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Ignoring the Soul of Brown: Board of Education v. Dowell

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NOTE

Ignoring the Soul of *Brown*: *Board of Education v. Dowell*

[A]t some point—perhaps in words that could connote either triumph or despair—the court will come to say: it is finished.[1]

Public school desegregation may no longer be front page news in America, but its odyssey through the nation's courts is not yet finished.[2] After decades of legally mandated separation of blacks and whites in public schools, followed by a relatively short period of attempts to racially unify education by judicial action, a crucial turning point in the social experiment begun with *Brown v. Board of Education* (*Brown I*)[3] may be near.

For nearly forty years, American society has had an emotional investment in judicially supervised school desegregation. Depending upon one's point of view, that investment has paid valuable dividends[4] or has

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1. Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 798 (1986). In his article, Professor Gewirtz referred to terminating federal district court supervision over school systems that have been ordered to remedy the segregation of black and white students. He predicted that the termination issue would become a crucial question in the civil rights field. *Id.* at 790. Professor Gewirtz has proved an accurate prophet; Board of Education v. Dowell, 111 S. Ct. 630 (1991), the first desegregation case decided by the Supreme Court in more than a decade, turned squarely on the question of when judicial supervision should end. *See infra* notes 12-19 & 52-89 and accompanying text.

2. The ongoing litigation surrounding Oklahoma City's public schools is representative of desegregation lawsuits. The suit originated as a class action in federal district court with a black minor, Robert Dowell (bringing the action through his father), representing similarly situated black children seeking to enjoin the operation of segregated public schools in Oklahoma City. Dowell v. School Bd., 219 F. Supp. 427, 428 (W.D. Okla. 1963). Initially, limited attempts to alleviate the segregation of the city's public schools failed. *See infra* notes 27-37 and accompanying text. In Dowell v. Board of Education, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972), the district court implemented a comprehensive plan centered on busing students to achieve racial balance in the schools, and ordered the school board and those acting in concert with it not to deviate from the plan and to obtain permission from the court before acting in any manner that might not be in accordance with the plan. *Id.* at 1273. Since 1985, the district court, the United States Court of Appeals for the Tenth Circuit, and the United States Supreme Court have struggled with the issues of whether desegregation has been achieved in Oklahoma City and whether control of the school system should be returned to local authorities. *See infra* notes 38-55 and accompanying text.

3. 347 U.S. 483 (1954).

4. Commentators have described the political, educational, and economic gains by blacks since the 1950s, and point to studies indicating that racial intolerance has lessened throughout the era of desegregation. *See* RICHARD KLUGER, SIMPLE JUSTICE 774-78 (1976); CHRISTINE H. ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY 10-13 (1990).

proved a dismal failure.[5] Both views have some merit, resulting in what one commentator called a "moral standoff":[6] segregated public education is wrong, but so is subjecting black and white schoolchildren to desegregation techniques, like busing, that disrupt and derogate their education. Should the standoff end? Has desegregation been fully achieved? If not, has America invested all the effort it cares to expend in the courts, or should judicial control of desegregation continue? Plenty of opportunities have arisen for America to answer these questions; as of 1988, more than a hundred cases were being litigated actively in the nation's federal courts,[7] and national and local officials have recently advocated bringing this litigation to a close.[8] Faced with this pressure, courts continue to search for a standard by which to measure how much progress school systems have made toward desegregation.[9] The goal of desegregation—a "unitary" school system—has proved difficult to define,[10]

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5. Another commentator has labelled early desegregation attempts as failures and advocates the democratic process, rather than the judiciary, as the proper forum for race-related policy. RAYMOND WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION 273-89 (1984). As Mr. Wolters put it, "local officials would almost certainly improve on the sorry record that disingenuous judges and naive reformers have made." *Id.* at 289.

6. J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL DESEGREGATION, 1954-78, at 132 (1979), *quoted in* James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1472 (1990).

7. For a comprehensive list of desegregation lawsuits compiled by the United States Justice Department, see *Current Status of Federal School-Desegregation Lawsuits*, EDUC. WK., June 1, 1988, at 18-19. This list was part of an announcement that the Justice Department would seek the closing of over two hundred of the cases. *Id.* at 18.

8. The administrations of President Ronald Reagan and President George Bush have promoted the issue of terminating judicial supervision of public education by arguing for termination before the courts and by entering into settlements with school boards that install desegregation decrees that end after compliance for a set period of time. *See* Gewirtz, *supra* note 1, at 790-91; Liebman, *supra* note 6, at 1465; *supra* note 7.

9. Before segregation can be cured, it is, of course, crucial to determine the harm of segregation that requires remedying. This Note focuses on the general developmental harm to separated black students: the "stigmatic injury" of an inferior, segregated education as cited by Justice Marshall in Board of Education v. Dowell, 111 S. Ct. 630, 642 (1991) (Marshall, J., dissenting). *See infra* notes 78-82 & 88-89 and accompanying text. For a scholarly treatment of the various theories of the harm resulting from segregated education, see Liebman, *supra* note 6, at 1474, 1484-1540.

10. The term "unitary" is generally construed to describe a school system that is in complete compliance with the constitutional ban on legally mandated segregation of public education. *See, e.g.*, Board of Educ. v. Dowell, 111 S. Ct. 630, 636 (1991); Green v. County Sch. Bd., 391 U.S. 430, 441 (1968). Confusion over the terminology arose after the Supreme Court's decision in Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), which seemed to suggest that a school district could be "unitary" in one area, such as student assignment, without being "totally . . . unitary." *Id.* at 436-37; *see infra* note 136 and accompanying text. In *Dowell* the Supreme Court briefly discussed the lower courts' confusion about what the word "unitary" means, but declined to formulate a more precise definition. *Dowell*, 111 S. Ct. at 635-36. Commentators have not been reluctant to attempt to define the term, however.

and what a supervising court should do after a school system becomes unitary[11] has remained equally in doubt.

In *Board of Education v. Dowell*,[12] the United States Supreme Court answered only one of the questions: what should the district court do once the school system is unitary? The Supreme Court held that judicial

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See Hugh J. Beard, Jr., *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction*, 49 LA. L. REV. 1239, 1241 (1989) (arguing that full compliance with a desegregation order should result in a finding of unitary status); Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1108 (1990) ("Unitary status is not so much a moment in time as it is a general state of being."); Thomas E. Chandler, *The End of School Busing? School Desegregation and the Finding of Unitary Status*, 40 OKLA. L. REV. 519, 534-35 (1987) ("[T]o achieve unitary status, all aspects of the public education system must be freed of the effects of state-sponsored racial segregation. [Unitary status] is not solely a matter of whether white children and black children go to school together." (citation omitted)); G. Scott Williams, Note, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM. L. REV. 794, 795-99 (1987) (arguing that unitary status may have a "short-term" definition—implementing and maintaining a desegregation plan; or a "long-term" definition—establishing permanent changes in a school system).

11. The United States Court of Appeals for the Tenth Circuit and the United States Court of Appeals for the Fourth Circuit have split over the question of whether a district judge's finding that a school system is unitary automatically dissolves any existing desegregation orders and ends the district court's jurisdiction. *Compare* Dowell v. Board of Educ., 795 F.2d 1516, 1520 (10th Cir.) (desegregation orders and jurisdiction continue after a finding of unitary status if not expressly ended), *cert. denied*, 479 U.S. 938 (1986), *with* Riddick v. School Bd., 784 F.2d 521, 534-35, 538-39 (4th Cir.) (jurisdiction ends automatically once unitary status is found), *cert. denied*, 479 U.S. 938 (1986). In Board of Educ. v. Dowell, 111 S. Ct. 630 (1991), the Supreme Court sided with the Tenth Circuit. *Id.* at 636; *see infra* note 15 and accompanying text.

Commentators have advocated retention of some powers by the district court after unitary status is found, *see, e.g.*, Chandler, *supra* note 10, at 555 (arguing that in some instances the court should retain full supervisory power for some time after the school system is unitary), or even after active supervision is ended. *See, e.g.*, Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 668-69 (1987) (arguing that a presumption of intent to discriminate should be retained and applied to school board action that substantially resegregates schools).

12. 111 S. Ct. 630 (1991). There have been many cases involving the class of plaintiffs represented by Robert Dowell and the Oklahoma City school board. The original suit was brought in 1963. Dowell v. School Bd., 219 F. Supp. 427 (W.D. Okla. 1963); *see supra* note 2. Since then, the case has been heard a number of times at the district, appellate, and Supreme Court level. *See, e.g.*, Dowell v. School Bd., 244 F. Supp. 971 (W.D. Okla. 1965) (ordering affirmative remedies), *aff'd in part*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967); Dowell v. Board of Educ., 338 F. Supp. 1256, 1259-60 (W.D. Okla.) (implementing a remedial plan known as the "Finger Plan"), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972); Dowell v. Board of Educ., 606 F. Supp. 1548 (W.D. Okla. 1985) (denying plaintiffs' motion to reopen the case), *rev'd and remanded*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986); Dowell v. Board of Educ., 677 F. Supp. 1503 (W.D. Okla. 1987) (refusing on remand to reopen the case), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991).

control of public education should be temporary,[13] observing that the supervising district court should find the Oklahoma City school board in compliance with the Constitution if the school system has cooperated with existing desegregation decrees and eliminated past discrimination to the extent practicable.[14] The Court pointed out that a finding of constitutional compliance—unitary status—would not automatically end litigation, since plaintiffs and school boards are entitled to an express, "precise statement" of the termination of a desegregation order.[15] The Court made it clear, however, that both existing orders and the district court's jurisdiction should end once the school system is unitary, because at that point the purpose of the litigation would be achieved.[16] The Court's opinion attributed great weight to local interests in controlling public education and held that dissolving desegregation decrees after a reasonable period of compliance by a school board properly recognized the importance of local interests.[17] In setting guidelines for deciding unitary status,[18] however, the Supreme Court's opinion was disappointingly cursory and slighted the central aim of *Brown I*: to eliminate the injury to segregated black students resulting from loss of the intangible benefits of an equal and integrated education.[19]

This Note recounts past judicial treatment of the desegregation of public education,[20] with emphasis on aspects of the federal courts' decisions that pertain to the goals and successes of desegregation and the importance of local interests in education.[21] The Note focuses on the courts' recognition of the intangible injury of segregated education, harms that cannot be measured quantitatively.[22] The Note analyzes the

13. *Dowell*, 111 S. Ct. at 637 ("[Desegregation] decrees . . . are not intended to operate in perpetuity.").

14. *Id.* at 638.

15. *Id.* at 636.

16. *Id.* at 636-37.

17. *Id.* at 637.

18. Essentially the Court dictated a two-part test for the district court to apply: (1) check the school board's compliance with existing orders, and (2) check for the elimination of past vestiges of legally mandated segregation. *See supra* text accompanying note 14. The Court's failure to expand on the second prong of the test is the subject of criticism in this Note. *See infra* notes 70-77 & 172-179 and accompanying text.

19. *Brown I*, 347 U.S. 483, 493-95 (1954).

20. *See infra* notes 90-165 and accompanying text. For brief but informative accounts of the Supreme Court's role in school desegregation, see Wiley A. Branton, The History and Future of School Desegregation, Remarks Prepared For Delivery Before the Eighth Circuit Judicial Conference (July 25, 1985), *in* 109 F.R.D. 241, 243-46 (1986); Chandler, *supra* note 10, at 522-30; Drew S. Days, III, *School Desegregation Law in the 1980's: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737, 1742-53 (1986) (book review).

21. *See infra* notes 102-165 and accompanying text.

22. *See infra* notes 92-107 & 160-165 and accompanying text.

Supreme Court's recent decision in *Board of Education v. Dowell*,[23] noting particularly the standards adopted for evaluating the success of judicial supervision of the desegregation of public education and, ultimately, for determining when such supervision should be terminated.[24] The Note concludes that the *Dowell* Court properly weighed local autonomy in evaluating the goals of desegregation, but faults the Court for imposing an overly mechanical test for determining the achievement of desegregation upon the lower federal courts.[25] Finally, this Note proposes a compromise between local autonomy and judicial supervision: a district court must analyze intangible factors such as community attitudes toward the school system before deciding unitary status, and then, if unitary status is granted, the court should return active control of the schools to local authorities, while preventing resegregation by retaining power through narrowly drawn permanent injunctions or an evidentiary mechanism that favors the plaintiffs.[26]

In 1961, a group of black schoolchildren challenged[27] the racial segregation of Oklahoma City's public schools in federal district court.[28] The district court found that a dual school system existed[29] and ordered a limited remedy.[30] Because the order was rendered ineffective by school

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23. 111 S. Ct. 630 (1991).

24. *See infra* notes 56-77 and accompanying text.

25. *See infra* notes 168-188 and accompanying text.

26. *See infra* notes 189-193 and accompanying text.

27. Court-ordered school desegregation is grounded in the Fourteenth Amendment to the United States Constitution, which provides, in relevant part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2; *see Brown I*, 347 U.S. 483, 495 (1954) ("[W]e hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

28. Dowell v. School Bd., 219 F. Supp. 427 (W.D. Okla. 1963). School segregation had been enforced by law since Oklahoma entered the union. *Id.* at 431. The Oklahoma Constitution empowered the state legislature to create racially separated schools. OKLA. CONST. art. XIII, § 3 (repealed 1966). State statutes enacted pursuant to the constitutional provision included a system of fines for the related misdemeanors of maintaining or teaching in an integrated school. OKLA. STAT. tit. 70, §§ 5-1 to 5-11 (repealed 1965); *see Dowell*, 219 F. Supp. at 431-33. The Oklahoma constitutional provision and statutes were declared unconstitutional and void by the district court. *Id.* at 433.

29. *Dowell*, 219 F. Supp. at 431, 444-46. A dual school system is characterized by racially separate programs—a "white" school program and a "black" school program within one system. *See* Green v. County Sch. Bd., 391 U.S. 430, 435 (1968) ("Racial identification of the system's schools was complete . . . . [T]he State, acting through the local school board and school officials, organized and operated a dual system, part 'white' and part 'Negro.' ").

The Oklahoma City school board had resolved in 1955 to discontinue separate schools, *Dowell*, 219 F. Supp. at 434, but eight years later the district court found "no tangible evidence [of] a good faith effort to integrate the public schools" other than the resolution. *Id.* at 435.

30. The district court ordered the Oklahoma City school system to enroll the black plaintiff, Robert Dowell, in the predominantly white high school from which he had been banned

board inaction,[31] the district court reopened the case and ordered affirmative remedies to end the dual system: the installation of a minority-to-majority transfer plan,[32] the redrawing of certain school-zone boundaries to overcome the effects of residential segregation, and the assignment of faculty so that the ratio of non-white to white teachers at each school would reflect the system-wide ratio.[33]

Nine years after its initial order, finding a dual system still in place,[34] the district court implemented a remedial scheme proposed by the plaintiffs, known as the "Finger Plan."[35] The Oklahoma City school board complied with the Finger Plan until 1977, when it moved to close the case and terminate the district court's jurisdiction.[36] The district court declared the school system to be unitary and apparently relinquished jurisdiction.[37]

Nevertheless the school district continued to operate under the Fin-

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by Oklahoma law. The court also ordered the school system to desist from allowing white children to transfer out of predominantly black schools without a good-faith reason and to integrate the staff and faculty of all schools. *Dowell*, 219 F. Supp. at 447.

31. Three court-appointed experts in education reported that transfer policies allowing whites to avoid assignment to black schools were still in place and that desegregation of faculties had taken place on only a "token basis." Dowell v. School Bd., 244 F. Supp. 971, 973-74 (W.D. Okla. 1965), *aff'd in part*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967). The school board's resistance to desegregation went beyond inaction. Thirteen recently-opened elementary schools were one-race schools, and construction plans called for eight new facilities to open in all-white neighborhoods. *Id.* at 975-76.

32. The minority-to-majority transfer plan allowed any student who was a member of the racial majority in her school to transfer to another school in which her race was in the minority. *Id.* at 977.

33. *Id.* at 977-78. Prior to ordering the adjustment of school zones, the court determined that the school district's use of neighborhood school zones in the past had contributed to residential segregation. *Id.* at 976-77.

34. At the beginning of the 1971 school year, the Oklahoma City school system operated 86 elementary schools; 53 schools had a student population over 90% white and 16 had a student population over 95% black. Dowell v. Board of Educ., 338 F. Supp. 1256, 1259-60 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

35. *Id.* at 1273. Named for its creator and plaintiffs' expert witness, Dr. John Finger, the Finger Plan assigned black children in the first through fourth grades to formerly all-white schools, and assigned white children in the fifth grade to formerly all-black schools. If a neighborhood elementary school was integrated, it was designated as a "stand-alone" school—a neighborhood school unaffected by the decree—for all grades. *Id.* at 1267-68, 1273; *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 9-10 (1971) (affirming District Judge McMillan's decision to order a variation of the Finger Plan in the Charlotte-Mecklenburg County, North Carolina school system).

36. *See Dowell*, 111 S. Ct. at 633-34.

37. Dowell v. School Bd., No. CIV-9452 (W.D. Okla. Jan. 18, 1977). For quotations from this unpublished "Order Terminating Case," see *Dowell*, 111 S. Ct. at 633-34. The order did not expressly dissolve the 1972 decree. *Id.* For discussions of the scholarly debate over whether a finding of unitary status automatically ends a desegregation order and the court's jurisdiction, see *supra* note 11; *infra* note 43 and accompanying text.

ger Plan until 1985.[38] That year, the Oklahoma City school board adopted a new student-assignment plan that eliminated busing of students in grades one through four and reassigned those students to neighborhood schools.[39] Establishing the neighborhood school zones resulted in a substantial number of one-race schools,[40] prompting the plaintiffs to move that the original suit be reopened.[41] The district court denied the motion.[42] The United States Court of Appeals for the Tenth Circuit reversed the district court, holding that the 1977 declaration of unitary status did not vacate the 1972 injunction implementing the Finger Plan.[43] The Tenth Circuit allowed the plaintiffs to challenge the new assignment plan as discriminatory.[44]

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38. *Dowell*, 111 S. Ct. at 634, 641; Dowell v. Board of Educ., 677 F. Supp. 1503, 1505 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991).

39. *Dowell*, 111 S. Ct. at 634, 641; *Dowell*, 677 F. Supp. at 1505. Curiously, the school board justified discontinuing the Finger Plan in part because of the projected success in desegregation. The board predicted that residential integration would increase and therefore anticipated creating 13 new "stand-alone" schools. *Dowell*, 677 F. Supp. at 1514. More "stand-alone" schools would mean fewer students in the fifth-grade centers in predominantly black neighborhoods, and subsequently, those centers risked closing. *Id.* Also, with more "stand-alone" schools in central Oklahoma City, the distance that students would be bused to other schools would increase. *Id.*

Although the plaintiffs recognized that the Finger Plan "ultimately proved inequitable", *id.*, they argued that this did not justify ending court-supervised efforts entirely, but only justified modifying the plan to continue to foster desegregation, *id.* at 1524-26.

40. *Dowell*, 677 F. Supp. at 1509-10. Of 64 elementary schools created, 11 schools had a student population greater than 95% black, five of which were greater than 99% black. Eighteen schools had a student population greater than 75% white, 12 of which had no individual minority constituency greater than 10%. The racial breakdown of the district's schoolchildren was 50.7% white, 36.0% black, 6.8% Hispanic, and 6.5% Native-American or Asian. *Id.*

41. Dowell v. Board of Educ., 606 F. Supp. 1548, 1549 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

42. *Id.* at 1557. In denying the motion, the district court held that the 1977 declaration of unitary status was binding as res judicata against the petitioners, and furthermore, that the school district was still unitary in 1985. *Id.* at 1555.

43. Dowell v. Board of Educ., 795 F.2d 1516, 1518-19 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). The Tenth Circuit expressly disagreed with the ruling in Riddick v. School Board, 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986), in which the Fourth Circuit held that a finding of unitary status and termination of active supervision should serve to dissolve existing desegregation injunctions. *Id.* at 534-35, 538-39; *see Dowell*, 795 F.2d at 1520 n.3. For a discussion of *Riddick*, see *infra* notes 155-161; *see also supra* note 11 (listing sources that analyze the effect of a unitary finding); L. Kevin Sheridan, Jr., Note, *The Unitariness Finding and Its Effect on Mandatory Desegregation Injunctions*, 55 FORDHAM L. REV. 551, 567-73 (1987) (comparing the *Dowell* and *Riddick* decisions). Mr. Sheridan concluded that *Dowell* focused on the purpose of the original injunction, that *Riddick* focused on local autonomy, and that the two approaches should be combined to decide properly the effect of unitary status. *Id.* at 572-73.

44. *Dowell*, 795 F.2d at 1523.

On remand, the district court[45] held that the school district had maintained its unitary status[46] and formally dissolved the 1972 injunction.[47] Once again the Tenth Circuit reversed the district court.[48] Citing *United States v. Swift & Co.*,[49] the court of appeals held that the desegregation decree should be terminated only upon a showing by the school district of " 'dramatic changes in conditions . . . that . . . impose extreme and unexpectedly oppressive hardships on the obligor.' "[50] The school board sought, and was granted, a writ of certiorari in the United States Supreme Court.[51]

The Supreme Court reversed the Tenth Circuit, holding that a *Swift* test for dissolution of the desegregation decree was inapplicable.[52] A majority of five justices observed that the proper test for dissolution was whether the school board had complied in good faith with the decree and whether the vestiges of de jure segregation[53] had been eliminated to the

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

46. *Id.* at 1515-19.

47. *Id.* at 1521-22.

48. Dowell v. Board of Educ., 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991).

49. 286 U.S. 106 (1932). In *Swift*, an antitrust case, an injunction was entered under a consent decree that forbade certain major meat-packing companies from expanding into the grocery business in order to prevent them from undercutting prices and driving independent grocers out of business. The injunction was prima facie permanent. *Id.* at 116.

50. *Dowell*, 890 F.2d at 1490 (quoting Timothy S. Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1110 (1986)). The Supreme Court refused to modify the injunction in *Swift* because the "danger" posed by the defendants that made the injunction necessary had not been "attenuated to a shadow" and the defendants were not "victims of oppression." *Swift*, 286 U.S. at 119. These requirements demand that the "obligor" (the party whose behavior has been enjoined—for example, a school district forbidden to practice segregation) moving to modify or terminate the injunction present "close to an unanswerable case." Humble Oil & Ref. Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.), *cert. denied*, 395 U.S. 905 (1969).

51. Board of Educ. v. Dowell, 110 S. Ct. 1521 (1990).

52. *Dowell*, 111 S. Ct. at 637. In *Swift* the meat-packers had repeatedly tried to have the injunction invalidated in the lower courts. *Swift*, 286 U.S. at 112. The *Dowell* Court clearly limited the *Swift* test for dissolving an injunction to similar cases in which the restrained party resists the court's order and the prohibited behavior is in danger of recurring. *Dowell*, 111 S. Ct. at 636. If the district court had found that the Oklahoma City school board complied with the desegregation decree and that the board "was unlikely [to] return to its former ways," the school board should not be required to meet the requirements of *Swift* in arguing for termination of the injunction. *Id.* at 636-37.

53. De jure segregation is segregation directly intended by school authorities, mandated by law, or otherwise enforced by an official racial classification. In other words, de jure segregation is segregation that has or had the sanction of law. *See* BLACK'S LAW DICTIONARY 425 (6th ed. 1990). The Supreme Court has held the difference between de jure and de facto segregation to be the "purpose or intent to segregate" on the part of school authorities, which characterizes de jure segregation. Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

extent practicable.[54] The Supreme Court then remanded the case to the district court, instructing the trial judge to apply the new standard in deciding whether to dissolve the decrees.[55]

The Court's opinion, written by Chief Justice Rehnquist, focused on the transitional nature of desegregation orders. The Court strongly emphasized language from the seminal school desegregation cases *Brown v. Board of Education (Brown II)*[56] and *Green v. County School Board*,[57] which implied that judicial control of school systems should be temporary.[58] Unlike the injunction imposed in *Swift*,[59] a desegregation decree should be designed to remedy unconstitutional discrimination and should be in effect only until relief is achieved.[60] The Court warned that the stringent *Swift* test[61] for dissolution of an injunction would "condemn a school district . . . to judicial tutelage for the indefinite future."[62] Although the Court set no time limit on the operation of desegregation decrees, it stressed that the school board's compliance with the decree for a reasonable time was "obviously relevant"[63] to the decision to dissolve.

The Court implicitly instructed the district court to decide whether the school board would maintain a desegregated system.[64] The Court reaffirmed, however, that segregation resulting from acts outside the school board's control[65] was not remediable by judicial action because such effects presumably did not result from state action in violation of the Constitution.[66]

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54. *Dowell*, 111 S. Ct. at 638.

55. *Id.*

56. 349 U.S. 294 (1955).

57. 391 U.S. 430 (1968).

58. *See Dowell*, 111 S. Ct. at 637 ("*Brown* [*II*] considered the 'complexities arising from the *transition* to a system of public education freed of racial discrimination' . . . . *Green* also spoke of the '*transition* to a unitary, non-racial system of public education.' ") (citation omitted) (quoting *Brown II*, 349 U.S. at 299 and *Green*, 391 U.S. at 436).

59. *See supra* notes 49-50.

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

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

62. *Dowell*, 111 S. Ct. at 638.

63. *Id.* at 637.

64. The Court first linked past compliance with the unlikelihood of a return to resegregation, *id.* at 636-37, then instructed the district court to check for good-faith compliance before deciding unitary status. *Id.* at 638.

65. One-race neighborhood schools resulting from de facto residential segregation and not intentional state action are an example of school segregation outside the control or fault of the school board.

66. *Dowell*, 111 S. Ct. at 637 (quoting Milliken v. Bradley, 433 U.S. 267, 282 (1977)). Residential segregation in Oklahoma City in 1987 was found by the district court to be a result of private decisions and economics rather than state action. Dowell v. Board of Educ., 677 F. Supp. 1503, 1511-12 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S.

Chief Justice Rehnquist wrote that the temporary nature of a desegregation decree is compelled by local government's powerful interest in control over public education.[67] The tension between judicial control of school districts and the interference with local interests caused by intrusive remedial action has long been a feature of the struggle toward desegregation.[68] In *Dowell* the Court asserted that the constitutional allocation of powers necessarily limited judicial control of local education strictly to the time required to remedy segregation.[69]

The *Dowell* Court had little to say about how the district court should measure the accomplishment of the desegregation decree. The district court was directed only to evaluate the fulfillment of the decree by a check of the school board's past compliance[70] and by a determination of whether the vestiges of past discrimination, as far as practicable, had been eliminated.[71]

The elimination of past discrimination and the attainment of "unitary" status,[72] said the Court, were to be determined by evaluating attempts to desegregate the six areas of school operations listed in *Green v. County School Board*: student assignments, faculty, staff, transportation, extracurricular activities, and facilities.[73] This approach to deciding unitary status had been applied by the district court in its decree of 1977;[74] the Supreme Court ordered the district judge to reconsider the same factors at the time of the new student assignment plan, 1985, before dissolving the decree.[75] Thus, the Court approved a checklist of the six factors from *Green*[76] as a method for determining whether unitary status has

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Ct. 630 (1991). The Tenth Circuit's opinion of that finding was held by the Supreme Court to be ambiguous, so the question was remanded to the district court for de novo consideration. *Dowell*, 111 S. Ct. at 638 n.2.

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

68. *See, e.g., Milliken*, 433 U.S. at 280-81 ("[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs . . . ."); Keyes v. School Dist. No. 1, 413 U.S. 189, 238 (1973) (Powell, J., concurring in part and dissenting in part) ("[D]esegregation remedies must remain flexible and other values and interests [must] be considered."); *Brown II*, 349 U.S. 294, 300 (1955) ("Courts of equity may properly take into account the public interest in the elimination of such obstacles [to the transition to desegregated schools] in a systematic and effective manner.").

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

70. *See supra* note 64 and accompanying text.

71. *Dowell*, 111 S. Ct. at 638.

72. *See supra* note 10.

73. *Dowell*, 111 S. Ct. at 638 (quoting Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)).

74. Dowell v. Board of Educ., 677 F. Supp. 1503, 1515 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991).

75. *Dowell*, 111 S. Ct. at 638.

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

been attained and the purpose of the desegregation decree fulfilled.[77]

Justice Marshall sharply disagreed with this approach.[78] Any standard for the dissolution of a desegregation decree must, he argued, reflect the primary aim of *Brown I*:[79] to eliminate the "stigmatic injury" of inferiority implicit in segregated education.[80] Justice Marshall stressed the existence of racially identifiable schools[81] as a characteristic of a segregated system and criticized the majority for not expressly requiring that all feasible attempts to avoid such schools be exhausted before a court finds that unitary status has been achieved.[82]

Justice Marshall also challenged the majority's argument that the school board had no responsibility to remedy segregative effects upon student assignment caused by demographic shifts.[83] Justice Marshall contended that present-day residential segregation could not be separated from seventy-five years of culpable state conduct by Oklahoma in propagating segregation by enforcing a dual school system.[84] Residential segregation, the dissenting Justice argued, must also be considered a vestige of discrimination if past school board actions contributed to such segre-

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77. *See also* Riddick v. School Bd., 784 F.2d 521, 534 (4th Cir.) (approving a district court's review of the six *Green* indicia in deciding unitary status), *cert. denied*, 479 U.S. 938 (1986).

78. *Dowell*, 111 S. Ct. at 639 (Marshall, J., dissenting). Justice Blackmun and Justice Stevens joined the dissent. Justice Souter did not take part in the decision of the case; the Court therefore, was split five to three.

One of his former clerks recently quoted Justice Marshall as saying: "You've got to be angry to write a dissent." Glen M. Darbyshire, *Clerking for Justice Marshall*, A.B.A. J., Sept. 1991, at 48, 50. Justice Marshall had been angered by aspects of the Court's desegregation jurisprudence. *See* Crawford v. Board of Educ., 458 U.S. 527, 554-55 (1982) (Marshall, J., dissenting) (arguing that since the California Supreme Court had interpreted the state constitution as not distinguishing between de jure and de facto segregation, a state constitutional amendment prohibiting busing as a remedy for de facto segregation deprived state courts of remedial power by a "racially nonneutral" reallocation of governmental power in violation of the Fourteenth Amendment); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 442-43 (1976) (Marshall, J., dissenting) (arguing against the majority's apparent approval of incremental attainment of unitary status); Milliken v. Bradley, 418 U.S. 717, 785-86, 802-03 (1974) (Marshall, J., dissenting) (arguing that residential segregation in Detroit was a result of local and state education policy and that the majority's refusal to order metropolitan area-wide desegregation precluded the only effective remedy). His efforts seem especially poignant in light of Mr. Darbyshire's revelation that Justice Marshall displayed in his office only one memento of his long association with the Court: a miniature reproduction of the *New York Times* front-page announcement of the decision in *Brown v. Board of Education*. Darbyshire, *supra*, at 48.

79. 347 U.S. 483, 493-96 (1954).

80. *Dowell*, 111 S. Ct. at 639 (Marshall, J., dissenting).

81. *Id.* at 642 (Marshall, J., dissenting).

82. *Id.* at 645 (Marshall, J., dissenting).

83. *Id.* at 645-46 (Marshall, J., dissenting); *see supra* text accompanying notes 65-66.

84. *Dowell*, 111 S. Ct. at 646 (Marshall, J., dissenting).

gation.[85] Justice Marshall attacked the majority's concern with limiting the duration of judicial control over public education[86] and bitingly characterized the majority's holding as a belief that "13 years of desegregation was enough."[87]

Justice Marshall felt that eliminating "stigmatic injury" to segregated schoolchildren must be the primary purpose of a desegregation decree and that a decree should not be dissolved until that purpose is achieved.[88] He clearly prioritized protecting the Fourteenth Amendment rights of black children over the local government's interest in controlling public education.[89]

American courts have struggled with the problem of racial discrimination in public education since 1850.[90] The "separate but equal" doctrine, announced by the Supreme Court in *Plessy v. Ferguson*,[91] survived until the middle of the twentieth century. Consecutive cases in 1950[92] paved the way for the demise of *Plessy*. In *Sweatt v. Painter*,[93] Heman Sweatt sought a writ of mandamus to compel officials of the University of Texas Law School to admit him as a student.[94] Texas state courts refused to issue the writ, claiming that a newly opened equivalent school

85. *Id.* at 646 n.8 (Marshall, J., dissenting).

86. "I also reject the majority's suggestion that the length of federal judicial supervision is a valid factor in assessing a dissolution." *Id.* at 646 (Marshall, J., dissenting). "The concepts of temporariness and permanence have no direct relevance to courts' powers in this context because the continued need for a decree will turn on whether the underlying purpose of the decree has been achieved." *Id.* at 647 n.11 (Marshall, J., dissenting).

87. *Id.* at 639 (Marshall, J., dissenting).

88. *Id.* at 641-42 (Marshall, J., dissenting).

89. *Id.* at 647 (Marshall, J., dissenting). The Supreme Court has reached the same conclusion when faced with violent resistance to desegregation. *See infra* notes 108-10 and accompanying text. Local interests and the Fourteenth Amendment are more evenly balanced in contemporary society, however, with moral arguments on both sides of the equation. *See supra* note 6 and accompanying text.

90. *See Brown I*, 347 U.S. 483, 491 & n.6 (1954). In *Brown I*, mention was made of Roberts v. City of Boston, 59 Mass. (1 Cush.) 198 (1850), in which a black minor, Sarah Roberts, challenged Boston's segregated schools on the basis of a state constitutional guarantee of equality. *Roberts*, 59 Mass. (1 Cush.) at 204, 206. The Massachusetts Supreme Judicial Court called the constitutional provision a "great principle," but held that Boston could enforce segregated schools "in the best interests of both [black and white] children" and stated that racial prejudice would not be cured by school desegregation. *Id.* at 206, 209.

91. 163 U.S. 537 (1896).

92. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). An earlier case, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938), began the erosion of *Plessy*. The state of Missouri, rather than provide a law school for black students, offered scholarships to black citizens for the purpose of attending out-of-state institutions. *Id.* at 342-43. The Supreme Court held that a state must provide equal education within its boundaries. *Id.* at 345, 349-52.

93. 339 U.S. 629 (1950).

94. *Id.* at 631.

was available to black students.[95] The Supreme Court disagreed. Not only was the University of Texas Law School materially superior to the institution open to the plaintiff,[96] but it possessed "to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school."[97] On the same day, the Court issued a similar decision in *McLaurin v. Oklahoma State Regents*.[98] G.W. McLaurin had been admitted to the University of Oklahoma Graduate School, but under conditions of isolation from white students.[99] As in *Sweatt*, the Court found "separate" to be unequal. McLaurin, set "apart from the other students," was "handicapped in his pursuit of effective graduate instruction."[100] Again, the inequality was, at least in part, intangible: "[s]uch restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[101]

The Supreme Court's historic decision in *Brown I*[102] followed four years later.[103] The *Brown I* Court denounced separate school systems as inherently unequal and unconstitutional,[104] citing injury to segregated schoolchildren from the imposition of a "feeling of inferiority."[105] After hearing reargruments on how to cure segregated education, the Court in

95. *Id.* at 632. "Separate but equal" education was rarely equal, *see* Donald E. Lively, *Separate But Equal: The Low Road Reconsidered*, 14 HASTINGS CONST. L.Q. 43, 43 n.3 (1986), and the institutions in *Sweatt* were no exception. At the time the case was filed, the University of Texas Law School had 16 full-time professors, a student body of 850, a library of 65,000 volumes, a law review, moot court, and a chapter of the Order of the Coif; the law school available to the plaintiff had four part-time professors and almost no other resources. *Sweatt*, 339 U.S. at 632-33. After *Sweatt* was initiated, a second school for blacks opened with five professors, a student body of 23, a library of 16,500 volumes, and, by the time *Sweatt* was decided, one alumnus admitted to the Texas bar. *Id.* at 633.

96. *Sweatt*, 339 U.S. at 633-34.

97. *Id.* at 634. These intangible qualities included the reputation and experience of the school's faculty and administration, its influential alumni, and its academic prestige. *Id.*

98. 339 U.S. 637 (1950).

99. *Id.* at 640. The conditions Mr. McLaurin endured seem ludicrous today. He attended classes with whites, but sat alone at a desk in a room adjoining the classroom; he could use the library, but could work only at a designated desk away from the main reading room; he could eat in the school's cafeteria, but only at his designated table and only at times when no whites were present. *Id.*

100. *Id.* at 641.

101. *Id.*

102. 347 U.S. 483 (1954).

103. For histories of the early desegregation cases and the litigation strategy of the NAACP, see MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 70-137 (1987); Nathaniel R. Jones, *The Desegregation of Urban Schools Thirty Years after* Brown, 55 U. COLO. L. REV. 515, 518-26 (1984).

104. *Brown I*, 347 U.S. at 495.

105. *Id.* at 494.

Brown II delegated to the district courts the equitable power to remedy this stigmatic injury[106] because of a need for "flexibility" to "adjust[ ] and reconcil[e] public and private needs."[107] The two *Brown* decisions left unanswered specific questions concerning a school district's duty to change existing policies and the appropriate methods of change.

The Supreme Court's desegregation mandate was openly and sometimes violently defied by segregationists.[108] The conflict reached the point of a constitutional crisis when Governor Orval Faubus dispatched the Arkansas National Guard to Little Rock's Central High School to prevent the admission of nine black students.[109] The Supreme Court reacted swiftly, proclaiming the primacy of the Fourteenth Amendment rights of schoolchildren over the preservation of local peace.[110] Failing at defiance, school districts turned to foot-dragging; changes in the status quo of segregation were therefore slow in coming.[111] In *Green v. County School Board*[112] the Court responded by placing the burden on school boards "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch,"[113] employing means that "[promise] realistically to work *now*."[114] *Green* directed district courts to retain jurisdiction over offend-

106. *See Brown II*, 349 U.S. 294, 300 (1955).

107. *Id.*

108. The reaction in the South has been described as "a panic bred of insecurity and fear." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 154 (3d ed. 1974). In the spring of 1956, a joint statement of 101 congressmen, the "Southern Manifesto," vowed "to use all lawful means to bring about a reversal of this decision [*Brown*] which is contrary to the Constitution." KLUGER, *supra* note 4, at 752. State legislatures poured forth a flood of pro-segregation acts, and some school districts stopped operations completely rather than admit blacks. WOODWARD, *supra*, at 156-67. The violence against the early civil rights movement was shocking in its intensity and irrationality. *See id.* at 173-85.

109. Cooper v. Aaron, 358 U.S. 1, 9 (1958). In *Cooper*, the school district had been prepared to comply with court-ordered desegregation for the 1957-58 school year when Governor Faubus intervened. *Id.* The district court enjoined Governor Faubus from blockading the school, and President Dwight Eisenhower sent federal troops to back the order. *Id.* at 11-12. Before the 1958-59 school year, however, with school operations thrown into "chaos, bedlam, and turmoil," the district court allowed the school system to postpone enrolling the nine black students. This judgment was made on June 20, 1958; within the space of three months the district court was reversed by the Eighth Circuit and the reversal was affirmed by the Supreme Court. *Id.* at 13-14.

110. *Id.* at 16.

111. WOODWARD, *supra* note 108, at 173.

112. 391 U.S. 430 (1968).

113. *Id.* at 437-38. *Green* sets a desegregation goal that, although often read as a call for balanced student assignment, may contain an element addressing the intangible qualities of public education: a district must convert to "a system without a 'white' school and a 'Negro' school, but just schools." *Id.* at 442.

114. *Id.* at 439.

ing school districts until segregation was eradicated.[115]

District courts remained unsure how to carry out *Green*'s mandate of affirmative action to dismantle dual systems.[116] The Court set forth guidelines for appropriate equitable remedies in *Swann v. Charlotte-Mecklenburg Board of Education*.[117] It designated the *Green* indicia of a school system's segregative character[118] as the proper focus of remedial action,[119] and it restated the goal of desegregation: the elimination of all vestiges of de jure segregation.[120]

The *Swann* Court was pragmatic in recognizing the tension between remedial desegregation decrees and local interests. The Court acknowledged community resistance to busing and the desirability of neighborhood schools.[121] The Court identified the influence of past school segregation on present-day residential segregation,[122] but did not require school districts to change policies and student assignments constantly to match a shifting urban population once unitary status was achieved.[123]

Three years later, in *Keyes v. School District No. 1*,[124] the Supreme

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115. *Id.*

116. *See* Days, *supra* note 20, at 1744.

117. 402 U.S. 1 (1971).

118. *See supra* text accompanying note 73.

119. Racial identification of a school on the basis of any one of the six *Green* factors constituted a prima facie case of constitutional violation. *Swann*, 402 U.S. at 18. The *Swann* Court singled out student assignment for particular attention. *Id.* at 22-31. Racial quotas for individual schools were discouraged, *id.* at 24, and the Court admitted that the existence of some one-race schools, taken alone, would not prevent a school system from attaining unitary status. *Id.* at 26. The existence of one-race schools, however, would require the school system to prove that such schools did not arise from intentionally discriminatory student assignment policies. *Id.*

120. *Id.* at 15; *accord* Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

121. *Swann*, 402 U.S. at 28, 30-31.

122. "People gravitate toward school[s] . . . . The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods." *Id.* at 20-21.

123. *Id.* at 31-32. Perhaps the *Swann* Court meant district court jurisdiction should terminate upon the school system attaining unitary status. *But see id.* ("This does not mean that federal courts are without power to deal with future problems" should an intentionally segregative act be shown.); *id.* at 21 (stating that district courts should retain jurisdiction to insure that school policies do not promote resegregation). It is not clear whether the Court endorsed retention of limited judicial power in the post-unitary stage, or merely acknowledged that future suits could be pursued. *See* Note, *supra* note 11, at 656 n.21.

124. 413 U.S. 189 (1973). Although the school system in *Keyes* had never been operated as a statutorily imposed dual system, the Court nonetheless affirmed the district court's finding of de jure segregation in a portion of the school district. The intentionally segregative acts of the school district, as a representative of the state, created the constitutional violation. *Id.* at 198-200, 212. The *Keyes* decision is best known for two fundamental concepts in desegregation jurisprudence. The first is the distinction between de jure and de facto segregation and the limitation on the power of courts to remedying only the former. *Id.* at 198. The second is the

Court addressed a contention by a school board that local interests in establishing a neighborhood school zoning policy were racially neutral. The school board claimed that segregative effects on student assignment under the policy were due to the racial polarization of Denver's residential neighborhoods, a phenomenon outside the board's control and not a result of its actions.[125] The Court disagreed, affirming the district court's decision that the board had manipulated attendance zones, teacher assignments, and the placement of new facilities with discriminatory intent,[126] and reserved judgment on whether a truly neutral neighborhood zoning policy that resulted in a substantial number of one-race schools would be unconstitutional.[127]

Justice Powell, in a separate opinion in *Keyes*,[128] urged that courts balance desegregation decrees to achieve their goals while respecting community interest in neighborhood schools.[129] Justice Powell argued that the battle to desegregate is often at the expense of public education's ultimate goal: the best possible education for all children.[130] The all-out rush to desegregate, while morally laudable, was sapping community involvement in local school systems.[131]

Public disillusion with busing may have affected the Supreme Court's jurisprudence;[132] three major desegregation decisions in the

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spatial presumption of intent: once de jure segregation in a "meaningful" segment of the school district is shown, a presumption arises that segregation elsewhere in the district also has resulted from intentional acts, and a system-wide remedy can be ordered. *Id.* at 208-09.

125. *Id.* at 211-12.

126. *Id.* at 198-202.

127. *Id.* at 212.

128. Justice Powell concurred in the decision to remand the case to the district court, but dissented from the majority's retention of the distinction between de jure and de facto segregation in determining a constitutional violation. *Id.* at 217-20 (Powell, J., concurring in part and dissenting in part). Chief Justice Burger concurred with the majority's opinion, Justice Douglas wrote separately but agreed with Justice Powell's opinion, and Justice Rehnquist wrote a dissenting opinion.

129. *Id.* at 244-46 (Powell, J., concurring in part and dissenting in part).

130. *Id.* at 253 (Powell, J., concurring in part and dissenting in part).

131. *See id.* (Powell, J., concurring in part and dissenting in part). Justice Powell wrote:

> The single most disruptive element in education today is the widespread use of compulsory transportation, especially at elementary grade levels. This has risked distracting and diverting attention from basic educational ends, dividing and embittering communities, and exacerbating, rather than ameliorating, interracial friction and misunderstanding. It is time to return to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert.

Id.

132. As Richard Kluger put it: " 'Bussing' replaced 'law-and-order' as the white-backlash code word of the early Seventies." KLUGER, *supra* note 4, at 765. By 1974, President Richard Nixon, who campaigned in 1968 on the slogan of "law and order," had appointed four Jus-

1970s limited the power of a district court to effect a remedy for segregation. In *Pasadena City Board of Education v. Spangler*[133] the Court chastised a district judge for requiring a school district to maintain specific racial quotas in student assignments each year.[134] Since the school district had complied with the district court's requirement for a year and then fell into noncompliance only because of factors beyond its control, the Supreme Court held that the district court had no authority to order annual readjustment of student assignment.[135] Under the Court's decision in *Pasadena City*, if a school district achieves the objective of a desegregation decree in one facet of school operations, the court's authority over that area is limited, even if the school system has not attained "total" unitary status.[136]

In *Milliken v. Bradley* (*Milliken I*)[137] the Court reversed a district court's order to desegregate Detroit's overwhelmingly black schools by busing children to and from the city's predominantly white suburbs, because only the city district, and not the suburban districts, had been found in violation of the Constitution.[138] Although, as Justice Marshall argued in his dissenting opinion,[139] an interdistrict remedy may have been the only plan likely to work, an appropriate remedy could not affect school districts beyond the boundaries of the constitutional wrong.[140] Absent a showing of intentional interdistrict discrimination,[141] interdistrict busing would not be allowed.[142] The *Milliken I* Court again empha-

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tices: Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist. These four Justices held diverse views on desegregation, yet voted together in Milliken v. Bradley, 418 U.S. 717 (1974), and Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

133. 427 U.S. 424 (1976).

134. *Id.* at 433-34. The district judge stated that his earlier order requiring student assignment to be adjusted so that the majority of students in any school would not be members of a minority race was meant to last "at least during my lifetime." *Id.* at 433.

135. *Id.* at 431-36.

136. *Id.* at 436-37. This concept of "partial unitary status" has resulted in confusion over the meaning of "unitary" and the perceived distinction between a "unitary" school system—a system with racially-balanced student assignment—and "unitary status"—a system that is completely desegregated and in compliance with the Fourteenth Amendment. *See supra* note 10. Some courts have declined to interpret *Pasadena City* as endorsing partial unitary status, however, asserting that the Supreme Court meant only to strike down the district court's overly rigid requirement of racial quotas. *See, e.g.*, Pitts v. Freeman, 887 F.2d 1438, 1447 (11th Cir. 1989), *cert. granted*, 111 S. Ct. 949 (1991).

137. 418 U.S. 717 (1974).

138. *Id.* at 742-45, 752-53.

139. *Id.* at 802-03 (Marshall, J., dissenting).

140. *Id.* at 745.

141. The plaintiffs in *Milliken I* argued that the State of Michigan was responsible for the segregation of Detroit's schools, and that since state policy had affected both the city and suburban schools, there was interdistrict responsibility for the segregation. *Id.* at 722-23.

142. *Id.* at 745.

sized local interests: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[143] Three years later, in *Milliken v. Bradley* (*Milliken II*),[144] the Supreme Court held that desegregation remedies should "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[145]

The tension between desegregative efforts and the desirability of local autonomy resulted in a movement to return control of public education to local authorities.[146] In *Spangler v. Pasadena City Board of Education*[147] the United States Court of Appeals for the Ninth Circuit overruled a district court's refusal to dissolve a nine-year-old desegregation decree.[148] The *Spangler* court concluded that the district court should consider interests in local autonomy when deciding whether to terminate judicial supervision of a school board.[149] The court held that nine years of compliance had accomplished the decree's goals[150] and that fears of reversion to discriminatory practices were unfounded.[151] Although the Pasadena City school board had indicated its intention to implement a neighborhood school zoning plan that would create a number of one-race schools, the Ninth Circuit felt that the community

143. *Id.* at 741-42.

144. 433 U.S. 267 (1977).

145. *Id.* at 280-81. This language implies a need to balance local autonomy against Fourteenth Amendment rights. *See* Douglas J. Brocker, Note, *Taxation Without Representation: The Judicial Usurpation of the Power to Tax in* Missouri v. Jenkins, 69 N.C. L. REV. 741, 752 (1991).

146. Justice Marshall, dissenting in *Milliken I*, lamented: "Today's holding, I fear, is more a reflection of perceived public mood that we have gone far enough in enforcing the Constitution . . . ." *Milliken I*, 418 U.S. at 814 (Marshall, J., dissenting). This trend back to local control may be partly attributed to local concerns about racial destabilization resulting from white families removing their children from school districts under busing plans. *See* Riddick v. School Bd., 784 F.2d 521, 525-26 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); Christine H. Rossell & Willis D. Hawley, *Understanding White Flight and Doing Something About It*, *in* EFFECTIVE SCHOOL DESEGREGATION 157-71 (Willis D. Hawley ed., 1981). The trend was no doubt accelerated by the Reagan Administration's push to terminate judicial desegregation plans. *See* Liebman, *supra* note 6, at 1465-66.

147. 611 F.2d 1239 (9th Cir. 1979).

148. *Id.* at 1240-41.

149. *Id.* at 1241 (citing *Milliken II*, 433 U.S. 267, 280-81 (1977)).

150. *Id.* at 1244 (Kennedy, J., concurring). Judge Goodwin wrote the primary opinion in *Spangler*. *Id.* at 1240-42. Judge Kennedy wrote an opinion concurring with Judge Goodwin, and Judge Anderson concurred with both opinions. *See id.* at 1242-48 (Kennedy, J., concurring); *id.* at 1242 (Anderson, J., concurring). Judge Kennedy's opinion may therefore be considered the opinion of the court.

151. *Id.* at 1245 (Kennedy, J., concurring).

interests[152] supporting the new plan negated any presumption of discriminatory intent.[153] The *Spangler* holding foreshadowed the Supreme Court's decision in *Dowell* by rejecting, as inapplicable to desegregation decrees, a *Swift* test—a requirement that the danger that prompted the decree be attenuated and that unforeseen, grievous harm would result should the decree continue—for dissolution of the district court's injunction.[154]

In 1986, the United States Court of Appeals for the Fourth Circuit followed the Ninth Circuit's lead. In *Riddick v. School Board*[155] the district court had declared the school system to be unitary and dismissed a desegregation suit.[156] When the plaintiffs attempted to reopen the suit, they were required to prove intentionally discriminatory action by the school board.[157] The Ninth Circuit affirmed the district court's finding that the school board's termination of busing and conversion to a neighborhood zoning plan was not carried out with discriminatory intent[158] and that existing residential segregation was not a vestige of de jure school segregation.[159]

Both *Spangler*[160] and *Riddick*[161] held that a school district's

152. *Cf.* Dowell v. Board of Educ., 677 F. Supp. 1503, 1516-17, 1523 (W.D. Okla. 1987) (discussing the increase in parental and community involvement when busing was discontinued and neighborhood schools were reinstated), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct 630 (1991).

153. *Spangler*, 611 F.2d at 1245 (Kennedy, J., concurring). The court also found persuasive an official resolution by the school board that disclaimed any intent to discriminate and resolved to continue affirmative action programs. *Id.* at 1245-46 (Kennedy, J., concurring).

154. *Id.* at 1245 n.5 (Kennedy, J., concurring); *see also supra* notes 49-50 and accompanying text (describing the *Swift* test for terminating injunctions).

155. 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

156. The procedural history of *Riddick* parallels that of *Dowell*. The initial determination of unitary status was an unpublished, unappealed order from 1975 that dismissed the case but did not expressly dissolve the desegregation decree. *Id.* at 525; Riddick v. School Bd., 627 F. Supp. 814, 819 (E.D. Va. 1984), *aff'd*, 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986). Nine years later, when the plaintiffs attempted to reopen the litigation, the district court held that unitary status was still in place and that the court's jurisdiction had terminated with the 1975 order. *Riddick*, 784 F.2d at 530; *Riddick*, 627 F. Supp. at 819-20.

157. *Riddick*, 627 F. Supp. at 820 (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976)); *cf.* Keyes v. School Dist. No. 1, 413 U.S. 189, 198 (1973) (requiring plaintiffs to prove discriminatory intent by the school board in the absence of de jure segregation). The Fourth Circuit upheld the district court's allocation of the burden of proof. *Riddick*, 784 F.2d at 534, 538-39.

158. *Riddick*, 784 F.2d at 540. The Fourth Circuit agreed that although the neighborhood zoning plan was installed in part to induce whites to keep their children in the public schools, the plan was a justifiable attempt to maintain a stable, desegregated system. *Id.* at 543.

159. *Id.*

160. Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring).

161. *Riddick*, 784 F.2d at 535.

achievement of unitary status should terminate judicial oversight of local education. In *Pitts v. Freeman*[162] the United States Court of Appeals for the Eleventh Circuit agreed,[163] but went further in setting standards for unitary status. A school district, the *Pitts* court held, could achieve unitary status only by maintaining desegregation in all six *Green* areas of school operations simultaneously for at least three years.[164] More important, a finding of desegregation in the six *Green* areas was to be only the first, mechanical check. "The factors operate, in part, as an indicator of more intangible vestiges."[165]

The current judicial focus on school desegregation has shifted from how to remedy a segregated system to an evaluation of the success of existing remedies and the appropriateness of relinquishing judicial control over the school district. This change in focus probably was an inevitable result of the large number of desegregation suits and the duration of judicial supervision in these cases.[166]

Local autonomy is lost, at least to some degree, when judicial control is imposed over public education. Many authorities believe this loss, combined with disruptive programs like busing, reduces community involvement in education and promotes the withdrawal of students, especially whites, from public school systems.[167] Even if it is assumed that control of public education belongs at a local level, concerns still arise over how to determine when a formerly dual system has become unitary,

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162. 887 F.2d 1438 (11th Cir. 1989), *cert. granted*, 111 S. Ct. 949 (1991).

163. *Id.* at 1445 n.7.

164. *Id.* at 1446. The "simultaneously" requirement is a clear rejection of an interpretation of Pasadena City Board of Education v. Spangler, 427 U.S. 424, 436-37 (1976), as allowing partial unitariness. *See Pitts*, 887 F.2d at 1446-47; *supra* note 136 and accompanying text. The Supreme Court has granted certiorari and *Freeman v. Pitts* has been docketed for the 1991-92 Supreme Court term; a primary question presented is the validity of the Eleventh Circuit's interpretation of *Pasadena City*. Freeman v. Pitts, 60 U.S.L.W. 3027 (U.S. July 16, 1991) (No. 89-1290). *Freeman v. Pitts* was argued on October 7, 1991, after this Note went to press; the reader may find it interesting to see how the Supreme Court disposed of the *Pitts* test for unitary status.

165. *Pitts*, 887 F.2d at 1446. Discussing the use of the six indicia, the court also said:

> [T]he *Green* factors are not entirely synonymous with the vestiges of past discrimination. State-imposed segregation affected society much more than any set of judicially-created factors can measure. . . . Application of the *Green* factors does not strip a district court of its responsibility and ability to consider unique circumstances in each school system. The *Green* factors approach is a means towards an end.

Id. (citations omitted).

166. *Current Status of Federal School-Desegregation Lawsuits*, *supra* note 7, at 18-19. The majority of desegregation suits were initiated from 1960 to the early 1970s. *Id.*

167. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 245-46 (1973) (Powell, J., concurring in part and dissenting in part); Riddick v. School Bd., 784 F.2d 521, 539-42 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); Dowell v. Board of Educ., 677 F. Supp. 1503, 1516-17, 1523-24 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991).

and thus has earned back its autonomy, and what supervision, if any, should be retained over a unitary system.

The majority opinion in *Dowell* eschewed an in-depth, thoughtful review of what unitary status should entail in favor of an emphasis on the interests in reinstating local control over schools. Although the Court's opposition to desegregation plans operating in perpetuity and its rejection of the *Swift* test[168] may be sound, it gave scant attention to the more fundamental question of the proper test for dissolution of desegregation decrees.

The clear mandate of Supreme Court precedent before *Dowell* required school districts to remove all vestiges of past discriminatory practices.[169] In *Dowell* the Court slipped subtly, and perhaps pragmatically,[170] to requiring the removal of discriminatory vestiges to the extent practicable.[171] The Court, however, offered no new insight on how a district court should measure the continuing presence of "vestiges," or how far "practicable" effort should extend. The Court set forth the *Green* indicia of a system's character—student assignment, faculty, staff, transportation, extracurricular activities, and facilities—as a checklist for eliminating vestiges of discrimination,[172] a procedure already followed by a number of lower courts.[173] Such an approach lends itself to quantifying unitary status, since the *Green* indicia can largely be reduced to ratios of black to white students and faculty and concrete comparisons of activities and facilities.

This approach, as Justice Marshall argued in his dissenting opinion, does not accurately reflect the spirit of the *Brown I* mandate against segregation.[174] Ratios and percentages do not reflect the intangible stigmata of segregation: students' inabilities "to engage in discussions and ex-

168. For a discussion of the *Swift* test, see *supra* notes 49-50 and accompanying text.

169. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1970) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."); Green v. County Sch. Bd., 391 U.S. 430, 437-39 (1968) ("School boards [must] take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. [T]he court should retain jurisdiction until . . . segregation has been completely removed.") (citations omitted).

170. *See* Gewirtz, *supra* note 1, at 796 ("If judicial remedial efforts are really justified so long as any harmful effects of discrimination persist, there is the possibility that remedies might continue almost indefinitely . . . . Indeed, as a society we will probably never completely free ourselves from our racial history . . . .").

171. *Dowell*, 111 S. Ct. at 638.

172. *See supra* text accompanying notes 72-77.

173. *See, e.g., supra* notes 74 & 77 and accompanying text.

174. *Dowell*, 111 S. Ct. at 639 (Marshall, J., dissenting).

change views with other students,"[175] the "feeling of inferiority,"[176] the "stigmatic injury."[177] Justice Marshall properly advocated a review of these intangible factors before granting unitary status to a school district; unfortunately, he set forth only the eradication of one-race schools as a measurement of intangible injury.[178] Although ridding the school system of one-race schools might include efforts to desegregate beyond the areas of school operations outlined in *Green*, the Supreme Court has often stated that unitary status should not depend on racial quotas or the elimination of one-race schools.[179]

An appropriate test for unitary status would combine a review of the six *Green* indicia as applied in *Pitts v. Freeman*,[180] a requirement that neighborhood school zones be drawn to maximize integration to the greatest extent practicable,[181] and a pointed investigation of community attitudes toward racially identifiable schools.[182] Any attempt to evaluate

175. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950). For a discussion of *McLaurin*, see *supra* notes 98-101 and accompanying text.

176. *Brown I*, 347 U.S. 483, 494 (1954).

177. *See supra* text accompanying notes 79-80.

178. *Dowell*, 111 S. Ct. at 639 (Marshall, J., dissenting).

179. Keyes v. School Dist. No. 1, 413 U.S. 189, 250-51 (1973) (Powell, J., concurring in part and dissenting in part); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-25 (1971).

180. 887 F.2d 1438, 1446 (11th Cir. 1989), *cert. granted*, 111 S. Ct. 949 (1991); *see supra* notes 162-165 and accompanying text.

181. *Cf.* Riddick v. School Bd., 784 F.2d 521, 526-27 (4th Cir.) (neighborhood zone plan that replaced mandatory busing consisted of attendance zones drawn to maximize integration), *cert. denied*, 479 U.S. 938 (1986).

182. Justice Marshall and a number of commentators have advocated prerequisites for unitary status that go beyond the *Green* indicia. Many of these suggestions touch upon nonquantifiable, intangible aspects of school operations. *See, e.g., Milliken I*, 418 U.S. 717, 804 (1974) (Marshall, J., dissenting) ("What is or is not a racially identifiable vestige of *de jure* segregation must necessarily depend on several factors. Foremost among these should be the relationship between the schools in question and the neighboring community." (citations omitted)); Brown, *supra* note 10, at 1162-63 (arguing that if segregative harm is the propagation of invidious values, determination of unitary status should include the evaluation of (1) commitment of local officials to change, (2) minority representation on school boards, (3) good faith compliance with decrees, and (4) efforts to eliminate racial bias by varying traditionally "white-oriented" curricula and testing procedures); Gewirtz, *supra* note 1, at 793 ("A period of sustained compliance, perhaps an entire generation, is needed for public perceptions about the racial character of the schools to be transformed."); Williams, *supra* note 10, at 799-805 (contending that the *Green* indicia are "surface vestiges"; "underlying vestiges" such as residential segregation, poor educational achievement of black students, and segregative effects from the closing and opening of schools must also be eliminated); Note, *supra* note 11, at 663, 667 (arguing that a finding of unitary status must consider the elimination of the threat of resegregation; a mechanical finding of unitary status does not demonstrate that attitudes have been altered); *cf.* Keyes v. School Dist. No. 1, 413 U.S. 189, 195-98 (1973) (listing community attitudes as a measurement of segregation).

An interesting question may arise over using community attitudes to measure desegrega-

community attitudes, must, of course, be somewhat subjective, but a district court that has been involved in the case for some time is appropriately placed to judge such attitudes. The *Dowell* court heard testimony from black school administrators and patrons in an attempt to evaluate community response to the new assignment plan;[183] similar techniques should be used in deciding unitary status.

The majority and dissenting opinions in *Dowell* also differed on the weight residential segregation should receive as a vestige of de jure school segregation. Lower courts have attributed contemporary residential segregation to economic and social factors;[184] with statutory segregation receding into history, holding school districts blameless for the lingering effects of residential segregation on school populations often seems reasonable.[185] De jure segregation should not always be considered " 'original sin,' " whose effects control de facto segregation today.[186] Yet even unitary school districts should be encouraged to draw neighborhood school zones to maximize integration.[187] Certainly such efforts should be required of nonunitary systems. Residential segregation should not be treated as irrelevant to school zoning.[188]

Finally, the *Dowell* Court properly recognized that a community's

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tion when some members of the black community prefer an all-black school to remain segregated out of pride in its educational successes. *See, e.g.*, Alison Jones, *Durham School Rolls Increase; Hillside High Again All Black*, RALEIGH NEWS & OBSERVER, Sept. 10, 1991, at B6.

183. Dowell v. Board of Educ., 677 F. Supp. 1503, 1519 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991).

184. *Id.* at 1511-12.

185. *See* Riddick v. School Bd., 784 F.2d 521, 539 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

186. *Dowell*, 677 F. Supp. at 1513 (quoting City of Mobile v. Bolden, 464 U.S. 55, 74 (1980)).

187. *See Riddick*, 784 F.2d at 540 (school board drew neighborhood zones to maximize integration).

188. In implementing its new neighborhood school plan, the Oklahoma City school district made no attempt to counteract residential segregation by drawing school zones to maximize integration. It simply reinstalled the school zones that were in place prior to 1972. The district court rather weakly reasoned that the failure to draw new lines was probative of nondiscrimination against blacks who had moved into the predominantly white zones. *Dowell*, 677 F. Supp. at 1517.

In the context of the relationship between school segregation and residential segregation, at least one school district has not claimed helplessness. The Palm Beach County, Florida public school system initiated a plan that calls on the county's incorporated communities and unincorporated developments to achieve racially balanced neighborhoods in exchange for a return to neighborhood schools. William Celis III, *District Finds Way to End Segregation and Restore Neighborhood Schools*, N.Y. TIMES, Sept. 4, 1991, at B8. This "carrot on a stick" approach has been well received locally and hailed as novel and comprehensive by academics. *Id.* In a test for unitariness that considered intangible factors and community attitudes, voluntary, extra efforts to desegregate, like the Palm Beach County plan, would certainly be more persuasive than mere compliance with court-ordered plans.

interest in schools is important. Persuasive arguments have been made for the great benefits that flow from parental involvement in education, an interest that suffers when children are bused to distant schools.[189]

The return of local autonomy may be achieved upon a finding of unitary status by ending active supervision by the courts. Limited retention of jurisdiction, perhaps through a narrowly drawn permanent injunction prohibiting specific discriminatory acts,[190] would not overly burden local autonomy. Alternatively, courts could relinquish active management of school operations, but retain a presumption of discriminatory intent should the school district's action result in resegregation.[191] Retention of mechanisms that favor plaintiffs may prove problematic to the actual use of local autonomy, however. Typically, upon regaining autonomy a school system wishes to end busing and reinstate neighborhood school zoning,[192] acts that commonly have resegregative effects. Mechanisms favoring plaintiffs should be made less difficult to overcome if the unitary school district, as justification for its acts, can show community support for such programs from both the black and the white population, system-wide educational benefits, and programs that have been designed to minimize resegregative impact.[193]

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189. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 251 (1973) (Powell, J., concurring in part and dissenting in part) (emphasizing the disruption in education caused by extensive busing); *Dowell*, 677 F. Supp. at 1523-24 (citing statistical improvements in education, linked to increased parental involvement with neighborhood schools). Justice Marshall points out in his dissent, however, that such concerns are best dealt with by formulating and modifying desegregation decrees, not by dissolving them. *Dowell*, 111 S. Ct. at 639 n.1, 648 (Marshall, J., dissenting).

190. *See* Dennis G. Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE W. RES. L. REV. 41, 61-64 (1986). Mr. Terez suggests that a finding of unitary status should necessarily include a permanent injunction requiring maintenance of the unitary system. The school district would bear the burden of proving a "substantial change in law or facts" before taking action that might disrupt the unitary status. *Id.* Similarly broad suggestions have not been accepted in influential cases, however. The plaintiffs in *Spangler* requested that if the court terminated the regulatory injunction over the school district, it should instate a prohibitory injunction against the reemergence of discriminatory policies. The Ninth Circuit rejected this proposal as too burdensome for the school district. Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1247 (9th Cir. 1979).

191. *See* Note, *supra* note 11, at 668-70. The author of the cited Note proposes a post-unitary burden allocation that would only require the plaintiff to make a prima facie case of substantial resegregative effects. Such a case would result in a rebuttable presumption that the school district acted with discriminatory intent.

192. *See, e.g.*, Riddick v. School Bd., 784 F.2d 521, 525 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); *Spangler*, 611 F.2d at 1243-44; *Dowell*, 677 F. Supp. at 1505.

193. Before unitary status is achieved, if a school district acts for putatively beneficial reasons (for example, by opening new facilities or using neighborhood attendance zones) but the acts result in resegregation, not only is the school district required to show lack of discriminatory intent, but the legitimate reason for the act must be balanced against the plaintiffs' right to a full remedy. *See* Note, *supra* note 11, at 660-61. A post-unitary presumption of intent by the

The Supreme Court's preoccupation in *Dowell* with ending desegregation decrees may properly serve local interests, but in its ruling the Court ignored the spirit of the *Brown* mandate of equal education for all. A greater emphasis on the intangible qualities of public education and retention of a passive supervisory role for the federal district courts may serve both goals more effectively, and hasten the day when our integrated society can say—triumphantly—"It is finished."[194]

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school board when its actions substantially resegregate may be justified to relieve plaintiffs of the difficulty of proving the school board's intent. Granting unitary status only after investigation into the moral commitment of the community to resist resegregation may help allay fears that the school board will backslide into intentional segregation, and justify allowing the school district to rebut the presumption of intent by simply showing legitimate community benefit from its acts without balancing that benefit against Fourteenth Amendment rights.

194. *See supra* note 1 and accompanying text.