Board of Education of Oklahoma City v. Dowell: Protection of Local Authority or Disregard for the Purpose of Brown v. Board of Education?

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The United States Constitution guarantees equal protection of the law to all citizens.1 The Fourteenth Amendment provides that “[n]o state shall make or enforce any law which shall deny . . . to any person within its jurisdiction the equal protection of the laws.”2 For fifty-eight years, the United States Supreme Court interpreted this amendment to mean that when substantially equal facilities are provided for both races, the races are treated equally, even if the facilities are separate.3

In Brown v. Board of Education (Brown I),4 however, the Supreme Court explicitly overruled the “separate but equal” doctrine, holding separate educational facilities in public schools unequal, and therefore unconstitutional.5 The Court looked to the effect of segregation on public education and found

2. Id. The Supreme Court has interpreted the Fourteenth Amendment as prohibiting all state-imposed discrimination against the African American race. See In re Slaughter-House Cases, 16 Wall. 36, 67-72 (1873) (holding that the purpose of the Fourteenth Amendment was to establish the freedom of the African American race, to protect that race from further oppression, and to forbid laws that discriminate against African Americans as a class); Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880).
3. Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown v. Board of Education, 347 U.S. 483 (1954), established the “separate but equal” doctrine and became the controlling authority for segregation in public education. See Joseph S. Ransmeier, The Fourteenth Amendment and the “Separate But Equal” Doctrine, 50 MICH. L. REV. 203, 204 n.11 (1951). Plessy v. Ferguson involved a Louisiana state act, passed in 1890, that mandated separate railroad coaches for Caucasians and African Americans. Plessy, 163 U.S. at 540. Plessy, 7/8 Caucasian and 1/8 African American, was an intrastate railroad passenger who refused to move from the “white” coach when a conductor instructed him to do so. Id. at 541-42. After police arrested Plessy, he challenged the statute’s constitutionality. Id. at 542. The Supreme Court upheld the constitutionality of the state law, using a Fourteenth Amendment analysis, id. at 550-52, in what has been called an intellectually frail decision. See Ransmeier, supra, at 214. Courts applied the rule of Plessy v. Ferguson in a wide variety of cases during the years following the landmark decision. See Ransmeier, supra, at 215. Courts applied the Plessy “separate but equal” doctrine to interstate passenger travel, id., to real estate, id. at 220, to marriage, id. at 223, and, most significantly for the purposes of this article, to public education. Id. at 216. Plessy was the law until 1954 when the Supreme Court in Brown v. Board of Educ. (Brown I), 347 U.S. 483 (1954), declared the “separate but equal” doctrine unconstitutional. 4. 347 U.S. 483 (1954).
5. Id. at 495.
segregated schools unequal because they generate a feeling of racial inferiority in African American children. Although the Supreme Court has established specific guidelines to implement its decision in Brown I, it has consistently looked to the effect of segregation before ordering a remedy. In recent years, the courts have addressed the problem of when to terminate a desegregation remedy. In particular, standards for determining when a desegregation remedy has achieved its purpose have generated conflicting results among United States courts of appeal decisions. The central issue in this conflict is whether a court should apply the federal law of injunctive remedies in dissolving a school desegregation decree.

In Board of Education of Oklahoma City Public Schools v. Dowell, the Court considered whether a district court could dissolve a desegregation decree if local authorities operated in compliance with the decree for a reasonable period of time. The decree was a result of a 1961 suit which arose when African American students and their parents sued the Board of Education of Oklahoma City Public Schools to end de jure segregation in the public schools. In 1963, the district court found that Oklahoma City was operating a "dual" school system—one intentionally segregated by race—and that previously, it had intentionally segregated both schools and housing. In 1965, the district court held that the school board's use of neighborhood zoning failed to remedy past segregation because one-race schools still existed as a result of residential segregation. In 1972, the United

6. Id. at 494.
7. See infra notes 46-43 and accompanying text.
8. See infra notes 144-69 and accompanying text.
9. See id.
11. Id. at 633.
12. "De jure segregation" is "segregation directly intended or mandated by law or otherwise issuing from an official racial classification or in other words . . . segregation which has or had the sanction of law." BLACK'S LAW DICTIONARY 425 (6th ed. 1990). De jure segregation indicates "any situation in which the activities of school authorities have had a racially discriminatory impact contributing to the establishment or continuation of a dual system of schools." Id. In contrast, "de facto segregation" refers to "that which is inadvertent and without the assistance or collusion of school authorities." Id. Keyes v. School Dis. No.1, 413 U.S. 189 (1973), defined "de jure segregation" as a "current condition of segregation resulting from intentional state action." Id. at 205.
15. Dowell v. School Bd. of Okla. City Pub. Schools, 244 F. Supp. 971, 975 (W.D. Okla. 1965), aff'd, Board of Educ. v. Dowell, 375 F.2d 158 (10th Cir.), cert. denied, 387 U.S. 931 (1967). Oklahoma City had once enforced residential segregation, and it still remained, even though not state-enforced, because of discrimination by some realtors and financial institutions. Dowell, 244 F. Supp. at 975. The district court found that segregated schools were the cause of some housing segregation. Id. at 976-77.
States District Court for the Western District of Oklahoma ordered a desegregation plan that necessitated extensive busing. At the school board’s request, the court later terminated its supervision of the decree. In 1977, the district court held that the school district had achieved “unitary” status.


kindergartners would be assigned to neighborhood schools unless their parents opted otherwise; children in grades 1-4 would attend formerly all white schools, and thus black children would be bused to those schools; children in grade five would attend formerly all black schools, and thus white children would be bused to those schools; students in the upper grades would be bused to various areas in order to maintain integrated schools; and in integrated neighborhoods there would be stand-alone schools for all grades.


The Court has concluded that [the Finger Plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before this court. . . .


18. Courts have failed to adopt a universal definition for the term “unitary.” Dennis G. Terez, Protecting the Remedy of Unitary Schools, 37 CASE W. RES. L. REV. 41, 58 (1986). However, the Eleventh Circuit in Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985), drew a distinction between a “unitary school system” as “one which has not operated segregated schools as proscribed by cases such as Swann v. Charlotte-Mecklenburg Board of Education and Green v. County School Board for a period of several years,” and a school system which has achieved “unitary status” as “one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures.” Id. at 1413 n.12. See Dowell, 111 S. Ct. at 635-36; see also Terez, supra, at 57 n.70.

The Georgia State Conference court admitted that other courts have confused these two terms. Georgia State Conference, 775 F.2d at 1413 n.12. In fact, the Fifth Circuit proposed a different definition, holding that a unitary school district is one “in which schools are not identifiable by race and students and faculty are assigned in a manner that eliminates the vestiges of past segregation.” United States v. Lawrence County School Dist., 799 F.2d 1031, 1034 (5th Cir. 1986). The Fifth Circuit then identified unitary schools as those which are fully integrated. Id. at 1038.
and as a result, the plaintiffs did not appeal.\textsuperscript{19}

In 1985, African American students and their parents challenged the school system's plan of neighborhood school assignments as a return to segregation.\textsuperscript{20} The district court initially refused to open the case, but the United States Court of Appeals for the Tenth Circuit reversed and remanded the case.\textsuperscript{21} On remand, the district court vacated the previous injunctive decree and returned the school district to local control.\textsuperscript{22} The court of appeals again reversed, holding that an injunctive decree remains in effect until a school district can show "grievous wrong evoked by new and unforeseen conditions."\textsuperscript{23} The United States Supreme Court granted certiorari to resolve the conflict between the Tenth Circuit's standard of using the federal law of injunctive decrees to dissolve a desegregation decree, and the more lenient standard of using traditional equitable principles applied by both the United States Court of Appeals for the Ninth Circuit and the United States Court of Appeals for the Fourth Circuit.\textsuperscript{24}

The Supreme Court, rejecting the Tenth Circuit's more stringent standard, reversed the court of appeals' decision and held that the proper standard for determining the dissolution of a desegregation decree is whether the decree has achieved the purposes of desegregation.\textsuperscript{25} Chief Justice Rehnquist, writing for the majority,\textsuperscript{26} considered the allocation of powers within

\begin{itemize}
\item \textsuperscript{19} Dowell, 111 S. Ct. at 633-34.
\item \textsuperscript{20} Id. at 634. The school board had adopted the Student Reassignment Plan (SRP) which, beginning with the 1985-86 school year, assigned students in grades kindergarten through four to neighborhood schools. Students in grades five through twelve continued to be bused. However, "[u]nder the SRP, 11 of 64 elementary schools would be greater than 90% black, 22 would be greater than 90% white plus other minorities, and 31 would be racially mixed." Id.
\item \textsuperscript{21} Dowell v. Board of Educ. of the Okla. City Pub. Schools, 795 F.2d 1516 (10th Cir.), cert. denied, 479 U.S. 938 (1986).
\item \textsuperscript{24} Dowell, 110 S. Ct. at 1521; see Dowell, 890 F.2d at 1483 (reasoning that the standard for modification of a desegregation decree is the federal law on injunctive remedies); Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239 (9th Cir. 1979) (holding that a district court must use equitable principles to determine when it can terminate a desegregation decree); Riddick v. School Bd. of the City of Norfolk, 784 F.2d 521 (4th Cir. 1986) (following Spangler, the court used equitable principles to determine when a desegregation decree could be terminated). See also infra notes 144-69 and accompanying text.
\item \textsuperscript{25} Dowell, 111 S. Ct. at 636. The Court was divided with five Justices joining in the majority opinion, and three Justices dissenting. Id. at 632-33.
\item \textsuperscript{26} The Chief Justice was joined by Justices White, O'Connor, Scalia, and Kennedy. Id. at 632-33.
\end{itemize}
the federal system and found that courts should use a different standard in school desegregation cases. The Court explained that since it has always intended a desegregation decree to be a temporary measure to remedy past discrimination, a federal court's control of a school system should not last longer than the time necessary to correct the effects of past intentional discrimination. The Chief Justice concluded that the district court should consider whether a school board had complied in good faith with the desegregation decree since it was imposed as well as whether the "vestiges of past discrimination" had been eliminated to the extent practicable.

In a forceful dissent, Justice Marshall rejected the majority's test, which focused on demonstrating present and future compliance with the desegregation decree, stating that the test ignores the persistent effects of the past discrimination. Instead, the dissent asserted, because the Court previously used the "stigmatic injury" associated with segregated schools as the central focus in establishing a desegregation decree, the Court should also use the stigmatic injury requirement in dissolving a decree. Further, Justice Marshall concluded that a "racially identifiable school" is a correctable condition which is likely to inflict stigmatic injury, and therefore, the Court should not lift a decree if this condition persists.

This Note explains Supreme Court decisions judging the adequacy of school desegregation remedies employed by school districts and judicial treatment of desegregation remedies. This Note first examines the Supreme Court's holding in Brown I that segregation in public education is unconstitutional, and the policies that accompanied Brown I, which courts have incorporated into desegregation doctrine ever since. This Note then presents the guidelines that the Court established for district courts to follow when awarding relief in desegregation cases. Next, this Note presents conflicting lower court decisions which have interpreted the Supreme Court's standards for establishing desegregation remedies. This Note then analyzes the majority and dissenting opinions in Board of Education of Oklahoma City v.

27. Id. at 637.
28. Id.
29. Id.
30. Id. (quoting Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)).
31. Dowell, 111 S. Ct. at 638.
32. Id. at 644 (Marshall, J., dissenting).
33. Id. at 642.
34. Id. at 643.
36. Dowell, 111 S. Ct. at 643-44.
37. Id. at 639.
Dowell. The Note observes that the Court, by formulating a standard for the dissolution of a desegregation decree without considering the stigmatic injury that segregation inflicts on African American children, ignored the purpose of desegregation precedent. This Note suggests that Dowell gives little guidance to lower courts in constructing a standard to dissolve a desegregation decree. This Note acknowledges that although subsequent decisions have clarified the Supreme Court Justices' opinions on the lifting of a school desegregation decree, the Court's position still remains ambiguous. This Note concludes that the Court in Dowell should have taken into account the stigmatic injury that both state-imposed segregation, and the effects of segregation after the state ceases to enforce segregation, inflicts on African American children.

I. THE ORIGINS OF DESSEGREGATION LAW

A. The Abolition of "Separate But Equal"

The Supreme Court's unanimous decision in Brown v. Board of Education (Brown I),\textsuperscript{38} declaring the doctrine of "separate but equal" unconstitutional, was the starting point for a major change in American race relations and is consequently considered one of the most important events in recent United States history.\textsuperscript{39} In Brown I, the Court held that segregation of children in public schools on the basis of race generates a feeling of inferiority in African American children and therefore, is invalid under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{40} Brown I arose when African American children from four different states\textsuperscript{41} brought a class action suit

\textsuperscript{38} 347 U.S. 483 (1954).


\textsuperscript{40} Brown I, 347 U.S. at 494-95. See supra note 2 and accompanying text. But see Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 34 (1959):

[If] the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant . . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis . . . for holding that the Constitution demands that the claims for association should prevail?

\textit{Id.} at 34.

\textsuperscript{41} The cases originated in Kansas, South Carolina, Virginia, and Delaware.
after they were refused admission to schools established under state laws which mandated or allowed local districts to mandate racial segregation.\footnote{Brown I, 347 U.S. at 486-88. For example, Topeka, Kansas maintained a segregated public school system in accordance with Chapter 72-1724 of the General Statutes of Kansas, 1949. Brown v. Board of Educ., 98 F. Supp. 797, 797 (D. Kan. 1951), rev'd, 347 U.S. 483 (1954). This statute authorized "cities of the first class" to establish and maintain separate schools for white and African American children in grades below high school. \textit{Id}.}

The Court reasoned that an examination of the circumstances surrounding the adoption of the Fourteenth Amendment was inconclusive in determining this case because there was so little information relating to the amendment's intended effect on public education.\footnote{43. Brown I, 347 U.S. at 489-90. The Court in \textit{Brown I} noted that the status of public education at the time of the adoption of the Fourteenth Amendment was far less than its status in 1954, the date of the opinion. Chief Justice Warren in \textit{Brown I} also examined how the Supreme Court has interpreted the Fourteenth Amendment. \textit{Id}. at 490-92. Chief Justice Warren recognized that the first cases decided after the Fourteenth Amendment's adoption prohibited all state-imposed discrimination against African Americans. \textit{Id}. at 490. \textit{See supra} note 2 and accompanying text. Next, Justice Warren noted that the Court interpreted the Fourteenth Amendment in \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896), overruled by \textit{Brown v. Board of Educ. (Brown I)}, 347 U.S. 483 (1954), with the "separate but equal" doctrine, but \textit{Plessy} did not involve education. \textit{Id}. at 490-91. Chief Justice Warren acknowledged that although the Court had decided six cases involving the "separate but equal" doctrine in public education, the legitimacy of the doctrine itself had not been challenged directly. \textit{Id}. at 491-92. \textit{See, e.g.}, \textit{Sweatt v. Painter}, 339 U.S. 629 (1950) (holding that a segregated African American law school could not provide equal educational opportunities); \textit{McLaurin v. Oklahoma State Regents for Higher Educ.}, 339 U.S. 637 (1950) (requiring that an African American admitted to a white graduate school be treated like all other students). Here, however, in distinguishing \textit{Brown I} from these earlier cases, Justice Warren stated that the question of the legitimacy of the doctrine was directly presented. \textit{Brown I}, 347 U.S. at 492.} Instead, the Court focused on the effect of segregation on public education, and concluded that...
separate educational facilities are not equal. The Court acknowledged the complexity involved in formulating an injunctive decree in this situation and then scheduled the case for reargument on the question of appropriate relief.

One year later, the Court announced its decision on the issue of appropriate relief for the desegregation of public schools in Brown v. Board of Education (Brown II). First, Chief Justice Warren delegated authority to fashion relief to the courts, which originally heard the cases, because of their familiarity with local conditions. Next, the Court addressed the public and private considerations involved and held that in forming injunctive decrees,

44. Brown I, 347 U.S. at 492-95. The Court recognized the importance of education to the American democratic society, and reasoned that where the state has undertaken to provide this significant opportunity, it must be available to all children on equal terms. Id. at 492-93. Chief Justice Warren clearly stated that "[t]o separate [African American 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." Id. at 494 (citing psychological studies at n.11). Therefore, in refraining from discussing the issue of whether segregation violates the Due Process Clause of the Fourteenth Amendment, see Bolling v. Sharpe, 347 U.S. 497 (1954), the Court held that "[s]eparate educational facilities are inherently unequal," id. at 495, because they deprive children of equal protection of the laws under the Fourteenth Amendment. Id.

In criticizing the Brown I opinion, one commentator has claimed that Brown I is not about racial inferiority. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 76 (1990). Judge Bork criticized Brown I's holding as "disingenuous" because the Court relied on the stigmatic injury of African American children to prove the unconstitutionality of segregation. Id. at 75. Judge Bork reasoned that the real rationale for Brown was deeper, and that it had nothing to do with the context of education or the infliction of stigma. Id. at 76. Judge Bork attributed the Brown I decision to the Warren Court's ability to make political decisions because it had the support of a political constituency. Id. at 77. See supra note 43 and accompanying text. By asserting that Brown I is not about racial inferiority, Judge Bork implies that the Court indicated that Brown I was about racial inferiority. This is not so. The sense of inferiority that is a result of legalized segregation was one of the reasons why Brown I held that separate educational facilities were unequal. See Brown I, 347 U.S. at 492-95.

45. Brown I, 347 U.S. at 495-96. The parties were requested to address questions four and five previously propounded by the Court. Id. at 495, n.13. In question four, the Court asked whether, within limits, a desegregation decree should allow African American children to be admitted to schools of their choice or whether the Court could allow a gradual adjustment to be brought about from a segregated school system to a desegregated school system. Id. The Court, in question five, asked: (a) whether the Court should formulate detailed decrees; (b) what specific issues the decrees should reach; (c) whether the Court should appoint a special master; and (d) whether the Court should remand these cases to the courts of first instance to frame decrees, what general directions these decrees should include, and what procedures the courts of first instance should follow in framing the specific terms of the decrees. Id.


47. Id. at 299. The primary inquiry of the district courts in this situation was to determine whether the action of school authorities in solving a variety of local problems "constitutes good faith implementation of the governing constitutional principles." Id.
these courts were to use traditional equitable principles.\textsuperscript{48} In addition, the Court instructed the lower courts to require school authorities to make a "prompt and reasonable start toward full compliance" with the ruling in \textit{Brown I}, but gave the lower courts authority to grant additional time if necessary.\textsuperscript{49} However, \textit{Brown II} placed the burden on school authorities to establish that they are complying with \textit{Brown I} in good faith.\textsuperscript{50} \textit{Brown II} stated that the district courts were to retain jurisdiction of the cases during the period of transition to a nondiscriminatory school system.\textsuperscript{51} \textit{Brown II} concluded with extreme imprecision that the lower courts were to assure that this transition was taking place "with all deliberate speed."\textsuperscript{52} \textit{Brown I} and \textit{Brown II} encountered strong public hostility and resistance in the South,\textsuperscript{53} and the Court's vague "with all deliberate speed" requirement gave little guidance to the lower courts enforcing desegregation.\textsuperscript{54} Finally, in a unanimous opinion in \textit{Cooper v. Aaron},\textsuperscript{55} the Court reaffirmed its commit-

\textsuperscript{48} The Court noted that equitable principles were appropriate for use in this type of situation because traditionally they have allowed for flexibility in shaping remedies and easy adjustment and reconciliation with public and private needs. \textit{Id} at 300. Here, the Court reasoned, the personal interest of African American children is at stake in gaining admission to public schools as soon as possible and without discrimination. \textit{Id}. The Court, however, recognized that there may be obstacles to the effectuation of this personal interest. \textit{Id}. The Court allowed the district courts to effectively eliminate these obstacles while taking into account the public interest, but emphasized that the courts must strongly enforce the constitutional principles involved, even if there is disagreement with them. \textit{Id}

\textsuperscript{49} \textit{Id} at 300.

\textsuperscript{50} \textit{Id}. Toward this end, the Court allowed the lower courts to consider a number of administration problems stemming from physical conditions of schools, transportation, personnel, revision of school districts and attendance areas, and revision of local laws and regulations. \textit{Id}. In addition, lower courts were given the power to evaluate the adequacy of any plans that school authorities may propose "to effectuate a transition to a racially nondiscriminatory school system." \textit{Id} at 301.

\textsuperscript{51} \textit{Id}. at 301.

\textsuperscript{52} \textit{Id}. \textit{Brown II}'s "with all deliberate speed" standard has been noted for its ambiguity. \textit{TRIBE}, supra note 39, \S 16-18, at 1489. \textit{See} Robert B. McKay, 'With All Deliberate Speed': A Study of School Desegregation, 31 N.Y.U. L. REV. 991 (1956).

The Court's rejection of petitioner's request for immediate relief in favor of the "all deliberate speed" approach engendered severe criticism. \textit{See}, e.g., R. Carter, The Warren Court: A Critical Analysis 46, 52-57 (R. Sayler, B. Boyer, & R. Gooding, eds. 1969). It has been reported that the "all deliberate speed" standard was worked into the amicus brief of the United States by a former law clerk of Justice Frankfurter in response to that Justice's privately expressed concerns about putting together a majority in \textit{Brown}. \textit{TRIBE}, supra note 39, \S 16-18, at 1489 n.9 (citing Philip Elman & Norman Silber, The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History, 100 HARV. L. REV. 817, 827-30 (1987)).

\textsuperscript{53} \textit{See} TRIBE, supra note 39, \S 16-18, at 1489; DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 381 n.15 (1980).

\textsuperscript{54} \textit{See} TRIBE, supra note 39, \S 16-18, at 1489.

\textsuperscript{55} 358 U.S. 1 (1958).
ment to the *Brown I* decision and clarified the meaning of the "with all deliberate speed" requirement enunciated in *Brown II*. The Court held that a federal district court could not allow an Arkansas school board to postpone its school desegregation program for two and one-half years. In *Cooper*, the school board requested postponement of its plan when the Governor of Arkansas dispatched units of the Arkansas National Guard to prevent school desegregation at a local high school. The district court granted the board's request for delay in implementing the relief, and the court of appeals reversed. The Court reasoned that a school board could not have legally complied in good faith in attempting to vindicate the rights of African American children if other state officials blocked its efforts.

### B. The Supreme Court Mandates Immediate Action

Thirteen years after the Court first enunciated its ambiguous "with all deliberate speed" requirement in *Brown II*, the Supreme Court in *Green v. County School Board* demanded that a school board establish a proposed desegregation plan that will show immediate progress toward dismantling state-imposed segregation. In *Green*, a class action was brought to challenge a Virginia school board's maintenance of a "freedom of choice" plan. The Court first recognized that the system's schools were racially identifiable

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58. *Id.* at 13-14. The Court found that state officials had contributed to segregated conditions and therefore, the school board could not assert its own good faith as an excuse for the delay in implementing desegregation. *Id.* at 15-16.
59. *Id.* at 9-10. The Governor took this action in anticipation of the widespread opposition that implementing the first stage of the desegregation plan would cause. *Id.* Supposedly, the Governor did this without any request by school authorities. *Id.* at 9. The Arkansas National Guard was withdrawn only after federal troops intervened. *Id.* at 12.
60. *Id.* at 13.
61. *Id.* at 14.
62. *Id.* at 14-16.
65. *Green*, 391 U.S. at 431-32. The school board operated one white combined elementary and high school (New Kent) and one African American combined elementary and high school (George W. Watkins). *Id.* at 432. Under the "freedom of choice" plan, students in both first grade and eighth grade had to affirmatively choose to attend either the New Kent School or the Watkins School. *Id.* at 433-34. Each year, students in any other grade had the option to choose which of the two schools to attend, and any student who did not make a choice was assigned to the school he or she previously attended. *Id.*
as to the student bodies, faculty, staff, transportation, extracurricular activities and facilities, precisely what Brown I declared unconstitutional and Brown II sought to abolish.\textsuperscript{66} Next, in evaluating the substantive requirements of the “freedom of choice” plan, the Court noted that it was relevant that this plan was not even enacted until eleven years after Brown I was decided and ten years after Brown II demanded a start toward desegregation.\textsuperscript{67} The Court then instructed the district courts that a desegregation plan provides effective relief if a school board is acting in good faith, if the plan is capable of dismantling segregation, and if the plan will work “at the earliest practicable date.”\textsuperscript{68} The Supreme Court ultimately rejected the “freedom of choice” plan in Green because it did not effectively desegregate.\textsuperscript{69} The Court, however, cautiously provided that its holding did not preclude the use of “freedom of choice” plans in the future if they would serve effectively.\textsuperscript{70}

C. The Supreme Court Establishes Specific Guidelines

After Green, the law remained unclear as to how school authorities and district courts were to comply with the mandates of Brown I.\textsuperscript{71} The Supreme Court’s decision in Swann v. Charlotte-Mecklenburg Board of Education\textsuperscript{72} attempted to establish guidelines that more precisely defined tech-

\begin{itemize}
  \item \textsuperscript{66} Id. at 435. The Court reasoned that “a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is . . . intolerable.” Id. at 438.
  \item \textsuperscript{67} Id. at 438. The Court noted that “[t]his deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable . . . .” Id.
  \item \textsuperscript{68} Id. at 439.
  \item \textsuperscript{69} Id. at 441. The Court remarked:

In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85\% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system.

\textit{Id.}

The Court in Green noted that in the view of the United States Commission on Civil Rights, in order for a freedom of choice desegregation plan to be effective, both African American and white parents and students need to act affirmatively. \textit{Id.} at 440 n.5. The Court neither endorsed nor rejected the following factors which were said to contribute to the ineffectiveness of a freedom of choice plan: fear of hostility from the white community, fear of violence or harassment, public officials’ wrongly deterring African American families from sending their children to white schools, poverty (and consequently embarrassment because of clothing) of African American families, and improvements in facilities in all-African American schools.

\textit{Id.}

\textsuperscript{70} Id. at 440-41.

\textsuperscript{71} Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971).

\textsuperscript{72} 402 U.S. 1 (1971).
niques to achieve a desegregated school system.\textsuperscript{73} In Swann, the petitioner challenged the appropriateness of a desegregation plan approved by the United States District Court for the Western District of North Carolina.\textsuperscript{74} The Supreme Court reviewed the district court's desegregation decree and upheld its proposed remedy.\textsuperscript{75} First, the Court held that a board of education could use mathematical ratios of the racial composition of a school as a guideline in shaping a desegregation remedy.\textsuperscript{76} Next, the Court held that the district court must closely scrutinize the existence of one-race or predominantly one-race schools within a school system when fashioning a remedial process of desegregation.\textsuperscript{77} Third, Swann established that in order to form a desegregation remedy, a district court may alter attendance zones to achieve a nondiscriminatory result.\textsuperscript{78} Finally, the Court ruled that local school authorities may use bus transportation as a tool of desegregation.\textsuperscript{79}

\section*{D. School Desegregation in the North}

Following Swann, the issue remained whether the same standards would be applied in the context of Northern school desegregation.\textsuperscript{80} In Keyes v.

\begin{itemize}
\item \textsuperscript{73} See \textit{id.} at 14.
\item \textsuperscript{75} Swann, 402 U.S. at 31-32.
\item \textsuperscript{76} \textit{Id.} at 25. The district court had directed "that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others." Swann, 311 F. Supp. at 267-68.
\item \textsuperscript{77} Swann, 402 U.S. at 22, 25-26. The district court's decree also stated "[t]hat no school [should] be operated with an all black or predominantly black student body." Swann, 311 F. Supp. at 268.
\item \textsuperscript{78} Swann, 402 U.S. at 28. The Court stated that "[t]he maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank-and sometimes drastic-gerrymandering of school districts and attendance zones." \textit{Id.} at 27. In addition, Swann endorsed "pairing" of schools, a "'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools." \textit{Id.} at 27. The Court held that the establishment of noncontiguous school zones, even to the extent that the zones are located on opposite ends of the city, was permissible because of the broad remedial powers of a district court. \textit{Id.} The Court provided that the desegregation remedy may even be awkward and inconvenient if it was effective in eliminating dual school systems. \textit{Id.} at 28. The Court also warned the district courts not to rely solely on maps to determine the distance between school zones, because these zones may often be more accessible to each other than they appear. \textit{Id.} at 29.
\item \textsuperscript{79} \textit{Id.} at 30. Swann recognized possible objections to transporting students by bus "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." \textit{Id.} at 30-31. However, the Court noted that in this case, the district court's decree called for students to be picked up on streets close to their homes, with bus trips lasting not more than thirty-five minutes. \textit{Id.} at 30.
\item \textsuperscript{80} BELL, supra note 53, § 7.4.4, at 393.
\end{itemize}
School District No. 1, the Supreme Court addressed school desegregation in the North in Denver, where the public school system had never operated under an explicit constitutional or statutory provision which mandated or allowed racial segregation. First, the Supreme Court held that where plaintiffs prove that school authorities implemented a segregative policy in a significant portion of a school system, this will support a finding that a dual system exists. Further, the Court found that the burden to prove lack of intent to segregate on the part of school authorities then shifts to those authorities. Lastly, the Court determined that if the school board cannot prove lack of segregative intent, then the board can rebut the presumption that a school system is segregated only by showing that its acts did not “create or contribute” to the segregated condition of the schools. In Keyes, the Court consistently applied in the North the school desegregation standards that it had already established, even without a finding of de jure segregation in every part of a school system.

II. Desegregation Remedies Found Inadequate by the Court

A. The Trend of Judicial Restraint

One year after Keyes, the Supreme Court decided Milliken v. Bradley (Milliken I), and overruled a district court’s desegregation decree only three years after the Court upheld the broad remedial power given to the federal district courts in Swann v. Charlotte-Mecklenburg Board of Educa-

82. TRIBE, supra note 39, § 16-18, at 1492.
83. Keyes, 413 U.S. at 191. Rather, the school board alone had manipulated student attendance zones, strategically selected school sites, and maintained a neighborhood school policy to further the existence of segregated schools throughout the school district. Id.
84. Id. at 201. The Court based its conclusion on three factors: first, that structuring segregative attendance zones to create a high percentage of African Americans in one school has the reciprocal effect of populating other schools with mostly white students, id. at 201; second, that building one segregated school will in turn directly affect the racial composition of other schools, id.; and third, that racially identifiable schools combined with student assignments and the construction of new schools could have a reciprocal effect on the actual makeup of residential neighborhoods. Id. at 202.
85. Id. at 208.
86. Id. at 211.

[I]n a school desegregation case [as opposed to a traditional lawsuit], the remedy takes the form of a judicial decree restructuring an institution and, often, establishing a continuing regime of oversight. Myriad particular circumstances must be taken into account by the district judge in framing the affirmative injunction, thereby drastically expanding the discretionary component of the relief.

Id.
The Supreme Court in *Milliken I* addressed the question of whether a district court could impose a multidistrict desegregation remedy if segregation existed in only a single school district. The district court in *Milliken I* found that a school board's proposed desegregation plan would make a Detroit school system even more one-race and would drive the urban white population further away from the city. Consequently, the district court ordered the school board to implement a desegregation remedy in a metropolitan area that included fifty-three suburban Detroit school districts. The Supreme Court, with four justices dissenting, held that the district court's order for an interdistrict remedy was not constitutionally required. The Court, unwilling to expand the existing scope of a desegregation remedy, determined that because the suburban districts had not committed any constitutional violation, they could not have a desegregation plan imposed upon them.

Approximately two years later, the Supreme Court decided *Pasadena City Board of Education v. Spangler*. In *Spangler*, the Court held that a district
court could not compel a school board to annually readjust its attendance zones to prevent the existence of a "majority of any minority" race in any public school if the school board had previously established a racially neutral system of student assignment. The Court examined the district court's continued jurisdiction to monitor student assignments against excerpts from Swann v. Charlotte-Mecklenburg Board of Education. The Court then found that a district court could not ensure that an appropriate racial mix was "maintained in perpetuity." Therefore, the trend of increasing restraint in the school desegregation area continued, in contrast to earlier desegregation cases that allowed the district court broad equitable authority to eliminate segregation.

B. The Trend of Judicial Restraint Continues

Dayton Board of Education v. Brinkman (Dayton I) represented the continued reluctance of the Supreme Court to endorse a district court's sweeping desegregation remedy. In Dayton I, the district court concluded that a school board's failure to eradicate schools with a substantial racial imbalance in a school district, a school board's use of optional attendance zones, and a school board's retraction of previous desegregation efforts were a "cumulative violation" of the Equal Protection Clause. The

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97. Id. at 435.
98. Id. at 434-35.
99. Id. at 433-37.
100. Id. at 436; but see Justice Marshall's dissenting opinion. Id. at 441-44 (Marshall, J. dissenting).
103. See Tribe, supra note 39, § 16-19, at 1497-98 (noting that "[s]chool integration cases decided in the wake of Washington v. Davis [426 U.S. 229 (1976)] at first appeared to continue the trend of retrenchment begun in Milliken I").
104. The district court concluded that most of the sixty-six Dayton, Ohio Public Schools "were imbalanced and that, with one exception," the school board had not tried to remedy this situation. Dayton I, 433 U.S. at 412.
105. The Court defined "optional zone" as "an area between two attendance zones, the student residents of which are free to choose which of the two schools they wish to attend." Id. at 412 n.8.
106. The Court noted that a newly-elected school board rescinded resolutions that called for remedial measures. Id. at 413.
107. Id. The Court criticized the district court for its ambiguous phrase "cumulative violation." Id. The Court interpreted the district court's phrase to mean that "there were three separate although relatively isolated instances of unconstitutional action on the part of petitioners." Id.
108. Id.
Court then imposed a system-wide desegregation remedy. The court of appeals affirmed.

The Court emphasized that because of the conflict in prior Supreme Court cases between federal courts' authority to grant relief in a desegregation case when a school board has violated the Constitution and the tradition of local autonomy of school districts, if federal judicial oversight is going to replace local oversight, a constitutional violation must be proven and legally justified. The United States Supreme Court decided unanimously to vacate the decision of the court of appeals and remand the case for further proceedings. Next, the Court enunciated a three-part inquiry for the district court and court of appeals to use in a case where legal segregation is no longer enforced. The Court determined that in order for the district court to impose its remedy, there must be a showing that the school board intended segregative actions. If it did, courts must find out how much segregation this caused in Dayton compared to how much segregation would have existed if the board had not acted. Finally, the Court noted that the remedy must be tailored to redress that difference.

On the same day as Dayton I, the United States Supreme Court held in Milliken v. Bradley (Milliken II), that a federal district court could order remedial education programs as part of a school desegregation decree, and ordered a state to contribute to the cost of those programs. First, the Court decided that the nature and scope of the constitutional violation determines the type of remedy. In addition, the Court noted that the remedy must return the victims of segregation to the position they were in before the school board's conduct. Finally, the Court held that lower courts must consider the need for state and local authorities to manage their own affairs. In Milliken II, the district court's four educational components to

109. Id.
110. Id. at 416.
111. Id. at 410.
112. Id.
113. Justice Marshall took no part in the case. Id. at 421.
114. Id. The Court imposed this requirement because of its holding in Washington v. Davis, 426 U.S. 229 (1976) (holding that there must be an intent to discriminate for a law to be declared violative of equal protection). See Tribe, supra note 39, § 16-19, at 1498.
116. Id. at 413, 420.
117. Id. at 414, 420.
118. Id. at 420.
120. See id. at 286-88.
121. Id. at 280.
122. Id.
123. Id. at 280-81.
the decree included a remedial reading and communications skills program, a comprehensive in-service teacher training program, a non-biased student testing program, and a student counseling and career guidance program.\textsuperscript{124} The Supreme Court determined that these programs were necessary to correct the effects of past discrimination from a \textit{de jure} segregated school system.\textsuperscript{125}

The United States courts of appeals continued to support the \textit{Swann-Keyes} principle.\textsuperscript{126} However, during the Supreme Court's 1978-1979 term, there was concern that limitations would be imposed on this principle.\textsuperscript{127} In August of 1978, Justice Rehnquist granted a stay to the Columbus, Ohio Board of Education for the implementation of its desegregation plan.\textsuperscript{128} When the Court heard \textit{Dayton Board of Education v. Brinkman (Dayton II)}\textsuperscript{129} and \textit{Columbus Board of Education v. Penick (Penick II)},\textsuperscript{130} however, the Court approved the desegregation plans because the Court found much evidence of past discrimination.\textsuperscript{131}

Because of the pervasive consequences of the segregated school system and the segregative impact of the school board's practices, the Supreme Court, in a 5-4 \textit{Dayton II} decision,\textsuperscript{132} affirmed the United States Court of Appeals for the Sixth Circuit's ruling that upheld a system-wide remedy.\textsuperscript{133} The Court held that since the school board had operated a dual school system, it had to dismantle that system and eliminate all its segregative effects.\textsuperscript{134} Finally, the Court rejected the argument that plaintiffs must prove

\begin{itemize}
  \item \textsuperscript{124} \textit{Id.} at 275-76.
  \item \textsuperscript{125} \textit{Id.} at 287.
  \item \textsuperscript{126} \textit{See Bell, supra note 53, at 406. See also supra notes 72-86 and accompanying text.}
  \item \textsuperscript{127} \textit{See Bell, supra note 53, at 406.}
  \item \textsuperscript{128} Columbus Bd. of Educ. v. Penick (Penick I), 439 U.S. 1348 (1978). To justify the stay, Justice Rehnquist cited burdens that the desegregation order would impose on the school system and the likelihood that the Court would soon grant a writ of certiorari to hear the case. \textit{Id.} at 1352-53.
  \item \textsuperscript{129} 443 U.S. 526 (\textit{Dayton II}) (1979).
  \item \textsuperscript{130} 443 U.S. 449 (\textit{Penick II}) (1979).
  \item \textsuperscript{131} \textit{See Dayton II, 443 U.S. at 535-37; Penick II, 443 U.S. at 475 n.8; see also Bell, supra note 53, at 406.}
  \item \textsuperscript{132} 443 U.S. 526 (\textit{Dayton II}) (1979).
  \item \textsuperscript{133} \textit{Id.} at 534.
  \item \textsuperscript{134} \textit{Id.} The Court explained that the school board had used optional attendance zones and maintained all-African American faculties during the 1930s and 1940s, as well as at the time of \textit{Brown I}. \textit{Id.} at 535. Specifically, the Court noted that in 1950, "the faculty at 100\% black schools was 100\% black and [ ] the faculty at all other schools was 100\% white." \textit{Id.} Because this situation existed in 1954, the Court reasoned that the board had responsibility to eliminate the effects of the segregation and that the board's actions would be judged by their effectiveness. \textit{Id.} at 537-38.
\end{itemize}
that each individual act of discrimination has a specific effect on current patterns of segregation.\footnote{135}

On the same day that it heard \textit{Dayton II}, the Court decided \textit{Columbus Board of Education v. Penick (Penick II)}.\footnote{136} In \textit{Penick II}, the Court noted that the operation of separate African American schools in Columbus, Ohio in 1954 was the direct result of school officials' acts.\footnote{137} Because of this, the Court reasoned, the school board had a duty to dismantle its dual system.\footnote{138} Next, the Court recognized that certain board actions revealed the board's purpose to segregate according to race.\footnote{139} Finally, the Court concluded that a desegregation remedy should be appropriate for the constitutional violation involved, and here, evidence of system-wide impact of the board's segregative policies justified the district court's imposition of a system-wide remedy.\footnote{140}

The remedies that the Supreme Court has found acceptable in desegregation cases vary according to the shifting majorities of the Court that have heard these cases.\footnote{141} Because of this, it is extremely difficult to reason from the requirement of a racially balanced school system as established in \textit{Brown}.

\footnote{135. Id. at 540-41.} \footnote{136. 443 U.S. 449 (\textit{Penick II}) (1979).} \footnote{137. Id. at 456. The Court evaluated the school system in 1954 because that was the year that \textit{Brown I} was decided. Id.} \footnote{138. Id. at 458. The Court stated that each time the board failed to dismantle its system, it was continuing to violate the Fourteenth Amendment. Id. at 459.} \footnote{139. Id. at 461-62. The Court cited the board's practice of assigning African American teachers to African American schools, its use of optional attendance zones, discontiguous attendance areas, boundary changes, and its selection of sites for new schools. Id.} \footnote{140. Id. at 466-67. As evidence of system-wide impact, the Court noted the board's pre-1954 policy of creating Afro-American schools, its post-1954 failure to desegregate, its segregative school construction policy, its student assignment policy, and its practice of assigning Afro-American faculty to Afro American schools. Id. at 467. To support its conclusion, the Court, referencing \textit{Keyes}, stated that "purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a systemwide discriminatory intent unless otherwise rebutted." Id. at 467.} \footnote{141. \textit{Tribe}, supra note 39, § 16-19, at 1499. For example, in \textit{Penick II}, the majority contained the same Justices as the majority in \textit{Dayton II} (although Chief Justice Burger and Justice Stewart concurred). Id. at 1499 n.52. In \textit{Penick II}, although Columbus, Ohio had not had statutorily-mandated segregation in this century, Justice White found a violation of the Fourteenth Amendment. \textit{See} \textit{Penick II}, 443 U.S. at 464-65; \textit{Tribe}, supra note 39, § 16-19, at 1499. The Court in \textit{Penick II} stated that it was applying the rationale of \textit{Keyes v. School Dist. No. 1}, 413 U.S. 189 (1973). Dissenting in \textit{Penick II}, however, Justice Rehnquist argued that the Court had relaxed the \textit{Keyes} standards for imposing a systemwide remedy based on inferred causal links between the practices of the School Board and the racial balance of the schools. \textit{See} \textit{Penick II}, 443 U.S. at 490-91, 500-01, 506-07 (Rehnquist, J., dissenting); \textit{see also} \textit{Tribe}, supra note 39, § 16-19, at 1499.}
to what is to be included in the components of a desegregation decree in a particular case.143

III. LOWER COURTS DISAGREE AS TO THE STANDARD FOR REMOVAL OF A DESSEGREGATION DECREE

The inconsistent rationale used by the Supreme Court to evaluate school desegregation remedies144 resulted in conflicting circuit court decisions regarding the correct standard to apply in judging the appropriateness of a desegregation decree when a school system argues that its system is no longer discriminatory.145 The first standard, adopted by both the Ninth Circuit in Spangler v. Pasadena City Board of Education146 and the Fourth Circuit in Riddick v. School Board of the City of Norfolk,147 evaluated a desegregation decree using traditional equitable principles.148 The second standard was adopted by the Tenth Circuit in Dowell v. Board of Education of Oklahoma City149 and applied the established “grievous wrong” standard for modification of a federal injunctive decree.150

A. The Standard of the Ninth Circuit and the Fourth Circuit

Spangler v. Pasadena City Board of Education151 held that a district court must relinquish its jurisdiction over a school board’s desegregation decree and used the three factors established in Milliken II152 to determine the appropriate remedy.153 The court reasoned that in using equitable principles,154 the district court should first consider the nature and scope of the constitutional violation.155 Second, the district court should restore the victims of discrimination to the position they would have been in if there was

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143. See Abram Chayes, Foreword: Public Law Litigation and the Burger Court, 96 HARV. L. REV. 4, 50-51 (1982) (noting that because the Court must form a prospective and affirmative remedy in public law litigation, the trial judge has much discretion, and consequently, there is less of a connection between the “right” asserted and the remedy).
144. See supra note 141 and accompanying text.
146. 611 F.2d 1239 (9th Cir. 1979).
147. 784 F.2d 521 (4th Cir.), cert. denied, 479 U.S. 938 (1986).
148. Id. at 537.
150. Id. at 1490.
151. 611 F.2d 1239 (9th Cir. 1979).
153. Spangler, 611 F.2d at 1241.
154. Id. See supra notes 48, 122-24 and accompanying text.
155. Spangler, 611 F.2d at 1241.
no illegal conduct. Third, the district court must take into account the interests of state and local authorities in managing their own affairs. The Ninth Circuit concluded that after nine years of court supervision, all three requirements were satisfied.

Riddick v. School Board of City of Norfolk also addressed the issue of whether judicial involvement ends when a school system achieves unitary status. The Fourth Circuit required a plaintiff to prove that a school board acted with discriminatory intent in order for a court to compel a remedy to counteract resegregation of a school system. Following the Ninth Circuit's opinion in Spangler, Riddick held that without proof of a school board's deliberate intent to discriminate, further supervision by a district court is not necessary.

B. The Tenth Circuit Adopts a More Exacting Standard

In Dowell v. Board of Education of Oklahoma City, the United States Court of Appeals for the Tenth Circuit upheld a more stringent standard for determining when a district court can terminate a desegregation decree, reasoning that the modification of a desegregation decree must be evaluated using the federal law on injunctive remedies. The court determined that a

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156. Id. Initially, the court noted that the school board's eight year compliance with the "1970 Pasadena Plan" was sufficient to meet the first two factors. Id.
157. Id. Emphasizing the temporary nature of a desegregation decree, the court criticized the district court for not considering the board's present and future compliance with the desegregation decree. Id. at 1241.
158. Id. at 1244.
159. Id. at 1241. The court, approving the modified decree, remanded the case to the district court with an order to terminate the case. Id. at 1242.
162. Spangler, 611 F.2d at 1239. The court reasoned that the district court must consider the nature and scope of the constitutional violation, and concluded that in Norfolk, the presence of one-race schools is not itself a violation of the Constitution because the school board did not show an intent to discriminate. Riddick, 784 F.2d at 537, 543. Next, the court determined that Norfolk's neighborhood assignment plan was sufficient to provide victims of segregation with whole relief. Id. Finally, the court explained that the school board, if it has eliminated de jure segregation, will be allowed to run its schools without federal court supervision if it has not shown an intent to discriminate. Id.
163. 784 F.2d at 537, 543.
165. Id. at 1485-86. The standard for modification of an injunction was first articulated in United States v. Swift & Co., 286 U.S. 106, 119 (1932). See Dowell, 890 F.2d at 1490. In Swift, the United States Supreme Court held that only "a clear showing of grievous wrong evoked by new and unforeseen conditions" should lead a court to change an injunction decree entered by consent. Swift, 286 U.S. at 119. Defendants in Swift, the five leading meat packers in the United States, filed a petition to modify a consent decree, id. at 113, enjoining them to dissolve
school desegregation injunction is essentially the same as any other injunctive order issued by a federal court, and that all parties must comply with the decree until it is modified by the court that first issued it. 166 For modification of a desegregation decree, the court demanded that the school board show dramatic changes had occurred from conditions unforeseen at the time of the decree. 167 In addition, the school board must show that these conditions now render the decree ineffective in protecting the rights of the decree's beneficiary and that the decree imposes extreme hardships on the school board. 168 The Supreme Court granted certiorari in Dowell to determine the

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166. Dowell, 890 F.2d at 1486. In Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941), Justice Frankfurter described an injunction as being "'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted." Id. at 298.

167. Dowell, 890 F.2d at 1490.

168. Id. at 1490.

Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.

appropriate standard to use in determining when a district court may terminate a desegregation decree.\footnote{Board of Educ. of Okla. City v. Dowell, 111 S. Ct. 630, 635 (1991); see Dowell v. Board of Educ. of Okla. City, 890 F.2d 1483 (10th Cir. 1989) (reasoning that the standard for modification of a desegregation decree is the federal law on injunctive remedies), rev'd, 111 S. Ct. 630 (1991); Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239 (9th Cir. 1979) (holding that a district court must use equitable principles to determine when it can terminate a desegregation decree); Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir.), cert. denied, 479 U.S. 938 (1986) (following Spangler, the court used equitable principles to determine when a desegregation decree could be terminated); see also supra notes 144-69 and accompanying text.}

IV. \textit{BOARD OF EDUCATION OF OKLAHOMA CITY v. DOWELL: A FURTHER EXTENSION OF THE TREND OF JUDICIAL RESTRAINT}

A. \textit{The Majority: Misinterpreting the Aim of School Desegregation Precedents}

1. Preliminary Questions

In \textit{Board of Education of Oklahoma City v. Dowell},\footnote{111 S. Ct. 630 (1991).} the United States Supreme Court established a flexible standard for district courts to use when determining when to dissolve a desegregation decree so as to show deference to local government control of education.\footnote{Id. at 637, 639.} In \textit{Dowell}, the Court first addressed whether respondents could challenge the district court's 1987 dissolution of the injunction that had imposed the desegregation decree.\footnote{Id. at 635.} The Board of Education of Oklahoma City argued that the 1977 district court order finding that the school system had achieved unitary status terminated the litigation, and therefore precluded Dowell from later contesting the 1987 order that had dissolved the decree.\footnote{Id. In 1987, the district court decided to lift the injunctive decree and return the school district to local control. \textit{Id}.} The Court disagreed that Dowell was barred from this action, first, because the 1977 order did not dissolve the desegregation decree, and second, because the district court's 1977 finding of a unitary school system was too ambiguous as to the meaning of the word "unitary."\footnote{The Court acknowledged that some courts have used the term "unitary" to refer to "a school district that has completely remedied all vestiges of past discrimination." \textit{Id}. at 635 (citing United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987); Riddick v. School Bd. of City of Norfolk, 784 F.2d 521, 533-34 (4th Cir. 1986); Vaughns v. Board of Educ. of Prince George's County, 758 F.2d 983, 988 (4th Cir. 1985)). According to this interpretation, a unitary school district has met the requirements of Brown v. Board of Educ. (Brown II), 349 U.S.}
tent in their use of the word "unitary," the Court refused to give the words "dual" and "unitary" significance as if they were located in the Fourteenth Amendment. The Court did not attempt to define these two words more precisely. The Court accepted the conclusion of the court of appeals that the 1977 order of the district court did not render the Oklahoma City school litigation res judicata.

2. The Majority's Standard

The Court found that the court of appeals mistakenly relied on language from prior case law when it held that a district court could lift or modify a desegregation decree only if there was a showing of "grievous wrong evoked by new and unforeseen conditions." The Court also determined that the court of appeals erred when it held that a court cannot modify or dissolve an injunction solely based on a school district's compliance with a decree. First, the Court rejected the lower courts' rigid application of the "grievous wrong" standard for modifying injunctive decrees, and instead restricted this standard to the specific area of trade restraints. The Court, however, then

294 (1955), and Green v. New Kent County School Bd. 391 U.S. 430 (1968). Dowell, 111 S. Ct. at 635. However, the Court noted that other courts have used "unitary" to identify "any school district that has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan." Id. (citing Dowell v. Board of Educ. of Okla. City Pub. Schools, 890 F.2d 1483, 1491-92 n.15 (10th Cir. 1989)). These courts still consider a school district unitary even if a school district contained vestiges of past discrimination. Id. See Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413 n. 12 (11th Cir. 1985) (explaining that a school district is "unitary" if it has not operated segregated schools for several years, but a district has achieved "unitary status" only when it "has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures." Id. at 1413 n.12).

175. Dowell, 111 S. Ct. at 636. See supra note 18 and accompanying text.

176. Id. The Court found only that courts have used "dual" to describe a school system that has intentionally segregated its students by race, and "unitary" to identify a school system that has complied with the Constitution. Id.

177. Id. The Court first looked to prior case law to decide whether a school board must be informed of its obligations under a desegregation decree. Id. (citing Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 427 (1976)). From this, the Court reasoned that if the decree will be terminated or dissolved, then the Court must notify both Dowell and the school board. Id.


179. Id.

180. Id. (citing United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).

181. Id. The Court reasoned that prior case law constrained the language in United States v. Swift & Co., 286 U.S. 106, 119 (1932), to the context of the continuing danger of unlawful restraints on trade. Dowell, 111 S. Ct. at 636 (citing United States v. United Shoe Mach. Corp., 391 U.S. 244 (1968)). The Court noted that in Swift, meat-packing companies initially agreed to never enter the grocery business, but later attempted to frustrate operation of the decree. Id. See Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992); see also supra note 166.
used language from prior case law which interpreted the "grievous wrong" standard from *Swift* to mean that "a decree may be changed upon an appropriate showing, and . . . it holds that it may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." The Court then applied this standard to the facts of *Dowell*. The Court reasoned that if the district court found that the Oklahoma City School District currently operated in compliance with the Equal Protection Clause of the Fourteenth Amendment, and that it was not likely that the school board would revert to enforced segregation, then the district court could find that the desegregation decree's purposes had been fully achieved.

The Court supported this analysis without addressing the entire body of prior desegregation law. Using select language from prior desegregation cases, the Court reasoned that federal court supervision of local school systems was never intended to provide more than a temporary method to remedy past discrimination. The Court quotes only nineteen words from *Brown v. Board of Education (Brown II)* to lend further credibility to the proposition that federal court decrees were imposed to effectuate a "transition" away from segregated schools. The Court noted again that desegregation decrees were not intended to operate forever, unlike the injunctive decree at issue in *Swift*. Citing prior case law, the Court emphasized that a desegregation decree is proper only when it directly addresses and relates to a constitutional violation. Therefore, the majority reasoned that concerns of federalism support its view that a court should dissolve a desegregation decree when local authorities have complied with it for a "reasonable period of time."

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183. Id. The majority in *Dowell*, however, does not explain how the district court should make this determination.
184. See id. at 644 (Marshall, J., dissenting).
185. Id. The Court mentioned that local control over a school system allowed for citizen participation and creativity in designing school programs. Id.
187. *Dowell*, 111 S. Ct. at 637. The Court noted that *Brown II* considered the "complexities arising from the transition to a system of public education freed of racial discrimination" when it held that desegregation was to proceed "with all deliberate speed." Id. (citing *Brown II*, 349 U.S. at 299-301 (emphasis added)). In addition, the Court indicated that Green v. New Kent County School Bd., 391 U.S. 430, 436 (1968), also mentioned the "transition to a unitary, nonracial system of public education." Id. (emphasis added).
188. *Dowell*, 111 S. Ct. at 637.
189. Id. (citing Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977)).
190. *Dowell*, 111 S. Ct. at 637. The majority does not specifically define how long a "reasonable period of time" should last other than to indicate that it is the "time required to
The Court departed from the court of appeals' "Draconian result" of "condemn[ing] a school district . . . to judicial tutelage for the indefinite future" when it indicated that a school board's compliance with previous court orders was relevant in deciding whether to modify or dissolve a desegregation decree. Accordingly, the Court found that neither the principles of injunctive decrees nor the Equal Protection Clause precluded courts from considering the school board's compliance with the decree when deciding whether to dissolve or modify the decree.

Finally, the Court remanded the case to the district court to decide whether the school board demonstrated sufficient compliance with the Constitution as of 1985, when the Student Reassignment Plan (SRP) was adopted to allow the desegregation decree to be dissolved. The effects of past intentional discrimination." 

The majority narrows its inquiry for the imposition of a desegregation decree to whether local authorities are in violation of the Constitution, and then allows the dissolution of that decree when the school system has remedied the effects of past intentional discrimination. The majority however, makes no reference to the transformation of public attitudes toward the racial character of the schools. See Keyes v. School Dist. No. 1, 413 U.S. 189, 196 (1973) (defining the word segregated to include "the community . . . attitudes toward the school"). Perhaps an entire generation of sustained compliance with a decree is needed to accomplish this goal. See Paul Gerwitz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 COLUM. L. REV. 728, 793 (1986). See also Spangler v. School Dist. No. 1, 611 F.2d at 1241 (as amended on denial of rehearing) (concluding that eight years is sufficient); Steele v. Board of Pub. Instruction, 448 F.2d 767, 767-68 (5th Cir. 1971) (finding that three years may be enough); Singleton v. Jackson Mun. Separate School Dist., 541 F. Supp. 904, 914-15 (S.D. Miss. 1981) (10 years); United States v. Corinth Mun. Separate School Dist., 414 F. Supp. 1336, 1339-40, 1345 (N.D. Miss. 1976) (five years).

191. Dowell, 111 S. Ct. at 638.
192. Id. at 637-38. The Court acknowledged that in Oklahoma City, the courts made a finding of de jure segregation in 1961, the injunctive decree was entered in 1972, and the Board complied with the decree until 1985. Id. In discussing the benefits of taking the school board's compliance into account, the Court noted that the composition of school boards change over time and that a district court has an opportunity to observe the school board's behavior in accordance with the decree over time. Id.
193. Id. at 638. The Court distinguished the case that the court of appeals relied on for its statement that "compliance alone cannot become the basis for modifying or dissolving an injunction." Id. at 637 (quoting Dowell v. Board of Educ. of Okla. City Pub. Schools, 890 F.2d 1483, 1491 (10th Cir. 1989)). The Court explained that United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953), involved the issue of whether an injunction should be issued, and not whether an injunction should be dissolved. Dowell, 111 S. Ct. at 637.
194. Dowell, 111 S. Ct. at 638.
195. In 1985, Dowell filed a motion arguing that the school district had not achieved "unitary" status and that implementation of the SRP was a return to segregation. Id. at 634. The SRP assigned students in grades kindergarten through fourth grade to neighborhood schools beginning in the 1985-86 school year, but continued to bus students in grades five through twelve. Id. In addition, any student was allowed to transfer to a school where he or she would be in the minority. Id. However, under the SRP, while 31 of 64 elementary schools would be
solved. The Court reasoned that the district court should address whether the school board had complied with the desegregation decree and whether vestiges of past discrimination had been eliminated "to the extent practicable." In searching for vestiges of de jure segregation, the Court directed the district court to look to the six factors that the Court in Green v. New Kent County School Board determined were the most indicative of segregated schools: student assignments, faculty, staff, transportation, extracurricular activities, and facilities. The majority concluded that if the board was entitled to have the desegregation decree terminated, it could then promulgate policies and rules concerning such matters as student assignments without court authorization. However, the majority was careful to provide that the school board's actions must still comply with the Equal Protection Clause.

B. The Dissent: A Clear Interpretation of the Aim of School Desegregation Precedents

Justice Marshall's dissent rejected the Court's interpretation of when a desegregation decree should be dissolved. The dissent argued that the Court did not evaluate accurately whether the purposes of the desegregation decree had been achieved because it failed to consider that the threatened reemergence of one-race schools is a "vestige" of de jure segregation. Justice Marshall focused more appropriately on the central purpose of school desegregation precedent: eliminating the stigmatizing harm that state-segregated schools impose on African American children.

racially mixed, 11 of these schools would be more than 90 percent African American, and 22 would be greater than 90 percent white plus other minorities. Id.

196. Id. at 638.

197. Id. The Court briefly mentioned in a footnote that the district court's finding that "present residential segregation in Oklahoma City was the result of private decisionmaking and economics, and that it was too attenuated to be a vestige of former school segregation" would be treated as res nova on further consideration of the case. Id. at 638 n.2. The Court provided no further analysis of this proposition.


200. Id.


202. Id. at 639 (Marshall, J., dissenting).

203. Id.

204. Id.
I. Dissent's Standard for Determining Whether a Desegregation Decree Should be Dissolved

Justice Marshall agreed with the majority that the proper standard for determining whether a district court should dissolve a school desegregation decree is whether the school system has fully achieved the purposes of the desegregation litigation as contained in the decree.205 However, the dissent strongly opposed the majority's opinion of what a school board must show to demonstrate that it has fully achieved the goals of a desegregation decree.206 Justice Marshall asserted that a standard for dissolving a desegregation decree must take into account the unique harm associated with segregated schools and must require the elimination of these schools.207

Justice Marshall first emphasized that the Court, since its decision in Brown I,208 has used remedying and avoiding the recurrence of stigmatizing injury as guiding objectives when formulating relief in a desegregation case.209 The dissent asserted that the Court has used stigma to inform its standard to determine the effectiveness of a desegregation remedy,210 to explain its requirement that a school district provide its victims of segregated

205. Id. at 641 (citing the majority opinion in Dowell, 111 S. Ct. at 636; United States v. Swift & Co., 286 U.S. 106, 119 (1932); United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976); Spangler, 427 U.S. at 444 (Marshall, J., dissenting)). Justice Marshall also agreed with the majority that before a school desegregation decree is dissolved, the district court must give a precise statement of how the standards for dissolution have been met. Id. at 641 n.3.

206. Id. at 639. Justice Marshall contended that the majority's conception of the purposes of a desegregation decree was not clear. Id. at 642 n.4. Justice Marshall attributed this to the majority's preoccupation with rejecting the court of appeals' use of the "grievous wrong" language from United States v. Swift & Co., 286 U.S. 106 (1932). Dowell, 111 S. Ct at 642 n.4 See also id. at 635 (majority opinion).

207. Id. at 642 (Marshall, J., dissenting).

208. 347 U.S. 483, 495 (1954). See supra note 43-44 and accompanying text. In Brown I, the Supreme Court first recognized the unique social harm that segregation itself inflicts on African American children. The Court held that segregated schools generate a long-lasting feeling of inferiority in African American children relating to their status in the community. Id. at 494. This feeling of inferiority in turn affects an African American child's motivation to learn, and consequently has a tendency to retard his or her educational and mental development. Id. The Court concluded that segregated schools were inherently unequal. Id. at 495.

209. Dowell, 111 S. Ct. at 642.

210. Id. Justice Marshall pointed out that in Green v. New Kent County School Bd., the Court held that a proposed desegregation plan was inadequate because it did not remedy the effect of segregation in "every facet of school operations." Id. (quoting Green, 391 U.S. 430, 435 (1968)). Justice Marshall further asserted that the Court made it clear in Green that under the Equal Protection Clause, school boards were obligated to eliminate every indication of "racially identifiable" schools that will cause the stigmatic injury that Brown I sought to redress. Id. (quoting Green, 391 U.S. at 435, and citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)). See supra notes 46-143 and accompanying text.
schools with "make whole" relief, and to explain its demand that remedies provide lasting integration of formerly segregated systems. Similarly, Justice Marshall reasoned that the Court should also make stigmatic injury central to the standard for dissolving a desegregation decree.

The dissent observed that the end which a desegregation decree seeks to achieve is the elimination of all vestiges of state-imposed segregation. While Justice Marshall conceded that the Court has never clearly defined a "vestige" of segregation, the dissent suggested a working definition of the

211 Dowell, 111 S. Ct. at 643. In further examining school desegregation precedent, Justice Marshall cited Milliken I, 418 U.S. 717 (1974), for the proposition that a school desegregation decree must "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Dowell, 111 S. Ct. at 643 (quoting Milliken I, 418 U.S. at 746). Justice Marshall again pointed out that in order to do this, the Court has held that school districts must remedy any lasting effects of former de jure segregation. Id. at 643 (citing Milliken II, 433 U.S. at 281-88 (1977)). The dissent explained that the relief upheld in Milliken II was intended to help prevent the stigma on African American children from turning into a self-perpetuating phenomenon. Id. (citing Milliken II, 433 U.S. at 287). See supra note 122.

212 Dowell, 111 S. Ct. at 643. Justice Marshall again cited prior case law to support his argument. He asserted that the Court has found that formerly segregated school districts must "make every effort to achieve the greatest possible degree of actual desegregation and . . . be concerned with the elimination of one-race schools." Id. (quoting Swann, 402 U.S. at 26) (emphasis added) (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 460 (Penick II) (1979); Raney v. Board of Educ. of Gould School Dist., 391 U.S. 443, 449 (1968)). Justice Marshall reasoned that the Court's focus on "achieving and preserving an integrated school system," id. at 643 (quoting Keyes v. School Dist. No. 1, 413 U.S. 189, 251 n.31 (1973) (Powell, J., concurring in part and dissenting in part) (emphasis added)), is rooted in the recognition that if racial separation in formerly segregated schools reemerges, then the message that African American children are racially inferior may be revived as well. Id. at 643. In addition, Justice Marshall referred to a recent school desegregation study to point out that many all-African American schools continue to suffer from high ratios of students to faculty, lower quality teachers, low-grade facilities and physical conditions, and lesser quality course offerings and extracurricular programs. Id. at 643 n.5.

213 Id. at 643-44. For this proposition, Justice Marshall reasoned that the stigmatic injury to African American that accompanies a segregated school system has been central to the Court's standard for evaluating the development of a desegregation decree. Id. Next, he asserted that the Court has also held that the ultimate end to be brought about by such a remedy is a nonracial system of public education through the elimination of all vestiges of state-imposed segregation. Id. at 644 (quoting Green, 391 U.S. at 436 and Swann, 402 U.S. at 15). Marshall recognized that "vestiges" includes every element of school operations as well as "the community and administration[']s attitudes toward [a] school." Id. (alteration in original) (quoting Keyes, 413 U.S. at 196). Consequently, Justice Marshall concluded that avoiding stigma should be the central aim of the standard for dissolving a desegregation decree as well.

214 Id. (quoting Swann, 402 U.S. at 15 (1971)).
215. In referring to "vestige," the dissent remarked that "the function that this concept has performed in our jurisprudence suggests that it extends to any condition that is likely to convey the message of inferiority implicit in a policy of segregation." *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* Justice Marshall pointed out that in *Green v. New Kent County School Bd.*, the Court rejected a freedom-of-choice plan because it anticipated that the choices made would reflect the message of racial inferiority that originated in the state-enforced segregation of schools. *Id.* The dissent acknowledged that a school board's compliance with a desegregation decree is relevant in considering whether the decree should be dissolved, but there must be a requirement in the standard for dissolution which would assure a district court that the school district will continue to operate an integrated school system. *Id.* at n.6.

222. *Id.*

223. *Id.* at 647.
Justice Marshall maintained that removal of the decree would be untimely because it would result in racially identifiable schools, precisely what an effective desegregation decree is supposed to abolish. The dissent acknowledged that the existence of these schools, when evaluated against the background of former state-imposed segregation, perpetuates the stigmatic injury to African American children associated with segregation. Therefore, Justice Marshall concluded, these schools must be eliminated whenever it is possible.

Justice Marshall also criticized the majority opinion for not addressing how the district court should consider the reemergence of racially identifiable schools in dissolving a desegregation decree. The dissent found each argument that the majority asserted to circumvent this issue logically flawed. First, the dissent confronted the majority's refusal to consider whether residential segregation in Oklahoma City is a vestige of former school segregation and then asserted that it is well established that school segregation may have a profound effect on the racial composition of residential neighborhoods. Next, Justice Marshall attacked the majority's allu-

224. *Id.* at 648.
227. *Id.* Justice Marshall pointed out that in Oklahoma City, when the board replaced the Finger Plan with a system of neighborhood school assignments for grades kindergarten through four, a system of racially identifiable schools developed. *Id.* Over one-half of Oklahoma City's elementary schools under the SRP now have student enrollment that is either 90% African American or 90% non-African American. *Id.*
228. *Id.* The majority instructed the district court to consider whether those "most important indicia of a segregated system" have been eliminated, citing only those aspects of segregated school operations identified in *Green*—"faculty, staff, transportation, extra-curricular activities and facilities" for guidance. *Id.* (citing the majority opinion in *Dowell,* 111 S. Ct. at 638).
229. *Id.*
230. *Id.* at 645 (citing Keyes v. School Dist. No. 1, 413 U.S. 189, 202 (1973); Columbus Bd. of Educ. v. Penick (*Penick II*), 443 U.S. 449, 465, n.13 (1979)). The dissent interpreted the majority opinion to mean that it accepted that vestiges may exist beyond those identified in *Green*, at least as a theoretical possibility, when it rendered *res nova* the issue of whether residential segregation in Oklahoma City is a vestige of former school segregation. *Id.* at 638. See supra text accompanying note 66.

Justice Marshall noted that the Court has held that any injurious condition resulting from state-enforced segregation must be remedied as much as possible. *Id.* at 646 n.8 (citing Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 280-81 (1977)). In *Dowell,* Marshall asserted, the record demonstrated that the Board's segregated school policies contributed to residential segregation, and therefore must be eliminated. *Id.* at 646. The dissent pointed out that as early as 1965, the district court found that the Board's use of neighborhood schools "serve[d] to . . .
sion to the fact that racially identifiable schools could be acceptable if they resulted from residential segregation perpetuated by "private decisionmaking." Finally, the dissent rejected the majority's assertion that the district court should take the length of federal judicial supervision into account in assessing a dissolution. Justice Marshall argued that a return to active supervision of the decree is not required, but observed that merely retaining the decree was a slight burden in comparison to the risk of violating African American children's constitutional rights.

exten[d] areas of all Negro housing, destroying in the process already integrated neighborhoods and thereby increasing the number of segregated schools." Id. (quoting Dowell v. School Bd. of Okla. City Pub. Schools, 244 F. Supp. 971, 977 (W.D. Okla. 1965)).

231. Id. at 645-47. Justice Marshall criticized the majority because its analysis ignored the roles of the state, local officials, and the board in creating the self-perpetuating patterns of residential segregation that now exist in Oklahoma City. Id. at 646. Justice Marshall concluded that because of the school board's pivotal role in creating a system of segregated schools which then prompted the accompanying stigma of racial inferiority, the school district must not be absolved from its obligation to desegregate. Id.

232. Id. at 646. The dissent conceded that the Court never intended "perpetual judicial oversight" of formerly segregated school districts. Id. However, Justice Marshall contended that precedent requires school system desegregation to be complete before lifting a desegregation decree to assure that the stigmatic harm identified in Brown I will not reemerge when the decree is no longer imposed. Id.

The dissent argued that the duration of federal judicial supervision is not a factor in assessing a dissolution because if it is unclear whether the school board has fulfilled its obligations, this ambiguity should be resolved in favor of the African American children. Id. at 647. Justice Marshall pointed out that the majority does not mention the burden of proof under its standard for dissolution of a school desegregation decree. Id. at 647 n.10. However, Justice Marshall asserted that in school desegregation cases, the presumption is against the school board that has engaged in de jure segregation. Id. (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979); Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971)).

The dissent does not deny that courts must consider the value of local control, but this must be considered in relation to the feasibility of the remedy rather than to the determination of whether the constitutional violation has been remedied. Dowell, 111 S. Ct. at 647.

233. Id. at 648. Justice Marshall acknowledged that modifying the desegregation decree may be appropriate in this case, but he maintained that the court had already ceased active supervision of the Oklahoma City desegregation process in 1977. Id.

234. Id. at 647. Justice Marshall asserted that

[t]he injunction . . . is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Id. at 647 n.11 (quoting Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941)). See supra note 166.
V. LOSING SIGHT OF THE ULTIMATE PURPOSE OF SCHOOL DESEGREGATION

In Board of Education of Oklahoma City v. Dowell, the majority concentrated on the limitation of federal judicial powers and, in the process, lost sight of what desegregation is actually supposed to achieve.235 The majority's remedy does not guarantee that a segregated school system will no longer exist, especially when the remedy is examined in light of lower court interpretations of Dowell's holding, a recent Supreme Court decision that established a more flexible standard for the lifting of a federal court desegregation decree,236 and a later Supreme Court ruling that allowed a federal court to incrementally or partially withdraw its supervision and control in a school desegregation case.237 Justice Marshall's dissent, on the other hand, focused on the purpose of desegregation as enunciated in prior desegregation cases: to eliminate the message of racial inferiority.238 Justice Marshall retained this aim first in formulating a standard for dissolution of a desegregation decree and second in applying that standard to the facts of Dowell.

A. Procedural Reasons for Rejecting the Dowell Decision

The majority opinion blatantly underestimated the consequences of a legitimate state system in Oklahoma City that separated and stigmatized Afri-

235. Id. at 637. Although goals for school desegregation vary from case to case, the goal of eradicating racial isolation and creating a racial balance is of primary importance. JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 44 (1984). Enhancing minority self-esteem, improving race relations, and increasing minority students' opportunities, providing equal access to educational resources, improving achievement of unsuccessful (most often minority) students, and encouraging support for desegregation are goals which would help attain a racial balance and eliminate racial isolation. Id. Finally, since continuity in a school system must also be maintained, desegregation must seek to avoid "white flight" to private schools and mostly white public schools, to minimize disorder in the community, and to prevent new forms of discrimination. Id. at 45. In addressing a desegregation remedy, the majority in Dowell did not successfully balance these goals with the need to exercise judicial restraint in a sensitive area of local control. See Joseph Henry Bates, Note, Out of Focus: The Misapplication of Traditional Equitable Principles in the Nontraditional Arena of School Desegregation (A Case Study of Desegregation in Little Rock, Arkansas), 44 VAND. L. REV. 1315, 1336 (1991).

236. See Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 763 (1992) (holding that the inquiry for modification of an institutional reform consent decree is only whether there has been a significant "change in fact or in law" and whether the modification is "suitably tailored to the changed circumstance"); see also supra note 165.

237. See Freeman v. Pitts, 112 S. Ct. 1430, 1445-46 (1992) (ruling that if a school system has complied with some aspects of a desegregation decree, a district court may give up its supervision and control over those aspects, even if other aspects remain in noncompliance); see also supra text accompanying note 66.

can American people for sixty-five years.\(^{239}\) The Dowell Court failed to take into account that this lengthy state-imposed segregated system has conditioned people's attitudes, and that these attitudes are deeply ingrained.\(^{240}\) After only thirteen years of active court supervision of desegregation in Dowell,\(^{241}\) the majority’s opinion that sufficient time has passed to eradicate sixty-five years worth of effects of desegregation is questionable.\(^{242}\) Justice Marshall’s dissent correctly criticized the majority for suggesting that thirteen years of desegregation was enough.\(^{243}\)

\(^{239}\) Dowell, 111 S. Ct. at 642. For a discussion of some of the indirect effects of school segregation in Little Rock, Arkansas, see, e.g., Bates, supra note 235, at 1344-45 (explaining that segregation has induced stagnating economic growth, increased movement of progressive individuals from troubled areas, decreased movement of progressive men and women to Little Rock, and also provoked public disturbance urging for a quick remedy). Moreover, the Supreme Court has recognized the close link between segregation in housing and in schools. Eric S. Stein, Attacking School Segregation Root and Branch, 99 YALE L.J. 2003, 2005 (1990). See, e.g. Columbus Bd. of Educ. v. Penick (Penick II), 443 U.S. 449, 465 n.13 (1979) (noting that segregated schools contribute to segregated housing patterns); Keyes v. School Dist. No. 1, 413 U.S. 189, 201-02 (1973) (same); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971) (“People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the pattern of residential development . . . .”).

\(^{240}\) Taylor, supra note 39, at 1724. “[E]xclusive judicial consideration of the school board’s behavior wrongly ignores the link between the school board and the broader political system and community of which the board is only a part.” Stein, supra note 239, at 2005 (footnote omitted). See Drew S. Days III, School Desegregation Law in the 1980’s: Why Isn’t Anybody Laughing?, 95 YALE L.J. 1737, 1742 (1986) (book review) (criticizing the Supreme Court for recognizing only the school board and not other governmental entities as a source of segregation). When segregation has been a continual community problem, it becomes connected with, and less distinguishable from discrimination in society. Bates, supra note 235, at 1344. Plaintiffs, in addition to demonstrating unconstitutional school segregation, often prove official housing discrimination at the same time. Stein, supra note 239, at 2013. See Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 778 F.2d 404, 423-25 (8th Cir. 1985) (finding public and private residential segregation with school board liability), cert. denied, 476 U.S. 1186 (1986).

\(^{241}\) Dowell, 111 S. Ct. at 637.

\(^{242}\) Id. at 637-38; See Taylor, supra note 39, at 1724 (explaining that if active court supervision is cut short, the effects of segregation may not be fully eradicated). A desegregation decree was not imposed on the Oklahoma City School Board until 1972, eighteen years after the Court first found segregated schools unconstitutional. Dowell, 111 S. Ct. at 639. Also, judicial efforts to dissolve Oklahoma City's dual education system were not well-received. Id. at 639. The district court concluded that “[t]his litigation has been frustratingly interminable, not because of insuperable difficulties of implementation of the commands of the Supreme Court . . . and the Constitution . . . but because of the unpardonable recalcitrance of the . . . Board.” Dowell v. Board of Educ. of the Okla. City Pub. Schools, 338 F. Supp. 1256, 1271 (W.D. Okla.), aff'd, 465 F.2d 1012 (10th Cir.) cert. denied, 409 U.S. 1041 (1972).

\(^{243}\) In 1972, the federal court imposed an injunction compelling the Oklahoma City School Board to implement a school desegregation plan and the injunction was terminated in 1985. Dowell, 111 S. Ct. at 639.
Affirmative remedies, especially those that have ended racial segregation and provided opportunities for education and employment, have been called the "principal legal engine of black progress." These remedies enable the once powerless to change their lives. By not enforcing an affirmative remedy, the majority in Dowell failed to understand the effects of the "caste system" of racial segregation and failed to understand the need for a remedy to prevent these effects from continuing after the end of formal segregation policies.

The success of the Brown I decision depended on the legislative and executive branches of the government to further the policies that the decision established. The Court became the catalyst that urged the nation to acknowledge problems that previously it had ignored. The Dowell decision represents a total retrenchment from the idea of the Court as catalyst.

244. See Taylor, supra note 39, at 1724.
245. Id. at 1734. "Victories in court were a kind of self-empowerment for black people that led to other successful legal, political and community efforts. From these successes followed heightened aspirations and increased confidence, confidence that was reinforced when people discovered they had the inner resources to withstand attacks on their rights." Id. at 1709.
246. Id. at 1700-03. Although the opportunities that are available to most African American and white children are still far from equal, the "official caste system" that existed in the United States for more than 200 years is no longer alive. Id. at 1701. The "official caste system" refers to the treatment of African American people as an inferior class, primarily in the South, through such things as legalized segregation in public institutions, the denial of the right to vote, and the provision of lower quality public services. Id. Today, although there are no longer outward manifestations of this caste system, "[f]ew recognize how deeply entrenched were the roots of the system, not just in economic but in emotional terms, and at what cost in blood and effort the elimination of the old order was purchased." Id. at 1702.
247. Segregation is itself the deepest educational harm because it is the result of institutional racism and a condition of state-imposed racial caste . . . . With integrated schools it is much more difficult to subordinate blacks as a group through unequal or inadequate school resources . . . . With desegregation—and white children being reassigned to previously black schools—also come new resources.

Correspondence from Nathaniel R. Jones, General Counsel, NAACP Special Contribution Fund, 86 YALE L.J. 378, 379-80 (1976).
248. Taylor, supra note 39, at 1734. The problem is that people fail to examine school desegregation with a historical perspective. Id. at 1702. Consequently, they fail to take into account the far-reaching effects of this system as well as the problems associated with eliminating these effects. See supra notes 221-23 and accompanying text, for an explanation of how the dissent in Dowell incorporated an understanding of the need to eliminate the effects of segregation into its remedy.
249. Taylor, supra note 39, at 1731.
B. Future Impact of Dowell

It is precisely the disparate results of the Supreme Court in school desegregation cases that clearly suggest that the dissent’s reasoning is sound. The objective in school desegregation cases is to give federal district courts as well as school districts law they can follow in imposing desegregation plans. Because of the inconsistent approaches the Court has used to achieve its goals, it is not easy to predict what the Supreme Court will do in a particular case.

The majority is worried about a desegregation remedy that would last longer than necessary, needlessly replacing the autonomy of local authority with the supervision of the federal courts. However, the dangers of not remediing segregation enough far exceed the inconveniences of imposing a decree for an extended amount of time. If the Court allows some state-imposed segregation to continue, the harm cannot be remedied. Some minority children will be forced to learn in racially isolated classrooms.

251. Tribe, supra note 39, § 16-19, at 1499. See also supra notes 87-143 and accompanying text.
252. Tribe, supra note 39, § 16-19, at 1499.
253. Dowell, 111 S. Ct. at 637. See also supra note 190.
254. Dowell, 111 S. Ct. at 648. A recent study shows the lasting impacts of school desegregation policies and recommends that these policies deserve serious consideration. Gary Orfield & Franklin Montfort, The Status of School Desegregation: The Next Generation, (forthcoming 1992) (executive summary at 3, on file with National School Boards Association and with Catholic University Law Review). The study found that segregation has grown in cities that implemented desegregation policies but did not change their surrounding suburbs. Id. (executive summary at 1). This “resegregation” has increasingly taken place in the Northeast and Midwest, rather than in the South, where the problem of intense segregation for African Americans was once centered. Id. (executive summary at 2). Now there is apprehension that legal rulings removing the courts from desegregation contribute to a resegregation of areas, including the South. Karen DeWitt, The Nation’s Schools Learn a Fourth R: Resegregation, N.Y. TIMES, Jan. 19, 1992, at E5. See Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 758 (1992); see also supra notes 226-27 and accompanying text.

Dr. Orfield argues that increasing segregation by race brings with it increasing segregation by income and also educational inequality. Orfield & Montfort, supra (executive summary at 2). However, neither politicians nor the public has made this escalating problem the subject of wide discussion. DeWitt, supra at E5. Dr. Orfield fears that “[w]ithout such a debate, we’re headed for an increasingly segregated society which is divided between white and minority.” Orfield & Montfort, supra (executive summary at 2).

255. See Taylor, supra note 39, at 1722. African American children will be inflicted with precisely the stigmatic harm that Brown I sought to prevent.
256. See id. at 1723. These classrooms are particularly detrimental to African American children if they are endorsed by government authorities; contra, e.g., Larry Tye, U.S. Sounds Retreat in School Integration; America’s Schools / The New Segregation, BOSTON GLOBE, Jan. 5, 1992, at National / Foreign 1 (noting that some African American leaders believe that in some cases, schools limited to African American boys may better meet the needs of inner-city African Americans).
the Court retains a desegregation remedy when it is no longer required, the harm is not as serious and is also temporary.\textsuperscript{257} A desegregation decree, as the dissent points out, must remain in place only for the amount of time that it serves its purpose.\textsuperscript{258} In addition, Justice Marshall noted that a court can modify or vacate an injunction when its continuance is no longer needed.\textsuperscript{259} Unfortunately, the majority’s remedy does not do enough to assure the establishment of a system of unitary schools.\textsuperscript{260}

In a recent decision, the Supreme Court established a more flexible standard for the modification of a consent decree, rejecting the use of the Swift “grievous wrong” standard in institutional reform litigation.\textsuperscript{261} In Rufo v. Inmates of Suffolk County Jail, the Court acknowledged that Dowell had rejected the use of the “grievous wrong” standard for the dissolution of a desegregation decree, and extended that Court’s reasoning to prison reform litigation.\textsuperscript{262} Rufo held that if there was a “change in fact or in law” from the time of the imposition of a consent decree and a showing that an adjustment is “suitably tailored to the changed circumstance,”\textsuperscript{263} a district court could modify a consent decree that mandated single-occupancy rooms in a Massachusetts jail.\textsuperscript{264}

Approximately three months later, the Supreme Court in Freeman v. Pitts\textsuperscript{265} continued to lessen the existing legal safeguards against segregated

\textsuperscript{257} Taylor, supra note 39, at 1723. The harm likely to be inflicted in this situation would be less serious in that parents’ freedom to send their child to a racially imbalanced school will be restricted. \textit{Id.} Even if parents live in a segregated neighborhood, they cannot assure that they will have this choice. \textit{Id.} The harm is temporary in that if the duration of the remedy is limited, then the harm which would stem from that remedy is lessened, if not eliminated. \textit{Id. But see} Wechsler, supra note 40; \textit{see} Bork, supra note 44, at 79-80 (“[T]here should be a presumption that individuals are free, and to justify coercion by government a case must be made that overcomes that presumption. The burden of persuasion is upon those who would regulate.”) \textit{See supra note 44 and accompanying text.}

\textsuperscript{258} Taylor, supra note 39, at 1723.

\textsuperscript{259} \textit{Id.}

\textsuperscript{260} Board of Educ. of Okla. City v. Dowell, 111 S. Ct. 630, 647 n.11 (1991) (quoting Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941)). “[T]he injunction is not a straightjacket; in all cases, the mandate to operate unitary schools will provide a framework for administering an efficient system of public education in accord with constitutional mandates.” Terez, supra note 18, at 71.

\textsuperscript{261} Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 758 (1992).

\textsuperscript{262} \textit{Id.} at 758-59.

\textsuperscript{263} \textit{Id.} at 763.

\textsuperscript{264} \textit{Id.} at 759.

\textsuperscript{265} 112 S. Ct. 1430, 1435 (1992). Justice Kennedy wrote the opinion of the Court, in which Chief Justice Rehnquist, Justice White, Justice Scalia, and Justice Souter joined. Justice Scalia and Justice Souter filed concurring opinions. Justice Blackmun also filed a concurring opinion, in which Justices Stevens and O’Connor joined. Justice Thomas took no part in the case. \textit{Id.}
schools when it held that a federal court can lift a school desegregation decree in stages, before a school system has fully complied with the decree. Freeman established three factors for a court to follow when ordering partial withdrawal from a desegregation decree: whether there has been compliance with the decree; whether retaining judicial control is necessary to achieve compliance with the decree; and whether the school district has demonstrated its good faith commitment to the decree. In addition, Freeman held that a school district is not obligated to correct racial imbalance caused by demographic factors after de jure segregation has been remedied. The Court emphasized that its holding is consistent with the Court's duty to remedy constitutional violations and to return schools to the control of local authorities. The decisions in Rufo and Freeman indicate that state and local officials will probably find it increasingly less difficult to change a federal court order that has demanded school integration in particular, or any type of reform litigation in general.

The one constant that lower courts have relied on in past desegregation cases, however, has been the unwavering aim that the Court has always held is controlling, the prevention of stigmatic injury to African American chil-

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266. Id. at 1445-46. In Freeman, the United States District Court for the Northern District of Georgia found, in 1986, that the DeKalb County, Georgia public school system was "unitary" with respect to four of the factors established in Green v. New Kent County School Bd., 391 U.S. 430 (1968), used to measure the racial identifiability of schools: student assignments, transportation, physical facilities, and extracurricular activities. Freeman, 112 S. Ct. at 1442. The court ordered no further relief in those areas. Id. In the areas of faculty assignments, resource allocation, and quality of education, however, the court retained supervisory authority, since the school district was not in full compliance with the desegregation decree. Id. The United States Court of Appeals for the Eleventh Circuit reversed the district court's findings, Pitts v. Freeman, 887 F.2d 1438 (1989), rev'd, 112 S. Ct. 1430 (1992), and the Supreme Court, in a unanimous decision, reversed and remanded the case. Freeman, 112 S. Ct. at 1436.

267. Freeman, 112 S. Ct. at 1446.

268. Id. at 1447. The district court found that the population changes that occurred in DeKalb County were caused by independent factors rather than by the policies of the school district. Id. The Supreme Court in Freeman allocated to the school district the burden of showing that any racial imbalance is not traceable to the prior de jure segregation. Id.

269. Id. at 1445.

270. See Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 758-59 (1992); see also Ruth Marcus, Supreme Court Eases Rules on Prisons, WASH. POST, Jan. 16, 1992, at A1; Paul M. Barrett, High Court Rules Debtors Cannot Shrink Mortgages to Reflect Property Value Loss, WALL ST. J., Jan. 16, 1992, at A4. In reaction to Freeman v. Pitts, one commentator has noted that "[w]e are now not only whittling down Brown v. Board of Education,... we are moving back to the 'separate but equal' doctrine of Plessy v. Ferguson [the controlling authority for segregation in public education]." Nat Hentoff, Back to Separate but Equal, WASH. POST, April 11, 1992, at A25 (quoting Kenneth Clark, New York City College psychology professor whose psychological studies were cited in the Brown I opinion). See supra note 44.
The dissent's reasoning is effective because it recognizes that lower courts must rely on the Court's enunciated aim of cases that it has heard in order to determine the goal toward which the Court will work in a new case. This is especially true since the approaches that the Court has used to achieve its goals have been less than uniform.

VI. CONCLUSION

In Board of Education of Oklahoma City v. Dowell, the United States Supreme Court missed an opportunity to guide the lower courts in determining what constitutes an appropriate standard for dissolution of a desegregation remedy. Rather, the Court added to the difficulty the courts have in interpreting the disparate results of prior desegregation cases. By constructing a standard for dissolution of a decree without considering the stigmatic injury of African American children, the Court ignored the purpose of the desegregation precedents. As a result, lower courts have little to guide them in determining what must be shown to demonstrate that a decree's purposes have been fully realized. After Dowell, a court can decide that the purposes of a desegregation decree have been achieved if a school district has complied with a decree in the past and probably will comply with the decree in the future, regardless if unenforced "vestiges" of segregation remain. For these reasons, Dowell's ambiguous standard will result in disparate results in future desegregation cases.

The Court should have decided the case consistently with desegregation precedent and taken into account the stigmatic injury that both state-imposed segregation and the effects of segregation after the state has ceased to enforce it inflict upon African American children. By failing to consider the harm in the message of racial inferiority, the Court encourages an environment in which formerly segregated school systems, culturally conditioned by many years of state-imposed segregation, may be allowed to silently slip back to the tragic injustices of a dual school system.

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271. Tribe, supra note 39, § 16-19, at 1499.
272. See, e.g., Appeal of Little Rock School Dist., 949 F.2d 253, 258 (8th Cir. 1991) (noting that “[i]n rejecting the Swift standard, . . . the [Dowell] Court did not indicate what showing would be necessary for a party to demonstrate the need for modification [of a school desegregation plan]”).
273. See supra notes 63-169 and accompanying text.