Litigating the Zero Sum Game: The Effect of Institutional Reform Litigation on Absent Parties

In the nineteenth century, the lawsuit primarily served as a vehicle for settling disputes between private parties about private rights. Each case, therefore, was a "self-contained episode," with the effects of the judgment confined to parties formally before the court. Further, the court awarded relief to those parties on a "winner-takes-all" basis.

This century, a growing body of legislation and constitutional interpretation designed to alter and regulate fundamental social and economic norms has developed. Consequently, a new model of civil litigation has emerged in which traditional ideas about parties and remedies can be unhelpful at best and may even lead to unjust results.

Lawsuits based on this new body of legislative and constitutional law do not arise solely out of disputes between private parties about
private rights. Rather, such suits seek to vindicate constitutional rights or social policies. Although each case involves a concrete dispute between the parties, the implications of the dispute often reach many people not before the court. As a result, "courts, recognizing the undeniable presence of competing interests, many of them unrepresented by the litigants, are increasingly faced with the difficult problem of shaping relief to give due weight to the concerns of the unrepresented." 

In attempting to protect the competing interests at issue in modern institutional reform litigation, courts have turned to principles developed in the courts of equity. When sitting in equity and granting injunctive relief, courts traditionally take responsibility for any consequences of their decrees that might adversely affect people not formally parties to the suit. As the United States Supreme Court has repeatedly noted:

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Judicial recognition of the need to balance interests, however, does not solve the problem of how to balance them. Several fundamental issues remain unresolved. First, courts have had to determine the goals at which to aim the balancing. Second, they have had to decide which interests can be balanced and which cannot. Third, courts have been required to choose the weight to give to the various affected interests. This Article will argue that the

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8 Id. at 1284.
9 Id. at 1296 (footnote omitted).
10 For a discussion of the development and doctrines of equity jurisprudence, see generally W. De Funjak, Handbook of Modern Equity (2d ed. 1956) and W. Walsh, A Treatise on Equity (1930). See also infra text accompanying notes 17-43.
11 Chayes, supra note 1, at 1292.
13 There are alternatives to interest balancing. Indeed, given the problems of overvaluing and undervaluing that have developed under interest balancing, an approach that seeks to maximize the plaintiffs' recovery might be preferable. For a full discussion of the implications of interest balancing versus rights maximizing in the context of school desegregation, see Gewirtz, Remedies and Resistance, 92 Yale L.J. 585 (1983).
14 Chayes, supra note 1, at 1312.
Supreme Court’s equitable interest balancing in institutional reform cases is flawed in certain systematic ways which result in overvaluing nonparty interests. Specifically, the Court has (1) included interests in its balancing that should not be balanced, (2) overweighted some interests and underweighted others, and (3) mischaracterized certain interests as public or private in ways that overstate or understate their importance.

This Article focuses first on the development of doctrines that allowed the interests of the defendant and the public to modify a prevailing plaintiff’s remedy in equity courts. The Article will then examine the Supreme Court’s application of these equity doctrines to the problems of institutional reform litigation in recent cases. Next, the Article will identify and discuss six factors that affect the Court’s balancing decisions in such cases. Finally, the Article will evaluate the appropriateness of the weight the Court has given to the different interests affected by institutional reform litigation decisions.

I

THE ORIGINS OF INTEREST BALANCING

The early English judiciary had a single-level court system. “Common law” courts dispensed justice by applying rigid rules and by strictly adhering to precedent that required an absolute judgment for the plaintiff or the defendant. However, the King reserved the power to intervene in common law court proceedings in order to see that justice was done in individual cases. These appeals for individual justice were made directly to the King, but he

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15 This Article describes the chronological development of interest balancing in institutional reform cases. This historical approach is necessary because it illustrates the Court's increasing deference to third-party interests. It also illustrates the success that third parties have enjoyed in recharacterizing their arguments so that factors once rejected as illegitimate have become interests which courts will balance against the plaintiff's interest in full relief. A historical approach is also necessary for clarity in the area of school desegregation because the substantive law changed in the 1970s. A remedies analysis that ignored this change would be misleading.

16 The Court has also greatly restricted the relief available to plaintiffs by narrowly defining the plaintiffs' rights, making proof of violations difficult, and carefully limiting remedies to the scope of provable violations. However, these issues are beyond the focus of this Article.

17 See H. McClintock, Handbook of the Principles of Equity 3 (2d ed. 1948).

18 Id. (citing Secular Ordinance of Edgar (959-75) ch. 2, Pound & Plucknett, Readings, 194 (allowing persons to seek mitigation of law from the King if the law was too burdensome)).
did not become involved in the case personally. Instead, the King delegated his discretionary power to his chancellors sitting as judges in equity.\textsuperscript{19} Because these chancellors were generally clergymen with no formal training in law, they relied on the "law of God" or on their own consciences, rather than on precedent, when deciding cases.\textsuperscript{20} Consequently, relief in equity varied greatly with the chancellor.\textsuperscript{21}

In contrast to the common law courts, equity courts could consider the interests of nonlitigants.\textsuperscript{22} The Chancellor ordered equitable remedies with both the public interest and the rights of the parties in mind.\textsuperscript{23} However, this equitable balancing of party and nonparty interests did not cause the equity courts to limit a successful plaintiff's remedy whenever it seemed inconvenient or unpopular. Equity courts seldom allowed "public interests" to defeat the interests of a seriously injured plaintiff.\textsuperscript{24}

Suits to enjoin torts best demonstrate how courts in the United States apply equity principles to take public interests into account when deciding cases that could potentially affect such interests.\textsuperscript{25}

\textsuperscript{19} See id. at 6-10; G. Clark, Equity § 5, at 4-5 (1954).
\textsuperscript{20} See G. Clark, supra note 19, § 4, at 3-4; H. McClintock, supra note 17, at 6 (citing Y.B. 4 Hen. 7, fo. 4, pl. 8 (1489)) (The Chancellor, Cardinal Morton, decided a case according to the law of God, claiming direct knowledge of it rather than citing authority); Earl of Oxford’s Case (1615) 1 Rep., ch. 1 (Lord Ellesmere cited Deuteronomy ch. 28, v. 30 as authority for the law of God).
\textsuperscript{21} See G. Clark, supra note 19, § 15, at 26 (citing Selden’s Table Talk, Title, Equity, cited in Gee v. Pritchard, 2 Swan. 402, 36 Rev. Rep. 670, 679 (1898)).

Equity is a roguish thing. For law we have a measure, and know what we trust to, Equity is according to the conscience of Him that is Chancellor; and as that is larger or narrower, so is Equity. ‘Tis all one as if they should make his foot the standard. . . . What an uncertain measure this would be. One Chancellor has a long foot, another a short foot, a third an indifferent foot. ‘Tis the same thing in the Chancellor’s conscience.

\textit{Id.}

\textsuperscript{22} See, e.g., Recent Cases, 28 Harv. L. Rev. 100, 110 (1914) (citing Curran v. Holyoke Water Power Co., 116 Mass. 90 (1874) ("A court of equity may consider the convenience and interests of others than the litigants in exercising its discretion whether to grant its extraordinary relief . . . ."). See also G. Clark, supra note 19, § 5, at 4-5 ("The common law can deal only with a two sided case; equity can deal with any number of sides, settling the rights of all the parties against each other.").

\textsuperscript{23} See, e.g., Virginian Ry. v. System Fed’n No. 40, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.").

\textsuperscript{24} See infra text accompanying notes 26-43.

\textsuperscript{25} Until the middle of the twentieth century, lawyers generally believed that injunctive relief was not available to protect personal (as opposed to property) rights. See Moscovitz, Civil Liberties and Injunctive Protection, 39 Ill. L. Rev. 144 (1944). There-
In these cases, courts sometimes refuse to issue injunctions because of the hardship to the public that would result if the requested relief were granted.

Public hardship is especially important in nuisance cases. *Grey ex rel. Simmons v. Mayor of Paterson* is illustrative. In that case, Paterson had built a sewer system that discharged into the Passaic River. The lower riparian owners sued to enjoin the operation of the system. The court denied the injunction, basing its decision largely on the public interest that would be affected if the sewer system were shut down:

On the one hand, the riparian owner is entitled to redress in respect of the deprivation of his property. On the other hand, the city of Paterson, at an enormous expense, has put into operation under legislative authority, and for a long series of years has used and enjoyed, a system of sewerage which accommodates a population of over 100,000 people. By the restraint prayed for, this sewerage system will be suddenly destroyed, and the homes of this multitude of people will be rendered perilous to health and life, and unfit for occupancy.

The court balanced many interests in reaching its decision, including the plaintiffs' property rights, the defendant's investment in the offending system, the defendant's apparent good faith, the plaintiffs' delay in bringing suit, and the public health and comfort. Since the plaintiffs' injury was "incidental and comparatively small," and because the potential harm to persons not before the court was great, the court declined to order injunctive relief. Instead, the court instructed the plaintiffs to seek money damages.

The outlines of equitable interest balancing, including balancing in the public interest, developed in the context of cases concerning property rights.

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26 60 N.J. Eq. 385, 45 A. 995 (1900).
27 *Id.* at 386, 45 A. at 997.
28 *Id.* at 386, 45 A. at 997-98. The court noted that the sewerage operated under legislative authority.
29 *Id.* at 387, 45 A. at 998. Equitable interest balancing already had a firm basis in American jurisprudence. In Richards's Appeal, 57 Pa. 105 (1868), cited in G. CLARK, supra note 19, § 215, at 314, the plaintiffs sought to enjoin the defendant from using soft coal in its puddling furnaces because the smoke discolored the plaintiff's fabrics in his cotton factory and made his home uncomfortable. The defendant's factory was worth at least half a million dollars and employed nearly a thousand people. 57 Pa. at 111. The court, in denying the injunction, specifically relied on the chancellor's discretion in equity. The injunction should be refused "if it be very certain that a greater injury would ensue by enjoining than would result from a refusal to enjoin. . . . [T]he chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing . . . ." *Id.* at 112-14.
30 60 N.J. Eq. at 387, 45 A. at 998.
The proper balance of interests was also at issue in Madison v. Ducktown Sulphur, Copper & Iron Co., another nuisance case. In Madison, the court refused to enjoin the operation of a copper plant. The plaintiff farm owners' property was worth less than $1,000. The defendant's plant, on the other hand, was worth approximately $2,000,000. Further, the plant was the source of half of the county tax revenues, employed most of the community's 12,000 residents, and was a major purchaser of supplies from county residents. An injunction would have forced the defendant to close its plant, thereby destroying the town's economy. The court had no difficulty balancing interests in this case. It denied injunctive relief and instead awarded damages.

Courts have applied this same interest balancing analysis in non-nuisance cases. In Knoth v. Manhattan Ry., the defendant built an elevated railway track in front of the plaintiff's premises, thereby decreasing the value of the plaintiff's property by about $1,200. The plaintiff sued to compel the removal of the track, but the court refused. The court found the plaintiff's injury small compared with the injury and inconvenience that the defendant and the public would suffer if the track were removed. Consequently, the court limited the plaintiff to monetary relief.

These and other cases illustrate the methods employed by the courts when balancing the various interests involved in equity suits. As a general rule, courts have compared both the magni-

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31 113 Tenn. 331, 83 S.W. 658 (1904).
32 Id. at 335, 83 S.W. at 666.
33 Id. at 333, 83 S.W. at 660-61.
34 Id. at 335, 83 S.W. at 666-67. The court said it would not "blot out two great mining and manufacturing enterprises, destroy half of the taxable values of a county, and drive more than 10,000 people from their homes . . . ." Id. at 335, 83 S.W. at 666.
35 Id. at 335, 83 S.W. at 667. The court was also influenced by the plaintiffs' ten-year delay in bringing suit. Id. at 332, 83 S.W. at 662-63.
37 Id. at 244, 79 N.E. at 1015.
38 The court found that the track was of great public utility and that its removal would seriously impair train service and increase public danger. Id. at 251, 79 N.E. at 1018.
39 The court also relied on the plaintiff's delay in filing suit and on the comparative insignificance of his injuries. "A court of equity is not bound to issue an injunction when it will produce a great public . . . mischief, merely for the purpose of protecting a technical or unsubstantial right." Id. at 252, 79 N.E. at 1018 (citation omitted).
40 See, e.g., Elliott Nursery Co. v. Du Quesne Light Co., 281 Pa. 166, 126 A. 345 (1924); Wilkins v. Diven, 106 Kan. 283, 187 P. 665 (1920); City of Wheeling v. Natural Gas Co., 74 W. Va. 372, 82 S.E. 345 (1914); Bliss v. Washoe Copper Co., 186 F. 789 (9th Cir. 1911) (refusing to enjoin copper smelter from operating, thereby limiting
tude of the plaintiff's and defendant's interests and their conduct with reference to the litigated transaction.\textsuperscript{41} Courts have also looked to the nature of the interests affected and to the relative proportion of the interests that each party could lose.\textsuperscript{42} In addition, courts have considered various nonparty interests, including public health, the local economy, the state's interest in developing industries, and public safety.\textsuperscript{6} Courts have refused to grant injunctive relief when these public interests combine with a small injury to the plaintiff and a large economic hardship to the defendant.\textsuperscript{43}

\section*{II}

\textbf{INTEREST BALANCING APPLIED TO INSTITUTIONAL REFORM REMEDIES}

\textit{A. Origins}

In the second half of this century, Congress and the federal courts began to recognize or create an increasing number of civil liberties.\textsuperscript{44} To allow individuals the opportunity to enjoy many of

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\textsuperscript{41} Factors such as the defendant's good faith or attempts to correct the problem generally weighed in defendant's favor, while a plaintiff's delay in bringing suit generally militated against relief. See Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904). \textit{Cf.} Brande v. Grace, 154 Mass. 210, 31 N.E. 633 (1891) (trial court should have enjoined construction of defendant's addition, but since trial court erred and the defendant completed its structure, appellate court refused to order the destruction of valuable property).

\textsuperscript{42} A court usually ordered a defendant who could abate the nuisance by actions short of closing its facilities to do so. See, e.g., New Jersey v. City of New York, 283 U.S. 473 (1931) (defendant allowed reasonable time to build incinerators rather than dump garbage into ocean).

\textsuperscript{43} See cases cited \textit{supra} note 40.

\textsuperscript{44} See \textit{supra} notes 4 & 5.
these new-found rights, society had to reorder its complex relationships.\textsuperscript{45} When society did not voluntarily reorder those relationships, many people turned to the courts.\textsuperscript{46} Whether the defendant was a governmental entity, such as a school or legislature, or a private entity, such as an employer or union, the courts were asked to create equitable remedies that would impact groups in addition to the defendant and the plaintiff.\textsuperscript{47} Faced with this situation, the courts relied on the interest balancing principles developed in the old equity cases. In doing so, the courts adopted the balancing approach from cases in which plaintiffs had small pecuniary interests to cases in which groups of plaintiffs had important civil liberty interests.\textsuperscript{48}

The first case addressing this issue was \textit{Brown v. Board of Education (Brown II)}.\textsuperscript{49} Although the Court declared in \textit{Brown I} that segregated public schools were inherently discriminatory,\textsuperscript{50} it postponed ordering an appropriate remedy. Instead, the Court requested reargument on two questions involving relief:

Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?\textsuperscript{51}

In answering these questions, the Court announced at the outset that it was aware of the needs of those other than the black student plaintiffs seeking an end to segregation. On that basis, the Court first declined to construct a remedy, remanding \textit{Brown II}'s companion cases to the district courts for further hearings on the issue of appropriate remedies\textsuperscript{52} and, second, declined to order complete and

\textsuperscript{45} Chayes, supra note 1, at 1284; Note, Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy, 89 Yale L.J. 513 (1980).
\textsuperscript{46} See cases cited infra notes 49-194.
\textsuperscript{47} See cases cited infra notes 49-194.
\textsuperscript{49} 349 U.S. 294 (1955) (\textit{Brown II}).
\textsuperscript{50} \textit{Brown v. Board of Educ.}, 347 U.S. 483, 495 (1954) (\textit{Brown I}).
\textsuperscript{51} Id. at 495-96 n.13.
\textsuperscript{52} \textit{Brown II}, 349 U.S. at 299. The Court felt that the district courts would be in a better position to assess whether the schools were complying with constitutional standards.
immediate relief. 53 In providing guidelines for the determination on remand, the Court reminded the district court judges that they would be applying equitable principles and balancing the public and private interests implicated to resolve the remedies questions. Further, the Court noted that these cases would require the district courts to grant flexible relief. 54

The Court specifically set out the interests that the lower courts were to consider in making their remedy determinations. On one hand, the black students had an interest in being granted admission to public schools "as soon as practicable on a nondiscriminatory basis." 55 On the other hand, militating in favor of deliberation rather than speed, were

the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. 56

Thus, the Brown II Court gave the administrative difficulties faced by the local schools considerable weight.

On its face, the Court's Brown II opinion contemplates only a short preremedy delay to consider local peculiarities and administrative problems. 57 Hostility to the integration remedy was not a factor the district courts were to consider in the balancing process. "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 58

In actuality, however, the likelihood of white opposition concerned the Court. 59 While it did not mention white opposition and did not legitimate such opposition as a factor to balance against the

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53 Id. at 300. This allowed the lower courts to hear and consider the interests of other people who claimed to have a stake in the relief ordered.
54 Id. The Court stated that "[i]n fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." Id. (citing A'lexander v. Hillman, 296 U.S. 222, 239 (1935) and Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)).
55 Brown II, 349 U.S. at 300.
56 Id. at 300-01.
57 Id.
58 Id. at 300.
plaintiffs' rights, the Court evidently recognized hostility as an important factor in remedy formation. In order to protect itself as an institution, the Court tried to avoid issuing unenforceable orders. The Court also hoped that by signaling flexibility, it could reduce resistance among the opponents of integration.

The Court cited very little authority for its Brown II balancing approach, relying instead on unspecified principles of equity. The principal authority cited was Hecht Co. v. Bowles, a case that applied equitable principles to the interpretation of the Emergency Price Control Act of 1942. Although often cited for its discussion of the nature of equity, Hecht does not stand as authority either for delaying remedies to solve administrative problems or for avoiding remedies to curb opposition to them. Nevertheless, since

(1977); and Hutchison, Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958, 68 GEO. L.J. 1, 53-54 (1979)).

60 Justice Frankfurter evidently had urged that the Court's opinion mention "attitudes" of opposition in addition to administrative difficulties. Hutchison, supra note 59, at 52-53.

61 See supra note 59.

62 See R. KLUGER, supra note 59, at 740.

63 See Hutchison, supra note 59, at 53-54.


67 The cases cited in the Brown II Supreme Court briefs filed by the opponents of a full and immediate end to segregated schools justified, at best, delay to accommodate administrative difficulties. Generally, the cited cases fall into four categories. First, some contain only general language describing a court's powers to act flexibly while creating equitable remedies. See Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 630 (1950); United States v. National Lead Co., 332 U.S. 319, 358 (1947); Yakus v. United States, 321 U.S. 414, 439 (1944); Alexander v. Hillman, 296 U.S. 222, 239 (1935). A second category of cases deals with questions of justiciability such as abstention and ripeness. See Eccles v. Peoples Bank, 333 U.S. 426, 434 (1948); Meredith v. Winter Haven, 320 U.S. 228 (1943). A third category of cases uses the flexibility of equity to provide more rather than less relief to successful plaintiffs. See SEC v. United States Realty & Improvement Co., 310 U.S. 434, 455 (1940) (court can refuse to sanction reorganization plan of bankrupt corporation even absent statutory authority to do so); United States v. Morgan, 307 U.S. 183, 194 (1939) (court can order money paid into registry of the court); Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937) (employer can be ordered to negotiate with employees' representative); Northern Sec. Co. v. United States, 193 U.S. 197 (1904) (court may enjoin shareholder from buying any more stock, getting dividends, or exercising control). Finally, a number of the cases cited to the Court authorize remedial delay based either on the complexity of the case or the defendant's progress toward a voluntary remedy. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 132 (1945) (execution of decree stayed until steps taken "with all deliberate speed" to enable FCC to take license applications); New Jersey v. City of New York, 284 U.S. 585 (1931) (New York given two years to end dumping, with semianual progress reports required on the building of incinerators); New Jersey v. City of New York, 283 U.S. 473 (1931) (New York City to be given a reasonable time to
Brown II, the Court has adopted an equitable balancing approach in cases involving remedies for civil rights violations.68

B. Later Cases: Absent Party Interests in Institutional Reform Litigation

People or groups not parties to the litigation often have interests or expectations that are affected by institutional reform cases. For example, prison guards are affected by prison reform decrees69 and shareholders are affected by remedies in antitrust70 and securities law cases.71 There are two kinds of cases in which the intricacies of nonparty interests have been most often litigated: school desegregation and employment discrimination cases.

1. School Desegregation Cases

Beginning with Brown II, the Supreme Court has analyzed institutional reform remedies most fully in school desegregation cases. Unfortunately, Brown II's vision of a "prompt and reasonable start"72 toward eliminating segregation was not realized. In Cooper v. Aaron,73 the Court faced the rebellion of the governor and legislature of Arkansas against court-ordered desegregation. Although the Court emphasized that the state's tactics74 would not succeed in "depriving the Negro children of their constitutional rights"75 and explicitly excluded hostility to racial desegregation as a relevant fac-

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68 See cases cited infra in notes 73-132.
69 See, e.g., Gates v. Collier, 501 F.2d 1291, 1299-1322 (5th Cir. 1974).
70 See, e.g., Standard Oil Co. v. United States, 221 U.S. 1 (1911).
74 Governor Faubus led the legislature to enact laws prohibiting integrated education, called out the troops to prevent a handful of blacks from attending a Little Rock high school, made statements "villifying federal laws," and utterly refused to use state law enforcement agencies to maintain public order. Id. at 15.
75 Id. at 16.
tor in delaying desegregation,\textsuperscript{76} the Court still gave great weight to the interests of whites.

Five years later, the Court's patience was wearing a little thin. \textit{Goss v. Board of Education}\textsuperscript{77} concerned a plan that allowed any student to transfer when he or she would otherwise be required to attend a school in which the majority of students were not of the transferee's race.\textsuperscript{78} The Court noted that the plan perpetuated segregation.\textsuperscript{79} Although the Supreme Court recognized the importance of the "multifarious local difficulties"\textsuperscript{80} involved in desegregating schools, it found such considerations inapplicable to the transfer plan and ruled the plan unconstitutional.\textsuperscript{81} The white students' desire to avoid going to school with black students merited no weight in the Court's balancing of interests.

In \textit{Green v. County School Board},\textsuperscript{82} a frustrated Court mandated immediate desegregation action. The Court stated that racial discrimination was to be eliminated "root and branch"\textsuperscript{83} and directed the school board to "come forward with a plan that . . . promises realistically to work now."\textsuperscript{84} The Court did not mention the expectations of white students or local administrative difficulties. Such factors were not significant enough to justify a fourteen-year delay in desegregation. Ultimately, the \textit{Green} Court held that it would accept "freedom-of-choice" plans designed to accommodate the interests of whites and school boards only if those plans also worked to eliminate segregation.\textsuperscript{85}

The Court returned to the issue of available remedies in desegregation cases in \textit{Swann v. Charlotte-Mecklenburg Board of Educa-

\textsuperscript{76} \textit{Id.} at 7.
\textsuperscript{77} 373 U.S. 683 (1963).
\textsuperscript{78} \textit{Id.} at 684.
\textsuperscript{79} \textit{Id.} at 686-87.
\textsuperscript{80} \textit{Id.} at 689.
\textsuperscript{81} Now, however, eight years after [\textit{Brown II}], . . . the context in which we must interpret and apply ["all deliberate speed"] to plans for desegregation has been significantly altered . . . The transfer provisions here cannot be deemed to be reasonably designed to meet legitimate local problems, and therefore do not meet the requirements of \textit{Brown}.
\textit{Id.} One year later, in \textit{Griffin v. County School Bd.}, 377 U.S. 218 (1964), the Court noted that there had been "entirely too much deliberation and not enough speed" in enforcing the rights of black students. \textit{Id.} at 229.
\textsuperscript{82} 391 U.S. 430 (1968).
\textsuperscript{83} \textit{Id.} at 438.
\textsuperscript{84} \textit{Id.} at 439 (emphasis in original).
\textsuperscript{85} \textit{Id.} at 437-39.
As it had in Brown II, the Court considered the role of the court in equity, stating: "[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Chief Justice Burger, writing for the Court, listed a number of interests to be weighed against the interests of the black litigants seeking desegregation. These interests included the students' desire to attend the schools nearest their homes, time or distance problems involved in busing, the age of the students, the location and capacity of school buildings, land values and site availability, and the integrity of the educational process. Thus, the Swann Court's balancing explicitly recognized minimization of the time a child might spend on a school bus and the preference for neighborhood schools as public interests. Nevertheless, the Court considered the interest in desegregation sufficient to justify an awkward or inconvenient remedy during the "interim period" necessary to dismantle a dual school system.

**Keyes v. School District No. 1**, the Supreme Court's first decision on school desegregation in the North, was concerned with proof of violation rather than with the problem of relief. Justice Powell's separate opinion, however, dealt with the issue of remedies. Justice Powell would require "that the legitimate community interests

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87 Id. at 15-16. Later in the opinion, the Court stated: "The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." Id. at 31.
88 Id. at 28.
89 Id. at 30-31.
90 Id. at 31.
91 Id. at 20.
92 Id.
93 Id. at 30-31. The Court has never explained why the interests of white students are "public" while the interests of black litigants are "private." See infra Sec. III.B.2. At times this mischaracterization, which is implicit in the Court's interest balancing from Swann onward, results in denial of any meaningful remedy to black students. See Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).
94 Swann, 402 U.S. at 28.
95 413 U.S. 189 (1973).
96 Id. at 217 (Powell, J., concurring in part, dissenting in part). Although the subject of Justice Powell's opinion is the de jure/de facto distinction, many of his comments are relevant to the question of interest balancing.
in neighborhood school systems be accorded far greater respect."

More specifically, he noted that "courts may have overlooked the
fact that the rights and interests of children affected by a desegrega-
tion program also are entitled to consideration." Justice Powell
clearly placed greater weight on the interests of families than on the
administrative problems of the school board. He argued that com-
pelling children to leave their neighborhoods impairs liberty and
privacy interests. Further, he voiced a fear that busing would
hasten an exodus from public schools to private schools and from
the inner cities to the suburbs. Justice Powell also warned that
forced integration might diminish support for public schools and
high quality education. He portrayed families as innocent bystand-
ers, characterizing them as "children and parents who did not par-
ticipate in any constitutional violation." He would therefore give
their concerns great weight.

In *Milliken v. Bradley (Milliken I)*, the immediate issue was
the propriety of an interdistrict remedy. However, the many opin-
ions in the case shed light on the Justices' views on remedy forma-
tion. The five-to-four split in *Milliken I* reflects a basic
disagreement concerning the result at which the Court's interest
balancing should aim. While the Court unanimously held in
*Swann* that the "district judge or school authorities should make
every effort to achieve the greatest possible degree of actual desegre-
gation," both the majority and the dissent in *Milliken I* inter-
preted the purpose of school desegregation remedies quite
differently. Dissenting Justices Marshall, Douglas, Brennan, and
White found a duty to "take all practicable steps to ensure that Ne-
gro and white children in fact go to school together." Chief Just-

ice Burger and the majority, on the other hand, interpreted *Swann*
to mean that the remedy should "restore the victims of discrimina-
tory conduct to the position they would have occupied in the ab-
sence of such conduct."

The *Milliken I* majority found the interest of local school boards

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97 Id. at 251 (Powell, J., concurring in part, dissenting in part).
98 Id. at 247.
99 Id. at 247-50.
100 Id. at 250.
103 Id. at 26.
104 See L. Tribe, American Constitutional Law § 16-20, at 1038 n.5 (1978).
105 Milliken I, 418 U.S. at 802 (Marshall, J., dissenting).
106 Id. at 746.
all-important. "No single tradition in public education is more deeply rooted than local control over the operation of schools . . .". As it had in Swann, the Court listed the interests indicating that desegregation should be limited. First, the Court noted the logistical problems attending the transportation of students. Second, the Court noted that the implementation of an interdistrict remedy would create a host of new problems concerning the composition and selection of school boards, school financing, taxes, curriculum determination, the purchasing of supplies, and new school location and construction.

The dissenting Justices balanced the interests quite differently. Justice Douglas, for example, found that "the equities are stronger in favor of the children of Detroit who have been deprived of their constitutional right to equal treatment by the State of Michigan." Justice White stated that the majority had given excessive weight to the administrative inconvenience interests involved. Additionally, Justice White did not find the Court's "talismanic invocation of the desirability of local control over education" convincing. Community participation, Justice White wrote, was important but not sufficient to rule out a remedy. He noted, however, that there were some legitimate public concerns to consider in fashioning a remedy. Plans that call for "school zoning, pairing, and pupil assignments, become more and more suspect as they require that schoolchildren spend more and more time in buses going to and from school and that more and more educational dollars be diverted to transportation systems." Thus, Justice White gave more weight to the nonparty interests and to the educational process than to administrative concerns.

Justice Marshall doubted the sincerity of the majority's reliance

107 Id. at 741.
108 Id. at 743.
109 The remedy contemplated by the lower court would have consolidated 54 independent school districts into one "vast new super school district." Id.
110 Id.
111 Id. at 762 n.13 (Douglas, J., dissenting).
112 The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State.
113 Id. at 778.
114 Id. at 764.
on local control. He saw white parents' dislike of busing as the real motivation for the majority's decision.\textsuperscript{115}

\textit{[J]ust as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law.}\textsuperscript{116}

The real interest weighing so heavily in the Court's balance, said Justice Marshall, was not so much local control as hostility to increased integration.

By the time \textit{Milliken v. Bradley (Milliken II)}\textsuperscript{117} reemerged, the Court treated the principles governing equitable relief as well-established. First, the nature and scope of the constitutional violation determines the nature of the remedy.\textsuperscript{118} Second, the court must design its decree to restore victims as close to the position they would have occupied in the absence of a violation as possible.\textsuperscript{119} Third, the court "must take into account the interests of state and local authorities in managing their own affairs."\textsuperscript{120} The Court also noted that in order to "ensure that federal-court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given to burdensome effects resulting from a decree that could 'either risk the health of the children or significantly impinge on the educational process.'"\textsuperscript{121}

\textsuperscript{115} "[I]t is plain that one of the basic emotional and legal issues underlying these cases concerns the propriety of transportation of students to achieve desegregation." \textit{Id.} at 812 (Marshall, J., dissenting).

\textsuperscript{116} \textit{Id.} at 814. In Hills v. Gautreaux, 425 U.S. 284 (1976), the Court affirmed its decision in \textit{Milliken I}. In \textit{Hills}, black tenants in public housing brought suit against the Chicago Housing Authority claiming that they were being placed in housing sites in the city of Chicago instead of in available housing out in the predominantly white suburbs. A lower court found this to be the case and ordered a metropolitan-area remedy as opposed to confining the remedy to the city of Chicago. The Court affirmed its decision in \textit{Milliken I}, but distinguished it from \textit{Hills}.

\textsuperscript{117} 433 U.S. 267 (1977).

\textsuperscript{118} \textit{Id.} at 280 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) and \textit{Milliken I}, 418 U.S. at 738).

\textsuperscript{119} \textit{Milliken II}, 433 U.S. at 280 (citing \textit{Milliken I}, 418 U.S. at 746).

\textsuperscript{120} \textit{Milliken II}, 433 U.S. at 281.

\textsuperscript{121} \textit{Id.} at 280 n.15 (quoting \textit{Swann}, 402 U.S. at 30-31). The Court also noted the existence of unspecified "practical as well as legal limits to the remedial powers of federal courts in school desegregation cases." \textit{Id.} at 281 (citing \textit{Milliken I}, 418 U.S. 717, 763 (1974)). \textit{See also} Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (\textit{Dayton I}).
As a practical matter, these three limits on injunctive relief made desegregation decrees less likely to affect third parties. The close tie between violation and remedy meant that courts were unlikely to provide remedies for the secondary effects of segregation such as segregated housing patterns. The limited goal of restoring victims to a discrimination-free position also limited the kind of remedies that courts could provide. With genuinely integrated education no longer the goal, the odds that a white child would be bused to achieve a more favorable racial balance were greatly diminished. The deference courts gave to local autonomy and the resulting prohibition of interdistrict remedies allowed third parties to escape a court's decree by moving to an adjacent but independent school district.

The Court's tying of violation to remedy in school desegregation cases became even more significant as the Court shifted its analysis on proof of violation. Beginning in the 1970s, the Court held that a plaintiff seeking to prove an equal protection claim must show purposeful discrimination. A showing by the plaintiffs that a school district's policies had a disparate impact on blacks was no longer sufficient. Therefore, plaintiffs in school cases now have to prove "not only that segregated schooling exists but also that it was brought about or maintained by intentional state action."

The scope of the intentional discrimination proved by the plaintiffs can limit the available remedy. In Dayton Board of Education v. Brinkman (Dayton I), the Court directed district judges to "determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." A court may provide a system-wide remedy only on

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124 Keyes v. School Dist. No. 1, 413 U.S. 189, 198 (1973). The Court did, however, go on to recognize that school districts that operated a dual school system in 1954 had an affirmative duty to dismantle that system. Columbus, 443 U.S. at 458; Dayton II, 443 U.S. at 537. Failure to do so, whether or not coupled with actions having foreseeable and anticipated disparate impact, could provide the necessary proof of intent.


126 Id. at 420.
proof of purposefully segregative practices with current system-wide impact.\textsuperscript{127}

These principles opened the door for opponents of busing to couch their arguments not as objections to the remedy but as evidence of lack of intent to discriminate. Justice Rehnquist argued that a school board’s preference for neighborhood schools is a neutral factor free of racial motivation.\textsuperscript{128} He further found that the board’s allegedly color blind invocation of “legitimate educational objectives” showed lack of segregative intent.\textsuperscript{129}

The late 1970s and early 1980s also saw further development of Justice Powell’s deference to nonplaintiff community interests. Expanding on his earlier position, Justice Powell argued that extensive federal remedial orders would adversely affect the plaintiffs themselves. The courts’ “intrusions on local and professional authorities” erode the quality of education, wrote Justice Powell.\textsuperscript{130} More important, community opposition to busing can defeat the integrative purpose of the courts’ orders when whites leave the system and reintegration results.\textsuperscript{131} Thus, Justice Powell continues to give great weight to the interests of absent parties.\textsuperscript{132}

In summary, in the school desegregation cases the Court gives considerable weight to nonparty expectations.\textsuperscript{133} Although the Court has not afforded these interests sufficient weight to leave plaintiffs with no remedy at all, they are sufficiently important to shape the court-ordered relief.\textsuperscript{134} The Court will balance interests such as student convenience, logistical difficulties, hostility to integration, local control, administrative convenience, and the quality of education against the black students’ interest in an effective remedy. Judicial consideration of these nonparty interests will lead to decrees that order less busing, provide for the busing of black rather

\textsuperscript{127} Id. (citing Keyes, 413 U.S. at 213).
\textsuperscript{128} See Columbus, 443 U.S. at 503 (Rehnquist, J., dissenting).
\textsuperscript{129} Id. at 510.
\textsuperscript{130} Id. at 483 (Powell, J., dissenting).
\textsuperscript{131} Id. at 484.
\textsuperscript{132} See Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437 (1980) (Powell, J., dissenting from dismissal of writs as improvidently granted) (giving great weight to busing of very young children, time and distance of busing, “economic, social, and educational factors,” migration to suburbs, community support, and city tax base).
\textsuperscript{133} The interests of white families opposed to busing are not always unrepresented. Rather, this perspective is often shared by the defendant school board. See Yeazell, Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case, 25 UCLA L. REV. 244, 249 (1977).
\textsuperscript{134} See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). These interests have sometimes supported legislative limits on court-ordered remedies.
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than white children, and provide for enriched learning centers in minority neighborhood schools.\textsuperscript{135}

2. Employment Discrimination

The second major group of institutional reform cases involving the needs of absent parties arose in the context of employment discrimination. Plaintiffs bring employment discrimination claims either as constitutional equal protection claims (when the employer is a government body), claims under Title VII of the Civil Rights Act of 1964,\textsuperscript{136} or both. The courts' analyses of remedies vary depending both on the constitutional or statutory basis of the plaintiff's claim and, if the claim is statutory, on the specific portions of Title VII relevant to the issue before the court.\textsuperscript{137}

Courts tend to balance interests in constitutional cases in much the same way that they do in school desegregation cases. In Title VII cases, however, courts begin with an analysis of the relevant statutory language and legislative history before moving to general equitable balancing. In formulating Title VII remedies, courts are guided by two principles.\textsuperscript{138} The first is statutory. The remedial purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination."\textsuperscript{139} The second is equitable. "[W]hen Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.'"\textsuperscript{140}

Courts consider the expectations of nonparties important when formulating remedies for employment discrimination. Courts also balance the nature of the relief requested and the number of nonpar-

\textsuperscript{136} 42 U.S.C. §§ 2000e to e-17 (1982).
\textsuperscript{137} See infra text accompanying notes 199-217.
\textsuperscript{138} 42 U.S.C. § 2000e-5(g) (1982) sets forth the relief a court is empowered to grant. A court may do the following:
order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.
\textsuperscript{139} Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
\textsuperscript{140} Id. at 417. See also supra note 21.
ties affected by the remedy in making their remedy decisions. However, the Justices differ sharply as to the correct analysis to apply and the appropriate weight to give to the interest of absent parties.

In *Los Angeles Department of Water & Power v. Manhart*, the issue was whether women, because they have a longer life expectancy than men, could be forced to pay more into an employer’s pension fund. The Court recognized that unless women as a class were assessed an extra charge, their pensions would be subsidized by male employees. Los Angeles maintained that fairness to male employees justified an extra assessment against female employees. The Court, however, gave this argument little weight in considering whether the employer’s system violated Title VII.

> [T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. . . . But a statute that was designed to make [sex] irrelevant in the employment market . . . could not reasonably be construed to permit a take-home-pay differential based on a [sexual] classification.

The Court gave nonparty expectations much greater weight in considering whether to award retroactive relief to the female employees. Here, the Court considered the interests of both male employees and retired employees in finding the lower court’s award of retroactive reimbursement in error.

Retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties. . . . If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees.

Five years later, in striking down a state retirement plan paying women lower benefits than men due to women’s longer life expectancy, the Court still deferred to the interests of the defendants and third parties in awarding a remedy. In *Arizona Governing Comm.
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A majority of the Court held that Title VII forbids employers to pay lower retirement benefits to women based on sex-based actuarial tables. On the remedy issue, however, five Justices refused to apply their holding retroactively. Those Justices voting to deny retroactivity were concerned about the remedy's effect on insurance companies and the insured's benefits, as well as the financial effect such a ruling would have on state and local governments.

In these pension cases, the Court balanced interests in deciding whether to award monetary relief. Remedy decisions are even more difficult when the Court considers injunctive remedies such as hiring and promotion goals or protection against layoffs. The Court's balancing in such cases sometimes involves a truly "zero sum" game: any benefit given to one group will take something away from another.

The Court first faced questions regarding injunctive relief in the context of identified victims of discrimination. In *Franks v. Bowman Transportation Co.*, the Court approved competitive seniority awards to discrimination victims. While recognizing that interest balancing was appropriate, the *Franks* Court distinguished the equitable principles applicable in institutional reform cases from those utilized in more traditional forms of litigation. The majority thought competitive seniority was consistent with the "traditional view that '[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.'" The majority

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147 Id.
148 Id.
149 Justices Powell, Burger, Blackmun, Rehnquist, and O'Connor voted against a retroactive award.
150 Norris, 463 U.S. at 1106.
151 Id. at 1106-07.
154 Plaintiffs brought a class action against their employer claiming that the employer engaged in racially discriminatory employment practices. The Court held that such discriminatory practices occurred and allowed both named and unnamed class members seniority status as if they had started work when the discriminatory practice occurred. Id. at 750-51, 779.
155 Id. at 778 (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941)).
acknowledged the expectations of white employees, but did not allow those expectations to limit the relief awarded the black plaintiffs.

[I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make whole' objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. . . . [W]e find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected.156

Justice Powell, joined by Justice Rehnquist, would have given considerably greater weight to the expectations of white employees. Justice Powell suggested that competitive seniority should be available only after the district court balances the claims of innocent incumbents against the plaintiffs' need to be made whole. He would allow no presumption in favor of competitive seniority.157

The Court came closer to Justice Powell's position when it faced the issue of Title VII remedies in *International Brotherhood of Teamsters v. United States.*158 Speaking of the "delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing,"159 the Court once again invoked the principles of equity and cited *Hecht Co. v. Bowles.*160 In *Teamsters,* the Court's balancing gave more weight to the expectations of incumbent employees than those expectations had been given in *Franks.*161 The Court listed factors such as "the number of victims, the number of nonvictim employees

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156 *Id.* at 774-75. *See also* Vogler v. McCarty, Inc., 451 F.2d 1236, 1238-39 (5th Cir. 1971) (cited with approval in *Franks,* 424 U.S. at 775 n.35); United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971) (cited with approval in *Franks,* 424 U.S. at 775).

157 *Franks,* 424 U.S. at 785-86. Justice Powell also suggested that the court could consider factors such as the employee turnover rate and the number of class members seeking relief in fashioning a remedy. *Id.* at 799 n.20.


159 *Id.* at 372.

160 *Id.* at 374-75. *See Hecht Co. v. Bowles,* 321 U.S. 321, 329-30 (1944); supra notes 64-67 and accompanying text.

161 Courts are to "'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.'" *Teamsters,* 431 U.S. at 375 (quoting Lemon v. Kutzman, 411 U.S. 192, 200-01 (1973) (Burger, C.J.)).
affected and the alternatives available to them, and the economic circumstances of the industry" as relevant equitable considerations to guide the lower court in striking a proper balance of interests.162

Another group of remedy cases in the employment context involved class-based relief. These cases indicate that a tenuous consensus has emerged on some bottom line results, although the individual Justices remain greatly divided on how to reach those results. An examination of the shifting majorities and pluralities in the cases is therefore necessary.

In United Steelworkers v. Weber,163 the Court considered a hiring plan voluntarily adopted by the employer and union. The plan reserved half of the openings in an in-plant training program for minorities. A white employee who was denied admission to the program challenged it as violative of Title VII. A majority of the Court disagreed. Justice Brennan, writing for the majority, found the plan permissible because it was designed to break down old patterns of discrimination and was structured to open employment to blacks in occupations traditionally closed to them. Justice Brennan also noted that the plan did not "unnecessarily trammel the interests of the white employees."164

Fullilove v. Klutznick165 involved an affirmative action program enacted by Congress which required that ten percent of the federal funds provided for local public works projects be set aside for minority businesses. Six Justices upheld the program against an equal protection clause challenge by white contractors.166 Justice Burger, writing for himself and Justices White and Powell, noted that the program would adversely affect nonminority firms. That the set-aside might "disappoint the expectations" of whites, however, was

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162 Id. at 376 n.62 (citing Justice Powell's separate opinion in Franks rather than the majority opinion. Franks, 424 U.S. at 796 n.17 (Powell, J., concurring in part and dissenting in part)).
164 Id. at 208. Justice Brennan observed that the plan did not require the discharge of whites and did not absolutely bar the advancement of whites. The temporary nature of the plan also made it more acceptable to the majority.

Justice Burger and Rehnquist, writing in dissent, would have held that Title VII bars all race-based preferences. Id. at 219.
165 448 U.S. 448 (1980).
166 Justice Stewart, joined by Justice Rehnquist, dissented, stating that the equal protection clause prohibits all racial classifications. Id. at 531-32. Justice Stewart distinguished pupil assignment plans in school cases, noting that "no pupil was deprived of a public school education as a result." Id. at 527 n.6. Justice Stevens also dissented, finding that the relationship between the set-aside and the past discrimination was not close enough. Id. at 540-41.
held insufficient to render the program unconstitutional.\textsuperscript{167} Justice Burger pointed out that, as in Weber, the burden shouldered by nonminorities was relatively light.\textsuperscript{168} Further, he suggested that the burden was not inequitable.

\textquotedblleft [A]lthough we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.\textsuperscript{169}

In a separate concurrence, Justice Powell emphasized that the set-aside had a limited effect on whites. "Any marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the governmental interest served by [the program]."\textsuperscript{170}

The Court recently considered four programs that provide race based preferences in hiring or promotion decisions. In \textit{Local 28, Sheet Metal Workers’ International Association v. EEOC},\textsuperscript{171} a majority of Justices upheld a numerical goal for minority union membership. In \textit{Local 93, International Association of Firefighters v. City of Cleveland},\textsuperscript{172} the Court upheld a consent decree embodying a race conscious promotion plan. In \textit{United States v. Paradise},\textsuperscript{173} the Court approved a remedial order requiring that fifty percent of promotions go to blacks until the employer implemented a nondiscriminatory promotion plan. In \textit{Johnson v. Transportation Agency, Santa Clara County},\textsuperscript{174} the Court upheld the promotion of a female employee, pursuant to an affirmative action plan, and consequent nonpromotion of a marginally better qualified male employee. These decisions indicate that a majority of the Court approves of the use of race conscious relief as a remedy for past discrimination under certain circumstances, even when that relief benefits persons not proved to be victims of the past discrimination.\textsuperscript{175}

\textsuperscript{167} \textit{Id.} at 484.
\textsuperscript{168} \textit{Id.}
\textsuperscript{170} \textit{Fullilove}, 448 U.S. at 515.
\textsuperscript{171} 106 S. Ct. 3019 (1986).
\textsuperscript{172} 106 S. Ct. 3063 (1986).
\textsuperscript{173} 107 S. Ct. 1053 (1987).
\textsuperscript{174} 107 S. Ct. 1442 (1987).
\textsuperscript{175} See infra text accompanying notes 176-82.
All of the Justices, however, would give some deference to the interests of white employees in cases such as these. Justices Brennan, Marshall, Blackmun, and Stevens would consider the effect of the remedy on white employees as part of traditional equitable interest balancing. In deciding whether a race-based preference is proper, one factor they consider is the effect of the hiring or promotion preference on the interests of white employees. Justice Powell reasons similarly. In evaluating a remedy, he would look to the effect of the burden on white employees and to the "diffuseness" of the burden. Justice O'Connor would give slightly more weight to the nonminorities' interests. She noted in her opinion in Sheet Metal Workers that race-based remedies are least likely to be acceptable when their effect will be "concentrated upon a relatively small, ascertainable group of nonminority persons."

Other Justices give nonminority interests even greater weight. Justice White has approved hiring preferences but finds that the interests of nonminorities outweigh the interests of minorities in a class-based remedy whenever that remedy would cause a current employee to lose his or her job. Justice Rehnquist would not allow any race-based preferences for persons other than the identified victims of a particular employer's discrimination. Thus, he would hold that the expectations of nonminorities outweigh the plaintiffs' interest in a group remedy. Although Justice Burger, in deference to the powers of Congress, upheld the minority set-aside in Fullilove, he too would prohibit race based discriminatory remedies under Title VII.

176 Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019, 3052 (1986); Johnson, 107 S. Ct. at 1451; Paradise, 107 S. Ct. at 1073.
177 Sheet Metal Workers, 106 S. Ct. at 3057 n.3 (Powell, J., concurring); Paradise, 107 S. Ct. at 1075-76 (Powell, J., concurring).
178 Sheet Metal Workers, 106 S. Ct. at 3061 (O'Connor, J., dissenting) (quoting EEOC v. Local 638 ... Local 28 of the Sheet Metal Workers' Int'l Ass'n, 753 F.2d 1172, 1186 (1986)).
In cases involving competitive seniority and layoffs, nonminority employees have fared better than they have in hiring cases. Although this disparate treatment is based on questionable constitutional analysis, the Court has nevertheless weighed the interests of employees in layoff cases more heavily than it has weighed the interests of applicants in hiring cases.

The Court has yet to approve a remedy that allows laying off senior white employees in order to protect newly hired blacks. In *Firefighters v. Stotts*, the district court enjoined the City of Memphis from applying its “last hired, first fired” seniority policy insofar as it would decrease the percentage of black employees in certain job classifications. When Memphis decided to lay off some employees, the court’s order forced the city to lay off some nonminority employees with more seniority than the retained minority employees. Five members of the Supreme Court found this remedy improper, in part because of its effect on nonminority employees. As Justice O’Connor, concurring in the decision, stated explicitly: “A district court may award preferential treatment only after carefully balancing the competing interests of discriminatees, innocent employees, and the employer.”

The Court returned to the question of layoff protection in *Wygant v. Jackson Board of Education*, an equal protection challenge to a provision in a collective bargaining agreement extending preferen-

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184 Admittedly, this is not the only area in which employees have received greater protection than applicants or probationary employees. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972) (procedural due process rights). Employees generally have procedural due process rights, however, only when they have a property interest in their job. The interests of nonminority employees are protected even when they have no enforceable right to their jobs under state law.
186 Id. at 567.
187 In so ruling, the district court was modifying an earlier consent decree. The consent decree provided promotion and back pay to various employees and adopted a long-term goal of increasing minority representation in each job classification in the fire department. The status of the court’s order as a modification of the consent decree clouded the procedural posture of the case, and led to considerable discussion of what kinds of violations were or could have been proven if the case had been fully litigated. Id. at 565-68.
188 Id. at 579. The language in *Stotts* indicating that only identified victims may receive seniority relief was disapproved as dictum in Local 28, Sheet Metal Workers Int’l Ass’n v. EEOC, 106 S. Ct. 3019, 3049 (1986).
189 Stotts, 467 U.S. at 588 (O’Connor, J., concurring).
tial protection against layoffs to some minority employees. As in Stotts, five Justices found the racial preference unacceptable. Justice Powell, writing for himself and Justices Burger and Rehnquist, distinguished Wygant from the earlier hiring cases. Hiring goals, wrote Justice Powell, "may burden some innocent individuals, [but] they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job." As she had in Stotts, Justice O'Connor framed the issue in language that more explicitly recognized the need to balance interests, stating that affirmative action plans must refrain from imposing "disproportionate harm on the interests . . . of innocent individuals directly and adversely affected by a plan's racial preference." Thus, because of the impermissible effect on white employees, the Court deemed the layoff plan in Wygant an unacceptable means of curing past discrimination. Justices Marshall, Brennan, and Blackmun, on the other hand, would have upheld the plan. Justice Marshall noted that the plan was a compromise which carefully balanced the equities involved and which had been developed through a process involving representatives of all affected groups.

As the above discussion illustrates, the employment cases as a group give varying deference to absent-party interests. When individual minority plaintiffs prove injury, the interests of white employees generally will not prevent courts from awarding hiring,

191 Id. at 282-83.
192 Id. at 287 (O'Connor, J., concurring). Justice O'Connor further notes that it is unnecessary for the Court to resolve the "troubling question [ ] of whether any layoff provision could survive strict scrutiny . . . ." Id. at 293 (emphasis added).
In a later case, Justice Powell enunciated the test that he would apply to answer the constitutional question:

Of course, it is too simplistic to conclude from the combined holdings in Wygant and this case that hiring goals withstand constitutional muster whereas layoff goals and fixed quotas do not. There may be cases, for example, where a hiring goal in a particularly specialized area of employment would have the same pernicious effect as the layoff goal in Wygant. The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not on the label applied to the particular employment plan at issue.

Sheet Metal Workers, 106 S. Ct. at 3057 n.3 (Powell, J., concurring).
193 See Wygant, 476 U.S. at 295 (Marshall, J., dissenting).
194 Id. at 299.
195 Technically, white employees may not be "absent" from these lawsuits at all. Sometimes, as in Weber, Fullilove, and Wygant, they are the plaintiffs. The court's primary inquiry, however, is the proper remedies to award minorities to correct the problems of past discrimination.
backpay, promotion, or competitive seniority remedies.\textsuperscript{196} Courts may also grant class-based relief for persons who are not individual victims,\textsuperscript{197} but courts will weigh the interests of white employees more heavily in these cases.\textsuperscript{198} As the group of nonminority employees adversely affected by the remedy gets smaller and the remedy gets more job threatening, courts give the nonminority interests increased weight. The Court, however, apparently does not consider the employer’s ability to change the remedy’s effect on nonminorities by using alternatives to layoff or by promoting or training more employees.

\section*{III}

\textbf{EQUITABLE INTEREST BALANCING ANALYZED: PATTERNS AND PRACTICES}

\textit{A. What Tips the Scales?}

At least six considerations enter into the Supreme Court’s equitable remedies calculus. First, the Court applies a different standard in cases based on constitutional rights than in cases based on legislative enactments. To some degree, the Court’s analysis also varies according to the specificity of the remedial provisions set forth in the statutes. Second, the Court weighs the interests of local governments—interests of both convenience and federalism—more heavily than the interests of absent individuals. Therefore, to the extent that third parties identify their interests with those of a governmental body, they are more likely to have their interests considered. Third, the Court gives some attention to the possible disruptive results that may be caused by the contemplated relief. A fourth and related factor is the absent party’s ability to thwart the remedy through resistance or avoidance. A fifth consideration is the source of the suggested remedy: Did it come from the defendant institution, the agreement of the parties, or was it imposed by a lower


\textsuperscript{197} \textit{See supra} text accompanying notes 171-94.

\textsuperscript{198} \textit{See supra} text accompanying notes 153-62.
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court? Sixth, the Court considers whether a group is available to administer the remedy.

1. The Basis of the Cause of Action

In cases based on federal statutes, the interests and expectations of absent parties are apt to receive less weight than they do in cases directly based on the Constitution, except insofar as the statute specifically gives those interests some weight. The balancing is foreordained by Congress.

For cases brought under an Act of Congress rather than the Constitution, the problem, formally at least, is not difficult. The courts can be said to be engaged in carrying out the legislative will, and the legitimacy of judicial action can be understood to rest on a delegation from the people's representatives. The judiciary is also, at least in theory, accountable: If Congress is dissatisfied with the execution of its charge, it can act to modify or withdraw the delegation.

The cases surveyed above illustrate the differences in weight the Court gives to absent party interests in constitutional versus legislative cases. In desegregation litigation brought under the fourteenth amendment, the Court has consistently given third-party expectations considerable weight. The Court limited the importance of absentee interests only when plans such as voluntary transfer and "freedom-of-choice" were revealed to be the equivalent of no remedy at all for black schoolchildren. Third-party interests, such as local control over schools, neighborhood attendance patterns, and time spent on buses, have had significant impacts on the remedies allowed successful plaintiffs in school desegregation cases.

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201 Chayes, supra note 1, at 1314.
203 Goss v. Board of Educ., 373 U.S. 683 (1963). Under voluntary transfer, a student, upon request, would be permitted, solely on the basis of his own race and the racial composition of the school to which he has been assigned by virtue of rezoning, to transfer from such school, where he would be in the racial minority, back to his former segregated school where his race would be in the majority.
These interests have also resulted in the increasing use of remedies such as "super schools" with enriched educational opportunities, which affect nonparties only insofar as paying for them may increase local taxes.\textsuperscript{206}

In employment discrimination cases brought under Title VII, on the other hand, the interests of absentee white employees have had less influence on the remedy. When plaintiffs as a class have proved actual discrimination against themselves as individuals, courts have allowed the interests of nonminority employees to affect the remedy only in unusual cases.\textsuperscript{207} Even in cases of group remedies that benefit persons who were not proven victims of a particular employer's discrimination, the interests of nonminorities have not always been controlling. When the remedy has affected a large group of nonminority third parties by foreclosing one of numerous job opportunities, their interests have been insufficient to prevent the court from granting a remedy.\textsuperscript{208} This is true even though remedies such as hiring goals and minority set-asides will adversely affect specific white applicants. Absentee interests have worked to eliminate a remedy creating a race-based preference only when the remedy would have eliminated most work opportunities for a small and identifiable group.\textsuperscript{209}


\textsuperscript{207} E.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 372-76 (1977) (Court considered the legitimate expectations of employees innocent of wrongdoing).

\textsuperscript{208} See Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019, 3057 (1986); United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979); cf. Fullilove v. Klutznick, 448 U.S. 448, 484 (1980) (plurality opinion) (remedies to cure effects of prior discrimination may require "sharing of the burden" by innocent parties).

\textsuperscript{209} See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (plurality opinion); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). In cases brought under Title VII, courts will determine the interests of nonminority employees under § 703 (voluntary remedies) and § 706(g) (court ordered remedies). \textit{See} Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. at 3073 n.8; Weber, 443 U.S. at 197. In cases brought under the fourteenth amendment challenging voluntary action by public employers, the Court uses an equal protection analysis to evaluate the decree's effect. \textit{See}, e.g., \textit{Wygant}, 476 U.S. 267 (1986). The Court is split on the issue of the difference, if any, in the two standards. Justices Brennan, Marshall, Powell, Blackmun, and Stevens have opined that Title VII may allow conduct that would be prohibited by the fourteenth amendment. Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442, 1449 n.6 (1987). Justices O'Connor, Scalia, White and Rehnquist would find that Title VII requires at least as much as the Constitution. \textit{Id.} at 1463 (O'Connor, J., concurring), 1469 (Scalia, J., dissenting). \textit{Cf.} Regents of Univ. of Cal. v.
The weight a court will give absentee interests also varies with the specificity of the remedy provisions of the applicable statute. Congress often expresses general goals or policies in enacting fundamental social and economic legislation. Consequently, judges are left a wide measure of discretion in awarding remedies under such statutes.\footnote{Chayes, \textit{supra} note 1, at 1314. In 1978, Congress amended Title VII to include discrimination based on pregnancy in response to the Court’s ruling in \textit{General Elec. Co. v. Gilbert}, 429 U.S. 125 (1976), which held that pregnancy policies did not discriminate against women.}

The Court places more weight on congressional intent and less weight on absentee-party expectations when it deals with a statute specifically addressing relief. Title VII, for example, contains a separate section describing the relief appropriate under the Act.\footnote{42 U.S.C. § 2000e-5(g) (1982).} The Act also contains specific provisions limiting the cause of action and the type of relief that courts can order.\footnote{42 U.S.C. § 2000e-5(g) states: \begin{quote} No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, . . . if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination . . . in violation of section 2000e-3(a) of this title. \end{quote}} Therefore, debates about the propriety of remedies for Title VII violations tend to center more on the congressional intent behind these provisions and on the meaning of the statutory language than on the balancing of competing interests.\footnote{See, e.g., \textit{Sheet Metal Workers}, 106 S. Ct. 3019, 3045-47 (Brennan, J.).} The Court gives less weight to absentee interests inconsistent with the congressional goals of the legislation than it gives to interests supported by the language and legislative history of the statute.\footnote{Compare \textit{Stotts}, which cites the seniority protection portion of Title VII, with \textit{Weber}, which does not. See \textit{Sheet Metal Workers}, 106 S. Ct. at 3048 (opinion of Brennan, J.) (distinguishing \textit{Stotts} because of the effect of the seniority provisions of § 703(h) of Title VII).}

The Court’s treatment of Title VII remedies contrasts with its
interest balancing under statutes that lack explicit remedy provisions. The proxy provisions of the Securities Exchange Act,\(^{215}\) for example, contain no specific statutory remedy. Even the existence of a private right of action under the statute had to await judicial determination.\(^{216}\) Therefore, when the Court balances interests under section 14 of the Act, congressional intent is not decisive. Instead, the Court relies on general equitable balancing, and often gives the interests of absentee parties sufficient weight to prevent the unscrambling of an unlawful merger.\(^{217}\)

2. Local Government Interests Versus Individual Interests

A recurring problem associated with federal injunctive relief against state or local governments is the extent to which such a decree will interfere with the operation of that government. This problem is inherent in the federal system. Thus, the Court weighs state and local government interests quite heavily.

The Court weighs two kinds of governmental interests against the desirability of the plaintiffs' requested injunctive relief. One interest is the avoidance of administrative inconvenience. In the school desegregation cases, the Court mentioned administrative inconveniences such as busing logistics, the physical condition of school buildings, personnel needs, administration of redistricting,\(^{218}\) taxes, school bonds, supply purchasing, and school board elections\(^{219}\) as factors to consider in structuring a remedy.

The second type of governmental interest that deters the Court from ordering injunctive relief against state governments revolves around federalism concerns. The Court has repeatedly mandated that judges use great care in applying federal equitable power to control state administration of state law.\(^{220}\) Considerations of federalism are a powerful force influencing remedial decrees, particularly when the proposed remedy threatens to interfere with the


\(^{220}\) For example, in Rizzo v. Goode, 423 U.S. 362 (1976), the Court rejected a remedy for police brutality that had been prepared by the police department under court order. The Court based its rejection on the "'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" Id. at 378 (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951) (an early abstention exclusionary rule case)). For a comment on the interaction of principles of federalism and equity in Rizzo, see L. Tribe, supra note 104, § 3-41, at 156 (1978).
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internal affairs of a state. Thus, in the school desegregation cases, local governmental interests played a major role in limiting equitable relief. Individual concerns, such as the amount of time children spent on buses, were mentioned less frequently. However, when the interests of third parties were expressed in state statutes, the Court afforded those interests more weight. For example, when the preamble to a state statute embodied the interests of parents objecting to busing, the Court legitimized those interests and gave them great weight. However, in a private school case, in which there were no governmental parties, the Court gave the interests of white parents and school administrators only cursory treatment.

Even in cases brought under federal statutes, as opposed to the Constitution, the Court may give governmental interests more weight than personal interests. While problems of federalism and governmental administration are not usually a factor in Title VII cases, they may become important when the employer is a governmental body. The Court's reluctance to shift the remedial burden to the municipal government in Manhart is illustrative. Although the Court attributed its reluctance to impose retroactive relief to the expectations of retired employees, Justice Marshall noted that any effect on retired employees could have been avoided by putting the burden on the discriminating city.

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221 See Milliken I, 418 U.S. at 741-43; Brown II, 349 U.S. at 299-301.
223 See, e.g., Crawford v. Board of Educ., 458 U.S. 527, 545 (1982) (The Court held that since the proposition's stated purpose—to further the public interest—was legitimate and nondiscriminatory, the Court would not dispute the lower court's judgment that the proposition was valid.).
224 Runyon v. McCrary, 427 U.S. 160 (1976). This difference in treatment, however, may also be due to the fact that the issue in Runyon was violation rather than remedy. Cf. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 721-23 (1978) (absentee interests did not affect finding a violation, but prevented awarding retroactive relief).
225 Manhart, 35 U.S. at 719-21.
226 Id. at 732 (Marshall, J., concurring in part and dissenting in part). Similarly, in Stotts those justices who invalidated the layoff protection remedy relied on the interests of white employees. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). As Justice Blackmun pointed out, however, the district court did not order the city to lay off any employees, and the city could have avoided the problem by finding an alternative to layoffs to solve its financial crisis. Id. at 605 (Blackmun, J., dissenting). Voter redistricting cases also demonstrate the different weight given to individual and governmental interests. In those cases which assert the political interests of local governments or governmental administrative problems, such interests weigh heavily against a full and immediate remedy. See, e.g., Reynolds v. Sims, 377 U.S. 533, 583-85 (1964) (concerns with governmental stability and continuity, and the complexities of election laws, should be considered when deciding the immediateness of relief). This can be con-
3. Extent of Disruption Caused by the Remedy

The more widespread the disruption an equitable remedy is apt to cause, the greater the weight the Court will give to interests that advocate less disruption. "[T]he interest in immediate protection of constitutional rights may be offset by the disruptive effects of injunctive relief . . . ."227

This principle can be observed in the Supreme Court’s desegregation and employment discrimination decisions. In desegregation cases, in which a remedy giving complete relief affects a school system or perhaps a whole city, the interests of absent parties figure more prominently than they do in most employment cases, in which the disruption will be confined to one company’s employment practices.

The Court does not, however, wholly ignore disruption in employment discrimination cases. The problem of company disorder may have been the basis for the Court’s suggestion in Franks228 and Teamsters229 that the remedy should vary with the number of people involved. Disruption also may explain the difference between the hiring cases and the layoff cases. Hiring and promotion goals affect specific individual applicants, but on a theoretical plane they also affect a larger and less identifiable group. Fictional seniority, at least at the time of the award, is also less disruptive than layoffs, as it does not allow a minority employee to replace a nonminority worker.230 Protection from layoff, however, can result in specifically identifiable employees losing their jobs,231 a situation which the Court has yet to find acceptable.232 Even in awarding damages,
disruption can be significant. The payment of damages and read-
justment of assessment schedules were factors the Court considered
in denying retroactive relief in *Manhart.*

Another kind of disruption that weighs in the Court's balancing
is one that arguably should be ignored: public hostility to the rem-
edy. Justice Marshall suggested that, beginning with *Milliken I,*
the Court's limit on school desegregation remedies arose not out of
legal principles, but out of a perceived public belief that the courts
had gone far enough. Perhaps a strong public aversion to prefer-
ential layoff protection also helps support the hiring/layoff distinc-
tion in affirmative action remedy cases.

Some commentators have suggested that the Court's limits on
remedies spring from hostility toward civil liberties rather than
from principles of equitable interest balancing. One commentator
voiced the suspicion "that at bottom [the Court's] procedural stance
betokens a lack of sympathy with the substantive results and with
the idea of the district courts as a vehicle of social and economic
reform." Another characterized the Burger Court's first years as
a "sad period of ... activism [against individuals and minorities]
cloaked in the worn-out if well-meant disguise of judicial re-
straint." Nevertheless, public hostility, at least if it does not
reach the level of an affront to the Court's authority, is a factor
that may limit injunctive relief.

4. *Third-Party Ability to Thwart the Remedy*

If third-party resisters have the ability to subvert the remedy or-

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233 The court considered the potential disruption which would be caused by requiring
the defendant to pay large damage awards and change current insurance and pension
plan rules as a factor in deciding to deny retroactive relief in *Manhart* and *Norris.* City


235 "Today's holding, I fear, is more a reflection of a perceived public mood that we
have gone far enough in enforcing the Constitution's guarantee of equal justice than it is
the product of neutral principles of law." *Id.* at 814 (Marshall, J., joined by Douglas, J.,
Brennan, J., and White, J., dissenting).

236 Chayes, *supra* note 1, at 1305.


238 Wright v. Council of Emporia, 407 U.S. 451, 456-59 (1972); Monroe v. Board of
Comm'r's, 391 U.S. 450, 454-57 (1968).
dered by the Court, their potential resistance may affect the remedy ultimately ordered. While the Court will not tolerate open resistance,\textsuperscript{239} resistance in the form of retreat and abstention seems to limit the remedies that courts will order.

A classic example of resistance is white flight, the decision of white families that are unhappy with desegregation remedies to leave the school system.\textsuperscript{240} In this context, individual families may balance the interests at issue differently than courts. "The decision to flee . . . is made when private individuals conclude that the net costs of the remedy to them, as they perceive and evaluate the remedial costs, exceed the net costs of fleeing."\textsuperscript{241} If significant numbers of white families leave a school system, integration will no longer be possible because not enough nonminority children will be left to desegregate the system. Thus, the ability to flee is the ability to render a remedy ineffective. When third parties are able to resist by retreat and abstention, as white families are able to do in school desegregation cases, courts seem to give greater weight to the third-party interests.\textsuperscript{242}

In contrast, white flight is not a significant factor in forming remedies in employment discrimination cases. Although some people might leave a job rather than work with minorities, such defections seem unlikely. Further, court ordered integration of the workplace does not cause the kind of temporary adverse consequences which may result from desegregation remedies.\textsuperscript{243} This difference may

\textsuperscript{239} See supra note 236.

\textsuperscript{240} Although numerous factors lead to white movement away from central cities, recent studies tend to agree that desegregation remedies hasten their exit. See Rossell, \textit{Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Plans?}, 12 J. LEGAL STUD. 69, 85-87, 93 (1983).

\textsuperscript{241} Gewirtz, supra note 13, at 634 (emphasis in original).


\textsuperscript{243} Desegregation remedies often require a readjustment of student attendance zones, student transportation, staff assignments, building use, and the location of special programs. The remedy may affect thousands of children and their families. Where the segregated system included schools that were separate but unequal, integration may introduce white students to the effects of inferior programs and physical plant. In the workplace, by contrast, the effects of a small shift in the racial composition of the workforce should be minimal.
contribute to the fact that white expectations receive less weight in employment cases than they do in desegregation cases.

5. Source of the Remedy

In institutional reform litigation, the Court's decree sometimes results from interparty negotiation, thus partially eliminating the "danger of intruding on an elaborate and organic network of . . . relationships." A remedy imposed by a court may not have this advantage.

At times, the standard of review the Court applies to a remedy depends on the source of the remedy. Whether the defendant suggested the remedy or whether it was imposed by the trial judge is very important to the Court. In *Milliken*, the Court carefully pointed out that "[t]his is not a situation where the District Court appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution." Local school boards can provide remedies that a court could not order. Thus, although a court cannot order continuous adjustments to maintain racial balance, a local school board may make such adjustments voluntarily. Similarly, in legislative reapportionment cases the origin of the remedy is highly significant. The Court does not scrutinize a plan created by the legislature as carefully as it considers one imposed by a district court. Apparently, the assumption underlying this principle is that the defendant, at least when it is a governmental entity, is more likely to have considered all relevant interests.

244 Chayes, *supra* note 1, at 1299. There are many forces which encourage parties to embody their settlements in consent decrees. First, consent decrees are subject to continuing oversight and interpretation by the court. Second, a consent decree may be easier to enforce than a contract. Third, litigation concerning a consent decree will go to the court which entered the decree, thus avoiding multiple forums and duplication of effort. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3076, 3082 n.13 (1986) (quoting Schwaeschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 889 and Brief for National League of Cities as Amicus Curiae 25).


In employment discrimination cases, the Court usually gives more leeway to remedies arising out of settlement agreements and consent decrees than to those imposed by a court. In *Local 93, International Association of Firefighters v. City of Cleveland*, the Court upheld a consent decree entered into by plaintiffs and the city employer over the objection of the union, noting that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." Similarly, in *Weber*, *Fullilove* and *Johnson*, the voluntary nature of the remedy influenced the Court. The strong policy favoring settlement of employment discrimination cases supports greater deference to agreed remedies. The Court has repeatedly noted that Congress intended voluntary compliance to be the preferred means of meeting the Title VII objectives. The Equal Employment Opportunity Commission, the agency charged with investigating claims of employment discrimination, also encourages affirmative action and voluntary settlement.

Even in fully litigated cases, trial courts sometimes circulate proposed remedial orders among the parties for comments, corrections, or suggestions. This procedure provides an opportunity for the court and the parties to fine tune the remedy ordered and eliminates some possible challenges.

6. Administration of the Remedy

The Court appears more willing to enter a decree that will disap-

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251 Id. at 3077.
255 See *Local No. 93*, 106 S. Ct. at 3072; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (quoting United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973)) (the purposes of Title VII can be achieved by the prospect of a court ordered backpay award which "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . . .").
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point nonparty expectations if a group exists that can administer the remedy. In part, this difference is based on the traditional judicial distaste for prolonged court involvement in administering remedies. The view that such long term judicial activism can be improper influenced the Court's decision in Pasadena City Board of Education v. Spangler. In that case, the Court held that the district judge exceeded his authority in deciding to supervise the racial composition of Pasadena schools during the judge's tenure.

In employment discrimination cases, employers or unions provide ready administrators. The Court may impose new employment policies, but the same people will administer those policies as are generally charged with the company's personnel function. A remedy that gives plaintiffs full relief may therefore place no extra administrative burdens on the federal courts and is more likely to be upheld. Also, some of the Justices see a union's participation in remedy formation as some representation of absentee interests.

The remedy administrator's importance to the Court is demonstrated most clearly by contrasting two interdistrict remedy cases: Milliken I and Hills v. Gareaux. In Milliken I, the Court found the administrative problems insuperable. Consequently, the Court declined to supervise the restructuring of state and local school administration to coordinate relief. In Hills, a housing case, the Court distinguished Milliken I since the wrongdoer in Hills, the Department of Housing and Urban Development, could administer an interdistrict remedy. "[A] metropolitan area remedy

\[259\] Id. at 438-40.

260 Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 312 (1986) (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting); Id. at 317-18 (Stevens, J., dissenting); United Steelworkers v. Weber, 443 U.S. 193, 197 (1979); cf. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 588 n.3 (1984) (O'Connor, J., concurring) ("[I]f innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process."). But see Wygant, 478 U.S. at 281 n.8 (opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J.). ("The Constitution does not allocate constitutional rights to be distributed like block grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights.").


263 Milliken I, 418 U.S. at 743-44. Cf. United States v. Board of School Comm'rs, 368 F. Supp. 1191, 1205 (S.D. Ind.) (ordering interdistrict relief, but allowing the Indiana General Assembly "a reasonable time" in which to devise and implement a remedy), aff'd, 483 F.2d 1406 (7th Cir.), cert. denied, 413 U.S. 920 (1973). For a history of this case, see Marsh, The Indianapolis Experience: The Anatomy of a Desegregation Case, 9 IND. L. REV. 897 (1976).
involving HUD need not displace the rights and powers accorded suburban governmental entities under federal or state law." 264

7. Summary of Balancing Trends: The Importance of Being Public

The six judicial considerations outlined above do not occur in isolation. They coexist and overlap, sometimes reinforcing one another and sometimes competing for prominence. In addition, the application of these considerations differs between private-party cases and cases involving local government defendants.

Institutional reform litigation is sometimes a contest between private parties. 265 However, the litigants' private status does not eliminate the presence of third-party interests. For example, in securities cases the interests of absent shareholders may be affected by any injunctive relief ordered, 266 just as the interests of white employees in employment discrimination cases may be affected. 267 Yet the equitable balancing in these cases does not differ markedly from the traditional model unless the remedy ordered violates the underlying statute. "[T]he immediate parties' interests [are] to be weighed and evaluated, [after which the court will] proceed to [consider] other interests that might be affected by the order." 268

When the defendant is a local government, the scales are tipped from the beginning. In such cases, the Court applies a rule that Justice Stewart found applicable in another context: "The Government always wins." 269 If a state does not win on the merits, it often succeeds in persuading the Court to give great weight to governmental concerns in structuring a remedy.

In some ways, the defendant's status as a local government affects each of the six judicial considerations discussed above. That the

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264 Hills, 425 U.S. at 298 n.13.
266 See, e.g., Mills, 396 U.S. at 388 ("[A] determination of what relief should be granted... must hinge on whether setting aside the merger would be in the best interests of the shareholders as a whole.").
267 See, e.g., Weber, 443 U.S. at 201 (although recognizing that race based affirmative action plans discriminate against whites, the Court upheld the plan because it was voluntarily entered into by private parties "to eliminate traditional patterns of racial segregation.").
268 Chayes, supra note 1, at 1293.
Court gives more weight to absentee interests in constitutional litigation may stem from the fact that a constitutional claim generally requires a government defendant. Thus, the limited remedies afforded plaintiffs in these cases may reflect deference to government. Additionally, an equitable decree imposed on a governmental defendant is more likely to cause greater disruption. Such a remedy is likely to affect large numbers of people either directly or indirectly, through budget reallocations caused by the court's order. Consequently, when a remedy requires the creation of a new governmental agency or a new governmental body representing multiple local governments, the Court is extremely unlikely to impose the remedy.

Even when other factors work in favor of a remedy, governmental interests can prevent it. For example, although local school boards can implement desegregation plans, the attendant administrative difficulties are given great weight. Even decrees that cause minimal disruption, such as those that require only mathematical calculations and the repayment of money, are sometimes rejected as too burdensome on absentee interests and on local government.

B. Evaluating the Patterns

The Court has adopted an interest-balancing approach to making equitable relief decisions in institutional reform cases. Interest balancing was derived from early equity cases involving actions such as nuisance or trespass. However, courts hearing those early cases subjected the plaintiff's rights to balancing only when those rights were minimal. Today, in the institutional reform cases, the Court applies balancing principles to cases in which the plaintiff has been deprived of important constitutional or statutory rights instead of minimal property rights.

The early equity courts balanced interests for a number of reasons. They balanced to adjust the timing of a remedy to minimize disruption. They balanced to permit methods of granting full relief that were less onerous to defendants. They balanced to grant

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273 See, e.g., New Jersey v. City of New York, 283 U.S. 473 (1931) (allowing the city reasonable time to build incinerators, rather than immediately banning garbage disposal); Standard Oil Co. v. United States, 221 U.S. 1 (1911) (final decree delayed for at least six months, in view of possible injury to public if immediately granted).
274 See, e.g., New Jersey v. City of New York, 283 U.S. 473 (1931) (allowing defend-
greater relief to plaintiffs than would have been available at law.\textsuperscript{275} In cases in which the plaintiffs' rights were minimal and the public interest was great, the courts balanced such interests and refused to grant equitable relief, giving money damages instead.\textsuperscript{276} However, the early equity courts did not balance away plaintiffs' important rights and leave them without a remedy.\textsuperscript{277}

Nevertheless, the Supreme Court has relied on established principles of equity to support its interest-balancing approach to institutional reform cases which, in many cases, balanced away plaintiffs' rights. To a great extent, the Court's lack of candor about what was actually being balanced allowed plaintiffs' interests to be defeated. In \textit{Brown II}, the Court spoke only of small delays to accommodate transitional difficulties and local conditions. There is some precedent for such delays in certain cases.\textsuperscript{278} In addition, the equitable principles cited in \textit{Swann} might support a fine tuning of remedies to minimize the amount of time children spend on buses, or to avoid disruption of the educational process.\textsuperscript{279} Precedent does not, however, support all of the balancing choices that the Court has made.

As a result of its loose application of precedent and its ad hoc approach to balancing in institutional reform litigation, the Supreme Court has erred in certain systematic ways. Those errors

\textsuperscript{275} See, e.g., SEC v. United States Realty & Improvement Co., 310 U.S. 434 (1940) (court may use equity powers to go beyond bankruptcy statutes); United States v. Morgan, 307 U.S. 183 (1939) (court may go beyond a statute to effectuate its remedial goal).

\textsuperscript{276} See, e.g., Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904) (money damages awarded in lieu of injunction against smelter operation); Grey ex rel. Simmons v. Mayor of Paterson, 60 N.J. Eq. 335, 45 A. 995 (1900) (no injunction against a city sewer system).

\textsuperscript{277} Compare Murtfeldt v. New York, W.S. & B. Ry., 102 N.Y. 703, 7 N.E. 404 (1886) (refusing to enforce a contract to erect a private crossing when the location of the road made construction difficult and the crossing would be of no value to plaintiff), with Fox v. Spokane Int'l Ry., 26 Idaho 60, 140 P. 1103 (1914) (enforcing a similar contract when construction was of approximately the same difficulty, but the crossing would be useful to plaintiff). \textit{Cf.} H. McClintock, supra note 17, \S 145, at 388 ("When the defendant who is committing legal wrong asks equity to balance the hardship to him against the injury he is inflicting on plaintiff, he ought not to prevail because of a mere difference in the money injury suffered.").

\textsuperscript{278} See City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

\textsuperscript{279} However, when he set these factors out in \textit{Swann}, Chief Justice Burger cited no cases to support the balancing of time on a school bus against effective integration. Rather, he relied on general principles of equity, citing Hecht Co. v. Bowles, 321 U.S. 321 (1944). See supra text accompanying notes 12, 54, and 64-67.
have resulted in overvaluing the interests of nonparties or undervaluing the rights of successful plaintiffs. More specifically, the Court has (1) balanced interests that should not be balanced, (2) mischaracterized certain interests in ways that overstate or understate their importance, and (3) given too much weight to some interests and too little weight to others. These errors have distorted the Court's balancing process and led to results that generally favor the government at the expense of individuals and third parties at the expense of plaintiffs.

1. Balancing the Unbalanceable

Although the Court may legitimately balance competing social goals against a full remedy for plaintiffs, it should not give independent weight to third-party resistance to the plaintiffs' rights. In school desegregation cases and, to a lesser degree, in employment discrimination cases, the Court has let such resistance influence its decisions.\(^{280}\)

In school desegregation cases, for example, resistance has always been a factor. In *Brown II*, the likelihood of public opposition was an unspoken motivation behind the Court's tolerance of "all deliberate speed."\(^{281}\) As time passed, resistance gained increasing acceptance as a factor to be balanced. Justice Powell's opinions, for example, recognized white flight as a relevant consideration.\(^{282}\) The *Crawford* majority's acceptance of "preserving harmony" as a neutral and acceptable legislative goal also seems to give weight to third-party resistance.\(^{283}\)

A court cannot realistically ignore third-party resistance to the plaintiffs' rights. To do so could unwittingly undermine the relief the court seeks to order. A court could, however, recognize the existence of such resistance but reject its legitimacy and thus provide more complete relief for the plaintiffs. Further, the Court must explicitly reject resistance that is purely resistance to the right itself. On the other hand, the Court should accommodate, to the extent possible, third-party resistance to the interim effects of a remedy.

\(^{280}\) See *supra* text accompanying notes 233-36; see *infra* text accompanying notes 281-82.

\(^{281}\) See, e.g., *supra* note 59.


\(^{283}\) See *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 543 n.29 (1982).
Courts can structure remedies to reduce resistance by minimizing the negative interim effects in ways that do not deny relief to the plaintiffs.284

The Court's unspoken deference to third-party resistance has made both of the above-mentioned options impossible. The Court has neither specifically rejected resistance as a relevant factor in institutional reform litigation balancing, nor suggested or approved remedies designed to lessen interim resistance. By deferring to third-party resistance without admitting it, the Court has given resistance great weight without precedential support for doing so285 and has avoided taking steps to minimize resistance by third parties.286

2. Problems of Mischaracterization

At times, the Court's characterization of some rights as private and others as public has been faulty. First, the Court has treated the desires of private individuals asserting private interests as public. Second, the Court has characterized as public governmental interests that are no more than the private interests of a governmental body. As a result, the Court has given excessive weight to interests opposing complete relief.

The Court, in balancing interests in institutional reform cases, has said that it balances the plaintiffs' private interests against the public interest. However, such a flat statement does not explain why the interests of black children and employees are considered private while the interests of white children and employers are considered public. By characterizing the preferences of third parties as "public interests," the Court has given those interests weight that

284 See generally Gewirtz, supra note 13 (emphasizing desegregation and white flight).
285 See supra text accompanying notes 279-83.
286 Justice Powell's dissent in the Court's dismissal of certiorari in the Dallas school case, for example, argued for reinstatement of the district court's order that maintained a number of one-race schools, apparently because he presumed that greater integration was impossible. Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437 (1980) (Powell, J., dissenting from dismissal of writs as improvidently granted). On remand, however, the district court decreased the number of one-race schools and ordered certain educational enhancement remedies, without sacrificing important societal interests. Tasby v. Wright, 630 F. Supp. 597 (N.D. Tex. 1986) (creating West Dallas learning centers); Tasby v. Wright, 585 F. Supp. 453 (N.D. Tex. 1984) (creating South Dallas learning centers), aff'd sub nom. Tasby v. Black Coalition to Maximize Educ., 771 F.2d 849 (5th Cir. 1985); Tasby v. Wright, 520 F. Supp. 683 (N.D. Tex. 1981), modified, 713 F.2d 90 (5th Cir. 1983).
would not be due if the interests of one private group were pitted against those of another.

Especially in cases involving a governmental defendant, the distinction between the interests of the liable entity and the third parties is unclear. Opposition to the remedy may be termed a desire for neighborhood schools (private interest) or for compact attendance zones (public interest). Opposition may be to higher taxes (private interest) or to excessive remedial costs (public interest). When third-party interests are essentially personal, especially when they involve objections to the remedy, the Court should not grant such interests enhanced status by identifying them with the public interest. Identifying once more the interests of white people with the interests of "the public" is, at minimum, a kind of dignitary harm.

Certain interests asserted by government defendants are properly characterized as public interests. Insofar as local government represents "the people," the Court should give weight to its interests. Thus, where local government promotes concerns such as participation in the political process or public health and safety, its interests are legitimately public. However, when the government merely complains of administrative inconvenience, its interests should be entitled to no more weight than those of a private litigant.

3. Problems of Weight

The Court consistently has given insufficient weight to the rights of plaintiffs in fashioning remedies in institutional reform cases. Before reaching the remedy stage, plaintiffs have proved that their constitutional or statutory rights have been violated. Yet the

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287 Perhaps because of this, groups opposing remedies have been most successful when they label their desires governmental interests. See, e.g., Crawford v. Board of Educ., 458 U.S. 527 (1982) (involving a state referendum amending the state constitution to effectively ban busing).

288 The fact that white employees' expectations are more difficult to characterize as public may explain why the Court gives less weight to those expectations than it gives to white parent's objections to desegregation remedies. The Court, however, has not expressly made this distinction and generally analyzes balancing in Title VII cases as being compelled by legislative intent.


290 See generally Milliken v. Bradley, 418 U.S. 717, 763 (1974) (Milliken I) (White, J., dissenting, notes that the segregation will be unremedied because of "undue administrative inconvenience.").
Court's balancing often affords the plaintiffs' rights less weight than it affords to government inconvenience, the unenforceable expectations of other employees, or extra time on a school bus.

As noted above, the characterization of defendant or third-party interests as public instead of private may account in part for the Court's undervaluing of plaintiffs' rights. Plaintiffs' interests are also undervalued by the Court's misuse of the balancing process. By using old equity cases in which the plaintiffs' interests were negligible as precedent, the Court sometimes ignores the importance of the plaintiffs' rights.\textsuperscript{291} Interest balancing in equity is a time-honored process which is not unique to institutional reform cases. It is used properly, however, only when the Court gives the plaintiffs' rights due weight and does not eliminate meaningful remedies. In comparing the value of certain remedial benefits with other social interests, "the social benefit of the right and the interest in undoing effects of its violation must be given exceptional weight in the balance; otherwise the Constitution's [and various statutes'] allocations of rights would be subject to a de novo utilitarian reevaluation in particular cases."\textsuperscript{292}

Another flaw in the Court's balancing approach to remedies issues in institutional reform cases is the excessive weight that the Court has given the defendants' interests. This overvaluing is due in part to the mischaracterization discussed above.\textsuperscript{293} The Court also has overvalued defendants' interests by its unwillingness to shift the burden of remedies from the plaintiffs or third parties onto defendants. For example, in school cases, the Court has not required school districts to spend money to improve dramatically the quality of education for all students in order to lessen white resistance and the problems resulting from the transition to a unitary school system.

Likewise, in the employment discrimination context, the Court did not require the government employers in \textit{Manhart} and \textit{Norris} to absorb the cost of a retroactive remedy in order to compensate plaintiffs without harming retired employees. Nor has the Court required government employers in financial straits to find money-saving alternatives to layoffs in order to protect the interests of both

\textsuperscript{291} See, e.g., Knoth v. Manhattan Ry., 187 N.Y. 243, 79 N.E. 1015 (N.Y. App. 1907); Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904); Grey ex rel. Simmons v. Mayor of Paterson, 60 N.J. Eq. 335, 45 A. 995 (1900).

\textsuperscript{292} Gewirtz, \textit{supra} note 13, at 607.

\textsuperscript{293} See \textit{supra} text accompanying notes 284-87.
plaintiffs and third parties. Instead, the Court has viewed the issues narrowly as conflicts between the plaintiffs and third parties without looking at ways to shift the remedial burden to the defendant.

Additionally, the Court sometimes has given excessive weight to the interests of third parties. Again, this is due in part to the Court's deference to resistance and to its mischaracterization of interests as public or private. Further, the Court's deference to legally unenforceable "expectations" has caused it to overvalue third-party interests. In employment cases, for example, even when discrimination against identified plaintiffs has been proved, the Court may balance the expectations of white employees against the value of a complete remedy to the plaintiff. In reviewing remedies provided to groups that may include persons who are not identified victims of discrimination, the Court has given even more weight to employee expectations. Yet in most states these employees have no enforceable legal right to continued employment.

The Court's deference to third-party expectations stems from a feeling that innocent parties should not bear the cost of a remedy. Undeniably, an effective remedy is sometimes impossible without imposing direct costs on selected third parties who did not violate the law. The extent to which this is unfair, however, will vary in ways not currently factored into the Court's balancing approach. For example, incumbent employees may have benefited from an employer's historic discrimination against minorities, and white parents and children may have benefited from segregated schooling through lower taxes or better "white" schools. Further, third parties may have contributed to discrimination as upper-level employ-

294 See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 375 (1977) (The Court acknowledged that balancing the expectations of innocent third parties was necessary, but declined to do so because of the limited facts on record.).

295 Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283-84 (1986) (less intrusive means of achieving racial balance than race-based layoff plan could be found, such as hiring goals).


297 See, e.g., Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442, 1068 (1987) ("the whites promoted since 1972 were the specific beneficiaries of an official policy which systematically excluded all blacks"); Fullilove v. Klutznick, 448 U.S. 448, 484-85 (1980) (Burger, C.J.) (upholding law requiring that 10% of federal funds granted for public works projects be used to procure services from minority owned businesses).
ees making discriminatory job decisions or as voters supporting a segregationist school board.

While the Court has considered the nature of costs imposed in its remedial interest balancing, it has not examined the relationship between the defendant and the costbearers. To the extent that such determinations are possible, an analysis of culpability would be preferable to a blanket presumption of innocence.

Since the Court has not attempted to examine the presumption of innocence, other than by judicial notice, it has not confronted the conflicts between this assumption and the way it has balanced certain interests. In employment cases, for example, the Court gives more weight to the interests of incumbent employees than to the interests of applicants. However, current employees are more likely to have been the perpetrators or beneficiaries of prior discrimination while applicants are more likely to be innocent. A presumption of, and deference to, third-party innocence again overvalues third-party interests in relation to the plaintiffs' interests.

IV

ARE THE THIRD PARTIES REALLY ABSENT?

Despite the apparent weight that the Court gives third-party interests, various groups and commentators have expressed concern that these interests are unrepresented and thus undervalued. In many cases, however, the affected third parties either participate directly in the litigation or are represented indirectly by the defendant.

Sometimes the affected parties actually intervene in the remedy stage of the lawsuit or bring suit as the original plaintiffs. For example, in the employment discrimination area, remedy issues are

298 For example, the Court's analysis of third-party rights in employment discrimination cases varies according to the kind of burden and size of the affected group. See, e.g., Local No. 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019, 3061 (1986) ("[G]oals . . . should not unnecessarily trammel the interests of nonminority employees."). In school cases, the Court considers time spent on buses. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970).


301 Government defendants or court appointed citizen committees often hold hearings during the remedy formation process which give affected parties a chance to assert their interests. See, e.g., Jones v. Caddo Parish School Bd., 487 F.2d 1275 (5th Cir. 1973) (biracial committee held seven public hearings concerning possible remedies).
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often raised by white plaintiffs bringing reverse discrimination claims. In Weber, Fullilove, Johnson and Wygant, white persons affected by a remedy brought suit. In Stotts and Local 93, a union dominated by white employees appealed the court-ordered remedies.

Similarly, in school desegregation cases white parents sometimes bring lawsuits or intervene in existing cases. In Swann, for example, a group of lower-income white parents intervened to argue that they bore an inequitable amount of the remedy's burden. In two cases, classroom teachers intervened to assert their interests in shaping the proposed remedy. Additionally, white parents hostile to student-assignment remedies have intervened in a number of cases. At the implementation stage, a number of school districts

302 Martin v. Charlotte-Mecklenburg Bd. of Educ., 626 F.2d 1165 (4th Cir. 1980) (plaintiffs brought suit to enjoin Board's implementation of pupil reassignment plan). In Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973), a group of parents wishing to challenge a pupil assignment plan tried to bring their own lawsuit but were instructed that they should instead intervene in the existing school case.


304 Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 738 F.2d 82 (8th Cir. 1984); Marsh, supra note 263, at 910 n.91. The National Education Association, however, has been denied intervention on behalf of black teachers on at least two occasions. See Bennett v. Madison County Bd. of Educ., 437 F.2d 554 (5th Cir. 1970); Horton v. Lawrence County Bd. of Educ., 425 F.2d 735 (5th Cir. 1970).

305 However, courts have tended to deny intervention to groups opposing integration more strenuously than defendants had opposed it. See United States v. Perry County Bd. of Educ., 567 F.2d 277, 280 n.4 (5th Cir. 1978) (“That a plan differing from that advanced by appellants was ultimately adopted does not mean that their interests were not represented.”); Cisneros v. Corpus Christi Indep. School Dist., 560 F.2d 190 (5th Cir. 1977) (school district had offered rigorous legal and factual arguments in support of the interests intervenors were asserting), cert. denied, 434 U.S. 1075 (1978); Spangler v. Pasadena City Bd. of Educ., 427 F.2d 1352, 1354 (9th Cir. 1970), cert. denied, 402 U.S. 943 (1971) (school board held hearings on proposed remedy and parents had opportunity to attend and influence Board's decision, but had no right to intervene); Hatton v. County Bd. of Educ., 422 F.2d 457, 461 (6th Cir. 1970) (school board had asserted "every reasonable defense" and white parents could not intervene to relitigate the desegregation cases). Cf. United States v. Board of School Comm'rs, 466 F.2d 573 (7th Cir. 1972) (affirmed denial of intervention of Citizens of Indianapolis for Quality Schools, but suggested that in view of later broadening of issues the district court reconsider and allow intervention), cert. denied, 410 U.S. 909 (1973).

306 For example, in Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976), there were at least two citizen group intervenors: Bustop, which objected to the fact that the school board allegedly exceeded its minimum constitutional obligation, and BEST, a group which "frankly disavowed any knowledge of or position toward any integration plan, but asserted that its members were well-intentioned citizens who would certainly have developed positions on the issues by the time they go to court." Yeazell, supra note 133, at 248, 259. See also Johnson v. San Francisco Unified
have used citizen monitoring commissions made up of representatives of most groups affected by the remedy.\textsuperscript{307}

The case of \textit{Tasby v. Estes},\textsuperscript{308} the Dallas school desegregation case, is an example of the kind of participation that third parties may have in the remedy stage of institutional reform litigation. The original plaintiffs represented a class of black and Hispanic children. Parents and children with differing interests intervened. They included the local branches of the National Association for the Advancement of Colored People (NAACP), two groups of persons living in naturally integrated areas of Dallas, and residents of a high-income, largely white area of Dallas.\textsuperscript{309} The district court took the basic form of the desegregation plan from a proposal by the Dallas Alliance, a community group with strong ties to the white business community.\textsuperscript{310} In addition, the court, in its first remedial order, appointed a Tri-Ethnic Committee to monitor the implementation of the decree.\textsuperscript{311} The defendant school district also had several citizen-interest organizations designed to give various groups information about, and input into, school district policy.\textsuperscript{312}

Third parties also achieve representation extrajudicially. Busing opponents in Washington and California used initiatives or referenda to change state law to protect their perceived interests.\textsuperscript{313} By
successfully identifying their interests with neutral sounding government interests, the California group succeeded in limiting the remedies available to successful plaintiffs.\textsuperscript{314}

In short, concerns about the lack of third-party representation in institutional reform cases are overstated, both procedurally and substantively. In many cases, the interests of third parties are actually represented by one of the parties to the suit.\textsuperscript{315} Even when the interests of persons affected by equitable remedies are not represented, their interests are protected by the Court's application of traditional equitable balancing principles, sometimes in derogation of the interests of successful plaintiffs.

**CONCLUSION**

Institutional reform cases differ in purpose and party structure from traditional civil litigation. Institutional reform cases aim to restructure certain units of society. In so doing, these cases affect institutions and individuals that are not before the court. Courts, commentators, and politicians have therefore expressed concern that the rights of the absent parties and institutions not be ignored in the remedy-creation process.

A survey of school desegregation and employment discrimination cases shows that such fears are largely unfounded. Far from ignoring third-party interests, courts protect them, at least when such interests are not de minimis. The courts do so in a number of ways. First, the affected parties are often \textit{not} absent. Many groups intervene at the remedy stage as parties or as litigating \textit{amici} of sorts, and thereby have an opportunity to protect their interests directly. Other groups have a chance to voice their interests through the decision-making processes of the defendant institution.\textsuperscript{316}

\textsuperscript{314} See supra note 221 and accompanying text.

\textsuperscript{315} Indeed, in many cases, the defendant has identified itself with those interests all along. Many school districts, for example, fought desegregation as long and hard as the white parents. Many employers and unions resisted equal employment practices and affirmative action as vigorously as the white employees objecting to the remedy.

\textsuperscript{316} Substantive law also protects third parties. In creating remedies, courts generally have refused to deal with the interaction between the defendant's unlawful conduct and other institutions in the community. For example, in school desegregation cases, courts will not provide remedies for segregated housing patterns or poor economic conditions in the black community unless proved to be a direct result of illegally segregated schools. By tying the remedy to a narrow definition of violation, courts have lessened the likelihood that third-party interests will be affected by institutional reform decrees.
The Court also protects the interests of absent parties through equitable interest balancing. Even when affected third parties are absent, the Court's equitable process of balancing the rights of the defendant and the public against the rights of the prevailing plaintiff assures that the interests of third parties are considered. Although these third-party interests do not always prevail, just as they would not always prevail in the political process, they are considered and weighed in creating equitable remedies.

Institutional reform cases raise very difficult issues of fairness and test the application of theories to an imperfect world. Interest balancing may be the best vehicle that we currently have to deal with the substantive and procedural difficulties inherent in lawsuits that affect large numbers of people, some of whom are not parties to the case. However, the rights of institutional reform plaintiffs are important ones. Such rights should not be balanced away by courts with unfairly tipped scales.