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The Future of Desegregation After *Dowell*: Returning to Pre-*Brown* Days?

Board of Education of Oklahoma City Public Schools v. Dowell[1]

I. INTRODUCTION

Court-ordered desegregation is one of the major social controversies of our time. School systems that have long been subject to the remedies of desegregation want to be relieved of judicial intervention and want control returned to the local school board. This desire, however, sometimes conflicts with the mandate in *Brown v. Board of Education*[2] that "in the field of public education the doctrine of 'separate but equal' has no place."[3]

In *Dowell*, the Supreme Court concluded that local control can be returned to a school board, with the resultant elimination of busing, so long as the district has taken all steps "practicable" to eliminate vestiges of past discrimination.[4] This Note will examine these requirements for the return of local control to the school board and how they could conflict with the mandate of *Brown v. Board of Education.* It will also address whether, under *Dowell*, a finding of unitariness will automatically dissolve an injunctive decree.

II. HISTORY OF THE SUPREME COURT AND DESEGREGATION

A. *The Implementation of Desegregation Remedies: 1954-1976*

The law of desegregation had its beginnings in *Brown v. Board of Education*,[5] where the Supreme Court held that the doctrine of "separate but equal"[6] has no place in public education and that "[s]eparate educational facilities are inherently unequal."[7] The Court held that classifying students by race was suspect, and separate educational facilities violated the equal

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1. 111 S. Ct. 630 (1991).
2. 347 U.S. 483 (1954) [hereinafter *Brown I*].
3. *Id.* at 495.
4. *Dowell*, 111 S. Ct. at 637.
5. 347 U.S. 483 (1954).
6. This doctrine was expounded by the Court in Plessy v. Ferguson, 163 U.S. 537, 540 (1896), in which the Court upheld a Louisiana law providing for segregation of railroad passengers by race.
7. *Brown I*, 347 U.S. at 495.

protection rights of black children under the 14th amendment.[8] The Court stated: "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[9]

The Court did not address the question of remedies, however, until 1955 in *Brown v. Board of Education*,[10] when the Court delegated responsibility for supervising desegregation to the federal district courts, "[b]ecause of their proximity to local conditions and the possible need for further hearings."[11] The Supreme Court empowered the federal courts to "enter such orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[12] Beyond these simple edicts, the standards for determining when a system violated the Constitution and the remedies available were to be decided on a case-by-case basis by the federal courts.[13] The Court relied upon the good faith of the people to implement desegregation, but was met with stern resistance in many cases.[14] Even with the strong resistance in the South, the Supreme Court rarely intervened to enforce the principles of desegregation.[15]

Finally, in the late 1960s, the Court appeared to run out of patience with state and local practices designed to avoid desegregation. In *Green v. County School Board*,[16] the Court struck down a "freedom-of-choice" plan and established the principle that school boards were "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[17] Therefore, the New Kent County School Board was given the burden of

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8. *Id.* at 493.

9. *Id.* at 494.

10. 349 U.S. 294 (1954) [hereinafter *Brown II*].

11. *Id.* at 299.

12. *Id.* at 301.

13. *See* Note, *The Unitariness Finding and Its Effect on Mandatory Desegregation Injunctions*, 55 FORDHAM L. REV. 551, 557 (1987).

14. *See* Chandler, *The End of School Busing? School Desegregation and the Finding of Unitary Status*, 40 OKLA. L. REV. 519, 524 (1987).

15. *See, e.g.*, Griffin v. County School Bd., 377 U.S. 218, 229 (1964) ("There has been entirely too much deliberation and not enough speed in enforcing the [constitutional rights] . . . ."); Goss v. Board of Educ., 373 U.S. 683 (1963) (invalidating a transfer policy where students could transfer to any school where they would be in the racial majority); Cooper v. Aaron, 358 U.S. 1 (1958) (where the Supreme Court reprimanded the Governor of Arkansas for attempting to prevent desegregation with National Guard troops).

16. 391 U.S. 430 (1968).

17. *Id.* at 437-38.

coming forward with a plan that "promises to realistically work *now* . . . until it is clear that state-imposed segregation has been completely removed."[18]

The next major desegregation case was *Swann v. Charlotte-Mecklenburg Board of Education*,[19] in which the Supreme Court gave the federal courts more exact guidelines for desegregating a dual school system. The Court held that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad . . . ."[20] The Court approved the use of racial quotas[21] and mandatory student reassignments in fashioning a remedy,[22] and cautioned that the existence of one-race schools called for a presumption against their constitutionality.[23] Further, the Court approved the use of busing to achieve racial desegregation, but limited it and other remedies when they endanger "the health of the children or significantly impinge on the educational process."[24] The Court made it clear, however, that once desegregation has been accomplished, there is no yearly constitutional requirement to adjust racial composition in schools.[25] After desegregation, the federal courts should have no need to intervene unless there is a "showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns . . . ."[26]

Until 1973, most desegregation cases occurred in the South, where statutes or state constitutions had required racial segregation.[27] In the Supreme Court's first Northern desegregation case, *Keyes v. School District No. 1*,[28] the Court distinguished between *de facto* and *de jure* segregation. The difference between *de jure* segregation and *de facto* segregation is the intent of the school district to segregate.[29] The Court held that only *de jure* segregation, that is, "a current condition of segregation resulting from intentional state action"[30] constitutes a violation of equal protection. A showing of *de jure* segregation in a substantial portion of the school system,

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18. *Id.* at 439 (court's emphasis).

19. 402 U.S. 1 (1971).

20. *Id.* at 15.

21. *Id.* at 25.

22. *Id.* at 28-29.

23. *Id.* at 26.

24. *Id.* at 30-31.

25. *Id.* at 32.

26. *Id.*

27. *E.g., Swann*, 402 U.S. at 1 (North Carolina); *Green*, 391 U.S. at 430 (Virginia); Goss v. Board of Educ., 373 U.S. 683 (1963) (Tennessee); Cooper v. Aaron, 358 U.S. 1 (1958) (Arkansas).

28. 413 U.S. 189 (1973).

29. *Id.* at 208.

30. *Id.* at 205.

however, would be enough to presume intentional segregation in all other areas.[31] This presumption could be rebutted only by showing that segregative intent was not a motivating factor or that past segregative acts did not "create or contribute to the current segregated condition."[32]

Milliken v. Bradley[33] is usually cited as the beginning of the end of desegregation.[34] In *Milliken,* the first case in which the Supreme Court overruled a desegregation decree,[35] the Supreme Court refused to allow an interdistrict remedy[36] unless it was shown that "racially discriminatory acts of the state or local school districts . . . have been a substantial cause of interdistrict segregation."[37] In overturning the interdistrict remedy, the Court emphasized the history of public education in the United States: "No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."[38] Following the precedent established in *Milliken,* the Supreme Court held in *Pasadena City Board of Education v. Spangler*[39] that desegregation decrees were never meant to operate in perpetuity and that the federal courts could not require a school district to alter its school zones every year to respond to residential changes.[40]

31. *Id.* at 208.

32. *Id.* at 210-11.

33. 418 U.S. 717 (1974).

34. *See, e.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1495 (2d ed. 1988) (Milliken signaled the Supreme Court's mounting hesitation in the school desegregation area).

35. *Milliken,* 418 U.S. at 717.

36. An interdistrict remedy is also known as a multidistrict remedy. This remedy usually arises when a large metropolitan area with many school districts is segregated. Courts may wish to include the suburban districts in the remedy, compelling them to agree to busing students. After *Milliken,* the federal courts can no longer inflict this on multidistricts, unless certain conditions are met. *Id.* at 744-45. A discussion of these conditions and interdistrict remedies in general is beyond the scope of this Note. *See* Goedert, *Jenkins v. Missouri: The Future of Interdistrict School Desegregation,* 76 GEO. L.J 1867 (1988).

37. *Milliken,* 418 U.S. at 745.

38. *Id.*

39. 427 U.S. 424 (1976).

40. *Id.* at 436-37.

B. Defining a Unitary School System

1. The Meaning of Unitariness

The first step in terminating judicial oversight of desegregation remedies is the finding that a dual school system has achieved "unitary" status.[41] The lower federal courts are not in agreement as to the exact meaning of unitary,[42] and the Supreme Court has never defined the term more precisely than it did in *Green*, where it related the indicia of a *dual* system as segregation among students, faculty, and staff, segregation of transportation, and segregation of extracurricular activities.[43] The determination of unitariness is within the discretion of the trial judges in light of the circumstances of the case before them.[44] At a hearing to determine whether unitariness has been achieved, the school board has the burden of showing that all vestiges of past discrimination have been removed.[45] Vestiges have been defined by one commentator as "those effects of intentional discrimination which, if left unremedied, perpetuate the hallmarks of the regime of school segregation."[46] In *Green*, the Supreme Court identified the areas in which all vestiges must be removed as "every facet of school operations--faculty, staff, transportation, extracurricular activities and facilities."[47]

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41. The term unitary had its first inception in *Green*, where the Court stated that "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . ." Green v. County School Bd., 391 U.S. 430, 436 (1968).

42. Some courts hold that unitariness cannot be achieved without all the effects of segregation being remedied. *See, e.g.*, United States v. Lawrence County School Dist., 799 F.2d 1031, 1037 (5th Cir. 1986); Pitts v. Freeman, 755 F.2d 1423, 1426 (11th Cir. 1985); Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983). Other courts, however, hold that unitary status can be achieved upon successful implementation of a desegregation plan. *See, e.g.*, Riddick v. School Bd., 784 F.2d 521, 533 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413-14 (11th Cir. 1985); Mapp v. Board of Educ., 630 F. Supp. 876, 881-83 (E.D. Tenn. 1986).

43. *Green*, 391 U.S. at 435. *See also* Note, *The Unitariness Dilemma: The First Circuit's Attempt to Develop a Test for Determining When a System is Unitary*, 66 WASH U.L.Q. 615, 624 (1988).

44. *See* Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 633, 662-63 (1987).

45. *See id.* at 657-61.

46. Note, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM. L. REV. 794, 800 (1987).

47. *Green*, 391 U.S. at 435.

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2. The Consequences of a Finding of Unitariness

There are two major consequences of a finding of unitariness. The first result is a shifting of the burden of proof to the plaintiff residents. As is often the case with elements difficult to prove, allocation of the burden of proof is often dispositive of who wins and who loses a case. It is even more dispositive in desegregation cases, because after a shifting of the burden, the plaintiffs can no longer rely upon prior segregative acts such as statutes that mandated segregated schools or specific school board policies of segregation to demonstrate intentional segregation.[48] Instead, they must show subsequent intentional segregative acts aimed at *reestablishing* a dual school system to satisfy the *Keyes* requirement of *de jure* segregation.[49] This is a difficult evidentiary burden for the plaintiffs, and yet, even if the plaintiffs meet this burden, the school board need only respond by showing *de facto* reasons for its actions.[50]

A second major consequence to the finding of unitariness is that it substantially diminishes the power of the court, and returns some control of educational policies to the school board.[51] One of the most important issues associated with this shift in control is the extent of control that is actually returned. There remains much confusion about whether a finding of unitariness completely terminates the court's jurisdiction in the case, returning all control to the school board and dissolving the injunctive decree.[52] In *Riddick v. School Board*,[53] the United States Court of Appeals for the Fourth Circuit held that once unitariness is found, the district court is totally divested of jurisdiction.[54] Other circuits have made similar holdings,[55] but there is not a general consensus among the federal courts. For example, the Eleventh Circuit has determined that jurisdiction over the school board continues even

48. *See generally* Note, *supra* note 44, at 665-68.

49. *See* Chandler, *supra* note 14, at 544-45.

50. *See* Note, *supra* note 44, at 662.

51. *See id.* at 620.

52. *See generally* Annotation, *Circumstances Warranting Judicial Determination or Declaration of Unitary Status With Regard to Schools Operating Under Court-ordered or Supervised Desegregation Plans and the Effects of Such Declarations*, 94 A.L.R. FED. 667, 698-723 (1989).

53. 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

54. *Id.* at 538-39.

55. *See, e.g.*, Morgan v. Nucci, 831 F.2d 313, 318-19 (1st Cir. 1987) (unitary attainment in student assignments terminates authority of federal court); United States v. Overton, 834 F.2d 1171, 1177 (5th Cir. 1987) (the notion that a district can be declared unitary but still be under federal court jurisdiction is "at war with itself").

after a finding of unitariness so that the court may continue to exercise its authority to some degree.[56]

C. *Modification or Dissolution of the Injunctive Decree*

1. Litigated decrees vs. Consent decrees

Courts use two types of injunctive decrees to enforce desegregation orders: litigated decrees and consent decrees. Litigated decrees are "based on the *court's* assessment of the appropriate application of the law to a predicted course of conduct by the obligor that interferes with the rights of the beneficiary."[57] Consent decrees, on the other hand, are "agreement[s] of the *parties* made under the sanction of, and approved by, the court not as a result of a judicial determination, but merely as their agreement to be bound by certain stipulated facts."[58] Litigated decrees are based solely on the legitimacy of the law in place when they are entered.[59] Subsequent changes in the law may mandate modification of litigated decrees.[60] Consent decrees, on the other hand, are also dependent upon the parties' agreement, because they are long-term contracts.[61]

2. General Considerations

Injunctive decrees require compliance by the enjoined parties until the decree is either dissolved or modified.[62] Federal Rule of Civil Procedure 60(b) governs the modification or dissolution of injunctive decrees.[63] Rule 60(b) provides that the court may modify or dissolve an injunctive decree if the enjoined party shows that "the judgment has been satisfied . . . or it is no

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56. *E.g.*, United States v. Board of Educ., 794 F.2d 1541, 1543 (11th Cir. 1986) (rejected idea that finding of unitariness terminated jurisdiction as too rigid); Lee v. Macon County Board of Educ., 681 F. Supp. 730, 737 (N.D. Ala. 1988) (leeway exists regarding issue of whether unitariness finding vacates a desegregation order); Keyes v. School Dist., 670 F. Supp. 1513, 1516 (D. Colo. 1987) ("[w]hen unitary status [is] achieved, court supervision can be removed only when it is reasonably certain that future actions will be free from institutional discriminatory intent.").

57. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1132 (1986) (emphasis added).

58. BARRON'S LAW DICTIONARY 119 (2d ed. 1984) (emphasis added).

59. Jost, *supra* note 57, at 1133-34.

60. *Id.* at 1134.

61. *Id.* at 1135.

62. Note, *supra* note 13, at 564.

63. *Id.*

longer equitable that the judgment should have prospective application . . . ."[64] Courts have wide latitude in deciding to modify or dissolve an injunctive decree and will apply the standard on a case-by-case basis.[65] A recent commentator contends there are three factors that courts generally assess in deciding whether to dissolve or modify an injunction.[66] First, a court will "consider any changes in circumstances" rendering protection of the plaintiffs unnecessary.[67] Second, the court will look at whether these new circumstances will create a "hardship for the enjoined party if the injunctive decree remains unchanged."[68] Third, a court will examine any change in law making the decree improper.[69] These factors were first articulated in *United States v. Swift & Co.*,[70] which involved a consent decree in an antitrust suit between the United States and five leading meat-packing companies.[71] In upholding the district court's denial of motions to modify the consent decree, the Supreme Court stated that:

> [t]he inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow . . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.[72]

Although the case only involved a consent decree, the Court further held that the power to modify is the same "whether the decree has been entered after litigation or by consent,"[73] indicating that the same standard should be applied to both litigated decrees and consent decrees.

In addition to these factors, desegregation injunctive decrees call for special considerations. In *Pasadena City Board of Education v. Spangler*[74], the Supreme Court stated that residential changes could only be the basis for

64. FED. R. CIV. P. 60(b)(5).

65. Note, *supra* note 13, at 564.

66. *Id.* at 564-65.

67. *Id.* at 564. *See also* United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968) ("decree may be changed upon an appropriate showing"); United States v. Swift & Co., 286 U.S. 106, 117-18 (1932) ("The question is whether [modification] can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect.").

68. Note, *supra* note 13, at 564-65.

69. *Id.*

70. 286 U.S. 106 (1931).

71. *Id.* at 106-07.

72. *Id.* at 119.

73. *Id.* at 114.

74. 427 U.S. 424 (1976).

modification if the changes were the result of intentional segregative action.[75] Because school desegregation decrees are temporary, once the "transition to a racially nondiscriminatory school system"[76] is effected, the decree is to be terminated. Finally, there is also the unresolved question of whether a finding of unitariness will dissolve desegregation decrees.[77]

III. COURT-ORDERED DESEGREGATION TODAY

A. *History of the Case*

Desegregation litigation in Oklahoma City began 30 years ago.[78] In 1961, black students and their parents sued the Oklahoma City Board of Education to end *de jure* segregation in the public school system.[79] In 1963, the District Court for the Western District of Oklahoma found intentional segregation in the schools and housing of Oklahoma City, and ordered the Board to desegregate.[80] In response to the court's mandate, the Board adopted new school boundaries, but a special transfer policy was also included which allowed children to transfer to schools in which their race was in the majority.[81] The Board and the district court continued to litigate over the desegregation issue, with the Board strongly opposing desegregation.[82] At one point the district court noted that the Board's actions, allegedly intended to desegregate, were actually hindering it and even reversing desegregation and destroying integrated neighborhoods.[83]

Finally, in 1972, because the Board refused to offer a meaningful desegregation plan of its own,[84] the district court ordered the Board to adopt a "Finger Plan."[85] The "Finger Plan" is based on a remedy primarily

75. *Id.* at 435-36.

76. *Brown II*, 349 U.S. 294, 301 (1954).

77. See *supra* notes 48-56 and accompanying text.

78. Board of Educ. of Oklahoma City Pub. Schools v. Dowell, 111 S. Ct. 630 (1991).

79. *Id.* at 633.

80. *Id.*

81. *Id.* at 640 (Marshall, J., dissenting).

82. *Id.* The Board adopted another "special" transfer policy, which had the same effect as the first one. *Id.*

83. *Id.* Eight of nine new schools in 1965 were located to serve all-white or a majority of all-white neighborhoods. *Id.* Also, the Board's inflexible attendance zones encouraged "white flight," that is, whites migrating to all-white areas. *Id.*

84. *Id.*

85. *Id.*

involving busing of students.[86] Three years later, after operating the "Finger Plan" successfully, the Board filed a motion to close the case.[87] In 1977, the district court granted the Board's motion and issued an order terminating the case, which declared that Oklahoma City had achieved unitary status.[88] The order ended the district court's supervision, but did not dissolve the injunctive decree.[89] No party appealed the order.[90]

B. The Disputed Action

The Oklahoma City School Board continued to operate the "Finger Plan" until 1985.[91] In 1984, the Board faced demographic changes that increased the distances that black students had to be bused to attend desegregated schools.[92] In response to these demographic changes, the Board adopted the Student Reassignment Plan ("SRP"),[93] which allowed neighborhood assignments for students in grades K-4 beginning in the 1985-86 school year.[94] Under the SRP, the student ratio in over one-half of the Oklahoma City schools was either 90% Black or 90% non-Black.[95] Respondents filed a motion to reopen case, charging that the school district was not unitary and that the SRP was a return to segregation.[96]

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86. The Finger Plan adopted by the Board was as follows:

a. Kindergartners attended neighborhood schools;

b. Grades 1-4 attended formerly all-white schools with black children being bused to those schools;

c. Grade 5 would attend formerly all-black schools with white children being bused to them;

d. Students in upper grades would be bused to various schools to maintain integrated schools; and

e. Stand-alone schools for all grades would be located in integrated neighborhoods.

Dowell v. Board of Educ. of Oklahoma City, 890 F.2d 1483, 1486 (10th Cir. 1989).

87. *Dowell,* 111 S. Ct. at 641.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 634.

93. The SRP has also been called a retrogression plan because it greatly increases the number of minority students attending one-race schools. *See* Landsberg, *The Desegregated School System and the Retrogression Plan,* 48 LA. L. REV. 789, 800-01 (1988).

94. *Dowell,* 111 S. Ct. at 634.

95. *Id.* at 641 (Marshall, J., dissenting).

96. *Id.* at 631.

After this filing, a sequence of legal events ensued. The district court refused to reopen the case, declaring that the 1977 order was a finding of unitariness, which acted as *res judicata*.[97] The court of appeals reversed and remanded, holding that while the 1977 order was a finding of unitariness, there was no language dissolving the injunctive decree.[98] On remand, the district court concluded that the injunctive decree should be vacated.[99] The district court reasoned that demographic changes, in no way influenced by the Board, had made the "Finger Plan" unworkable, and that the Board had operated busing for over a decade in good-faith compliance with the injunctive decree.[100] The court of appeals again reversed.[101] It held that an injunctive decree cannot be lifted unless it meets the *Swift* standard requiring a "grievous wrong evoked by new and unforeseen conditions."[102] The Board of Education of Oklahoma City petitioned for *certiorari*, which was granted in 1990.[103]

C. *The Instant Decision*

1. Unitariness

In *Dowell*, the Supreme Court first considered whether the respondents could contest the 1987 order when they had not appealed the 1977 order.[104] While the district court may have found that the district was unitary in 1977, it had not clearly dissolved the injunctive decree.[105] The Supreme Court held that when such a decree is to be dissolved or terminated, respondents are

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97. Dowell v. Board of Educ. of Oklahoma City Pub. School, 606 F. Supp. 1548 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

98. Dowell v. Board of Educ. of Oklahoma City Pub. School, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

99. Dowell v. Board of Educ. of Oklahoma City Pub. Schools, 677 F. Supp. 1503 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991).

100. *Dowell*, 111 S. Ct. at 631.

101. Dowell v. Board of Educ. of Oklahoma City Pub. Schools, 890 F.2d. 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991). *See also* Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE W. RES. L. REV. 41, 48 (1986).

102. *Dowell*, 890 F.2d. at 1490.

103. *Dowell*, 111 S. Ct. at 635.

104. *Id.* at 635.

105. *Id.*

entitled to a "precise statement" to that effect.[106] Ambiguous statements that indicate a unitariness finding but do not appear to dissolve the injunctive decree are not enough.[107] Therefore, the Court stated that while the 1977 order did bind the parties as to a finding of unitary status, it did not terminate the injunctive decree because there was no direct language of dissolution.[108]

In reaching this conclusion, the Supreme Court considered the meaning of the word "unitary."[109] It noted that the lower courts have been inconsistent in their use of the word.[110] The lower courts have generally taken two different views: (1) "a school district that has completely remedied all vestiges of past discrimination,"[111] or (2), "any school district that has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan."[112] The Supreme Court stated that the word unitary should be used "to describe a school system which has been brought into compliance with the command of the Constitution."[113]

2. Injunctive Decree

The Supreme Court next considered the standard for lifting an injunctive decree in a desegregation case. The Court rejected the court of appeals reliance on the *Swift* standard of a "grievous wrong evoked by new and unforeseen conditions."[114] The Court distinguished *Dowell* from *Swift* by stating that the decree in *Swift* was meant to operate in perpetuity, while desegregation decrees are clearly a "temporary measure to remedy past discrimination."[115] Because desegregation decrees are temporary measures, the *Swift* standard is too strict, subjecting a school district to judicial overview indefinitely.[116] The Court held that the proper federal standard to apply in determining "a sufficient showing of constitutional compliance" to warrant dissolution or modification of a desegregation decree is whether "the purposes

106. *Id.* at 636.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 635.

112. *Id.*

113. *Id.*

114. *Id.* The Court noted that *Swift* had been narrowed by United States v. United Shoe Mach. Corp., 391 U.S. 244 (1968), which stated that *Swift* holds that a decree can be changed once the purposes of the decree have been "fully achieved." *United Shoe*, 391 U.S. at 248.

115. *Dowell*, 111 S. Ct. at 637.

116. *Id.*

of the desegregation litigation had been fully achieved."[117] To this end, the court must examine: (1) "whether the Board had complied in good faith with the desegregation decree since it was entered,"[118] and (2) "whether the vestiges of past discrimination had been eliminated to the extent practicable."[119] Moreover, courts should consider the elements listed in *Green*: student assignments, faculty, staff, transportation, extra-curricular activities and facilities.[120] The Court concluded with a reminder that while a school district that has been released from a desegregation injunctive decree no longer requires direct judicial supervision, it is still subject to the equal protection clause of the fourteenth amendment.[121] The Court then reversed and remanded the case to the district court to determine whether the Board was entitled to have the decree terminated as of 1985.[122]

IV. THE FUTURE OF DESEGREGATION IN THE POST-UNITARY PERIOD

Dowell answers few questions and leaves many of the major desegregation issues undecided. The decision can be commended for permitting dissolution of the injunctive decree only when the "purposes of the desegregation litigation have been fully achieved,"[123] and for requiring a precise statement when a decree is to be dissolved or modified before such can occur. Thus, it appears that a mere finding of "unitariness" will be insufficient to terminate jurisdiction unless the court specifically dissolves the injunctive decree.

The Court's definition of unitary, however, merely perpetuates the controversy surrounding that term and fails to give the federal courts clear guidance on the issue. The Court first indicates that unitary means constitutional compliance,[124] which it later implies will allow dissolution of the injunctive decree.[125] Therefore, while the Court states that the injunctive decree can only be lifted once its purposes have been "fully achieved," it implies that this happens upon a finding of constitutional compliance, or unitariness. These ambiguities do nothing to clarify the issue of unitariness for the lower courts, who will continue to apply their various standards of

117. *Id.*
118. *Id.* at 638.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 636.
125. *Id.*

unitariness with no uniformity.[126] Therefore, school districts with substantial similarities could get different results depending upon the circuit in which they are located.[127]

The Court's rationale for rejecting the *Swift* standard is sound, because desegregation decrees have never been thought to be permanent.[128] In fashioning a different standard for desegregation decrees, however, the Court has ignored a number of prevailing issues in desegregation. The standard to be used in dissolving a desegregation injunctive decree requires the courts to examine only the good-faith compliance of the Board and whether the visible indicia of a segregated school system (vestiges) are eliminated to the extent practicable.[129] This allows district courts to lift injunctions even if the less visible effects of segregation still exist.[130] For example, under this standard, a court may not be able to consider segregative residential patterns as remaining vestiges of segregation in the schools, even though precedent indicates that many residential patterns are perpetuated by segregative acts.[131] Indeed, the Board in *Dowell* had destroyed some integrated neighborhoods by adopting zones that encouraged "white flight."[132] Many commentators and courts have acknowledged that segregated schools perpetuate segregated residential patterns and that residential patterns should be considered a vestige of segregation.[133] Unlike some other vestiges, residential patterns, once established, are difficult to alter.[134] Many decades may pass before there is a need for the construction of new schools that might aid in correcting segregative residential patterns.[135] The Supreme Court, by

126. For various views of the definition and application of unitariness, see Riddick v. School Bd., 784 F.2d 521, 533 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); Pitts v. Freeman, 755 F.2d 1423, 1426 (11th Cir. 1985); Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983).

127. *See Dowell*, 111 S. Ct. at 636. The Court addressed the inconsistent use of "unitary" in the lower courts.

128. *See supra* notes 62-77 and accompanying text.

129. *Dowell*, 111 S. Ct. at 636.

130. *Id.* at 644 (Marshall, J., dissenting).

131. *See* Milliken v. Bradley, 418 U.S. 717, 728 n.7 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971); Keyes v. School Dist. No. 1, 303 F. Supp. 289 (D. Colo. 1969).

132. *Dowell*, 111 S. Ct. at 640 (Marshall, J., dissenting).

133. *See* Note, supra note 46, at 800-01.

134. *Id.* at 802.

135. Some courts and commentators have recognized that some vestiges of *de jure* segregation are not quickly abolished. *See, e.g.*, Morgan v. McDonough, 554 F. Supp. 169, 170 (D. Mass. 1982), *aff'd*, 726 F.2d 11 (1st Cir. 1984) ("[t]he vestiges of pervasive and long-standing purposeful discrimination in public education are neither simply nor quickly eradicated"); Note, *supra* note 46, at 802. ("underlying vestiges

ignoring this less visible vestige of segregation, is allowing present segregated residential areas to thrive, and may even be destroying some of the desegregation that has already been accomplished.

In addition, the new standard fails to consider the threat of re-segregation and the feeling of inferiority promulgated by segregation as vestiges of previous *de jure* segregation. Throughout the history of desegregation, the Supreme Court has emphasized the stigmatic effect of segregation on black children and the need to eradicate racial discrimination.[136] The Court has also urged school districts to totally eliminate racial separation and maintain integrated schools.[137] In order for the lower courts to enforce these directives, the standard for dissolution should also include consideration of whether the school board has done all practicable to eliminate "vestiges capable of inflicting stigmatic harm."[138] Therefore, dissolution of the injunction should not be possible so long as further segregation continues, even in those school districts adjudged unitary. Modification of the decree to return some local control to the school district could occur, but judicial intervention is necessary to some extent to protect black children from this stigma.

By disregarding these issues in forming the standard for dissolution, the Supreme Court has opened the door for widespread declarations of unitariness coupled with dissolutions of injunctive decrees. With these dissolutions, school boards will be able to take future actions, such as the dismantling of the desegregation remedies, so long as they are not acting out of discriminatory intent—intent that will be virtually impossible for plaintiffs to prove.[139] By allowing such a result, the Court has ignored racial reality in the United States and precedent of the oldest desegregation cases. Many districts that have been desegregated for a decade or more strongly oppose desegregation.

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may take many more years to be eliminated").

136. *See* Milliken v. Bradley, 418 U.S. 717, 746 (1974) (integration should "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25-26 (1971) (discussion of the "state-imposed stigma of segregation"); Green v. New Kent County School Bd., 391 U.S. 430, 442 (1968) (desegregation plan should "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools."); *Brown I*, 347 U.S. 483, 493-94 (1954) ("Segregation of white and colored children in public schools has a detrimental effect on colored children.").

137. *See, e.g.,* Keyes v. School Dist. No. 1, 413 U.S. 189, 251 n.31 (1973) (Powell, J., concurring in part and dissenting in part) (school boards must also preserve an integrated school system); Green v. Green County School Bd., 391 U.S. 430, 436 (1968) ("the transition to a unitary, non-racial system of public education was and is the ultimate end to be brought about . . . .").

138. *Dowell*, 111 S. Ct. at 647 (Marshall, J., dissenting).

139. *See supra* note 50 and accompanying text.

In fact, many school board campaigns in major cities have centered on the issue of desegregation, with continued opposition based upon racial considerations.[140] In the face of this strong opposition to racial equality in public schools, the Court should not abandon the strict standards established since *Brown*, nor should it allow school districts to avoid desegregation remedies with arguments of local autonomy or temporary decrees. If such local political concerns overshadow the need for racial equality in public schools, then segregation will continue and *Brown* and its progeny may become a mere footnote in legal history.

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140. *See, e.g.*, St. Louis Post-Dispatch, March 4, 1991, at 1, col. 5. When asked why he was contributing to an anti-busing candidate in St. Louis, Samuel T. Turnipseed stated, "[W]e lived separately for about 300 years until they [the federal government] caused all this trouble in the last forty or so. Our federal government tried to force [black people] down our throats. We were getting along fine without them." *Id.* at 6, col. 1.