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Is Brown Dying? Exploring the Resegregation Trend in Our Public Schools

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IS *BROWN* DYING? EXPLORING THE RESEGREGATION TREND IN OUR PUBLIC SCHOOLS+

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INTRODUCTION

The fiftieth anniversary of *Brown v. Board of Education*[1] has triggered significant reflection on the case, including its meaning, its goals, and its legacy. In order to understand whether a Supreme Court case is still relevant, it is helpful to know what makes a Supreme Court case relevant or important when it is first decided.[2] The relevance and importance of the *Brown* decision operate on so many different levels that it would be impossible in one hour or one single year fully to examine the ramifications of this seminal Supreme Court decision.

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1. 347 U.S. 483 (1954).

2. Mark Tushnet has argued that in assessing the impact of a Supreme Court decision both short-term and long-term effects of the decision must be examined. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). In the case of *Brown*, the short term victory was that legally sanctioned segregation was declared unconstitutional. *Id.* at 135-36. In the long term, after a decade it was clear that the decision was being ignored by local authorities. *Id.* Thus, should the measure of success for *Brown* be actual desegregation of the schools or the long term change in public opinion about the propriety or justice of legally sanctioned explicit school segregation? *Id.*

Tushnet argues that Supreme Court decisions also have separate ideological and material effects: In *Brown*, the ideological victory was that the Supreme Court's pronouncement that legally sanctioned segregation in schools is unconstitutional became embedded in the public's consciousness. *Id.* Supreme Court decisions may also be measured by the legal outcomes and political outcomes of the decisions. For every decision there are four possibilities: (1) win legal and political; (2) win legal and lose political; (3) lose legal and win political; and (4) lose legal and political. *Id.*

The obvious impact that *Brown* had was the end of *de jure* racial segregation in our public schools. The more controversial and ongoing debate surrounding one of *Brown's* legacies is whether *Brown* was intended to or actually did achieve any level of sustained success in actually integrating our public schools.[3] This essay approaches the question whether *Brown* is dead by focusing on the impact that *Brown* has today on the racial integration of our public schools. There is clear evidence that after *Brown* there was significant racial integration of our nation's public schools.[4] One method of measuring *Brown's* continuing vitality is to examine whether our schools are continuing down the path of racial integration or regressing towards increased segregation.

The goal of this essay is to examine closely the resegregation trend in school districts where court-ordered desegregation decrees have ended. A 2004 study by the Harvard Civil Rights Project ("CRP") entitled *Brown at 50: King's Dream or Plessy's Nightmare?* identifies the trend towards resegregation in American public schools.[5] CRP notes that schools are more segregated today than they were twenty years ago, and that the trend towards resegregation continues.[6] CRP also notes that the percentage of African American students attending majority white schools peaked in 1988 at 43.5%.[7] By 2001, the number of African American children attending majority-white institutions had declined to 30.2%, the lowest level since 1968.[8] CRP reports that by the 2000-01 school year,

3. *See generally* DERRICK BELL, SILENT COVENANTS (2004) (arguing that in *Brown* the Supreme Court should have held that black schools should be made equal, valuing equality of education over racial integration).

4. *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, *Brown* at 50: King's Dream or *Plessy*'s Nightmare? 18 (2004), *available at* http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php (last visited Feb. 17, 2005). This study specifically looks at patterns of segregation after the Supreme Court's opinion in *Board of Education v. Dowell*, 498 U.S. 237 (1991) The study found "[d]uring the period when executive agencies and courts actively enforced desegregation (1964-1970), the percent of black students in white schools increased more than 14-fold in six years. Over the next eighteen years, to the high point in 1988, the increase in the share of black students in majority white schools was about 33 percent." ORFIELD & LEE, *supra* at 19.

5. ORFIELD & LEE, *supra* note 4, at 4.

6. *See id.*

7. *Id.* at 19.

8. *Id.* at 18.

the average white student was attending a school that was 79% white.[9] The average African American student was attending schools that were approximately 54% African American and 30% white.[10] The average Latino student was attending schools that were 54% Latino, and 28% white.[11] Even more disturbing is CRP's finding that many students are attending intensely segregated schools, defined as schools that are 90-100% single race.[12] As of 2001, fifty-one percent of African American students in the Northeast and 46.8% of African American students in the Midwest attend intensely segregated schools.[13] Latino students face similar conditions in our public schools.[14] Thus, fifty years after *Brown*, a large majority of African American and Latino students attend segregated schools.[15]

In many school districts in which court-ordered desegregation has ended, the level of resegregation has increased in the school district. I identify the district court cases where lifting of a desegregation decree has led to resegregation in the affected school district as "district court resegregation cases." The goal of this essay is to analyze district court resegregation cases.

Unlike this essay, much of the legal scholarship on *Brown* and subsequent desegregation cases focuses on Supreme Court decisions. The Supreme Court decisions in the early 1990s in *Board of Education v. Dowell*,[16] *Freeman v. Pitts*,[17] and *Missouri v. Jenkins*[18] received significant treatment from legal scholars. Many pointed out that this trilogy of decisions made it easier for desegregation decrees to be lifted and signaled the beginning of the end for widespread court-ordered desegregation. I call these three 1990s cases that substantially limited district court remedies for segregation the "Supreme Court resegregation cases." In contrast to *Brown*, *Green v.*

9. *Id.* at 16-17.
10. *Id.* at 17.
11. ORFIELD & LEE, *supra* note 4, at 17.
12. *See id.* at 20-21.
13. *See id.* at 20.
14. *See id.* at 21.
15. *See id.* at 31.
16. 498 U.S. 237 (1991).
17. 503 U.S. 467 (1992).
18. 515 U.S. 1139 (1995).

New Kent County School Board,[19] and many earlier Supreme Court decisions in the desegregation area that expanded remedies in desegregation cases, the Supreme Court resegregation cases limited the court ordered remedies available in desegregation cases.

This essay will focus on district court resegregation cases that followed from the Supreme Court resegregation cases. My goal is not to state definitively the causes of the resegregation trend in our public schools. In order to legitimately identify the causes of the resegregation trend significant empirical work must be done to isolate the many factors that are at issue, including demographic shifts that have made our school districts more racially isolated in the last thirty years. Instead, this essay will identify commonalities in the district court resegregation cases. There are several significant similarities in the district court resegregation cases related to the actions of the parties (plaintiffs, defendants, and the United States as intervening party), and the district courts that may aid in the larger project of identifying the causes of the resegregation trend.

In Part I of this essay I will briefly describe the history of court-ordered desegregation, and the role that district courts have played in crafting school desegregation plans. In Part II of this essay I will examine the Supreme Court resegregation cases of the early 1990s, and the subsequent analysis of those cases by legal scholars. In Part III of this essay I will look beyond the Supreme Court resegregation cases and describe the commonalities in the district court resegregation cases. Finally, in Part IV of this essay I will analyze the implications of these commonalities in the district court resegregation cases and areas that should be addressed in these cases.

I. A Brief History of Court Ordered Desegregation

In 1954, the Supreme Court famously declared in *Brown* that *de jure* segregated schools were "inherently unequal."[20] At the time of *Brown* the Supreme Court did not provide a remedy for the plaintiffs in that case or explain how the school districts should desegregate.[21] A year later, in *Brown II*, the court declared that schools

19. 391 U.S. 430 (1968) (holding that the time for "all deliberate speed" had ended).

20. *See Brown*, 347 U.S. at 495.

21. *Id.* at 495-96.

operating under these now unconstitutional schemes should desegregate with "all deliberate speed."[22] This lack of urgency in the Supreme Court's declaration lead to a corresponding lack of significant progress towards desegregation in many Southern schools, because local school boards actively resisted the Supreme Court's holding in *Brown*.[23] The Supreme Court's decision in *Brown II* also failed to fully define the remedy for the constitutional violation due to the vagueness of the "all deliberate speed" standard.[24]

The Supreme Court's 1968 decision in *Green* signaled the true beginning of federal court supervision of the desegregation of local schools.[25] In *Green*, the Court declared that the time for "all deliberate speed" had ended.[26] The Supreme Court put the burden on local school boards to develop plans to be approved by federal courts to desegregate their schools in all areas including: student assignment, faculty assignment, transportation, and extracurricular

22. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) [hereinafter "*Brown II*"]. *See also* NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN 202-206 (2004) (giving an account of the genesis of the "all deliberate speed" formulation).

23. *See* Mark Tushnet, *Public Law Litigation and the Ambiguities of* Brown, 61 FORDHAM L. REV. 23, 24 (1992) (describing the various forms of resistance used by southern school systems in the wake of *Brown*, including "passive resistance" in the form of facially race neutral student assignment plans that perpetuated single race schools, and "massive resistance" in states such as Virginia where the state legislature passed statutes to continue segregation and block lawsuits through the assertion of Eleventh Amendment Immunity); *Freeman*, 503 U.S. at 472 (stating that after the decision in *Brown* the Dekalb County school district in Georgia took no "positive action" towards desegregation until 1966-1967).

24. John H. Blume et al., *Education and Interrogation: Comparing* Brown *and* Miranda, 90 CORNELL L. REV. 321, 339 (2005); Meredith Lee Bryant, *Combatting School Resegregation Through Housing: A Need For a Reconceptualization of American Democracy and the Rights it Protects*, 13 HARV. BLACKLETTER L.J. 127, 159-60 (1997).

25. Prior to the Supreme Court's decision in *Green*, there was widespread resistance to *Brown* and little progress in the actual racial integration of public schools. *See* ORFIELD, & LEE, supra note 4, at 17 (explaining "[t]here was only the tiniest token of progress during the first ten years following *Brown*, where 98 percent of Southern black students remained in all black schools a decade later. The resistance to even the most modest changes was extreme in almost every place in the South.").

26. *Green*, 391 U.S. at 436.

activities.[27] These became known as the *Green* factors for unitary status.[28]

In the wake of *Green*, many lawsuits were brought by African American parents seeking to have their schools desegregated. In *Swann v. Charlotte-Mecklenburg Board of Education,* the Supreme Court indicated that federal district courts had full authority to supervise and craft desegregation orders.[29] At the height of federal court supervision of school desegregation, approximately 500 schools were under federal desegregation orders.[30]

II. *DOWELL, FREEMAN, JENKINS*: THE SUPREME COURT RESEGREGATION CASES

Approximately thirty-five years after the *Brown* decision, a number of school districts under court ordered desegregation decrees sought to have federal district courts lift those desegregation orders. In a trilogy of early 1990s Supreme Court cases, the Court made it easier for school districts to have desegregation orders lifted. *Dowell*, *Freeman*, and *Jenkins* are usually highlighted as evidence of the Supreme Courts' current hostility towards federal court supervision of school desegregation.[31]

In *Dowell*, the Board of Education of Oklahoma City ("Board") sought to dissolve a desegregation decree ordered by a federal district court in 1972.[32] After only five years operating under this de-

27. *Id.* at 435, 439.

28. Cathryn Vaughn, *The School Choice Provision of No Child Left Behind and Its Conflict with Desegregation Orders*, 13 B.U. PUB. INT. L.J. 79, 84, 94 n.49 (2003).

29. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

30. *See* Martha McCarthy, *Elusive "Unitary Status,"* 69 EDUC. L. REP. 9, 11 (1992), *citing Integration Questions Remain in Wake of High Court Ruling*, EDUC. DAILY, Jan. 17, 1991, at 1.

31. *See, e.g.*, Wendy Parker, *The Future of School Desegregation*, 94 NW. U.L. REV. 1157, 1158 (2000) (arguing that the *Dowell*, *Freeman*, and *Jenkins* decisions in the 1990s signalled the Supreme Court's "reflexively hostile" view of desegregation litigation); ORFIELD & LEE, *supra* note 4, at 9 (stating that a decade of resegregation has followed since the Supreme Court's decision in *Dowell*). Prior to these decisions in the early 1990s, there were several other Supreme Court decisions that limited remedies in desegregation. For example, in *Milliken v. Bradley*, the Supreme Court invalidated a court ordered desegregation decree that called for a interdistrict remedies. *See* Milliken v. Bradley, 433 U.S. 267 (1977). *See also* GARY ORFIELD & S.E. EATON, DISMANTLING DESEGREGATION THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996).

32. 498 U.S. 237, 240-41 (1991).

segregation order the school board moved for, and the district court found that the through successful implementation of the desegregation plan the school district had achieved "unitary" status.[33] The district court further found that lifting of the desegregation decree would not result in the school district destroying its unitary status.[34]

Several years after the desegregation decree was lifted, the Board adopted a Student Reassignment Plan ("SRP") that would end busing and allow neighborhood school assignment for K-4 students, and continue busing for the higher grades.[35] African American parents sought to challenge the SRP by reopening the original desegregation litigation.[36] The African American parents argued that the SRP plan proposed by the Board would lead to resegregation of many of the schools.[37] The district court held that its previous order granting unitary status to the school district precluded further court supervised desegregation.[38] The Tenth Circuit re-

33. The term "unitary" as used in the desegregation cases originated in *Green*, in which the Supreme Court stated the goal of a school desegregation order is to achieve a "unitary, nonracial system of public education." *Green*, 391 U.S. at 436. Unitary status is achieved when a school system no longer discriminates against children on the basis of race, by eliminating all vestiges of state sponsored segregation. *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 759 (3d Cir. 1996) (citing *Green*, 391 U.S. at 436, 442). In the early 1990s cases, the Supreme Court stated that the term "unitary" has no "fixed meaning." *See Freeman*, 503 U.S. at. 487. Instead, a district court approaching the issue of whether a school district has achieved "unitary" status should ask: (1) whether the school board has complied in good faith with the desegregation decree, and (2) whether the vestiges of past discrimination have been eliminated to the extent practicable. *See Dowell*, 498 U.S. 237. *See also* Berry v. School Dist., 195 F. Supp. 2d 971, 975 (W.D. Mich. 2002) (stating the issues for the unitary status hearing were: (1) whether racial disparities in the Green factors (student and faculty assignment, transportation, facilities, extracurricular activities) had been alleviated; (2) whether other vestiges of segregation remain (such as achievement gap); (3) whether the defendants complied in good faith).

34. *Dowell*, 491 U.S. at 240-41.

35. *See id.* at 242. A student assignment or reassignment plan is the method used by a school district to assign students to particular schools with the school district. Some typical student assignment/reassignment plans include neighborhood assignment, student choice, and magnet schools.

36. *Id.*

37. *Id.* (stating that under the SRP eleven of sixty-four schools would be greater than 90% African American, and 22 of the elementary schools would be greater than 90% white).

38. *Id.* at 243.

versed the district court's opinion and held that the original desegregation order was still in effect.[39]

The Supreme Court reversed and remanded the Tenth Circuit's decision. The Court concluded that when a district court is deciding whether to lift a desegregation decree the court should consider whether the defendant school 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."[40] More importantly for future cases was the Court's conclusion that despite indications that the SRP would lead to significant resegregation in the school district, there would be no remedy for the plaintiffs unless they could demonstrate that the school board's adoption of the SRP was motivated by racial animus.[41]

Dowell represents a crucial moment in the legacy of *Brown*, and for the current trend towards resegregation. CRP notes that much of the resegregation that has taken place in the last fifteen years occurred after the Supreme Court's decision in this case.[42] While it may be impossible definitively to link resegregation to a single Supreme Court decision, *Dowell* did and will continue to have a significant impact on court supervised desegregation orders, because *Dowell* makes it possible for district courts to lift desegregation decrees even though there is a strong possibility that alternatives to the plan will lead to resegregation of schools. The decision signaled to district courts and school boards that after a desegregation decree is lifted a school board has no further obligation to maintain student assignment plans that would sustain the desegregation attained under the court order. While it may be debated whether there should be any continuing obligation for the school board after the decree is lifted, it is clear that under *Dowell* the possibility of resegregation is not an important factor in a federal court's decision regarding whether to lift a desegregation decree.

In *Freeman*, the Supreme Court continued the trend of *Dowell*, and made it easier for school boards to have desegregation decrees

39. *Id.*

40. *Dowell*, 498 U.S. at 249-50.

41. *Id.* at 250.

42. *See* ORFIELD & LEE, *supra* note 4, at 9-10.

lifted. The Supreme Court held that where a school district has achieved compliance with some aspects of a desegregation plan, the district court need not retain control over those aspects of the case while the school district seeks unitary status in other areas.[43] In effect, the case allows the partial release of school boards from a desegregation decree before the school district meets every requirement of the decree.

The Dekalb County schools were ordered to desegregate in 1969.[44] The school district worked with the Department of Health, Education, and Welfare to devise a desegregation plan.[45] The school district adopted a neighborhood school assignment plan, in which all of the schools created for black students under *de jure* segregation were closed, and students were assigned to neighborhood schools.[46] In 1986, the school district sought to have the case dismissed, claiming that the school district had achieved unitary status. The district court found that Dekalb County achieved unitary status as to student assignments, transportation, physical facilities and extra curricular activities.[47] The district court also found that unitary status had not been achieved in the areas of teacher and principal assignments, resource allocations, and quality of education.[48] As a result of these findings, the district court partially lifted the desegregation order in the areas in which unitary status had been achieved.

The Supreme Court held that school districts may be released from a desegregation order in increments.[49] The Court held that the fact that single-race schools exist in the school system does not mean that the school system is a continuing dual system that requires remediation. The Supreme Court focused on the causal connection between the school system's acts to sustain *de jure* segre-

43. *Freeman*, 503 U.S. at 471 & 489 ("holding "a federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control.").

44. *Id.*

45. *Id.* at 472.

46. *Id.* at 473.

47. *Id.* at 474.

48. *Id.*

49. Freeman, 503 U.S. at 471 (holding that a district court may withdraw its supervision over discrete areas in which the school district has complied with a desegregation plan).

gation and current conditions in the schools. The Court concluded that if current segregation in the school system is to be redressed, segregation must have been caused by the original constitutional violation.

The similarities with *Dowell* are clear. In *Freeman*, the Supreme Court emphasized the importance of returning school administration to local control, and ending supervision by the federal court. The Court noted that local autonomy of school districts is a national tradition, and that returning schools to local control is essential for their accountability to the governmental system.[50] Also, in both *Dowell* and *Freeman* the Court focused almost solely on the link between that lingering segregation and past constitutional violations.[51]

The Dekalb County Schools sought release from the desegregation order at a time when it was clear that their schools remained intensely segregated. While there were demographic changes in Dekalb County, the number of blacks and whites attending schools in the district was almost equal. Black students made up 47% of the students in the district.[52] The Supreme Court noted that in the 1986-1987 school year, 50% of all the black students in the district attended schools that were over 90% black.[53] Also, of the 22 high schools in the district, 10 of the high schools had populations that were 80% one race.[54] Thus in *Freeman*, actual lingering segregation and the possibility of increasing resegregation did not deter the Supreme Court from finding that the desegregation decree should be lifted.

In *Jenkins*, the Supreme Court continued to limit the district court's ongoing remedial authority in desegregation cases. This desegregation case began in 1977, twenty-three years after the Court's

50. *Id.* at 490. The Court then stated that when school boards make decisions without judicial supervision they are held accountable to the citizenry. The flaw in this assertion is that desegregation decrees are remedies for a school district's violation of an individual's constitutional rights. The courts should be responsible for crafting and supervising remedies for constitutional violations.

51. *See* Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L. J. 863, 866 (1993) (noting that both the district courts and Supreme Court in *Dowell* and *Freeman* focused on the causation issue).

52. *Freeman*, 503 U.S. at 476.

53. *Id.*

54. *Id.*

decision in *Brown*, and a remedial order was not in place until 1985, over thirty years after *Brown*.[55] The facts of *Jenkins* differ from many desegregation cases in that it was the school board who filed suit as a plaintiff against the state, alleging that the state "had caused and perpetuated a system of racial segregation in the schools of the Kansas City metropolitan area."[56]

The Supreme Court determined that the district court's order to increase teacher salaries as part of the desegregation plan was beyond the district court's remedial authority. The Supreme Court more broadly held that the district court's orders which were designed to attract white students from the suburbs to the urban schools were also beyond the district court's authority, because they attempted to create an interdistrict remedy for an intradistrict constitutional violation.

The Court also continued its focus as in *Freeman* of closely linking any remedial action to those disparities created by the defendant's illegal actions. Under this "incremental effect" standard school boards may attribute racial disparities in the schools to outside factors such as demographic shifts and socioeconomic status.[57] Thus, as in *Dowell* and *Freeman* in the face of lingering racial disparities, the Court allowed the district court's remedial powers to be limited.

III. District Court Resegregation Cases

CRP asserts that there has been more than a decade of resegregation following the Supreme Court's decision in *Dowell*.[58] CRP's recent study identifies a total of thirty-eight school districts where unitary status has been declared since *Dowell*, specifically between 1990-2002.[59] In thirty-four of the school districts that gained unitary status there was resegregation, measured as a decrease in the

55. *Id.* at 474.

56. *Id.*

57. *Jenkins*, 515 U.S. at 1172. *See* Parker, *supra* note 31, at 1172.

58. *See* Orfield & Lee, *supra* note 4, at 18 (explaining "[t]his resegregation is linked to the impact of three Supreme Court decisions between 1991 and 1995 limiting school desegregation and authorizing a return to segregated neighborhood schools, decisions which were interpreted by a number of Southern courts as prohibiting even voluntary race-conscious plans to maintain desegregated schools where local authorities believed integration to be a crucial goal.").

59. *Id.* at 38.

exposure of black students to white students, and the exposure of Latino students to white students.[60] I call these district court cases in which the district court declared unitary status for a school district and resegregation followed "district court resegregation cases." In the large majority of the thirty-four schools where resegregation occurred there was a more than a 10% decline in the exposure black students and Latino students to white students.[61] In only four school districts there were gains in desegregation after the desegregation decree was lifted.[62]

An examination of the district court resegregation cases reveals many commonalities. They include: (1) the initiation of unitary status proceedings by the defendant school board; (2) a short amount of time after the desegregation order was entered that the school board sought unitary status; (3) a lack of opposition by plaintiffs or the United States to the declaration of unitary status; (4) increasing resegregation even prior to the formal lifting of the desegregation decree; and (5) arguments by defendant school boards that resegregation is inevitable due to demographic shifts and other factors.

First, in many of the district court resegregation cases the defendant school district moved for unitary status.[63] In these cases it

60. *Id.* The thirty-four school districts identified by CRP as experiencing resegregation after the unitary status are: Alexander City, Ala., Benton Harbor area schools, Mich., Brandywine School District, Del., Buffalo City School Districts, N.Y., Butler County, Ala., Charlotte-Mecklenburg Schools, N.C., Chatham County, Ga., Christina School District, Del., Cincinnati City SD, Ohio, Coffee County, Ga., Colonial School District, Del., Dade County School District, Fla., Dallas ISD, Tex., Dayton County SD, Ohio, Dekalb County, Ga., Denver County, Colo., Duval County School District, Fla., Gadsen City, Ala., Hillsborough County School District, Fla., Indianapolis Public Schools, Ind., Jefferson County, Ky., Kansas City, Kan. Little Rock, Ark., Muscogee County, Ga., Oklahoma City, Okla., Opelika City, Ala., Pontiac City School District, Mich., Prince George's County Public Schools, Md., Red Clay Consolidated School District, Del., Rockford School Dist 205, Ill., Russell County, Ala., San Diego City Unified, Cal., St. Lucie County School District, Fla., Topeka Public Schools, Kan.

61. *Id.* at 35-36.

62. *Id.* at 38. The four school districts with increasing desegregation after the desegregation decree was lifted were Auburn City, Ala., Jefferson ISD, Tex., Lee County, Ala., Tallapoosa County, Ala.

63. *See, e.g.*, Coalition to Save Our Children v. State Bd. of Educ., 90 F.3d 752, 758 (3d Cir. 1996) (in which Delaware State Board of Education moved for unitary status); United States v. Bd. of Educ., 1995 WL 224537 (S.D. Ga. 1995); Arthur v. Nyquist, 904 F. Supp. 112, 114 (W.D.N.Y. 1995) (in which Buffalo City School District sought unitary status); Tasby v. Woolery, 869 F. Supp. 454, 456 (N.D. Tex. 1994). In contrast to these

was the school district, and not the federal district court that sought to end the federal court supervision of the school district's desegregation efforts.[64] For example, in *Dowell*, after only five years of court supervised desegregation the school district sought to have the desegregation decree lifted.

Upon first glance it seems routine that a school district under a court order would seek to have that court supervision lifted. Although there have been thirty-eight cases where unitary status has been declared since 1991, there is evidence that the *Dowell, Freeman,* and *Jenkins* opinions did not immediately lead a large number of school boards to seek to have desegregation decrees lifted. In 2000, Wendy Parker published a comprehensive study of desegregation cases in six states comprising the Fifth and Eleventh Circuits.

cases, in the six Alabama cases identified as experiencing resegregation, the unitary status proceedings began when a federal district court ordered eleven Alabama school districts to "move toward 'unitary' status" and the "termination of litigation." *See* Lee v. Auburn City Bd. Of Educ., 2002 WL 237091, *4 (2002).

64. Although there have been thirty-eight cases where unitary status has been declared, there is some evidence that the *Dowell*, *Freeman*, and *Jenkins* opinions did not immediately lead a large number of school boards to seek to have desegregation decrees lifted. In 2000, Wendy Parker published a comprehensive study of desegregation cases in six states comprising the Fifth and Eleventh Circuits. Parker concluded that while some large school districts in these states were released from their desegregation cases, a greater number of these lawsuits continue. *See* Parker, *supra* note 30, at 1187-1206. Parker conducted two separate empirical studies to assess the current state of school desegregation in the South. In the first study, Parker examined 126 published opinions from federal courts in all six states. In the second study Parker looked at docket sheets in desegregation cases in the Middle District of Alabama, Middle District of Georgia, and the Northern District of Mississippi. *Id.* at 1187. Parker found that in all six states only twenty-eight school districts were involved in unitary status proceedings, and that in only six of these proceedings did the school district itself raise the unitary status issue. *Id.* at 1189-90.

Parker also concludes that the Supreme Court's decision in *Dowell* had little effect on a defendant's decision to request unitary status. *Id.* at 1192. After *Dowell*, only eight school districts requested unitary status and in four additional school districts the district court raised the unitary status issue *sua sponte*. *Id.*

Parker offers several theories as to why defendant school districts are not initiating unitary status proceedings. *Id.* at 1208. Parker argues that mostly large school districts initiate unitary status proceedings. *Id.* Parker's study demonstrates that of the 132 very large school districts in the six states studied, 11.4% seek unitary status, while only 1% of 1,265 small districts sought unitary status. *Id.* This is an indication that small and mid-size school districts do not have the legal or monetary resources to initiate these proceedings. *See id.* at 1207-09. Also, larger school district may be more likely to encounter the demographic obstacles to integration "allowing them to offer plausible excuses or rationales for a segregated student body." *Id* at 1209.

Parker concluded that while some large school districts in these states were released from their desegregation cases, a greater number of these lawsuits continue. Therefore, it is noteworthy that in the district court resegregation cases many of the school districts initiated the unitary status proceedings. The initiation of unitary status proceedings by the defendant school district is an important common feature in the district court resegregation cases because it points out this important contrast. It is not a foregone conclusion that the lifting of a desegregation decree will automatically lead to resegregation. These district court cases demonstrate that when a school district seeks unitary status, instead of a court initiating that process, resegregation is a common result.

Another common factor in the district court resegregation cases is the timing of the school district's early efforts to have the desegregation decree lifted. In many of the district court resegregation cases the school district sought to have the desegregation order lifted less than twenty-one years after the decree was put in place.[65] I characterize these school district decisions as "early" because in most of these cases the unconstitutional system on *de jure* segregation was in place for many decades, and even after *Brown* many of the school districts refused to comply with the holding in *Brown* without the formal entering of a desegregation order by a district court.[66]

Perhaps the most surprising commonality in these cases is that in a number of cases the plaintiffs, or United States as intervening party, concede that unitary status has been met, without attention to the possibility that resegregation will result from the lifting of the court order.[67] One possible explanation for the lack of resis-

65. *See, e.g., Coalition to Save Our Children*, 90 F.3d at 757-58 (unitary status sought seventeen years after desegregation order entered); United States v. Bd. of Educ., 1995 WL 224537 (S.D. Ga. 1995) (unitary status sought after 25 years); Arthur v. Nyquist, 904 F. Supp. at 114 (unitary status sought after 16 years).

66. *See, e.g.*, Charles Zelden, *From Rights to Resources: The Southern Federal District Courts and the Transformation of Civil Rights in Education*, 1968-1974, 32 AKRON L. REV. 471 (1999). HARVIE WILKINSON, III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, 101 (1976); Billy G. Bridges, *The Forty Year Fight to Desegregate Public Education in the Fifth Circuit and In Particular Mississippi*, 16 MISS. C. L. REV. 289, 306-07 (1996).

67. *See, e.g.*, Berry v. School Dist. 195 F. Supp. 2d 971, 975 (W.D. Mich. 2002) (in which plaintiffs in the desegregation case conceded that "Green" factors for unitary

tance by plaintiffs may be the increase of racial diversity on the local school boards in the South. The increase in the number of African American members on Southern school boards may lead African American plaintiffs to believe that the school board will act in good faith in the area of desegregation, even without federal court supervision.[68] For example, in Alabama, including in Opelika City and Auburn where plaintiffs conceded that unitary status criteria were partially met, the school boards include black members.[69] Plaintiffs may feel more comfortable that a racially diverse school board will not adopt intentional policies designed to maintain or increase racial segregation in the schools.

The increased level of racial diversity on school boards may also contribute to a federal district court's willingness to grant unitary status.[70] In several of the school districts in Georgia where unitary status was declared, including Muscogee County and Coffee County, there is African American representation on the defendant school board.[71] In Muscogee County, one third of the school board is African American. In the desegregation case in Dallas ISD, Texas the district court specifically noted the increased racial diversity of the defendant school board when describing the background facts of the case.[72]

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status were met); Auburn City Bd. of Educ., 2002 WL 237091, *3 (M.D. Ala. 2002) (in which plaintiffs conceded that the school board met standards for unitary status on the issues on student assignment and transportation); Lee v. Opelilka City Bd. of Educ., 2002 WL 237032, *2–*4 (M.D. Ca. 2002) (in which plaintiffs agreed at status conference that the actions of the schools board indicated compliance with the desegregation order and that the case should be terminated).

68. The increased level of racial diversity on school boards may also contribute to a federal district court's willingness to grant unitary status. In several of the school districts in Georgia where unitary status was declared, including Muscogee County and Coffee County, there was black representation on the defendant school board. In Muscogee County one third of the school board is African American.

69. *See* www.alsde.edu (last visited Feb. 26, 2005).

70. *See* Alfred A. Lindseth, *The Changing Vision of Equality in Education: Response: A Different Perspective: A School Board Attorney's Viewpoint*, 42 EMORY L.J. 879, 882 (1993) (arguing that current school desegregation cases rarely involve intentional discrimination because school boards are now made up of members of all races and are working in good faith).

71. *See* www.doe.k12.ga.us (last visited Feb. 26, 2005).

72. *See* Tasby v. Woolery, 869 F. Supp. 454, 475 (N.D. Tex. 1994). The court noted that in 1994, the school board was comprised of three African American members, two Hispanic members, and four Caucasian members. Despite this numerical diversity, the racial diversity of the school board did not prevent the school board from seeking to lift

African American plaintiffs may also concede aspects of the unitary status requirements because racial balance in the student populations in the schools has significantly improved under the desegregation plan. The acknowledgement by black plaintiffs that there are racially balanced student populations in the district schools is sometimes viewed by district courts as conceding that unitary status should be granted. However, racial balance in the student population is not the only issue that African American plaintiffs would like a school district to address before unitary status is declared.

For example, in the Brandywine School District case, the African American plaintiffs/appellants conceded racial balance in the student population in the school district, but argued that segregation continued to thrive within schools.[73] The African American plaintiffs claimed that minority students were overrepresented in special education and underrepresented in gifted classes. Despite this claim the district court granted unitary status, arguing that a school district is not required to create racial balance in each school, grade or classroom.

Another important commonality in the district court resegregation cases is that the United States, as either an intervenor or a plaintiff, has played only a minor role in opposing unitary status. For example, in the desegregation case in Coffee County, Georgia, the United States Department of Health, Education, and Welfare approved the desegregation plan created by the school district in 1969.[74] In 1994, the school district sought unitary status and the Department of Justice did not oppose unitary status. One possible explanation for this is that the Supreme Court's decisions in *Dowell, Freeman,* and *Jenkins* indicate that the Court is no longer supportive of ongoing remedial measures in these cases. The Department of Justice and the Solicitor General's office have historically played an important role in *Brown* and its enforcement.[75] Notwithstanding

the desegregation decree. The three African American school board members opposed the decision to seek unitary status, and claimed that they were disenfranchised on the board because many important votes were cast entirely along racial lines. *Id.*

73. *Coalition to Save Our Children*, 90 F.3d at 762.

74. United States v. Bd. of Educ. 1995 WL 224537 (S.D. Ga. 1995).

75. *See* NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILLIP ELMAN (2004) (describing the role played by the Solicitor General's office in *Brown*).

the Supreme Court's current hostility towards court supervised desegregation, the Department of Justice should continue to rigorously investigate and oversee desegregation cases to determine whether court supervision is still needed.

Another common factor in the district court resegregation cases is that resegregation had already begun prior to the district court's declaration of unitary status. In *Freeman*, the Dekalb County Schools sought release from the desegregation order at a time when it was clear that their schools remained intensely segregated. The number of blacks and whites attending the Dekalb County Schools were almost equal, with black students made up 47% of the students in the district.[76] Despite this racial balance in the overall school population, 50% of all the black students in the district attended schools that were over 90% black.[77] Also, of the twenty-two high schools in the district, 10 of the high schools had populations that were 80% one race.[78] The Dekalb County Schools and the Supreme Court concluded that although there were significant numbers of intensely segregated schools in the school district, the lingering segregation could not be traced to the previous unconstitutional acts of the school board.[79] *Green* allows a court to consider whether a school district has complied in good faith with a desegregation decree.[80] Plaintiffs may want to argue that a school district's knowledge that there is already resegregation occurring at the time of the unitary status proceeding is an indication of bad faith on the part of school district.[81]

Another common factor in the district court resegregation cases is that in these cases the school districts rely heavily on factors such as shifting racial demographics to explain lingering single race

76. *Id.* at 476.

77. *Freeman*, 503 U.S. at 476.

78. *Id.*

79. *Id* at 494.

80. *Green*, 391 U.S. at 436.

81. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977) (stating that looking at the impact of state action is an important starting point in determining whether the state engaged in acts of intentional discrimination); Reno v. Bossier Parrish Sch. Bd., 520 U.S. 471, 489 (1997) (same).

schools and resegregation.[82] School districts have been able successfully to deflect their culpability in the resegregation trend by pointing to demographis factors. In *Manning*, the desegregation case in Hillsborough County School District, Florida the school board contended that the presence of some racially identifiable schools in the district were caused by demographic shifts in the district.[83]

In *Coalition to Save Our Children*, the school board argued that persisting disparities in performance between black students and white students were caused by socioeconomic factors.[84] The school board presented demographic data from the 1990 Census to demonstrate that black students in the school district, are on average, from families of lower socioeconomic status.[85] The school board also presented evidence that this socioeconomic gap was the cause of the achievement gap, and not persisting segregation in the schools.[86] The Third Circuit agreed that the achievement gap was not a vestige of *de jure* segregation, but instead was caused by this socioeconomic gap.

While it is obviously in the school district's interest to attempt to explain resegregation trends by referring to socioeconomic factors when requesting unitary status, district courts wrongly accept this explanation without significant analysis. In Hillsborough County, without any analysis of the school districts claims the district court concludes that "a shift in demographics was a substantial cause" in creating racially identifiable schools.[87] The district court in *Coalition to Save Our Schools* also accepts without thorough analy-

82. *See, e.g.*, Alfred A. Lindseth, *supra* note 70, at 882 (asserting that school boards have little to do with lingering school segregation, because current segregation in schools is primarily caused by housing segregation and other demographic patterns).

83. *See* Manning v. School Bd., 244 F.3d 927, 936-37 (11th Cir. 2001). The courts defined a "racially identifiable" school as any school with a black/white ratio varying plus or minus 20 points from a 20/80 ratio.

84. *See Coalition to Save Our Children*, 90 F.3d at 777.

85. *Id.*

86. *Id.*; *See* Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784, 818-20 (D. Del. 1995) (citing 1990 U.S. Census statistics and 1992 Vital Statistics Report of Delaware to demonstrate a "black/white gap" in education, socioeconomic status, employment, and other areas).

87. *Manning*, 244 F.3d at 936-37. The African American plaintiffs/appellees argued that demographic changes alone did not account for the presence of racially identifiable schools.

sis that the achievement gap between black and white students is due lingering societal racism and other factors, but not *de jure* segregation in the schools. The court stated:

> The evidence also demonstrates that the intramural or school environment cannot be expected to make up for deficiencies in the child's extramural environment. There is no credible evidence demonstrating that the differences between black and white children's success in school can be attributed to the former *de jure* segregated school system. The continued existence of racial discrimination in society as a whole, and the effect of that discrimination on the ability of a black child to enter school on an equal footing with more privileged white schoolmates, are not matters in dispute in this litigation.[88]

Another important commonality in the district court resegregation cases is that the United States, as either an intervenor or a plaintiff, has played only a minor role in opposing unitary status. For example, in the desegregation case in Coffee County, Georgia, the United States Department of Health, Education, and Welfare approved the desegregation plan created by the school district in 1969.[89] In 1994, the school district sought unitary status and the Department of Justice did not oppose unitary status.

Finally, the district court resegregation cases demonstrate that *Dowell*, *Freeman*, and *Jenkins* opened the door for lower courts to feel increasingly empowered to grant unitary status. A large majority of the district court resegregation cases cite *Dowell* or *Freeman* for the proposition that the goal in desegregation cases is to return the schools to local control. This perspective is one that shifts the goal of desegregation cases from the creation of sustained racial integration of public schools, to local control of public schools, even if that local control leads to resegregation.[90] The lack of concern by federal district courts about resegregation as a possible outcome of

88. *Coalition to Save Our Children*, 901 F. Supp. at 823.

89. United States v. Bd. Of Educ., 1995 WL 224537 (S.D. Ga. 1995).

90. *See* Lee v. Tallapoosa County Bd. of Educ., 2002 US Dist LEXIS 23464, *15-*16.(2002) (stating "[i]t has been long recognized that the goal of a school desegregation case is to promptly convert from a *de jure* segregated school system from a system without "white" schools or "black" schools, but just schools."), *citing Green*, 391 U.S. at 442.

unitary status proceedings appears to be traceable to the Supreme Court's resegregation cases.

In the Brandywine School District, Delaware case, when granting unitary status the court emphasized the importance of local control and cited *Dowell* and *Freeman* as authority.[91] The court stated:

> We are keenly aware that, for as long as we have imposed federal supervision on local school boards, those bodies have suffered the loss of their defining function — control over their own schools. Thus in the present matter the citizens of the New Castle school districts have for nearly 20 years what the Court has described as the 'vital national tradition' of local autonomy of school districts.[92]

While the district court expresses interest in the concerns of the "citizens of New Castle," the court fails to discuss the effect on the African American citizens/students of New Castle caused by *de jure* segregation. The district court also fails to acknowledge the fact that when left to local control, the New Castle school officials were found to have failed to comply with *Brown's* mandate thirty-four years after the *Brown I* decision.[93] The district courts' emphasis on local control and minimizing the other intrests in these cases is a clear consequence of the Supreme Court's decisions in *Dowell, Freeman,* and *Jenkins* where the Court prioritized returning school districts to local control.

IV. Conclusion: Addressing the District Court Resegregation Cases

The common factors that I have identified in the district court resegregation cases suggest several issues in these cases that should be addressed by advocates and courts that seek to insure that *Brown's* legacy in terms of creating racially integrated public schools is not destroyed. The commonalities in these cases may be addressed by defendant school districts, plaintiffs, and courts. The

91. *Coalition to Save Our Children*, 90 F.3d at 760.

92. *Id.*

93. *Id.* at 757. When the desegregation order was entered in 1978 the court made a liability finding that state authorities had continually refused to desegregate the public schools.

need to combat resegregation is a topic that warrants significant reflection and comprehensive study. I offer the following suggestions as the beginning of my own reflection on this difficult problem.

Defendant school districts that are committed to maintaining racial integration must approach desegregation decrees and the lifting of desegregation decrees differently. The district court resegregation cases clearly demonstrate that after desegregation decrees are lifted, there are events occurring within the school district that are decreasing the level of desegregation that was attained under court order.

Under our current law, the school district may be most effective at preventing resegregation, because the role of defendant school systems in sustaining racial integration has been exaggerated by the Supreme Court's emphasis on returning schools to local control.[94] The Supreme Court's, and by extension the district courts', reliance on local school systems to govern themselves in the area of desegregation may be horribly ill conceived, but the conclusion remains that under our current legal precedents local school districts have significant control over desegregation remedies. Therefore, it is vital to consider legal incentives to motivate schools boards to maintain student assignment and resource plans that prevent resegregation. Incentives should be created to encourage school districts to maintain student, teacher, and resource allocation plans that create racially integrated schools, and to maintain those plans even without court supervision.

These incentives may include monetary grants to school districts that are able to maintain racial integration after the end of court ordered desegregation. Also, under federal legislation such

94. *See Dowell*, 498 U.S. at 248 (stating "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'") (internal citations omitted); *Freeman*, 503 U.S. at 490 (stating that local autonomy of school districts is a "vital national tradition" and that returning control of schools to local authorities allows accountability to the citizens).

as No Child Left Behind,[95] the quality of a school should be partially measured by its ability to create and maintain racially diverse student bodies and faculties. No Child Left Behind establishes accountability standards for reading and math, and also requires that statistics be kept on the progress of minority students.[96] States and the federal government should consider creating accountability standards to measure racial integration. The Supreme Court's decision in *Grutter v. Bollinger*,[97] affirmed a state's right to consider race in student admissions for the purpose of creating a racially diverse student body. Elementary and secondary schools should be encouraged to adopt race-conscious student assignment plans that value racial diversity.

Although further efforts should be made to encourage local school boards voluntarily to maintain plans for racially integrated schools, it is clear from the district court resegregation cases that the project of desegregation is currently more successful when the school district is under a court order to desegregate.[98] Thus, plaintiffs, both minority plaintiffs and the United States as intervenor or plaintiff, should vigorously oppose granting of unitary status in any school district where there is evidence of lingering racial segregation, or a strong possibility that resegregation will occur after the desegregation decree is lifted. In opposing the grant of unitary status, the plaintiffs should emphasize that among the factors for unitary status set forth in *Green* is whether the school district has complied in good faith with the desegregation order.[99] Part of the district court's evaluation of the school district's good faith should be whether the school district will maintain the plans that lead to desegregation after the decree is lifted. A school district operating in good faith under a desegregation decree should be able to demonstrate that they are committed to not allowing the school dis-

95. 20 U.S.C. § 6301 (2001).

96. *Id.*

97. 539 U.S. 306 (2003) (holding that diversity among student body is compelling state interest and that individualized evaluations may include considerations of all factors, including race and ethnicity, that contribute to diversity).

98. ORFIELD & LEE, *supra* note 4, at 37 ("It is very clear, however, that desegregation is declining rapidly in places the federal courts no longer hold accountable and that just a decade ago there were much higher levels of interracial contact.").

99. *See Green*, 391 U.S. at 438.

trict to return to the racially imbalanced student populations that existed in the *de jure* segregation era.

Also, plaintiffs must challenge more vigilantly the blanket assertion by school districts that lingering segregation is caused by racial demographic shifts and other factors outside of the school district's control. For example, much of the residential segregation that plays a role in resegregation may be traced to previous acts by the state of housing segregation. Plaintiffs should attempt to demonstrate when "demographic shifts" are connected to unconstitutional or otherwise illegal acts by the state or local government.

School districts, minority plaintiffs, and our courts should be joined in an effort to maintain *Brown's* legacy. The existence and increasing nature of resegregation is a threat to that legacy. If our legal system hopes to prevent *Brown*'s legacy from perishing, there must be a vigorous recommitment to the project of racial integration of our public schools.

One lesson of *Brown* is that it is ineffectual for our Supreme Court to declare a right and leave those who have suffered from the violation of their constitutional rights without an effective remedy. The long term legacy of *Brown* will be judged by whether the decision fulfilled its promise.