100. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 94 (1979).
101. Id. at 95.
102. 3 WILLIAM BLACKSTONE, COMMENTARIES 433-34 (1768).
104. This example is borrowed from MILSOM, supra note 97, at 87. See also Subrin, supra note 92, at 919; Langbein, supra note 103, at 633.
105. MAITLAND, supra note 89, at 27-29.
106. 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 304-309 (1924). Holdsworth notes that the systematization of equity in the chancery court was furthered by improvements in procedures in the common law courts, including, for example, the growth of actions on the case, which reduced the need of many litigants to petition the Chancellor. Id. at 301. For other reasons see id. at 300-02.
Equity, which originally meant the discretionary, not to say arbitrary interference of the Chancellor, for the avowed and often real purpose of securing substantial justice between the parties in a given case, might, no doubt, have been so developed as to shelter and extend the despotic prerogative of the Crown. But this was not the course of development which Equity actually followed; at any rate from the time of Lord Nottingham (1673) it was obvious that Equity was developing into a judicial system for the application of principles which, though different from those of the common law, were not less fixed. 107

F.W. Maitland asserted that equity by the time of Blackstone was simply that part of the law “administered only by those certain courts which would be known as courts of equity.” 108 The Judicature Acts of 1873 and 1875 abolished the procedural distinction between law and equity so that the administration of equitable rules was no longer the sole province of the chancery court.

B. American Equity

The Puritans carried their distaste of the monarchy and the fear of arbitrary discretion with them from England to the New World. 109 There were chancery courts of some sort in all thirteen colonies before the Revolution. 110 The colonists, however, had a healthy distrust of the English chancery, which exercised power derived from the royal prerogative and proceeded without a jury. After the Revolution, many of the states retained the jurisdictional distinction between law and equity, despite its origin in the royal prerogative, which would have otherwise given them a “theoretical basis for resistance to courts of equity.” 111 Even states that did not establish separate courts of equity incorporated equitable principles into their constitutions or legislated equitable remedies and procedures. 112 However, in order to justify exercise of the equitable function, which had in England been based on the royal prerogative, there had to be a separation of the legal function of equity from the source of its power. The Americans chose to keep the beneficial function of equity as an alternative source of remedies and discard the original justification for its existence (i.e., the King’s responsibility to see that justice was done in all cases). But this selective adoption of English practice left the colonists without a justification for judicial exercise of the power of equity. The power of

107. Dicey, supra note 95, at 381.
109. See generally Subrin, supra note 92, at 926-29.
110. See Solon Dyke Wilson, Courts of Chancery in the American Colonies, in 2 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 779 (1908).
111. Peter Charles Hoffer, The Law’s Conscience 86 (1990). As Subrin puts it, “After 1776, several states passed reception statutes that adopted the ‘common law.’ Although exactly what had been received is not clear, English common law procedures continued in force.” Subrin, supra note 92, at 928.
112. See Hoffer, supra note 111, at 88-91.
judges to stray from the democratically enacted, written law could not be justified by the responsibility of the monarch, or the clergy, to see that justice was done. What justification was there?

Peter Hoffer suggests that the legitimacy of equity in the republican context was based not on royal prerogative but rather on public trust. A trust is held by a trustee for the beneficiary and it imposes fiduciary duties on the trustee. If those duties are violated, the trust is subject to equitable remedies, including dissolution. Thus, the exercise of equitable jurisdiction by the newly formed governments of the states was legitimized in the same way every other government power was legitimized, as an exercise of republican power (i.e., the power of the people). According to Hoffer, by the turn of the century, “[s]tate equity practice had thoroughly republicanized equity.” Thus, the colonists chose to maintain the legal forms with which they were familiar, while selectively adapting them to the political system they were creating.

The federal government did not establish separate courts of equity, but engrafted the jurisprudential distinction in the Constitution and maintained separate pleading and practice procedures. Article III, Section 2 of the United States Constitution gives the Supreme Court jurisdiction over all cases “in law and equity” that arise under its jurisdiction. Hoffer describes the issue that this forced the Framers to confront:

[T]he legitimacy of public law rested not on the perceived need of individuals or the interest groups they represented, but on conventional sources of authority. In postrevolutionary America, law derived from constitutions, statutes, and precedent, supplemented by a handful of treatises and essays . . . . However strong the sense of commercial crisis they shared, the Framers could not hope to gain broad acceptance of the new Constitution in state ratifying conventions if they created it without regard to existing practices of governance and law.

Perhaps because of simple familiarity, as Hoffer suggests, the issue of granting equitable powers to the federal courts did not stir up much debate, although the anti-federalists at the time did state their grievances. But the dual jurisdictional grant of law and equity in the federal courts did spark some discussion which demonstrated that generation’s continuing reservations about discretionary powers vested in judges and the potential for lawlessness that this entailed.

113. Id. at 100. Hoffer contends that on a grand scale, Thomas Jefferson employed this reasoning in writing the Declaration of Independence, which allowed that if the instruments of government did not pursue their entrusted duties of promoting life, liberty, and the pursuit of happiness, the beneficiaries (that is, the people of the United States) could dissolve the government. See id. at 71-73.

114. Id. at 99.

115. See id.
Thomas Jefferson, for example, feared that the granting of equitable powers to common law courts would entice judges to put aside centuries of common law rules: "Relieve the judges from the rigour of text law, and permit them, with praetorian discretion, to wander into its equity, and the whole legal system becomes uncertain." He said this, despite the success of some of the colonies in administering dual systems. In the constitutional context, the fear was that the granting of equitable powers to federal judges would be interpreted by them as a license to stray from enforcing the letter of the Constitution. The Federal Farmer, a series of Anti-federalist letters published prior to the ratification of the Constitution, voiced this concern:

It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; ... equity, therefore, in the supreme court for many years will be mere discretion.  

The fear was that by opening up cases “arising under” the Constitution to equitable jurisdiction, federal judges would acquire “an arbitrary power or discretion . . . to decide as their conscience, their opinions, their caprice, or their politics might dictate.”

Alexander Hamilton, on the other hand, argued that it was necessary to empower the federal courts with equity jurisdiction because even under the Constitution and the laws of the United States, equitable questions would arise, whether they involved classic equitable questions such as those of fraud and trusts, or simply cases were there was some “unequal and unconscionable advantage” taken of one of the parties. Hamilton recognized the necessity not only of that part of equity jurisdiction that had already hardened into legal principles, but also of leaving some room for the exercise of judicial discretion to remedy harms not otherwise systematically recognized, what Hamilton referred to as “hard bargains.” James Wilson, who shared Hamilton’s faith in the federal courts’ ability to administer equity, also recognized the hardening principle, which was constantly operating in equity:

Law and equity are in a state of continual progression; one occupying incessantly the ground, which the other, in its advancement, has left. The posts

116. Id. at 101 (citation omitted).
118. Letter from the Federal Farmer (Jan. 17, 1788), in 2 The Complete Anti-Federalist 322-23 (Herbert J. Storing ed., 1981). Interestingly, the Federal Farmer recognized the hardening process that had already occurred in Great Britain, noting that there, equity had acquired a “precise meaning” because the proceedings had become systematic, unlike in the United States. Id. at 322.
120. See id.
now possessed by strict law were formally possessed by equity; and the posts now possessed by equity will hereafter be possessed by strict law. . . . In this view of the subject, we shall find as little difficulty in pronouncing, that every court of equity will gradually become a court of law; for its decisions, at first discretionary, will gradually be directed by general principles and rules.121

In fact, it is arguable that once equitable powers were granted to the law courts, it was inevitable that they would take on the attributes of the rule of law. Just the fact that in the American context, equitable power was within the province of a completely independent judicial branch and did not derive its power in any way from executive prerogative, suggests from the outset that its administration would be in accordance with judicial principles, particularly the rule of law and judicial self-restraint.122 Thus, although the fear that equitable discretion would overrun the rule of law was understandable in the light of the Revolutionary struggle, the context in which that discretion would be exercised made it extremely unlikely, at least at that time, that such fears would, on any grand scale, be realized. Nevertheless, the grant of equitable power free from its historical and legitimating justification as derived from the royal prerogative left it rootless. The significance of this, and the risk that it entailed, only became apparent with the advent of school desegregation and institutional reform litigation.

The growth of the country during the late eighteenth and early nineteenth century was accompanied by tremendous growth in the law. Although legal reforms after the Revolution were relatively conservative and the law remained grounded in the English common law, new, native law was created as the courts and legislatures set to work. As one scholar has stated:

Lawyers noted a variety of ills besetting the legal order [around 1820]. Their complaints fell into four broad areas: problems arising out of the magnitude and diversity of the emerging legal product; the institutional role of the judiciary in the common law system; the continued close affinity of American law to English jurisprudence; and the difficulties encountered in dealing with statutory materials.123

The diversity in legal doctrine among the states led some to fear that the underlying principles of the common law were getting lost and the complexity of the law would make it impossible for able people to attempt to learn it so as to become lawyers.124 The growth of law and the vast areas of judicial discretion that it revealed and engendered led to two related but distinct responses.

124. Id. at 49.
One way in which this fear of discretion was addressed was through the codification movement, whose proponents based their position on the belief that codification of the substantive law would eliminate much of the discretion of judges to interpret and change the common law and the ability of lawyers to have a monopoly on its use.\textsuperscript{125} The relevance of that movement for these purposes is that it resulted in the procedural merger of law and equity, initially in some state courts, and then finally, in 1938, in the federal courts with the promulgation of the Federal Rules of Civil Procedure. This merger first occurred in New York in 1848 with the advent of the Field Code, which abolished the procedural distinction between law and equity, and at the same time substantially restricted judicial discretion.\textsuperscript{126} Thus, not only were cases involving principles of law and cases involving principles of equity heard by the same judges, but both types of principles could be applied in the same case, even to the same issue.

The codification movement can be seen as one response to a general concern that judicial discretion, evinced by the growing amount of law being created by judges in the late eighteenth and early nineteenth century, was proceeding in an undemocratic and haphazard way. The other response was the rise of formalism.

The critique of the common law that the codification movement brought to the fore was that, as the common law was developing in the United States, it was neither systematic nor democratic. The most obvious object of this criticism was equity jurisdiction which proceeded with one judge and no jury. Moreover, it was not until the early nineteenth century that there were any written opinions of equity decisions. At that time, James Kent, the Chancellor of New York's chancery court, began recording his decisions. Chancellor Kent's goal was to present equity jurisprudence as a "scientific system" which relied upon principled decisionmaking.\textsuperscript{127} But it was Joseph Story who fulfilled the "scientific" approach to equity jurisprudence with his Commentaries on Equity Jurisprudence, published in 1836. His purpose was to demonstrate to the proponents of codification that codification was unnecessary because the common law itself contained the principles necessary to contain judicial discretion and to constitute a knowable, standardized system of law.

The only way to present equity jurisprudence as a science was by emphasizing that the exercise of discretion was highly principled and limited. Thus, Story began with Aristotle's definition of equity as a correction of law where it is "defective by reason of universality,"\textsuperscript{128}

\begin{enumerate}
\item Id. at 47. Cook's book covers this movement in great detail.
\item Subrin, supra note 92, at 934-35.
\item 14 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 4 (1873).
\end{enumerate}
and noted that because this is true of all universal rules, there would always be equity in any legal system. The discretion that must be exercised in order to do this was a discretion bound by the objectives of the legislature, not simply by individual conscience on a case by case basis. In this sense, the most important maxim of equity for Story was _legem aequitas sequitur_—equity follows the law—because “discretion is a science, not to act arbitrarily, according to men’s wills, and private affections, so that discretion, which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other.”

The value of separate courts of equity was that they could administer remedies for rights not recognized at common law and they had the power to grant injunctions to vindicate rights and prevent wrongs, whereas the common law courts could only give damages after the wrong was done. Thus, the difference between equity courts and common law courts rested less with the amount of discretion that the judges exercised than with the procedures each followed, particularly the modes of trial, proof, and remedy.

The important similarity between equity courts and common law courts, which allowed for the “scientific” development of both, was the importance of precedent. Only by following precedent could the equity courts escape their reputation of being arbitrary. Quoting Lord Redesdale in part, Story noted:

> There are . . . certain principles, on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity have, in this respect no more discretionary power than courts of law. They decide new cases as they arise, by the principles, on which former cases have been decided; and may thus illustrate, or enlarge, the operation of those principles. But the principles are as fixed and certain, as the principles on which the courts of common law proceed. In confirmation of these remarks, it may be added, that the courts of common law are, in like manner, perpetually adding to the doctrines of the old jurisprudence; and enlarging, illustrating, and applying the maxims, which were first derived from very narrow and often obscure sources.

Thus, the important distinction between law and equity courts was not the relative amount of discretion exercised by each, but the fact that the equity court could provide relief for rights that law courts either did not recognize, or did not have the power to remedy.

Story’s defense of the common law as principled and grounded in precedent played an important part in preventing the codification movement from reaching the level of success that its most radical proponents urged: the elimination of the common law and the extreme restriction of judicial discretion. The combination of the codification

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129. Id. at 12.
130. See id. at 52.
131. Id. at 2 (citations omitted).
movement, which resulted in the procedural merger of law and equity in many state courts, and the formal, scientific conception of law, which took root in the nineteenth century, made equity more "palatable" by being reconceived as an orderly system of universal rules.132

The merger of law and equity meant that ordinary legal rights, which otherwise would have been cognizable in law courts that had previously lacked jurisdiction over equitable remedies, had the benefit of such remedies. Equity no longer could be defined as the ability of a certain court to create a remedy for a theretofore unrecognized right, but now meant the ability of all courts, including the federal courts, to use the remedies that once were the province of equity courts in any dispute that they determined deserved such treatment and which met the qualifications established by the courts. In the federal courts, merger opened up all of these remedies to plaintiffs bringing lawsuits under the Constitution and federal laws.

Thus, equity was no longer shorthand for the jurisdictional question of where one should sue, or which procedures one should follow. Because of that fact, Morton Horwitz has pointed out that one significant result of these conceptual and procedural changes was the final and complete emasculation of Equity as an independent source of legal standards . . . . [As such, Equity was] transform[ed] . . . from an eighteenth century system of substantive rules derived from 'natural justice' to a nineteenth century positivist conception of Equity as simply providing a more complete and inclusive set of procedural remedies.133

Through merger, equitable remedies were completely divorced from their origin as remedies in situations that otherwise were not legally cognizable because there was no legal rule under which the complainant could sue. The court of chancery in England, it will be recalled, did not declare rights, but rather acted in personam in a particular case by ordering relief to remedy a particular injury. As Milsom explains:

[R]esults were not declared to be so; instead parties were told to make them so. When a seller of land refused to convey it, chancery did not declare that it belonged to the buyer notwithstanding this: it compelled the conveyance. Property in the land passed to the buyer because the seller after all conveyed it to him: the seller conveyed it because chancery told him to, and would punish disobedience.134

Historically, a right to an equitable remedy only came into being after it was determined what remedy was appropriate for a particular injury. Equity started with the remedy whereas "law" started with

132. Roscoe Pound, The Formative Era of American Law 155 (Peter Smith ed., 1938). Subrin points out that Pound, although promoting procedure based on equity, was also concerned with precision and uniformity. Subrin, supra note 92, at 948.


134. Milson, supra note 97, at 90.
Since the remedy was determined first, the right was simply deduced from the contours of the remedy. As equity "hardened," the rights themselves were established. Yet, historically speaking, equitable rights were derivative of the remedies, which preceded them, as the discussion of the law of trusts demonstrates.135

Once equity and law were merged, these "extraordinary" remedies could also be used to vindicate what were already legally cognizable rights. Courts could now use equitable remedies to vindicate rights that were in no way historically derivative of them. Thus, the a priori link between the right and the remedy that had existed both at law and at equity was severed when law and equity merged.136 As Subrin eloquently put it, "the tail of historic adjudication was now wagging the dog."137 Yet, this did not mean, as Horwitz contended, that equity was emasculated. Rather than being emasculated, it shifted in some cases. For example, in desegregation cases, once a constitutional violation was recognized and a desegregation remedy was ordered, a new scheme of jural relations was established where the court's order became a duty imposed upon the defendants, which itself created new rights (i.e., the right to particular relief in the plaintiff). Thus, equity, as practiced in modern institutional reform litigation, has become a new source of remedial rights, which have turned out to be quite substantive.

C. Equity and Desegregation

It was this development which allowed equity to "triumph"138 in the second half of the twentieth century and set the stage for the modern problems with equitable remedies in institutional reform litigation. The potential for these modern problems came not with Brown v. Board of Education, but with the hybrid system created in 1789 and
1938 by the rejection of the royal prerogative on the one hand, and the merger of the systems of law and equity on the other. Within a merged system of law and equity, the problem of discretion is not only whether a court will recognize a right not previously recognized in the law, but also, even if recognized, how the court will remedy it. This, in turn, resulted in a jurisprudential division between the right and the remedy that historically was anathema to equity. As Abram Chayes put it in his discussion of institutional reform litigation:

At this point, right and remedy are pretty thoroughly disconnected. The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc. In the process, moreover, right and remedy have been to some extent transmuted. The liability determination is not simply a pronouncement of the legal consequences of past events, but to some extent a prediction of what is likely to be in the future. And relief is not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved.139

Conceptually, the definition of a right in equity is no longer dependent upon the type of remedy chosen because the right came first. This is why Gary L. McDowell points out the irony in the codifiers' success in merging law and equity. Their goal was to limit judicial discretion by replacing the common law with statute, but in the context of their procedural reforms, they ended up giving judges even greater discretion because judges could now use their equitable powers in many more cases:

By combining procedures in law with procedures in equity the Court in effect ignored the dangers of equity the Founders had recognized . . . . In the attempt to reduce equity to a safe and more certain code, the Court paved the way for the power of equity to be exercised with a disregard for precedent and procedure. By tearing equity loose from the bindings of common-law procedure, it had rendered suits at equity simpler in process but at the price of emasculating equity as a source of substantive law. Equity became nothing more than a set of procedural remedies reflective of the current opinion of a judge. Equity jurisprudence, wrenched free of the common law, was thus deprived of the moderating force of history.140

Those who argue that institutional reform litigation remedies are illegitimate because they extend judicial power beyond the intent of the Framers of the Constitution, fail to take into account the circumstances under which equity was adopted, adapted, and then procedurally emasculated in the United States. John Yoo, for example, expands upon Justice Thomas' view in Jenkins III and argues that the Framers intended the grant of equity jurisdiction to the Supreme

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139. Chayes, supra note 76, at 1293-94. In a later article, Chayes went further, stating that "there is no way to reason from the 'right' to a desegregated school system established by Brown to the content of the decree in any particular case. It is equally impossible to work backward from the relief to define the contours of the right." Abram Chayes, Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 50 (1982).

140. GARY L. McDOWELL, EQUITY AND THE CONSTITUTION 93 (1982).
Court to be purely jurisdictional and nothing more, solely to avoid problems such as Supreme Court review of state equity courts.\textsuperscript{141} Otherwise, Yoo argues, federal courts lack institutional authority to impose institutional remedies. But how can we know the scope of equitable authority when it was stripped of its original reason for existence, the King's prerogative, without a clear replacement, and then stripped of its procedural distinctiveness? One could as easily say that these events created a new, unique, and legitimate type of judicial power that remained dormant until awoken by the \textit{Brown} case.

One can see an example of this kind of judicial power at work in the first remedial opinion issued in \textit{Jenkins v. Missouri}.\textsuperscript{142} This school desegregation case was brought by the school board and children of the school board members in the Kansas City, Missouri, School District ("KCMSD") claiming that the State had created and maintained a system of racially segregated schools. In ordering a remedy which included, \textit{inter alia}, a reduction in class sizes, creation of a summer school program, magnet school programs, staff development programs, and capital improvements, the court relied upon highly generalized principles. In describing its remedial powers, the court stated:

\begin{quote}
The principles that have guided this Court in implementing a desegregation plan for the KCMSD are clear. "In fashioning, and effectuating (desegregation) \ldots decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by facility for adjusting and reconciling public and private needs."

Further, the goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation. In achieving this goal, the district court may use its broad equitable powers, recognizing that these powers do have limits. Those limits include the nature and scope of the constitutional violation, the interests of state and local authorities in managing their own affairs consistent with the constitution, and insuring that the remedy is designed to restore the victims of discriminatory conduct to the position that they would have occupied in the absence of such conduct.\textsuperscript{143}
\end{quote}

The only principles guiding the court in creating a decree are on the one hand, flexibility, and on the other, the legal standard for success (i.e., the elimination of vestiges of segregation). There are no principles for how the court is supposed to measure whether its proposed plan, or the plan submitted by the parties, will cure the effects of segregation.

\textsuperscript{141} John Choon Yoo, \textit{Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts}, 84 CAL. L. REV. 1158 (1996); see also, Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 316 (1999) (noting that the equitable jurisdiction of the federal courts is limited to the type of relief traditionally accorded by the English courts of equity).

\textsuperscript{142} 639 F. Supp. 19 (W.D. Mo. 1985).

\textsuperscript{143} \textit{Id.} at 23 (quoting Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955)).
Predictably, the introduction of this type of discretion, which arose theoretically with the merger of law and equity and practically with the advent of institutional reform litigation, brought with it fears that judges were no longer bound by rules and principles in the remedial stage of institutional reform litigation. As discussed above, concern about the absence of rules and principles has been widespread and ongoing since Brown I was decided. The problem is that there has not developed a satisfactory way in which the remedial law in these cases could “harden” the way previous equitable discretion has. The primary reason for the failure of equitable discretion in institutional reform litigation to evolve and harden in the way it has historically is that there is no workable standard of success. For example, the standard for measuring success now, as stated by the Court in Board of Education v. Dowell, that the vestiges of discrimination be eliminated “to the extent practicable,” provides little guidance as to what current conditions might count as a vestige.

The principles which are intended to guide courts in formulating a remedy, which should also be useful in measuring success and thus justifying termination, are highly generalized and offer no practical guide as to whether the relief ordered is capable of being quickly and effectively implemented. In Milliken v. Bradley (Milliken II), for example, the Court set out three factors to guide courts in exercising equitable jurisdiction in school desegregation cases. These factors were:

In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation . . . . The remedy must therefore be related to ‘the condition alleged to offend the Constitution . . . .’ Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible ‘to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.’ Third, 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 . . . . Once invoked, ‘the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.’

Thus, Justice Thomas’ concern that the courts lack the inherent power to order vast, complex, remedies in institutional reform litigation is misplaced. The equitable power exercised in institutional reform litigation originated in English practice, was modified upon importation into the United States, gained power with the merger of law and equity, and came to fruition when invoked to remedy the

146. In Milliken II, the Court referred to Brown II’s reference to “equitable principles” that should guide courts in fashioning desegregation decrees. But what these principles are was not spelled out in either case.
147. Id. at 280-81 (citations omitted).
rights created by the Fourteenth Amendment. If history teaches us anything about the legitimacy of complex and enduring equitable remedies, it can only be agnosticism. But that does not mean Justice Thomas' other concerns are unwarranted. To say that the courts have the power to remedy constitutional violations in large public institutions is not to say that the way in which courts have been creating and implementing those remedies is optimal. The concerns about discretion and effectiveness remain, but the issue must be reformulated.

The power to order institutional change in institutional reform litigation has led to a crisis in equity similar to the crises facing the Chancellors in England. As in those instances, equity in institutional reform litigation must find a way to harden through the application of knowable, general principles. Thus, rather than view the exercise of discretion as a sign of illegitimacy of institutional reform litigation, this exercise of discretion can be understood as the first stage in the hardening process. That this is the current state of institutional reform litigation was well articulated by David Kirp:

(T)he Supreme Court's lack of clarity in explicating doctrine has required a different reasoning process, which defines the wrong by inspecting what is required by way of remedy. Judicial decision-making with respect to segregation is thus at its heart incremental. Wrong defines remedy, which in turn redefines wrong. The Court moves away from the evil to be undone, not toward some predetermined end. Brown sets in motion a decision-making strategy rather than resolving a problem.

Unlike the law of trusts, described above, which developed out of the consistent application of particular remedies, desegregation jurisprudence, because of the Court's lack of clarity at its inception, has faltered. The complexity of desegregation remedies has prevented them from developing into a coherent doctrine that could then clarify the nature of the right at issue. The task, therefore, is to find a way to reconceive equitable remedies so that the judge's discretion at the remedy stage is guided by principle and precedent analogous to the principles and precedents that guide judges at the liability stage. Stephen Subrin put it this way:

The defense of equity power in constitutional cases designed to restructure public institutions tends to undervalue the problem of how to translate rights, constitutional or otherwise, into daily realities for the bulk of citizens. Aspects of common law procedure and thought, not equity, may be required to help deliver or vindicate rights, now that equity has opened a new rights frontier.

148. See Akhil R. Amar, Becoming Lawyers in the Shadow of Brown, 40 Washburn L.J. 1, 7 (2000) ("The Fourteenth and Fifteenth Amendments provide . . . clear[] . . . support for the idea that our Reconstructed Constitution is refounded on principles of free and equal citizenship.").

149. DAVID L. KIRP, JUST SCHOOLS 52 (1982).

150. Subrin, supra note 92, at 913.
The remedial principles of equity must be formalized, just as Justice Story attempted to formalize the principles of equitable rights in the nineteenth century. This would give courts the tools with which to exercise their discretion at the termination stage in a productive and effective way. The key to that formalization lies in Justice Thomas’ other concern expressed in Jenkins III about the nature of the constitutional right at issue.

IV. RIGHTS & INTERESTS

Discussions of... jural interests seem inadequate... for the very reason that they are not founded on a sufficiently comprehensive and discriminating analysis of jural relations in general. Putting the matter in another way, the tendency-and the fallacy-has been to treat the specific problem as if it were far less complex than it really is; and this commendable effort to treat as simple that which is really complex has, it is believed, furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems.

—Wesley Newcomb Hohfeld

A. Introduction

The importation of equity into the United States and its merger with law in the late nineteenth century gave to judges a powerful remedial tool. The unlinking of rights from equitable remedies, in the context of a constitutional system that gave primacy to certain rights, coupled with the advent of the modern bureaucratic state, made institutional reform litigation inevitable. Initially just in theory, but finally in fact, judges could use this new power to order vast remedies. They willingly began exercising this power in the 1960s in the context of school desegregation, then prison reform, and then hospital reorganization cases, to name a few types of institutional reform litigation. Unlike in early equity cases, where the remedy in effect preceded the explicit recognition of a right, courts approached these cases by finding liability and then, in separate proceedings, formulating a remedy. Because of this, there emerged a temporal and doctrinal separation between the right stage and the remedy stage of these cases. The archetype of this separation is the year that separated the liability opinion and the remedial opinion in Brown v. Board of Education.

One result of this doctrinal separation between the right and the remedy stage in school desegregation cases is that it has set equity free from its most fundamental defining characteristic: the harm that it is intended to remedy. Since both the concept and appropriate application of equity is so vague, and yet so potentially far reaching, once it was divorced from specific legal violations and was set free to work

on any legal violation, it became impossible to know in any particular case how far its reach was or should be without invoking some political consideration—whether it be frustration with uncooperative school officials, or overemphasis on local school control—that moved the focus from the fundamental issue of vindicating constitutional rights.

As explained above, this separation led judges to exercise substantial discretion in remedying rights violations. In Brown II, the remedial opinion of Brown v. Board of Education (Brown I), the Supreme Court set out broad standards to be followed by district courts when drawing up desegregation remedies. The Court emphasized both the flexibility of equity and the fact that the decree must address the plaintiffs' interests. It found that the constitutional principles at stake indicated that the plaintiffs had an interest in admission to school on a nondiscriminatory basis, and that the defendants had a duty "to effectuate a transition to a racially nondiscriminatory school system." 

In the early, post-Brown, desegregation cases, the Court exploited the vagueness of the reach of equity by coupling its understanding of the practical flexibility of equity with its strong view of the right at stake. In Green v. County School Board, the Court expressed its frustration with the defendants' unwillingness to implement a practical desegregation plan by articulating a broad right. The Court understood this broad right to include both the "immediate" right to nondiscriminatory school assignments as well as the "ultimate" right to a "unitary, nonracial system of public education" and to the elimination of the effects of past discrimination.

A few years later, in Swann v. Charlotte-Mecklenburg Board of Education, the Court acknowledged that a lack of guidelines hindered previous efforts at effective desegregation and noted that the "essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case," and emphasized that "flexibility rather than rigidity" was the hallmark of equity. The task of the court in these cases was to "correct . . . the condition that offends the Constitution" and "eliminate from the

153. Id. at 301.
155. Id. at 436.
156. Id. at 438 n.4 ("'We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" (quoting Louisiana v. United States, 380 U.S. 145,154 (1965)).
158. Id. at 15.
159. Id. at 16.
public schools all vestiges of state-imposed segregation."160 The Court concerned itself with substantive fairness, not with the semantic distinctions involved in defining the scope of equity.161 Thus, the Court determined that inremedying the effects of past discrimination, school districts likely had to go beyond merely making race neutral student assignments, and held that the exercise of judicial equitable power permitted the use of mathematical ratios in determining student assignments, the alteration of attendance zones, and the transportation of students (busing).162 The remedies provided in these early desegregation cases, where the Court was often faced with fierce resistance to its holding in Brown, the powers of equity, and the remedies it allowed, were a direct function of the Court's expansive understanding of the plaintiffs' right to go to a school that was free from racial discrimination.

Swann is also significant because it fixed the right-remedy separation that was formally introduced in Brown I and Brown II. The Swann Court set an extremely broad and undefined goal for desegregation remedies (the elimination of the vestiges of desegregation) and then invoked an equally broad judicial power to create remedies, without ever explaining the theoretical or practical nexus between them. This left later courts with the task of either exercising this broad power in perpetuity, or of finding a principled way to limit it as politics demanded. Predictably, courts have taken the latter approach, limiting the scope of desegregation remedies by focusing on the limits of the equitable power. This has been accomplished by the invocation of some familiar and long-standing doctrines.

Beginning in the late 1970s, the Court began to focus on the substantial limits on equity in order to create a sense of limitation and discipline in its desegregation jurisprudence. The main impetus for this change was that in northern school desegregation cases, beginning in Denver with Keyes v. School District No. 1,163 the existence and scope of the violation became an issue. In the earlier cases (all of which involved southern school districts), the violation (intentional discrimination by race), was easily proved because it was written into the law. In Keyes, where no such law existed, the Court held that intentional discrimination could not be assumed merely by the existence of schools segregated by race, but instead, had to be proven.164 This was a difficult and time consuming process.165 It also introduced into
the liability determination the issue of local control. Issues of local autonomy and control arise naturally from discussions of the intent of local authorities in assigning students and faculty and in making decisions about opening and closing schools. Thus, in this next wave of cases, defendants were able to shift the focus to the remedy and the extent of the remedial duty arising out of liability for intentional segregation. Through these cases, the Court developed a more limited view of the powers of equity and its relationship to the duty owed by the Equal Protection Clause.

For example, in *Milliken v. Bradley (Milliken I)*, the Supreme Court reversed the decision of the district court to use the entire Detroit metropolitan area to desegregate the Detroit School District because it amounted to an interdistrict remedy for an intradistrict violation, which contravened the remedial requirement that the nature of the violation dictates the scope of the remedy. The Court, in finding that the remedy had to be limited to the school district found to have practiced segregation, put great emphasis on the tradition of local control of public schools, arguing that it was the most deeply rooted tradition in public education. While mentioning that the nature of the violation determines the scope of the remedy, it viewed the violation not from the point of view of its effects on the plaintiff class, but from the point of view of the geographical and administrative position of the violators, thereby de-emphasizing the right of the plaintiffs to attend a "racially nondiscriminatory school system."

More recently, in *Missouri v. Jenkins (Jenkins III)*, the Supreme Court struck down a remedy based on "desegregative attractiveness," which attempted to improve the Kansas City School District to such an extent that white students from private schools and outlying districts would choose to attend those schools, thereby voluntarily desegregating those schools. One of the Court's rationales for striking this down was that because there was no limit on how much spending the district court could order to create "desegregative attractiveness," it

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167. Id. at 738.
168. Id. at 741-43; see also Dayton Bd. of Educ. v. Brinkman (Dayton I), 433 U.S. 406, 410 (1977) ("local autonomy of school districts is a vital national tradition"); Hills v. Gautreaux, 425 U.S. 284, 294 (1976) (noting that the *Milliken I* decision was based on the limitations on the federal courts' exercise of their equity power because the remedial order was not commensurate with the constitutional violation).
169. See *Milliken I*, 418 U.S. at 746.
170. Id. at 754-55 (quoting Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 301 (1955)).
could put off the return of the school district to local control indefinitely.\textsuperscript{172}

When the issue of local control is raised in desegregation cases, it can have a powerful effect because concepts about local authority are well developed; they appear not only in federal cases, but in fact date back to the issues in \textit{The Federalist} papers and the dispute between the Federalists and the Jeffersonians.\textsuperscript{173} Thus, they are easy to invoke and understand. The interests underlying the constitutional right to equal protection in the context of school segregation, on the other hand, have not been fully developed and are therefore easily manipulated, either as justification for limitless remedies (this is arguably what occurred in the district court in \textit{Missouri v. Jenkins}\textsuperscript{174}) or to strike down remedies when a court is not faced with the kind of egregious local segregative motives and actions of an earlier time.

Thus, when there is not a clear and articulable connection made between the right and the remedy, it matters whether one thinks of equal protection in general, and the segregation problem in particular,

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\item 172. \textit{Id.} at 100. Gary Orfield points out the irony that in \textit{Jenkins III}, the Court, premised on its concern with local autonomy, struck down the remedy which promoted local autonomy by funding the district's requested educational improvements. \textsc{Gary Orfield et al., Dismantling Desegregation} 97 (1996); see also David I. Levine, \textit{The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer}, 16 \textsc{Harv. BlackLetter L.J.} 39, 122, 124 (2000) (describing as a "myth" the notion that school districts desire a return to local control).
\item 173. \textit{See, e.g., The Federalist} No. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961); \textit{The Federalist} No. 15, at 108-09 (Alexander Hamilton) (Clinton Rossiter ed., 1961); \textit{cf.} Jared A. Levy, Note, \textit{Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education}, 78 B. U. L. Rev. 575, 601-03 (1998) (noting the Fourteenth Amendment's intentional encroachment on state power and federalism). \textit{But see Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making And The Modern State} 20 (1998) (contending that federalism and separation of powers concerns were appropriate and understandable at the time of the framing of the Constitution, but now, in the modern bureaucratic state, may be "showing their age").
\item 174. As the Supreme Court noted, in addition to mandating a low student-teacher ratio, establishing a full-day kindergarten, expanding the summer program, and mandating teacher salary increases (to name just a few remedies), the district court ordered long-range capital improvements which included:

- high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; green houses and vivariums; a 25-acre farm with an air conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities.

\textit{Jenkins III}, 515 U.S. at 79 (quoting \textit{Missouri v. Jenkins} (\textit{Jenkins II}), 495 U.S. 33, 77 (1990) (Kennedy, J., concurring in part and concurring in judgment)).
\end{enumerate}
from the point of view of the violators or that of the victims (i.e., as primarily a question of remedy or a question of right). An emphasis on one or the other affects the standards for judging the legality of remedies to correct constitutional violations. If a court at the remedy stage is primarily concerned with the rights of the plaintiffs, it is going to create a remedy and keep it in force until those rights are vindicated, justifying its position by emphasizing both the content and seriousness of the right, and the broad flexibility of equity. We see this in the early cases in which the Court established that the scope of the violation includes not only the intentional segregative acts, but also the effects these acts had.\(^{175}\) The Court has stated that the defendant school districts must return the plaintiffs to the position they would have been in without the unconstitutional segregation.\(^{176}\) Another way this standard has been articulated is that the defendant is under a duty to eliminate the "vestiges of state-imposed segregation"\(^{177}\) and create a "unitary school system." Yet, as already discussed, these terms are almost entirely undefined. We might understand the district court in \textit{Missouri v. Jenkins} as thinking in terms of this model. It poured so much money and innovation into the Kansas City school system so that the plaintiffs could acquire good schools, thereby eliminating the vestiges of past discrimination and returning the plaintiffs to the position they would have occupied in the absence of discrimination.

Justice Thurgood Marshall explicitly held this view. He consistently discussed the remedial duty in terms of the plaintiffs' rights. For example, in \textit{Dowell}, writing in dissent, he accused the majority of ignoring the fact that the harm to the plaintiffs can continue beyond the time a state stops practicing segregation.\(^{178}\) He viewed the remedial question as whether the defendant was taking "the steps necessary to cure that condition which offends the Fourteenth Amendment."\(^{179}\)

On the other hand, if the court focuses more on the remedial issue, it will conceive of a remedy in terms of the duty and then consider it


\(^{179}\) \textit{Milliken I}, 418 U.S. at 784; see also \textit{Dowell}, 498 U.S. at 260 (arguing that the right to be free from stigmatic injury should be the focus of the Court's inquiry into whether a district court can dissolve a desegregation decree); John C. Jeffries, Jr., \textit{The Right Remedy Gap in Constitutional Law}, 109 YALE L.J. 87, 111-112 (1999) (describing how single-ceiling began as a remedy for unconstitutional conditions and eventually took on a life of its own so that double-ceiling became per se unconstitutional, until the Supreme Court balked in \textit{Chapman v. Rhodes}, 434 F. Supp. 1007 (S.D. Ohio 1977), aff'd, 498 F.2d 1099 (6th Cir. 1980), rev'd 452 U.S. 337 (1980)).
implemented when the defendants can demonstrate implementation, or at least a good faith effort to implement it as far as possible.\textsuperscript{180} That is, the standard of success of the remedy will focus not on whether the rights of the plaintiffs have been vindicated, but on whether the defendants have carried through on the terms of the remedial duty.

In its most recent discussion of this issue, in \textit{Jenkins III}, after pointing out that the desegregation plan in Kansas City after almost twenty years had cost close to $200 million, the Court stated that the “ultimate inquiry” in determining whether the district court could end at least some of its supervision, was “whether the [constitutional violator] has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination have been eliminated to the extent practicable.”\textsuperscript{181} This included an analysis of whether the district court’s orders had served to “restore[e] the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct,”\textsuperscript{182} coupled with an interest in eventually restoring control of the school district to state and local authorities.

Yet, when the Court struck down the part of the desegregation order that was premised on the goal of “desegregative attractiveness” as an interdistrict remedy for an intradistrict violation, it did not factor into its analysis whether desegregative attractiveness was effective in restoring the plaintiffs to the position they would have occupied in the absence of segregation or whether it helped to eliminate the vestiges of discrimination. Rather, as discussed above, in its review of the remedy, it concentrated on the limits of the equitable judicial power as the justification for striking down that aspect of the decree. The vagueness of the Court’s understanding of the violation lost out to the well developed judicial doctrine of local control.\textsuperscript{183} Although the Court continues to insist that the scope of the right determines the scope of the remedy, the separation of the two has resulted in a desegregation jurisprudence which is currently rooted in the purported limitations


\textsuperscript{181} \textit{Jenkins III}, 515 U.S. at 89.

\textsuperscript{182} \textit{Id.} at 70.

\textsuperscript{183} Similarly, in ruling on the appropriateness of the district court’s denial of the State’s attempt to achieve partial unitary status because test scores in the Kansas City schools were lower than the national average, the Court noted that “the District Court must bear in mind that its end purpose is not only ‘to remedy the violation’ to the extent practicable, but also ‘to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.’” \textit{Jenkins III}, 515 U.S. at 102 (quoting \textit{Freeman}, 503 U.S. at 489).
on equity rather than the opportunity of equitable remedies to correct rights violations.\textsuperscript{184}

Despite the fact that the liability and remedy stages of institutional reform litigation have evolved into separate and distinct proceedings, the desegregation jurisprudence that evolved out of \textit{Brown} is characterized by the reiteration of the necessity of creating a fact-based connection between the right and the remedy. The nature of this connection is premised on the notion that the scope of the violation determines the scope of the remedy, an oft repeated phrase.\textsuperscript{185} Logically, therefore, the connection between the right and the remedy must depend, at least initially, on determining the scope of the violation. The Court has failed, however, to define the scope of the violation.

In fact, the contours of the requirement that the scope of the right determines the scope of the remedy has thus far been stated almost entirely in platitudes, which have become mysterious terms of art that have little ability to function as principled explanations and limitations on the reach of equitable remedies. As a result, the extent of equitable power at the remedy stage is not firmly rooted in the nature of the right that has been violated. Thus, from an historical perspective, one can view the Court's current desegregation jurisprudence as two steps removed from the origin of its equitable powers. First, there was the separation of the right and remedy in equity which came about primarily through the promulgation of the 1938 Federal Rules of Civil Procedure and the merger of law and equity. The second step in this separation is the inability of the Court, despite its insistence on their connection, to articulate the connection between the breach of the duty not to deny equal protection, and the remedial duties to which this breach gives rise. Thus, not only is the remedy not explicitly tied to the right by virtue of the order in which they arise, but it is also not sufficiently tied to the right by the legal theories created by the Court.

Thus, the nature of the constitutional right at stake must be explored more thoroughly if there is ever going to be any principled rights-based limitation on the reach of equity in institutional reform litigation in general, and school desegregation cases in particular. This exploration must include an attempt to understand what the Court means when it talks about the "scope of the violation." For if

\textsuperscript{184} Wendy Parker, \textit{The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities}, 50 HASTINGS L.J. 475, 552 (1999) ("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.").

that is the ultimate limit on a court's equitable powers at the remedy stage, then we must at least try to understand it.

B. Hohfeld

The starting point for any discussion of the modern use of the language of rights must be with Wesley Hohfeld. In 1913, Hohfeld published his article *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*,186 where he tried to identify and classify the subtleties involved in the discussion of legal rights.187

Jeremy Bentham in particular may be credited with anticipating Hohfeld's project insofar as his most caustic criticism of natural rights centered on the extreme ambiguity of the language of rights. Speaking of the *French Declaration of the Rights of Man and the Citizen*, Bentham declared:

The logic of it is of a piece with its morality:- perpetual vein of nonsense, flowing from a perpetual abuse of words,-words having a variety of meanings in the same page,-words used in meanings not their own, where proper words were equally at hand,-words and propositions of the most unbounded signification, turned loose without any of those exceptions or modifications which are so necessary on every occasion to reduce their import within the compass, no only of right reason, but even of the design in hand, of whatever nature it may be.188

Unlike Bentham, however, Hohfeld's project was an analytical one only: to reveal complexity by capturing the hidden detail in assertions about rights, thereby providing a descriptive account of what we mean when we talk about rights.189 Hohfeld categorized rights into four groups, each with a distinct meaning, and each then coupled with an opposite and a correlative. The four categories were claim-right, privilege, liberty, and immunity. Hohfeld laid this out in the following table:190

<table>
<thead>
<tr>
<th>Jural Opposites:</th>
<th>claim-right</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>no-right</td>
<td>duty</td>
<td>disability</td>
<td>liability</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Jural Correlatives:</th>
<th>claim-right</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>duty</td>
<td>no-right</td>
<td>liability</td>
<td>disability</td>
<td></td>
</tr>
</tbody>
</table>

187. Hohfeld, however, was not the first to notice the ambiguity in rights talk. Richard Tuck, for example, traced the idea of rights back to the fourteenth century and demonstrates that the language of rights has always been equivocal, not in the least because the language of rights is so malleable. Richard Tuck, *Natural Rights Theories: Their Origin and Development* (1979).
189. Cardozo characterized Hohfeld's project as "a plea that fundamental conceptions be analyzed more clearly, and their logical conclusions, developed more consistently." Benjamin N. Cardozo, *The Nature of the Judicial Process* 37 (1949).
To Hohfeld, a right is best described as the prerequisite for requiring someone else to behave in a certain way toward the right holder. Thus, a claim-right is correlative with a duty and its opposite is a no-right. If one has a claim-right, then someone else is under an obligation to act toward the right holder in a certain way, and the holder of the claim-right does not have a no-right (this is obviously tautological, which underscores its categorization as an opposite). Thus, my claim-right to payment of a debt correlates with someone else's duty to pay the debt. Privileges, on the other hand, refer to my ability to behave in a certain way without interference. If one person has a privilege, then someone else has a correlative no-right, and the holder of the privilege also has no duty. Thus, my privilege to speak my mind about a political situation is correlative with the rest of the world's no-right to interfere with my speech, and it also means I am under no duty not to speak my mind on the topic.

The notion of a legal power is that one is capable of changing one's legal relations. Thus, David Lyons cites the example of one's capacity or ability to get married and transfer one's own property as examples of legal powers. If one has a legal power, someone else would be under a liability (the correlative of power), and the holder of the power would not be under a disability (the opposite of power) from exercising that power. Hohfeld gives the example of a contract offer to illustrate how power and liability correlate. If A offers to sell goods to B, and A agrees to keep the offer open for one week, during that week, B has the power to buy those goods, and A is under a liability that she may have to sell those goods.

Lastly, the notion of immunity refers to the immunity holder's security in not having her legal relations changed by a certain person, who is in turn under a correlative disability as to changing those relations. To illustrate, Hohfeld gives the example of a property holder who is immune from certain others transferring her ownership to themselves or anyone else. Those others are thus under a disability from performing that transfer. Because liability is the opposite of immunity, it can also be said that the property holder is not under a liability to have such a change affected.

191. See id. at 51.
192. DAVID LYONS, RIGHTS 9 (1979)
193. This is a much watered-down version of Hohfeld's illustration. See Hohfeld, supra note 151, at 55. It is worth noting Carl Wellman's contention that there is also a liability connected to the power to marry because for a marriage to be valid, not only must both parties consent (an exercise of their powers), but they must also enlist the aid of someone else: a minister, rabbi, justice of the peace, etc. who has the legal power to marry them. As to this person, the couple, in Hohfeldian terms, has a liability to be married. This liability is most evident in the context of same-sex marriages where the legal invalidity of these unions derives not from the failure of the couple to exercise of their powers of consent, but the absence of any legally recognized power of the individual officiating to marry them. CARL WELLMAN, A THEORY OF RIGHTS 86-89 (1985).
Hohfeld's categories have proven useful to generations of legal scholars and judges as an aid in thinking analytically about rights, but they have also been the subject of some criticism for their failure to capture everything that Hohfeld intended. In any event, there are two important facts that Hohfeld's analysis forces us to confront. First, it cannot be denied that when one makes a statement such as "I have a right to X," one might easily be talking about a right, privilege, power, or immunity, or some combination of two or more of them. By understanding Hohfeld's analysis, we are better able to understand what one means by such a statement, and are therefore in a better position to understand its implications for the behavior of others in relation to it. Second, by breaking down the meaning of the statement "I have a right to X," Hohfeld also alerts us to the important distinction between rights and privileges. Only if one has a right in the more limited Hohfeldian "claim-right" sense can the violation of it be redressed by the imposition on another of a duty. As one scholar put it, rights are "nothing but duties imposed on others. Rights define the extent of the legal protection that is granted to the interest." Privileges by themselves are just the freedom to act in a certain way, and if harm to others results, the privilege-holder is not liable for that harm, which remains damnum absque injuria.

It might be useful, therefore, to apply Hohfeld's scheme to the legal issues involved in desegregation jurisprudence in order to reveal the complexity involved in applying the Fourteenth Amendment's command that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Initially, if the duty not to deny equal protection of the laws means that the government has a duty to be neutral in school assignments

196. David Lyons has argued rights and duties are not always correlative by demonstrating that what he calls "active rights" (Hohfeld's privileges) such as the right to free speech, do not correlate with duties because the duties of noninterference with such rights were created not to protect those rights per se, but for other reasons. Laws against assault, for example, primarily exist to protect one's interest in bodily integrity, even though they also serve as duties of non-interference correlative to the right to free speech. Whether one wants to call the duties correlative to "active rights" and "privileges" duties or, in Hohfeld's terminology, "no-rights," it is important to recognize that even though those duties/no-rights existed prior to the active rights/privileges, if they had not been already in existence, they would have had to be created once the active right/privilege was recognized. David Lyons, Rights, Claimants, and Beneficiaries, in RIGHTS 58-77 (David Lyons ed., 1979).
(i.e., not to discriminate in school assignments), then African-American children have a right to be assigned to school on a non-discriminatory basis and therefore an immunity from being forced into segregated schools. Correlative with these rights on the part of African-American children is the State's duty to assign all children to school on a non-discriminatory basis, and the State's disability from making racially discriminatory assignments.

This application of Hohfeld's analysis is fairly straightforward. It amounts to a simple acknowledgment that the Equal Protection Clause is stated in the form of a duty and that it confers on all citizens a correlative right that the State comply with that duty. The more difficult question presented by desegregation jurisprudence is whether there are in fact other rights and duties that can be deduced from the Equal Protection Clause, or whether other interests that some might understand to be rights remain as just privileges, powers, or immunities.

For example, in Hohfeldian terms, the duty not to deny equal protection, and its correlative right, as outlined above, also includes a privilege, but no duty, on the part of the State to provide an adequate education so long as it does so equally. But it does not afford a particular right on the part of African-American children to have an adequate education. This must also mean that the State has a privilege, but no duty, to provide an inadequate education, again, so long as it does so on equal terms. Accordingly, there is also an immunity by government to a lawsuit based on inadequate educational opportunities alone, which is correlative with a disability on the part of schoolchildren to demand an adequate education grounded in the Equal Protection Clause.

This analysis highlights that any lawsuit making demands on the government based on a violation of the Equal Protection Clause in the context of segregation is faced, at least in Hohfeldian terms, with a very limited duty, and therefore a very limited right. If the duty involved is not to discriminate on the basis of race in school assignments, then the logical Hohfeldian right that correlates is the right to not have the State make such discriminatory assignments. The logical remedy for such discrimination then is simply to have the State stop discriminating. Consequently, at least one way to understand

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199. In fact, the duty is stated in the form of a double negative, *viz*, the duty *not to deny* equal protection.

200. This analysis deals only with the United States Constitution, and does not take into account state laws and constitutions which might require a higher duty to provide, for example, a certain type and/or level of education. See, e.g., Ark. Const. art. XIV; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1.

201. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("[T]he Equal Protection Clause does not require absolute equality or precisely equal advantages.").
Justice Thomas' concurrence in Jenkins III is as an attempt to apply a Hohfeldian account of remedies to the desegregation context. In fact, Justice Thomas notes that "the point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color" and that "[r]acial isolation itself is not a harm; only state-enforced segregation is."\(^2^0^2\)

This interpretation of the nature of the right to equal protection demonstrates the inherent, and perhaps intended, limitations of the Hohfeldian scheme, the most significant of which is that Hohfeld did not explain how remedial rights relate to other rights. He explained how for every right there is a duty, and presumably, this duty would carry over to remedial rights (i.e., when a court orders a particular remedy, this constitutes a new duty to which the plaintiff has a correlative right). But Hohfeld did not have a theory for how this secondary cluster of remedial rights and duties relates to the initial right-duty cluster. It has been suggested that, in Hohfeldian terms, once a breach of a legal duty has been found, the court has the power to create a new set of jural relations:

It may confirm the original claim-duty relation if this was in dispute, as by an injunction or an order for specific performance. Or it may substitute another claim-duty relation, as to pay damages . . . . A's claim thus exists by virtue of B's duty, this usually being based on an interest of A's, but is quite independent of the legal remedy.\(^2^0^3\)

That is, there is a duty not to deny equal protection and a correlative right to equal protection. For example, the violation of the duty by practicing intentional racial segregation in public schools does nothing to the existence of the right. The victims of segregation still have a right to equal protection, even if that right has been violated. The remedial issue is what duties does the violation of the right to equal protection give rise to? Hohfeld does not provide us with a way of discovering what the appropriate remedy would be when a court is faced with the breach of a duty. Yet, one thing that is clear from the Supreme Court's desegregation jurisprudence is that the Court has never held what one might deduce to be a strictly Hohfeldian view of the remedy, that is, that all the State needs to do is stop discriminating.

The Court in Green, for example, stated that once intentional segregation was found, school authorities had the duty to transform the school district into one in which "racial discrimination would be eliminated root and branch."\(^2^0^4\) The remedial duty has alternatively been expressed as the requirement that the school district return the plain-

\(^{203}\) Wilson, supra note 194, at 201-02.
tiffs to the place they would have been in had there been no discrimi-
nation. Thus, according to the Court, the breach of the duty not to
deny equal protection gives rise to new and arguably more substantial
duties to eradicate the effects of discrimination. Yet, the Supreme
Court since Brown I has not been explicit and consistent about what
counts as an effect of discrimination. To put this in Hohfeldian terms,
there is no explication of the right that gives rise to and is correlare
with the creation of new remedial duties. Courts recognize the need
for new duties to eradicate the effects of the wrong done to the plaint-
iffs, and they understand that at some level plaintiffs have a “right”
to these duties. Yet, courts have not explicitly developed a theory
of rights to ground these duties. This lack of clarity may be the result
of judges understanding that the violation of the Equal Protection
Clause gives rise to new duties on the part of the State, yet not under-
standing that the creation of these new duties cannot be coherent un-
less the interests that ground the correlative rights are also
recognized. The failure to acknowledge the new Hohfeldian relation-
ship created at the remedy stage, and the failure to explain the con-
nection between those remedial rights and duties and the rights and
duties from which they arose, has prevented the Court from being able
to articulate principled limits on the scope of its remedial power.

The absence of a theory of how remedial duties relate to the rights
violation to which they give rise highlights another limitation of
Hohfeld’s theory: Hohfeld did not have a theory of how rights might
generate duties, and vice versa. Many laws, including the Fourteenth
Amendment, are stated in terms of duties which exist upon their pro-
mulgation, even without the identification of specific correlative
rights. Thus, one could see the distinction between Plessy v. Fergus-
on, where the Supreme Court upheld the legality of segregation
under the Fourteenth Amendment’s Equal Protection Clause, and
Brown v. Board of Education, where segregation was found to be ille-
gal under that Clause, as a new understanding of the type of right to
which the duty not to deny equal protection gives rise. That there
could be two such different interpretations of the duty not to deny

205. Id.
right of the Negro respondents residing in Detroit is to attend a unitary school
system in that district.”).
207. 163 U.S. 537 (1896).
208. The Supreme Court in Brown I acknowledged as much, stating, “In approaching
this problem, we cannot turn the clock back to 1868 when the [Fourteenth]
Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written.
We must consider public education in the light of its full development and its
present place in American life throughout the Nation. Only in this way can it be
determined if segregation in public schools deprives these plaintiffs of the equal
equal protection itself indicates that duties and rights are not simultaneously created but may need to be generated from each other in light of the political and social context. As Joseph Raz has stated:

The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live. A change of circumstances may lead to the creation of new duties based on the old right.\(^{209}\)

Given the limitations of the Hohfeldian approach, which does not explain how remedial duties emerge from rights, once a violation of a duty has been found, we must then turn to a substantive theory of rights to figure out how to define the scope of the new jural relations that are created at the remedial stage. This is what Justice Thomas explicitly resisted in Jenkins III, and what the majority of the Court has implicitly resisted. The right and duty analysis which allowed the court to identify the breach of duty must be set aside. Once the violation is found, the court must then set up a new scheme of jural relations. That is, it must impose new duties on the defendant to compensate the plaintiff for the harm and create an institutional structure where the relevant effects of the violation are eradicated.\(^{210}\)

This analysis brings us right back to the fundamental question left open by Hohfeld, namely, what is the nature of the injury inflicted when the State violates its duty not to deny equal protection? Even if we accept that in the context of public schooling, this duty translates directly into the duty not to discriminate in school assignments solely on the basis of race (surely an indisputable proposition at this point\(^{211}\)), we are still left with the question of how to understand this right such that we can generate appropriate remedial duties when the right has been violated by the nonperformance of the original duty (in this case, the intentional segregative acts of the defendant school districts and/or State). To put it another way, given the correlativity of duties and rights, what rights are generated by the Equal Protection Clause?

If the interests that the duty not to deny equal protection are intended to protect can be identified in a general way, then two important things will be accomplished. First, plaintiffs will no longer have the burden of proving a specific causal link between the defendants' acts of segregation and the harm suffered. Instead, they will only have to prove that there was segregation, and that they suffered harm to those identified interests. Second, there will be a better understanding of the nature of the right, thereby allowing courts a more

\(^{210}\) See Owen Fiss, The Civil Rights Injunction 87 (1978).
\(^{211}\) See Brown I, 347 U.S. at 495 ("We have now announced that ... segregation [in public education] is a denial of the equal protection of the laws."). See generally Charles Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960).
principled way of crafting remedies to vindicate that right, and also an understanding of when those duties have achieved success.

The approach suggested above would require the Court to specifically identify the range of interests protected by the Equal Protection Clause in the context of public schooling; determine whether the defendants violated the Equal Protection Clause by practicing segregation; and then, in the termination context, ask whether the plaintiffs continue to suffer harms to those identified interests. This would shift the difficulty of proof in desegregation cases from causation to interest identification. In order to make this shift, however, we need a theory of rights.

C. Interest Theory of Rights

Joseph Raz sets forth an “Interest Theory” of rights. He states: “X has a right” if and only if X can have rights; and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty. In Raz’s view, rights occupy an intermediate place between interests and duties. The strength and nature of the interest creates the right, and the existence of the right creates a duty. Rights are the grounds for imposing duties, and duties are justified by the existence of the right. As Raz states, “[t]he specific role of rights in practical thinking is, therefore, the grounding of duties in the interests of other beings.”

Under the Interest Theory, to say that X has a right is to say that X’s interests would be advanced by the performance of a duty, whether or not that duty actually exists. Thus, this theory is victim-based because it looks to the interests of the right-bearer to decide how to assign duties. Rights generate duties, but there is not an exact correlativity because not all rights have necessarily generated specific duties at any one time. Hohfeld tells us that duties correlate with rights, and Raz tells us that those duties are determined by the nature of the interests that generated the right:

If a duty is based on a right . . . then it trivially follows that one cannot know the reasons for it without knowing of the right (or without knowing that the interest which it protects is sufficient to be the ground of a duty—which is the definition of a right).

The issue here is not how to derive rights from interests, but rather how to derive duties from interests, given the pre-existence of a constitutional right. That is, Interest Theory, as a descriptive enterprise, posits that the language of rights in our system is evidence of the importance that we give to certain interests. As the Supreme Court itself noted: “Rights, constitutional and otherwise, do not exist in a

212. Raz, supra note 209, at 166.
214. Raz, supra note 209, at 185.
vacuum. Their purpose is to protect persons from injuries to particular interests and their contours are shaped by the interests they protect.\textsuperscript{215}

Rights simplify discourse because we can use rights as a shorthand for expressing important interests, and we do not have to discuss ultimate values every time a practical question arises. But that does not mean that we can disregard the fact that these rights are created by interests in the first place. On the contrary, as Raz formulates it, it is the nature and content of these interests that tell us what duties are created by certain rights.\textsuperscript{216}

The interplay of interests, rights, and duties has been stated in more formal terms by Raz. Raz envisions a justificatory hierarchy of interests, core rights, and derivative rights. Core rights are justified by interests, and derivative rights are justified by core rights. Thus, my right to personal liberty is a core right, justified by interests in liberty, freedom, and personal dignity. My derivative right to walk on my hands (Raz's example) is derived from my right to personal liberty, even though walking on my hands is only very indirectly justified by my interest in freedom. That is, it is enough of a justification for my right to walk on my hands to simply say I have a right to liberty and non-interference; I do not need to invoke the higher justification of fundamental interests that ground that core right. On the other hand, if I want to justify the core right, I must reach back to the interests that ground that right.\textsuperscript{217}

The ultimate justification for a right is that the interest underlying that right is important enough to protect, even at the expense of the general welfare. In a situation where rights and utility conflict, rights prevail.\textsuperscript{218} Of course, there may be situations where rights conflict,

\textsuperscript{216} Raz, supra note 209, at 181-82.
\textsuperscript{217} Raz, supra note 209, at 168-70. Dworkin posits a similar hierarchy of rights, although he analyzes the justificatory process, as it is undertaken in judges, in much greater detail. Dworkin contends that specific legal rights are recognized through the interpretation of past precedent in light of principles of justice, fairness, and procedural due process. A judge recognizes a novel legal right by interpreting past decisions with an eye toward consistency, as if all of the law had been written by one consistent, fair, just author. The declaration of a right, if derived through this process of integrity, is the result of a construction of legal practice in its best light. Ronald Dworkin, Law's Empire 176-224 (1986).
\textsuperscript{218} See Ronald Dworkin, Rights As Trumps, in Theories of Rights 153 (Jeremy Waldron ed., 1984). Dworkin calls rights trumps, but Dworkin is not an interest theorist. Rather, he views rights as necessary to trump utility in situations where there is a high likelihood that without them, the majority preference might be driven by unacceptable motives, such as racial bias. Ronald Dworkin, Taking Rights Seriously 223-239 (1978). As Jeremy Waldron explains, rights are necessary to exclude certain reasons for public action, not for "the immunization of particular interests for their own sake." Jeremy Waldron, Pildes on Dworkin's Theory of Rights, 29 J. Leg. Stud. 301, 304 (2000).
in which case a utilitarian calculation might be necessary as one method of resolving the conflict, but such a calculation only becomes available after the acknowledgment that there are fundamental interests conflicting with each other, not fundamental interests conflicting with other interests. As Jeremy Waldron put it, "there are certain losses whose infliction on individuals in the resolution of political conflict is morally unacceptable. That is, there are certain losses that people should not have to run the risk of suffering when they agree to be bound by the democratic process."219

To say rights trump utility, however, is not to say that conflicts between rights and other interests will necessarily be conflicts between the interests of the individual and the interests of society. The justification for individual rights must be understood, according to Raz, as both the interest of the individual and the common good.221 The existence of a right might point not only to the value society has placed on an individual interest, but also the value society understands this interest to have for the common good. The right to free speech, for example, protects an interest in open political discussion, something one cannot do alone, and something that many would agree benefits society in general, not just the individuals engaged in a political dialogue.

Rights are unique, according to Raz, because they have enough force and importance to ground duties and to define the scope of those duties by virtue of the interest and the respect due to them.222 In order to determine what duties arise out of a certain right under the Interest Theory, we have to look backward to the values and interests that generate the right, and forward to the circumstances within which duties are created, thus taking into account "conflicting considerations."223 The Interest Theory of rights tells us that rights are the concretization of certain fundamental interests, and that the naming of those rights does not necessarily correlate with any specific duties. Thus, not every right gives rise to a particular duty, or all of the duties that could promote its justificatory interests. Rather, it only gives rise to those duties that are sufficiently free from conflicting considerations.224 Thus, one can have rights, or believe in rights, without being clear about what the duty is and whose duty it is.

Waldron has elaborated on this point, arguing that any particular right creates "waves of duties":

222. See Raz, supra note 209, at 249.
223. Waldron, supra note 220, at 198.
224. Id. at 182.
We talk about rights when we think that some interest of an individual has sufficient moral importance to justify holding others to be under a duty to serve it. But if a given interest has that degree of importance, it is unlikely that it will justify the imposition of just one duty. Interests are complicated things. There are many ways in which a given interest can be served or diserved, and we should not expect to find that only one of those ways is singled out and made the subject matter of a duty.\footnote{Jeremy Waldron, \textit{Rights in Conflict}, \textit{in Liberal Rights: Collected Papers 1981-1991}, 212 (1993).}

Waldron's elaboration of the Interest Theory provides a connection that Hohfeld's theory did not: between the initial right and the duties to which its violation might give rise. Waldron gives the example of the right not to be tortured. The obvious correlative duty would be a duty not to torture, but Waldron goes farther and demonstrates that it might also create, for example, a duty to educate people about the wrongfulness of torture, as well as a need to monitor situations where torture is likely.\footnote{Id.} Most important for these purposes, however, is that Waldron also recognized that remedial duties are generated by the right and its underlying interest. Still concerned with the torture example, Waldron writes:

> In the case of each of these duties, the argument for imposing it is traced back, via the complexities of political life, to the concern for an individual interest that underpinned the right in the first place: we say that the right protects a basic human interest and that in the current circumstances of human life one cannot be said to take that interest seriously if one is content to stop at the previous wave of duty and not worry about anything further. . . . [F]or our conception of the interest will operate as a normative resource base from which a whole array of moral requirements can be developed.\footnote{Id. at 213.}

The Interest Theory of rights has many attributes that might prove useful in thinking analytically about rights in the context of school desegregation litigation and remedies. First, the theory posits that as a descriptive matter, rights are reflections of interests that are valued highly enough to justify their precedence when they conflict with other interests. Second, duties correlate with rights not on a one-to-one basis, but rather in an ongoing process of dynamic generation.\footnote{See id. at 303.} It follows, then, that in order to understand what duty is appropriate to vindicate a particular right, one must understand the interests that ground that right. Third, in understanding those interests, one must consider not only individual interests, but also interests that society in general might have that justify the right. Fourth, the creation of duties based on those interests must take into account not only the interests, but also the context in which the duty will be created and carried out.
A few caveats are in order before proceeding to analyze school desegregation jurisprudence with the aid of rights theory. First, the interests that justify rights do not cover the field of morality. The Interest Theory of rights is intended to be descriptive of legal, not moral, rights, although of course there will be some overlap. Related to this caveat, it must also be understood that this analysis should not fall victim to the naturalistic fallacy: the attempt to get an "ought" from an "is." The Interest Theory of rights is an attempt to describe legal rights accurately, to jibe with our intuition of what we mean when we talk about rights. The Interest Theory does not tell us which interests ought to generate rights and duties, and it does not tell us which specific interests have generated rights and duties. The utility of the theory is that it alerts us to the fact that in talking about rights, we are talking about intermediate conclusions, conclusions about the value of certain interests. But if the task is to generate duties based on a right, as it is for courts trying to create remedies in school desegregation cases, then one must look beyond these intermediate conclusions to the interests that ground them. The next section of this Article attempts to do this by exploring what courts say about rights and duties, and trying to glean from that the underlying values and interests at stake. This is the first and most important step in the creation of effective remedies which would then carry with them the standard for judging their success and failure. It is also an acknowledgement of the historical fact that equitable remedies give rise to rights.229 Thus, in looking at the desegregation jurisprudence of the past forty years in light of the Interest Theory of rights, some clarifying principles may emerge that can in turn be applied to future cases.

D. Rights Theory Applied

The Fourteenth Amendment to the United States Constitution states that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."230 This is, to put it mildly, "exceedingly abstract moral language."231 In the Hohfeldian spirit, the Supreme Court has understood this statement of a negative duty to create a right in any person within the State's jurisdiction to equal protection of the laws. As Justice Strong recognized over one hundred years ago:

229. See Levinson, supra note 136, at 887. The attempt to identify relevant interests by examining the remedial duties developed by the Supreme Court could be characterized as a Dworkinian exercise in post interpretive/reforming analysis. That is, to interpret the law as it stands in order to better understand its underlying principles so as to then apply them more effectively in the future. See generally Dworkin, supra note 218, at 45-86.


The words of the [Equal Protection Clause of the Fourteenth] [A]mendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.\(^\text{232}\)

This equally abstract right, derived from the duty, must then be translated into something meaningful in order to function as a legal rule. Raz would contend that as a core right, that is, a right that is not derived from other rights but stands on its own as an expression of fundamental interests, the right to equal protection of the laws serves a justificatory function for derivative rights.\(^\text{233}\) One of these derivative rights, as Justice Strong points out, is the right to be exempt from racially discriminatory legislation.

If we accept the Hohfeldian description of the correlativity of rights and duties, and the descriptive power of the Interest Theory which holds that interests form the basis for rights, rights form the basis for duties, and interests therefore form the basis for duties, then we must understand the Equal Protection Clause as creating a right that reflects certain fundamental interests. Assuming that the goal of any remedy is to put the plaintiff back in the position she would have occupied in the absence of the violation, or at least try to rectify the loss resulting from the violation, then in crafting remedial duties to vindicate rights violations, courts must understand the nature of those interests in order to restore them.\(^\text{234}\) If this is true, then we ought to find in cases in which courts are called upon to create or evaluate remedies arising out of a breach of the duty not to deny equal protection, that they look to the interests that gave rise to the duty not to deny equal protection.

Perhaps surprisingly, there are not very many appellate cases that explicitly discuss the nature of the right to equal protection in the context of school segregation. Because the Equal Protection Clause is stated in terms of a negative duty (*no* State shall *deny*), the violation of the right is dependent upon proof of the violation of the duty. Plaintiffs who bring desegregation cases must prove that the defendants

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\(^{232}\) Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879); accord Cooper v. Aaron, 358 U.S. 1, 17 (1958) (recognizing a constitutional right of children "not to be discriminated against in school admission on grounds of race or color.").

\(^{233}\) Raz, *supra* note 209, at 168-70.

\(^{234}\) As Abram Chayes put it, "[r]elief is . . . an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1294 (1976); see also Frank H. Easterbrook, *The Limits on Judicial Power in Ordering Remedies*, 14 Harv. J.L. & Pub. Pol'y 103, 111 (1991) (“[T]he choice of remedy follows from the choice of objective. That choice is substantive.”).
breached this negative duty (i.e., denied them equal protection) by practicing intentional discrimination. This focuses the burden of production on bringing forth enough evidence to prove intentional discrimination. Although a discriminatory purpose can sometimes only be proven by its effects, even in these types of cases, the effects examined are usually issues of racial balance among the students, and sometimes faculty, in a particular school district. Thus, a history of officially segregated schools, coupled with the absence of affirmative steps having been taken to correct that segregation after such laws were proclaimed to be illegal by the Supreme Court in Brown I, and a determination that the current imbalance can be traced back to the official segregation, were usually enough to justify a finding of intentional discrimination and a violation of the Fourteenth Amendment. Thus, at the liability stage of most desegregation cases, the focus has been on proving intentional discrimination by the school district, not in defining the scope of the right not to be denied equal protection of the laws.

There is of course, a notable exception in Brown I. In Brown I, the Court first recognized that intentional segregation was a denial of equal protection, and it had to explain why. The Court did this by examining the interests which ground the duty not to deny equal protection in order to establish the contours and proper interpretation of that duty.

The issue in Brown I was whether the doctrine of "separate but equal" was applicable to public education. The Court assumed that the segregated schools the plaintiffs attended were essentially equal in terms of what the Court called "tangible factors," such as buildings, curricula, and qualifications and salaries of teachers. Thus, in deciding that segregation was a violation of the Equal Protection Clause, the Court looked instead to "the effect of segregation itself on public education." The effect on black children, according to the Court, was "a feeling of inferiority ... that may affect their hearts and minds in a way unlikely ever to be undone." This sense of inferiority was found to affect motivation, to retard emotional development, and to deprive the black children of benefits they would otherwise enjoy.

236. See Keyes, 413 U.S. at 201.
240. Id.
241. Id. at 494.
242. Id.
Looking solely at the Brown I Court’s discussion of the nature of the right to equal protection, there appear to be two relevant interests. There is an interest in equal educational opportunity (once the State decides to provide an education). There is also an interest in being free from state action that carries the message of inferiority (what is referred to as stigma). This latter interest is really just an interest in being treated respectfully by the State.243

Thus, the Court found that the State could be violating the Equal Protection Clause either when it distributed benefits unequally because of race, or when it provided equal but separate treatment when there was no reason other than race for the separation. The latter point is inferred from the Court’s statement that segregated schools are “inherently unequal.”244 In this way, the Brown I Court tied the definition of the violation directly to the interests of the plaintiffs by defining the violation not simply in comparative terms (i.e., whether they were treating the plaintiffs equally to white children), but also in noncomparative terms which took into account the perspective of the plaintiffs, the right-bearers.245 The inequality between the white and black schools during segregation was not only in how benefits were distributed but also in how each race understood the segregation, the effect that the segregation had on their “hearts and minds.” This was why separate could never be equal.246

244. Brown I, 347 U.S. at 495.
245. Joel Feinberg, Noncomparative Justice, in Justice: Selected Readings (Joel Feinberg & Hyman Gross eds., 1977). Joel Feinberg draws a distinction between comparative and noncomparative justice that is helpful in understanding the Brown I decision. According to Feinberg, some determinations of justice depend on making comparisons between people. “When the occasion for justice is the distribution of divisible but limited goods . . . how much will be left for the others is always pertinent to the question of how much it would be just for any particular individual to get.” Id. at 56. Justice can also take a noncomparative form, where someone can be treated unjustly without reference to anyone else. Feinberg focuses on what he calls the “justice of judgments.” Id. at 57. Injustice arises in this context when someone is wrongly judged, that is, the judgment about them is either wrong in reference to the truth (e.g., the falsely accused) or is derogatory without basis in fact. See id. Segregation was a comparative injustice because black and white students did not get the same education, particularly if one includes access to opportunity as one of the benefits of an education. Segregation was also a noncomparative injustice because it was a judgmental injustice, that is, it made a wrong and unfair judgment about African-American children—that their skin color indicated something about their mental and moral worthiness. As Feinberg states, the injustice in the judgment “consists precisely in the falsity of the derogatory allegation.” Id. The injustice of this does not depend in any way on how someone else is judged.
246. The Court has been criticized for its use of social science evidence to buttress its finding that segregation has an adverse effect on the psyches of black children. See, e.g., Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73
Although the Fourteenth Amendment seems simply to protect an interest in equality, the Court in Brown I indicated that it protects another interest as well: the interest in being treated respectfully by the State. The Brown I Court revealed this dual nature of the Fourteenth Amendment in its discussion of the unconstitutionality of "separate but equal." The Equal Protection Clause instructs us how to protect whatever interests the government is taking seriously. In the context of public education, therefore, it tells us that if the government decides to provide an education, it must do so equally (at least as far as racial distinctions are concerned). Thus, when equality operates in the context of scarce resources, it is simple to understand its meaning, viz, those resources must be distributed equally. Yet, the Brown I Court, in assuming for the purpose of its decision that the segregated schools at issue were equal as to all tangible goods, recognized another interest implicit in the equal protection guarantee: the interest in being treated respectfully by the government. And the particular nature of that interest is not a function of scarce resources.

This second, noncomparative conception of equality goes beyond notions of formal equality to a recognition that, in some circumstances, the concept of equality is really a stand-in for concepts of rights, and rights are determined by interests. As Peter Weston has explained, the idea of equality is circular if it is understood to stand for the idea that like people should be treated alike. That is, equality is a truth because it is a tautology. The underlying issue in noncomparative equality analyses is the determination of qualities which are relevant for treating people differently. In what way should people be considered alike for the purposes of the distribution of certain goods, and then to what goods are they all entitled: "When several people qualify under a principle the principle generates equal-

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Harv. L. Rev. 1, 32-33 (1959). These criticisms have been amply addressed by those simply pointing out that all one needs to do is take judicial notice of society in order to understand that one of the purposes of segregation was to insinuate the inferiority of blacks, and that the message was duly absorbed by many. See, e.g., Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 9 (1976) (noting the "plain fact" that the meaning of segregation was to put blacks in a position of inferiority); Charles Lawrence, "One More River to Cross"—Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies, in Shades of Brown: New Perspectives on School Desegregation 50-56 (Derrick Bell ed., 1980). Richard Kluger persuasively demonstrates that the footnote to social science evidence was included as a way of dismissing the claim made in Plessy that any feelings of inferiority were self-imposed by black school children and not the direct result of segregation. See Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality 705-07 (Special ed. 1994). This method of indirectly criticizing the reasoning in Plessy has itself been criticized.

ity of rights, but that is entirely fortuitous. A person's right would be the same were he the only one to hold a right under the principle.248

Thus, in situations where scarcity of resources is not at issue, the use of the term "equality" is rhetorical because it simply serves to reinforce the right to a benefit that is conferred by a particular underlying principle.249 The Brown I Court appears to have understood this. The Court assumed that black and white children are alike for the purposes of public schooling, that is, skin color signified nothing relevant to the means and ends of public schooling. The problem with segregation was that it constituted a failure to treat black citizens as they deserved to be treated because segregation stigmatized them by taking race into account in school assignments and then denied them educational opportunity by favoring the white schools. This is why the Court found that intentionally segregated schools could never be equal because they always signified the mistreatment of black children. Similarly, Weston argues that the substance of the Equal Protection Clause is that blacks have a right to be free from certain kinds of wrongs. He then goes on to make the point to which this Article is addressed: "Significantly, the courts have thus far failed to identify the precise sort of injury that the substance of the Equal Protection Clause is designed to prohibit, a failure that may itself result from the fact that the clause is stated in the language of equality."250 In fact, the Supreme Court, in the context of segregation, did identify this sort of injury as psychological harm resulting from receiving the message of inferiority from the State; it just never indicated how that injury would be remedied.

The Supreme Court has identified two different interests protected by the Equal Protection Clause in the context of primary and secondary education. The first is the interest in equal treatment, the substance of which (i.e., education, resources, etc.) must be tied to what other people are getting. The second is an interest in respectful and dignified treatment and is independent of scarcity concerns. By 1954, it was simply undeniable that this second interest was violated by racial segregation.251 This dual justification for the violation is crucial to analyzing desegregation remedies because it points to two different effects of segregation that must be remedied, and that if not remedied, should count as vestiges of discrimination for the purposes of determining whether a remedy should be terminated.

248. Raz, supra note 209, at 225.
249. See id. at 228. Raz argues at the same time, however, that in conditions of scarcity, equality has some independent meaning. If there is a scarce resource, then it is meaningful to say that it should be divided up equally. What one is entitled to in that situation is dependent on what everyone else is getting. As such, equality becomes a "principle of conflict resolution." Id. at 223-25.
250. Westen, supra note 247, at 567.
251. See Lawrence, supra note 246, at 50-56.
Once the Supreme Court recognized and explained the Fourteenth Amendment right not to be forced into racially segregated schools in Brown I, the Court rarely considered it necessary to return to the underlying, interest-based justification in subsequent cases. One possible explanation of this is given by Raz, who believes that the authoritative declaration of the right "puts a distance between the right and the interest it serves" insofar as the justification for the duty was in part that a legitimate authority said so.²⁵² Like other rights, the right to equal protection is an intermediate point between interests and duties and serves as a justification for the grounding of duties in others. Once an interest has been elevated to the status of right, it is not necessary to reach back to the interests that grounded the right: the existence of the right itself indicates that important interests are at stake and that others' duties can be justified if based on that right.²⁵³

Thus, after Brown I, courts did not need to consult the plaintiffs' interests to define the scope of the violation, all they had to do was use the test the Court had established to identify the violation, that is, the finding of intentional segregation.²⁵⁴ Because in the cases immediately following Brown I it was not difficult to find that the defendants were practicing or had recently practiced intentional discrimination, the focus after Brown I shifted to the question of what remedy was sufficient to cure the violation.

According to the Court, the ultimate goal of any remedy for intentional segregation on the basis of race is a "racially nondiscriminatory school system,"²⁵⁵ which it coupled with "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis."²⁵⁶

Thus, in its first foray into the remedial stage of desegregation litigation, the Court set out a vague standard open to much interpretation. It defined the remedial duty as the creation of a "racially nondiscriminatory school system."²⁵⁷ This could be broadly read to mean that the school system must be free of all the effects of discrimination that were created by the prior practice of segregation even after it had ceased. It could also be read in a more narrow way by understanding "nondiscriminatory school system" to simply mean a system where no officials practiced intentional segregation. Which interpretation of the remedial duty one adopts reflects, or creates, a different understanding of the nature of the plaintiffs' interests at stake. That

²⁵². Raz, supra note 209, at 262.
²⁵³. See id. at 180.
²⁵⁶. Id. at 300.
²⁵⁷. Id. at 301.
is, under the first interpretation, there is an assumption that the plaintiffs' right to equal protection is meant to protect interests not only in not being told that they must go to a school that is racially segregated, but also an interest in going to a school that is free from any racially discriminatory effects. Under the more narrow reading of the Court's standard, the plaintiffs' interests would include only the former. Interestingly, the Court's attempt to state the remedial standard in terms of the plaintiffs' interests adopted the narrower reading, that the interest of the plaintiffs was in "admission to public schools as soon as practicable on a nondiscriminatory basis."²⁵⁸ This seems to imply that the plaintiffs' right extends only to "blind admissions."

By looking at these opinions, we can see how the seeds of confusion were sown at the earliest stage of desegregation jurisprudence. On the one hand, the Court recognized in Brown I that there were a number of serious harms stemming from state-compelled racial segregation of school children, including lack of educational opportunity and stigma. But in Brown II, where the Court set out remedial standards, albeit in broad generalizations, the Court had already moved away from recognizing the nature of the remedial duty in terms of the interests that grounded the initial duty (the duty not to deny equal protection), and was operating at the level of what Raz would call "derivative rights." That is, the Court, having established the right not to be the victim of State-imposed segregation, was now thinking about the duty only in terms of that right, not in terms of the interests that grounded it. In contemplating a remedy, the Court was more concerned, in Dworkinian terms, with the determination of "the secondary rights people have to the method and manner of enforcing their primary substantive rights."²⁵⁹

Had the Court made the interest-duty connection more explicit at the time it decided Brown II, it might have recognized that the primary purpose of the remedial duty was to eliminate the stigma and create equal educational opportunities among schools, and that racial mixing, from a constitutional standpoint, was secondary. The Justices may have imagined that by desegregating the schools through neutral student assignments, the underlying interests of the plaintiffs would eventually also be vindicated, but even this is not clear.²⁶⁰ What is

²⁵⁸. Id. Various Justices have argued that the narrow reading is the appropriate one. See Missouri v. Jenkins (Jenkins III), 515 U.S. 70 (1995) (Thomas, J., concurring); Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (Rehnquist, J., dissenting).

²⁵⁹. DWORKIN, supra note 219, at 390 (1986); see also Swann, 402 U.S. at 16 (noting that the remedy must "repair the denial of a constitutional right" and "correct the condition that offends the constitution").

²⁶⁰. For example, in Keyes, Justice Powell, in a concurring opinion, argued that the "original meaning" of Brown I was "essentially negative: It was impermissible under the Constitution for the States . . . to force children to attend segregated schools." Keyes, 413 U.S. at 220.
clear is that the Justices were once again bent on presenting a unanimous opinion, and were themselves unsure of how enforcement of their historic decision should proceed.261 The necessity of integration was not only the view of the Brown plaintiffs, but also the view of some district court judges as well. Judge Robert L. Carter, one of the lead attorneys in Brown I, believed at the time that "[i]ntegrated education appeared to be an indispensable means to equal education. Indeed, to us, equal education meant integrated education."262 Judge Wisdom stated that the Brown decisions demonstrated the "overriding right of Negroes as a class to a completely integrated public education."263 Nevertheless, the failure to be explicit about this permitted the debate about the scope of the remedy to stray from its grounding in the plaintiffs' interests. As Gary Orfield put it: "The [Brown I] decision established a revolutionary principle in a society that had been overtly racist for most of its history. But the statement of principle was separated from the commitment to implementation, and the implementation procedures turned out not to work."264

Because the Court after Brown came to focus on the remedy rather than the nature of the right, it is from the remedies that the actual contours of the right, its "cash value" can be understood.265 David Kirp contends that these desegregation decisions "required a different reasoning process, which defines the wrong by inspecting what is required by way of remedy."266 But, as Part II of this Article demonstrated, there was nothing new or different about that reasoning process. Decisions in equity historically began with the remedy from which, after a while, the contours of the right could be discerned. The difference was that in modern desegregation jurisprudence, there are two sources for understanding the nature of the wrong: the posited right itself (equal protection) and the remedy invented to protect it (variations on court-ordered school desegregation with an emphasis on racial balance).

The second category of desegregation cases where the Court might reveal its conception of the underlying interests of the plaintiffs are those involving the propriety and legality of proposed remedies. What do discussions about the remedial duty in desegregation jurisprudence tell us about the judicial conception of the underlying interests of the

261. KLUGER, supra note 246, at 739-47.
265. See Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 COLUM. L. REV. 857, 887 (1999). This observation, however, does not provide any clue as to how a court faced with a violation ought to approach the question of remedy.
266. DAVID L. KIRP, JUST SCHOOLS 52 (1982).
plaintiffs? Although the interests themselves are rarely discussed explicitly in the cases, the assumption of the Interest Theory of rights is that interests ground the rights and duties that correlate with them. If a remedy is ordered to compensate for the violation of a constitutional right, then the remedy should, according to this theory, be directed at vindicating the interests that ground the constitutional right.

The Supreme Court developed a variety of standards for the creation of desegregation remedies, some more specific than others. These are relevant to the present inquiry because they too might provide some indication of the nature of the interests at stake. Its first major statement of the remedial standard came in Green v. County School Board, where the Court stated two remedial goals based on Brown II. The immediate goal was to eliminate the exclusion of black children from white schools, and the “ultimate goal” was to bring about a “unitary, nonracial system of public education.” Such a system was necessary “to remedy the established unconstitutional deficiencies of its segregated system.” Thus, the Green Court’s language tracked the standards set out in Brown II and made clear that the words “racially nondiscriminatory school system” in Brown II should be read broadly to include something in addition to nondiscriminatory school assignments. The Green Court understood the problem as systemic, “well-entrenched,” and not able to be remedied by simply opening the doors of white schools to blacks and vice-versa: “School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.” The fulfillment of this duty, the Court held, was required by the constitutional rights of the plaintiffs.

The Court’s first attempt to amplify the Green standards came in Swann v. Charlotte-Mecklenburg Board of Education. In this case, the Court approved of the limited use of mathematical ratios as a “starting point” toward desegregating the school district. It held that children could be transported by bus to schools in order to achieve desegregation, as long as the time or distance traveled did not “either risk the health of the children or significantly impinge on the educational process.” The Court also allowed for the existence of all

268. Id. at 435-36.
269. Id. at 437.
270. Id. at 437-38.
272. There is no constitutional right, however, to a particular degree of racial balance. See id. at 24; Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-35 (1976).
black schools in the context of an otherwise desegregated system, as long as the district could demonstrate that the composition of the schools, was not the result of discrimination.

These early cases, along with a host of others, discussed the remedial duty primarily as a duty to desegregate, that is, to stop discriminating in school assignments on the basis of race, and to take affirmative steps to create some racial mixing in the schools. Unitary was thus described as a system where "no person is to be effectively excluded from any school because of race or color." 274 The duty to make a transition to a nondiscriminatory school system first stated in Brown II, was interpreted as a duty to see to it that black and white kids, wherever "reasonable, feasible, and workable," went to school together. 275 Thus, remedies were focused on transportation (busing), minority to majority transfer plans, 276 alteration of attendance zones, 277 school construction, 278 and the temporary use of racial quotas. 279 Yet, doubt as to the sufficiency of these remedies lingered. For example, in Swann, after approving of the district court's plan which included busing, temporary racial quotas, and the rearrangement of attendance zones, the Court said that the defendant school system would be unitary when it achieved full compliance with the Court's decision in Brown I. 280 It is significant that the Court understood the standard for compliance to be Brown I, not Brown II. Is this an indication that, in addition to being a clear rejection as inadequate of "all deliberate speed," 281 the Court understood that stigma and educational opportunity were the true interests at stake? Swann also was the first case to state the object of desegregation as the elimination of "all vestiges of state-imposed segregation" from the public schools. 282

If we analyze the Swann remedies in terms of the plaintiffs' interests, there is a narrow and a broad way of looking at them. Narrowly, these remedies seem to vindicate an interest by black school children in going to school with white school children, coupled with an interest in not being the subjects of intentional discriminatory school assignments. More broadly, one could see the interest in going to school with white children as a proxy for an interest in educational opportunity, assuming that the only realistic way that black children are going to get the same opportunity as white children is if they are served together. And one could further view the interest in not being the sub-

276. See id. at 26.
277. See id. at 28.
278. See id. at 21.
jects of intentional discriminatory school assignments as an interest in being free from stigma. But if there is a relationship between the broad and narrow understanding of how the remedies vindicate the plaintiffs' interests, it must be based on some empirical fact, that is, that going to school with white children will in fact provide the black children with a better education than they would get in a segregated school, and that by ceasing discriminatory assignments, the black children will no longer experience stigma. If this connection cannot be established, then the remedies approved in Swann may not be the best method of achieving compliance with Brown I. By the same token, the only way to determine whether this connection is established is by explicitly recognizing the primacy of the interests at stake and using them as the reference point for the justification of remedial duties.

The racial mixing approach to desegregation is just one aspect of the way in which the Court has sought to achieve compliance with Brown I. In addition to a remedy involving pupil assignments, the Court has placed an affirmative obligation on defendant school districts to remove the effects of intentional discrimination. This requirement has been stated in a variety of ways, including that the desegregation decree must be designed so as to restore the victims to the position they would have occupied in the absence of intentional segregation (i.e., to make them "whole" again); that the federal courts are within their equitable authority when attempting to cure conditions that flowed from the original violation; and that the remedy is determined by the nature and scope of the violation. Thus, under this effects test, the Court has approved judicial decrees requiring the desegregation of faculty and staff, remedial education programs, and in-service training for faculty and staff.

Although the Supreme Court does not discuss the details of these remedies, when it has approved them, there is usually a district court opinion which lays out the rationale for how particular remedies are intended to eliminate the effects of discrimination. These opinions focus primarily on educational opportunity. For example, the district court opinion in Milliken made the remedy-interest connection explicit. Relying on Brown I, the court emphasized that it was educational components that were necessary to remedy the effects of past discrimination. These components included in-service training, coun-

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283. See Milliken II, 433 U.S. at 280-82. In other words, "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." Id. at 282.


285. See Milliken II, 433 U.S. at 284-87 (citing numerous district and appellate cases which had approved remedial education programs).

286. Id. at 286.
seling, curriculum design, testing, and remedial reading. The court acknowledged the psychological damage that can result from segregation and recognized that it was more the perception of educational inequalities than of one race schools that created this damage.

The district court also noted that the justification for the desegregation order was the educational and psychological damage suffered by black children in segregated schools, and the court went on to evaluate its own remedial guidelines in light of how they would impact these factors. In addition to proposing the transportation of black children to identifiably white schools in order to eliminate all racially identifiable white schools, the court focused on restoring quality and equality to all of the schools in the system through a variety of educational components, including remedial reading programs, in-service training, vocational education, and fairer testing procedures. These measures were all intended to assure those previously "deprived of equal opportunity by past discrimination . . . that the injury from segregation, sometimes intangible, will be eradicated."

Although not as explicitly as in Brown I, some of the cases that have evaluated the adequacy of proposed remedies, when they discuss interests at all, do return to the interest in educational opportunity and the interest in being free from stigma. Two things have confused their analysis, however, and prevented those identified interests from becoming the touchstones of termination jurisprudence. First, the Supreme Court has not explicitly stated that the interest analysis is key to creating remedies. As a number of Justices have pointed out in concurring and dissenting opinions, it is not clear what a "vestige" of discrimination is or how a court should go about identifying one. Second, the Court's language is very ambiguous as to how a district court is to measure the plaintiffs' interests against competing interests, such as local control over school districts.

The other place where one can find explicit recognition of the interest-remedy connection in the context of evaluating proposed remedies is in concurring and dissenting opinions of individual justices, particularly Justice Thurgood Marshall. Not surprisingly, since he was one

288. Id. at 1131. The court articulated the damage is the "devastating psychological impact upon black children of the knowledge that they are being excluded from white schools." Id. at 1132.
289. Id. at 1131. The court noted that in a predominantly black district, to scatter whites throughout the district just to get some racial mixing "assumes that there is some divining grace in being white," which was demeaning to blacks, and that a desegregation plan rather "must be based upon constitutional and equitable rights of individual students and upon the educational goals that desegregation seeks to attain." Id.
290. Id. at 1147.
of the lead lawyers who argued *Brown I*, Justice Marshall believed that the touchstone for evaluating the sufficiency and effectiveness of a desegregation remedy was the interests of the right-bearers, and saw the significance of plaintiffs' interests in evaluating remedies.

Justice Marshall offered up a strong version of this view in his dissent in *Milliken I*. The majority of the Supreme Court in that case struck down the district court's order for the desegregation of the Detroit school system because the order included school districts outside of Detroit even though there was no allegation that those school districts had practiced intentional segregation. The Court held that in the absence of a violation by the suburban districts, the order including them in the remedy violated the equitable maxim that the scope of the violation determines the scope of the remedy.292 One of Marshall's responses to this theory was that the State of Michigan was in fact implicated in the segregation of the Detroit public schools, which should have opened up the way for more expansive remedies. More significantly for these purposes, however, was his contention that the goal of the remedy was to vindicate the plaintiffs' rights and that once a constitutional violation had been found, the district court's equitable power extended as far as necessary to accomplish that goal.293 Justice Marshall's focus in his *Milliken I* dissent was on the fact that racially identifiable schools were a direct effect of intentional segregation and there was no way to eliminate racially identifiable schools without including suburban districts. Thus, he understood the "scope of the violation" to refer to the extent to which the plaintiffs had been harmed by the defendants' conduct, whereas the majority in *Milliken I* understood it to refer to the extent of the defendants' conduct.294

Such a fundamental disagreement over how to define a constitutional violation stems directly from the acceptance of the Hohfeldian scheme of the correlativity of rights and duties and the absence of a theory of how remedial duties fit into that scheme. If rights and duties are correlatives, then when thinking about remedies, one has a

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293. *Id.* at 800 n.19 (Marshall, J., dissenting) ("While a finding of state action is of course a prerequisite to finding a violation, we have never held that after unconstitutional state action has been shown, the District Court at the remedial stage must engage in a second inquiry to determine whether additional state action exists to justify a particular remedy.").
294. In another dissent in *Milliken I*, Justice White also decried the majority's "arbitrary" limits on federal equitable powers and tried to refocus the issue on the violation of the plaintiffs' rights, calling the majority's approach "unresponsive to the goal of attaining the utmost actual desegregation." *Milliken I*, 418 U.S. at 781 (White, J., dissenting). The remedial limitation that an intradistrict violation cannot be corrected by an interdistrict remedy permits "the party responsible for the constitutional violation to contain the remedial powers of the federal court within administrative boundaries over which the transgressor itself has plenary power." *Id.* at 772.
choice whether to focus on the right or focus on the duty. If the right to equal protection is the correlative of the duty not to deny equal protection, then when analyzing a situation involving intentional racial discrimination in school assignments, one can either begin by seeing it as a breach of the duty or as a violation of the right. Which one is chosen makes a difference as to how one views the remedy. If the situation is primarily viewed as a failure to fulfill a duty, then the logical remedy is the fulfillment of the duty: in this case to stop intentionally discriminating. If the situation is primarily viewed as a violation of a right, then the logical remedy is to figure out how to restore that right to the right-bearer. The Supreme Court, in recognizing the need to eradicate the lingering effects of segregation as well as to cease discriminating has acknowledged both perspectives, but has failed to explain the basis of the right-bearer’s viewpoint. In addition to the practical implications of the failure of the Court, at least in its majority opinions, to refer back to the underlying interests identified in Brown, jurisprudential implications began to surface once the termination cases began to be litigated. This is the third group of desegregation cases to be examined.

To date, there are three cases that have reached the Supreme Court where the question of termination or partial termination of a school desegregation remedy has been directly addressed: Board of Education v. Dowell,295 Freeman v. Pitts,296 and Missouri v. Jenkins (Jenkins III).297 In all three cases, the Court has attempted to articulate the standard that must be met before a court can terminate all or some of its supervision over a desegregation remedy. In Dowell the Court set the standard for when a court may terminate its jurisdiction over a school district. The school district must have complied in good faith with the desegregation decree, and the vestiges of past discrimination have to be eliminated “to the extent practicable.”298 In determining whether vestiges remain, the district court must look to what have become known as the Green factors: faculty, staff, transportation, extra-curricular activities, and facilities.299 In Freeman, the Court made clear that the Green factors must be examined to see if they are free from racial discrimination.300 But the Court also hearkened back to the interests identified in Brown I and Swann and held that the goal of the segregation remedy was “to ensure that the principal wrong of the de jure system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present.”301

299. See id. at 250 (citing Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)).
300. Freeman, 503 U.S. at 486.
301. Id. at 485.
Freeman Court emphasized the breadth and flexibility of equity and understood the primary limitation on federal equity power as causation: equity could only operate on conditions caused by the initial segregative acts.302

We can see a parallel in Dowell and Freeman, which involved the termination of desegregation remedies, to the early cases of Green and Swann, involving the adequacy of proposed remedies. All four of these cases, in reviewing and creating remedial standards, looked to the original interests that informed the Court’s initial determination of the unconstitutionality of school segregation in Brown I. These pairs of cases are parallel because they were among the first cases that took up a particular remedial problem. Green and Swann were decided by the Supreme Court in 1968 and 1971 respectively, and were among the Court’s first opportunities to define the scope of desegregation remedies. Dowell and Freeman were decided in 1991 and 1992 respectively, and were the first termination cases to reach the Court. In both pairs the Court understood the need to go back to basics, as it were, when creating a new remedial standard.

Yet after Freeman and Dowell, just as after Green and Swann, the Court decided that by defining the remedial standard in terms of interests and drawing upon the breadth of equity, it had given too much discretion to district courts to create remedies which, in the Court’s view, were unwieldy and potentially limitless. Thus, the reaction was similar: to invoke the limits of equity to create some boundaries for the remedies, and to create some hope for their eventual termination. So, just as the Court’s doctrine in Milliken I can be viewed as a severe limitation on the remedies allowed by the rights focus and broad remedial powers outlined in Green and Swann, so can Jenkins III be viewed as a limitation on the demanding termination standard set forth by the Court in Dowell and Freeman. In Milliken I, the Court held that because the scope of the violation determines the scope of the remedy, school districts that were not responsible for the segregation at issue in the case could not be constitutionally required to participate in remedying that segregation. The Milliken I Court reached this result by focusing its analysis on the breach of the duty and the agency responsible for that breach rather than on the effects of that breach on the rights of the plaintiffs. In Jenkins III, the Court again shifted from its rights focus of Dowell and Freeman to a duty focus, holding that it was impermissible to require a school district to provide certain remedies with the avowed goal of attracting children from other school districts as a method of achieving desegregation because,

302. Id. at 487-88; see also id. at 495-96 (“The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the de jure violation being remedied.”).
like *Milliken I*, that was an interdistrict goal for an intradistrict violation.

There are many explanations for why the Court shifted the focus in its termination of supervision cases away from the rights and back to the duty. One scholar has called it the “We’ve Done Enough” theory of school desegregation cases.\(^{303}\) There may be political, administrative, moral, and legal reasons for the Court’s shift. Whatever theory one adheres to, however, the ability of the Court to change course in school desegregation cases is at least in part attributable to the fact that the Court has refused to carry through on the theory of rights that initially generated its desegregation jurisprudence. To the extent that the Court has been explicit about such a theory, it seems to have adopted the Interest Theory. It justified its initial decision in *Brown I* using such a theory.

If in fact *de jure* segregation is a violation of the Equal Protection Clause because of the interests of school children at stake, then the only way that the Court’s jurisprudence can make sense is if the analysis remains focused on those interests.\(^{304}\) But this does not mean that the federal courts will be running state school districts into the next millennium. Were the Court to acknowledge the Interest Theory and create its termination jurisprudence by focusing on protection of the plaintiffs’ interests in educational opportunity and freedom from racial stigma, the breadth and longevity of desegregation remedies would be tempered by some very difficult empirical questions. An analysis of Justice Marshall’s dissent in *Dowell* highlights some of these difficulties.

As he did in his *Milliken I* dissent, in *Dowell*, Justice Marshall focused on the plaintiffs’ interests and argued that a desegregation decree could not be lifted “so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions.”\(^{305}\) Marshall contended that the key to *Brown* was that one-race schools produced stigma and so if a remedy had the potential to eliminate one-race schools, then it should not be terminated. But Marshall offers up no evidence that one-race schools per se inflict stigma. In fact, in addition to Justice Thomas, there is a growing group of scholars and writers who argue that one-race schools might benefit African-American children, imbui-
ing them with racial pride and self-sufficiency. Whether or not one-race schools create stigma is a quasi-empirical question which cannot reasonably be assumed with the assurance and alacrity with which it was assumed in 1954, when the cause and the message of intentional segregation was absolutely clear.

In fact, Marshall's dissent subtly acknowledges the complexity of the stigma issue in one passage where he reiterates the connection between the remedial requirement of integration and stigma, arguing that "the reemergence of racial separation in . . . schools may revive the message of racial inferiority implicit in the former policy of state-enforced segregation." Yet to support this statement, he quotes not studies that demonstrate stigma results from racial separation, but studies indicating that that schools attended predominantly by racial minorities have drastically inferior facilities, course offerings, and extracurricular programs when compared to predominantly majority (white) schools. Thus, Marshall himself ties stigma more to lack of funding and educational opportunity than to racial isolation. That is, the message of inferiority to which Brown I referred is now conveyed not by de jure racial segregation, but by unequal funding and distribution of goods. Whether or not this could or should be solved by continual efforts at racial balance and integration is an open question, even after one acknowledges that the unequal distribution of goods and the stigma that accompanies it should be considered a vestige of segregation.

V. CONCLUSION

[All] law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law, not in the legislator, but in the nature of the thing, since the matter of practical affairs is of this kind from the start . . . . Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the


308. Id. at 260 n.5.
The Court's implicit acceptance of the Hohfeldian explanation of the correlativeity of rights and duties, coupled with its failure to articulate a theory of rights to accompany that acceptance, has created a complicated and confused desegregation jurisprudence. The confusion stems from the fact that the identification of intentional discrimination in school assignments centers primarily on tracing racial imbalance within a school district back to before 1954 when segregation was legal. The Court has always acknowledged that to remedy that violation, the school district must do more than simply stop discriminating, yet it has never been able to identify the appropriate scope of the remedy beyond simply inventing terms of art to approximate the intuition that something beyond ceasing to discriminate is required.\textsuperscript{310} The Court has stated that the defendants must also in some way remedy the effects of segregation by attempting to place the plaintiffs in the position they would have been in absent the discrimination; by eliminating the vestiges of segregation to the extent practicable; or by creating a unitary school district. Yet the Court has been at a loss to explain what those vestiges are, and has declined to define what it means by "unitary."\textsuperscript{311} Without a recognition of the interests underlying the duty not to deny equal protection and its correlative right, the lower federal courts remain open to the charge that they are going beyond their equitable powers because they do not have a reference point for creating, approving, and terminating remedies.

There are a few conclusions to be drawn from the application of Interest Theory to the Supreme Court's desegregation jurisprudence. First, the Interest Theory does seem to be generally descriptive of how the Court conceives of the right to equal protection under the Fourteenth Amendment. In \textit{Brown I}, the Court grounded its holding that intentional racial segregation in public schools was unconstitutional by doing an interest analysis of the right to equal protection. But, consistent with this analysis, the Court has also recognized competing interests, most particularly the community's interest in local control over the schools. As Raz and Waldron point out, although rights and duties are correlative, there is not an exact correlativeity between particular rights and particular duties. Rather, the interests must be used as a reference point for the creation of duties, taking into account


\textsuperscript{310} See Lawrence, supra note 246, at 50-56.

\textsuperscript{311} See Dowell, 498 U.S. at 246.
competing interests.312 Thus, in creating duties, the interests of the right holder must be weighed against other interests. Yet, there is significance to the fact that the plaintiffs' interests have been elevated to the status of a right by the Fourteenth Amendment, whereas many of the competing interests, such as the interest in local autonomy over school districts, have not been so elevated.313 The Court's refusal since Brown to explore the ramifications of these competing interests has prevented it from being able to articulate a coherent jurisprudence.

Second, the interest analysis may allow us to move away from the causation problem that has occupied the Court and scholars, namely the question of whether the original intentional segregation proximately caused the current inequality in educational opportunity and the existence of stigma. If the Court were to identify explicitly the relevant interests that are intended to be protected by the Equal Protection Clause, as it did in Brown I, and then make the causation presumption, it could shift its focus to the remedy and ask what remedies would protect the plaintiffs’ interests. The focus would shift to the question of what remedial duties will address those interests. Such an analysis would leave the plaintiffs with a high burden of causation, but it would be focused not on past injustices but on future solutions.

Third, the interest analysis also broadens the remedial focus beyond racial mixing to explicitly take into account the interests of the plaintiff-victims of past intentional racial segregation. It may be that active racial desegregation/integration after intentional segregation has ceased serves the interests of the plaintiffs in restoring their right to equal protection, in which case racial balance would be the key to termination decisions. But the interest analysis forces us to confront the fact that racial mixing serves as a proxy for those interests and that creating educational opportunity in schools where black students are not made to feel inferior to their white counterparts—whether those counterparts are sitting next to them or in another school—are the primary interests that underlie the right to equal protection. Through the Interest Theory of rights, one can see the constitutional dimension to the more recent shift toward plaintiffs requesting remedies that address education and funding concerns for minority students and away from racial balance remedies.314 Once harm to these interests is presumed by the existence of past intentional discrimina-

312. See id.; Lawrence, supra note 246.
tion, the analysis should shift to how to restore these interests: It is an open question, not yet explicitly addressed by the Supreme Court, how best to do this.

This question, whether a certain fact can be considered a "vestige of discrimination" because it continues to promote the feeling among African-American children that they are not being treated respectfully by the State, could be approached in a way analogous to how courts evaluate other debates about issues of similar abstraction. A momentary digression will clarify this point.

To succeed in a Title VII sexual harassment claim, a plaintiff must show that a "hostile environment" exists. In *Harris v. Forklift Systems, Inc.*, the Supreme Court held that in order to state a claim for hostile environment, the plaintiff did not have to show that she suffered "concrete psychological harm," but rather, that "the environment would reasonably be perceived and is perceived as hostile or abusive." Thus, the pertinent question is whether a reasonable person would find, and whether this plaintiff did find, that the environment was hostile or abusive. Courts look to a variety of factors in making this determination, including, as Justice Scalia has stated, "[c]ommon sense, and an appropriate sensitivity to social context."

By analogy, the only way to evaluate Justice Thomas' claim that it is racist to assume that all-black schools are inferior is to do so in light of the interests that the Supreme Court has identified as relevant to the inquiry. That might mean exploring whether the one-race status of these schools is reasonably perceived by those children as a signal of inferiority or lack of respect. The question of how to define reasonableness (i.e., do we ask about the reasonable child or the reasonable African-American child), is analogous to the "reasonable person" versus "reasonable woman" issue in sexual harassment law. The point is that it should be recognized as a key question.

317. As to this standard, there is also debate about whether the standard should be that of a "reasonable person" or a "reasonable woman." Whichever is used, the standard is an objective one that asks whether the plaintiff's perception that the work environment is hostile or abusive is reasonable. See Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Robert Unikel, "Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326 (1992).
318. *Oncale*, 523 U.S. at 82; see also *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1562 (S.D. Fla. 1994) (making a distinction, based on the testimony, between severe conduct and mere "banter").
320. Interestingly, in *Brown I*, the Supreme Court seemed to employ a quasi-subjective standard, stating that "[t]o separate them from others of similar age and
There has been some research in this area. Many have contended that the feeling of disrespect that existed during segregation can be eliminated more effectively through educational equity than racial mixing. If this could be demonstrated, then a remedy might involve improving schools while monitoring the plaintiffs' affective functioning.

Finally, by keeping the focus on the interests of the plaintiffs, standards of success emerge that are more concrete than anything proposed by the Court to date. An explicit recognition that unequal educational opportunity and stigma are the wrongs to be corrected provides the parties and the court with a qualitative standard for developing remedies and measuring success. Moreover, the standard is the same, whether the court is creating a remedy, or measuring its success. The courts could begin to figure out whether, for example, test scores are an adequate measure of educational opportunity, rather than focusing on the unanswerable question of how much reduction in achievement was caused by segregation. The type of evidence required to determine the former is no less subjective and "sociological" than the evidence required to determine the latter.

A more honest and analytically coherent jurisprudence is the first step toward the exercise of more principled discretion in school desegregation cases. The interests that ground the plaintiffs' right to equal protection, once made explicit, would serve as limits on the judge's discretion at the remedy creation stage. That is, all aspects of the remedy would have to be justified by an explanation of how well they promote the interests harmed by the defendants' conduct. In this way, the hardening of equitable discretion in school desegregation could proceed, thus initiating the historical progression that has always justified and limited this discretion.

These issues remain vital despite the current absence of intentional school segregation because the Court has said that vestiges of discrimination must be eliminated before active school desegregation efforts can be terminated. Presumably, if either of these effects were demonstrated in the context of a case, a prima facie case of qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.


322. See Missouri v. Jenkins (Jenkins III), 515 U.S. 70, 100 (1995) (requiring the district court to make a determination of the "the incremental effect that segregation has had on minority student achievement").

323. See Parker, supra note 304, at 526 (arguing that "the right-remedy connection, with its presumption of legally compelled remedies, has [since 1991] an even stronger reach in determining the remedy").
remaining vestiges of segregation would be shown and termination would be inappropriate. Thus, Justice Thomas might be correct in arguing that all black schools are not a vestige of discrimination and may in fact be beneficial, but that is a proposition that can and must be tested in light of the Court's own desegregation jurisprudence. As the Court stated in *Brown I*:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

This attempt to take seriously the Court's own standards for desegregation remedies will certainly be met with resistance from both sides of the debate. A few commentators have already argued that there is no need to attempt reconciliation between the nature of the right and the remedy. Owen Fiss, for example, argues that judges enter the world of politics upon reaching the remedial stage of institutional reform litigation and that in order to do this effectively, the judge must put aside her preconceived notions about what Fiss calls the "tailoring principle," by which he means "the insistence that the remedy must fit the violation." The tailoring principle, Fiss argues, is inadequate because it too severely limits the remedial possibilities. But rather than telling us how we are to know, in the absence of the tailoring principle, what the remedy is supposed to cure, Fiss falls back on the notion of constitutional values. Yet he derives those values from his interpretation of the right at stake.

Thus, Fiss, despite his claims to the contrary, does not abandon the right, but instead calls it a constitutional value; and thereby, he claims, increases the types of remedies that might be appropriate.

The tailoring principle also obscures the criteria of choice in suggesting that the violation will be the exclusive source of the remedy; it suggests that the shape of the remedy is exclusively a function of the definition of the violation. The overriding mission of the structural decree is to remove the threat posed to constitutional values by the organization, but there are additional or subsidiary considerations—largely embraced within the traditional concept of "equitable discretion"—that play a critical role in the remedial process. One set of subsidiary considerations might be considered normative: they express values other than the one that occasions the intervention. For example, a school decree might be predicated on a desire to eliminate a threat to racial

324. See *Bd of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (noting that unitary status depends on whether the vestiges of discrimination have been eliminated "to the extent practicable").
equality, but other values—such as respect for state autonomy, evenhandedness, or a minimization of coercion—should be considered.\(^3\)

But this is exactly what the Interest Theory of rights accomplishes. Fiss, by claiming he is abandoning the right-remedy nexus, opens himself up to the objection that judges thereby become free-wheeling promoters of desirable social policy. Putting the focus of remedial limitations on the nature of the right, and defining that right as a reflection of important interests, centers the inquiry in a way that the more generalized notion of constitutional values cannot. The Interest Theory points to one of the places where limitations might be found: in the right at stake. Although this does not itself solve the problem of limits, because we still must contend with what Waldron has called the "waves of duties" that interests generate,\(^3\)\(^2\)\(^8\) the project of analyzing those interests and asking hard questions about their scope and implications is something clearly within the province of judicial expertise. The notion of constitutional values is not helpful because it does not give judges a useful focus. Perhaps the difference is just one of perspective; whereas I am contending that rights can serve as limitations, Fiss understands rights to be indeterminate licenses from which judges can learn little about the limits on their discretion.

Rights serve as limitations by narrowing judicial discretion to the particular harm. Rights analysis focuses the nature of the proof and focuses the scope of the remedy. In order for rights theory to serve as a limitation on judicial discretion, judges must be willing to ask the hard questions about the nature of the constitutional rights at stake. The Interest Theory of rights is an accessible and effective method of approaching that question.

The pressing question for anyone who has read up to this point, must be, is any of this relevant anymore? After Jenkins III, countless writers, scholars, and journalists have been forecasting, for better or worse, the end of desegregation.\(^3\)\(^2\)\(^9\) District courts have responded by terminating longstanding desegregation orders.\(^3\)\(^3\)\(^0\) The newest wave of lawsuits in this area are aimed at undoing voluntary desegregation techniques under the rubric of illegal affirmative action. There are lawsuits in various states, brought by white parents whose children were unable to attend the public school of their choice because that school was using race as a factor in admissions in order to desegregate and/or diversify.\(^3\)\(^3\)\(^1\) The lines that separate desegregation from integration from diversity, if there ever were such lines, are blurring.

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327. Fiss, supra note 326, at 48-49.
328. See Waldron, supra note 220, at 212.
329. See, e.g., Joondeph, supra note 313, at 599.
331. See Tuttle v. Arlington County Sch. Bd., 135 F.3d 698 (4th Cir. 1999); Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999),
Yet, these are exactly the reasons why the analysis presented here still has relevance. There are no clear standards for determining when desegregation has been accomplished and when a decree can be terminated because there were no clear standards for ordering these decrees in the first place. It is impossible to set standards for termination of an order if there is no understanding of what was supposed to be accomplished by that order and the way in which that order was carried out in the school. This involves knowing what was supposed to be accomplished by the remedy, and whether the remedy achieved its goals.

The termination cases are the most recent reminder that judges have little guidance for judging the lingering effects of discrimination and whether they have been eliminated. Instead, they substitute other factors, such as the good faith of the school district, the degree of racial balancing, and sometimes the extent to which the problems with physical plants have been improved. If the legitimacy of judicial action lies in the logical justification of its results, then the focus must shift to providing this justification. This has become more urgent as the Supreme Court has refined its affirmative action jurisprudence, requiring that the factual findings upon which a state government bases its claim that the use of racial classifications is remedial be very specific and that the use of racial classifications be narrowly tailored to remedy the effects of that discrimination. Unlike in the typical affirmative actions case, where the Court reviews racial classifications to “smoke out’ illegitimate uses of race,” the understanding that racial classifications in the aftermath of school segregation are in fact remedial was the Court’s own claim throughout the 1960s and 1970s.

The necessity of this is brought home by Belk, described in Part I of this Article. In that case, the court made clear that once the unitary status of a school district is judicially determined, then attempts at racial balance, diversity, or any other result that requires any race consciousness, will be subject to strict scrutiny, which is usually, “strict in theory but fatal in fact.” The bright line drawn by the Court in Belk, between districts vulnerable to claims of illegal affirmative action and districts not so vulnerable because their unitary status has not been judicially determined, is an implicit recognition that the central issue remains the elusive definition of unitary status.

333. Id. at 721.
A theory about how the Supreme Court ought to analyze desegregation cases will not be a panacea for the difficulties endemic to school desegregation. Yet, it is also true that the case-by-case approach and the almost complete absence of theoretical underpinning for the Supreme Court's desegregation jurisprudence prevents a clarification of the practical issues involved. This Article suggests a more focused and productive approach to those practical issues.

The final outcome of the massive social experiment that began with Brown, now depends, as it always has, on the definition of a "vestige of discrimination," which can only be properly addressed by returning to first principles. And those principles must be addressed separately and apart from the current affirmative action debate.\(^{335}\) Perhaps a discussion of the theoretical premises underlying desegregation was not as necessary forty-eight years ago when the violation, its meaning, and its effects, were so transparent, but it appears to be necessary now.

\(^{335}\) See Kevin Brown, *Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments*, 34 Akron L. Rev. 37 (2000) (arguing that the Supreme Court should use its education jurisprudence, not its equal protection jurisprudence, to analyze racial classifications in the context of public schools).