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Kevin P. Fitzpatrick

Lynne E. Trimble

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THE SUPREME COURT'S UNSUCCESSFUL ATTEMPT TO CLARIFY WHEN SCHOOL BOARDS HAVE COMPLIED WITH DESEGREGATION DECREES: *BOARD OF EDUCATION OF OKLAHOMA CITY v. DOWELL*

The notion of equality of individuals, a cornerstone of American society, is heralded by the Declaration of Independence and guaranteed to all by the United States Constitution.¹ To achieve the ideal of equality, particularly equality of opportunity, America's sociologically diverse and multi-ethnic peoples must not be segregated.² Hence, to promote the success of society and its

¹ See The Declaration of Independence para. 2 (U.S. 1776). It provides in relevant part: "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." The United States Constitution, which evolved out of the spirit of the Declaration of Independence, provides equal protection under the laws of the United States. See U.S. CONST. amend. XIV:

No state shall make or enforce any law which shall abridge, the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Id.; *Fulfilling the Letter and Spirit of the Law, Desegregation of the Nations Public Schools. A Report of the United States Commission on Civil Rights*, at viii (Aug. 1976) [hereinafter *Fulfilling the Letter*] (all United States citizens should have equal chance); see, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (opportunity to attain education fosters success); Taylor, *Brown, Equal Protection and the Isolation of the Poor*, 95 YALE L.J. 1700, 1703 (1986) (United States citizens should have chance to develop their skills and be rewarded for their development).

² See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 253 (1973) (Powell, J., concurring in part and dissenting in part) (integrated school system, established by rational means and understood by parents and children, will promote society's success); Devins, *School Desegregation Law in the 1980's: The Courts' Abandonment of Brown v. Board of Education*, 26 WM. & MARY L. REV. 7, 12 (1984) (judges should presume that schools would be naturally integrated absent state fostered segregation); Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L.J. 377 (1980) (examines social science evi-

citizens, education—"the very foundation of good citizenship"³—should be equally available to all, and should be integrated.⁴ Since public schools play a critical role in educating contemporary society,⁵ the affirmative desegregation of these schools will allow America's children to achieve a desirable sense of community, in keeping with the fulfillment of equal opportunity.⁶ In a

dence on integration of communities). See also WEBSTER'S DICTIONARY 953 (2d ed. 1970). Integrate means "to make whole or complete by adding or bringing together parts . . . to put or bring (parts) together into a whole." *Id.*

³ *Brown*, 347 U.S. at 493. See, e.g., *Williams v. Dade County School Bd.*, 441 F.2d 299, 302 (5th Cir. 1971) (education is "vital and, indeed, basic to civilized society") (quoting *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961)); *Sullivan v. Houston Indep. School Dist.*, 333 F. Supp. 1149, 1172 (S.D. Tex. 1971) (education is "priceless commodity"), *vacated*, 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 608, 96 Cal. Rptr. 601, 618, 487 P.2d 1241, 1258 (1971) ("[W]e are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treatment of it as a 'fundamental interest.'"), *cert. denied*, 432 U.S. 907 (1977); D. FELLMAN, *THE SUPREME COURT AND EDUCATION*, at xi (3d ed. 1976) (promotion of education serves America's general welfare).

⁴ See *Wright v. Council of Emporia*, 407 U.S. 451, 472 (1972) (Burger, C.J., dissenting). Implementation of desegregation proposal would have no black schools and no white schools "but just schools." *Id.* (quoting *Green v. New Kent County School Bd.*, 391 U.S. 430, 442 (1968)). The goal of a desegregation remedy is "a unitary, non-racial system of public education." *Green*, 391 U.S. at 436. "[I]n the field of public education the doctrine of 'separate but equal' has no place—separate educational facilities are inherently unequal." *Brown*, 347 U.S. at 495; see also 20 U.S.C. § 1701 (1988). "The Congress declares it to be the policy of the United States that—(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex or national origin." *Id.* Compare *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (right to education not explicitly mentioned in Constitution) with J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 735 (2d ed. 1983) (recognition of right to education embodied in concept of liberty recognized by Constitution). See generally R. WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION* 4 (1984) (blacks attending segregated schools have impaired educational development).

⁵ See, e.g., *Brown*, 347 U.S. at 493 (education important to our democratic society); *Piper v. Big Pine School Dist.*, 193 Cal. 664, 673, 226 P. 926, 930 (1924) ("[T]he common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities."); J. HOGAN, *THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST* 2 (2d ed. 1985) (public schools are principal dispensers of knowledge and learning); E. REUTTER, JR., *THE LAW OF PUBLIC EDUCATION* 1 (3d ed. 1985). "The public education system in the United States is an instrumentality for carrying out a function that society has determined to be a desirable one—the education of all the children of all the people." *Id.*

⁶ See, e.g., *Estes v. NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., dissenting) (ethnically diverse public schools help children assimilate into our pluralistic society); *Wright*, 407 U.S. at 460 (district court may enjoin desegregation proposal that impedes dismantling dual segregated system); *Green*, 391 U.S. at 438 (calling for prompt and effective disestablishment of dual school system); *Monroe v. Board of Comm'rs*, 391 U.S. 450, 459 (1968) (desegregation plan must be shown to be affirmatively converting system into unitary non-discriminatory system); *Spangler v. Pasadena City Bd. of Educ.*, 311 F. Supp. 501, 513 (C.D. Cal.

Desegregation Decrees

decision that will affect countless desegregation cases pending across the country,⁷ the Supreme Court, in *Board of Education v. Dowell*,⁸ held that a federal court's supervision of a school board which was ordered to desegregate ends when the court decides the board has complied with the desegregation decree.⁹ Thereafter, control of the composition of the school and its facilities can be relinquished to local school authorities,¹⁰ subject as always, to the mandate of equal protection.¹¹

Dowell, and its complex procedural history, has spanned a period of thirty years.¹² In 1961, seven years after *Brown v. Board of*

1970) (integration provides positive educational benefits to prepare children to live in multi-racial society). *But see* A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 132 (1978) ("[N]o policy that a court can order, and a school board, a city or even the state has the capacity to put into effect, will in fact result in the foreseeable future in racially balanced public schools.").

⁷ *See Supreme Guessing Game: Integrated, But Watched Ever After*, Nat'l L.J., Oct. 1, 1990, at 1 (*Dowell* decision expected to affect hundreds of desegregation cases). *Cf.* HOGAN, *supra* note 5, at 11 (approximately 52,167 state and federal cases have affected education from 1789 through 1984).

⁸ 111 S. Ct. 630 (1991).

⁹ *See id.* at 638: *accord Wright*, 407 U.S. at 479 ("Judicial power ends when a dual school system has ceased to exist.") (Burger, J., dissenting). *See also* Columbus Bd. of Educ. v. Penick, 439 U.S. 1348, 1353 (1978) (school desegregation orders are very sensitive because they restructure system of education); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 227-28 (5th Cir. 1983) (termination of desegregation decree fact specific to each case); *Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 789-98 (1986) (discussing difficulties in deciding when court supervision is terminated in desegregation cases). *But see Terez, Protecting the Remedy of Unitary Schools*, 37 CASE W. RES. L. REV. 41, 43 (1986) (remedy imposed on school board for segregation of schools does not disappear once school district is unitary).

¹⁰ *Dowell*, 111 S. Ct. at 638; *see Riddick v. School Bd. of Norfolk*, 784 F.2d 521, 543 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); *see also* Note, *Unitariness and Busing: Placing the Burden of Proof for Obtaining Judicial Review When a School Board Stops Busing*, 92 DICK. L. REV. 437, 460 (1988) [hereinafter Note, *Unitariness and Busing*] (public policy requires return of qualified control of schools to local boards); Note, *The Unitariness Finding and its Effect on Mandatory Desegregation Injunctions*, 55 FORDHAM L. REV. 551, 553 (1987) [hereinafter Note, *The Unitariness Finding*] (once local officials have complied with desegregation decree, control of school system returns to them): *cf.* *Board of Educ. v. Pico*, 457 U.S. 853, 881-82 (1982) (local school boards have discretion in management of school affairs but must comply with first amendment); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1976) ("[l]ocal autonomy of school districts is a vital national tradition"); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969) (same); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (same); *Riddick*, 784 F.2d at 543 (school boards will run schools when all vestiges of *de jure* segregation are eradicated).

¹¹ *Dowell*, 111 S. Ct. at 638; *see Barnette*, 319 U.S. at 637 (fourteenth amendment protects citizens against state and its subdivisions, including boards of education).

¹² *See Dowell*, 111 S. Ct. at 633.

*Education*¹³ declared "separate educational facilities inherently unequal,"¹⁴ respondent Robert Dowell, along with other black students, brought an action to end *de jure* segregation¹⁵ in the Oklahoma City public school system.¹⁶ In 1963, the United States District Court for the Western District of Oklahoma ruled that the Oklahoma City Board of Education's (the "Board") mere statement of policy to desegregate was not enough to eliminate vestiges of segregation or violations of constitutional rights¹⁷ and ordered the Board to take "clear affirmative aggressive action to bring about desegregation."¹⁸ Finally, in 1972, after the Board failed to devise a suitable desegregation plan, the district court ordered Oklahoma public schools to adopt the "Finger Plan" proposal submitted by the respondents.¹⁹

The Board functioned under the Finger Plan for five years, and in 1977, the district court granted a motion to close the case.²⁰ However, in 1984, the Board adopted the Student Reassignment Plan which, in effect, resegregated some schools.²¹ A year later, a

¹³ 347 U.S. 438 (1954).

¹⁴ *Id.* at 495.

¹⁵ See *infra* note 43 (*de facto/de jure* segregation distinction).

¹⁶ Dowell v. Oklahoma City Pub. Schools, 219 F. Supp. 427, 428 (W.D. Okla. 1963).

¹⁷ Dowell v. Oklahoma City Bd. of Educ., 244 F. Supp. 971, 976 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967).

¹⁸ See *id.* at 982.

¹⁹ See Board of Educ. v. Dowell, 338 F. Supp. 1256, 1273, *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). The plan was developed by Dr. John Finger, a consultant hired by the plaintiffs. *Id.* at 1259. Dr. Finger was a professor of education at Rhode Island State University and an expert in the field of desegregation. See Dowell v. Board of Educ., 890 F.2d 1483, 1486 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991). The "Finger Plan" involved the restructuring of high school and junior high school attendance zones so that no school had less than 15 percent or more than 30 percent black enrollment. See Dowell, 338 F. Supp. at 1267-68. Black students in grades one through four were bused to formerly all-white schools. *Id.* at 1268. White fifth grade students were then bused to fifth grade centers. *Id.* Children in kindergarten were allowed to attend their neighborhood schools, despite the fact that the schools would then be segregated, in order to have the security of being near home. *Id.*; see also Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 30-31 (1971) (transportation may be excluded as desegregation tool when young children's health or educational process is impeded by time or distance of travel); Estes v. NAACP, 444 U.S. 437, 442 (1980) (Powell, J., dissenting) (Court recognized that concern for very young children's health and welfare may exclude them from desegregation busing plans) (citing Swann, 402 U.S. at 31).

²⁰ See Board of Educ. v. Dowell, No. 9452, slip op. App., at 174-76 (W.D. Okla. Jan. 18, 1977).

²¹ See Dowell v. Board of Educ., 606 F. Supp. 1548, 1552 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). The Student Reassignment Plan

Desegregation Decrees

class action suit was filed on behalf of black school children which included a motion to reopen the *Dowell* case.²² The district court refused to reopen the case, claiming the faculty and student body were integrated.²³

The court of appeals reversed, holding that when the district court found the school system to be unitary,²⁴ it merely ended active court supervision, although the Board would still have to adhere to the constitutional mandate of desegregation.²⁵ On remand, the district court found the new plan constitutional because the requisite discriminatory intent to segregate on the part of the Board was not present.²⁶ Nevertheless, the court of appeals reversed once more, holding that the district court had again found that the school district was integrated. This finding released the Board from court supervision despite any evidence that the circumstances underlying the issuance of the decree had substantially changed.²⁷ Finally, the Supreme Court granted certiorari to resolve a conflict which had arisen among the circuits in determin-

eliminated compulsory busing for students in kindergarten through fourth grades. *Id.* All fifth year centers, junior high schools, and high schools continued mandatory busing. *Id.* at 1552-53. Also, an equity officer was appointed to observe all of the schools to keep them integrated. *Id.* at 1552.

²² See *id.* at 1549. The petitioners claimed that the Oklahoma school system had not attained "unitary" status and had consequently resegregated. *Id.* at 1549.

²³ See *id.* at 1556-57 (school board's Student Reassignment Plan [SRP] was constitutional because it was not intentionally discriminatory).

²⁴ See *Dowell v. Board of Educ.*, 111 S. Ct. 630, 636 (1991). "Courts have used the terms 'dual' to denote a school system which has engaged in intentional segregation of students by race, and 'unitary' to describe a school system which has been brought into compliance with the command of the Constitution." *Id.*

²⁵ See *Dowell v. Oklahoma City Pub. Schools*, 795 F.2d 1516, 1522-23 (10th Cir.), cert. denied, 479 U.S. 938 (1986) (school board's abandonment of Finger Plan without court approval jeopardized plaintiffs' rights).

²⁶ See *Dowell v. Board of Educ.*, 677 F. Supp. 1503, 1515-16 (W.D. Okla. 1987), rev'd, 890 F.2d 1483 (10th Cir. 1989), rev'd, 111 S. Ct. 630 (1991). The school system reflected the demographics of the segregated residential areas. *Id.* at 1512-13. As a result, the district court concluded that supervision of the school system could be relinquished to local authorities. *Id.* at 1526.

²⁷ See *Dowell v. Board of Educ.*, 890 F.2d 1483, 1491 (10th Cir. 1989), rev'd, 111 S. Ct. 630 (1991). The court of appeals looked at this case not as a desegregation case, but as a case in equity and therefore applied injunctive remedies. *Id.* at 1486. See, e.g., *United States v. Swift*, 286 U.S. 106, 119 (1932) (first articulated standard to modify injunctive relief granted); Beard, *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction*, 49 LA. L. REV. 1239, 1240 (1989) (desegregation litigation not exempt from same rules of civil procedure and substantive law applicable in other types of litigation).

ing school district compliance with desegregation decrees.²⁸

The Supreme Court remanded the *Dowell* case to the district court for a factual determination of whether the school district complied with the desegregation decree.²⁹ In offering direction to the district court, the Court held that court supervision ends when "the board complie[s] in good faith with the desegregation decree . . . and the vestiges of past discrimination ha[ve] been eliminated to the extent practicable."³⁰ The Court further provided that when considering vestiges of past segregation, the district court should consider "not only . . . student assignments, but . . . 'every facet of school-operations, faculty, staff, transportation, extra-curricular activities and facilities.'"³¹ The Court thus concluded that when a school district is released from a desegregation decree, court authorization of new school policies and procedures is no longer needed.³² However, the Court warned that school districts remain subject to the mandate of the equal protection clause of the fourteenth amendment.³³

Justice Marshall, writing for the dissent, was concerned with the lack of guidance in the majority's opinion.³⁴ "[T]he inquiry it commends to the District Court fails to recognize explicitly the threatened reemergence of one-race schools as a relevant 'vestige' of *de jure* segregation."³⁵ Justice Marshall believed that as long as the conditions of segregation declared unconstitutional in *Brown* persist, compliance with a desegregation order is not complete, and consequently, the need for court supervision is not dispelled.³⁶ The dissent also criticized the majority's vague standard

²⁸ See *Dowell v. Board of Educ.*, 110 S. Ct. 1521 (1990).

²⁹ See *Dowell*, 111 S. Ct. at 638 (Court remanded after holding that substantial compliance with district court's decree was necessary before decree could be terminated).

³⁰ *Id.*

³¹ *Id.* (quoting *Green v. County School Bd.*, 391 U.S. 430, 435 (1968)).

³² *Id.* at 638.

³³ See *id.*

³⁴ See *Dowell*, 111 S. Ct. at 644 (Marshall, J., dissenting). Justice Marshall, joined in dissent by Justices Blackmun and Stevens, expressed his dissatisfaction with the vagueness and relative mildness of the majority's standard, as compared to the *Brown I* standard, which required the school district to eliminate the effects of past discrimination. *Id.*

³⁵ *Id.* at 639 (Marshall, J., dissenting).

³⁶ See *id.* (Marshall, J., dissenting). Justice Marshall restated the court of appeal's finding that feasible steps could be taken by the school board to eliminate one race schools. *Id.* He concluded that the purposes of the desegregation decree had not been achieved. *Id.*

Desegregation Decrees

for determining achievement of compliance with a desegregation decree.³⁷ The dissent believed that the majority's emphasis on operation in compliance with the fourteenth amendment would not satisfactorily guarantee the elimination of vestiges of segregation.³⁸ Justice Marshall stressed that the ultimate goal of a school board is to "eliminate *any* condition that perpetuates the message of racial inferiority inherent in the policy of state-sponsored segregation."³⁹

This Comment will suggest that *Dowell's* standard for compliance with a desegregation order is vague and unworkable. It will then discuss the conflict between the Fourth, Ninth and Tenth Circuits which *Dowell* was explicitly intended to resolve and will examine how the decision has increased the confusion surrounding compliance with desegregation decrees. Finally, this Comment will suggest that the adoption of the standard enunciated by the First Circuit would more properly address the issues facing school districts in decades to come.

I. THE FOURTH AND NINTH CIRCUITS' APPROACH TO COMPLIANCE

In *Riddick v. School Board of Norfolk*,⁴⁰ a case decided by the United States Court of Appeals for the Fourth Circuit, the plaintiffs challenged a post-unitary school board plan calling for the end of mandatory busing.⁴¹ The court held that in order for a

³⁷ See *id.* at 644. (Marshall, J., dissenting). Although the Court asserted that the vestiges of past discrimination should be eliminated, the dissent pointed out that the continued majority of one race schools in the school district comprised such a vestige. *Id.*

³⁸ See *id.* (Marshall, J., dissenting). By placing emphasis on the equal protection clause rather than on the effects of past discrimination, the dissent feared that the Court ignored the stigmatic harm done to minority children through a message of racial inferiority. *Id.*

³⁹ *Dowell*, 111 S. Ct. at 648 (Marshall, J., dissenting) (emphasis in original).

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

⁴¹ *Id.* at 524. The plan was proposed in response to significant "white flight" and decreased parental involvement in education attributed to mandatory busing. See *id.* at 526 (experts concluded that busing led to both desegregated schools and declining white enrollment which would resegregate schools, if not discontinued); see also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 469 (1979) (Burger, J., concurring) (highly doubtful that busing accomplishes desired goals); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 222 (1973) (busing easier to implement in rural areas than in cities because of dense shifting populations, numerous schools, and traffic problems associated with metropolitan areas) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 14 (1971)); *Lee v. Macon City Bd. of Educ.*, 616 F.2d 805, 810 (5th Cir. 1980). Several experienced educators stated that busing would burden pupils, their parents, and the school system with serious time and transporta-

school system to become unitary, "[a]ll aspects of public education must be freed from the vestiges of state sanctioned racial segregation"⁴² It also stated that the jurisdiction of the district court terminates once unitariness is achieved.⁴³

tion problems. *Id.* Black educators emphasized that any gains made by desegregation of the early grades would be outweighed by the disadvantages of cross-town busing. *Id.* The stability gained from attending a school near home and family for several years, especially in the presence of siblings and friends, was stated to be more important than desegregation. *Id.*; see also *Flax v. Potts*, 864 F.2d 1157, 1161 (5th Cir. 1989) (end of busing would decrease "white flight" and stabilize residential integration).

"White flight" is a term used to describe the phenomenon of whites retreating from schools or communities in order to resist desegregation. See Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 629 (1983). Instead of challenging integration directly, these white parents react by transferring their children to private schools or by moving to other communities. *Id.* Most studies of "white flight" indicate that mandatory desegregation causes many white students to leave their schools. See Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 663 n.66 (1987). But see Devins, *supra* note 2, at 13 (recommending standard which recognizes busing as preferred remedy but allows school board to show that busing is ineffective).

⁴² *Riddick*, 784 F.2d at 533 (emphasis added). Specifically, a school system's faculty, staff, transportation practices, facilities, extracurricular activities and student assignments must all be integrated before the school system as a whole would be deemed "unitary." See *id.*; see also *Green v. County School Bd.*, 391 U.S. 430, 435 (1968) (setting forth standard for assessing school district's unitariness).

⁴³ *Riddick v. School Bd. of Norfolk*, 784 F.2d 521, 535 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986). In contrast to the Tenth Circuit's indefinite, and seemingly perpetual involvement in *Dowell*, the Fourth Circuit requires a court's jurisdiction to end at a fixed point in time. *Id.* (once unitary system is achieved, district court's role ends); see also *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 440-41 (1976) (issue before Court was when court desegregation decree should cease). Under the Fourth Circuit's approach, the plaintiffs bear the burden of proving that the school board has intentionally discriminated in adopting the new plan. *Riddick*, 784 F.2d at 537. "We agree . . . that *Swann* and the cases that follow, both in the Supreme Court and in the courts of appeals, require a plaintiff to prove discriminatory intent on the part of the school board of a unitary school system." *Id.*

The court emphasized that its holding only applies to systems which have successfully uprooted all vestiges of *de jure*, as opposed to *de facto*, segregation and have thus been declared "unitary." See, e.g., *Gilmore v. City of Montgomery*, 417 U.S. 556, 565 (1974) (private infringement of individual rights does not implicate fourteenth amendment equal protection clause); *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958) (Constitution protects individuals from state action only); *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324, 333 (4th Cir. 1984) (refusing to remedy desegregation problems caused by demographic and individual prejudices); Rosson, *Busing in Unitary School Districts: A Board's Right to Modify the Plan*, 35 W. EDUC. L. REP. 607 (1987) [hereinafter Rosson, *Busing in Unitary School Districts*]. Only *de jure* segregation is prohibited by the fourteenth amendment. *Id.* This type of segregation is always caused by governmental action, but not all governmental action that separates people by race is *de jure* segregation. *Id.* Sometimes governmental plans do not intentionally discriminate based on race, but nevertheless have a segregatory effect. *Id.* This is known as *de facto* segregation. *Id.* *De facto* segregation may also result from private acts of citizens such as their choice of residence. *Id.* Unlike *de jure* segregation, *de facto* segregation is not illegal and does not create a duty to desegregate. *Id.* *Riddick*, 784 F.2d at 543 ("Our holding is a limited one, applicable only to those school

Desegregation Decrees

In *Spangler v. Pasadena City Board of Education*,⁴⁴ the United States Court of Appeals for the Ninth Circuit proposed a standard distinct from those adopted by the Fourth and Tenth Circuits.⁴⁵ *Spangler* involved an appeal by the Board of Education of Pasadena City from the denial of its motion to end ten years of court supervision over its school system.⁴⁶ The Ninth Circuit agreed with the Fourth Circuit's position that a court's jurisdiction must end once the school system is declared "unitary."⁴⁷ However, *Spangler* did little to clarify the law as to when a court's jurisdiction will come to an end and merely adopted the vague three-part test previously espoused by the Supreme Court in *Milliken v. Bradley*.⁴⁸

systems which have succeeded in eradicating all vestiges of *de jure* segregation."'). If the plaintiffs failed to establish discriminatory intent, their action would fail and the school board would continue to operate the educational system without the intervention of the federal courts. See *id.* But see *Board of Educ. v. Dowell*, 111 S. Ct. 630, 646 (1991) (Marshall, J., dissenting) (result in desegregation cases should be same even if segregation is caused by decisions of private individuals); *Milliken v. Bradley*, 418 U.S. 717, 761 (1974) (Douglas, J., dissenting) (no constitutional difference between *de jure* and *de facto* segregation).

Riddick has been criticized for placing the burden of proof on the plaintiffs after a finding of unitariness as too heavy a burden because it is extremely difficult for the plaintiff to prove intent. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 233 (1973) (Powell, J., concurring in part and dissenting in part). Decisions resting on the Court's impression of the subjective intent of the school board will be "fortuitous, unpredictable and even capricious." *Id.* Such a standard will provide inadequate protection from discrimination to minority students. *Id.* at 227; see also *Terez*, *supra* note 9, at 70 (advocating shifting of burden to school board to show that its proposals conform to unitary schools concept). Note, *supra* note 41, at 654 (under some circumstances, once control given back to school authorities, burden of proof should be on school board); Note, *The Unitary Finding and the Threat of School Resegregation: Riddick v. School Board*, 65 N.C.L. Rev. 617, 638 (1987) (questioning whether plaintiffs can meet burden of proving discriminatory intent in school system that is already unitary); Note, *Attacking School Segregation Root and Branch*, 99 YALE L.J. 2003, 2020-21 (1990) (discussing difficulty of proving discriminatory intent since school boards are likely to conceal it; suggesting use of circumstantial evidence of community sentiment and acts by municipal officials as proof of school board's intent); *Dowell* failed to resolve the issues of which party carries the burden of proof and what the burden should be. See *Coyle, School Ruling Leaves Burden on Lower Courts*, Nat'l L.J., Jan. 28, 1991, at 5.

⁴⁴ 611 F.2d 1239 (9th Cir. 1979).

⁴⁵ See *supra* notes 24, 40-43 (discussing Tenth and Fourth Circuit approaches).

⁴⁶ *Spangler*, 611 F.2d at 1240.

⁴⁷ *Id.* at 1241-42.

⁴⁸ *Id.* at 1241. The court enumerated three factors to be considered in determining whether a school system may be deemed unitary:

[1] "the nature and scope of the constitutional violation; [2] the remedial objective: to restore, as nearly as possible, the victims of discrimination to the position they would have occupied in the absence of illegal conduct; and [3] interests of state and local authorities in managing their own affairs, consistent with the Constitution."

II. THE SUPREME COURT'S ATTEMPT AT COMPLIANCE

A. *Five Interpretive Problems*

Recognizing the need to resolve this conflict between the circuits, the United States Supreme Court granted certiorari to the Tenth Circuit in *Board of Education v. Dowell*.⁴⁹ A review of the decision, however, illustrates that it may actually raise more questions than answers.⁵⁰

First, the Court incorrectly states that under the Tenth Circuit standard of unitariness set forth in *Dowell*, a "school district" could be called unitary and nevertheless still contain vestiges of past discrimination.⁵¹ What the Tenth Circuit actually meant was that a "particular educational area," for example student assignments, could be declared unitary, although the school district as a whole contained vestiges of past discrimination.⁵² In support of the proposition, the Tenth Circuit cited *Morgan v. Nucci*.⁵³ In *Nucci*, the First Circuit was extremely careful in pointing out that the school district as a whole would not be declared unitary merely because a particular educational area such as student assignments was unitary.⁵⁴ Thus, the Supreme Court's analysis of the Tenth Circuit's standard was based on an incorrect interpretation of what that standard required. This misinterpretation is particularly disturbing when one considers that, if anything, the Tenth Circuit was more determined to actively enforce desegregation than the other circuits.⁵⁵

Second, although the Supreme Court points out the differences in the definitions of the terms "unitariness" and "dual system" and acknowledges that this has fostered inconsistency in the use of these terms by the lower courts, it does not attempt to resolve this disparity nor does it set forth a clear definition to be used in fu-

Id.

⁴⁹ *Board of Educ. v. Dowell*, 111 S. Ct. 630, 635 (1991).

⁵⁰ See *infra* notes 51-77 and accompanying text.

⁵¹ *Dowell*, 111 S. Ct. at 635 (emphasis added).

⁵² *Dowell v. Board of Educ.*, 890 F.2d 1483, 1499 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991).

⁵³ *Dowell*, 890 F.2d at 1499 (citing 831 F.2d 313 (1st Cir. 1987)).

⁵⁴ *Nucci*, 831 F.2d at 318-19.

⁵⁵ *Dowell*, 890 F.2d at 1493 (school board must show that plan does not re-establish dual system).

Desegregation Decrees

ture cases.⁵⁶ Instead, the Court simply observed that it was “not sure how useful it is to define these terms more precisely, or to create subclasses within them.”⁵⁷ In so doing, the Court may have impliedly done away with the use of the terms “unitary” and “dual.”⁵⁸ If this is what the Court intended, it should have done so clearly and expressly since interpretation of these terms has been the primary source of inconsistency and confusion in this area,⁵⁹ indeed, the question of what constitutes unitariness has been called the “central riddle” in desegregation cases.⁶⁰ Indirectly disposing of the term “unitary” is especially inappropriate considering that the Court has consistently used the term throughout the relevant cases, and the term’s elimination might invalidate most, if not all, of the case law in this area.⁶¹ Thus, instead of resolving the inconsistencies in this area, the Court may have added a new level of complexity to desegregation law.⁶²

⁵⁶ Board of Educ. v. Dowell, 111 S. Ct. 630, 635-36 (1991).

⁵⁷ *Id.* at 636 (questioning usefulness of defining “unitary” and “dual system” more precisely).

⁵⁸ *Id.*

⁵⁹ See *id.* at 635-36. Many lower courts have used “unitary” in different and inconsistent ways. *Id.*; see, e.g., Terez, *supra* note 9, at 57 (vague definition of “unitariness” results in confusion and inconsistent decisions); Note, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM. L. REV. 794, 795 (1987) (meaning of “unitary” unclear, and “premature finding of unitariness could lead to inadequate remedy”) (citations omitted); Sherman, *Classroom Bias Cases Continue*, Nat’l L.J., (Jan. 11, 1988, at 24) (Supreme Court has declined to address issue of “unitariness” in spite of split between circuits). But see Northcross v. Board of Educ., 397 U.S. 232, 236-37 (1970) (Burger, J., concurring) (“argument that the definition of unitary is unclear is unsupported”).

⁶⁰ Morgan v. Nucci, 831 F.2d 313, 319 (1st Cir. 1987) (“question of what constitutes unitariness [is] the central riddle of the law of school desegregation”) (citing Fiss, *The Charlotte-Mecklenburg Case: Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 700-01 (1971)).

⁶¹ See Missouri v. Jenkins, 110 S. Ct. 1651, 1666 (1990) (state policy which impedes operation of unitary system must be eliminated) (citing United States v. County of Macon, 99 U.S. 582 (1879)); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) (district court has broad power to create remedy assuring unitary system) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971)); Milliken v. Bradley, 433 U.S. 267, 276 (1977) (equal treatment of students facilitates conversion to unitary system).

⁶² See Coalition to Save Our Children v. Delaware Bd. of Educ., 757 F. Supp. 328, 349 (D. Del. 1991). In *Coalition to Save Our Children*, the district court concluded that there is no longer a need to use the term “unitary.” *Id.* (court dispensed with word “unitary” because Supreme Court in *Dowell* found lower courts’ use of “unitary” inconsistent and confusing). It remains unclear whether the Supreme Court has in fact dispensed with the term “unitary” entirely. It is likely that other courts may come to different conclusions as to the ramifications of the Supreme Court’s holding. Scholars have used the term “unitary” in analyzing *Dowell*, suggesting that the Court may not have effectively done away with the

Third, the Supreme Court stated that it was an error for the court of appeals to apply the standard in *United States v. Swift*,⁶³ which dealt with injunctions in perpetuity, to a desegregation injunction, which is only a temporary measure to remedy past discrimination.⁶⁴ In describing the temporary nature of a desegregation decree, the Court stated that it would be dissolved "after the local authorities have operated in compliance with it for a *reasonable* period of time."⁶⁵ Although the Court identifies what happens once a board is released from judicial control,⁶⁶ it never clearly identifies what must occur for a board to be eligible for release. Thus, the Supreme Court failed to answer the central issue in this area which has divided the courts: "When does a district court's jurisdiction over a school system end?"⁶⁷

The fourth problem with the *Dowell* opinion is that it remands the case to the district court to decide "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."⁶⁸ This instruction, perhaps the most significant part of the case, merely pieces together broad language used time and again by many of the federal courts.⁶⁹

term. See, e.g., Lively & Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U.L. REV. 1307, 1325-26 n.88 (1991) ("unitary" system must be achieved to dissolve desegregation decree) (citing Board of Educ. v. Dowell, 111 S. Ct. 630 (1991)); Note, *Race-Based Faculty Hiring and Layoff Remedies in School Desegregation Cases*, 104 HARV. L. REV. 1917, 1918 n.11 (1991) ("unitariness" determination requires district court to examine six Green factors) (citing Dowell, 111 S. Ct. at 638); see also N.Y. Times, Feb. 20, 1991, at A3, col. 3 (unclear whether Supreme Court now intends to elaborate on terms "dual" and "unitary" or to develop another framework for analyzing "the legacy of segregation").

⁶³ 286 U.S. 106 (1932).

⁶⁴ Dowell, 111 S. Ct. at 636-37.

⁶⁵ *Id.* at 637 (emphasis added).

⁶⁶ *Id.*

⁶⁷ See *id.* at 638. From the Court's decision, a district court's jurisdiction over a school system apparently ends upon a finding of constitutional compliance. See *id.* However, the Court's opinion could also be interpreted to mean that a district court's jurisdiction ends upon a finding of "unitariness" or upon compliance with the decree for a reasonable period of time. *Id.* at 636-37. The "reasonable period of time" standard seems to say that a district court's jurisdiction could end even before "unitariness" is achieved as long as the school board complies with the desegregation plan adopted. See *id.* at 637. Conceivably, such "reasonable compliance" could take place even though the plan itself fails to completely desegregate the school system. The Court also failed to address whether "unitariness" should even be considered in this determination.

⁶⁸ *Id.* at 636-38.

⁶⁹ See, e.g., South Park Indep. School Dist. v. United States, 453 U.S. 1301, 1303 (1981)

Desegregation Decrees

The Court uses the phrases "good faith,"⁷⁰ "vestiges of past discrimination,"⁷¹ and "extent practicable"⁷² without defining what

(finding that authorities implemented plan in good faith); *Estes v. NAACP*, 444 U.S. 437, 440 (1980) (noting school board's good faith efforts to create unitary school system); *Dowell v. Board of Educ.*, 890 F.2d 1483, 1499 (10th Cir. 1989) (one factor court looks at to determine if student assignments area is unitary is good faith of school board in desegregation effort and operation of schools), *rev'd*, 111 S. Ct. 630 (1991); *Monteilh v. Saint Landry Parish School Bd.*, 848 F.2d 625, 628 (5th Cir. 1988) (school board acted in good faith by treating all children in school system equally).

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("racial distinctions are . . . highly relevant to . . . state objective of eliminating pernicious vestiges of past discrimination"); *Pitts v. Freeman*, 887 F.2d 1438, 1446 (11th Cir. 1989) (educational areas can be analyzed to determine whether all vestiges of past discrimination have been eliminated from school system), *cert. granted*, 111 S. Ct. 949 (1991); *Monteilh*, 848 F.2d at 629 (unitary means eliminating all vestiges of past discrimination); *United States v. Lulac*, 793 F.2d 636, 642 (5th Cir. 1986) (state has duty to eliminate vestiges of past discrimination). *See also Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 240 (1973) ("[B]oundaries of neighborhood attendance zones should be drawn to integrate to the extent practicable, the school's student body."); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 225 (5th Cir. 1983) (same); *United States v. Texas Educ. Agency*, 679 F.2d 1104, 1114 (5th Cir. 1982) (same); *Brunson v. Board of Trustees of School Dist. No. 1*, 429 F.2d 820, 823 (4th Cir. 1970) (same); *Davis v. East Baton Rouge Parish School Bd.*, 514 F. Supp. 869, 873 (D. La. 1981) (same), *aff'd*, 721 F.2d 1425 (5th Cir. 1983).

⁷⁰ *Dowell*, 111 S. Ct. at 638. The term "good faith," as used by the courts, means good faith compliance with a desegregation decree. *Id.* Yet the phrase could also impose a requirement that a court look to whether the school board acted with discriminatory intent. *See Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987). If the school board is found to be acting in good faith, it is unlikely that it is intentionally discriminating. *Id.* at 321. *But see Dowell*, 890 F.2d at 1503 (fact that school board members acted in good faith does not mean absence of discriminatory intent), *rev'd*, 111 S. Ct. 630 (1991). The Tenth Circuit in *Dowell* considered intent to be irrelevant and focused instead on apparent changes in conditions which have taken place since the decree was entered. *See id.* at 1491.

⁷¹ *Dowell*, 111 S. Ct. at 638. Phrases to the same effect as "vestiges of past discrimination" were used by the Fourth Circuit in *Riddick*. *See Riddick*, 784 F.2d at 534. Although it may be that the Supreme Court was adopting the *Riddick* approach when it used this language, the Court's opinion does not mention *Riddick*, nor does it expressly approve of the *Riddick* standard. Thus, it is difficult to determine whether *Riddick* is still good law after *Dowell*.

Attorneys specializing in education law have also emphasized that *Dowell* did not clarify the term "vestige of segregation" and that lower courts and subsequent decisions will have to address "the extent to which educational vestiges and other types of harm must be remedied." *See Tatel & Borkowski*, *Dowell Upheld Basic Principles, Left Hard Issues for Later Cases*, Nat'l L.J. Mar. 18, 1991, at 27. In addition, many commentators have criticized the vague language used by the *Dowell* Court. *See Coyle*, *School Ruling Leaves Burden on Lower Courts*, Nat'l L.J. Jan. 28, 1991, at 23 (emphasizing vagueness of term "vestiges of past discrimination"); *End to School Busing Eased*, World News Digest, Jan. 17, 1991, at 35 [hereinafter *End to School Busing Eased*] (same); N.Y. Times, Feb. 20, 1991, at A1, col. 3 (same).

⁷² *Dowell*, 111 S. Ct. at 638. This language was used by the First Circuit in *Morgan v. Nucci* and it may be that the Supreme Court was attempting to adopt the *Nucci* approach. *See Morgan v. Nucci*, 831 F.2d 313, 324, 329 (1st Cir. 1987). Yet this is by no means clear from the Court's directive, and *Nucci* is not cited for this proposition. *Dowell*, 111 S. Ct. at

they mean. Thus, the opinion did not resolve the conflicting interpretations which have arisen due to the ambiguity of these terms.

Fifth, by analogy to the Supreme Court's earlier decision in *Spangler*, the *Dowell* Court stated that, in order to terminate or dissolve a desegregation decree, the respondents and the school board are entitled to a precise statement from the court.⁷³ In *Spangler*, the Court required a district court issuing a desegregation decree to provide the school board with a precise statement of its obligations under the decree.⁷⁴ In *Dowell*, the Court discussed what statement is to be given when a desegregation decree is terminated or dissolved.⁷⁵ Although the Court agreed that respondents and the school board were entitled to a precise statement, it failed to indicate or define what statement the district court could have provided to satisfy this requirement.⁷⁶ Such lack of guidance and vague terminology by the Court may have jeopardized whatever right or notice this "precise statement" was meant to provide.⁷⁷

B. A Better Approach

It is recognized that setting forth specific guidelines in the desegregation area is difficult because desegregation law is highly controversial, politicized and fact-sensitive.⁷⁸ The primary diffi-

638. The Court also fails to identify what steps a school board must take and what results must be accomplished to reach "the extent practicable," nor does it indicate how much money, time, and effort must be expended before a district court may properly conclude that a school system is desegregated to "the extent practicable." *Id.*; see also *End to School Busing Eased*, *supra*, at 35 (*Dowell* failed to define "practicable").

⁷³ *Dowell*, 111 S. Ct. at 636.

⁷⁴ See *id.* (citing *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976)).

⁷⁵ See *id.*

⁷⁶ *Id.*

⁷⁷ *Id.* The Court gave respondents the right to a precise statement that a decree is being terminated, yet it did not indicate whether this means simple notice, or if a statement of the reasons for the termination was required. *Id.*

⁷⁸ See Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1472 n.56 (1990). Liebman states that:

The problem . . . is that we are no longer certain what kind of question public school desegregation really is. Twenty years ago we were convinced it was a matter of showing southern school segregation to be morally wrong. But with busing, good moral arguments exist on both sides. To the extent that desegregation has become less a moral question, or at least more a moral standoff it is also less clearly a constitutional requirement the Supreme Court is entitled to impose?

Id.

Desegregation Decrees

culty in formulating a standard is that the competing interests of local authorities⁷⁹ and minorities must be balanced in each case.⁸⁰

There may be no perfect solutions in the desegregation area in light of the demographic, geographic, and sociological complexities of modern urban communities. See *Estes v. NAACP*, 444 U.S. 437, 448 (1979). Desegregation cases turn on close factual distinctions. See Note, *The Unitariness Finding*, *supra* note 10, at 575. Thus, it is difficult to formulate standards governing the appropriate time for courts to end their involvement in the desegregation process. *Id.* at 576.

⁷⁹ See *Spallone v. United States*, 493 U.S. 265, 272 (1990) (citing *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977)). In devising a solution to the problem of school segregation, federal courts must consider "the interests of state and local authorities in managing their own affairs consistent with the Constitution." *Id.*; see also *Delaware State Bd. of Educ. v. Evans*, 446 U.S. 923, 926 (1980) (Rehnquist, J., dissenting). In his dissent, Justice Rehnquist stressed the importance of local control:

The [*Milliken*] Court emphasized that "local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation and a healthy competition for educational excellence." The Court not only emphasized these important benefits of local control, but also recognized the inability of courts and judges to assume that role, noting that "[t]his is a task which few, if any, judges are qualified to perform."

Id. (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)); see also *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955) (local authorities have primary responsibility for elucidating, assessing and solving desegregation problems).

A number of federal courts have expressed the view that the judiciary should not intervene in the local or legislative arenas. See, e.g., *Ayers v. Allain*, 914 F.2d 676, 695 (5th Cir. 1990) (Higginbotham, J., concurring in part and dissenting in part) (judiciary not competent, nor appropriate institution to set educational policy); *Lee v. Anniston City School Sys.*, 737 F.2d 952, 955 (11th Cir. 1984) (quoting *Milliken*, 433 U.S. at 281) (although federal courts have authority to ensure that unitariness is achieved, school authorities have the primary responsibility for elucidating, assessing and solving these problems); *Lee v. Washington County Bd. of Educ.*, 625 F.2d 1235, 1237 (5th Cir. 1980) (elected or appointed authorities, not federal courts, should manage internal affairs of local school system); see also Rabkin, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 248 n.197 (control over educational policy historically and constitutionally belongs to state and local school authorities).

School boards mirror the will of the local community and are better able than courts to make policy decisions regarding education. See Strossen, 'Secular Humanism' and 'Scientific Creationism': Proposed Standards for Revising Curricular Decisions Affecting Students' Religious Freedom, 47 OHIO ST. L.J. 333, 354 (1986). Professional educators and elected officials have more resources and expertise than the courts. *Id.* As a result, courts may lack the means to articulate appropriate standards for resolving educational issues. *Id.* Finally, educational institutions should be given wide discretion in managing educational affairs. *Id.* "Judicial deference to educational decisions by state and local officials reflects several important traditions and concerns, including: preserving local democratic control over educational policy; protecting teachers' academic freedom; and maintaining policies that comport with the views of educational experts." *Id.*; see also *Flax v. Potts*, 864 F.2d 1157, 1161 (5th Cir. 1989). Neighborhood schools make important contributions to the quality of education. *Id.* For example, where less time is spent on local transportation, more time can be spent on extracurricular activities and parental involvement programs. *Id.* In addition, money saved from eliminating compulsory busing could be spent on primarily minority schools. *Id.*

It is not enough for the standard adopted to be theoretically sound; it must also take into account the practical realities of everyday life and provide an adequate plan of implementation.⁸¹

Although a number of courts have grappled with this issue, the United States Court of Appeals for the First Circuit, in *Morgan v. Nucci* and *Morgan v. Burke*, articulated a standard that is both equitable and functional.⁸² In *Nucci*, the court held that the Constitution requires "maximum practicable desegregation"⁸³ in all edu-

The Supreme Court's desegregation policy places the judiciary in conflict with the other branches of government. See Devins, *supra*, note 2, at 42-43. The Court's extension of desegregation law has been called "the worst sort of judicial overreaching." *Id.* Some commentators have speculated that this overreaching may provoke Congress into challenging the existence of courts as institutions. *Id.* The limitations that desegregation law has placed on the public school system "are both constitutionally unnecessary and educationally unsound." *Id.* As one commentator points out, judicial intervention in the public school system has been a recurring source of discontent and resentment. See Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 OHIO ST. L.J. 117, 132 (1987). Many believe that by usurping legislative authority and interfering with parental discretion, the Court's "active judicial role in promoting equal protection objectives actually sacrifices them." *Id.*

⁸⁰ See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 486 (1979) (Powell, J., dissenting). "If public education is not to suffer further, we must 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.*; see also R. SALAMONE, EQUAL PROTECTION UNDER LAW 49 (1986) (desegregation orders must balance societal, individual and community interests).

⁸¹ See *Estes v. NAACP*, 444 U.S. 437, 448 (1980) (Powell, J., dissenting). Justice Powell emphasized that court orders designed to remedy constitutional violations must take into account the particular circumstances present in each case and the alternative remedies available. *Id.* (Powell, J., dissenting). Although it has only given general guidelines in this area, the Supreme Court has emphasized the importance of "effectiveness and practicalities." *Id.* (Powell, J., dissenting). Thus, according to Justice Powell, the Court recognizes that "perfect solutions may be unattainable in the context of the demographic, geographic and sociological complexities of modern urban communities." *Id.* (Powell, J., dissenting). This imperfection is demonstrated by the tendency of parents to enroll their children in private schools, move to other communities, or refuse to move into a particular school district. *Id.* (Powell, J., dissenting).

⁸² *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987); *Morgan v. Burke*, 926 F.2d 86 (1st Cir. 1991).

⁸³ *Nucci*, 831 F.2d at 324. "[M]aximum practicable desegregation" is the ultimate remedial goal in these cases. *Id.* at 322. "Both the Supreme Court and this court have repeatedly stated that a judicially imposed desegregation remedy goes too far if it attempts to engineer some sort of idealized racial balance in the schools." *Id.* at 325; see, e.g., *Brown v. Board of Educ.*, 892 F.2d 851, 910 (10th Cir. 1989) (realistic approach should be taken so that courts do not intervene in local affairs any longer than necessary); *Lee v. Macon City Bd. of Educ.*, 681 F. Supp. 730, 738 (N.D. Ala. 1988) (agreeing with *Morgan's* incremental approach to unitariness); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983) (whether public officials have eliminated segregation and its vestiges depends upon conditions in district, achievements to date and feasibility of further measures). *But see Pitts*

Desegregation Decrees

cational areas⁸⁴ and that a court's jurisdiction ends when a school system is found to be unitary.⁸⁵ In so doing, the court formulated a practical standard, followed later in *Morgan v. Burke*, that minimizes court intervention in school affairs, yet protects the rights of minority students guaranteed under the equal protection clause.⁸⁶

The *Nucci-Burke* standard takes an "incremental" approach to unitariness⁸⁷ which further emphasizes the importance of returning control of educational policy to the local authorities.⁸⁸

v. Freeman, 887 F.2d 1438, 1446-47 (11th Cir. 1989) (rejecting *Morgan's* holding permitting school systems to attain unitary status incrementally and stating that unitary status not achieved until school system maintains at least three years of racial equality in six *Green* areas), cert. granted, 111 S. Ct. 949 (1991); *Terez*, supra note 9, at 60-61 (calling for elimination of all racially identifiable schools and permanent injunction requiring defendants to establish and maintain unitary schools). See generally *Gewirtz*, supra note 9, at 778-79 (courts should consider plans which allow city students to transfer to suburban schools and vice versa).

⁸⁴ See *Green v. County School Bd.*, 391 U.S. 430, 435 (1968) (discussing the relevant six educational areas). See also *Dowell v. Board of Ed.*, 111 S. Ct. 630, 638 (1991) (quoting *Green* factors); supra note 31 and accompanying text (*Dowell v. Board of Ed.*, 111 S. Ct. 630, 638 (1991) (quoting *Green* factors)). The unitariness of each separate factor must be considered individually. See *Nucci*, 831 F.2d at 319. In *Nucci*, the court stated that in order to determine whether student assignments have achieved this status, the court must apply the standard of "maximum practicable desegregation." *Id.* In addition, a court must look to: (1) the number of one-race or racially identifiable schools; and (2) whether the school board has shown good faith in implementing the desegregation plan and in operating the schools. *Id.*

⁸⁵ See *Nucci*, 831 F.2d at 318 (consequences of unitariness is "mandatory devolution of power to local authorities").

⁸⁶ *Id.* at 324-25 (realistic, not idealistic desegregation is goal); see also *Burke*, 926 F.2d at 92.

⁸⁷ See *id.* at 318 (incremental approach espoused); see also *Burke*, 926 F.2d at 92.

⁸⁸ *Nucci*, 831 F.2d at 324-25 (court should not intervene in school affairs any longer than necessary).

Like *Nucci*, *Riddick* recognizes the importance of the role of local authorities in the educational process. See *Riddick v. School Bd. of Norfolk*, 784 F.2d 521, 539 (4th Cir.) ("[n]o one seriously disputes that public education has traditionally been a local concern") (citing *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974)), cert. denied, 479 U.S. 938 (1986). That is why the district court's role ends once a school system is found to be unitary and control over the system must be returned to local authorities. *Id.* at 535. See *South Park Indep. School Dist. v. United States*, 453 U.S. 1301, 1304 (1980) (once school system declared unitary, district court's jurisdiction terminates); *Green v. County School Bd.*, 391 U.S. 430, 439 (1968) (court should retain jurisdiction until state-imposed segregation completely eliminated); *Flax v. Potts*, 915 F.2d 155, 159 (5th Cir. 1990) (court must stop supervising school board policy once need to oversee it ends); *United States v. Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987) (district court jurisdiction must end when school system found unitary); *Vaughns v. Board of Educ.*, 758 F.2d 983, 988 (4th Cir. 1985) (district court's jurisdiction not perpetual and terminates when school system achieves unitary status) (citations omitted); *Beard*, supra note 27, at 1286 (once school system becomes unitary, all in-

Under this approach, once a school board achieves a unitariness in one or more areas, those areas are returned to local control without necessarily waiting to achieve unitariness in the entire school system.⁸⁹

The *Nucci-Burke* standard also points out that unitariness is not achieved at the "magical moment"⁹⁰ when the school board has technically complied with part of the decree, for example, by meeting the desired white-to-minority student ratio for the first time.⁹¹ The standard calls for limited judicial monitoring over a school board for a three-year period after it has technically com-

junctions should be dissolved and case should be terminated).

The Tenth Circuit, by contrast, seems to encourage judicial overreaching by allowing district courts to supervise the educational process for an indefinite period of time. *Dowell*, 890 F.2d at 1492 (finding of unitariness does not mandate dissolution of decree without proof of "substantial change in the circumstances which led to the issuance of that decree") (citations omitted), *rev'd*, 111 S. Ct. 630 (1991). The chief criticism of the Tenth Circuit approach is that the court unnecessarily encroaches upon the power of local authorities to operate their own school systems even after the constitutional violation has been cured. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 483 (1979) (Powell, J., dissenting). In a vigorous dissent, Justice Powell argued that judicial intrusion on local and professional authorities would have an adverse effect upon the quality of public education. *Id.* He pointed out that the reorganization of the affected school systems in this case would require the busing of 111,000 students, the reassignment of faculty and staff and the closing of a number of schools. *Id.* In his view, these changes ignored the substantial educational and economic reasons against dismantling local school structures. *Id.* He charged the majority with engaging in "judicial legislation" by substituting its views for those of the legislature and of seriously interfering with private decisionmaking. *Id.* at 483-84. Justice Powell concluded that "[t]hese harmful consequences are the inevitable by-products of a judicial approach that ignores other relevant factors in favor of an exclusive focus on racial balance in every school." *Id.* at 484.

⁸⁹ *Nucci*, 831 F.2d at 318. As stated by the First Circuit in *Morgan v. Burke*, a companion case to *Nucci*, "the achievement of unitariness in [each individual] sector can be judged independently of progress or lack thereof in other sectors." *Burke*, 926 F.2d at 92 (citing *Morgan v. Nucci*, 831 F.2d 313, 318-19 (1st Cir. 1987)). The Supreme Court granted certiorari on February 19, 1991 to the appellant in *Pitts v. Freeman*. *See Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989), *cert. granted*, 111 S. Ct. 949 (1991). *Freeman* presents an issue on which the circuits have split: whether a school district can be unitary with respect to some of its operations and not others. *See Tatel & Borkowski, supra* note 71, at 27. In contrast to *Nucci*, *Freeman* held that integration could not be achieved on a piecemeal basis. *See Freeman*, 887 F.2d. at 1446. By granting certiorari to the Eleventh Circuit, the Supreme Court implicitly recognized that several important issues were left unresolved by *Dowell*. *See Tatel & Borkowski, supra* note 71, at 27; *see also Greenhouse, Supreme Court Roundup, Court to Review Case from Georgia on Desegregation*, N.Y. Times, Feb. 20, 1991, at A1, col. 3 (Supreme Court's decision to hear *Freeman* may be result of *Dowell's* failure to provide much guidance to school districts and federal judges).

⁹⁰ *Burke*, 926 F.2d at 91.

⁹¹ *Id.*

Desegregation Decrees

plied with the student-assignment portion of the decree.⁹² It is only when the school board has complied with the student-assignment portion of the decree for the three-year period, that unitariness is achieved.⁹³ Once maximum practical desegregation is reached in a particular educational area, for example, student assignments, and thus the three-year probationary period has necessarily expired, unitariness is achieved and the district court's jurisdiction over that particular educational area terminates.⁹⁴ The

⁹² *Morgan v. Burke*, 926 F.2d 86, 91 (1st Cir. 1991); see also *Nucci*, 831 F.2d at 326. During the three year probationary period, the Board would submit annual or biannual progress reports to the district court to assure that the prior segregatory patterns had not resurfaced. See *id.* at 316 (stating that district court required board to submit semi-annual reports); see also *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 230 (1969) (requiring school boards to submit annual reports to court); *United States v. DeSoto Parish School Bd.*, 574 F.2d 804, 809 n.11 (5th Cir. 1978) (same) (citing *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 395 (5th Cir. 1967) (en banc), cert. denied, 439 U.S. 982 (1978)). The *DeSoto* court noted that "[s]uch a requirement had long been the practice in school cases." *Id.* Were it not for this discretion, "the entire exercise . . . could well prove to have been a painful charade." *Burke*, 926 F.2d at 91. The First Circuit in *Burke* emphasized that such monitoring has been employed in both the Fifth and Eleventh Circuits. *Id.* (citing *Quarles v. Oxford Mun. Separate School Dist.*, 868 F.2d 750, 752 (5th Cir. 1989); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983); *Freeman*, 887 F.2d at 1446 n.9). These circuits have had "perhaps the most comprehensive and intensive experience in desegregation litigation." *Id.*; see also *Nucci*, 831 F.2d at 326.

This is a reasonable compromise between the *Riddick* view that court intervention should end immediately at the point of unitariness and the Tenth Circuit's view that it should last indefinitely. See *supra* note 88. Critics may argue that a school board could wait out the three year probationary period and then segregate again. This is unlikely in light of the fact that the particular educational area would be fully integrated at the time it is declared unitary. See *supra* note 90 and accompanying text. Thus, minority administrators and staff members would be able to resist any attempts at resegregation either at the local level or by bringing a new lawsuit against the school board. The potential for such suits is a powerful deterrent against intentional resegregation since the lawsuits are quite lengthy and, if the school board loses, it will be forced to implement a new plan which can be extremely costly in terms of dollars, time, and effort. See *Columbus Bd. of Educ. v. Penick*, 439 U.S. 1348, 1352 (1978). The Supreme Court emphasized the high costs of desegregation activities which include:

inventory, packing, and moving of furniture, textbooks, equipment, and supplies; completion of pupil reassignments, bus routes and schedules, and staff and administrative reassignments; construction of bus storage and maintenance facilities; hiring and training of new bus drivers; and notification to parents of pupil reassignments and bus information. Most important . . . there will occur the personal dislocations that accompany the actual reassignment of 42,000 students, 37,000 of whom will be transported by bus. The Columbus school system has severe financial difficulties. It is estimated that for calendar year 1978 the system will have a cash deficit of \$9.5 million, \$7.3 million of which is calculated to be desegregation expenses.

Id.

⁹³ *Burke*, 926 F.2d at 91.

⁹⁴ *Id.*

district court would retain jurisdiction over other educational areas which had not yet complied with the decree for the requisite three-year probationary period.⁹⁵ In this way, unitariness would be achieved separately in each of the six educational areas mentioned in *Dowell*.⁹⁶

Admittedly, the *Nucci-Burke* standard is not perfect since it does not precisely define the phrase "maximum practicable desegregation."⁹⁷ However, it does emphasize the need for the remedy to be practical and not merely theoretical.⁹⁸ From this it may be argued that "maximum practicable desegregation" takes into account the resources of the individual school and the "demographic, geographic and sociological complexities" of the community.⁹⁹ This is a reasonable approach that is fair to all concerned because, while it requires the school board to desegregate to the extent practicable, it does not impose an insurmountable burden on the board which far exceeds the social ill it was designed to remedy.¹⁰⁰ Objective evidence, such as financial statements, maps and census data, will assist a court in assessing the practical realities of the situation.¹⁰¹

Finally, the *Nucci-Burke* standard stresses what so many courts have failed to recognize, namely, that a court's power is limited¹⁰² in this area because "the scope of the remedy is determined by the nature and the extent of the constitutional violation."¹⁰³

⁹⁵ *Id.*

⁹⁶ *Id.*; see *Dowell v. Board of Educ.*, 111 S. Ct. 630, 638 (1991) (quoting *Green v. County School Bd.*, 391 U.S. 430, 435 (1968) (six factors)).

⁹⁷ *Nucci*, 831 F.2d at 324.

⁹⁸ *Id.*

⁹⁹ See *supra* note 81 (advocating balanced evaluation of societal and educational interests in achieving desegregation).

¹⁰⁰ *Nucci*, 831 F.2d at 324-25.

¹⁰¹ *Id.* at 319. Justice Powell emphasized that the demographic and economic realities of cities must be taken into consideration in the desegregation area. *Id.*

¹⁰² See, e.g., *Spallone v. United States*, 110 S. Ct. 625, 632 (1990) (remedial powers of equity court not unlimited); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-23 (1971) (desegregation cases should not be used for purposes beyond their scope, they cannot embrace all problems of racial prejudice); *Wright v. Council of Emporia*, 407 U.S. 451, 477 (1972) (Burger, C.J., dissenting) (court's preference should not displace local school board plans where it would only provide small change in racial composition).

¹⁰³ *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 16. Allowing local school districts to retain their autonomy has been called a "vital national tradition." *Columbus Bd. of Educ. v. Penick*, 439 U.S. 1348, 1353 (1979) (citing *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977)). School desegregation decrees are a critical limitation of that tradi-

Desegregation Decrees

Courts have so consistently issued overbroad desegregation decrees, that an argument may be made that this is an area best left to local authorities who have traditionally used their training and expertise to oversee education.¹⁰⁴ Local authorities can debate, discuss and formulate appropriate guidelines in this area of the law.¹⁰⁵ If the authority enacts a plan that is unconstitutional or fails to affirmatively desegregate when ordered to do so, it is only then that the courts should get involved.¹⁰⁶

CONCLUSION

Although *Dowell* sets out to resolve the inconsistencies and confusion in the area of desegregation, the decision raises more questions than it answers. It fails to define what constitutes a unitary school system and to identify what are the consequences of being declared unitary. The direction given by the Court only complicates the area further by using vague terminology without explanation. It is submitted that the courts should follow the *Nucci-Burke* standard adopted by the First Circuit because it is fair and equitable to all concerned and it recognizes the important role that local authorities play in educating this nation's young people.

tion because they often require a change in the structure of the educational system. *Id.* "[J]udicial imposition on this established province of the community is only proper in the face of factual proof of constitutional violations and then only to the extent necessary to remedy the effect of those violations." *Id.* A court's role is to correct constitutional violations by balancing individual and collective interests. *See* Alexis I. DuPont School Dist. v. Evans, 439 U.S. 1375, 1377-78 (1978) (citing *Swann*, 402 U.S. at 16). "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." *Id.* (quoting *Swann*, 402 U.S. at 16). *See* Flax v. Potts, 915 F.2d 155, 159 (5th Cir. 1990) (remedies must be narrowly tailored to meet scope of violation).

¹⁰⁴ *See* *Penick*, 443 U.S. at 487-88 (Powell, J., dissenting). Justice Powell disapproved of courts' issuing overbroad decrees and engaging in "ongoing supervision over school systems." *Id.* at 487. (Powell, J., dissenting). He pointed out that many legislatures may welcome judicial intervention for the very reason that this is a complex and highly controversial area. *Id.* In his view, the judiciary was the "branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education." *Id.* at 488 (Powell, J., dissenting); *see also* Dozier v. Chupka, 763 F. Supp. 1430, 1435 (S.D. Ohio 1991) ("court's role has always been that of an overseer of a temporary judicial remedy, not that of a coparticipant with city government in the establishment of executive policy and execution of legislative decision-making").

¹⁰⁵ *See supra* note 79 (emphasizing important role local and legislative authorities play in educational process).

¹⁰⁶ *Id.* (same).

Since education is "the very foundation of good citizenship," application of the *Nucci-Burke* standard in desegregation cases may lead to the ultimate goal of a successful and equal society.

Kevin P. Fitzpatrick & Lynne E. Trimble