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Book Review

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sent? Do we have a right to ignore consent of the governed as an (*an*, not *the*) ultimate value simply by labelling their decision as morally obtuse or selfish or wrong?

Perhaps Little Rock is an example of a terribly embarrassing but frequent event: that public discourse on moral issues does not produce the moral result that liberal intellectuals know to be right. The Supreme Court had initiated a public moral discourse in *Brown* and as the public became more and more engaged in that discourse in Little Rock and elsewhere, the public came to reject, not the principle, but the priority initially assigned to it by the Court. In short, Little Rock may be a perfect example of what the liberal proceduralist wing of constitutional interpretation says it wants, namely a public discourse initiated and guided by courts leading to a choice of policies consonant with public values.[11] The trouble is that this particular discourse led to a choice of values and policies that the liberals don't like. Thus it becomes necessary to characterize it as a discourse that went astray, that lost its focus on moral questions and so reached a poor moral result. Those who are not liberal may prefer to characterize Little Rock as a true moral discourse that brought to light conflict between the ultimate values of consent and racial equality and yielded precisely that moral compromise which is to be expected and even applauded when two ultimate moral values collide.

THE BURDEN OF BROWN. By Raymond Wolters.[1] Knoxville: The University of Tennessee Press. 1984. Pp. 346. $24.95.

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The Burden of Brown by Raymond Wolters is a long book with a very short message: integration is bad, but desegregation is not. The distinction between the two is crucial to Wolters's analysis. Desegregation is the prohibition of officially sanctioned separation of the races. Integration, on the other hand, is the compelled mixing of the races for the sake of mixing. The "burden" of *Brown v. Board of Education*,[3] according to Wolters, is that the Supreme

11. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

1. Professor of History, University of Delaware.
2. Professor of Law, University of Illinois.
3. 347 U.S. 483 (1954).

Court has blurred this distinction and erroneously requires integration instead of merely prohibiting segregation. Wolters's thesis is that *Brown* had two prongs: one said that officially sanctioned separation of the races offended the Constitution, the other that exclusion of blacks from the company of whites caused psychological harm that also offended the Constitution. The fact that the Supreme Court interlocked these concepts led to a common usage of these terms as synonymous. It has also, Wolters says, led to tragically misdirected attempts to reform the nation's schools by integration orders.[4]

Wolters seeks to support his thesis by tracing the effect of the court orders in the jurisdictions that were part of the original *Brown* companion lawsuits.[5] The narrative is painstakingly detailed, apparently thorough, and occasionally engaging. As history it is interesting, but it fails as proof that integration has harmed the nation's schools. As a tool to assist legal decisionmakers in formulating rights and remedies in the area of school desegregation, it is woefully inadequate. Wolters succeeds instead in telling a fascinating tale of remedies law. His historical narrative inadvertently shows that the road from *Brown* was determined by the need for a meaningful remedy for the constitutional right to the end of official school segregation. Unintentionally he tells a tale relevant not only to understanding the development of integration orders as an essential remedy to end official segregation, but also to an appreciation of new issues in civil rights remedies.

I

Wolters appears to have no quarrel with the decision that segregation on the basis of race is unconstitutional. His disagreement is with the remedy. Thus his book really should have the less catchy title, *The Burden of Brown II. Brown I* was the original 1954 Supreme Court opinion holding that segregated schools violate the equal protection guarantee. The question of appropriate relief was reserved until the next term. The result was *Brown II*, in which the Court articulated its famous command that segregated schools should be dismantled with "all deliberate speed."[6] The Court de-

4. R. WOLTERS, THE BURDEN OF BROWN 7-8 (1984).

5. There were three companion cases in *Brown I*. They were: *Briggs v. Elliott* from Clarendon County, South Carolina; *Davis v. County School Board* from Prince Edward County, Virginia; and *Gebhart v. Belton* from New Castle County, Delaware. A fourth case that became a companion case to *Brown II* was *Bolling v. Sharpe* from Washington, D.C. It had to be decided separately on substantive grounds as a fifth amendment claim, but was joined with the fourteenth amendment cases for the remedial decision.

6. 349 U.S. 294, 301 (1955).

clined to follow the usual practice[7] of ordering an immediate end to an unconstitutional practice because of the anticipated difficulties in the transition to desegregated schools. Thus the cases were remanded for an order to the school board in Topeka, Kansas, and to the school boards in the four companion suits, to make "a prompt and reasonable start toward full compliance"[8] with the elimination of segregated schools.

Wolters decided to trace developments in the districts that were parties to the original *Brown* suit. In so doing, he chronicles accounts of resistance and adaption that ultimately resulted in schools that are as segregated today as they were in 1954. He concludes that these histories reveal the "burden" of *Brown*: black school children are no better off in these districts today, while white school children go to segregated academies at great expense to their families.[9]

Wolters wants his book to make a social scientific statement about the evil of judicial overreaching,[10] but his methodology does not support his conclusions. The scope of his study is necessarily narrow since only five school districts are examined. These five are hardly representative, nor could they be called randomly selected, precisely because they were carefully selected for test cases by black activists in the 1950's. As social science, then, this book is not very useful.

Despite Wolters's failure to do what he set out to do, the book succeeds with a very different end. What Wolters has unwittingly done is to chronicle a fascinating tale of remedies law. How does a court enforce a constitutional right when the announcement of the right is met with mass resistance? How do trial courts contend with the task of making concrete orders to follow the nebulous command of *Brown II*? The book thus succeeds unintentionally in revealing the remedial logic of the evolution from desegregation orders to integration orders. Frustrated by ineffectual orders to end official segregation, courts naturally began to take a greater role in dictating school boards' policies. When judges were reluctant to take that step, those in government charged with enforcing the end of official segregation cajoled them to do so. Aside from any desire that some judges or social activists may have had to create racial mix for its own sake,[11] racial mix orders ultimately became necessary to over-

7. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 639-40 (2d ed. 1984).

8. 349 U.S. at 300.

9. R. WOLTERS, *supra* note 4, at 284-85.

10. *Id.* at 275-76.

11. Wolters's account of integration in Washington, D.C., emphasizes the liberal tone

come the resistance of school boards to meaningful open enrollment plans.

This "accomplishment" of the book is ironic in light of Wolters's conclusion that the book reveals the error of integration orders as opposed to freedom of choice plans. Wolters's concluding paragraph argues that desegregation rather than integration should be accepted as the correct requirement of the equal protection clause. He asserts that when freedom of choice again prevails, the "[m]anagement of the public schools would then be returned to local school boards and superintendents, and racial policies would be fashioned through the give-and-take of the democratic process." Optimistically he continues, "With every form of racial discrimination prohibited, local officials would almost certainly improve on the sorry record that disingenuous judges and naive educational reformers have made in the *Brown* school districts."[12]

One must wonder when the conclusion was written in relation to the work on the rest of the book. The narrative of the book, discussed more fully in the next section of this review, shows instead that judicial reliance on the "democratic process" in school boards to secure nonracial assignment was virtually futile. The book thus underscores the familiar relationship between rights and remedies: a right without an effective remedy is a paper tiger.

II

In the early years after *Brown*, the courts did what Wolters advocates: they ordered school districts to cease official segregation. The question is what to do when a school board intentionally violates such a decree. Wolters generously assumes obedience, but his own account of mass resistance to the earliest desegregation orders calls into question his optimism.

Wolters's approach reflects little appreciation of the relationship of rights to remedies. The right that *Brown* represents is, at least, a right to be free from officially sanctioned separation. When a school district has been found to have intentionally separated the

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of the opinions of Judge J. Skelly Wright. He finishes that chapter with the following conclusions:

> [Wright] was so committed to integration and so captivated by the sociological theories then expounded by James S. Coleman that he could not let pass the opportunity to impose his views on Washington's schools. Instead of assisting school administrators in their efforts to upgrade public education in Washington, he identified them with the evil he was contending against, destroyed them, and in the name of the Constitution delivered the school system to excesses of disorder and academic experimentation.

Id. at 63.

12. *Id.* at 288-89.

races in violation of this constitutional right, what remedy should follow? Wolters does not say. Presumably the remedy would be an order not to segregate anymore. But what if this order is disobeyed?

Courts can and must do more than lament disobedience, of course. Under a freedom of choice desegregation plan, a court can require the school board to accept transfer applications from black students seeking to enter white schools. When orders are disobeyed, courts have the contempt power, but contempt is more suitable to defiant individuals than to a body like a school board.[13] Moreover, criminal contempt sanctions serve only to punish defiance; they do not secure the constitutional right. Damages could be awarded to students who were forced to wait for approval of their applications beyond a reasonable time.[14] But such remedies fall short of addressing the right of nonracial assignment to schools. How does one devise a court order that prohibits community harassment of black families seeking to send their children to the white schools? How should a judge devise an order to prevent racial assignment of children entering school for the first time? These remedial problems for the very limited right of nonofficial segregation suggest that an affirmative integration order is the logical solution to force compliance on a recalcitrant school board.

The point is that an affirmative integration order is useful even for the limited purpose of enforcing the end of official segregation. Beyond that, there is the question of using integration orders as relief for children presently suffering the effects of past discriminatory school assignment.[15] Last, and very likely least important in the history of integration orders, is the reference to the Kenneth Clark

13. The contempt power has failed in many contexts to be a simple solution for disobedience. Excellent reviews of the inherent difficulties with the contempt power can be found in Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873 (1975); Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971).

14. Monetary damages were not sought in any of the original *Brown* cases. In a 1973 class action in Topeka, Kansas, a monetary remedy was sought in addition to a petition for an injunction to require integration. The district court denied the class action; eventually the individual claim was settled. That suit sparked the reopening of the original *Brown* case, however, because no final decree had been entered in the litigation that started twenty years earlier. The result of the 1950's litigation had been the assignment of students to neighborhood schools. Plaintiff Linda Brown had been denied assignment to her neighborhood school on the basis of race. After the litigation, however, those neighborhood schools were overwhelmingly attended by students of one race. The Department of Health, Education and Welfare [HEW] cited Topeka for violation of its guidelines in 1974, but the district court ruled that it retained exclusive jurisdiction over the issue. New orders to close some schools and to redistrict were made during the 1970's. Further *Brown* litigation was still pending in 1983. R. WOLTERS, *supra* note 4, at 263-71.

15. This aspect of civil rights injunctions has been very ably analyzed by Professor Fiss in O. FISS, THE CIVIL RIGHTS INJUNCTION (1978).

doll study in *Brown I*, which indicated that black children are psychologically harmed by segregated schools. This last reason, so highlighted by Wolters, appears to be mere window-dressing.[16] It is hard to take seriously the notion that if the Supreme Court became convinced that this theory of psychological harm is not scientifically valid, then the Court would undo integration orders.[17] More likely, integration orders would have developed to replace the freedom of choice plans even if the Supreme Court had never mentioned the Kenneth Clark study. Integration orders were natural and logical because they were the only remedy that was capable of effectively ending official segregation.

Everyone is familiar with the stories of mass resistance in Prince Edward County, Virginia, and in Little Rock, Arkansas. In Prince Edward County, angry whites closed down the public school system entirely and sent their children to private academies.[18] In Little Rock, federal troops were called in to secure the peace when a handful of black children tried to enter an all white school.[19] That resistance was sparked by orders requiring mere desegregation, not affirmative integration.

Less well known is the revealing story of a quiet little town that was involved in one of the original *Brown* cases—Summerton, South Carolina.[20] Summerton was a town of 1500 people in Clarendon County, sixty-five miles from Charleston. It was a poor farming community with a high black population. Before *Brown* the

16. Professor Kurland's theory is that the footnote referring to Dr. Clark's study was necessary in order to deal with *Plessy v. Ferguson* in some fashion other than overruling that contrary precedent. Kurland suggests that *Brown I* was written in a "shabby, disingenuous" way for the sake of achieving unanimity. Kurland, "Brown v. Board of Education *Was the Beginning*": *The School Desegregation Cases in the United States Supreme Court 1954-1979*, 1979 WASH. U. L. Q. 309, 317 (1979). Thus, with respect to *Plessy*, the Court wrote: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that segregated schools adversely affect black children psychologically] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected." 347 U.S. at 494-95. Kurland maintains that the footnote was only to support the idea that psychology has advanced since the days of Plessy. His theory is that the Court wished to achieve unanimity by handling *Plessy* delicately. Kurland then adds a comment: "It would take an extraordinarily sophisticated, or perhaps extraordinarily naive, approach to judicial behavior to believe that the cited literature [in the Clark footnote] was the cause of the Court's judgment rather than the result of it." Kurland, *supra*, at 318.

17. An effort to relitigate the social scientific issue was rejected in litigation in Charleston, South Carolina, brought shortly after *Brown*. The district court accepted the evidence, but ruled that stare decisis applied. R. WOLTERS, *supra* note 4, at 147-48.

18. The history of Prince Edward County is included in Wolters's book because it was one of the original *Brown* companion cases. *Id.* at 65-127.

19. Other constitutional issues involved in the fascinating tale of Little Rock are discussed in Farber, *The Supreme Court and the Rule of Law*: Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387.

20. R. WOLTERS, *supra* note 4, 129-74.

schools were what Wolters describes as "separate and unequal."[21] The student-faculty ratio and the curriculum were much worse at the black schools, and so were the facilities. The white schools were built of brick and stucco, and they had indoor toilets and drinking fountains. The black schools were made of wood, and they had outhouses and buckets with dippers for drinking water. Moreover, the white children could take buses to school, while the black children had to walk. The walk in this rural community could be for miles, sometimes past a closer white school to get to a black school.

The Reverend J.A. DeLaine, who had himself walked ten miles to get to and from school as a child, was the moving force in the community. In response to an NAACP suggestion that the time had come to challenge the white-only busing policy, he found the families that were willing to be named as plaintiffs. The case of *Briggs v. Elliott* was filed in 1949 and eventually became one of the *Brown* companion cases.

Wolters tells us that before the litigation was over, the families of the named plaintiffs suffered great economic hardship. The parents of Briggs, who headed the list of plaintiffs, both lost their jobs, as did others. Credit was denied to others, so that they could not acquire the supplies needed to farm. Wolters quotes an observer who explained the squeeze this way, "[D]on't gin his cotton, don't renew his bank note, fire him from his job. This is reprisal for anyone who wants to 'stir up trouble' and sign a petition."[22] An attorney in town explained that he would neither rent land nor extend credit to any member of the NAACP because that organization was trying to destroy everything the white people of Summerton believed in. "We would like, if they are not satisfied here, for them to go where their ideas are accepted." Indeed, the Briggs family moved to New York. DeLaine moved to a nearby town, but ultimately he went to New York. His church was burned; he was sued successfully for slander by a white principal; he was told to get out of town in ten days. This latter "request" was underscored by carloads of white men circling his neighborhood and firing gunshots into the air. DeLaine sent his family to safety, then stayed for the return of the angry caravan. He shot into the cars and killed a man. He was given asylum in New York by his church and lived the rest of his life in exile.

Briggs v. Elliott originally challenged only the whites-only busing policy in Summerton. It was later amended to challenge the constitutionality of the racially separate schools, a theory the

21. *Id.* at 131.
22. *Id.* at 133.

NAACP was supporting in several selected suits. When *Briggs v. Elliott* came to trial, the NAACP-supported plaintiffs produced evidence concerning the psychological harm that segregated schools does to black children. Among those testifying was Kenneth Clark, who explained his doll study. The attorneys for the county did not pay much attention to the psychological evidence because it seemed so inconsequential. They focused instead upon the abundance of legal precedent for the legality of segregation. The county conceded early in the litigation that the separate schools were unequal, however, and noted that the state was in the process of massive revamping and modernizing of the black schools. The three-judge district court ruled against the plaintiffs' theory that the equal protection clause prohibited segregation, and retained jurisdiction to review the periodic progress reports on the improved black schools.[23]

Briggs became one of the *Brown* companion cases. After *Brown II* was decided in 1955, *Briggs* was remanded to the three-judge district court with instructions to desegregate the Summerton public schools. Judge Parker then wrote the order interpreting *Brown* to mean that Summerton must proceed with "all deliberate speed" to operate its schools "on a racially nondiscriminatory basis." The order included a passage that came to be known as the *Briggs* dictum that the Supreme Court had not said that the states must mix persons of different races in the schools; it had only said that " a state may not deny to any person on account of race the right to attend any school that it maintains."[24]

The whites in Summerton, outnumbered one to ten by the black community, had no difficulty agreeing to resist the end of official segregation. A meeting of 350 white townspeople debated closing the public schools altogether. One local leader, a former member of the General Assembly, successfully argued that the appropriate tactic was delay. He explained that there could be twenty-five more years of "segregation time" in the South if methods of resistance were tested one at a time. The strategy was to try a plan for the maintenance of segregation until the court prohibited it. " 'When that is ruled out, another, then another, and another . . . until one is found that is acceptable.' " Then, he explained, closing the schools could be a last resort.[25]

Summerton schools remained completely segregated until 1965—ten years after *Briggs v. Elliott* was decided in favor of the plaintiffs. The delay was attributable in part to the decision of the

23. *Id.* at 134-39.
24. 132 F. Supp. 776, 777 (1955).
25. R. WOLTERS, *supra* note 4, at 141-42.

NAACP to concentrate its efforts elsewhere. Thurgood Marshall, an NAACP activist at the time, had witnessed the white mood when he attended a meeting in Summerton in 1955.[26] The NAACP turned its attention to nearby Charleston instead. Meanwhile, the Summerton activists had their own problems, as previously described. No black child entered a white school in Summerton for ten years. "Unofficial" segregation successfully prevailed.

The suit in nearby Charleston succeeded in achieving token desegregation in 1964. A year later Summerton followed with token enrollment of black children in white schools. That break finally came with a new lawsuit filed in 1960 by fifteen black parents, some of whom had been plaintiffs in the original suit. The district court judge found that the Summerton school board had made no substantial effort to comply with *Brown* and that the schools were being operated "in a discriminatory manner based exclusively upon the race of the students."[27] Applications for transfer had been routinely denied to all black students. The judge ordered Summerton to admit the plaintiffs to the schools of their choice. By this time, 1965, only nine of the forty-three children who were plaintiffs were still in school, and only five of those nine still wished to attend white schools. Those five were enrolled.

Under Summerton's court-enforced freedom of choice plan after 1965, the schools retained their racial character. The black schools remained all black. The white schools were attended by all the white children and two percent of the black children. Because the ratio of blacks to white was so high in the town, those two percent of black children comprised twelve percent of the students in the white schools.

Wolters views this situation as nearly ideal.[28] The white schools were attended by more than a token number of blacks. Those children were there at the affirmative request of their parents, and thus they were more likely to adjust well. The harassment of earlier years was virtually gone; some level of peaceful coexistence reigned in the white schools with a black minority.

The problem is that this remedy fell short of enforcing the

26. *Id.* at 145.

27. *Id.* at 151.

28. Wolters appears in part to endorse the "optimal mix" theory of desegregation in his conclusion. *Id.* at 273-89. He explains that theory earlier: "The theory of equal educational opportunity held that the best situation for effective desegregation was one in which blacks made up about 30 percent of the total number of students. In such an environment blacks could escape the effects of being socialized in a lower-class black culture without suffering at the same time from psychological isolation." *Id.* at 161. A major problem with this approach from a remedial perspective is how to choose *which* black children receive this remedy, if it is indeed an effective one, and which do not.

right to the end of official segregation. Segregation was not over in the sense that schools ceased to be identified as "white schools" and "black schools." One could hardly consider official segregation to be ended until schools lost the racial identities that the school board had originally given them and still *wanted* them to have. Would the school board have accepted all the black applications if there were enough to threaten the white majority character of the "white" school? Or would they have been rejected on the ground that there was no room, without contemplating the possibility of a lottery for accommodating overselection of a white school? How would they have handled massive applications from black children at the entry level into the white school? Unless a court could be convinced that the school board would have responded to such circumstances without considering the race of each child and the racial character of each school, it is impossible to say that official segregation has been replaced by "color blindness."

In Summerton, official segregation finally ended in 1970. The Office of Education brought the Health, Education and Welfare [HEW] guidelines on compulsory integration to Summerton.[29] The Supreme Court had decided in the 1968 case, *Green v. County School Board*,[30] that affirmative integration orders could be an appropriate remedy. This remedy was then introduced in Summerton. The result was that all but six of Summerton's white students withdrew from the public schools. They enrolled instead in a Baptist parochial school that had been established in 1965, after the very first blacks were admitted to white schools.[31]

The white flight from Summerton's public schools was regrettable, but predictable from experience in other communities. Wolters assails this result as resegregation that resulted in less racial mixing than there had been under the freedom of choice plan.[32] The resegregation was beyond the control of the court at that point because parents cannot be compelled to send their children to public schools instead of private ones. But the final result did succeed in ending any remnant of official segregation: the school board no longer desired any individual school to have a particular racial character. Schools were "just schools."[33] The fact that virtually all

29. Wolters notes at some length the irony that it was the Nixon administration that vigorously enforced the liberal HEW guidelines. Richard Nixon's campaign against Hubert Humphrey, Wolters notes, led the South to believe that Nixon was opposed to compulsory racially-mixed integration. *Id.* at 161-65.

30. 391 U.S. 430 (1968).

31. R. WOLTERS, *supra* note 4, at 165.

32. *Id.* at 173-74.

33. The Supreme Court used the phrase "just schools" in *Green v. County School Bd.*:

the students were black is fundamentally irrelevant to the right to end official segregation. It would be relevant only if the goal of the courts had been to maximize racial mixing, a goal Wolters rejects. The schools were now truly open. No other remedy could have cured the constitutionally offensive intention of the school board to preserve the racial character of the schools. Freedom of access only "worked" because of the correct perception of the population that certain schools were basically reserved to certain races; if any substantial number of blacks had taken advantage of the plan by applying to "white schools," white flight would surely have resulted. White flight was unfortunate, but was an inevitable result of any remedy that could have secured the right of blacks to truly open schools.

III

The remedial problems in school desegregation cases are not unlike those in employment discrimination cases. Consider the problem posed by the case of *International Brotherhood of Teamsters v. United States*,[34] a 1977 Supreme Court case concerning rights and remedies under Title VII of the Civil Rights Act of 1964. In *Teamsters* a trucking company was found to have discriminated intentionally on the basis of race and national origin in the assignment of jobs. Minorities were virtually all assigned to the less desirable job of city drivers, whereas the better over-the-road jobs were reserved for whites. The seniority lines were completely separate, so workers could not transfer to the desirable over-the-road jobs without losing accumulated seniority. Before the lawsuit, applications for transfers from minorities were automatically rejected. The trial court found intentional discrimination and ordered that applications for transfer be considered without regard to race or national

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> The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

391 U.S. 430, 441-42 (1968) (footnote omitted). It is this case that Wolters considers anathema because it changed the right from desegregation to integration. R. WOLTERS, *supra* note 4, at 7, 274-75. *Green* is more properly seen as merely a remedies case, struggling to find a way to enforce the previously announced right that schools may not be officially segregated.

34. 431 U.S. 324 (1977).

origin. The problem is that such a limited remedy alone is not sufficient for current employees, only for future ones. Current minority employees could not take advantage of the right to transfer without losing seniority. Only the few with the least seniority to lose would be in a position to transfer.

The older minority employees who were discriminatorily denied the opportunity to transfer years ago are identifiable victims of past discrimination. To leave them without a more meaningful remedy would be a severe curtailment of the right not to suffer discrimination in employment. The Supreme Court said that such identifiable victims could be granted retroactive seniority in the over-the-road line.[35] If this remedy had not been provided, the over-the-road line would have been integrated by only a few young minorities; the basic character of the existing work force would have remained the same. The over-the-road drivers would have been racially identifiable as a white group of employees, and the older minority employees would still have been excluded.

The analogy to school desegregation is that the end of official segregation is meaningless if the practical result is that schools keep their racial identities. The identifiable victims of past discrimination are the black children who were discriminatorily assigned to schools under official segregation. Most of their parents did not choose to take advantage of the court-ordered remedy that transfer to the white school was possible. Unless each of them actively preferred the school to which their children had originally been discriminatorily assigned, the remedy was incomplete; in the absence of a constitutional violation, those students would have attended different schools. The reason for failure to apply for a school transfer is unimportant. Although it was easy to identify seniority as the reason for not transferring lines in *Teamsters*, it should not be necessary for the reason to be so easily identifiable. Fear of harassment is certainly a possibility, but it should not be necessary to prove it. Even if schools retain the racial character unconstitutionally imposed on them only because of inertia, their racial character is still attributable to the previous constitutional violation. The question is whether one believes that the identifiable victims have been put in the position that they would have occupied absent discrimination. If not, the remedy is incomplete. In such a case, the only way to end the continued presence of intentionally segregated schools is to order affirmative integration.

This analogy is apt only for the remedies necessary to undo the continued desire of a school board to keep the racial character of

35. *Id.* at 367-71.

previously segregated schools. It relates only to identifiable victims of immediately past discrimination. Once that problem has been cured and schools have lost their intentional racial character, continued integration orders no longer relate to identifiable victims. At that point integration orders would not be to remedy past intentional discrimination, but would be mixing for the sake of racial mixture. Only then one can truly say that the right being enforced is different than the simple right to the end of official segregation.

Another analogy to employment discrimination involves the current debate about affirmative action remedies for unidentified victims of discrimination. When an employer has been found to have discriminated in hiring, a court may order as a temporary remedy that the excluded group be given preference in hiring. This remedy is not limited to identified victims of discrimination, but extends also to unidentified ones. In other words, the people who benefit from the remedy are not necessarily the ones who suffered the loss of the right. The Supreme Court has upheld this remedy in some contexts,[36] but is still considering its appropriate use. Most notably, a case currently pending before the Court concerns the use of this remedy in a consent decree by a state employer when there has been no finding of past discrimination.[37]

In school desegregation cases, an order to integrate children who have never been the victims of intentional discrimination would be a remedy for those who have lost no right. The classic example is the racial disparity between cities and suburbs. The racial character of city and suburban schools usually is not the result of the desire of a school board or a state to segregate. The economic forces that caused such racial separation may be compatible with the *wishes* of officials, but they are not *intentionally caused* by them.[38] Wolters complains bitterly that this is a double standard for the North and the South,[39] but to grant a remedy in such situations would be to change the right. In fact, it would be to create the very right that Wolters believes that equal protection clause does

36. *Compare* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (upholding voluntary affirmative action plan by private employer as not violative of Title VII of the Civil Rights Act of 1964) *with* Firefighters Local Union v. Stotts, 104 S. Ct. 2576 (1984) (reversing district court order that modified seniority provisions of consent decree to provide for benefit of unidentifiable victims of possible prior discrimination).

37. The Supreme Court has granted certiorari in a case that poses the questions left open by *Stotts* and *Weber*: Can a public employer adopt a racial preference for unidentifiable victims of possible past discrimination absent a finding of past intentional discrimination? Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S.Ct. 2015 (1985).

38. *See* Milliken v. Bradley, 418 U.S. 717 (1974).

39. R. WOLTERS, *supra* note 4, 288.

not contain: the right to racial mixing in the schools solely because it causes harm to be separate for any reason.

IV

The nation's public schools have experienced considerable upheaval since *Brown*. Ending segregation has been painful. Many believe that the public schools have deteriorated in the past thirty years. There is a natural tendency to seek to fix blame for these problems. Wolters speaks for those who blame the Supreme Court for the upheaval and blame the deterioration on integration and liberal educational reformers.

The deterioration of schools, if it truly exists, is difficult to trace. Many factors may be responsible. The fact that it is believed to have followed *Brown* can hardly be conclusive proof that it was caused by *Brown*. Wolters purports to trace the decline of specific white schools to the influx of black students in the sixties and seventies. Those decades were also a period of enormous upheaval for other reasons, most notably the Vietnam War and Watergate. Social science cannot by its nature be an exact science, but surely one could do better by way of proof than this *post hoc ergo propter hoc* argument. Why not compare schools, for example, where integration was beginning in a particular period with those where integration had not yet begun? Objective criteria could be established, such as reduced test scores or the increase of graffiti on the walls, to test the hypothesis that integration was the cause of such changes. This proposed study is crude and fraught with difficulties, but it contrasts with Wolters's willingness to attribute unquestioningly such changes in the *Brown* communities to the courts.[40]

40. *Compare* Wolters's ancedotal account of the decline of P.S. du Pont High School in Wilmington, Delaware:

> There were disciplinary problems, however, as racial mixing increased in the wake of continuing white flight and black immigration. "It was almost as if there was something magic—or hellish—when the black enrollment reached 40 percent," recalled Jeanette McDonnal, the dean of girls at P.S. du Pont High School. "The black attitudes changed then, and the whites had reason to be frightened." Beginning in the early 1960s there were frequent reports of petty extortion at P.S. du Pont as older black students demanded protection money from younger students of both races. Graffiti appeared on the school's previously immaculate buildings, refuse littered the grounds, and windows were smashed. More serious trouble erupted after police picked up two black youths for questioning about some obscenities that had been painted on a building. "They didn't pick up any honkies," one black student declared, "so we were going to repay them. We were going to mess with somebody on their side." Spotting a white boy and girl after school that day, a group of blacks sprang to the attack. "There's some honkies. Let's go get them," the black cried. The white girl reported, "The girls came running across the street. They kicked me, hit me, pulled my hair and broke my brassiere. About a dozen of them. Some boys came over and started on my boy friend, who was trying to help me. All I got was a black eye, a stiff neck, and a sore head."

Wolters blames the upheaval over schools on judicial and administrative activists who brought integration orders to replace freedom of choice plans. Wolters believes that without such judicial arrogance, school boards would improve upon the current condition of schools. As his own tales reveal, his conclusion is unsupported by the history of desegregation resistance. Orders to end official segregation failed to provide an adequate remedy because segregation continued to be the intention of the school boards. Freedom of choice plans reflected only a concession that total segregation was no longer possible; the schools kept the racial characters that the schools boards wanted them to have. Only integration orders could combat such unconstitutional intention to segregate. The fact that in some places the result was resegregated education because of white flight is unfortunate but irrelevant. Only when the school boards ceased to govern schools that resembled the old officially segregated schools did official segregation end.

Other scholars have identified other possible reasons why *Brown* caused upheaval in the schools. Professor Wilkinson blames the Supreme Court for taking so long to end the slow deliberateness of "all deliberate speed."[41] Dean Bell blames parents for their racist response to any mixing of the races in schools.[42] Wolters, as we have seen, blames integration orders that replaced freedom of choice plans.

Perhaps there is no blame to be fixed at all. It is possible that public schools are the same as they would have been had they remained officially segregrated. Whatever the unknowable truth, it seems unlikely that *Brown* remedies could have successfully developed any other way. Once one accepts that official segregation of the races is offensive to the Constitution, enforcing that right becomes a remedial problem.

Wolters's desire to turn back the clock and allow freedom of choice plans is understandable, but not helpful. First, the clock cannot be turned back; it is naive to think that it could. Second, even if we could redo history, it would be a mistake to freeze the development of school desegregation remedies with freedom of choice plans. To do so would be to countenance the intentional perpetuation of the vestiges of official segregation. The right to the end of official segregation would thus be left without an effective remedy. Rights without effective remedies are no rights at all.

Id. at 191-92 (footnote references to two personal interviews omitted).

41. Wilkinson, *The Supreme Court and Southern School Desegregation, 1955-1970: A History and Analysis*, 64 VA. L. REV. 485 (1978).

42. Bell, *A School Desegregation Post-Mortem*, 62 TEX. L. REV. 175 (1983).