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School Desegregation: Progress or Regression - Freeman v. Pitts

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SCHOOL DESEGREGATION: PROGRESS OR REGRESSION?

Freeman v. Pitts,
112 S. Ct. 1430 (1992)

Patricia D. Green

I. INTRODUCTION

Our nation is constantly faced with the problems of racial discrimination. One area in which this discrimination is particularly troublesome is public education. Certainly, no one can deny that all children, regardless of race, deserve equal educational opportunities in this nation. Nor does anyone doubt the validity of the Supreme Court's requirement in *Brown v. Board of Education*[1] that school systems eliminate the effects of past racial discrimination. However, exactly what is meant by this directive and how it is to be accomplished has been the subject of much debate.[2]

Freeman v. Pitts[3] is the latest in a long line of Supreme Court cases dealing with the desegregation of our nation's public schools.[4] It comes at a time when more people than ever are confused as to what is required by the Equal Protection Clause of the Fourteenth Amendment. Thus, the holding of this case, while remaining consistent with the holdings in the cases preceding it, gives some new insight into what is required by the mandate in *Brown* and into what the future might hold for the many school districts still subject to desegregation orders.

II. FACTS

A. Past Litigation

DeKalb County School System (DCSS) is one of many school districts throughout the nation affected by the Supreme Court's mandate in *Brown v. Board of Education*.[5] Like many school systems nationwide, the district's response to this order was both slow and inadequate.[6] In fact, DCSS was segregated by law until 1966 when it adopted a freedom-of-choice plan which allowed its students to choose the school they wanted to attend.[7]

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

2. *See infra* notes 41-257 and accompanying text.

3. 112 S. Ct. 1430 (1992).

4. *See infra* notes 41-257 and accompanying text.

5. *Freeman*, 112 S. Ct. at 1436. The Supreme Court in *Brown v. Board of Education* found that segregation of public schools based on race violated the Fourteenth Amendment, 347 U.S. 483, 495 (1954), and ordered the school systems to do away with this practice "with all deliberate speed." *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

6. *Freeman*, 112 S. Ct. at 1436.

7. *Id.*

However, when the Supreme Court determined in 1968 in *Green v. County School Board*[8] that such freedom-of-choice plans did not adequately address the problem of segregation, the school district was required to take further action.[9] At this point, students filed a class action in the district court against DCSS.[10] In response to this class action, DCSS voluntarily began investigating what measures should be taken to desegregate the school district.[11] This investigation led to a consent order in which DCSS agreed to close all of its minority schools and reassign all of its students.[12]

DCSS made much progress pursuant to this consent order, and little judicial intervention was required.[13] However, DCSS continued to have difficulties with its minority to majority ("M-to-M") program which allowed students who were in the majority at their assigned school to transfer to a school where they were in the minority.[14]

B. Present Litigation

In 1986 DCSS petitioned the court for dismissal of the class action along with a finding that the school district was unified.[15] In considering whether DCSS was unitary, the district court looked to the essential factors named in *Green* as well as to the quality of education available to black students as compared with white students.[16]

The district court called DCSS "'an innovative school system that has travelled the often long road to unitary status almost to its end.'"[17] The court also determined that DCSS was unified except with respect to teacher assignments, allocation of resources and quality of education.[18] Thus, the district court determined that further relief would be ordered only in the areas found not to be unified.[19]

On appeal, the United States Court of Appeals for the Eleventh Circuit overruled the district court's determination that DCSS was unified in certain aspects, stating that all *Green* factors should be considered together.[20] It further stated that in order to achieve unitary status, a school system must comply with all *Green* factors for many years.[21] Upon granting *certiorari*, the Supreme Court reversed the decision of the court of appeals, stating that the district court did indeed have the

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8. 391 U.S. 430 (1968).
9. *Freeman*, 112 S. Ct. at 1436.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1437.
14. *Id.*
15. *Id.*
16. *Id.* The factors named in *Green* are: "faculty, staff, transportation, extracurricular activities and facilities." Green v. County Sch. Bd., 391 U.S. 430, 435 (1968).
17. *Freeman*, 112 S. Ct. at 1437 (quoting App. to Pet. for Cert. 71a).
18. *Id.* at 1437.
19. *Id.*
20. *Id.* at 1442.
21. *Id.*

authority to dismiss this suit in increments.[22] It then remanded the case to the court of appeals for further consideration of whether DCSS had fully complied with its good faith obligation to desegregate.[23]

III. HISTORY

The fight for racial equality in public education began with the now famous Supreme Court decision *Brown v. Board of Education.*[24] *Brown* consolidated four similar cases from different states in an effort to address the growing problem of segregation by law or *de jure* segregation.[25] Each of these cases dealt with local statutes which either required or allowed public schools to segregate their students by race.[26] While in some cases the separate schools were found to be operated unequally, all but one of these cases upheld the validity of these statutes based on the Supreme Court's ruling in *Plessy v. Ferguson.*[27]

However, *Brown* squarely confronted *Plessy's* "separate but equal" doctrine, and the Supreme Court held that any school system segregated by law could not be considered equal.[28] In past cases, the Court had considered only whether minority schools and white schools were equal in all aspects.[29] In *Brown,* however, the Court stated that "[w]e must look instead to the effect of segregation *itself* on public education."[30]

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22. *Id.* at 1443.

23. *Id.* at 1450.

24. 347 U.S. 483 (1954). *See also* Brown v. Board of Educ., 349 U.S. 294 (1955).

25. *Brown,* 347 U.S. at 486-88 & n.1. In *Brown,* minority students brought suit in federal district court in an effort to prevent the state of Kansas from enforcing a statute allowing segregation by race in its public schools. *Id.* at 486 n.1. The district court had denied an injunction, stating that the black schools were equal in most respects to the white schools. *Id.*

The facts in *Briggs v. Elliott* and *Davis v. County School Board* were substantially similar to the situation in *Brown* except that the statutes involved *required* segregation by race. *Id.* at 486-87 n.1. Here, however, the district court found that the minority schools were not of the same quality as the white schools. *Id.* As a result, the court ordered the school system to take immediate measures to make the minority schools equal to the white schools. *Id.* However, the court found the statutes themselves to be valid and refused to allow minority students to attend the white schools during the equalization process. *Id.*

In *Gebhart v. Belton,* minority students brought suit to prevent enforcement of a statute in Delaware which also required segregation by race. *Id.* at 487-88 n.1. In this case, however, the court determined that the minority schools were inferior and ordered the district to enroll the minority students in the white schools. *Id.* The court further determined that segregation itself created inferior schools. *Id.*

26. *Brown,* 347 U.S. at 487-88.

27. *Id.* at 488. In *Plessy v. Ferguson,* 163 U.S. 537 (1896), the Court addressed the question of whether railroad companies could segregate their passengers by race. *Id.* at 540. In *Plessy* a man was forced off of a train and jailed for sitting in the "white" section of the train pursuant to a statute which allowed for segregation by race. *Id.* at 541-42. In that case, the Supreme Court considered whether the statute violated the Fourteenth Amendment. *Id.* at 543. In determining that the statute did not violate the Fourteenth Amendment, the Court stated:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Id. at 551. The Court concluded by stating that "[i]f the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." *Id.* at 551-52.

28. *Brown,* 347 U.S. at 493.

29. *Id.* at 491-92.

30. *Id.* at 492 (emphasis added).

In looking into the effects of segregation on minority students, the Court said that "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[31] This attitude led to the finding that "[s]eparate educational facilities are inherently unequal."[32] Thus, the Court found that maintaining separate educational facilities based on race violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[33] The Court then ordered further inquiry in order to determine an appropriate remedy for this constitutional violation.[34]

This further inquiry led to yet another *Brown v. Board of Education* (*"Brown II"*).[35] In *Brown II,* the Court determined that supervision of the desegregation of the nation's public schools should fall into the hands of the district courts which "[b]ecause of their proximity to local conditions and the possible need for further hearings . . . [could] best perform this judicial appraisal."[36]

The Supreme Court continued by recognizing the difficulties involved in such massive overhaul of the public schools.[37] Therefore, it ordered that desegregation be effectuated "as soon as practicable."[38] The school districts were left with a final order—to comply with the directives of *Brown II* "with all deliberate speed."[39]

Since *Brown* and *Brown II,* state school systems have taken drastic measures in attempting to avoid compliance with the mandates of the Supreme Court.[40] For instance, in *Goss v. Board of Education,*[41] the local school system incorporated into its desegregation plan a transfer program which allowed any students who were in the minority at their assigned school to transfer to another school where they would be in the majority.[42] Plaintiffs in this case contended that this transfer program ran counter to *Brown* in that it was based only on the students' race.[43]

The Court in *Goss* found that the transfer program violated the Equal Protection Clause of the Fourteenth Amendment.[44] It stated further that the transfer program "lends itself to perpetuation of segregation."[45] This program was struck down because its effect was to promote segregation rather than to prohibit it.[46]

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31. *Id.* at 494.
32. *Id.* at 495.
33. *Id.*
34. *Id.* at 495-96 (footnote omitted).
35. 349 U.S. 294 (1955).
36. *Id.* at 299.
37. *Id.* at 300.
38. *Id.*
39. *Id.* at 301.
40. *See infra* notes 41-74 and accompanying text.
41. 373 U.S. 683 (1963).
42. *Id.* at 684.
43. *Id.* at 684-85.
44. *Id.* at 689.
45. *Id.* at 686.
46. *Id.* at 688.

Perhaps the most blatant attempt to avoid school desegregation, however, may be found in *Griffin v. County School Board.*[47] After *Brown* required Virginia to take steps to desegregate its public schools, the state was reluctant to comply with this mandate.[48] In an attempt to avoid school desegregation, the state in 1956 amended its constitution to allow funds to be given to students attending non-religious private schools.[49] The General Assembly then closed all public schools attended by both white students and minority students.[50] However, the Virginia Supreme Court found this legislation to be unconstitutional.[51] Further attempts to avoid desegregation led to the implementation of a "freedom-of-choice" plan and to the repealing of the laws requiring school attendance. This allowed each school district to choose whether to require attendance.[52]

In response to this legislation and as a result of a Fourth Circuit decision requiring Prince Edward County to desegregate,[53] the county refused to open its public schools.[54] Private schools were made available for the white students in the county, but the minority students rejected offers to open a private school for them.[55] After 1960, these private schools were largely funded by the tuition grant program adopted by the General Assembly.[56]

Thus, in 1961 minority students sought a court order preventing the county from paying these funds.[57] The district court ordered the county to stop giving tuition grants until the public schools reopened but abstained from deciding whether the schools could remain closed, leaving this decision for the state court.[58] However, prior to the state court's decision on this matter, the district court later held that "'the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers.'"[59] Subsequently, the county supervisors filed a suit for declaratory judgment asking the district court to allow the state courts to make their decision before ruling.[60] The district court again refused to abstain.[61]

On appeal, however, the United States Court of Appeals for the Fourth Circuit reversed this decision, stating that "the District Court should have abstained to await state court determination of the validity of the tuition grants and tax credits,

47. 377 U.S. 218 (1964).
48. *Id.* at 221.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 221-22.
53. *See* Allen v. County Sch. Bd., 266 F.2d 507, 511 (4th Cir. 1959).
54. *Griffin*, 377 U.S. at 222-23.
55. *Id.* at 223.
56. *Id.*
57. *Id.* at 224.
58. *Id.*
59. *Id.* (quoting Allen v. County Sch. Bd., 207 F. Supp. 349, 355 (E.D. Va. 1962)).
60. *Id.* at 225.
61. *Id.*

as well as the validity of the closing of the public schools."[62] The Supreme Court subsequently granted *certiorari* "in view of the long delay in the case . . . and the importance of the questions presented."[63]

In determining whether the actions of the district court were proper, the Supreme Court looked to various procedural matters not important to this discussion.[64] The Court then turned to the question of whether closing the public schools denied the minority students their Fourteenth Amendment rights.[65] While the Court held that the Equal Protection Clause did not require Virginia's counties to be treated the same,[66] it further looked to the effect that closing the county's public schools had on minority students.[67] The Supreme Court then stated, "[w]hatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional."[68] Thus, the Supreme Court held this action to be a violation of the Equal Protection Clause.[69]

The Court next considered what remedies would be appropriate for this violation.[70] In so doing, the Court found that the district court did indeed have the authority to prevent the school district from paying tuition grants.[71] It went even further, however, stating that "the District Court may . . . require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County."[72] The Court concluded by stating that "[t]he time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying . . . constitutional rights to an [equal] education."[73] Thus, the Court reversed the

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62. *Id.* (citing Griffin v. Board of Supervisors, 322 F.2d 332 (4th Cir. 1963)).

63. *Id.* (quoting Griffin v. Board of Supervisors, 375 U.S. 391, 392 (1963)).

64. First, the Supreme Court addressed the question of whether the supplemental pleading filed in 1961 was in reality a new cause of action. *Griffin*, 377 U.S. at 226. The Court stated that the complaint "was not a new cause of action but merely part of the same old cause of action arising out of the continued desire of colored students in Prince Edward County to have the same opportunity . . . afforded to white people." *Id.*

Further, respondents argued that when the original case decided with *Brown* was remanded to the district court, it was in violation of 28 U.S.C. § 2281 that only a single judge took jurisdiction rather than the original panel of three judges. *Id.* at 227. The Supreme Court ruled, though, that the three judge panel need only preside over cases affecting the general public and not those cases affecting a specific district. *Id.* at 228.

The respondents further argued that this suit was barred by the Eleventh Amendment. *Id.* However, the Court reiterated that injunctions against state officials were not barred by the Eleventh Amendment. *Id.* (citing *Ex parte* Young, 209 U.S. 123 (1908)).

The final procedural issue addressed by the Court was whether the district court should have abstained from this question. *Id.* In determining that this case was not one for abstention, the Court stated that "[t]here has been entirely too much deliberation and not enough speed in enforcing the constitutional rights." *Id.* at 229.

65. *Griffin*, 377 U.S. at 230.

66. *Id.*

67. *Id.* at 230-31.

68. *Id.* at 231.

69. *Id.* at 232.

70. *Id.*

71. *Id.*

72. *Id.* at 233.

73. *Id.* at 234.

judgment of the court of appeals and remanded the case to the district court to do whatever necessary to guarantee minority students an equal education.[74]

The next step in the long road toward racial desegregation led to the decisions in both *Green v. County School Board*[75] and *Raney v. Board of Education.*[76] *Green* was the first Supreme Court case to consider the effectiveness of "freedom-of-choice" plans where students were required each year to determine for themselves which school they would attend.[77]

In 1965 minority students in Virginia brought suit against the county to order the school district to desegregate.[78] Prior to *Brown*, the New Kent County Schools were segregated by law, with the white students attending one public high school and the minority students attending a separate public high school.[79] This was true despite the fact that there existed no residential segregation throughout the county.[80]

After *Brown* made *de jure* segregation unlawful, Virginia made many attempts at bypassing this requirement.[81] One such attempt included the Pupil Placement Act[82] which required that school age children be reassigned to whatever school they had attended the year before.[83] However, any student could apply to attend another school.[84] Up to September 1964 no students had requested a transfer.[85]

In 1965 the school board asked the court to dismiss the preceding suit because the minority students had not requested to be transferred to the "white" school.[86] Later, however, the school board voluntarily instituted what it called a "freedom-of-choice" plan in an effort to desegregate its schools.[87] This plan enabled students to choose each year which school they wanted to attend.[88] If any student failed to choose between the schools, he or she was reassigned to his or her previous school.[89] A later amendment to this plan also addressed racially nondiscriminatory staff and teacher placement.[90] This plan, as amended, was approved by the district court, and part of that decision was affirmed by the court of appeals which ordered the district court to determine a provision for the teachers "'which is much more

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74. *Id.*
75. 391 U.S. 430 (1968).
76. 391 U.S. 443 (1968).
77. *Green*, 391 U.S. at 431-32.
78. *Id.* at 432.
79. *Id.*
80. *Id.*
81. *Id.* at 432-33.
82. VA. CODE §§ 22-232.1 *et seq.* (1964).
83. *Green*, 391 U.S. at 433.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* The school board did so to remain eligible for financial assistance from the federal government. *Id.*
88. *Id.* at 433-34.
89. *Id.* at 434.
90. *Id.*

specific and more comprehensive.'"[91] The Supreme Court subsequently granted *certiorari*.[92]

In considering the adequacy of the "freedom-of-choice" plan in ending segregation by law, the Supreme Court stated that it would be necessary to look to five areas in determining whether the effects of *de jure* segregation had been eliminated.[93] These five areas included: "faculty, staff, transportation, extracurricular activities and facilities."[94] The Court further stated that the directives of *Brown II* were only the first step toward eliminating *de jure* segregation.[95] It continued saying that "open[ing] the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system."[96]

The Supreme Court interpreted *Brown II* as placing an "affirmative duty" to eliminate all evidence of racial discrimination.[97] It further found it to be the obligation of the district courts to maintain jurisdiction over the various segregation cases until the school boards could be shown to be acting in good faith in attempting to desegregate their school systems.[98] It then ordered the district court to "retain jurisdiction until it is clear that state-imposed segregation has been completely removed."[99]

Turning to the issue of the adequacy of the "freedom-of-choice" plan itself, the Court said:

> We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself.[100]

The Court concluded its inquiry by finding that, as the school system in question was still a "dual system," the "freedom-of-choice" plan could not be considered a sufficient step toward the elimination of segregation by race in this public school system.[101] Since the plan in reality placed the burden *Brown II* had put on the school district into the hands of the children and their parents, the Supreme Court ordered the school board to revise its plan to make it one that might realistically work.[102]

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91. *Id.* at 434-35 (quoting Bowman v. County Sch. Bd., 382 F.2d 326, 329 (4th Cir. 1967)).
92. *Id.* at 435. *See* Green v. County Sch. Bd., 389 U.S. 1003 (1967).
93. *Id.* at 435.
94. *Id.*
95. *Id.* at 436.
96. *Id.* at 437.
97. *Id.* at 437-38.
98. *Id.* at 439.
99. *Id.*
100. *Id.* at 439-40.
101. *Id.* at 441.
102. *Id.* at 441-42.

The facts in *Raney*, a case decided on the same day, are very similar to those in *Green*.[103] One difference, however, was the fact that minority students in *Raney* had applied to attend the "white" school.[104] Since applications to that school had exceeded the space available in it, several of these minority students' applications were denied.[105] These students subsequently filed suit against the school district to be permitted to attend the school of their choice.[106] The district court denied the request, and the Eighth Circuit affirmed this decision.[107] Again, the Supreme Court granted *certiorari*[108] and decided, as in *Green*, that the "freedom-of-choice" plan proposed by the school district was not sufficient.[109]

Monroe v. Board of Commissioners[110] came at the same time as both *Green* and *Raney*. It dealt with a variant of the "freedom-of-choice" plan called "free transfer."[111] In this plan, students were assigned to different schools according to the geographic boundaries of the school district along with a provision allowing any student to transfer to another school in the district when there was space available at that school.[112]

In 1964 minority students filed suit against the school board alleging that this "free transfer" program was being administered in a racially discriminatory fashion.[113] The district court found that the school board had indeed discriminated in its duties by denying minority students' transfer requests but allowing the requests of the white students.[114] The district court further held that the board had produced the attendance zones in the elementary schools by gerrymandering; however, the attendance zones for the junior high schools were appropriately drawn to produce "meaningful desegregation."[115]

The Supreme Court questioned the effectiveness of the "free transfer" program, stating that it "'lends itself to perpetuation of segregation.'"[116] It stated also that "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable."[117] The case was finally remanded to the district court for further investigation into an appropriate and effective remedy.[118]

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103. Raney v. Board of Educ., 391 U.S. 443, 445 (1968).
104. *Id.* at 446.
105. *Id.*
106. *Id.*
107. *Id.* at 447 (citing Raney v. Board of Educ., 381 F.2d 252 (8th Cir. 1967)).
108. *See* Raney v. Board of Educ., 389 U.S. 1034 (1968).
109. *Raney*, 391 U.S. at 447.
110. 391 U.S. 450 (1968).
111. *Id.* at 452.
112. *Id.* at 453-54.
113. *Id.* at 454.
114. *Id.*
115. *Id.* at 454-55.
116. *Id.* at 459 (quoting Goss v. Board of Educ., 373 U.S. 683, 686 (1963)).
117. *Id.*
118. *Id.* at 459-60.

As school districts continued to be objects of *de jure* segregation, more drastic steps were taken to end racial discrimination in the schools.[119] For example, in *Swann v. Charlotte-Mecklenburg Board of Education*,[120] the Court more thoroughly addressed the power granted to the district courts through their equity jurisdiction.

Swann began in largely the same manner as all of the previous school desegregation cases in that the school board had a long history of *de jure* segregation.[121] Upon finding that this state-imposed segregation still existed, the district court ordered the school district to come up with a plan to eliminate discrimination.[122] The court found the board's plan unacceptable and requested that Dr. John Finger devise another plan to end racial discrimination.[123] The school board's plan restructured the attendance zones of the students to attempt a better racial mix[124] while the "Finger Plan" relied heavily on busing and what it called "satellite zones" which moved students from their residential areas to other area schools to achieve the maximum racial balance in the school system.[125] At the junior high and high school level, the district court adopted the school board plan with some alterations by Dr. Finger, but at the elementary school level it adopted the "Finger Plan" in its entirety.[126] The Court of Appeals for the Fourth Circuit reversed this decision as related to the elementary schools, stating that busing created an unreasonable burden on the students.[127]

In determining whether the district court had appropriately used its equitable jurisdiction, the Supreme Court reiterated that "the objective . . . remains to eliminate from the public schools all vestiges of state-imposed segregation."[128] It continued by stating that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[129]

The Court next turned to the question of whether a constitutional violation was present and briefly reviewed the *Green* factors.[130] In so doing the Court recognized that different remedies may be appropriate for different violations.[131] It stated that "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings

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119. *See* Wright v. Council of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

120. 402 U.S. 1 (1971).

121. *Id.* at 5-6.

122. *Id.* at 7.

123. *Id.* at 8.

124. *Id.*

125. *Id.* at 9.

126. *Id.* at 10.

127. *Id.*

128. *Id.* at 15.

129. *Id.*

130. *Id.* at 18.

131. *Id.*

and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights . . . is shown."[132] After determining that a constitutional violation existed, the Court reviewed what remedial measures might be appropriate.[133]

The Supreme Court first considered whether it would be appropriate to use racial quotas to eliminate discrimination.[134] It had been alleged that the district court had imposed quotas on the school system, but the Court found no evidence to validate that allegation.[135] It went on to say that the Constitution does not require every school to represent the racial mixture of the neighborhood in which it is found.[136] However, the Court agreed that quotas might be acceptable as "a starting point in the process of shaping a remedy, rather than an inflexible requirement."[137] This idea led to a ruling that the use of quotas as a *guideline* was not an abuse of the district court's discretion.[138]

The Court next turned to the question of the constitutionality of one-race schools.[139] It stated that "the existence of some small number of one-race . . . schools within a district is not in and of itself the mark of a system that still practices segregation."[140] However, the Court warned that where school systems had been plagued with the effects of *de jure* segregation and where one-race schools exist, there was created a presumption of a constitutional violation.[141] The Court further placed on the school systems "the burden of showing that such school assignments are genuinely nondiscriminatory."[142]

Next, the Court considered the appropriateness of the use of gerrymandering to desegregate schools within a system.[143] The Court agreed that in a system not plagued with a history of discrimination such gerrymandering might be inappropriate, but where racial segregation still exists courts may order measures even though they may be "administratively awkward, inconvenient, and even bizarre."[144] Thus, gerrymandering was found to be an appropriate remedial measure.[145]

Finally, the Supreme Court questioned whether the use of busing would be appropriate in achieving the goal of desegregation.[146] In finding that busing was also an acceptable remedy in this case, the Court determined that the time and distance

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132. *Id.*
133. *Id.* at 22.
134. *Id.*
135. *Id.* at 23.
136. *Id.* at 24.
137. *Id.* at 25.
138. *Id.*
139. *Id.*
140. *Id.* at 26.
141. *Id.*
142. *Id.*
143. *Id.* at 27.
144. *Id.* at 28.
145. *Id.*
146. *Id.* at 29.

traveled would not be too great and would not place a large burden on the students.[147] In fact, it determined that in some cases the time and distance would be less when busing was employed.[148] As a result, the Court found that ordering the use of busing was not an abuse of the district court's discretion.[149]

After determining that the district court's actions had been proper, the Supreme Court concluded with a reminder that once a school system has been unified it is not "constitutionally required to make year-by-year adjustments" to its programs.[150] This reminder stemmed from the prevalent notion that segregation for the sake of segregation is not the aim of *Swann* and cases like it; it is only state imposed segregation and its effects that must be attacked.[151] Once this *de jure* segregation is found to exist, however, the Supreme Court will allow great latitude in enforcing the constitutional rights of the minority students.[152]

Perhaps the most drastic measures allowed by the Court can be found in *Wright v. Council of Emporia*[153] and *United States v. Scotland Neck City Board of Education.*[154] In these cases, the Supreme Court addressed the question of whether the district courts had the authority to prevent a city from forming its own school system.[155]

In *Wright*, the town of Emporia, Virginia, decided to become a city but paid the county to continue its control over the school system.[156] However, after Greensville County became subject to a court order requiring a desegregation plan, the city attempted to create its own school district.[157] The district court enjoined the city from creating its own district because it felt that this action would prevent effective desegregation of the Greensville school district.[158] The court of appeals used the "dominant purpose" rule in reversing the decision of the district court, stating that *de jure* segregation was not the "dominant purpose" for the new school district.[159]

The Supreme Court, however, reversed the ruling of the court of appeals and found that the district court was acting within its authority in denying the creation of a new school system.[160] The Court said it was necessary to look to the *effect* and not merely to the purpose of an action in determining whether that action was a constitutional violation.[161] Here, the Court determined that the district court was

147. *Id.* at 30.
148. *Id.*
149. *Id.* at 31.
150. *Id.* at 32.
151. *Id.* at 15.
152. *Id.*
153. 407 U.S. 451 (1972).
154. 407 U.S. 484 (1972).
155. *Wright*, 407 U.S. at 453; *Scotland Neck*, 407 U.S. at 485.
156. *Wright*, 407 U.S. at 453-54.
157. *Id.* at 456.
158. *Id.* at 458.
159. *Id.* at 460-61.
160. *Id.* at 462.
161. *Id.*

justified in finding that creating a new school district would deprive the minority students of their constitutional rights[162] and further agreed that "Emporia's establishment of a separate system would actually impede the process of dismantling the existing dual system."[163] It concluded by stating that where a more effective method of eliminating segregation exists, the burden of proof is on the school board to explain its use of the less effective method.[164]

In Chief Justice Burger's dissent, in which Justices Blackmun, Powell, and Rehnquist joined, he stated that the district court's actions were an abuse of its discretion.[165] Burger argued that effective desegregation could be achieved even with the existence of two separate school districts.[166] Thus, he stated that "if local authorities devise a plan that will effectively eliminate segregation in the schools, a district court must accept such a plan unless there are *strong* reasons why a different plan is to be preferred."[167] Burger further argued that, as there would only be a modest difference in the racial make-up of the schools either with or without the existence of separate districts, a discriminatory effect could not be presumed without evidence of a discriminatory purpose.[168]

Scotland Neck also dealt with the question of the district court's authority to prevent the creation of a new school system.[169] Again, the Court found that "any attempt . . . to carve out a new school district from an existing district that is in the process of dismantling a dual school system 'must be judged according to whether it hinders or furthers the process of school desegregation.'"[170] It therefore held that it was proper for the district court to prevent the creation of a school district that "would have the effect of impeding the disestablishment of the dual school system."[171]

Concurring with the majority, Chief Justice Burger, with whom Justices Blackmun, Powell and Rehnquist joined, agreed that this new school district would undermine the efforts of the larger school district and preclude meaningful desegregation.[172] He further stated that the city was largely motivated by its desire to avoid desegregation; thus, this discriminatory purpose was sufficient to allow the district court to prevent the creation of this new school district.[173]

Up until 1976 it seemed no measures, however drastic, would be beyond the authority of the district courts in eliminating segregation.[174] However, some limi-

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162. *Id.* at 463.
163. *Id.* at 466.
164. *Id.* at 467 (citing Green v. County Sch. Bd., 391 U.S. 430, 439 (1968)).
165. Wright v. Council of Emporia, 407 U.S. 451, 471 (1972) (Burger, C.J., dissenting).
166. *Id.* at 476.
167. *Id.* at 477 (emphasis added).
168. *Id.* at 482-83.
169. *Scotland Neck*, 407 U.S. at 485.
170. *Id.* at 489 (quoting *Wright*, 407 U.S. at 460).
171. *Id.* at 490.
172. United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972) (Burger, C.J., concurring).
173. *Id.* at 492.
174. *See supra* notes 41-173 and accompanying text.

tations on the discretion of the district courts became apparent in *Pasadena City Board of Education v. Spangler.*[175] In *Pasadena,* a suit was brought against the school board to eliminate discrimination.[176] The district court in 1970 ordered the school board to submit a plan of desegregation for its approval.[177] The plan as finally approved included a requirement that no school have an enrollment that consisted of a majority of minority students.[178]

In 1974 the school board sought modification of the judgment, requesting that this requirement be deleted from the desegregation order.[179] The district court denied its request and the Court of Appeals for the Ninth Circuit affirmed this decision with reservation.[180]

The Supreme Court found that, while there had subsequently been an "ostensible" violation of the plan, there had been full compliance in the first year of its implementation.[181] Therefore, the Supreme Court determined that the district court abused its discretion in refusing to modify the order. It further stated that as the district was unified at one time, it required a subsequent constitutional violation in order to require adjustments to the student attendance format.[182] In conclusion, the Court held that "the District Court was not entitled to require the [Pasadena Unified School District] to rearrange its attendance zones each year to ensure that the racial mix desired by the court was maintained in perpetuity."[183]

Justices Marshall and Brennan, in dissenting, argued that the district court did not abuse its discretion because the school board had never fully cooperated with the court order.[184] They further argued that unification for merely a short period of time was not necessarily sufficient.[185] They stated that as the modification was requested before the violation was remedied fully, the district court's decision should be affirmed.[186]

The Supreme Court, in *Milliken v. Bradley,*[187] also balked at allowing the district courts to order interdistrict desegregation plans. In *Milliken,* the National Association for the Advancement of Colored People ("NAACP") brought suit requesting a preliminary injunction preventing the enforcement of Act 48, a statute they argued prevented the effective desegregation of the Detroit City Schools.[188] The dis-

175. 427 U.S. 424 (1976).

176. *Id.* at 427. In this case, the United States intervened as a party. *Id.* Later, it was this intervention which prevented the dismissal of this suit as moot because the plaintiffs had failed to make the suit a class action. *Id.* at 429-30.

177. *Id.* at 428.

178. *Id.* at 429.

179. *Id.*

180. *Id.*

181. *Id.* at 431.

182. *Id.* at 434-45 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971)).

183. *Id.* at 436.

184. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 441 (1976) (Marshall, J., dissenting).

185. *Id.* at 442.

186. *Id.* at 444.

187. 418 U.S. 717 (1974).

188. *Id.* at 722-23.

trict court refused to grant the preliminary injunction, but the court of appeals reversed that decision.[189] On remand, the district court ordered the submission of desegregation plans, with a "Magnet Plan" finally approved for desegregating Detroit's schools.[190] The court of appeals subsequently affirmed this decision and ordered the district court to proceed with a trial on the merits of the case.[191]

At the resulting trial, the district court found that there existed state-imposed segregation because the use of optional zones foreseeably resulted in segregation.[192] Reasons for this ruling included the fact that the district created North-South running zones when East-West running zones would be more effective and the fact that most schools in the district were in predominantly minority or predominantly white neighborhoods.[193] It further determined that the Act impeded desegregation.[194] In shaping a remedy, the district court found that intra-district plans were ineffective in eliminating discrimination and ordered the submission of inter-district plans for this purpose.[195] The court made this finding without determining that any of the other districts had participated in discriminatory practices.[196] The court of appeals affirmed the decision of the district court but required the court to ensure that all suburban school districts affected by this decision would have an opportunity to be heard.[197]

Upon granting *certiorari,* the Supreme Court stated that the district court had exceeded its authority in ordering such a remedy.[198] The Court held that the district court had gone beyond the directives in *Brown* in ordering an interdistrict remedy without finding an interdistrict constitutional violation.[199] The Court concluded that it would require a showing that the district lines were drawn in a discriminatory fashion to allow such a massive remedial measure.[200]

Justice Stewart concurred with the judgment and added that the action was not an appropriate exercise of equity jurisdiction because the remedy was not equal to the violation found.[201] He further argued that the courts have the authority to attack only what is *found* to be a constitutional violation.[202] Justice Douglas dissented, stating that the Court's decision takes a step back toward the "separate but equal" doctrine found in *Plessy.*[203] As the creation of the school district lines cre-

189. *Id.* at 723.
190. *Id.*
191. *Id.* at 723-24.
192. *Id.* at 724-25.
193. *Id.* at 725.
194. *Id.* at 727.
195. *Id.* at 732-33.
196. *Id.* at 732.
197. *Id.* at 736.
198. *Id.* at 745.
199. *Id.* at 744-45 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).
200. *Id.*
201. Milliken v. Bradley, 418 U.S. 717, 754 (1974) (Stewart, J., concurring).
202. *Id.* at 757.
203. Milliken v. Bradley, 418 U.S. 717, 759 (1974) (Douglas, J., dissenting) (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

ated or continued segregation, its effect was to make minority schools both "separate" and "inferior."[204] Justice White's dissent, joined by Justices Douglas, Brennan and Marshall, called the majority decision an arbitrary limitation on the district court's equitable powers.[205] He feared that segregation would go unremedied without an interdistrict plan and concluded by stating that the district court was in a better position to determine what was an appropriate remedy and that the Supreme Court should not disturb its findings.[206]

As had come to be the case in most school desegregation cases, the next case to be decided by the Supreme Court, *Dayton Board of Education v. Brinkman*,[207] centered around the determination of an appropriate remedy for years of school segregation by law. Here, however, the court looked again to the appropriateness of a remedy employed initially in *Swann*: the use of quotas to desegregate the school system.[208] The plan proposed in this case required a certain racial quota to be maintained within each school in the district, based on the black-white ratio of the population.[209] This plan was employed after the Court of Appeals for the Sixth Circuit had found the initial plan to be inadequate and ordered the district court to formulate a new plan.[210] This new plan was subsequently approved by the Sixth Circuit.[211]

After granting *certiorari*, the Court stated that the main reason for hearing this case was "for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system."[212] In its decision, the Supreme Court recognized both the broad power of the lower courts in the exercise of their equity powers and the need for local government to remain autonomous.[213] Often, these two objectives have collided, so it is imperative for any exercise of equity jurisdiction by the district courts to be in response to a claim that is "satisfactorily established by factual proof and justified by a reasoned statement of legal principles."[214]

The Supreme Court next considered the findings of fact of the district court.[215] It stated that the district court had found that the schools in the school district were indeed segregated, but they found no evidence of racial discrimination.[216] However, the court found a cumulative violation in the "'racially imbalanced schools,

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204. *Id.* at 760-61.
205. Milliken v. Bradley, 418 U.S. 717, 780-81 (1974) (White, J., dissenting).
206. *Id.* at 769-70.
207. 433 U.S. 406 (1977).
208. *Id.* at 408.
209. *Id.* at 408-09.
210. *Id.*
211. *Id.* at 408.
212. *Id.* at 409.
213. *Id.* at 410.
214. *Id.* (citing Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976)).
215. *Id.* at 410-12.
216. *Id.* at 412.

optional attendance zones, and recent Board action.'"[217] The Supreme Court agreed that the district court had a proper basis for determining that this violation existed.[218] However, it felt that the subsequent remedy required by the court of appeals was an inappropriate response to the nature of the violation.[219] In so holding, the Court reiterated that "[t]he finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board."[220]

The Supreme Court held that it was improper for the court of appeals to order such a drastic remedy while affirming the validity of the findings of fact of the district court.[221] The court of appeals did not have the authority to impose a larger remedy simply because it was "vaguely dissatisfied" with the remedy proposed by the district court.[222] Thus, the Court concluded that "the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court."[223] It then ordered the district court to conduct further investigation into the violation and tailor a remedy that would be appropriate to address that wrong.[224] Justice Brennan, concurring, added that "[i]f it is determined on remand that the School Board's unconstitutional actions had a 'systemwide impact,' then the court should order a 'systemwide remedy.'"[225]

The Supreme Court's decision in *Dayton* led to the next case in the history of school desegregation cases: *Columbus Board of Education v. Penick.*[226] In *Columbus*, as in *Dayton*, the district court had ordered a district-wide remedy upon finding that constitutionally violative practices existed.[227] Here, however, this remedy was ordered as a result of what the district court found to be "systemwide" racial discrimination.[228] The court of appeals affirmed this decision and the Supreme Court granted *certiorari.*[229]

In affirming this judgment, the Court looked briefly at the history of school desegregation,[230] reaffirming that many past cases had imposed on the school districts "an affirmative duty to desegregate."[231] The Court also addressed its holding in *Dayton* that the court of appeals could not impose a systemwide remedy based

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217. *Id.* at 413 (quoting Brinkman v. Gilligan, 446 F. Supp. 1232, 1259 (S.D. Ohio 1977)).
218. *Id.* at 414.
219. *Id.* at 417.
220. *Id.* at 413.
221. *Id.* at 417.
222. *Id.* at 418.
223. *Id.*
224. *Id.* at 420.
225. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 423 (1977) (Brennan, J., concurring).
226. 443 U.S. 449 (1979).
227. *Id.* at 453-54.
228. *Id.* at 454.
229. *Id.*
230. *Id.* at 455-61. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 347 U.S. 483 (1954).
231. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 459 (1977).

on the findings of the district court.[232] However, the Court distinguished this case from *Dayton*, stating that the district court had made findings (that were supported by the evidence) that the Columbus School Board had been practicing systemwide racial discrimination which justified a systemwide remedy.[233] As the Supreme Court affirmed the judgment of the court of appeals, it restated its long-standing position that once a constitutional violation has been established, a district court has broad power in formulating a remedy as long as that remedy addresses the violation prompting it.[234]

The most recent school desegregation case to be addressed by the Supreme Court, other than the instant case, was *Board of Education v. Dowell.*[235] This case was different from the preceding cases in that it dealt with a request by the school district to lift the injunction that had been present for many years.[236]

This case began in 1961 when minority students sought to end *de jure* segregation in the schools of Oklahoma City.[237] On a finding that the school district had indeed "intentionally" operated a "dual" school system and a subsequent finding that the attempts by the school board to alleviate the effects of this discrimination were insufficient, the district court ordered the adoption of a plan which incorporated neighborhood school assignment and busing to achieve a racial balance in the district's schools.[238]

After five years of compliance with the order, the school district in 1977 requested that the district court close the case.[239] In so doing, the district court found that "'[t]he School Board, as now constituted, has manifested the desire and intent to follow the law.'"[240] Subsequently, it held that "'[j]urisdiction in this case is terminated . . . only to final disposition of any case now pending on appeal.'"[241] The plaintiffs did not appeal the district court's order.[242]

However, in 1984 certain demographic shifts in the school district led the school board to consider new programs to alleviate some of the busing that they felt had become too burdensome.[243] Thus, it adopted a Student Reassignment Plan ("SRP") to reduce the effects of busing on the school district.[244] The board also allowed for any student in the majority at a school to transfer to a school where that student would be in the minority.[245]

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232. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465-66 (1979).
233. *Id.* at 466.
234. *Id.* at 465-66.
235. 111 S. Ct. 630 (1991).
236. *Id.* at 633.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 634 (quoting No. Civ-9452 (W.D. Okla. 1977); App. 174-176).
241. *Id.* (quoting No. Civ-9452 (W.D. Okla. 1977); App. 174-176).
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*

Plaintiffs then attempted to have the case reopened, arguing that the school district had never been unified and that the SRP program caused a return to racially segregated schools.[246] The district court refused to hear the case again because it said the school district had been found to be unitary and still was unitary in all of the areas specified in *Green*.[247] However, the Court of Appeals for the Tenth Circuit reversed this decision because it said the injunction had not been terminated; therefore, the plaintiffs were still able to challenge the offending program.[248]

On remand, the district court determined that the changing demographics had made it impossible for the school district to employ the plan they had been under and that the school district had complied with the order in good faith for more than ten years.[249] It further concluded that the present segregation could not be proven to be a result of the past state-imposed segregation or of discriminatory intent.[250] The district court therefore lifted the injunction from the now unitary school system.[251] Again, the court of appeals reversed, basing its decision on common injunctive principles which were not uniquely suited to injunctions of this nature and, for that reason, the Supreme Court granted *certiorari*.[252]

The Supreme Court spent a great deal of time discussing the differing views of when a school district can be considered unitary and in so doing admitted that it would be impossible to give the term a precise definition.[253] However, it did agree with the terms used often by lower federal courts which use "'dual' to denote a school system which has engaged in intentional segregation of students by race, and 'unitary' to describe a school system which has been brought into compliance with the command of the Constitution."[254] The Court then turned to whether the district court was correct in finding that the school system had been unified and that the injunction should be lifted.[255]

The Supreme Court found it necessary to remand the case to the district court to look to all of the *Green* factors in determining whether *de jure* segregation had been eliminated in the school district.[256] It concluded by stating that if the district court did indeed find that the school district had been unified in these areas, the

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246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 634-35.

251. *Id.* at 635.

252. *Id.*

253. *Id.* at 635-36. Here, the Court also determined that the plaintiffs did have a right to appeal the dissolution of the injunction despite their previous failure to appeal because the injunction itself was not lifted at the same time that the case had been closed. *Id.* at 635.

254. *Id.* at 636.

255. *Id.* at 636-37. The Court also determined that the court of appeals had used the incorrect standard in reversing the judgment because of the unique nature of injunctions of this type. *Id.* at 636. The Court stated that these injunctions had always been meant to be a temporary means of bringing a school district into compliance and not a permanent feature of the school system. *Id.* at 637.

256. *Id.* at 638 (citing Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)).

minority students could challenge the SRP only if it represented a new constitutional violation.[257]

IV. INSTANT CASE

Freeman v. Pitts[258] also looked at the power and the responsibilities of the district court in choosing to lift a desegregation order but with a slightly different twist. In *Freeman*, the Supreme Court looked at the ability of the district court to relinquish its control over a school district in increments.[259] The Court reached an eight-zero decision in determining that the district court had the authority to relinquish control of DCSS in stages.[260]

In this opinion, the Court stated that the district court's discretion to order a partial relinquishment of a desegregation case "derives both from the constitutional authority which justified its intervention in the first instance and its ultimate objectives in formulating the decree."[261] The Court went on to address again the two objectives of judicial intervention in school desegregation cases: "to remedy the violation *and in addition* to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution."[262] It stated also that a "transition phase" in which the authority to control the school district is returned to the school board in stages would be appropriate.[263] The Court then gave three factors for the district court to consider in determining whether this partial withdrawal should be effectuated:

> [1] whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; [2] whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and [3] whether the school district has demonstrated . . . its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.[264]

The district court was then advised to give closer scrutiny to the question of whether the school district has shown good faith in its policies and a true attempt to eliminate evidence of past racial discrimination.[265]

After this discussion, the Supreme Court held that "the Court of Appeals did err in holding that, *as a matter of law,* the District Court had no discretion" to return partial control to the school district.[266] The Court further stated that it was up to

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257. *Id.*
258. 112 S. Ct. 1430 (1992).
259. *Id.* at 1436.
260. Justice Thomas took no part in this decision.
261. *Freeman*, 112 S. Ct. at 1445.
262. *Id.* (emphasis added) (citing Milliken v. Bradley, 433 U.S. 267, 280-81 (1977)).
263. *Id.*
264. *Id.* at 1446.
265. *Id.*
266. *Id.* (emphasis added).

the discretion of the district court to address each *Green* factor separately, while keeping in mind that these factors are in many ways connected to each other.[267] The Supreme Court, however, ordered further inquiry into the adequacy of the desegregation in the area of attendance, stating that a finding of lack of bad faith is not necessarily equal to a finding of good faith.[268]

Justice Scalia, in his concurring opinion, reminded that the district court had found that the discrepancies in student assignments resulted from residential patterns and not from the past *de jure* segregation.[269] He warned that the Court's argument of an "affirmative duty" to those school districts practicing racial discrimination has often been incorrectly interpreted "to speak as though the Constitution requires such racial balancing."[270] He further argued that the time was coming that the burden of proof should shift back to the plaintiff in these cases because of the great progress made in desegregation and the incredible difficulty in proving segregation is not a product of past governmental action.[271] He reiterated that "[t]he constitutional right is equal racial access to schools, not access to racially equal schools."[272]

Justice Souter, also concurring, stated that while the district court does have the authority to relinquish its control of the school district in stages, "it should make a finding that there is no immediate threat of unremedied *Green*-type factors causing population or student enrollment changes that in turn may imbalance student composition."[273] Justice Blackmun's concurring opinion, joined by Justices Stevens and O'Connor, agreed with neither the ruling of the district court nor the ruling of the court of appeals.[274] In first stating that the district court, through equitable principles, did have the authority to partially release the school board from its affirmative duty, Blackmun continued by arguing that the facts of this particular case did not merit such a finding.[275]

V. ANALYSIS

"[T]he Supreme Court has demonstrated increasing antipathy toward race-conscious remedies designed to overcome discrimination in education . . . ." So says Sonia R. Jarvis in her essay, *Brown and the Afrocentric Curriculum.*[276] But is she correct? At first glance, one might think that certainly the Supreme Court has been giving less protection to minority students than ever before. After all, most of the recent cases have served to limit the equitable powers of the district courts

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267. *Id.*
268. *Id.* at 1450.
269. Freeman v. Pitts, 112 S. Ct. 1430, 1450 (1992) (Scalia, J., concurring).
270. *Id.* at 1451.
271. *Id.* at 1452.
272. *Id.*
273. Freeman v. Pitts, 112 S. Ct. 1430, 1455 (1992) (Souter, J., concurring).
274. Freeman v. Pitts, 112 S. Ct. 1430, 1455 (1992) (Blackmun, J., concurring).
275. *Id.*
276. Sonia R. Jarvis, Essay, *Brown and the Afrocentric Curriculum,* 101 YALE L.J. 1285, 1285-86 (1992).

rather than to broaden them as was seen in the cases after *Brown*.[277] However, appearances do not always represent reality, as may be the case here.

On looking at the Supreme Court cases since *Brown*, it is apparent that the directives of that case are still being followed. Despite arguments to the contrary, the Supreme Court has remained consistent with its rulings, stating in each case that the elimination of *de jure* segregation must be achieved by employing whatever means necessary. However, as *Freeman v. Pitts* indicates, many problems arise when trying to apply the past rulings of the Court to the unique factual situations today. Societal changes have done much to hamper the effectiveness of these rulings, making the mandates of the original *Brown* case virtually unworkable. One of the main reasons for the present difficulties in school desegregation cases is the difficulty of the burden of proof.

A. Burden of Proof

After the massive resistance to *Brown*, the Supreme Court, in *Swann*, placed the burden of proof in school desegregation cases on the school districts. In thus ruling, the Court stated that because of the past practices of *de jure* segregation, the existence of racially identifiable schools within a district creates a presumption of state-imposed discrimination. This presumption is rebuttable only by specific evidence by the school board to prove that the segregation resulted from other factors and not from the prior governmental actions.[278]

This presumption places a heavy burden on the school districts, for it is often difficult to tell exactly what has caused a certain school to become or remain segregated.[279] Perhaps this burden was placed on the school district early on as a protection for the minority students. As early as *Brown*, the Supreme Court has stressed its finding that segregation itself does not violate the Constitution without some state action creating it.[280] Therefore, placing this burden on the school systems has made it possible to grant relief to minority students where the school districts might otherwise be able to hide behind society's segregation and avoid its duty to do whatever is possible to provide equal educational opportunities for all of its students.

However, this burden might not always stay with the school districts, as *Freeman v. Pitts* suggests.[281] In fact, *Freeman* states that "[a]s the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system."[282] As more school districts continue to make great strides in their

277. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1976); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). *But see* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Griffin v. County Sch. Bd., 377 U.S. 218 (1972).

278. *Swann*, 402 U.S. at 15.

279. Freeman v. Pitts, 112 S. Ct. 1430, 1452 (1992) (Scalia, J., concurring).

280. Brown v. Board of Educ., 349 U.S. 294, 298 (1955).

281. *Freeman*, 112 S. Ct. at 1453-54 (Scalia, J., concurring).

282. Freeman v. Pitts, 112 S. Ct. 1430, 1448 (1992).

attempts at desegregation, minority students will no longer be able to point to the time when segregation by law prevented them from enjoying the equal educational opportunities enjoyed by white students across the country. The time is coming when this burden will shift back to the minority plaintiffs to prove not only that segregation exists but also that the segregation is a result of state or school district action.[283] After all, the Supreme Court has stated many times that once a school system has become unified, it no longer has an affirmative duty to desegregate but need only present a race neutral program for its school system.[284] With this, the school boards will not be held responsible for any segregation resulting from factors outside of their duty and power.[285]

Certainly, this time is coming, but is it coming too soon? One might argue that it has been nearly forty years since the Supreme Court first abolished the "separate but equal" doctrine in our nation's public schools. Forty years certainly seems like a long time; however, consider the fact that more than ten years after *Brown* many states still had laws which had the effect of preventing minority students from attending school with white students.[286] Remembering this, forty years does not seem like such a long time. But the Supreme Court is correct in determining that it never meant for the district courts to maintain control over school districts forever.[287] After all, it is vital for local schools systems and local governments to be able to have control over their own affairs.[288]

Freeman makes it clear that the Court is willing to begin to ease the burden on school districts to prove such a difficult proposition.[289] Therefore, the question becomes how best to accomplish the goal of returning control of education to the states while continuing to ensure that the constitutional rights of minority students are being upheld.

Questions arise as to how to lift this difficult burden from the school districts while continuing to offer the protection to the minority students afforded by *Brown*. As Martha M. McCarthy states in *Elusive "Unitary Status"*,[290] "[c]riteria have been lacking for school officials and judges to use in determining when a school district's affirmative duty has been fulfilled."[291] Certainly, it is often difficult to determine when a school district has been acting consistently with the constitutional requirements. However, *Freeman* does center on one criterion in particular that has been found in other school desegregation cases: good faith.[292]

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283. *See Freeman*, 112 S. Ct. at 1453-54 (Scalia, J., concurring).

284. Board of Educ. v. Dowell, 111 S. Ct. 630, 638 (1991).

285. *See, e.g., id.*

286. *See, e.g.*, Griffin v. County Sch. Bd., 377 U.S. 218 (1964).

287. *Freeman*, 112 S. Ct. at 1445.

288. *Id.*

289. *Id.* at 1448.

290. Martha M. McCarthy, Ph.D., *Elusive "Unitary Status,"* 69 W. EDUC. L. REP. 9, 13 (1991) [hereinafter McCarthy].

291. *Id.*

292. *Freeman*, 112 S. Ct. at 1446.

B. Good Faith

Freeman did indeed reiterate the importance of the school district's exercise of good faith in complying with a court order in order to be found to be unitary.[293] In fact, it stated that it was one of the most important factors to consider in this regard.[294] This ruling finds support in past desegregation cases.[295]

The first Supreme Court case to address the requirement of good faith was *Green*.[296] *Green*, in addressing the effectiveness of freedom-of-choice programs in eliminating segregation, said that the district courts should maintain jurisdiction over the case until the school district has complied with its mandates *in good faith*.[297] This statement was made while the Supreme Court was granting the district court broad discretion to pattern a remedy it found to be justified by the wrong.[298] By discussing the issue of good faith at this point, the Supreme Court was perhaps trying to set guidelines for the eventual return of control to the school district, a goal second only to desegregation itself.[299]

Dowell proposed that "the federal judiciary should terminate supervision of school districts where school boards have complied with desegregation mandates in good faith for a reasonable period of time and eliminated vestiges of *de jure* segregation 'as far as practicable.'"[300] Good faith was also an essential element of *Dayton* where the Court determined that the remedy exceeded the scope of the violation because the district court had determined that segregation existed without finding any evidence of racial discrimination.[301] In a situation such as this, a finding of good faith might lead the courts to determine that the rebuttable presumption borne by the school district in *Swann* is no longer appropriate for the situation.

Freeman stated that "[t]he causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its *good faith*."[302] Here again, the Court allows an opportunity for the school districts to regain control of their systems by using the existence of good faith compliance to relax somewhat the burden which is present in school desegregation cases. In so doing, the Supreme Court allows an opportunity for the school districts to make strides toward unification of their schools.

This finding of good faith is very important because a finding of unification greatly changes the scope of the evaluation. As Dr. McCarthy further states, "a

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293. *Id.* at 1448.

294. *Id.* at 1446.

295. *See, e.g.*, Board of Educ. v. Dowell, 111 S. Ct. 630 (1991); Green v. County Sch. Bd., 391 U.S. 430 (1968).

296. *Green*, 391 U.S. at 430.

297. *Id.* at 439.

298. *Id.*

299. *See Freeman*, 112 S. Ct. at 1445.

300. McCarthy, *supra* note 290, at 13.

301. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417-18 (1976).

302. *Freeman*, 112 S. Ct. at 1448 (emphasis added).

unitary school district's practices are evaluated in terms of *intent* instead of their *effectiveness* in achieving desegregation."[303] If a finding of unity changes the scope of the investigation in court cases from effectiveness to intent, then it will have a dramatic impact on school desegregation cases without ever departing from the basic principles set forth in *Brown*.

C. Supreme Court's Role

The Supreme Court has indeed remained constant in its goal since the first school desegregation case it heard. The Court has often given broad latitude to the district courts which have found school districts to be operating in a racially discriminatory manner.[304] However, each time the Court has done so it has been with a reminder that desegregation for the sake of desegregation is not the aim of the courts of the nation; it is only when the segregation has resulted from some constitutional violation that the courts may act, and in acting, the Court has continued to give the same guidelines.

Freeman reiterates all of the fundamental principles of equity found in the preceding school desegregation cases.[305] Here, the Court has seemingly relaxed these principles to some degree, perhaps recognizing that the sweeping changes made necessary early in the fight for racial equality have become unnecessary and at some times even detrimental. However, it still seems to be trying to hold to a proposition that has lost its usefulness, due in part to the changing nature of local school systems.

A very important fact to reiterate is that in the very beginning, the Supreme Court placed both the authority and the duty in the hands of the district courts to investigate these instances of racial discrimination and determine what would be an appropriate remedy for them. This was done because the district courts, being local, were in a better position to maintain an active role in the desegregation effort and were better able to collect information and make determinations upon this data.[306] This order is consistent with the overall scheme of the Supreme Court, which is by nature not equipped to deal with issues of this kind. In fact, the Supreme Court, as such, is supposed to act only when it has been shown that the district courts and subsequently the courts of appeals have exceeded their power as defined by the Court.

Thus, it has been necessary for the Supreme Court to set down guidelines for the lower courts to use in fashioning these remedies, and it has faithfully done so. While many may argue that these guidelines are vague, it is because of the nature of equity jurisdiction that this is so. Equitable principles are meant to be broad and

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303. McCarthy, *supra* note 290, at 17 (first emphasis added).

304. *See supra* note 118.

305. *Freeman*, 112 S. Ct. at 1443-45.

306. Brown v. Board of Educ., 349 U.S. 294, 299 (1955).

flexible and only to be interfered with when they exceed the bounds set by the Supreme Court.[307]

Freeman reiterates these principles of equity by stating that "[t]he essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way."[308] The Court here stresses the need for flexibility in determining the appropriate remedies in cases dealing with racial discrimination.[309] This flexibility allows the lower courts broad discretion in determining the steps necessary for desegregation in its particular school systems. This is so largely because of the need for flexible boundaries which enable the district courts to decide the appropriate remedy in each case.

The boundaries set by the Supreme Court have indeed been broad. Since *Brown* the Supreme Court has required a finding of a constitutional violation for the district courts to be empowered to take charge of the school districts which would normally have a right to remain autonomous.[310] However, once this violation has been shown to exist, the Supreme Court has repeatedly allowed sweeping measures to be employed in bringing about the end of this constitutional violation.[311] In fact, this power has been checked only when the Supreme Court has found that the courts have ordered a remedy that goes beyond the scope of the violation itself.[312]

Looking to the past school desegregation cases, it becomes apparent that most deal, not in determining whether a constitutional violation exists, but in determining if an appropriate remedy has been offered.[313] Thus, any alleged inconsistency in these rulings comes not in the law itself but in the position of the case when it is heard. In each case the Court has said that the "punishment must fit the crime." Thus, any check on the district court's equitable authority has come only upon a holding of the Supreme Court that the lower court did not pattern the remedy after the violation.[314]

For instance, *Swann* allowed sweeping remedies from the district court because of the pervasive nature of the continued effects of the constitutional violation.[315] Also, *Wright* and *Scotland Neck* allowed the courts to prevent the creation of new school districts because the previous combined school districts had engaged in discriminatory practices, and there was evidence that separating the districts would further segregate the children.[316]

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307. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1976).

308. *Freeman*, 112 S. Ct. at 1444.

309. *Id.*

310. *See supra* notes 41-257 and accompanying text.

311. *See supra* note 119.

312. *See, e.g., Dayton*, 433 U.S. at 418; Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435 (1976).

313. *See supra* notes 41-257 and accompanying text.

314. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1976).

315. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971).

316. Wright v. Council of Emporia, 407 U.S. 451, 464-66 (1972); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 489 (1972).

On the other hand, the times in which the Supreme Court has limited the exercise of equitable remedies have also centered around the relationship between the remedy and the violation.[317] For example, the use of inter-district remedies for intra-district violations was found to exceed the power of the court.[318] In so holding, the Court did not find the inter-district remedies themselves to be inappropriate; they were only inappropriate in this case where all affected parties were not adjudged to be acting contrary to the Constitution.[319] Also, the Court in *Dayton* found that the court of appeals was incorrect in ordering massive desegregative measures on a school system that had not been found by the district court to be engaging in massive discriminatory practices.[320] The Court considered the procedural aspect of the case far beyond any substantive aspect in ruling that a remedy may be ordered only after a *finding* of a constitutional violation sufficient to merit the order.[321]

All of this lends merit to the proposition that the Supreme Court has maintained consistency throughout its history in determining school desegregation cases. This stems from the fact that the Court is merely judging the adequacy of the district court's rulings and fact finding and not determining these facts for itself. Thus, if any change is occurring in our court system it is occurring on the district court level and not at the level of the Supreme Court.

D. Future of School Desegregation

According to Martha M. McCarthy, Ph.D., "[s]ubstantial attention is focused on the *Pitts* case in hopes that the Supreme Court will provide school districts attempting to end judicial oversight some clarification as to what constitutes a vestige of segregation."[322] While *Freeman* did not exactly accomplish this goal, it has been helpful in showing how a school district is best able to eventually regain control of its systems. *Freeman* recognizes the difficulties involved in continuing to require the school districts to bear the burden of proving that the segregation in their systems is not a result of prior governmental behavior. It also manages to hold true to the principles of *Brown* while allowing some new flexibility in this burden. Perhaps this is because the Supreme Court recognizes the unique difficulties involved in desegregating the public schools and realizes that the school systems have only partial control over this aspect of the schools.

One might think that *Freeman v. Pitts* serves no end, but I do not believe this to be so, for I do not agree totally with Wallace Loh in his statement that "[l]aw is an instrument of social policy."[323] While the effect of the law may be to bring about

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317. *See supra* note 312 and accompanying text.

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

319. *Id.*

320. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 418 (1976).

321. *Id.*

322. McCarthy, *supra*, note 290, at 18.

323. Wallace D. Loh, *In Quest of* Brown's *Promise: Social Research and Social Values in School Desegregation*, 58 WASH. L. REV. 129, 142 (1982) (reviewing ELEANOR WOLF, TRIAL AND ERROR: THE DETROIT SCHOOL SEGREGATION CASE (1981)).

social reform it cannot be said to be an end in itself for "the effectiveness of a Supreme Court decision . . . is not measured so much by changes in people's hearts as by changes in their behavior."[324] Thus, while the Supreme Court may be able to take great strides toward eliminating *de jure* segregation from our schools, it is limited in its ability to eliminate discrimination from our lives.

Life has changed drastically since *Brown* when racial discrimination was a way of life. What was once a necessary way of dealing with the effects of discrimination may now be considered too much of an intrusion into the power of the local school districts. *Brown* was both an important case and a necessary one in the history of the struggle for racial equality. While it is true that this struggle has not reached an end, it becomes apparent that the mandates in cases like *Brown* and *Swann* have outgrown their usefulness. These measures once necessary may now be considered detrimental. *Freeman,* while continuing to affirm these decisions, seems to suggest just this. Perhaps the role of the Court in school desegregation cases is just about to come to an end.

VI. CONCLUSION

It is true that our nation's past has been plagued with terrible instances of racial discrimination. While the United States, largely through the Supreme Court and the various lower federal courts, has taken great strides in eliminating this racial discrimination from our cities, especially our local schools, there is still much to be done. Minority school children continue to be subject to problems resulting from the lack of appropriate educational facilities, qualified teachers and often educational opportunities themselves.

In view of these continued problems, many criticize the Supreme Court, stating that it has fallen short of its promises in *Brown* of an equal educational opportunity for all students. However, the problems of discrimination cannot fall solely on the shoulders of the members of the Supreme Court, who have through the years maintained consistency with the ruling in *Brown v. Board of Education.* In fact, many have criticized the Supreme Court for its refusal to employ its power to desegregate for the sake of desegregation, a goal that even *Brown* held was not protected by the Constitution.

Certainly, more changes must be made in this country. If change does not occur, racial harmony will only be a myth with no chance of it ever becoming a reality. However, the courts of this nation, more particularly the Supreme Court, cannot be harnessed with the impossible task of changing the social morality of an entire nation. This is not now, nor ever has it been, the purpose of the Supreme Court.

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324. Irving G. Hendrick, *Stare Decisis, Federalism, and Judicial Self-Restraint: Concepts Perpetuating the Separate But Equal Doctrine in Public Education, 1849 - 1954,* 12 J. L. & ED. 561, 584 (1983).