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DURABLE SCHOOL DESEGREGATION IN THE TENTH CIRCUIT: A FOCUS ON EFFECTIVENESS IN THE REMEDIAL STAGE

DANIEL MCNEEL LANE, JR.*

I. INTRODUCTION

Two players begin a game of chess. Each player knows the moves each piece can make, how to capture her opponent's pieces, and other rules of chess. But neither player knows how to win — neither player knows the definition of checkmate. Is it the King she is after, or the more powerful Queen? Need she capture the bishops and knights as well? Now suppose the game lasts not for hours, but for decades. At times, the players are hostile and frustrated, at other times they seem almost cooperative, working only to bring the game to an end.

The game described above is not unlike the school desegregation litigation experience of the last three decades. Skilled lawyers struggle relentlessly over such issues as the need for a desegregation plan, the terms of the plan, the particulars of its implementation, and so forth. Yet they have no clear definition of the end result they seek — unitary status — because the courts have yet to define "checkmate" for school desegregation purposes. Both sides are kept off-balance. Neither side knows what remedies the plaintiff is entitled to, or what showing the school district must make to satisfy its duty to desegregate.

Without establishing a clear definition of unitary status, in three recent cases the Tenth Circuit Court of Appeals has pointed the way toward checkmate, announcing endgame rules for school desegregation contests.[1] These decisions touch on every facet of school desegregation remedial measures, yet a single message emerges: school districts operating under a duty to desegregate must take steps that will effect lasting changes in the school system. Understanding the scope and import of the Tenth Circuit's decisions requires a brief overview of federal school desegregation doctrine. In *Brown v. Board of Education* ("*Brown I*"),[2] the starting point, the Supreme Court established that segregation of public school students on the basis of race violates the equal protection clause

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1. Keyes v. School Dist. No. 1, 895 F.2d 659 (10th Cir. 1990), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. Apr. 30, 1990)(No. 89-1698); Brown v. Board of Educ., 892 F.2d 851 (10th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. Apr. 26, 1990)(No. 89-1681); Dowell v. Board of Educ., 890 F.2d 1483 (10th Cir. 1989), *cert. granted*, 110 S. Ct. 1521 (1990).

2. 347 U.S. 483, 495 (1954).

of the fourteenth amendment.[3] The following year the Supreme Court stated in *Brown II*[4] that school authorities operating segregated school systems[5] bore the "primary responsibility for elucidating, assessing, and solving" local school problems that prevent the transition to a "racially nondiscriminatory school system."[6] Subsequent school desegregation doctrine has divided, like the *Brown* decisions, into liability and remedial phases, in some cases more neatly than in others.

Supreme Court school desegregation doctrine has undergone a legal mitosis of sorts, as right and remedy issues have grown more and more distinct, remaining connected only at the root — the equal protection clause. In *Green v. County School Board*, for example, the Court stated that school boards operating a dual school system are charged with the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial desegregation would be eliminated root and branch."[7] Moreover, the Court added that each instance of a failure or refusal to fulfill this affirmative duty constitutes a further violation of the fourteenth amendment.[8] But, after taking the necessary steps to eliminate racial segregation, the school board need do no more, even if shifting demographic patterns resegregate the schools.[9] The conundrum should be obvious: after implementation of the "remedy," the school district may, in all essential respects, be identical to the school district at the time the remedy was ordered.[10]

A variety of factors may explain this apparent gap between the right initially declared and the remedy eventually obtained.[11] Professor Freeman argues that the courts improvidently settled on an approach to the problem of race discrimination from the perspective of the perpetrator rather than the perspective of the victim. Consequently, the courts have focused on school boards' discriminatory actions rather than on the inferior conditions under which minority students often must seek an education.[12]

> The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of par-

3. For a scholarly, yet moving, account of the events leading up to the decision, see R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

4. Brown v. Board of Educ., 349 U.S. 294 (1955).

5. In *Brown I*, the Court consolidated appeals from Kansas, South Carolina, Virginia and Delaware. 347 U.S. at 486.

6. *Brown*, 349 U.S. at 299, 301.

7. Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

8. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979).

9. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

10. *See* Branton, *The History and Future of School Desegregation*, 109 F.R.D. 241, 248 (1986).

11. *See generally* Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1741 (1985).

12. *See* Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978).

> ticular actors. It is a world where, but for the conduct of these misguided ones, the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities and where deprivations that did correlate with race would be "deserved" by those deprived on grounds of insufficient "merit."[13]

In the years following *Brown*, the Supreme Court has viewed the equal protection clause as a means of righting discrete wrongs rather than as a means of doing right.[14]

Professor Strauss characterizes this phenomenon as the "taming" of *Brown*. Courts tend to focus on discriminatory intent because they perceive it as a sharply defined limit that least threatens social order.[15] Practical considerations are also at work—courts may respond to intense political and economic strains associated with complete remedies by "narrowing the right to match the remedy."[16] Finally, while courts are quite adept at recognizing and defining rights, they may be wary of engaging in protracted affirmative management of complex social problems.[17]

The antidiscrimination model of equal protection creates problems of proof that may bar liability altogether. Those who were instrumental in creating segregated conditions are often long gone. In their place are officials whose commitment to equality may be quite genuine, but who are equally committed to local control of schools and an end to bussing. More importantly, segregated conditions in the schools usually result from broader patterns of discrimination in housing and employment. Only a piece of the pattern is within the purview of the court, which can hardly hold school boards solely responsible for apartheid-like social conditions that contribute to inequality in the schools.

The Court has sought to relax these problems of proof, not by relaxing the discrimination requirement itself, but by instituting procedural mechanisms to aid the plaintiff in establishing discriminatory intent.[18] For instance, in *Keyes v. School District No. 1*,[19] the Court stated that when intentional segregative actions take place in a significant part of the school district, unconstitutional intent will be presumed in the

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13. *Id.* at 1054.

14. *See* Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 940-51 (1989).

15. *Id.* at 954-56.

16. *Judicial Right Declaration*, *supra* note 11, at 1762-63.

17. Institutional features of the courts, such as law of the case and stare decisis, somewhat justify this wariness. Each decision of a court binds, to a greater or lesser degree, subsequent decisionmaking on the same subject. Government agencies, on the other hand, are relatively free to shift directions radically. Ironically, shifts in the Justice Department's civil rights agenda, particularly under William Bradford Reynolds, most clearly demonstrate this principle. *See, e.g.* Martin v. Wilks, 109 S.Ct. 2180, 2191-93 (1989)(Stevens, J., dissenting).

18. *See* Days, *School Desegregation Law in the 1980's: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737, 1746-53 (1986). Professor Days characterizes the school board's continuing affirmative responsibility to desegregate as one of these hurdles.

19. 413 U.S. 189 (1973).

district as a whole.[20]

Adopting the approach of the Supreme Court's remedy cases, the Tenth Circuit's recent school desegregation cases at times purport to be no more than procedural housekeeping. In truth, the equal protection rights at stake are inextricably intertwined with the court's holdings which clarify the parties' burdens and dust off injunctive relief doctrines. In these cases, the Tenth Circuit sought to resolve the prior doctrine's emphasis on discriminatory intent with the need to provide minority schoolchildren with more than transitory vindication of their equal protection rights. The result of these cases is that once the plaintiffs establish the school district's segregative intent, they need not fight that battle over again with every subsequent challenge to district actions.

In each case before the Tenth Circuit, the school district attempted, in response to plaintiffs' objections to district policy, to establish that it had satisfied its duty to desegregate. Consequently, each school district urged the district court to terminate jurisdiction over the matter. Usually, termination of jurisdiction entails declaring the school district "unitary," which, in simplest terms, means that the district is no longer operating a "dual" school system. In effect, any decree under which the school district is operating is dissolved, and total control over school matters is returned to the school district. The issues on which these cases turned involved demonstrating the school district's entitlement to a declaration of unitariness or termination of jurisdiction.

This article discusses *Keyes*, *Brown*, and *Dowell* in the order in which the issues they address would likely arise in the course of school desegregation litigation. In *Keyes*, a vigorously litigated case, the district court denied the school district's motion for a declaration of unitariness and termination of jurisdiction. The Tenth Circuit affirmed, agreeing that the Denver desegregation plan, incorporated in the district court's decree, was not complete by its terms. In *Brown*, the district court declared the school district unitary after the plaintiffs challenged school conditions following a period of dormancy. The Tenth Circuit reversed on the basis of clear error. Finally, in *Dowell*, the district court terminated jurisdiction eight years after it declared the school district unitary. The Tenth Circuit reversed, finding that the protection of the court decree was still necessary to protect desegregation gains in Oklahoma City.

II. *Keyes v. School District No. 1*

A. *Background*

By the Tenth Circuit's own count, its third opinion in *Keyes v. School District No. 1*[21] was the eighteenth federal court opinion published in this case.[22] *Keyes* began in 1969, when a group of Denver schoolchildren, by and through their parents, sued to enjoin the school board

20. *Id.* at 203.
21. 895 F.2d 659 (10th Cir. 1990).
22. *Id.* at 661 n.1.

from rescinding three previously adopted resolutions. The intent of these resolutions was to facilitate desegregation of the Denver school system.[23] The district court ultimately found that the school board pursued a policy which maintained, encouraged, and continued segregation in the public schools.[24] In 1974, the district court ordered a desegregation plan,[25] which, with slight modifications, remains in effect today.[26] In 1984, the school district moved for an order declaring the Denver schools unitary, dissolving the injunction with respect to student assignments, and terminating the district court's jurisdiction in the case.[27] Plaintiffs opposed the motion and moved for an order directing the school district to produce plans and policies to remedy perceived shortcomings in the district's desegregation efforts.[28]

At the hearing, and on its motion, the district argued that a decade of compliance with the court-ordered desegregation plan entitled the district to a declaration of unitariness.[29] In a lengthy opinion, the district court considered the board's policies, attitudes, and understanding with respect to desegregation of the Denver schools. The court also considered statistical evidence that it found troubling.[30] The court denied the district's motion for declaration of unitary status, and instead ordered the district to submit a plan for achieving unitary status. The plan was to address faculty assignment, student transfer policies, and desegregation of three minority elementary schools. The school district submitted the plan as ordered.[31]

In 1987, the district court issued an "interim decree" intended to "relax the degree of court control over the Denver public schools." Essentially, the decree eliminated reporting requirements and allowed the school district to make changes in the desegregation plan without prior court approval.[32] The court characterized the interim decree as a step toward terminating the court's jurisdiction. The school board appealed the denial of unitary status and the entry of the "interim decree."[33]

On appeal, the district made several arguments, using as a basis the Supreme Court's opinion in *Pasadena City Board of Education v. Spangler*.[34] First, the district argued that long-term compliance with the court-ordered desegregation plan, which it characterized as complete in design and not contemplating later judicial reappraisal, entitled the school district to a declaration of unitariness.[35] The district argued that the

23. Keyes v. School Dist. No. 1, 303 F. Supp. 279, 281 (D. Colo. 1969).
24. *Id.* at 287.
25. Keyes v. School Dist. No. 1, 380 F. Supp. 673 (D. Colo. 1974).
26. *Keyes*, 895 F.2d at 661.
27. *Id.* at 661-62.
28. *Id.* at 662.
29. Keyes v. School Dist. No. 1, 609 F. Supp. 1491, 1498 (D. Colo. 1985).
30. *Keyes*, 895 F.2d at 662-63.
31. *Id.* at 662.
32. *Id.* at 663.
33. *Id.*
34. 427 U.S. 424 (1976).
35. *See id.* at 435-37; *Keyes*, 895 F.2d at 664-66.

school system should be declared unitary with respect to student assignments even though it may not be unitary with respect to either faculty assignments or its student transfer policy.[36] The school district argued, citing *Spangler*, that the district court erred in focusing on the racial identity of three elementary schools, and in demanding future maintenance of a racial balance. The school district argued that there was no constitutional right to a particular racial balance in a school's student body,[37] and that segregative effects of future board actions were irrelevant to the unitariness determination. Finally, the school district argued that there was no evidence indicating that future boards would act with segregative intent.[38]

B. *The Unitariness Inquiry*

The court in *Keyes* recounted school desegregation law from *Brown v. Board of Education*, recognized the district court's broad equity powers, and noted that such remedial measures are reviewed only for an abuse of discretion.[39] Recognizing that the Supreme Court "has not defined precisely what facts or factors make a district unitary," the Tenth Circuit considered the elements which cause the segregation of a school system.[40] Racial balance in student assignments is but one factor. Courts must also consider the existence of individual discrimination in transportation of students, integration of faculty and staff, equality of financial support to different schools and integration of school activities, and the presence or absence of a discriminatory pattern in the construction and location of new schools.[41]

The court then set forth the definition of unitariness newly minted in *Dowell* and *Brown*.[42] "This Court has defined 'unitary' as the elimination of invidious discrimination and the performance of every reasonable effort to eliminate the various effects of past discrimination."[43] In light of this standard, "when a school board has a duty to liquidate a dual system, its conduct is measured by 'the effectiveness, not the purpose, of [its] actions in decreasing or increasing segregation caused by the dual system.' "[44]

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36. *Keyes*, 895 F.2d at 664.

37. *Id.*

38. The United States, appearing as *amicus curiae* in a brief submitted by former Assistant Attorney General William Bradford Reynolds, argued that the district court must terminate jurisdiction over a case when it finds the district to be unitary. The district was unitary here, in the government's view, because it had fully implemented a court-approved desegregation plan in good faith. *Id.*

39. *Keyes*, 895 F.2d at 664-65.

40. *Id.* at 665. Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 662 (1987) (asserting that the Supreme Court has declined to provide a definition because "it has recognized that no single, inflexible formula could apply to all school systems").

41. *Keyes*, 895 F.2d at 665.

42. *See infra* text accompanying notes 85-88, 144-54.

43. *Keyes*, 895 F.2d at 665-66 (citing Dowell v. Board of Educ., 895 F.2d 1483, 1491 & n.15 (10th Cir. 1989); Brown v. Board of Educ., 892 F.2d 851, 859 (10th Cir. 1989).

44. *Id.* at 666 (quoting Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979)).

The court reviewed the district court's finding that the Denver Public School System was not unitary under a clear error standard.[45] The school district, however, failed to identify or even assert clear error in the district court's decision.[46] The school district instead argued that "as a matter of law three racially identifiable elementary schools out of about eighty cannot prevent a school district from attaining unitary status."[47] This is a factual argument dressed up as a legal argument to obtain a standard of review less deferential to the trial court. The court of appeals rejected this argument, observing that the existence of even only three racially identifiable schools, "especially when they once have been eliminated and then resurface as a result of board action, is strong evidence that segregation and its effects have not been eradicated."[48] With respect to such schools, the district must show that they "are nondiscriminatory and that their composition is not the result of present or past discrimination."[49] A showing merely that the resegregation of the schools is not the result of new, intentional segregation did not satisfy the district's burden.

The court then turned to the district's argument that compliance with the court-approved plan for ten years entitled it to a declaration of unitary status. The court rejected this argument, agreeing with the court below that the desegregation plan adopted in 1974 "was not intended to be complete in itself; rather, the court and the district had 'the expectation that changes would be required in future years.'"[50] The Tenth Circuit concluded that the evidence adequately supported the finding that student assignments were not unitary, rendering harmless the district court's error in failing to recognize that a school district may be declared unitary in some respects and not others.[51]

Finally, the court deferred to the district court's finding that the school district "was both without the ability and without the will to ensure that the effects of prior segregation [would] not resurface."[52]

C. *The Interim Decree*

The district court crafted its decree to meet the specificity requirements of Federal Rule of Civil Procedure 65(d),[53] yet remain broad

45. *Id.* at 666.
46. *Id.* at 666-67.
47. *Id.* at 667.
48. *Id. See also* Note, *Allocating the Burden of Proof After A Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 662-63 (1987) (noting that the Supreme Court has never "produced a single, comprehensive statement defining unitariness" because "[j]ust as the methods for desegregating dual school systems necessarily vary with the circumstances, so does the determination whether desegregation has been successful").
49. *Keyes*, 895 F.2d at 667.
50. *Id.* at 667 n.2 (quoting the district court, 609 F. Supp. at 1506).
51. *Id.* at 667.
52. *Id.*
53. FED. R. CIV. P. 65 states, in relevant part:
(d) Form and Scope of Injunction or Restraining Order.
Every order granting an injunction and every restraining order shall set forth the

enough to allow the school district to operate free of direct court intervention.[54] The decree did not prescribe racial balance targets for student or faculty assignments, nor did it require prior court approval of student or faculty assignment changes by the district. Instead, the decree conferred broad authority on the district to operate the schools while, at the same time, it prevented adoption of discriminatory school policies.[55]

On appeal, the school district challenged the decree, arguing that its lack of clarity violated Rule 65.[56] In a meticulous review, the court eliminated only one paragraph of the fourteen paragraph order. The court reasoned that the paragraph only required the school district to obey the law.[57] On the whole, the court disagreed with the school district, approving of the order as "a commendable attempt to give the board more freedom to act within the confines of the law."[58] Despite the district's "frustration with not knowing its precise obligations under the Constitution," the court agreed with the trial court's conclusion that the school district "has not accomplished all desegregation possible and practical," though it remains under a continuing duty to do so.[59]

III. *Brown v. Board of Education*

The Tenth Circuit's recent opinion in *Brown v. Board of Education*,[60] contrasts starkly with the landmark opinions of the same name.[61] Long and complex, it delves into the intricate factual setting from which the case evolved.[62] The proposition upon which Judge Seymour based the opinion, however, was straightforward: plaintiffs bringing a school desegregation action against a former *de jure* segregated school system are entitled to a presumption "that current disparities are causally related

reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

54. *Keyes*, 895 F.2d at 663.

55. *See id.* at 668 n.5.

56. *Id.* at 668.

57. *Id.*

58. *Id.* at 669.

59. *Id.* at 670.

60. 892 F.2d 851 (10th Cir. 1989).

61. Brown v. Board of Educ., 347 U.S. 483 (1954) ("*Brown I*"); Brown v. Board of Educ., 349 U.S. 294 (1955) ("*Brown II*").

62. The majority and dissenting opinions in *Brown* are marked by contentious exchanges, including numerous references to "revised" opinions. *See, e.g.*, *Brown*, 892 F.2d at 862. References to "revised" opinions also appear in *Dowell*, and are unfortunate in both decisions. First, of course, earlier opinions have little meaning for the reader, who has access only to the "revised" opinion released. Second, and more importantly, the references imply that the original opinion was flawed, and any revision was merely cosmetic. To the extent a judge seeks to avoid such sniping, the judge is discouraged from revising his opinions in response to criticism of earlier drafts. Such revisions, however, may focus an issue or clarify an important point, and should be encouraged rather than discouraged.

to past intentional conduct."[63]

A. *Background*

At the time of the Supreme Court's decision in *Brown v. Board of Education*, the Topeka Board of Education operated segregated schools at the elementary level only.[64] State legislation allowed segregation below high school level, and the Kansas Supreme Court had already declared segregation in Topeka junior high schools unconstitutional.[65] Oliver Brown and other black citizens of Topeka filed a class action challenging the statute's authorization of school segregation below the high school level, and in the Supreme Court's decision secured the sweeping rejection of the "separate but equal" doctrine. The board took immediate steps to desegregate, permitting black students to attend former white schools even before the Supreme Court's decision in *Brown II*. On remand, the district court approved the board's "Four Step" desegregation plan, but did not terminate jurisdiction over the case.[66]

In the mid-1970s, the Office of Civil Rights ("OCR") of the Department of Health, Education and Welfare ("HEW") initiated administrative enforcement proceedings against the Topeka School District, alleging that the school district was not in compliance with Title VI of the Civil Rights Act of 1964.[67] The board obtained a preliminary injunction against the administrative proceeding,[68] but both the administrative proceeding and the injunction action were dismissed when the board submitted a plan acceptable to HEW in 1976. The board subsequently implemented the plan.[69]

In 1979, a group of black parents and children filed a motion to intervene in the original proceeding as additional named plaintiffs. They asserted that the school district failed to desegregate its schools in compliance with the Supreme Court mandate, and they alleged that the school district maintained and operated a racially segregated school system.[70] The district court granted the motion to intervene and, after a period of discovery and motion practice, conducted a trial in October 1986.[71] The Court declared the school district an integrated, unitary school system.[72]

63. *Brown*, 892 F.2d at 854.
64. *Id.*
65. *Id.*
66. *Id.* at 885. *See* Brown v. Board of Educ., 139 F. Supp. 468, 470 (D. Kan. 1955).
67. 42 U.S.C. § 2000(d) (1982). The Topeka School District was required to comply with section 601 of the Civil Rights Act because it received federal funds through the Kansas Department of Education. *Brown*, 892 F.2d at 855 & n.2.
68. *Brown*, 892 F.2d at 855.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id. See* Brown v. Board of Educ., 671 F. Supp. 1290 (D. Kan. 1987). The court also held that the school district did not violate Title VI of the Civil Rights Act of 1964. In addition, the court dismissed the Governor of Kansas from the case and exonerated the State Board of Education from liability for racial conditions in the school district. *Brown*, 892 F.2d at 855.

Despite population growth, today, as in 1950, Topeka's population remains approximately 10% black.[73] Hispanics comprise about 5% of the population; other minorities comprise less than 1.5%.[74] Since the 1950s, the white population has spread westward, the black population has mostly spread eastward, and the inner city has declined.[75] Meanwhile, the percentage of black and minority[76] children in the Topeka schools has grown steadily since 1952, with black students representing 8.4% of the Topeka student population. During the 1985 school year, 18.4% of the students in Topeka were black, and 25.95% were members of a minority group.[77]

In 1951, Topeka operated four black and eighteen white elementary schools. Under the Four Step plan, which was adopted to eliminate the effects of *de jure* segregation in 1955, two elementary schools became more than 20% black, while three remained more than 99% black. Through the late 1950s and early 1960s, Topeka annexed outlying areas, and various schools were closed and opened. By 1966, Topeka no longer had any all-black elementary schools, though three schools remained all white, and nearly half of all minority elementary school students attended schools with minority populations of more than 50%.[78]

The 1976 reorganization of Topeka elementary schools, prompted by the OCR proceedings, took place after the minority population in Topeka schools climbed to 20.9%. Even after the reorganization, more than a third of minority elementary school students attended four schools with minority populations of more than 50%. Nearly 60% of the white elementary school students attended elementary schools with white populations of more than 80%.[79] The racial balances in the schools remained approximately the same when the district court heard the case in 1985.[80]

The 1979 action challenged conditions in the junior high and high schools for the first time. The student populations of the junior high and high schools of Topeka were not segregated by race at the time of the Supreme Court's decision in 1954. At the time, however, five of the six junior high schools had white populations of more than 80%; the sixth had a minority population of 30%.[81] By 1966, after a period of annexation and expansion, eight of the eleven junior high schools had white populations of more than 80%; one junior high had a minority

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73. *Brown*, 892 F.2d at 855.

74. *Id.*

75. *Id.* at 855-56. This pattern is similar to that in Oklahoma City. *See infra* text accompanying note 179.

76. The parties agreed that distinguishing between blacks and other minority students would serve no purpose.

77. *Brown*, 892 F.2d at 856.

78. *Id.* at 856. One elementary school had a minority population of nearly 50%, while four schools had minority populations of more than 50%, ranging as high as 93.1%.

79. *Id.* at 856-57. Almost a quarter of all white students attended 90+% white schools.

80. *Id.* at 857. The only notable difference was that the lowest percentage of minority students in any elementary school rose to 7.2%.

81. *Id.* The lowest percentage of minority students in any school rose to 7.2%.

population of 61.8%.[82] The high school minority populations ranged from a high of 25%, to a low of .4%.

At the time of the trial in 1985, the percentage of minority students in Topeka middle schools was 26.9%, and the level in high schools was 23.8%.[83] Two of six middle schools had white populations of more than 90%; one had a minority population of nearly 49%.[84] Two high schools had minority populations near 30%, and one had a white population of more than 90%.

B. *Determining Unitary Status*

Before it could consider the central issue in *Brown* — whether or not the Topeka school system was unitary — the court had to establish a touchstone definition of unitariness. Essentially, the court of appeals adopted the district court's definition: a unitary school system is "one in which the characteristics of the 1954 dual system either do not exist or, if they exist, are not the result of past or present intentional segregative conduct of [the school district]."[85] The court added that "[a]n additional essential requirement of unitariness is whether, however, 'school authorities [made] every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.' "[86]

Judge Seymour rejected a snapshot approach in determining whether the school district attained unitary status — that is, one which considers the state of the school system only at the time of trial. Rather, "a court must consider what the school district has done or not done to fulfill its affirmative duty to desegregate, the current effects of those actions or inactions, and the extent to which further desegregation is feasible."[87] But, once the plaintiff establishes intentional segregation in the past by the school district, and a current condition of segregation, the burden shifts to the defendant to prove that "its past acts have eliminated all traces of past intentional segregation to the maximum feasible extent."[88]

In a case such as *Brown*, where past intentional segregation by the school district has long since been established, the plaintiff's principal burden is to prove a current condition of segregation. The court held that to satisfy this burden the "plaintiff must prove the existence of racially identifiable schools, broadly defined."[89] Student assignments alone may identify a school as racially identifiable, as in the case of virtual one-race schools. But racial identifiability may also turn on other

82. *Id.* at 858. Minority students comprised 15.3% of the junior high school student population and 14.9% of the high school student population.
83. From 1976 to 1981, Topeka adopted a middle-school/high-school system.
84. *Brown*, 892 F.2d at 858 & n.13.
85. *Id.* at 859 (quoting *Brown*, 671 F. Supp. at 1293).
86. *Id.* (quoting Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971)).
87. *Id.*
88. *Id.*
89. *Id.* at 859-60.

factors, such as faculty assignments or community and administration attitudes towards the school. [90]

The court next focused on the issue of one-race schools. While such schools are not *per se* unconstitutional, their existence in a school system with a history of *de jure* segregation gives rise to a presumption that they result from discrimination.[91] The existence of one-race schools thus satisfies the plaintiff's initial burden of showing a current condition of segregation. As a result, the burden of persuasion shifts to the school system.[92] The court in *Brown*, of course, did not confront a school system in which the district maintained schools with 90+% minority student populations.[93] In 1985, however, minority students made up only 25.95% of the student population.[94]

The question then is how to determine the existence of racially identifiable schools in Topeka. The Tenth Circuit refused to focus solely on the distribution of minority students among district schools. The court stated that whatever the percentage of minority students in a school district, "[i]t is clear that a school with 90+% students of one race is a predominantly one-race school . . . whether the students at the school in question are white or minority."[95] The court's reasoning yields a straightforward rule: proof of the existence of 90+% white schools, in a school system that mandated segregation in the past, shifts to the school district the burden of proving that the existence of the essentially all-white schools is not the result of past intentional conduct.[96]

Judge Baldock, dissenting, sharply differed with the majority over this burden-shifting mechanism. In particular, the majority and dissent differed on what the plaintiff must prove to shift the burden of persuasion to the school district.[97] The dissent argued that in a former *de jure* segregated school system, the plaintiffs must "establish the *prima facie* case by proving that there is a current condition of intentional segregation, [and] that the *de jure* system or its vestiges remain or were reestablished in part of the school system."[98] The burden then shifts to the school district to prove that "segregative intent was not among the fac-

90. *Id.* at 860.

91. *Id.*

92. *Id.*

93. *See, e.g.*, Dowell v. Board of Educ., 890 F.2d 1483, 1487 (10th Cir. 1989).

94. *Brown*, 892 F.2d at 856.

95. *Id.* at 860.

96. The court further observed that, even absent racial imbalances, it may determine that schools are racially identifiable based on demography, geography, history of particular schools, and areas of the city. *Id.* at 860-61. Given the existence of 90+% white schools in Topeka, the presence of these factors in Topeka only bolstered the court's ultimate conclusion.

97. Not satisfied with demonstrating the majority's asserted error of law, however, Judge Baldock seemed intent on showing that the majority's every point, every statement, and every observation, were wrong. Judge Baldock criticized the majority for making "its own factual findings after an ad hoc evaluation of the evidence." *Id.* at 889 (Baldock, J., dissenting). Yet, he engaged in his own tedious review of the record. *Id.*

98. *Id.* at 892.

tors that motivated their actions."[99] Under Judge Baldock's approach, if the school district cannot disprove segregative intent, it may satisfy its burden by showing that "past segregative acts did not create or contribute to the current segregated condition."[100] Essentially, the dissent's proffered burden-shifting scheme entails a search for segregative intent at every level.

The majority, on the other hand, concluded that the inquiry into intent was resolved when the court initially found an equal protection violation. Consequently, the district was required to negative any connection to the previously established discriminatory intent. "Once a plaintiff has proven the existence of a current condition of segregation, the school district bears the substantial burden of showing that that condition is not the result of its prior *de jure* segregation."[101] The school district does not satisfy its substantial burden merely by showing an "absence of invidious intent," or even by showing a "firm commitment to desegregation."[102] Rather, the school district must show that it has taken steps to satisfy its affirmative duty to desegregate — it must show "*action* that in fact produces a unified school district."[103] Any action that perpetuates the dual system, therefore, violates the school district's duty to desegregate.[104]

Judge Seymour emphasized that the plaintiff need not prove that the current condition of segregation is the result of intentional segregation—that is, that the school district intended to segregate the students by race in pursuing its policies.[105] Instead, any action that perpetuates a dual system violates the school district's duty to desegregate.[106] "Where plaintiff has established segregation in the past and the present, it is 'entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants.' "[107] The court justified this approach on the basis of fairness and also found it necessary to ensure that "subconscious racial discrimination does not perpetuate the denial of equal protection to our nation's schoolchildren."[108]

There is also an institutional consideration not mentioned by the court. The school district is in the position to establish the absence of cause or connection between prior segregative conduct and a current

99. *Id.* (quoting Keyes v. School Dist. No. 1, 413 U.S. 189, 211 (1973)).
100. *Id.*
101. *Brown*, 892 F.2d at 861.
102. *Id.* at 861-62.
103. *Id.* at 862 (emphasis in original).
104. *Id.* (quoting Pitts v. Freeman, 755 F.2d 1423, 1427 (11th Cir. 1985)).
105. *Id.*
106. *Id.* at 862 (quoting Pitts v. Freeman, 755 F.2d 1423, 1427 (11th Cir. 1985)).
107. *Id.* at 863 (quoting School Bd. v. Baliles, 829 F.2d 1308, 1311 (4th Cir. 1987)).
108. *Id.* The court's use of the term "subconscious racial discrimination" has an unfortunately contentious psychoanalytic ring to it. The term conjures up a vast shared subconscious which somehow spins forth school policy through the unwitting actions or inaction of school administrators. For support, the court refers to one law review article, rather than to any evidence in the record. *See* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 327 (1987).

condition of segregation, and properly bears the burden of so doing.[109] Plaintiffs, on the other hand, typically have no meaningful access to evidence which affirmatively establishes a connection. Aside from being fundamentally fair, placing the burden on the school district comports with traditional notions of logic and efficiency in duty allocation.

The court next examined the means by which a school district can negate the cause or connection between past segregative conduct and a current condition of segregation. The passage of time alone may support the district's argument that any relationship between the two is too attenuated for one to have caused the other.[110] But the school district must also show the measures it has taken to integrate. Absent proof of affirmative action, the court will presume that the current condition of segregation results from prior intentional segregative conduct. "A showing that the school district has not promoted segregation and has allowed desegregation to take place where natural forces worked to that end is insufficient."[111] While "[n]eighborhood schools are a deeply rooted and valuable part of American education," a neighborhood school plan must be scrutinized carefully where the neighborhoods are themselves segregated, because such a plan tends to prolong the existence of segregation in schools.[112] A neutral neighborhood school plan, administered "in a scrupulously neutral manner," will not fulfill the affirmative duty to desegregate if it fails to enhance racial balance.[113] The court should also consider the school district's decision not to take certain actions that either promote or discourage segregative effects.[114] Finally, evidence of the school district's intent is important to determine how the district's actions have shaped current conditions in the school district.[115]

Beyond the absence of a cause or connection, the defendant school district must demonstrate that it has done everything feasible to achieve maximum practicable desegregation.[116] Judge Seymour warned that, while courts should be practical, they "must not let long standing racism blur their ultimate focus on the ideal."[117]

C. *A Current Condition of Segregation in Topeka*

Because the district court improperly allocated the parties' respective burdens of proof, *Brown* would seem ripe for remand.[118] After all,

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109. *Cf.* Missouri v. Jenkins, 110 S. Ct. 1651, 1654 (1990) ("Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for the problems of segregation upon those who have themselves created the problems.").
110. *Brown*, 892 F.2d at 863.
111. *Id.* at 863-64.
112. *Id.* at 864.
113. *Id.*
114. *Id.* at 865.
115. *Id.*
116. *Id.* at 866.
117. *Id.*
118. *Id.* at 890 (Baldock, J., dissenting).

the court identified an error of law that goes to the very heart of the district court's finding of facts. The majority noted that "the court focused too greatly on the school district's lack of discriminatory intent."[119] The district court's error was in "limiting the school district's burden merely to showing that it had nondiscriminatory reasons for acting as it did."[120] Not having the burden at trial to come forward with evidence negating the causal connection between its past conduct and the school district's current condition, the district did not attempt to do so. But, rather than remanding the case to allow the school district to make such a showing, the court of appeals launched into a "more specific review of the record" to determine whether the district court's finding of unitariness was clearly erroneous. The court justified this approach first by noting that "much of the record evidence consists of statistics and other undisputed facts," and second by disclaiming any reliance on disputed expert testimony. This is a troubling approach, for *Brown* is not a case in which the statistics speak for themselves. Judge Seymour conceded that this case is a close one in which "statistics alone do not appear as egregious" as in other cases.[121] But, the court nonetheless adopted the mantle of expert.

The court then turned to the conditions in Topeka to determine whether the plaintiffs had demonstrated a current condition of segregation which would shift the burden of proof to the defendants. The court first noted that in a school system such as Topeka's, where the minority student population is relatively small, the concentration of minority students is the "hallmark of discrimination."[122] The court observed that, whether measured in absolute percentage terms or measured as a function of relative deviation from district-wide minority student population, a number of schools in Topeka are racially identifiable by student assignment.[123] The court also concluded that a number of schools were racially identifiable by faculty and staff assignment.[124] Looking at these factors together, the court discerned "a clear pattern of assigning minority faculty/staff in a manner that reflects minority student assignment. This correlation is fatal to the school district's effort to show a lack of current segregation."[125] The court also found that the racial identifiability of the schools is supported by their geography, the residential population in the areas surrounding the schools, and the history of the schools.[126] For instance, the district located schools in the outlying white areas of Topeka, which were traditionally attended by almost exclusively white student populations.[127]

The presence of racially identifiable schools shifted the burden of

119. *Id.* at 867.
120. *Id.* at 868.
121. *Id.* at 867.
122. *Id.* at 869.
123. *Id.* at 870.
124. *Id.* at 871.
125. *Id.* at 872.
126. *Id.* at 873.
127. *Id.*

proof to the school district. The court held that the school district failed to meet its burden in proving the absence of a causal link between the former *de jure* segregation in Topeka and the current condition of segregation.[128] The court noted that any lessening of segregation in the school district since the initiation of the district's Four Point plan in the 1950s, which the district argued was sufficient to satisfy its duty to desegregate, was due to demographic population shifts rather than any action by the district to promote integration.[129]

The court ultimately found a causal link between the former *de jure* segregation and the current segregative condition. First, the court chronicled the desegregative efforts or lack of efforts through the decades since the Supreme Court's decision in *Brown*.[130] Next, the court looked to various individual factors that over time "most clearly demonstrate the continuing causal link between past and present segregation."[131] These factors included student and faculty/staff assignments over time, attendance boundary determinations, and the locations of schools that the district has both opened and closed over the years. Finally, the court considered a number of schools it believed illustrated the causal link.

After deciding that Topeka could do more to eradicate the effects of past segregation and segregative acts, the court recognized the district court's error in declaring the Topeka system unitary.[132] The court, though reluctant to ascribe ill motives to the school district, found fault in Topeka's failure to "actively strive to dismantle the system that existed." The court also found fault in the district's investment of "little or no thought" to the effects of its actions on the segregative characteristics that remain from the 1950s. "Where prior *de jure* segregation exists . . . we are convinced that permitting white schools and minority schools to remain racially identifiable as such without significant efforts to the contrary is in effect to permit the continuation of a dual system of education."[133]

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128. *Id.* at 874.
129. *Id.*
130. *Id.* at 874-77.
131. *Id.* at 877.
132. *Id.* at 886.
133. *Id.* The court also reversed the district court's holding that the school district did not violate section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and 34 C.F.R. § 100.3(b). The court concluded that the same actions or inactions that violated the equal protection clause also violated Title VI. The court affirmed the district court's grant of summary judgment in favor of the Governor of Kansas on both the constitutional and Title VI claims, and the court's finding that the State Board of Education was not responsible for racial conditions in the school district. The state constitution granted him no authority to remedy the circumstances existing in the Topeka school district. *Id.* at 887. Nor did the plaintiff show that the State Board of Education had the power to act to remedy the constitutional regulations. *Id.* at 888. Kansas statutes authorized only the local school board to take the actions necessary to remedy the current condition of segregation in Topeka. *Id.*

IV. *Dowell v. Board of Education*

The Supreme Court has granted certiorari in *Dowell v. Board of Education*,[134] and in reviewing the decision may for the first time map out the steps necessary to terminate federal jurisdiction. Thus, *Dowell* may be associated with the close of the desegregation era, as *Brown* is associated with its birth, and *Keyes* with its maturity.[135]

A. *Background*

The unusual procedural context in which the district court decided *Dowell* distinguishes it from *Keyes* and *Brown*. The district court declared the Oklahoma City School District unitary in 1977, but did not terminate jurisdiction over the case at that time. When the school district implemented a new student assignment program in 1984, the plaintiffs moved to reopen the case.[136] The plan resulted in dramatic racial imbalances in the elementary schools: eleven of the sixty-four elementary schools enrolled 90+% black student populations, and twenty-one enrolled 90+% non-black student populations.[137] In the district as a whole, whites comprised 47% of the student population, blacks comprised 40%, and nonblack minorities comprised 13%.[138]

In 1985, the plaintiffs filed a motion to intervene and to reopen the case. This occurred after the school board adopted the Student Reassignment Plan ("the Plan"), without first seeking court approval.[139] Although the subsequent hearing was ostensibly limited to the issue of whether the intervenors could reopen the case and intervene, the court considered numerous substantive issues, including the constitutionality of the Plan.[140] The district court dissolved the 1972 decree and terminated jurisdiction over the case.

The Tenth Circuit reversed on appeal, holding that the court abused its discretion in failing to reopen the case and in prematurely reaching the merits of the Plan's constitutionality.[141] The court's mandate to the district court on remand was quite specific. The court found that once the plaintiffs proved that the defendants violated the 1972 mandatory order by adopting the Plan, the burden shifted to the defendants to prove either that changed conditions required modification of

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134. 890 F.2d 1483 (10th Cir. 1989).

135. *See* Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1057-1102 (1978).

136. *Id.* at 1486.

137. *Id.* at 1487.

138. *Id.* at 1495 n.30. The plan affected only elementary schools; student populations in grades five through twelve were undisturbed. These circumstances contrast ironically with those in *Brown*, in which the original plaintiffs attacked segregation in the elementary schools of Topeka, Kansas. The junior high and high schools were not subject to *de jure* segregation. Only in the most recent proceedings did the intervenor-plaintiffs attack the condition of segregation in those schools. *See supra* text accompanying notes 64-72.

139. *Id.* at 1486.

140. *Id.* at 1487.

141. *See* Dowell v. Board of Educ., 795 F.2d 1516, 1523 (10th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986).

the order or that the facts or law no longer required the enforcement of the order.[142]

The Tenth Circuit in 1986 expressly declined to consider the issue of the Plan's constitutionality. Instead, the court confined remand to a determination of whether the order would be enforced or whether and to what extent it would be modified.[143] The eight-day hearing on remand focused largely on the issue of whether substantial demographic changes in the Oklahoma City School District rendered inequitable and oppressive the desegregation plan under the prior order.[144]

At issue was the 1972 decree, which required the school district to comply with the Finger Plan in making student assignments.[145] Under the Finger Plan, black elementary school students in grades one through four were bussed to previously all-white elementary schools. Moreover, white fifth-grade students were bussed to "fifth year centers" located in previously black elementary schools.[146] A number of "stand-alone" schools, located in racially balanced neighborhoods, served as neighborhood elementary schools not subject to bussing.[147]

The Finger Plan was in effect until the board adopted the Student Reassignment Plan for the 1984-85 school year.[148] The Plan assigned all students in grades one through four to their neighborhood schools, thereby eliminating compulsory bussing of those students entirely.[149] The Plan also provided several features, such as a "majority-to-minority" transfer option. This option was implemented to prevent inequities in the neighborhood school approach.[150] The fifth year centers, middle schools, and high schools continued to maintain racial balance through bussing under the Plan.[151] In the sixty-four elementary schools subject to the Plan, however, blacks comprised 90+% of the student population in eleven district schools, and less than 10.7% in 21 others.[152]

The court considered a demographic analysis of the school district population, the history of the Plan's preparation and adoption, the views of the various community members on issues relating to the Plan, and the numerous programs the district adopted to promote contacts between black and white students in grades one through four. The district defended the neighborhood schools program on the bases that it promoted parental involvement in the elementary schools, and that it avoided subjecting children to long bus rides in the morning. Moreover, the district stated that "educationally, it is better for a child to have

142. *Id.*
143. *Id.*
144. *Id.* at 1487-88.
145. *Id.* at 1486 & n.1. The Finger Plan was named for its author Dr. John A. Finger, Jr., a Rhode Island College Professor of Education.
146. *Id.* at 1486.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 1487 & n.2.

a family nearby."[153]

Ultimately, the district court concluded that demographic changes rendered the Finger Plan inequitable because black students in the first through fourth grades would have to travel longer and longer distances to attend integrated schools as new areas of the district qualified for stand-alone status. According to the district court, these demographic changes were legitimate, nondiscriminatory factors that motivated adoption of the Plan. The Plan, in the school district's view, effectively maintained a unitary district while promoting increased parental and community involvement in the schools.[154] Accordingly, the court dissolved the 1972 decree mandating compliance with the Finger Plan.[155]

B. *Modifying Court-Ordered Desegregation Plans*

Constrained by a prior panel's decision in review of the district court's decision, Judge Moore, writing for the majority, resorted to well-established black letter law regarding modification of injunctions.[156] The court embraced the standard enunciated in *United States v. Swift & Co.*,[157] which required "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" to justify modifying an injunction. *Swift*'s exacting standard recognizes that modification based on anything less than a compelling showing of change would allow the parties to repeatedly assault the injunction. In effect, the parties could reverse the judgment of the trial court based on evidence unavailable or not presented when the court made its decision. The court also considered "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow."[158]

> [T]o pass muster under this test, the party seeking relief from an injunctive decree 'must demonstrate dramatic changes in conditions unforeseen at the time of the decree that both render the protections of the decree unnecessary to effectuate the rights of the beneficiary and impose extreme and unexpectedly oppressive hardships on the obligor.'[159]

Judge Baldock, dissenting, took issue with the court's reliance on *Swift*. He stated that "principles specifically concerning the process of desegregation have been enunciated by the Supreme Court."[160] First, the dissent distinguished *Swift* and the other injunction cases relied upon by the majority, noting that those cases involved injunctions which

153. *Id.* at 1488.

154. *Id.* at 1489. The court also rejected the plaintiff's alternative plan, the Foster Plan, as unnecessary and not feasible.

155. *Id.*

156. *See id.* at 1489-91.

157. 286 U.S. 106, 119 (1932).

158. *Dowell*, 890 F.2d at 1490 (quoting *Swift*, 286 U.S. at 119).

159. *Id.* (quoting Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1110 (1986)).

160. *Id.* at 1513 (Baldock, J., dissenting).

forbade or limited only private commercial conduct.[161] The dissent further pointed out that different considerations may apply when a court decides whether to modify prohibitory injunctions from when a court considers modification of a primarily mandatory injunction involving complex affirmative duties.[162] Finally, the dissent stated that desegregation decrees typically contemplate modification as circumstances change, and that the *Swift* standard deprived the court and school district of the "practical flexibility" contemplated by the Supreme Court where a school district is seeking to establish a racially nondiscriminatory school system.[163]

Judge Baldock's criticism echoes the late Judge Friendly of the Second Circuit, who rejected a rigid interpretation of *Swift* in *King-Seeley Thermos Co. v. Aladdin Industries*,[164] opting instead for an approach that allowed the trial court to rely on the parties' experience under the decree:

> While changes in fact or in law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes.[165]

The Second Circuit has since employed this more flexible standard in institutional reform litigation that requires ongoing judicial supervision.[166] Judge Baldock's proffered approach differs from the Second Circuit approach in that it would turn on the type of case in which the injunction was entered, and might have the unfortunate effect of creating a patchwork doctrine under which dubious and legalistic distinctions between cases determine whether injunctions should be modified.

Whatever the merits of the dissent's position, the Tenth Circuit has yet to adopt a more flexible modification standard, and a prior panel determined the setting within which the majority had to reach its decision. The prior holding in *Dowell* specifically framed the issue on remand in terms of the showing necessary under Federal Rule of Civil Procedure 60(b) to justify modification or dissolution of the injunction. It was a decision rendered under this mandate from which the plaintiffs appealed.[167]

Having set forth the standard, the court established a threshold showing that must be satisfied in order to establish entitlement to a modification of the injunction. The "condition that eventuates as a

161. *Id.* at 1514 (quoting Spangler v. Board of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)).
162. *Id.* at 1515.
163. *Id.* (quoting *Brown II*, 349 U.S. at 300-01).
164. 418 F.2d 31 (2d Cir. 1969).
165. *Id.* at 35. Though *King-Seeley* concerned a consent decree, it relied heavily on Justice Fortas' opinion in United States v. United Shoe Machinery, 391 U.S. 244, 248 (1968), which involved a litigated decree.
166. Kozlowski v. Coughlin, 871 F.2d 241, 247 (2d Cir. 1989); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 970 (2d Cir. 1983).
167. *Dowell*, 890 F.2d at 1487 & n.5.

function of the injunction cannot alone become the basis of altering the decree absent the *Swift* showing,"[168] nor can compliance alone satisfy the *Swift* showing.[169] The school district must establish by clear and convincing evidence either that the conditions which led to the original decree no longer exist, or that the condition the order sought to alleviate has been eradicated.[170] Any change of conditions must go to the very heart of the purpose of the decree to justify its modification.[171]

Under the majority's approach, a declaration of unitariness plays little role in determining whether the decree should be modified. At most, a declaration of unitariness addresses the goal of the injunctive relief — the elimination "root and branch" of racial discrimination enforced through a dual school system.[172] Consequently, the district, even if unitary, must show a substantial change in the circumstances which led to the issuance of the decree, in order to justify the dissolution of the decree.[173]

C. *Changed Conditions in Oklahoma City*

No one disputed that the board's adoption of the Plan violated the express terms of the 1972 decree.[174] A prior panel held that the board's action, in violating the decree, opened the door for the plaintiffs to challenge "the presumptions premised in the declaration of unitariness."[175] The court held that the emergence of thirty-two "one-race majority" elementary schools, out of a total sixty-four elementary schools, "not only establishes a *prima facie* case that the decree has been violated and the presumption of unitariness challenged, but also satisfies plaintiffs' burden in reopening and shifts the burden to defendants to produce evidence of changed circumstances or oppressive hardship."[176]

The board sought to satisfy its "heavy burden" of showing that the Plan would not perpetuate or reestablish a dual school system by demonstrating that substantial demographic changes established conditions, unforeseen at the time of the decree's entry, which created hardships so "extreme and unexpected" as to render the decree oppressive.[177] The court agreed that the board showed substantial changed circumstances, but concluded that the school district failed to establish that the dangers to which the decree was directed had disappeared.[178]

168. *Id.* at 1490.
169. *Id.* at 1491.
170. *Id.* (distinguishing Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437-38 (1976)).
171. *See id.* at 1492. Though it should seem obvious from this course of analysis, the intent of the parties in proposing changes in the decree or adopting changes that violate the decree has little or no relevance.
172. *Id.* at 1491.
173. *Id.* at 1492.
174. *Id.* at 1492-93.
175. *Id.* at 1493 (quoting *Dowell*, 795 F.2d at 1522).
176. *Id.*
177. *Id.*
178. *Id.*

Essentially, the school board sought to show that at the time the decree was entered, most blacks lived in the inner-city areas of Oklahoma City, but that in intervening years, many blacks moved from the inner city to the north, east and south portions of Oklahoma City, thereby lengthening the bus ride for black elementary school students. The court scrutinized the district's evidence, including the district's study of the population movement within seven inner-city tracts, including the district's study identifying "substantial turnover" in the black inner-city population of Oklahoma City.[179]

The plaintiffs attacked the district's study as too narrowly focused. The plaintiffs claimed that the study failed to consider either predominantly black neighborhoods just to the north of the study area, or the effects of highway construction that forced a portion of the population out of the study area. Moreover, while the district established population turnover within the tracts studied, it failed to distinguish between those who moved within the neighborhood and those who moved from the neighborhood to other parts of the city.

The court also considered the parties' conflicting evidence on the impact of bussing elementary school children.[180] Obviously, demographic changes in the school district would be of less import if the distance the district bussed students had no effect on their education. The school district offered evidence that black children who were bussed to school tested lower than those who attended neighborhood schools.[181] The district also argued that bussing had an adverse emotional impact on the child.[182] Again, the plaintiffs attacked substantial deficiencies in the district's study, including the study's failure to take into account socioeconomic differences between the children bussed and the children attending school in their neighborhoods.[183]

The court concluded that the substantial body of conflicting evidence in the case pointed to differing explanations and potential solutions, but that the most significant uncontradicted evidence in the record was the emergence of lopsided enrollment patterns in the elementary schools. "Of the approximately 6,464 black students attending the District's elementary schools K-4, 2,990, or 46.2% of all black elementary schoolchildren in the District attend the eleven 90%+ black elementary schools."[184] The conflicting evidence in the record simply failed to satisfy the district's heavy burden of justifying such a condition of racial imbalance.

The court also rejected the district's argument that the stand-alone schools' emergence under the Finger Plan created an extreme and unexpected hardship that justified modifying or dissolving the decree. The

179. *Id.* at 1494.
180. *Id.* at 1496.
181. *Id.*
182. *Id.*
183. The court also considered racial balance, racial contact indices (such as the "dissimilarity index"), and census data.
184. *Id.* at 1497.

district argued that as elementary schools in racially balanced neighborhoods became stand-alone schools, black children who had been bussed to those schools were bussed even farther to attend elementary school.[185] Because stand-alone schools offer kindergarten through fifth grade classes, their growth shrinks the pool of students for fifth-grade centers located in black communities. Consequently, these centers would have to close. The court concluded, however, that the emergence of stand-alone schools is hardly inevitable. Indeed, eight of the original stand-alone schools which opened in 1972 have lost their stand-alone status. Other schools entitled to stand-alone treatment were not designated as such because of capacity problems, budget constraints, and local politics.[186]

D. *The Failures of the Student Reassignment Plan*

Though the evidence of changed circumstances failed to convince the court that the decree should be modified, the court was convinced that the Finger Plan mandated by the decree should be modified.[187] The court's order contemplated changes in the Finger Plan from the beginning, requiring only that the school board obtain prior court approval before altering or deviating from the Plan.[188] The court examined the Plan to determine whether it "encompasses the changed circumstances and maintains the continuing prospective effect of the decree," in which case dissolution of the decree would be appropriate.[189] As framed by the court, the central question was whether the Plan relieved the effects of changed circumstances and potential hardship or whether it made the district "un-unitary" by reviving effects of past discrimination.[190] The court utilized three factors to determine whether the Plan maintained unitariness in student assignments—the number of racially identifiable schools that emerged under the Plan, the school officials' good faith in the desegregation effort, and whether the district had attained the "maximum practicable desegregation of student bodies at the various schools."[191]

The court of appeals expressed its concern that implementation of the Plan "has the effect of reviving those conditions that necessitated a remedy in the first instance."[192] The district court had concluded that even though the Plan created one-race schools, it did not violate the equal protection clause unless the board adopted it with discriminatory intent. The district court had also dismissed racially identifiable faculty assignments as the product of teacher preference and seniority policies, and had relied on the district's projection that it would soon bring ele-

185. *Id.*
186. *Id.* at 1498.
187. *Id.*
188. *See* Dowell v. Board of Educ., 338 F. Supp. 1256, 1273 (W.D. Okla. 1972).
189. *Dowell*, 840 F.2d at 1499.
190. *Id.*
191. *Id.*
192. *Id.*

mentary faculties into racial balance. The majority instead focused on evidence in the record that racial imbalances in faculty assignments were becoming more rather than less pronounced. Predominantly black elementary schools were increasingly staffed by predominantly black faculties.[193]

The majority doubted the efficacy of the Plan's majority-to-minority transfer option. Few parents knew of the option, which was also subject to the capacity limitations of transferee schools. Thus, even if parents were aware of the transfer option, their child might not obtain a space in the parents' preferred school. Nor did the majority credit other features of the Plan, such as the Effective Schools, Student Interaction, and Adopt-A-School programs, which focused respectively on improving test score performances, bringing together students of different races from different schools, and raising private funds for educational purposes. The court concluded that the Equity Committee and Equity Officer established under the Plan were ineffective to achieve meaningful equality among the elementary schools because of limitations on the officials' discretion to make substantial expenditures. These programs, the court concluded, were merely "cosmetic trappings" that impeded the district's ability to achieve unitary status.[194]

Finally, the court concluded that the district court erred in focusing on the issue of whether the board adopted the Plan with discriminatory intent. The court found that the district court invited incompetent evidence through its persistent inquiries of witnesses, lay and expert, whether they believed the Plan was adopted with discriminatory intent.[195]

The district court misperceived the inquiry mandated by *Swann* in determining whether the Plan achieved or maintained unitary status. The district court was obligated to determine whether the Plan counteracted the continuing effects of past school segregation. The court looked to the Plan's effectiveness in maintaining unitary status, and concluded that the Plan failed.[196] Accordingly, the court directed the district court, on remand, to modify the Finger Plan in order to accommodate the changed circumstances, maintain racially-balanced elementary schools, and assure that faculties achieve racial balance.[197]

V. Conclusion

The two chess players with whom we began characterize the frustration and uncertainty that often attend school desegregation litigation. Lack of a clearly defined goal encourages gamesmanship and intransigence, and often pits one group in the community against another. The three recent Tenth Circuit cases provide no answers to the player's

193. *Id.* at 1500.
194. *Id.* at 1504-05.
195. *Id.* at 1502-03.
196. *Id.* at 1504.
197. *Id.* at 1505-06.

quandary. There can be no single definition of checkmate for desegregation purposes because there is no single game. Every board differs in size and shape, and every game has different pieces with different functions. Indeed, there rarely are only two players, but rather usually four or five or more. Ultimately, Denver is not Pasadena, nor is it Topeka or Oklahoma City.

The Tenth Circuit has provided direction. For instance, a school district is no more entitled to declaration of unitariness for achieving racial balance in a given percentage of its schools, as the court showed in *Keyes*, than a member of the student population is entitled to a given racial balance in her school. Nor does strict compliance with a court-ordered plan satisfy the district's duty to desegregate if the plan itself is not complete in its terms. The district's duty is to desegregate, not to comply with fixed desegregation rules.

The courts in *Brown* and *Dowell*, while disdaining rigid rules for determining unitary status, are more concerned with the mechanics of litigating the question. To this extent the court strengthens the hand of plaintiffs by declining to compel them to prove intentional discrimination in every challenged act of the school district. The court also looks to a broad array of factors to determine the district's status, moving away from a focus on student racial composition as the nearly exclusive measure of a district's efforts. In sprawling prairie towns like Topeka and Oklahoma City, the location and construction of new schools, and the annexation of new areas may play nearly as large a role in the unitariness determination as student racial composition.

Finally, these three cases could well have political ramifications at the local level. Those officials who have persistently resisted school desegregation often have undermined attempts to fashion a complete remedy, forcing the courts to order provisional measures. It seems clear now that compliance with such measures, for however long, cannot ensure that the districts will be deemed unitary. Those most opposed to a federal presence in school administration may have unwittingly helped prolong it.