SUPREME COURT OF THE UNITED STATES

No. 89–1290

ROBERT R. FREEMAN, ET AL., PETITIONER *v.* WILLIE EUGENE PITTS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 31, 1992]

JUSTICE SCALIA, concurring.

The District Court in the present case found that the imbalances in student assignment were attributable to private demographic shifts rather than governmental action. Without disturbing this finding, and without finding that revision of student assignments was necessary to remedy some other unlawful government action, the Court of Appeals ordered DeKalb County to institute massive busing and other programs to achieve integration. The Court convincingly demonstrates that this cannot be reconciled with our cases, and I join its opinion.

Our decision will be of great assistance to the citizens of DeKalb County, who for the first time since 1969 will be able to run their own public schools, at least so far as student assignments are concerned. It will have little effect, however, upon the many other school districts throughout the country that are still being supervised by federal judges, since it turns upon the extraordinarily rare circumstance of a *finding* that no portion of the current racial imbalance is a remnant of prior *de jure* discrimination. While it is perfectly appropriate for the Court to decide this case on that narrow basis, we must resolve—if not today, then soon—what is to be done in the vast majority of other districts, where, though our cases continue to profess that judicial oversight of school operations is a temporary expedient, democratic processes remain suspended, with no prospect of restoration, 38 years after *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*).

Almost a quarter-century ago, in *Green* v. *School Bd., New Kent County*, 391 U.S. 430, 437–438 (1968), this Court held that school systems which had been enforcing *de jure* segregation at the time of *Brown I* had not merely an obligation to assign students and resources on a race-neutral basis but also an ``affirmative duty'' to ``desegregate,'' that is, to achieve insofar as practicable racial balance in their schools. This holding has become such a part of our legal fabric that there is a tendency, reflected in the Court of Appeals opinion in this case, to speak as though the Constitution requires such racial balancing. Of course it does not: The Equal Protection Clause reaches only those racial imbalances shown to be intentionally caused by the State. As the Court reaffirms today, if ``desegregation'' (*i. e.*, racial balancing) were properly to be ordered in the present case, it would be not because the extant racial imbalance in the DCSS public schools offends the Constitution, but rather because that imbalance is a ``lingering effect'' of the pre-1969 *de jure* segregation that offended the Constitution. For all our talk about ``unitary status,'' ``release from judicial supervision,'' and ``affirmative duty to desegregate,'' the sole question in school desegregation cases (absent an allegation that current policies are intentionally discriminatory) is one of remedies for past violations.

Identifying and undoing the effects of some violations of the law is easy. Where, for example, a tax is found to have been unconstitutionally imposed, calculating the funds derived from that tax (which must be refunded), and distinguishing them from the funds derived from other taxes (which may be retained), is a simple matter. That is not so with respect to the effects of unconstitutionally operating a legally segregated school system; they are uncommonly difficult to identify and to separate from the effects of other causes. But one would not know

that from our instructions to the lower courts on this subject, which tend to be at a level of generality that assumes facile reduction to specifics. ``[Desegregation] decrees,'' we have said, ``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,'' *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U.S. ___, ___ (1991) (slip op., at 9); *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977). We have never sought to describe how one identifies a condition as the effluent of a violation, or how a ``vestige'' or a ``remnant'' of past discrimination is to be recognized. Indeed, we have not even betrayed an awareness that these tasks are considerably more difficult than calculating the amount of taxes unconstitutionally paid. It is time for us to abandon our studied disregard of that obvious truth, and to adjust our jurisprudence to its reality.

Since parents and school boards typically want children to attend schools in their own neighborhood, ``[t]he principal cause of racial and ethnic imbalance in . . . public schools across the country—North and South—is the imbalance in residential patterns.'' *Austin Independent School Dist.* v. *United States*, 429 U.S. 990, 994 (1976) (Powell, J., concurring). That imbalance in residential patterns, in turn, ``doubtless result[s] from a mélange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near people of own's one race or ethnic background.'' *Columbus Bd. of Education* v. *Penick*, 443 U.S. 449, 512 (1979) (REHNQUIST, J., dissenting); see also *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 424, 435–437 (1976). Consequently, residential segregation ``is a national, not a southern phenomenon'' which exists ```regardless of the character of local laws and policies, and regardless of the extent of other forms

of segregation or discrimination.''' *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 223, and n. 9 (1973) (Powell, J., concurring in part and dissenting in part), quoting K. Taueber, NEGROES IN CITIES (1965).

Racially imbalanced schools are hence the product of a blend of public and private actions, and any assessment that they would not be segregated, or would not be *as* segregated, in the absence of a particular one of those factors is guesswork. It is similarly guesswork, of course, to say that they *would* be segregated, or would be *as* segregated, in the absence of one of those factors. Only in rare cases such as this one and *Spangler*, see 427 U.S., at 435–437, where the racial imbalance had been temporarily corrected after the abandonment of *de jure* segregation, can it be asserted with any degree of confidence that the past discrimination is no longer playing a proximate role. Thus, allocation of the burden of proof foreordains the result in almost all of the ``vestige of past discrimination'' cases. If, as is normally the case under our Equal Protection jurisprudence (and in the law generally), we require the plaintiffs to establish the asserted facts entitling them to relief—that the racial imbalance they wish corrected is at least in part the vestige of an old *de jure* system—the plaintiffs will almost always lose. Conversely, if we alter our normal approach and require the school authorities to establish the negative—that the imbalance is *not* attributable to their past discrimination—the plaintiffs will almost always win. See *Penick*, *supra*, at 471 (Stewart, J., concurring in result).

Since neither of these alternatives is entirely palatable, an observer unfamiliar with the history surrounding this issue might suggest that we avoid the problem by requiring only that the school authorities establish a regime in which parents are free to disregard neighborhood-school assignment, and to send their children (with transportation paid)

to whichever school they choose. So long as there is free choice, he would say, there is no reason to require that the schools be made identical. The constitutional right is equal racial access to schools, not access to racially equal schools; whatever racial imbalances such a free-choice system might produce would be the product of private forces. We apparently envisioned no more than this in our initial post-*Brown* cases.[1] It is also the approach we actually adopted in *Bazemore* v. *Friday*, 478 U.S. 385, 407–409 (1986), which concerned remedies for prior *de jure* segregation of State university-operated clubs and services.

But we ultimately charted a different course with respect to public elementary and secondary schools. We concluded in *Green* that a ``freedom of choice'' plan was not necessarily sufficient, 391 U.S., at 439–440, and later applied this conclusion to all jurisdictions with a history of intentional segregation:

> ```Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the

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[1]See*, e.g., Cooper* v. *Aaron*, 358 U.S. 1, 7 (1958) (``[O]bedience to the duty of desegregation would require the immediate general admission of Negro children . . . at particular schools''); *Goss* v. *Board of Education of Knoxville*, 373 U.S. 683, 687 (1963) (holding unconstitutional a minority-to-majority transfer policy which was unaccompanied by a policy allowing majority-to-minority transfers, but noting that ``if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or transfer to another'').

> continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a ``loaded game board,'' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments.'' *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 28 (1971).

Thus began judicial recognition of an ``affirmative duty'' to desegregate, *id*., at 15; *Green*, 391 U.S., at 437–438, achieved by allocating the burden of negating causality to the defendant. Our post-*Green* cases provide that, once state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there arises a presumption, effectively irrebuttable (because the school district cannot prove the negative), that any current racial imbalance is the product of that violation, at least if the imbalance has continuously existed, see, *e.g., Swann, supra,* at 26; *Keyes,* 413 U.S., at 209–210.

In the context of elementary and secondary education, the presumption was extraordinary in law but not unreasonable in fact. ``Presumptions normally arise when proof of one fact renders the existence of another fact `so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.''' *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788–789 (1990), quoting E. Cleary, McCormick on Evidence §343, p. 969 (3d ed. 1984). The extent and recency of the prior discrimination, and the improbability that young children (or their parents) would use ``freedom of choice'' plans to disrupt existing patterns ``warrant[ed] a presumption [that] schools that are substantially disproportionate in their racial composition'' were remnants of the *de jure* system. *Swann*, *supra*, at 26.

But granting the merits of this approach at the time of *Green*, it is now 25 years later. ``From the very first, federal supervision of local school systems was intended as a *temporary* measure to remedy past discrimination.'' *Dowell,* 498 U.S., at ___ (slip op., at 9) (emphasis added). We envisioned it as temporary partly because ``[n]o single tradition in public education is more deeply rooted than local control over the operation of schools,'' *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974) (*Milliken I*), and because no one's interest is furthered by subjecting the nation's educational system to ``judicial tutelage for the indefinite future,'' *Dowell, supra*, at ___ (slip op., at 9); see also *Dayton Bd. of Education* v. *Brinkman*, 433 U.S. 406, 410 (1977) (*Dayton I*); *Spangler* v. *Pasadena City Bd. of Education*, 611 F.2d 1239, 1245, n. 5 (1979) (Kennedy, J., concurring). But we also envisioned it as temporary, I think, because the rational basis for the extraordinary presumption of causation simply must dissipate as the *de jure* system and the school boards who produced it recede further into the past. Since a multitude of private factors has shaped school systems in the years after abandonment of *de jure* segregation—normal migration, population growth (as in this case), ``white flight'' from the inner cities, increases in the costs of new facilities—the percentage of the current makeup of school systems attributable to the prior, government-enforced discrimination has diminished with each passing year, to the point where it cannot realistically be assumed to be a significant factor.

At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time. While we must continue to prohibit, without qualification, all racial discrimination in the operation of public

schools, and to afford remedies that eliminate not only the discrimination but its identified consequences, we should consider laying aside the extraordinary, and increasingly counterfactual, presumption of *Green*. We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition: that plaintiffs alleging Equal Protection violations must prove intent and causation and not merely the existence of racial disparity, see *Bazemore*, *supra*, at 407–409; *Washington* v. *Davis*, 426 U.S. 229, 245 (1976); that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents, see, *e.g., Dowell, supra*, at ___ (slip op., at 9); *Dayton I, supra*, at 410; *Milliken I*, *supra*, at 741–742; and that it is ``desirable'' to permit pupils to attend ``schools nearest their homes,'' *Swann*, *supra*, at 28.