

***Brown II*: Ordinary Remedies for Extraordinary Wrongs**

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During events that marked the fiftieth anniversary of *Brown v. Board of Education*¹ (*Brown I*) in 2004, legal scholars and commentators offered a mixed assessment of the decision's impact on public schools in the United States. Scholars often celebrated *Brown I*'s promise of equal justice as an enduring contribution to constitutional law.² But anniversary accounts also described the many stumbling blocks that efforts to integrate American schools had faced in the last fifty years.³ At many anniversary get-togethers, scholars concluded that *Brown I*'s promise was one the nation had yet to fulfill.⁴

Part of the blame for the failure of *Brown I* has been assigned to the so-called remedial phase of the Court's decision, *Brown II*.⁵ Instead of requiring immediate desegregation, or setting a timetable for the attainment of concrete results, the Court simply sent the cases back down with a directive that the district courts oversee compliance of *Brown I* "with all deliberate speed."⁶ The lack of specificity may have encouraged Southern intransigence, just as it may have enabled the Court to insist on a principle that

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1. 347 U.S. 483 (1954).

2. *E.g.*, Darlene Clark Hine, *The Briggs v. Elliot Legacy: Black Culture, Consciousness, and Community Before Brown, 1930-1954*, 2004 U. ILL. L. REV. 1054 (2004).

3. *E.g.*, Nathaniel R. Jones, *The Judicial Betrayal of Blacks—Again: The Supreme Court's Destruction of the Hopes Raised by Brown v. Board of Education*, 32 FORDHAM URB. L.J. 109 (2004).

4. For a sampling of the anniversary literature, see Hine, *supra* note 2; Jones, *supra* note 3; Boyce F. Martin, Jr., *Fifty Years Later: It's Time to Mend Brown's Broken Promise*, 2004 U. ILL. L. REV. 1203 (2004).

5. 349 U.S. 294 (1955).

6. *Id.* at 301.

it lacked the administrative capacity to enforce.⁷ In any case, the Court essentially got out of the desegregation business in 1955 and did not re-enter the field until several years passed during which the South made little progress.⁸ Even today, *Brown II* stands as something of a monument to the principle that judicial opinions do not necessarily change the world.

Somewhat in contrast to the experience with school desegregation after *Brown II*, the Court's decision in *Loving v. Virginia*⁹ actually did change the world, at least as the Court had defined it. In *Loving*, the Court ruled that the principle of equal protection prohibited Virginia and fifteen other Southern states from criminalizing interracial marriages.¹⁰ By all accounts, the decision accomplished its goals. Although the states in question may not have immediately repealed their anti-miscegenation laws, prosecutions and the denial of marriage licenses to those of different races seem to have ended. Indeed, in contrast to school desegregation, where a steady stream of decisions have been issued in an effort to implement *Brown I*,¹¹ *Loving* generated very little subsequent litigation. Life for interracial couples in the post-*Loving* South still required a special form of courage, but the Court's decision succeeded in de-criminalizing the relationship.

In this Essay, I explore the lessons of the Court's divergent remedial schemes in *Brown II* and *Loving*. Part I explores the *Brown II* decision and the factors that moved the Court to adopt a deliberate speed formula that both anticipated and invited Southern resistance. Part II looks at the *Loving* decision and the Court's comparative success in making that decision stick. Part

7. Southerners had argued that the Court should not impose any affirmative obligations in *Brown II* and should recognize that it would take time to come into compliance. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 300 (2001). Many in the South regarded *Brown II* as a victory. *Id.* at 300. For an overview of what followed, see NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE* (1969).

8. On the absence of any noticeable integration in the South during the first decade following the decision, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

9. 388 U.S. 1 (1967). On the origins of the Virginia anti-miscegenation laws that the Court invalidated in *Loving*, see A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *GEO. L.J.* 1967 (1989).

10. See *Loving*, 388 U.S. at 12 (finding states' laws prohibiting interracial marriage unconstitutional).

11. See, e.g., *Brown II*, 349 U.S. at 294; *Freeman v. Pitts*, 503 U.S. 467 (1992); *Milliken v. Bradley*, 433 U.S. 267 (1977) (demonstrating the litigation over public schools and desegregation in the wake of *Brown II*).

III examines the changes in the law of federal court remedies for constitutional violations in the years since *Brown II* came down. If remedial weakness enabled the Court to reach its decision in *Brown I*, then paradoxically, the principle of equality that the Court articulated in 1954 has helped to foster an impressive expansion of the remedial capacity of the federal courts. Other analyses have focused on the structural injunction as an extraordinary form of relief to implement school desegregation obligations. Part III focuses instead on remedies that now make up a part of the ordinary remedial arsenal of the federal courts, and leave state and local governments much less room to maneuver in seeking to skirt their constitutional obligations.

I. *Brown II* and All Deliberate Speed

Many observers have commented upon the Court's failure to secure school integration in the wake of its *Brown* decisions. Some view the Court's failure as evidence that the Supreme Court cannot implement significant social change through a judicial decree.¹² On this account, only a change in society itself, perhaps buttressed with the support of the legislative branch, can make a significant difference on large questions of social policy.¹³ Others view the Court's failure as one of will.¹⁴ Believers in this analysis think that *Brown I* was rightly decided, stating that an enduring principle of equality, but that the Court declined to do the hard work necessary to deliver on that promise.¹⁵ For these observers, the Court betrayed the promise of *Brown I* by failing to insist on Southern compliance;¹⁶ by failing to address de facto segregation in the North; by treating the suburbs and cities as distinct polities for integration purposes;¹⁷ by failing to deal with the enormous financial disparities between school districts;¹⁸ and by winking at these failures in recent decisions to approve the termination of federal judicial oversight.¹⁹ In the end, both groups of observers

12. See ROSENBERG, *supra* note 8, at 47-54 (discussing the comparative contributions of the executive, legislative, and judicial branches of the federal government to desegregating public schools).

13. *Id.* at 62.

14. See generally KLARMAN, *supra* note 8 (arguing that the *Brown* decision did more to mobilize White resistance to desegregation than to further the Civil Rights Movement).

15. *Id.* at 354-55.

16. *Id.* at 350.

17. *Id.* at 348.

18. *Id.* at 351-52.

19. *Id.* at 356.

agree that the Court did not deliver the goods.

Those who participated in the Supreme Court's decision of the remedial phase of the *Brown* litigation clearly anticipated some of what actually occurred later on.²⁰ That is, the lawyers and Justices all foresaw a period of sharp Southern intransigence and a refusal on the part of school boards to implement the school desegregation requirement.²¹ In front of the Supreme Court, lawyers for South Carolina admitted that the "white people" of the South would not send their children to "Negro schools."²² Segregation was deeply ingrained, the lawyers explained, and the Court could not simply demand that it be changed immediately.²³ In response, Chief Justice Warren mused aloud that the plaintiffs might have to wait until 2045—a date ninety years in the future—if they were obliged to wait for Southern attitudes to change.²⁴ Similar if less drastic predictions were not uncommon. Justice Black reported at the Court's conference that his law clerk did not expect integrated schools to appear in his home town in Alabama for at least a generation.²⁵ Meanwhile, lawyers from Virginia explained to the Court in some detail the array of tactics that Southern school boards and governments could use to put off full compliance.²⁶

In the face of Southern hostility, the Court temporized. Instead of announcing a specific timetable for desegregation, or setting forth parameters by which progress towards desegregation might be measured, the Court sent the cases back to the lower courts with an oxymoronic directive: the lower courts were to admit the African-American plaintiffs to the public schools on a racially nondiscriminatory basis, and were to do so with "all deliberate speed."²⁷ The formulation, a favorite of Justice Felix

20. See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 63-64 (2001) (noting the inclusion of the deliberate speed formula in the government's amicus brief in *Brown I* and describing Justice Jackson's concern that the end of segregation would flood the Court with a series of follow-up decisions).

21. *Id.*

22. See RICHARD KLUGER, *SIMPLE JUSTICE: THE STORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 732 (Vintage Books 2004) (1975).

23. *Id.*

24. *Id.* at 736. At the time of Chief Justice Warren's comment in 1955, it had been nearly ninety years since the Fourteenth Amendment became law in 1868. *Id.*

25. *Id.* at 743.

26. *Id.* at 736 (noting that local assemblies might "refuse to vote the money, refuse to support the necessary laws, and repeal public attendance laws" in response to court instructions).

27. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

Frankfurter, had originated in a Holmes opinion dealing with the intransigence of the West Virginia legislature in refusing to appropriate funds to pay a judgment.²⁸ Although the formulation's origins in English Chancery remain somewhat obscure, the phrase first appeared in the brief of the United States as *amicus curiae* in the *Brown* litigation.²⁹ The concept may have originated with Philip Elman—a former law clerk to Justice Frankfurter and an attorney in the Solicitor General's office.³⁰ Elman later claimed that the phrase made an important contribution to the resolution of the *Brown* controversy.³¹

As Elman describes the problem, the Court had been sharply divided about whether to overturn *Plessy v. Ferguson*.³² Chief Justice Fred Vinson did not want to overturn the old decision, and he could apparently count on the support of two or three other Justices in reaffirming *Plessy*.³³ Such a division would produce, according to Justice Frankfurter, a fractured Court and a god-awful mess.³⁴ Vinson's death during the summer of 1953, and the appointment of Earl Warren as Chief Justice, opened the way for a unanimous decision to overturn *Plessy*. Elman recalls that Justice Frankfurter pungently described Vinson's death as the only "solid piece of evidence" he had seen of the existence of God.³⁵ Elman ultimately agreed with Frankfurter's assessment: the winning formula was "God plus 'all deliberate speed.'"³⁶ Deliberate speed,

28. See *Virginia v. West Virginia*, 222 U.S. 17, 20; see also KLUGER, *supra* note 22, at 745-46 (accounting the origins of the term).

29. See KLUGER, *supra* note 22, at 746.

30. See Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 827 (1987) [hereinafter *Elman History*] (describing Elman's contribution of the "deliberate speed" formula to the federal government's *amicus* brief as one of the proudest acts of his career).

31. *But cf.* Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938 (1987) (criticizing Elman for having exaggerated his own role in the desegregation cases, and for having downplayed the contributions of Thurgood Marshall and the NAACP Legal Defense Fund).

32. 163 U.S. 537 (1896).

33. See *Elman History*, *supra* note 30, at 824 (describing Frankfurter's view that the Court might muster only a 5-4 vote to overturn *Plessy* during Vinson's tenure as Chief Justice). Based on subsequent developments, it appears that Justices Jackson and Reed would have joined Vinson, and perhaps Justice Clark. See *id.* at 829; see also POWE, *supra* note 7, at 23 (describing the Court as closely divided following the initial argument in 1952: Black, Douglas, Burton and Minton viewed segregation as *per se* unconstitutional; Vinson, Reed, and Clark appeared ready to reaffirm *Plessy*; Jackson worried about the political question doctrine as a possible barrier to judicial involvement; Frankfurter shared Jackson's concerns).

34. *Elman History*, *supra* note 31, at 824-25.

35. *Id.* at 840.

36. *Id.*

in Elman's judgment was "just plain wrong as a matter of constitutional law" because it denied relief to individuals after a finding that their personal constitutional rights had been violated.³⁷ However, the indefensible was essential in Elman's view, and in the Court's as well, because it enabled the Court to establish the principle of racial equality and to reject *Plessy* without having to face the consequences of an immediate order directing the desegregation of the public schools.³⁸ In Elman's words, it "broke the logjam."³⁹

The role of the "deliberate speed" formulation (the phrase was before the Court in briefs by 1953, well before the decision in *Brown I* came down)⁴⁰ provides a basis for reassessing two aspects of the *Brown II* decision. If, as Elman suggests, members of the Court well understood both the likely intransigence of the South and feared the Southern backlash that a more expeditious remedy would have triggered,⁴¹ then perhaps remedial weakness played an essential role in securing *Brown's* statement of principle in the first place. That should not excuse the Court's failure to follow through on the promise of school desegregation; denial of any remedy to those whose rights had been violated remained indefensible throughout the early 1960s, just as it had been at the time of the decision.⁴² But it does cast a different light on the Court's failure to take more meaningful steps to secure *Brown's* implementation. The Court's inaction may have been the implicit price of the decision to push ahead with the invalidation of *Plessy's* rule of segregation as it applied to public schools.

If the Court had resigned itself to a period of inaction in the wake of *Brown*, it may be worth reevaluating the scholarly portrait of a Court surprised by the sharpness of the Southern reaction and impotent to secure social change. Several members of the Court apparently believed that Congress should take the lead role in rooting out segregation in the South.⁴³ That appears to

37. *Id.* at 827.

38. *Id.* at 830.

39. *Id.*

40. See *supra* text accompanying note 29.

41. See KLUGER, *supra* note 22, at 736-44 (describing the deliberative process in *Brown II* and the concern with implementation).

42. See KLARMAN, *supra* note 8, at 362-63 (discussing the use of legislative action to accelerate the process of school desegregation).

43. A conference at Howard University in 1952 focused on "The Courts and Racial Integration in Education." In a talk entitled "Can Courts Erase the Color Line?" John P. Frank assessed the Court's role in shaping national policy. Frank recounted the history of segregation in the Supreme Court, noting an 1873 decision that invalidated segregation on statutory grounds and the 1896 decision in *Plessy*

have been Justice Jackson's view.⁴⁴ Elman does not expressly attribute a similar view to Justice Frankfurter, preferring to describe his mentor and friend as a skillful champion of the cause of desegregation.⁴⁵ According to Elman, Frankfurter engineered a series of delays that kept the Court from reaching *Plessy* during the early 1950s, and portrayed these moves as driven by his doubts about the views of his colleagues.⁴⁶ Frankfurter may have shared to some extent the views of Vinson and Jackson about the need for legislative primacy, and may have felt (as Elman did) that the issue had been presented to the Court prematurely.⁴⁷ For at least some of the Justices, then, the deliberate speed formulation may have served to create space for the legislative response that finally appeared in the Civil Rights Act of 1964.

The *Brown I* decision was an essential feature in clearing the way for the legislative response that eventually arrived. *Plessy* remained a powerful and enduring symbol of the legitimacy of racial apartheid in the South.⁴⁸ Not only did Southerners frequently draw on *Plessy* in defending segregation as the law of the land, but even responsible Northern legislators might have fairly doubted the power of Congress to deploy the remedial

that switched positions and upheld the practice. Frank concluded from this history that the Court was following dominant opinion on both occasions:

The transformation suggests the inherent limitation on the judicial process as a maker of basic social policy. On the ultimate questions of policy, courts have a way of accommodating the Constitution to what the country will tolerate. And yet the judicial process is more than a mere echo of popular demand; for the judges help to make the symbols by which the country lives. *Plessy v. Ferguson* was thus at once both an acquiescence in, and a spur to, the growing practice of segregation.

John P. Frank, *Can The Courts Erase the Color Line?* 21 J. NEGRO EDUC. 304, 305 (1952). My thanks to Elaine Gehrmain for bringing this conference to my attention. John Frank's account may nicely describe *Brown*, a decision that both echoed popular opinion and provides a potent symbol by which the country lives.

44. At oral argument, Justice Jackson noted his assumption that the plaintiffs had come to court because Congress had failed to intervene. See POWE, *supra* note 7, at 47.

45. See Elman *History*, *supra* note 30, at 831-32 (describing Frankfurter's central role in delaying the timing of *Brown* and in the June 1953 decision to set the cases for reargument); *cf. id.* at 841 (noting Jackson's preference for legislative enforcement of the Fourteenth Amendment and describing Frankfurter as "torn").

46. For example, Frankfurter believed that the libertarians (Black and Douglas) would rather dissent from a decision reaffirming *Plessy* than actually overturn *Plessy* and confront the question of Southern resistance. See *id.* at 839.

47. See POWE, *supra* note 7, at 44 (noting Frankfurter's concern with timing); see also Philip Elman, *Response*, 100 HARV. L. REV. 1946, 1952 (1987) (describing Frankfurter as attracted to Jackson's view that Congress should take the lead through the exercise of its powers under section 5 of the Fourteenth Amendment).

48. *Cf. Elman History*, *supra* note 30, at 828-29 (discussing the Justices' concern with the social consequences of overruling *Plessy*).

powers of Section 5 of the Fourteenth Amendment to invalidate a regime of racial segregation that *Plessy* had proclaimed to be entirely consistent with the Equal Protection Clause.⁴⁹ Section 5, as the Rehnquist Court has been at pains to remind us in recent years, does not empower Congress to rewrite the Fourteenth Amendment but only to carry into effect its terms as the Court has previously defined them. *Brown* thus serves both as a symbol of the legal claim of African-Americans to equality of treatment before the law,⁵⁰ and as the constitutional foundation for a more active enforcement role on the part of Congress.⁵¹ Or, as Justice Jackson had reportedly explained in the run-up to *Brown*, he wished that the Court could simply erase the *Plessy* precedent from the U.S. Reports, without having to say whether it was rightly or wrongly decided.⁵² However impractical, such an approach would at least have cleared the way for legislative involvement of the kind Jackson preferred.

The traditional story of "deliberate speed" as the profound betrayal of *Brown*'s promise may thus deserve some reconsideration. Perhaps the deliberate speed formula enabled the *Brown* Court to reach a unanimous decision to reject *Plessy* that would have otherwise eluded the Court altogether. Perhaps deliberate speed helped to secure both the constitutional principle and the popular support that later helped to spur the passage of the 1964 civil rights legislation. Perhaps deliberate speed gave the American people an opportunity to consider the claim of equal

49. These doubts shaped the nature of the eventual response. When Congress took steps to desegregate places of public accommodation in Title II of the Civil Rights Bill, it did so in the exercise of its commerce power and did not expressly rely upon its powers under the Fourteenth Amendment, except as to places where discrimination was supported by State action. 42 U.S.C. § 2000b (2000); see generally GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 201-03 (13th ed. 1997) (discussing Congress's decision to rely on the commerce power to enact civil rights legislation); cf. RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES 5-7, 13 (2001) (describing the efforts of some in the Johnson administration to base the public accommodation legislation on an expansive theory of state action that would have reached private conduct). Similarly, the provisions most directly related to education, those in Title VI that prohibited discrimination by recipients of federal funds, were based upon the spending power. See ROSENBERG, *supra* note 8, at 47-48 (discussing how complete compliance with desegregation laws became a requirement for schools to receive federal funding).

50. Cf. Frank, *supra* note 43, at 316 (discussing what makes a legal victory meaningful).

51. Cf. Elman *History*, *supra* note 30, at 841 (discussing judicial preference for legislative enforcement).

52. See POWE, *supra* note 7, at 46-48 (discussing Justice Jackson's concern with the political and social ramifications of overruling *Plessy*).

educational opportunity on the merits and to reject Bull Connor's fire hoses and German shepherds. In short, perhaps remedial thinness played a role in securing the articulation of an increasingly thick principle of equality. If true, we may have some reason to celebrate the fiftieth anniversary of *Brown II* even as we remain sober-minded about the costs of remedial thinness to generations of school children.

II. *Brown* and *Loving*: Comparative Remediation

Before we accept the claim that the Court could imagine the *Brown* decisions only by restricting their remedial implications, however, we should consider alternatives. The Court's handling of interracial marriage provides one possible point of comparison. Litigants in Alabama and Virginia sought to challenge the constitutionality of "anti-miscegenation" statutes in the immediate aftermath of *Brown*. But the Court refused to hear the cases of *Jackson v. Alabama*⁵³ and *Naim v. Naim*,⁵⁴ accepting the government's advice in the latter case that the issue was not properly presented on the record.⁵⁵ The Court's diffidence was driven not by the technical presentation of the issue but by the Justices' perception that the South was simply not prepared for the invalidation of its interracial marriage laws.⁵⁶ The Court

53. *Jackson v. State*, 72 So. 2d 114 (Ala. Ct. App. 1954), cert. denied 348 U.S. 888 (1954).

54. 87 S.E.2d 749 (Va. 1955).

55. The Court ducked the case twice. See *Naim v. Naim*, 350 U.S. 891 (1955) (remanding case to Virginia's supreme court); *Naim v. Naim*, 90 S.E.2d 849 (1955) (reaffirming its prior decision upholding the constitutionality of Virginia's miscegenation law); *Naim v. Naim*, 350 U.S. 985 (1955) (dismissing appeal from Virginia's reaffirmance). Elman described the Court's action here as an unprincipled decision to duck a potentially explosive constitutional question. See *Elman History*, supra note 30, at 46-47.

56. The evidence tends to support the claim that the Court deliberately declined to reach the merits of the interracial marriage controversy. For one thing, the *Plessy* decision contained language that described as obviously constitutional the states' power to adopt such laws. See *Plessy v. Ferguson*, 163 U.S. 537 ("[L]aws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the State."). *Brown I* disavowed *Plessy*, but only in limited terms. Thus, *Brown I* based its decision on the sense of inferiority that segregation fostered in its victims, and ruled that separate but equal has no place in public education. 347 U.S. 483, 495 (1954). Then came its treatment of *Plessy*: rather than flatly overruling that decision, the *Brown I* Court explained that any language in *Plessy* contrary to this finding is rejected. *Id.* Such a limited statement invites the conclusion that other aspects of *Plessy* might survive, to an uncertain extent. Moreover, the Court had also ducked the interracial marriage issue on two other occasions. In 1954, six months after the *Brown I* decision, the Court denied certiorari in a case from Alabama that presented the issue. See *Jackson*, 72 So. 2d at 116. Again, in its 1964 decision in *McLaughlin v. Florida*, 379 U.S. 184 (1964),

ducked the question in 1954 and 1955, only to take it up twelve years later in *Loving v. Virginia*.⁵⁷ In *Loving*, of course, the Court voted unanimously to overturn interracial marriage restrictions.⁵⁸

Despite the fact that the Court in 1955 apparently regarded interracial marriage as a more explosive issue than desegregated schools,⁵⁹ the remedy it fashioned in *Loving* was extraordinarily effective. The Court simply invalidated the Lovings' criminal conviction, and declared the law unconstitutional.⁶⁰ The decision pretty much ended interracial marriage restrictions once and for all. No subsequent decisions arrived at the Court's docket. In the lower courts, much the same thing occurred. A federal district court invalidated Delaware's law against interracial marriage, citing *Loving*.⁶¹ But the matter had been pending in the district court at the time *Loving* came down and did not present a question of post-*Loving* intransigence.⁶² No other post-*Loving* issues arose in the state or federal courts.⁶³ In comparative terms, one might conclude that *Loving* adopted a far more effective remedial formula than *Brown*.

One might attribute the success of *Loving* to a simple change in the times. Perhaps the country was prepared to accept the invalidation of laws against interracial marriage by 1967, and that acceptance created a climate of compliance. Perhaps the Court was wrong to have dodged the *Naim* case as an initial matter,

the Court declined to reach the constitutionality of the South's interracial marriage laws, preferring to base its decision on a direct challenge to a statute that made the punishment for co-habitation out of wedlock differ depending on race. *Id.* at 196.

57. 388 U.S. 1 (1966).

58. See generally Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 HOW. L.J. 229 (1998) (describing the Lovings' successful challenge to the Virginia prohibition against interracial marriage).

59. For evidence of the issue's potential explosiveness, consider the fact that the interpositionist James Kilpatrick darkly predicted that *Brown* might one day lead to the invalidation of "a State's power to prohibit interracial marriage." POWE, *supra* note 7, at 59; see also PATTERSON, *supra* note 20, at 5-6 (describing one Alabama senator's warning that desegregationists ultimately seek to "open the bedroom doors of our white women to black men" and quoting fears of Southerners that racial mixing the schools would lead to mixed marriages).

60. *Loving*, 388 U.S. at 12.

61. See *Davis v. Gately*, 269 F. Supp. 996 (D. Del. 1967) (invalidating Delaware's statute banning interracial marriage and citing *Loving*); cf. *Dick v. Reaves*, 434 P.2d 295 (Okla. 1967) (upholding the validity of an interracial marriage, notwithstanding state law to the contrary, as an incidental issue in a dispute over an intestate's estate and citing the decision in *Loving*).

62. *Davis*, 269 F. Supp. 996.

63. See generally Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1770-1990*, 41 HOW. L.J. 289 (1998) (discussing Supreme Court post-*Loving* cases involving the right to marry).

misjudging the depth of Southern attachment. Perhaps the combination of civil rights legislation and the rise of new Southern politicians in the years between *Brown* and *Loving* had prepared the way for acceptance of the *Loving* pronouncement. Whatever one's explanation, *Loving* may represent an example of a situation in which the Court was able to achieve an important change by judicial decree. With a single stroke, the Court wiped away the laws of sixteen states and did so without triggering the backlash that so many had predicted.⁶⁴ Today, few would doubt that the nation has accepted the Court's conclusion as to the constitutionality of interracial marriage.⁶⁵

To be sure, one might try to minimize the significance of the Court's accomplishments in *Loving*. In contrast to *Brown*, the *Loving* decision did not require objecting Southerners to enter into interracial relationships; it simply de-criminalized the partnerships that some Southerners voluntarily arranged on their own. Unlike *Brown*, where the Court had prohibited segregation but had largely failed to achieve any results for ten years,⁶⁶ the *Loving* case did not insist on changing the behavior of those opposed to racial mixing. It simply made interracial relationships lawful for those committed to them, and left society free to come around. So long as the South officially tolerated interracial marriages, white supremacists were free to declaim against the loss of racial purity and moderate opinion was free to express polite dismay at the hard life faced by those who would cross the color line in the name of love.

With these limits on the reach of its remedial principle, *Loving's* approach may help to shed light on the limited remedial ambition of the deliberate speed formulation adopted in *Brown II*.⁶⁷

64. *Loving*, 388 U.S. at 6.

65. See John Hart Ely, *If At First You Don't Succeed, Ignore the Question Next Time? Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT. 215 (1998) (working out a problem of constitutional theory but treating the rightness of *Loving* as clear beyond any doubt).

66. See ROSENBERG, *supra* note 8, at 49-54 (arguing that it was not until the passage of civil rights legislation that desegregation became more rapid).

67. Many observers may question the aptness of the suggested comparison of *Loving* and *Brown*, and I thank Professors Goodwin Liu, Gerald Rosenberg, and Daria Roithmayr for sharing their questions with me. *Brown*, as I suggest in the text, required some affirmative action by unwilling parties to achieve the goal of integration, whereas *Loving* created a right that courts could more easily enforce through review of criminal convictions or through injunctive relief against any discriminatory denial of a marriage license. This more ready enforceability may appear to explain why *Loving's* implementation followed with little controversy, and may explain why some question the relevance of the *Loving* experience to the *Brown* problem. But perhaps *Loving's* more ready enforceability helps us to re-

During the Court's deliberations in *Brown II*, Justice Hugo Black proposed a narrow decree, one that would order the admission of the plaintiffs in the *Brown* cases to the schools of their choice but that would refrain from addressing broader issues of segregation.⁶⁸ Justice Black understood that such a remedy would have little immediate impact on the make-up of many Southern schools, especially those in the deep South.⁶⁹ But Black's approach would have defined the remedial aspirations of the *Brown* decisions in terms that the federal courts might enforce. That was Black's goal: to accept the Court's inability to achieve widespread integration by judicial decree and to frame a remedy that coincided with the actual scope of judicial power.⁷⁰ Imagine a simple order that directed admission of the plaintiffs to the local school of their choice and forbade state and local governments from using race as a factor in the administration of public schools.⁷¹ Federal courts might have enforced such a rule through oversight of school board decisions, at least where those decisions used race as a factor.⁷²

Rather than directing the admission of the plaintiffs, as the Court had done in previous cases involving litigants who challenged their exclusion from graduate and professional schools, *Brown II* directed a "start" to the process of desegregation but did not order the immediate admission of the plaintiffs.⁷³ In ordering their admission on a racially non-discriminatory basis with all deliberate speed, *Brown II* seemingly countenanced delay until admission could be worked out as part of a larger system-wide plan to secure desegregation. The Court emphasized the inevitability of a "transition" period⁷⁴ during which school boards

imagine the way the Court defined the rights of African-American students in the *Brown* decision. Perhaps greater attention to remedial issues in *Brown II* could have articulated rights that the federal courts could more readily enforce.

68. KLUGER, *supra* note 22, at 738.

69. *Id.* at 742-43.

70. *Id.* at 743.

71. Such an approach was eventually adopted after much foot-dragging in Orleans Parish. There the district court simply ordered that all students were to be admitted to either the White or African-American school of their choice nearest their homes, and that any school transfer rules were to be administered without regard to race. See *Bush v. Orleans Parish*, 187 F. Supp 42, 45-46 (E.D. La. 1960).

72. A major drawback of Justice Black's approach was its apparent reliance on a cumbersome case-by-case approach, focusing on the claims of individuals rather than treating the plaintiffs as members of a class. See KLUGER, *supra* note 22, at 743 (describing Black's preference for treating the plaintiffs as individuals rather than as representatives of a class).

73. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955).

74. *Id.* at 299.

would face a host of difficulties and might have to consider such factors as physical plant, school transportation, and district boundaries in considering how to achieve compliance.⁷⁵ Rather than a test the lower courts could apply in measuring school board progress, the Court invited the lower courts to consider whether the action of the local authorities "constitutes good faith implementation" of the governing constitutional principles.⁷⁶ With the "principles" so loosely stated, and with all the facts and circumstances declared relevant, the use of a "good faith" standard appears to have acknowledged the inevitability of recalcitrance and backsliding.

The Court's approach to the problem of reforming the laws that governed school admission policies offers an especially revealing example of the Court's willingness to tolerate delay. In the course of describing the various matters that the school boards would likely consider in shaping a plan for desegregation, and the various problems that might require "additional time" after a "start" has been made, the Court included a reference to the "revision of local laws and regulations."⁷⁷ The reference operates less as an invitation to the lower courts to invalidate all local laws that use race as a factor in admissions than as an invitation to the school boards to use the need for legislative action as a justification for further delay. Even though there was need for comprehensive legislation in dealing with the transition to unitary school systems, there was little prospect for securing such legislation from Southern assemblies.⁷⁸ The Court's reference to law revision seemingly invites a degree of deference to the difficulty of procuring local legislation, in apparent violation of the rules of federal supremacy.

The plight of Virgil Hawkins, who had successfully challenged his exclusion from the University of Florida's state-run law school, showed the adverse effects of the Court's temporizing.⁷⁹ Although prior decisions in the professional school cases had ordered prompt admission upon a finding that an African-American had been wrongly excluded from graduate or professional education,⁸⁰ the Florida court refused to order

75. *Id.* at 300.

76. *Id.* at 299.

77. *Id.* at 300-01.

78. See *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966).

79. See *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413 (1956).

80. See *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (ordering admission to the University of Texas Law School); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337,

admission, claiming that *Brown* had switched to a remedial framework of gradualism.⁸¹ Although the Supreme Court repeatedly reversed the Florida high court, it did not grant relief, and Mr. Hawkins eventually gave up on a career in law altogether.⁸²

To be sure, one cannot assume that the adoption of an immediate admission formulation would have resulted in more widespread integration during the troubled years of massive Southern resistance⁸³ and extreme indifference by the Eisenhower administration.⁸⁴ Moreover, such an approach would have placed the burden entirely on the African-American community to secure integration through a process of application.⁸⁵ Doubtless such applications would have been met with any number of pretextual rejections (not to mention violence and intimidation), just as they were under the school choice and pupil placement plans that emerged.⁸⁶ African-American applicants would have been forced to challenge such rejections in the courts and to demonstrate that the school board's asserted need to preserve neighborhood schools or to group students at similar levels of achievement were pretexts for continuing discrimination on the basis of race.⁸⁷ Doubtless "White flight" would alter the demographics of neighborhood public

351-52 (1938) (ordering admission to the University of Missouri Law School).

81. See Florida *ex rel.* Hawkins v. Bd. of Control, 83 So. 2d 20, 25 (Fla. 1955).

82. See POWE, *supra* note 7, at 64 ("[B]ut by then Florida had changed its admission standards for the law school and with his wife pressuring him, he gave up.").

83. Even Thurgood Marshall and Robert L. Carter, legal counsel for the NAACP, praised the Court for having performed its job "brilliantly." Thurgood Marshall & Robert L. Carter, *The Meaning and Significance of the Supreme Court Decree*, 24 J. NEGRO EDUC. 397, 397 (1955).

84. See PATTERSON, *supra* note 20, at 81-82 (noting Eisenhower's refusal to support the *Brown* decision publicly and suggesting that the judicial caution that followed may have owed something to the perceived absence of presidential support).

85. *But cf. id.* (discussing *Brown II*'s empowerment of federal courts to "supervise and control desegregation of the schools").

86. See, e.g., Green v. County Sch. Bd., 391 U.S. 430 (1968) (school choice plan); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956) (pupil placement).

87. See Marshall & Carter, *supra* note 83, at 400 (asserting that under *Brown II*, the burden is "on the school boards to prove to courts' satisfaction that their programs have eliminated . . . enforced segregation, and not upon plaintiffs to prove some form of segregation remains"). Although Marshall and Carter expressed regret at the absence of any specific deadline, they recognized that nothing would happen under the decree unless African-Americans "demand and insist upon desegregation." *Id.* at 402. It would take a "long and bitter fight" but desegregation would come only if African-Americans "exhibit real militancy and press relentlessly for their rights." *Id.*

schools, but that was precisely what occurred anyway.⁸⁸ The integration battles in Southern cities like Little Rock made clear that the burden of integrating public schools fell with enormous disproportion on the African-American community, just as did the burdens of Jim Crow, Montgomery, and Selma. If the gap between *Brown's* aspirations and the more sobering reality was as broad as many had correctly anticipated, then perhaps immediate admission was in order.

The prospect of a limited remedy of the kind Justice Black supported in *Brown II* forces us to confront the chastening of aspiration such a remedy may have entailed. Written in somewhat amorphous terms, the deliberate speed formula had a protean quality that included the capacity for growth and change.⁸⁹ Just as it could accommodate a period of massive resistance, the remedial formula in *Brown II* could later stretch to encompass the Court's growing impatience with the slow progress of desegregation.⁹⁰ The Court's 1968 decision in *Green v. County School Board*,⁹¹ expanding the range of remedial options for district courts and casting more affirmative obligations on Southern school districts, was imaginable within the context of a deliberate speed formula.⁹² Had Justice Black's more narrow conception of the proper scope of remedies taken hold in 1955, however, the 1968 expansion of remedial options may have appeared to have presented a sharper break with the remedial assumptions of the past. A more specific statement of the Court's remedial expectations in 1955 may have deprived its decision of the capacity to goad some states and to confront other states with their failure to have made any significant headway.

On the other hand, the contemplation of more limited remedies forces us to confront the possibility that *Brown II*

88. See KLARMAN, *supra* note 8 (detailing struggle in Little Rock).

89. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955).

90. See *Green*, 391 U.S. 430 (turning away from the emphasis on negative remedies and instead recognizing affirmative remedial obligations by focusing less on the good faith of school officials and more on their actual success in moving from a dual to a unitary school system); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (providing more detailed remedial guidance and approving the use of busing).

91. 391 U.S. at 441-42. The Court's insistence on concrete steps to be taken "now" underscored its insistence on the elimination of all vestiges of discrimination, "root and branch." *Id.* at 438.

92. See *id.* at 435-38 (noting that the school board's freedom of choice plan had failed to achieve the "racially nondiscriminatory school system" that the *Brown II* decision required; emphasizing the board's failure to make any effort for ten years, and contrasting that omission with *Brown II's* requirement of a "prompt and reasonable start" (quoting *Brown II*, 349 U.S. at 301)).

demanded less of the South than it was capable of achieving. Justice Frankfurter had worked to delay any decision for fear, he said, of the possibility that the other Justices might vote to reaffirm *Plessy*.⁹³ Was that really possible? Elite opinion in the wake of World War II had turned so sharply against Jim Crow that one can scarcely conceive of the Court actually voting to reject the claims of the *Brown* plaintiffs.⁹⁴ Thurgood Marshall may have had a surer grasp of the tide of history than did Frankfurter and Black; Marshall's decision to press the Court for an answer ultimately rested on the sure-footed sense that the African-American community had waited long enough.⁹⁵ Marshall knew, perhaps better than Justices Jackson and Frankfurter, that the process of change in the South could not really begin until the Court overturned *Plessy* and the approving stamp that decision had placed on the institution of Jim Crow.⁹⁶ In that sense, his decision to ask the Court to take the first step⁹⁷ may have been the most difficult and most praiseworthy of the many tough calls he made as the NAACP's lead lawyer.

Just as one wonders if the Court waited too long, and proceeded too cautiously in *Brown*, a sense of missed opportunity hangs over the *Loving* decision as well. Given the response to *Loving* when it came down, and the Court's success in establishing the legality of interracial marriage through a simple decree,⁹⁸ one wonders why the Lovings of the world had to wait so long. A moving memoir of their relationship exposes the pain they would have been spared had the Court invalidated Virginia's laws in *Naim v. Naim*.⁹⁹ One cannot avoid asking if that hardship was justified by the prudential considerations that led Justice Frankfurter to put off the Court's consideration of the interracial marriage issue, just as it had put off its decision in *Brown*.¹⁰⁰ Indeed, the more conservative members of the early Warren Court may have been projecting their own ambivalence about interracial marriage in expressing concern with the likely Southern reaction

93. See POWE, *supra* note 7, at 44.

94. See generally Michael J. Klarman, *Brown, Racial Changes, and the Civil Rights Movement*, 80 VA. L. REV. 7, 83-84 (1994) (discussing the gradual emergence of well-educated middle class blacks after World War II who rejected Jim Crow).

95. See POWE, *supra* note 7, at 39-41.

96. See *id.*

97. See *id.*

98. See KLUGER, *supra* note 22, at 286-300.

99. See *id.* at 286.

100. See POWE, *supra* note 7, at 71.

to its de-criminalization.¹⁰¹ The timing of *Loving* may have had more to do with changes in the make-up of the Court between 1955 and 1967 than with the Court's perception of likely Southern reaction.¹⁰²

If the timing of *Loving* owes something to certain Justices' own ambivalence toward interracial marriage in the 1950s, then perhaps we should reconsider the Court's adherence to its self-imposed rule of unanimity. Justice Frankfurter was absolutely convinced of the need for unanimity, and he persuaded Chief Justice Warren of the wisdom of that approach in dealing with the Jim Crow South.¹⁰³ Unanimity was thought essential to strengthen the Court's message to the country, and to help to lessen the likelihood of Southern opposition.¹⁰⁴ Warren has earned high marks from historians for his work in bringing Justices Jackson and Reed around to his views in *Brown*.¹⁰⁵ In retrospect, the Court's unanimity did not encourage Southern acceptance of the decision. Instead of taking up the words of a dissenting Justice, opposition to *Brown* in the South simply coalesced around the Southern Manifesto, and around the nineteenth century doctrine of interposition as reformulated by columnist James Kilpatrick.¹⁰⁶ Southerners proved that they were perfectly capable of dismissing the decision as a judicial usurpation of the legislative power without a dissenting opinion that pointed them to that conclusion.¹⁰⁷

If unanimity gained the Court little in terms of acceptance of its decisions in the South, it may have taken a toll on the Court's own decisional processes. The Court apparently split in response to the Virginia decision in *Naim*, recognizing it as a direct

101. *Id.* at 209.

102. President Kennedy made appointments to fill positions vacated by the retirements of Justices Whittaker and Frankfurter, thereby providing what historians have referred to as the Warren Court's fifth vote. *See id.* at 209-16. Of the nine Justices who participated in the *Brown I* decision in 1954, only Chief Justice Warren, Justices Black, Clark, and Douglas remained on the bench at the time of *Loving* in 1967. *See id.* Justices Reed, Jackson, Frankfurter, Minton, and Burton had all left the Court. *See id.*

103. *See* KLUGER, *supra* note 22, at 700.

104. *See id.*

105. *See id.*

106. *See* POWE, *supra* note 7, at 58-62 (noting initial approval by the South of *Brown II*, followed by dissent and organization around the Southern Manifesto).

107. *See* *Loving v. Virginia*, 147 S.E.2d. 78, 82 (Va. 1967), *rev'd*, 388 U.S. 1 (1967) (reaffirming the constitutionality of miscegenation laws and describing the proposal to overturn such laws as inviting "judicial legislation in the rawest sense of that term").

challenge to the authority of *Brown*.¹⁰⁸ Without a rule of unanimity, self-imposed or otherwise, the Justices may have agreed to hear the *Naim* case and invalidate laws banning interracial marriage.¹⁰⁹ But with Justice Frankfurter urging further delay to protect *Brown*, and Justice Clark joining in the view that one bombshell was enough, the Court unanimously chose the path of avoidance.¹¹⁰ One has to ask if the desire for unanimity enabled certain Justices to use the possibility of dissent to forestall consideration of the issue.

III. *Brown II* and the Evolution of Constitutional Remedies

The claim that *Brown II* represents a failure of the Court's remedial authority seems hard to dismiss. The decision seems to admit the inevitability of Southern resistance and to acknowledge that no real change would soon occur in the make-up of public schools. One can see this acceptance of the inevitable clearly expressed in a paper by Professor Alexander Bickel, writing on the occasion of the tenth anniversary of *Brown*.¹¹¹ Bickel viewed the period of massive resistance and the absence of widespread integration with a measure of equanimity.¹¹² The important point was to establish the legal principle of equality before the law and access to public schools without regard to race.¹¹³ Only then could the federal courts begin to take up the task of administering or implementing the right through the issuance of more effective and far-reaching remedies.¹¹⁴ Even so, Bickel viewed the federal courts as incapable of accomplishing more than they did during the first decade.¹¹⁵

Bickel stated two reasons for the inevitable remedial failure.¹¹⁶ One connects to his famous concern with the counter-majoritarian difficulty, which led him to question the legitimate scope of the Court's role in interpreting the Constitution.¹¹⁷

108. See POWE, *supra* note 7, at 71-73.

109. *Id.*

110. See *id.* at 71-72. See generally Elman *History*, *supra* note 30, at 845-47.

111. See Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

112. See *id.* (declaring that Bickel is both encouraged by the prospects of the future but also outraged by the token compliance since *Brown II*).

113. *Id.* at 194.

114. *Id.*

115. *Id.* at 216 ("No judicial remedy . . . could conceivably work any wonder, even small ones . . .").

116. See *id.* at 196-201.

117. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-

According to Bickel, the Court cannot expect general acquiescence every time it makes a pronouncement about an issue of deep concern to broad segments of society.¹¹⁸ Rather, the Court must expect a period of opposition and non-compliance.¹¹⁹ To Bickel, that was the lesson of the *Lochner* era, and he applied the same lesson to the Southern resistance to *Brown*.¹²⁰ Bickel thus rejected criticisms of the "deliberate speed" formula; rather than a capitulation in the face of anticipated resistance, the formula operated as a candid recognition of the Court's limitations.¹²¹ As he concluded, the remedial consequences would have been the same "no matter what the form of the Supreme Court's decree."¹²²

A second point underlaid Bickel's acceptance of Southern resistance. Bickel understood the array of remedies available to the Court in constitutional cases to be quite limited.¹²³ As he described the system of remedies, the enforcement of judge-made constitutional law had been left to private initiative.¹²⁴ Moreover, the system of remedies as he understood it operated "prospectively only, so that no penalties attach to failure to abide by it prior to completion of a judicial proceeding seeking enforcement."¹²⁵ As a practical matter, the prospective operation of the remedial system gave every officer in the South the freedom to act at variance with the new constitutional order. On Bickel's view, "no one is under an obligation to carry out a rule of constitutional law announced by the Court, until someone else has conducted a successful litigation and obtained a decree directing him to do so."¹²⁶ In the meantime, individuals were free to agitate against the acceptance of the *Brown* principle and act in violation of it without consequence.¹²⁷ While the Court might have proclaimed its own supremacy in *Cooper v. Aaron*, proclamations did not make it so.¹²⁸

Bickel's account of the remedial foundation of the Court's inability to change Southern society by judicial decree invites us to

23 (1962).

118. See Bickel, *supra* note 111, at 196.

119. See *id.* (arguing disagreement is both legitimate and relevant but will nonetheless cause delay).

120. See *id.* at 196-98.

121. See *id.* at 198-99.

122. See *id.* at 201.

123. See *id.* at 198-99.

124. See *id.*

125. *Id.* at 199.

126. *Id.*

127. See *id.*

128. *Id.* at 198 (citing *Cooper v. Aaron*, 358 U.S. 1 (1958)).

consider whether the federal courts would offer the same limited range of judicial remedies for constitutional violations today. This part examines that question. Setting to one side the rise of the structural injunction, which has been a much-discussed outgrowth of desegregation litigation,¹²⁹ this part looks at the growth of less celebrated judicial remedies for civil rights violations in the years since *Brown II*. In a host of ways and along a variety of dimensions, public officials would enjoy much less freedom today to await the federal enforcement actions than Bickel described in his account of *Brown II*. The second section of this part considers the implications of this change in remedial potency. *Brown's* principle has led to the recognition of remedial options well beyond those imaginable at the time *Brown II* articulated its formula of deliberate speed.

A. Remedial Changes Since *Brown II*

Many of the federal judicial remedies for violations of constitutional law that we take for granted today were unavailable at the time of *Brown II*. Without specifying each of the changes in exhaustive detail, this section briefly summarizes the expansion of remedies that has occurred in the past fifty years. In many cases, as this section shows, the expansion of remedial options occurred in litigation over the enforcement of civil rights—litigation that frequently forced the Court to confront the inadequacy of the state courts.

1. Damage Remedies for Constitutional Wrongs

At the time of *Brown II*, the law of federal remedies did not include a routinely available right of action for money damages resulting from a constitutional violation. A short time later, in its 1961 decision in *Monroe v. Pape*,¹³⁰ the Court recognized the availability of a claim under § 1983 for official actions taken under color of state law that violate the Constitution.¹³¹ As the Court concluded, the statute provides a remedy both for unconstitutional state statutes, customs, and policies, and for the actions of state

129. Compare William Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) (focusing on the legitimacy of the remedial discretion exercised by trial courts in institutional suits) with Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978) (expressing skepticism about the use of structural reform litigation to effect institutional change).

130. 365 U.S. 167 (1961), rev'd sub nom. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978).

131. *Id.* at 171-72.

and local government officials that violate state and federal law.¹³² By construing the statute to provide a federal remedy, even where the state law also prohibited the action in question and state courts were available to entertain the claim, the Court sidestepped any requirement that individuals exhaust state remedies as a prelude to § 1983 litigation.¹³³ The decision represented, as Justice Frankfurter noted in dissent, a major departure from the usual assumption that “the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property.”¹³⁴

The recognition of a damages claim for constitutional torts fundamentally alters the calculus of state and local government officials. Unlike the situation that Professor Bickel described at the time of *Brown*, such officials can no longer ignore federal constitutional law with impunity and await the issuance of a decree naming them as defendants. Rather, such officials must consider the possibility that they may face individual liability for the violation of constitutional rights. To be sure, doctrines of official immunity shield officers from liability except in circumstances where they have violated clearly established rights.¹³⁵ But in many instances where Southern officials deliberately flouted the dictates of *Brown*, it would have been possible to show a violation of clearly established law.

Of course, one can question the effectiveness of a damages remedy from a variety of perspectives. Such a remedy may not have altered the behavior of Southern politicians who promised segregation now, and segregation forever. The right to trial by jury that attaches to such proceedings under § 1983 would have placed the ultimate decision in the hands of jurors who may have faced a good deal of pressure to nullify the constitutional rights of the plaintiffs through a defense verdict.¹³⁶ Difficult valuation problems would have certainly arisen had any case gone to trial that required juries to reckon the cost to African-Americans of

132. *Id.* at 173-74.

133. The importance of the Court's non-exhaustion ruling became clear a few years later. See *McNeese v. Bd. of Educ.*, 373 U.S. 668, 674-75 (1963) (permitting individuals to sue to enjoin a segregated school system without requiring them first to exhaust available administrative remedies in an Illinois case arising that failed to present massive resistance overtones).

134. See *Monroe*, 365 U.S. at 237 (Frankfurter, J., dissenting).

135. See *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982).

136. See *Monterey v. Del Monte Dunes*, 526 U.S. 687, 709-10 (1999) (concluding that the Seventh Amendment right to trial by jury attaches to a § 1983 action against a governmental entity for effecting a regulatory taking; emphasizing the claim for monetary relief as the key to determining the scope of the jury trial right).

their exclusion from integrated public schools.¹³⁷ Yet despite these difficulties, and many more, the availability of a damages remedy may have altered the calculus of Southern officials bent upon obstructing the enforcement of *Brown*. Assuming the articulation of a set of clear legal expectations on the part of the Court, intransigence may have resulted in personal liability for the executive branch officials responsible for massive resistance.

2. Actions to Stay State Court Proceedings

At the time of *Brown*, the federal courts followed a fairly strict policy of avoiding any entanglement in pending state court criminal proceedings. Under the long-standing Anti-Injunction Act,¹³⁸ courts of the United States may not grant injunctions to stay state court proceedings except as authorized by an act of Congress, where necessary in aid of jurisdiction, or to protect or effectuate the federal court's judgments.¹³⁹ The Supreme Court had announced a fairly demanding approach to an earlier version of this statute in its 1941 decision in *Toucey v. New York Life Insurance Co.*,¹⁴⁰ ruling that judge-made exceptions to the ban on anti-suit injunctions were disfavored.¹⁴¹ In the wake of *Toucey*, and the statute's recodification in 1948, lower federal courts were left to debate whether § 1983 might be seen as authorizing the issuance of injunctive relief against state court proceedings that were apparently brought to frustrate or impede the constitutional rights of African-Americans. Two early decisions rejected anti-suit injunctions on the merits,¹⁴² and two more reasoned that § 1983 did

137. The task of valuing dignitary interests in constitutional tort litigation has proven somewhat vexed. See, e.g., *Carey v. Phipps*, 435 U.S. 247 (1978) (fashioning a federal common law rule to measure damages owed in connection with a state official violation of procedural due process); cf. *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986) (rejecting a jury instruction that had invited valuation based upon the historic value of the constitutional right at issue and holding that damages must compensate for injuries actually suffered rather than constitutional rights abstractly infringed). But cf. *Bogel v. McClure*, 332 F.3d 1347, 1358-59 (11th Cir. 2003) (upholding a substantial verdict based upon testimony as to the dignitary and emotional injuries suffered as a result of an unlawful race-based transfer). To some extent, the award of an attorney's fee to prevailing parties under § 1983 ensures that violations of constitutional law do not go entirely unpunished, even where as suggested in *Carey*, they may produce only nominal damages. See *Carey*, 435 U.S. at 266 ("[T]he denial of procedural due process should be actionable for nominal damages without proof of actual injury.").

138. See 28 U.S.C. 2283 (2000).

139. See *Id.*

140. 314 U.S. 118 (1941), superseded by statute, 28 U.S.C. 2283, as recognized in *Missouri v. U.S. Bankr. Ct.*, 647 F.2d 768 (8th Cir. 1981).

141. *Id.*

142. See *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950); *Tribune Review*

not qualify as an express grant of authority to issue injunctions and could not be seen as overriding the provisions of the Anti-Injunction Act.¹⁴³

These limitations on the power of the federal courts to issue injunctions against flagrantly unconstitutional state court proceedings left African-Americans and other civil rights activists to raise their constitutional claims in the state criminal justice systems.¹⁴⁴ Consider the case of the Freedom Riders:¹⁴⁵ officials in Jackson, Mississippi arrested hundreds of freedom riders for violating local laws that required the segregation of facilities in a bus depot.¹⁴⁶ Although some sued successfully to enjoin future arrests under a patently unconstitutional statute, state officials did not treat the federal decision as decisive of the constitutional issue in state court criminal proceedings.¹⁴⁷ Many of those arrested simply acquiesced in state criminal sanctions; others litigated through all levels of the Mississippi court system without success, only to have their convictions summarily reversed by the Supreme Court.¹⁴⁸ Doubts as to the availability of a federal remedy against pending state criminal proceedings may have persuaded the litigants that state court criminal processes were to be exhausted and ultimate relief sought in the Supreme Court.¹⁴⁹

Today, the Court has expanded the availability of § 1983 as a source of authority for federal courts to enjoin pending state criminal proceedings. In the decisive case, *Mitchum v. Foster*,¹⁵⁰ the Court held that § 1983 provided the district courts with

Publ'g Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957).

143. See *Smith v. Lansing*, 241 F.2d 856 (7th Cir. 1957) (finding that § 1983 does not provide an express grant of authority to issue anti-suit injunctions); *Island S.S. Lines, Inc. v. Glennon*, 178 F. Supp. 292 (D. Mass. 1959).

144. See generally Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 796-97 (1965) (describing the use of state criminal justice systems to attack lawful demonstrations in support of civil rights).

145. See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, 451-91 (1988).

146. See *id.* at 474-75.

147. See *Bailey v. Patterson*, 369 U.S. 31 (1962), *on remand*, 206 F. Supp. 67 (S.D. Miss. 1962) (denying injunctive relief), *reversed*, 323 F.2d 201 (5th Cir. 1963) (ordering entry of injunctive relief against future arrests two years after the freedom rides of 1961).

148. See *Thomas v. Mississippi*, 380 U.S. 524 (1965) (per curiam).

149. See, e.g., *Cline v. Frink Dairy Co.*, 274 U.S. 445, 452-53 (1927) (reversing an injunction against pending prosecutions but affirming the grant of an anti-suit injunction against any future state court prosecutions for constitutionally protected activity).

150. 407 U.S. 225 (1972).

authority, in an appropriate case, to grant injunctive relief.¹⁵¹ Although the Court has carefully circumscribed the availability of such relief and has made it clear that the federal structure of the government requires respect for state court primacy in the handling of criminal proceedings,¹⁵² the Court has approved anti-suit injunctions in certain kinds of civil rights cases.¹⁵³ Although the rules that govern the interplay between federal actions for injunctive relief and state criminal proceedings have grown more complex over time,¹⁵⁴ civil rights plaintiffs are still able to seek relief in federal court against the threat of prosecution for engaging in constitutionally protected activities.¹⁵⁵

3. Expansion of Class Action Treatment for Civil Rights Litigation

As of the date of *Brown II*, the original version of Rule 23 of the Federal Rules of Civil Procedure governed class action practice in the federal courts.¹⁵⁶ Borrowed from equity practice, the civil rules divided multiparty litigation into three categories: true, hybrid, and spurious class actions.¹⁵⁷ According to Professor Moore, true class actions involved parties whose joint interest would have required joinder of their common claims in any case; hybrid class actions involved claims to a particular property interest; and spurious class actions involved the common claims of

151. *Id.* at 242 (stating that "Congress plainly authorized the federal courts to issue injunctions in § 1983 actions" in order to fulfill the purpose of § 1983).

152. *See* *Younger v. Harris*, 401 U.S. 37, 53-54 (1971) (generally prohibiting the issuance of injunctions to stay state court criminal proceedings, but recognizing exceptions for prosecutions conducted in bad faith or for the purpose of harassment and those that seek to enforce a flagrantly unconstitutional state statute).

153. *See* *Dombroski v. Pfister*, 380 U.S. 479, 489 (1965) (concluding that a civil rights group could seek to enjoin prosecution under two Louisiana statutes that threatened the group's members with prosecution for subversive activities; noting a pattern of threats and intimidation that justified immediate relief).

154. *See, e.g.,* *Hicks v. Miranda*, 422 U.S. 332, 349 (1975) (requiring federal court deference to a state criminal proceeding initiated after the filing of the federal action but before the federal court had conducted proceedings of substance on the merits).

155. *See* *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (upholding the power of federal court to grant preliminary injunctive relief against state prosecution in cases threatening irreparable injury and in which the plaintiff is likely to prevail on the merits); *Steffel v. Thompson*, 415 U.S. 452, 475 (1974) (upholding the power of federal court to entertain an action for declaration of rights to engage in handbilling free from the threat of arrest and prosecution).

156. *See* Joel Seligman & Lindsey Hunter, *Introduction*, 39 ARIZ. L. REV. 407, 407-08 (1997) (noting that Rule 23 was originally adopted in 1938 and not revised until 1966).

157. *See* 3B JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 23.30 (2d ed. 1948).

individuals whose claims might overlap on issues of law or fact but who were viewed as bound only to the extent their interests were actually brought before the court.¹⁵⁸

Class action litigation was not immediately embraced as the procedural tool of choice in the wake of *Brown II*. Although the *Brown* Court treated the suits as "class actions," some lower federal courts declined to embrace the broader forms of relief that class action treatment would apparently have entailed.¹⁵⁹ By treating the plaintiffs as individuals, litigating common claims on an individual basis rather than as members of a class,¹⁶⁰ the courts played into the hands of massive resistance.¹⁶¹ One leading state strategy was to require African-American students to apply to the school board for a transfer to a formerly all-White school.¹⁶² Such transfer decisions often took time, and often resulted in the denial of the application.¹⁶³ Class action treatment might have facilitated a speedier challenge to such laws, cutting through the ordinary rule that individuals must exhaust their administrative remedies before bringing suit to challenge administrative action.

158. See *id.* For further discussion of Rule 23 as it stood around the time of *Brown II*, see *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 877, 929-33 (1958), noting, in part, that "there has been an almost complete acceptance by the courts" of Moore's labels.

159. See, e.g., *Holt v. Raleigh City Bd. of Educ.*, 265 F.2d 95, 98 (4th Cir. 1959) (finding that parents who fail to appear and submit to interrogation by the Board of Education did not exhaust the remedies provided by state statute and therefore could not appeal to the federal courts); *Beckett v. Sch. Bd.*, 185 F. Supp. 459, 461 (E.D. Va. 1959), *affd sub nom. Farley v. Turner*, 281 F.2d 131 (4th Cir. 1960) (holding that the Pupil Placement Board's policy of denying all applications of African-American children for placement in predominantly White schools violates equal protection and due process). See generally Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448 (1962) (discussing the evolution of federal court attitudes toward pupil placement acts; noting the typical requirement of exhaustion before federal court class action review and unconstitutionality as an exception to the exhaustion requirement).

160. See, e.g., *Carson v. Warlick*, 238 F.2d 724, 729 (4th Cir. 1956); *cf. Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372, 384 (N.D. Ala. 1958) (upholding a pupil placement law that required consideration of individual applications for admission against a facial challenge).

161. See Note, *The Federal Courts and Integration of Southern Schools*, *supra* note 159, at 1453 (stating that individual-based pupil placement statutes made mass integration almost impossible, placed burdensome procedures on individual black students, and established vague standards that made it difficult to prove that an individual denial was based on race).

162. See Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1712-14 (1997) (describing the use and workings of pupil placement laws as a more successful strategy than massive resistance for preventing school desegregation).

163. See *id.*

Eventually, the federal courts began to embrace such uses of the class action, as they moved away from the token integration associated with the early pupil placement plans.¹⁶⁴

In 1966, Rule 23 was amended to regularize class action practice in civil rights litigation. Rule 23(b)(2) was specifically designed for the civil rights class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class," thereby making relief appropriate for the "class as a whole."¹⁶⁵ The associate reporter of the new rule, Albert Sacks, had served as an instructor at legal training sessions for NAACP lawyers,¹⁶⁶ and the official account of the rule change makes clear its desire to foster civil rights litigation.¹⁶⁷ Since the changes took effect, and no doubt due in part to a more favorable body of underlying substantive law, class action litigation has become the tool of choice for challenges to school segregation, employment discrimination, and prison conditions.¹⁶⁸ It provides an important procedural predicate for structural reform litigation.

4. Relaxation of the Abstention Doctrines in § 1983 Cases

At the time of the *Brown I* decision, the Supreme Court often required litigants who wished to challenge the constitutionality of state law to pursue state court remedies if an interpretation of unsettled state law could provide an alternative basis for relief. The leading case, *Railroad Commission of Texas v. Pullman Co.*,¹⁶⁹ arose as a challenge to the constitutionality of a state agency

164. See Carl Tobias, *Public School Desegregation in Virginia During the Post-Brown Decade*, 37 WM. & MARY L. REV. 1261, 1278-79 (1996).

165. FED. R. CIV. P. 23(b)(2).

166. See Jack Greenberg, *Civil Rights Class Actions: Procedural Mean of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997) (describing the role of Albert Sacks).

167. See 39 F.R.D. 69, 102 (1966) (illustrating the application of Rule 23(b)(2) by referring to actions in the "civil rights field, where a party is charged with discriminating unlawfully against a class"). Of course, a rule change may look out of place on a list of judge-made remedies for the violation of constitutional rights. But as the drafters of the rule were at pains to point out, Rule 23(b)(2) follows the lead of several decisions that expanded class treatment in school desegregation controversies. See *id.* (listing numerous appellate court decisions finding a proper class action in school desegregation and public accommodation cases).

168. See Greenberg, *supra* note 166, at 577-85; see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing the growth of litigation beyond two private parties to larger social questions in which the trial judge has become "the creator and manager of complex forms of ongoing relief;" specifically noting school desegregation, employment discrimination, and prisoners' rights cases as examples of this new type of litigation).

169. 312 U.S. 496 (1941).

decision that discriminated against African-American railroad employees.¹⁷⁰ Justice Frankfurter held that the district court should not have reached the merits, but should have stayed the litigation pending a state court determination of the legality of the agency's action under state law.¹⁷¹ As Frankfurter explained, in a decision that clearly reflected his consistent desire to put off any head-on consideration of the continuing vitality of *Plessy*, state courts might avoid the constitutional issue by adopting an interpretation of the state statute that blocked the agency's action on state law grounds.¹⁷² At the height of massive resistance, the Court refused to treat § 1983 as an implied exception to the *Pullman* abstention doctrine.¹⁷³

Pullman abstention represented a major obstacle to the ability of civil rights plaintiffs to challenge the many new laws that Southern legislatures adopted to frustrate the *Brown I* decision. As Justice Douglas explained, concurring in one such case, African-American litigants subjected to *Pullman* abstention might soon find themselves in state court, facing a journey that "may be not only weary and expensive but also long and drawn out."¹⁷⁴ This journey through the state court was required by *Pullman*'s insistence upon a sure-footed reading of state law, one that only the state's supreme court could provide. Only after obtaining a determination of the state law issue, and only after preserving their right to return, could the federal plaintiffs revive the federal proceeding and seek a ruling there on the constitutional question.¹⁷⁵ *Pullman* abstention played an aggravating role in complicating the NAACP's attempt to defend itself from Virginia's attempt to regulate the organization out of existence.¹⁷⁶

While *Pullman* abstention remains a potential source of delay today, its effects have been ameliorated somewhat by more

170. See *id.* at 497-98.

171. See *id.* at 501.

172. See *id.*

173. See *Harrison v. NAACP*, 360 U.S. 167, 180 (1959) (Douglas, J., dissenting) (criticizing the majority's application of the abstention doctrine; arguing that the doctrine is especially inappropriate as applied to civil rights cases and that "the federal courts are the unique tribunals which are to be utilized to preserve the civil rights of the people").

174. *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 435 (1964) (Douglas, J., concurring).

175. See *id.* at 428.

176. See *NAACP v. Button*, 371 U.S. 415, 417-19 (1963) (describing the six years of jockeying in state and federal courts that preceded the Court's decision upholding the NAACP's claim to immunity from disclosure of its membership lists).

recent developments. Many states provide for the certification of questions of state law directly to the state's supreme court.¹⁷⁷ Such certification procedures provide a mechanism for obtaining the more sure-footed reading of state law that *Pullman* abstention seeks to precipitate. Moreover, the Court itself has suggested that the availability of such certification procedures, and the need to avoid undue delay, should play a role in the abstention calculus.¹⁷⁸ These changes, coupled with developments that foreclose federal plaintiffs from seeking injunctive relief on state law rights of action,¹⁷⁹ have reduced the likelihood of *Pullman* abstention.

5. Expansion of Remedies Against Local Governments and School Boards

Along with the expansion in the availability of § 1983 remedies against government officials, the Court has expanded the scope of municipality liability. It was not at all obvious at the time of *Brown I* that § 1983 provided an action for damages, let alone an action against local government entities like counties, cities, or school boards. In *Monroe v. Pape*,¹⁸⁰ the Court authorized suits against individual government officers but rejected municipal liability, concluding that local government entities were not "persons" within the meaning of the statute.¹⁸¹ Several years later, the Court overruled this aspect of *Monroe*, holding that governments were proper defendants in § 1983 actions.¹⁸² In doing so, the Court made clear that governments were not liable on a strict theory of *respondeat superior* for the torts of their employees, but bore responsibility only for injuries inflicted as a result of the government's official policy or custom.¹⁸³

Such a remedy subjects government entities, at the local but

177. See Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 159 (2003) (noting that some form of certification to the state's highest court is available to federal judges in forty-seven states).

178. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76-79 (1997) (holding that the lower court erred in reaching the merits of the state constitutional law issue instead of certifying the question).

179. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (holding that the Eleventh Amendment bars the federal district courts from entertaining actions to compel state officials to comply with state law). Under *Pennhurst*, plaintiffs will have fewer occasions to identify state law grounds that might trigger *Pullman* abstention by federal courts.

180. 365 U.S. 167 (1961).

181. See *id.* at 191-92.

182. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978).

183. See *id.* at 694.

not state level,¹⁸⁴ to liability for policies both written and unwritten, official and informal.¹⁸⁵ This new remedy could reach both the formal rules and regulations that Southern school boards adopted in the administration of pupil placement and other programs, as well as the informal rules that such entities adopted as part of a practice of massive resistance or intransigence. The Court has cut back on the scope of § 1983 somewhat, limiting to some extent what constitutes a policy that will subject government units to liability;¹⁸⁶ but these limits would not affect the availability of damages for policies designed to evade the recognition of constitutional rights.¹⁸⁷

6. Expansion of the Capacity to Secure Enforcement of Constitutional Rights

As remedial schemes have grown more potent, the capacity of individuals to mount effective challenges to state and local government activity has also improved. Individuals may turn to the federal government for enforcement; the government's role in the enforcement of constitutional rights at the state and local level has grown dramatically in the years since *Brown I*. The federal government may institute criminal proceedings against individual state and local officials for violations of civil rights and may bring civil actions to end a pattern or practice of constitutional violations.¹⁸⁸ The Attorney General may intervene in pending civil

184. The Court has held that states are not subject to liability under § 1983. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70-71 (1989).

185. See *Monell*, 436 U.S. at 690-91 (noting that local governments can be sued for unconstitutional customs "even though such a custom has not received formal approval through the body's official decisionmaking channels").

186. See, e.g., *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 414 (1997) (concluding that the requisite degree of deliberate indifference had not been shown to justify finding the county responsible for the actions of a deputy later involved in the use of excessive force); *St. Louis v. Praprotnik*, 485 U.S. 112, 130-31 (1988) (concluding that lower level officials do not fashion policy for the city government within the meaning of § 1983).

187. See *Bd. of County Comm'rs*, 520 U.S. at 404; *Monell*, 436 U.S. at 694.

188. As for criminal sanctions, see 18 U.S.C. §§ 241, 242 (2000), which proscribe a conspiracy to injure or oppress any citizen in the free exercise of rights and privileges secured by the Constitution and any act that willfully deprives citizens of such rights and privileges. As for civil proceedings, see 42 U.S.C. §§ 2000a-5(a), 2000b(a), 2000c-6(a), 2000e-6(a) (2000), which authorize the Department of Justice to initiate civil actions to end a pattern of resistance to the exercise of rights to public accommodations, to desegregate public facilities, to desegregate public schools, and to end employment discrimination, respectively. The most recent addition to the Department of Justice's pattern or practice authority declares it unlawful for any law enforcement agency to engage in a pattern or practice of depriving persons of their constitutional rights and empowers the Attorney General to bring a civil action to challenge such patterns or practices. See 42 U.S.C. §

rights litigation, moreover, to advance the government's own views about the enforcement of the rights at issue.¹⁸⁹ In addition to petitioning the federal government, individuals may approach an increasing number of more and less well-funded legal services and non-profit organizations that define their mission as the enforcement of constitutional rights.¹⁹⁰ The rise of litigation-minded non-profit groups, modeled to some extent on the NAACP's Legal Defense Fund and the ACLU, expands the likelihood that individuals who suffer constitutional violations can find organizations willing to press their claims.

B. Implications of the Court's Expanded Arsenal of Ordinary Remedies

It would be a mistake to suppose that the growth in the arsenal of ordinary remedies has fundamentally transformed the power of the Court to change American society. Political opposition to the Court's decisions remains a fact of life, and one can see the impact of conservative religious opinion on the shape of such opposition today.¹⁹¹ The school prayer decisions remain controversial,¹⁹² as does the suggestion that the Constitution forbids any reference to God in the pledge of allegiance.¹⁹³ The prospect of same-sex marriage has produced a host of political responses at the state level,¹⁹⁴ and Congress has enacted

14141(b) (2000). For an account of this provision, see Eugene Kim, *Vindicating Civil Rights Under 42 U.S.C. § 14141: Guidance for Procedures in Complex Litigation*, 37 HASTINGS CON. L.Q. 767 (2002).

189. See 42 U.S.C. §§ 2000a-3(a), 2000e-5(f) (2000) (authorizing the Department of Justice to intervene in civil actions brought by private parties to enforce rights under the public accommodations and employment titles of the Civil Rights Act, upon a certification that the case is of general public importance).

190. See, e.g., Robert J. Rhudy, *Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons*, 5 MD. J. CONTEMP. LEGAL ISSUES 223, 245-46 (1994) (noting that the United States "has seen an explosion of single-purpose nonprofit organizations which can retain legal counsel to represent client concerns within their subject areas").

191. See, e.g., Michael P. Farris, *Facing Facts: Only a Constitutional Amendment Can Guarantee Religious Freedom for All*, 21 CARDOZO L. REV. 689, 692 (1999) (describing opposition from conservative religious groups to Justice Scalia's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

192. See Mark W. Cordes, *Prayer in Public Schools After Santa Fe Independent School District*, 90 KY. L.J. 1, 1 (2002) ("Religion in public schools has long been a subject of intense controversy in our country and from all appearances will remain so for a long time to come. Among the various ways that religion might interject itself in schools, there is none more volatile than the issue of school prayer.").

193. See generally Charles J. Russo, *The Supreme Court and Pledge of Allegiance: Does God Still Have a Place in American Schools?*, 2004 BYU EDUC. & L.J. 301 (2004).

194. See Nancy K. Kubasek et al., *Fashioning a Tolerable Domestic Partners*

legislation to foreclose federal judicial consideration of the limits on interstate enforcement of same-sex marriage under the Defense of Marriage Act.¹⁹⁵

But the expanded arsenal of ordinary remedies for constitutional violations suggests that the federal courts no longer occupy the same position of remedial weakness that Bickel viewed as compelling the adoption of something like the deliberate speed approach of *Brown II*. Litigants today may go to federal court to seek injunctive and declaratory relief against the proposed enforcement of unconstitutional state laws, and need not rely upon the state courts in the first instance.¹⁹⁶ Litigants may also seek an award of damages both against the responsible officials and against the governmental entity itself in many instances.¹⁹⁷ Just as the extraordinary powers of the federal courts in institutional reform litigation have expanded dramatically in the last fifty years, so too have their ordinary remedial tools.

It thus becomes possible to consider a narrower, and perhaps more effective, decision in *Brown II*. Rather than an invitation to gradualism and resistance, the Court might have insisted on prompt admission of the plaintiffs to the school of their choice and a prompt end to the maintenance of segregated schools. Such a narrow, rights-based approach had been included among the remedial options that the Court considered in setting reargument for *Brown II*.¹⁹⁸ It opted instead, as critics have noted, for a regime of reliance on federal courts as the monitors of school board compliance that brought us the period of institutional reform

Statute in an Environment Hostile to Same-Sex Marriages, 7 L. & SEXUALITY 55, 62-65 (describing various state actions, including statutes prohibiting same-sex marriage and constitutional amendments).

195. See Defense of Marriage Act, 28 U.S.C. § 1738C (2000); see also Jill R. Green, *Will the Marriage of Dick and Jane Evolve into the Marriage of Jane and Jane? Same Sex Marriage: A Viable Union in the 21st Century*, 45 LOY. L. REV. 313, 328 (1999) (discussing the provisions and purposes of the Defense of Marriage Act).

196. There has long been an exception to abstention and other doctrines preventing federal intervention when the petitioner could show that an irreparable injury would be caused by the state prosecution. See *Doran v. Salem*, 422 U.S. 922, 931 (1975). The power to intervene was broadened after *Dombrowski v. Pfister*, 380 U.S. 479 (1965), but has since been limited. See Note, *Federal Court Intervention in State Criminal Proceedings*, 85 HARV. L. REV. 301, 301 (1971). For an extensive discussion of *Dombrowski* and its progeny, see Frank L. Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535 (1970).

197. See, e.g., 42 U.S.C. § 1983 (2000) (authorizing suit against government officials acting under color of law); *Monell v. Dep't of Soc. Servs.*, 436 U.S. at 658, 663 (1978) (authorizing suit against municipal governments as such).

198. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 n.13 (1954).

litigation.¹⁹⁹ That era has just about come to an end, at least for school desegregation, and scholars still cannot agree as to whether the federal courts played a useful role. Certainly the problems of segregated housing patterns and segregated education remain largely unremedied.²⁰⁰

Some chastening of judicial ambition may have come to inform the Court's more recent forays into the articulation of new constitutional rights. *Lawrence v. Texas*²⁰¹ may provide a case in point. More like *Loving* than *Brown I*, *Lawrence* discerns a liberty interest in the due process clause that immunizes sexual conduct in the privacy of one's home from criminal sanctions.²⁰² One supposes that the Court will have few occasions to police its newly articulated right, or to consider the constitutionality of new state laws adopted by offended state legislatures who wish to resist the Court's decree. Criminal sanctions will quietly disappear from the statute books. But on one reading, the *Lawrence* Court stopped short of attempting to integrate gays more completely into American life, and short of any indication that gays have a constitutional right to marry one another.²⁰³ Instead of building deliberate speed into its remedial formula, the *Lawrence* Court temporized through the issuance of a decree that specified what may prove to be a thin constitutional right.²⁰⁴

Conclusion

Brown II stands as a symbol of delay and gradualism and has rightly attracted the criticism of those who suspect that the Court could have done more to stand up to Southern resistance. This Essay suggests that the Court might have overcome gradualism and resistance with a more concrete decree that clearly stated the

199. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992) (noting the "upsurge in institutional reform litigation" since *Brown I*).

200. See Danielle R. Holley, *Is Brown Dying? Exploring the Resegregation Trend in Our Public Schools*, 49 N.Y.L. SCH. L. REV. 1085, 1086-87 (2004) (discussing current trend toward resegregation in United States schools); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 440 (1998) ("Housing segregation . . . remain[s] dismally high.").

201. 539 U.S. 558 (2003).

202. See *id.* at 578.

203. See *Lawrence*, 539 U.S. at 578. ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."). But see David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453 (suggesting reasons why the *Lawrence* rationale may not be so easily confined).

204. The Court announces a very narrow and specific privacy interest, defining its holding as much by what it does not say as by what it does. See *id.*

right of individual students to admission to the schools of their choice. The Court actually considered a decree of this sort, but chose instead the vague terms that Southerners understood as an invitation to delay. Perhaps that outcome was inevitable; Elman's account of the Court's deliberations suggests that the "deliberate speed" formula, as an alternative to immediate admission, played a decisive role in securing a unanimous Court in *Brown I*. If so, then as much as we may regret the unprincipled gradualism of *Brown II*, we might embrace it as the price of securing the enduring principle of equality in *Brown I*.

Brown II might deserve another backhanded compliment. If, as Alexander Bickel argued, the federal courts were in no position to insist on implementation of the *Brown* principle in 1955, fifty years later we find the federal courts at least a bit more fully armed. Remedies have evolved dramatically in fifty years, and federal courts may insist more emphatically on compliance with the Court's dictates. Many of these changes owe something to the civil rights revolution of the 1960s and the perceived need to open the federal courts to the enforcement of constitutional rights. Legal analysts can criticize the litigiousness that has accompanied the rights explosion of the past fifty years, but society often benefits when it channels opposition into federal litigation and away from violent resistance. By helping to provide federal courts with a set of tools to address constitutional violations, *Brown II* has done its part to deepen the nation's commitment to the rule of law. Popular constitutionalism, to a surprising degree, now often takes place in the courtrooms.

No one understood better than Thurgood Marshall that the enunciation of the equality principle in *Brown* was only the beginning of the struggle to end school segregation in the United States. Marshall explained that it would take relentless pressure by African-Americans to make the promise of desegregation a reality. Even then, as Marshall explained, desegregation would move at its own pace, quickly in some places, and more slowly in others. But in the end, in words that seem to be a fitting summary of *Brown II*, the principle would triumph, and desegregation would "come eventually to all."²⁰⁵

205. Marshall & Carter, *supra* note 83, at 403.

