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COMMENT

BOARD OF EDUCATION V. DOWELL: A LOOK AT THE NEW PHASE IN DESEGREGATION LAW

Board of Education v. Dowell,

Since the Thirty-Ninth Congress debated and passed the Fourteenth Amendment,¹ the impact of the Equal Protection Clause² on segregation has evolved within a framework of constant debate.³ Even the United States Supreme Court swung from one extreme to the other when it overruled Plessy v. Ferguson⁴ in Brown v. Board of Education⁵ ("Brown I") holding that racial segregation "generates a feeling of inferiority as to [black students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . . Separate educational facilities are inherently unequal."⁶

In the twenty-five years since Brown I was handed down, a body of case law has developed to guide the federal courts in applying equitable remedies to dismantle the "vestiges"⁷ of desegregation, "root and branch"⁸ with "all deliberate speed"⁹ in order to restore the victims of discrimination "to the position they would have occupied in the absence of such conduct."¹⁰

In recent years however, there has been a series of cases in the

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¹. U.S. CONST. amend. XIV.
². Id. ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").
⁴. 163 U.S. 537 (1896).
⁵. 347 U.S. 483 (1954) [hereinafter Brown I].
⁶. Id. at 494-95.
federal courts, brought by school boards seeking to lift the injunctions originally imposed as a remedy to segregation.\textsuperscript{11} The core of the school boards' argument is that they have complied with the courts' injunctions in good faith for a substantial period of time in an effort to correct the vestiges of past discrimination, and therefore the injunctions should be lifted.\textsuperscript{12} Any segregation that remains with respect to the composition of the public schools is now a result of factors beyond local school board control, such as segregated housing patterns.\textsuperscript{13}

The culmination of these cases\textsuperscript{14} occurred in \textit{Board of Educa-}

\begin{itemize}
  \item \textsuperscript{11} See, e.g., \textit{Board of Educ. v. Dowell}, 111 S. Ct. 630 (1991); \textit{Riddick v. School Bd.}, 784 F.2d 521 (4th Cir.), \textit{cert. denied}, 479 U.S. 938 (1986); \textit{United States v. Board of Educ.}, 794 F.2d 1541 (11th Cir. 1986); \textit{Spangler v. Board of Educ.}, 611 F.2d 1239 (9th Cir. 1979).
  \item \textsuperscript{12} \textit{Dowell}, 111 S. Ct. at 633-34.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} It should be noted that since \textit{Dowell} was decided, the Supreme Court has handed down a subsequent case also dealing with the termination of segregation injunctions. \textit{Freeman v. Pitts}, 112 S. Ct. 1430 (1992). The issue in \textit{Freeman} was whether the district court may terminate its jurisdiction over part of a desegregation plan where the school board had achieved constitutional compliance in four of the six areas specified in \textit{Green v. County Sch. Bd.}, 391 U.S. 430 (1968), while retaining jurisdiction over the parts of the plan where vestiges of \textit{de jure} segregation remain. \textit{Freeman}, 112 S. Ct. at 1441-42. For a more in depth discussion of \textit{Green}, see infra notes 28-31 and accompanying text. The Supreme Court, reversing the Court of Appeals for the Eleventh Circuit, held that the District Court may give up jurisdiction incrementally, retaining jurisdiction over certain portions of the plan while relinquishing others. \textit{Freeman}, 112 S. Ct. at 1145-46. The Court then listed the factors that the lower courts should consider when deciding whether or not to give up jurisdiction over the desegregation decrees in increments:

\begin{quote}
Whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated to the public, and to the parents and students of the once disfavored race, 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."
\end{quote}

\textit{Id.} at 1446.

The Court then continued, elaborating on these guidelines:

In considering these factors a court should give particular attention to the school system's record of compliance. A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations. And with the passage of time the degree to which racial imbalances continue to represent vestiges of constitutional violation may diminish, and the practicality and efficacy of various remedies can be evaluated with more precision.

These are the premises that guided our formulation of \textit{Dowell} of the duties of a district court during the final phases of a desegregation case . . . .

\textit{Id.}
tion v. Dowell,\textsuperscript{15} where the Supreme Court, in a 5-3 decision, over an outraged dissent written by Justice Marshall, held that when determining whether or not to dissolve a desegregation injunction, the district court should decide "whether the Board made a sufficient showing of constitutional compliance.... [The] Court should address whether the Board [has] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination [have] been eliminated to the extent practicable."\textsuperscript{16} This Comment analyzes the dissent's criticisms of the majority holding in Dowell, in an effort to ascertain whether the holding is consistent with Brown I and its progeny, or a curtailing of well established constitutional rights.\textsuperscript{17} Subsequently, this Comment offers several

\textsuperscript{15} 111 S. Ct. 630 (1991).

\textsuperscript{16} Id. at 638.

\textsuperscript{17} It should be noted that as a general matter, desegregation orders are still being enforced successfully across the country. James S. Liebman, Desegregating Politics: "All-Out" School Desegregation Explained, 90 COLUM. L. REV. 1463, 1467 (1990) (listing some of the cities presently operating successfully under desegregation orders: Buffalo, Charlotte-Mecklenburg, Columbus, Dayton, Denver, Greenville, Jacksonville, Louisville, Minneapolis, Nashville-Davidson, St. Louis, San Diego, Tampa-St. Petersburg, and Wilmington-New Castle). During the Reagan Administration, a federal government study found that desegregation injunctions have led to a national trend away from isolating black students in black schools. See Fines Welch & Audrey Light, New Evidence on School Desegregation 969-70, 974-75 (1987). In the 125 schools studied, the numbers of black students attending "minority" schools declined from 62\% to 30\%, while the numbers attending "white schools" rose from 17\% to 44\%. Id.

alternative solutions as compromises between the majority and dissenting opinions.

I. THE PRIOR CASE LAW

In order to analyze Dowell, the standards laid down by the Supreme Court in the preceding fifty years must be examined. This will allow for a detailed comparison of the Equal Protection Clause as interpreted by the Warren Court in 1954 and the Rehnquist Court today.

Generally, any examination of the case law of desegregation begins with Brown v. Board of Education. In Brown I, the Court recognized that "segregation has a tendency to [hinder] the educational and mental development of negro children and deprive them of some of the benefits they would receive in a[n] ... integrated system." The impact is magnified "when it has the sanction of the law." Therefore, "in the field of public education the doctrine of 'separate but equal' has no place."

Although the Court found that separate was inherently unequal in Brown I, it did not address adequate remedies until a year later in Brown v. Board of Education ("Brown II"). In Brown II, the court delegated the responsibility of fashioning equitable remedies to the federal district courts because of their "proximity to local conditions." The Supreme Court then ordered the district courts to take such actions as are "necessary and proper to admit to all public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

Brown II was followed by a variety of cases where local school boards implemented plans designed to avoid integration at any cost. In reaction to these plans, as well as others which were not

18. 347 U.S. 483 (1954). It should be noted that the road to Brown I began in 1950 in two cases: Sweat v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). Both cases had to do with black graduate students challenging the segregation of their education as violations of the Equal Protection Clause. In both cases the Court found for the student, holding the separate education to be unequal. In both of these cases however, the inequality was in some way tangible (i.e., poorer facilities, etc.).
20. Id.
21. Id. at 495.
23. Id. at 299.
24. Id. at 301.
so obviously motivated by racism, the Supreme Court, in *Green v. County School Board*, upon finding the school system to be unconstitutionally segregated placed an "affirmative duty [on local school boards] to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated." *Brown II* was not merely a call for a school board to act without discriminatory intent, but rather a "call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution." Additionally, the Court listed six factors to consider when evaluating attempts to desegregate: (1) composition of the student body; (2) faculty; (3) staff; (4) transportation; (5) extracurricular activities; and (6) facilities.

The most important desegregation case, however, in terms of offering guidance to the district courts, is *Swann v. Charlotte-Mecklenburg Board of Education*. In *Swann*, the court first reiterated the school board’s affirmative duty to desegregate. The Court then touched upon the distinction between *de facto* and *de jure* segregation.

*De jure* segregation occurs when the court finds that the segregation was the result of a school board’s intent to discriminate, either past or present. It is this intent to discriminate which is critical to finding a constitutional violation. Without a finding of the

373 U.S. 683 (1963); Cooper v. Aaron, 358 U.S. 1 (1958). In *Griffin*, the court struck down a plan to close down all the public schools and then fund all white private schools by tax credits. *Griffin*, 377 U.S. at 232-34. In *Goss*, the Court struck down a plan that rezoned school districts providing for initial desegregation, and then allowing any student in a minority in a particular school to transfer to where he would be in a majority. *Goss*, 373 U.S. at 688-89. In *Cooper*, the governor of Arkansas used the national guard to block black students from being admitted to an all white Little Rock high school. The Court enjoined the governor from blocking the school and federal troops were sent in to back the court order. *Cooper*, 358 U.S. at 11-12.

26. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (implementing a "freedom of choice" plan allowing students to choose to attend whatever school they want is a violation of the equal protection clause).


28. Id. at 435.

29. Id. at 437-38.

30. Id. at 437.

31. Id. at 435.


33. Id. at 16.

34. See id. at 17-18.

35. See id. at 15. For a more extensive discussion of *de jure* and *de facto* segregation, see, *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205-08 (1973).

36. See *Washington v. Davis*, 426 U.S. 229 (1976); *Keyes*, 413 U.S. at 208; *Swann*,
requisite intent, there is only *de facto* segregation, and no equal protection violation.\(^{37}\) Additionally, the Court noted the desirability of using a neighborhood school policy absent the existence of school board intent to discriminate.\(^{38}\) This is especially important because it shows that even as far back as *Swann*, the Court implicitly recognized the importance of local influence over public education and the tension that may exist between that influence and those rights protected by the Equal Protection Clause. The Court’s recognition of the validity of a neighborhood school policy absent any discriminatory intent is vital. Given the present state of the desegregation law, a neighborhood school policy, combined with segregated residential patterns, could easily produce segregated public schools, while not violating equal protection standards.\(^{39}\)

The Court then addressed four specific issues: (1) the extent to which racial quotas may be used in forming a remedial order; (2) whether a single race school necessarily means that a constitutional violation exists; (3) whether redrawing school attendance zones is permissible in forming an equitable remedy; and (4) what limits, if any, exist on the use of busing as a tool for achieving desegregation.\(^{40}\) The court held that ratios of black to white students as a whole may be used to help formulate a desegregation plan, but that precise ratios may not serve as an absolute requirement in achieving integration.\(^{41}\) The existence of a single race school does not necessarily mean that desegregation has not occurred.\(^{42}\) It does, however, require close scrutiny by the courts, and the burden is on the school board to show that the single race school is not a result of intentional segregation.\(^{43}\) The redrawing of school attendance zones is permissi-
bile as a component of an integration plan.\textsuperscript{44} The redrawn zones do not have to be either compact or contiguous.\textsuperscript{45} Additionally, busing was approved as a method for achieving integration, as long as the health and welfare of the children were not put in jeopardy as a consequence.\textsuperscript{46}

In \textit{Keyes v. School District No. 1},\textsuperscript{47} the Court reiterated the importance of the distinction between \textit{de jure} and \textit{de facto} segregation, emphasizing that \textit{de jure} segregation would be found only where the intent to segregate existed.\textsuperscript{48} Otherwise, there was no constitutional violation.\textsuperscript{49} The Court also held that unconstitutional segregation in a substantial part of the school district was sufficient to make a prima facie case for segregation throughout the entire district, regardless of whether the requisite intent was found throughout the entire district.\textsuperscript{50} The burden of rebutting this presumption is on the school board.\textsuperscript{51}

Since \textit{Keyes} was handed down in 1973, the Supreme Court has limited the scope of desegregation remedies in several decisions.\textsuperscript{52} In \textit{Milliken v. Bradley} ("\textit{Milliken I}")\textsuperscript{,53} the district court found that the Detroit school system had practiced a policy of \textit{de jure} segregation.\textsuperscript{54} However, because most of the Detroit schools were at least 75\% black, a desegregation plan operating within the city limits would be ineffective.\textsuperscript{55} The lower court therefore ordered a desegregation plan that involved busing children between the mostly white suburbs and the mostly black city.\textsuperscript{56} The Supreme Court, in a 5-4 decision, over several dissents,\textsuperscript{57} including a vigorous dissent written

\begin{footnotes}
\footnote{44. \textit{Swann}, 402 U.S. at 28-29.}
\footnote{45. \textit{Id}.}
\footnote{46. \textit{Id}. at 30-31.}
\footnote{47. 413 U.S. 189 (1973).}
\footnote{48. \textit{Id}. at 208.}
\footnote{49. \textit{Id}.}
\footnote{50. \textit{Id}.}
\footnote{51. \textit{Id}. at 210-11.}
\footnote{54. \textit{Milliken I}, 418 U.S. at 748-49.}
\footnote{55. \textit{Id}. at 725-26.}
\footnote{56. \textit{Id}. at 732-33.}
\footnote{57. \textit{Id}. at 757 (Douglas, J., dissenting); \textit{Id}. at 762 (White, J., dissenting).}
\end{footnotes}
by Justice Marshall, held that if there was no constitutional violation found to have occurred in the mostly white suburbs, then a constitutionally based remedy could not be imposed upon them. The decision relied on the firmly entrenched rule that a constitutional remedy cannot exceed the scope of the violation. In arriving at this holding, the Court placed a great deal of emphasis on the local community interests at stake in operating a school district: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and the quality of the educational process." Several years later, in Milliken v. Bradley ("Milliken II"), the Supreme Court reiterated its point, holding that in addition to considering the nature and scope of the constitutional violation, it is imperative that the court give due weight to "the interests of state and local authorities in managing their own affairs, consistent with the Constitution." These two holdings are important because the Court is now explicitly recognizing both the legitimate interest that a locality has in controlling its public education system, and the conflict these interests may have with constitutionally protected rights.

In Pasadena City Board of Education v. Spangler, the District Court implemented a desegregation plan which used racial quotas in a rigid fashion, combined with a yearly reassignment policy. Specifically, the school board was given a quota for its schools, and each year, if the quota was not met for whatever reason, students were reassigned in order to comply with the court order. The plan was based on the notion that no student who was in the minority race should be in the majority of a given student body. The school

58. Id. at 781 (Marshall, J., dissenting).
59. Id. at 745.
63. Id. at 280-81.
64. This recognition, however, was not a new insight into desegregation law. In Swann, the Court implicitly recognized this same notion when it addressed the potential desirability of neighborhood school policy for a locality. See supra notes 32-39 and accompanying text.
66. Id. at 433-34. For discussion of the use a racial quotas as a part of a desegregation plan, see supra notes 40-41 and accompanying text.
67. Spangler, 427 U.S. at 433-34.
68. Id.
board complied with the court order for a year, before it fell outside the boundaries of the quota as a result of factors beyond the school board’s control, such as population movements.69 The Supreme Court (as in Milliken I) struck down the order because it imposed too broad a remedy: enforcing an injunction for racially imbalanced schools where the imbalance was not the result of a constitutional violation, having nothing to do with the school board’s intent to discriminate.70

II. THE MOST RECENT PHASE IN THE CASE LAW

Beginning in the late 1970s, the focus of court decisions has shifted from limiting the breadth71 of desegregation orders to lifting those orders entirely.72 In Spangler v. Board of Education,73 the Court of Appeals for the Ninth Circuit held that nine years of compliance with a court desegregation order in good faith was sufficient to accomplish the order’s goals.74 In reaching its decision, the Ninth Circuit recognized the paramount local interests involved in maintaining a public school system.75 Consequently, the district court’s denial of the school board’s motion was overruled and the order was lifted.76 The district court’s central reason for denying the board’s request was that the board planned to return to a neighborhood school policy.77 The lower court denied the board’s motion in spite of the

69. Id. at 434.
70. Id. at 431. See supra notes 35-37 and accompanying text (addressing intent as a prerequisite to an equal protection violation).
71. See e.g., Board of Educ. v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 418 U.S. 717 (1974). Both of these cases focused on the injunctions imposed by the lower courts, finding them to be invalid because their scope was too broad. Both cases held that the breadth of the constitutional remedy may not exceed the scope of the violation.
72. See e.g., Fitts v. Freeman, 887 F.2d 1438 (4th Cir. 1989), rev’d, 112 S. Ct. 1430 (1992); Riddick v. School Bd., 784 F.2d 521 (4th Cir.), cert. denied, 479 U.S. 938 (1986); Spangler v. Board of Educ., 611 F.2d 1239 (9th Cir. 1979).
73. 611 F.2d 1239 (9th Cir. 1979).
74. Id. at 1241 (citing Milliken II, 433 U.S. 267, 280-81 (1977)). The Court’s decision was also affected by the Board’s testimony that it would continue with affirmative action in support of integration. Id.
75. Spangler, 611 F.2d at 1241.
76. Id.
77. Id. at 1243 (Kennedy, J., concurring). It should be noted that Judge Kennedy’s concurring opinion was joined by Judge Anderson, giving it majority support of the three member panel.

A neighborhood school policy has been held to be in compliance with the Equal Protection Clause absent a showing of segregative intent. See, e.g., Milliken II, 433 U.S. 267, 280 n.14 (1977); Spangler, 427 U.S. 424, 434-36 (1976); Swann v. Board of Educ., 402 U.S.
fact that it was no longer acting with the requisite unlawful discriminatory intent.  

In Riddick v. School Board of Norfolk, 79 the Court of Appeals for the Fourth Circuit upheld a school board’s plan calling for an end to mandatory busing. 80 The main reason for the school board’s desire to stop busing was because “white flight” was occurring in such magnitude that it was outweighing the effects of the desegregation order. 81 The Fourth Circuit followed Spangler, carrying it further.

1, 26 (1971).
78. Spangler, 611 F.2d at 1241.
80. Id. at 526, 533.
81. Id. at 526. For a more in depth discussion of “white flight” and its impact on desegregation, see Paul Gerwitz, Remedies and Resistance, 92 YALE L.J. 585, 628-65 (1983); Note, Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation, 100 HARV. L. REV. 653, 663 n.66 (1987). White flight is a particularly troublesome form of resistance to desegregation injunctions because it is resistance by retreat rather than by obstruction. Gerwitz, supra, at 629.


For the most part, this controversy seems to have subsided. Most scholars now agree that there has been a general trend of whites away from urban centers, but this movement is accelerated by the presence of a desegregation order. See Christine H. Rossell, Applied Social Science Research: What Does It Say About the Effectiveness of Desegregation Plans?, 12 J. LEGAL STUD. 69, 80-94 (1983) (summarizing the general agreement that exists among scholars). Additionally, these results are also summarized by two volumes of Congressional hearings. See School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 160 (1982) [hereinafter House School Desegregation Hearings] (statement of G. Orfield); id. at 205-06 (statement of D. Armor); id. at 217-18 (statement of C. Rosell); Court Ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 193 (1982) [hereinafter Senate Busing Hearings] (statement of J. Ross); id. at 210 (statement of C. Clotfelter); id. at 232 (statement of R. Farley).

Several cities have shown strong evidence bearing out this proposition. including Boston, Los Angeles, and Memphis. The Senate Busing Hearings, supra, at 198-99, have shown that after the 1975 desegregation order in Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), aff’d, 530 F.2d 401 (1st Cir.), cert. denied, 426 U.S. 935 (1976), 60% of the Boston’s families with children in the public schools either moved or began sending their children to parochial schools. In Los Angeles, after a similar order, white enrollment fell from 37% to 24% between 1976 and 1980. House School Desegregation Hearings, supra, at 207, 214 (statement of D. Armor). In Memphis, it was estimated that white enrollment dropped literally in half because of the school desegregation plan. See George Noblit &
Once a school system was found to be unitary, the injunction must be terminated. The Court continued, holding that once unitary status has been achieved, in order to challenge a new school board plan, a new intent to discriminate must be shown.

In 1989, the Court of Appeals for the Tenth Circuit adopted a more stringent test for school boards seeking to have the courts remove desegregation orders in *Dowell v. Board of Education*. Spec-

Thomas Collins, *School Flight and School Policy: Desegregation and Resegregation in the Memphis City Schools*, 10 URB. REV. 203, 206 (1978). A Cleveland Study showed that its desegregation injunction caused white enrollment to drop by over one-third. OFFICE ON SCH. MONITORING & COMMUNITY RELATIONS, *ENROLLMENT DECLINE AND SCHOOL DESSEGREGATION IN CLEVELAND: AN ANALYSIS OF TRENDS AND CAUSES* 23 (1982). Other cities where the evidence supports similar conclusions are Birmingham, Chattanooga, Dallas, Dayton, Denver, Detroit, Oklahoma City, Omaha, Pasadena, San Francisco, and Seattle. See *House School Desegregation Hearings*, supra, at 207, 214 (statement of D. Armor) (claiming that desegregation plans account for anywhere between 30% and 70% of white flight in these cities).


The issue regarding tipping that has confronted courts in the last fifteen years is whether the courts may fashion remedies that are tailored to avoid the possible neutralizing effects that white flight might otherwise have on desegregation orders. Gerwitz, *supra*, at 630-31. See *Estes v. NAACP*, 444 U.S. 437 (1980). This issue is beyond the scope of this Comment.

82. For the purposes of this Comment, the term "unitary" will be considered synonymous with "desegregated" for the purposes of constitutional analysis. There has been a certain degree of confusion surrounding the term. See, e.g., *United States v. Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987); *NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Vaughns v. Board of Educ.*, 758 F.2d 983, 988 (4th Cir. 1985). However, elucidating that confusion is beyond the scope of this Comment. For a somewhat broader discussion of the term, which reaches the same conclusion, see *Board of Educ. v. Dowell*, 111 S. Ct. 630, 635-36 (1991). For an attempt to shed light on the confusion, see G. Scott Williams, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM. L. REV. 794 (1987).

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

84. *Id.* at 537. *Riddick* has been criticized as placing too harsh a burden on plaintiffs. See Dennis G. Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE W. L. REV. 41, 70 (1986) (advocating a shifting burden so that school boards must show that their plans conform to the unitary status); Mitchell F. Ducey, Note, *The Unitary Finding and the Threat of School Resegregation*: *Riddick v. School Board*, 65 N.C. L. REV. 617, 638 (1987) (questioning a plaintiff's ability to meet the rigorous standards handed down in *Riddick*).

specifically, the Tenth Circuit held that for a school board to obtain such relief, "nothing less than a clear showing of grievous wrong evolved by new and unforeseen conditions . . . to change what was decreed after years of litigation with the consent of all concerned," would suffice. The Supreme Court granted certiorari to Dowell to resolve the conflict in the standards laid down by the Tenth Circuit and those laid down by the Ninth and Fourth Circuits in Spangler and Riddick.

III. BOARD OF EDUCATION v. DOWELL

The litigation of the school desegregation issue in Dowell began in 1961, when black students and their families sued the Oklahoma City Board of Education ("School Board" or "Board") to end the de jure segregation existing in the public school system. In 1963, the District Court for the Western District of Oklahoma found that Oklahoma City had intentionally segregated both schools and housing. Two years later, the district court found the School Board's attempts to desegregate based on a rezoning plan to be inadequate. Because the School Board had been unable to successfully eliminate the vestiges of past discrimination the district court eventually imposed the "Finger Plan." Under the Finger Plan, kindergarten-aged children were assigned to neighborhood schools unless their parents opted otherwise. Children in grades one through four attended previously all white schools, thereby causing black children to be bused to those schools. Children in grade five attended formerly all black schools,
thereby causing white children to be bused.95 Children in higher grades were bused to a variety of other areas in order to maintain integrated schools.96 In already integrated neighborhoods, there were stand-alone schools encompassing all grades.97

In 1977, pursuant to a motion by the School Board, the district court held that the Finger Plan had “worked and that substantial compliance with the constitutional requirements ha[d] been achieved.”98 The court continued, “Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of the Court.”99 In spite of this recognition of the effects of the Finger Plan, the lower court did not explicitly terminate the injunction.100

In 1984, demographic changes began to place greater burdens on young black children.101 As more neighborhoods became integrated, more stand-alone schools were established.102 This increased the distance between the remaining schools that still had students being bused, and left black children having to commute longer distances.103 To alleviate this problem, the School Board adopted the “Student Reassignment Plan,” which contained a neighborhood school policy for children in grades kindergarten through four.104 Busing continued for students in grades five through twelve, and any student could transfer from a school where he was in the majority to where he was in the minority.105

One year later, a “motion to reopen the case” was filed, arguing that the School Board had never obtained a unitary status and that implementation of the student reassignment plan would only serve to

95. Id.
96. Id.
97. Id.
98. Id. at 634.
99. Id.
100. While this point appears trivial at first, it becomes critical to the Supreme Court’s analysis in terms of finding standing for the appellants. Id. at 635. The Court found that because the district court did not explicitly dissolve the injunction, the lower court’s finding of unitary status (which was not appealed) was not res judicata with respect to dissolving the injunction. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
reimpose segregation. Additionally, the motion claimed that the plan would leave approximately one-quarter of the city's schools with a 90% black student body, and one-third with a 90% non-black majority. Slightly less than one-half of the schools would remain integrated.

The district court denied the motion, holding that its 1977 finding of unitary status was res judicata, and that the school district had remained unitary. Specifically, the lower court held that the School Board, the student body, the support staff, the faculty and administration, the transportation, the extra curricular activities, and the facilities were all integrated. Therefore, in order to bring this suit, the plaintiffs needed a new showing of intent to segregate.

The Court of Appeals for the Tenth Circuit reversed, holding that while the finding of unitary status in 1977 was binding, there was nothing in that order indicating explicitly that the desegregation injunction was lifted. Because the injunction was never terminated, the Tenth Circuit reasoned that the School Board was still subject to the order, and therefore, the student reassignment plan could be challenged. The Court of Appeals then remanded the case for determination of whether the injunction should be limited or modified.

On remand, the district court found that the Finger Plan was no longer tenable because of demographic changes. The Board had done nothing within the prior twenty-five years to promote residential segregation, and busing had occurred for over ten years in good faith compliance with the injunction. The existing circumstances causing segregation in housing patterns were too attenuated to be considered a vestige of former school segregation. Consequently, the

106. Id.
107. Id.
108. Id.
110. Id. at 1554 (relying on the standards set forth in Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)).
114. Dowell, 795 F.2d at 1521.
115. Id. at 1523.
116. Dowell, 111 S. Ct. at 634.
117. Id.
118. Id.
Court vacated the injunction and returned the school district to local control.\textsuperscript{119} Again, the Tenth Circuit reversed,\textsuperscript{120} recognizing that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate."\textsuperscript{121} Therefore, the Tenth Circuit, relying on United States v. Swift & Co.,\textsuperscript{122} the seminal case with regard to dissolving injunctions, held, "the inquiry [before the court] is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow."\textsuperscript{123} Consequently, a party seeking relief from an injunction "must demonstrate dramatic changes in the 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."\textsuperscript{124}

Applying this stringent test, the Tenth Circuit relied on the fact that a high percentage of the schools would become one race schools if the student reassignment plan were implemented, and held that Oklahoma City's situation had not changed sufficiently to warrant termination of the injunction.\textsuperscript{125} The court concluded that regardless of a finding of unitary status, the school board is still obligated by the affirmative duty not to impede the process of disestablishing the dual system.\textsuperscript{126}

On appeal, the Supreme Court affirmed the Tenth Circuit’s holding that the school board was still bound by the desegregation order in spite of the district court’s 1977 finding of unitary status, because the order did not explicitly dissolve the decree.\textsuperscript{127} Therefore, the plaintiffs did not need a new showing of discriminatory intent to

\footnotesize{\textsuperscript{119} Id.}
\footnotesize{\textsuperscript{120} Dowell v. Board of Educ., 890 F.2d 1483 (10th Cir. 1989), rev’d, 111 S. Ct. 630 (1991).}
\footnotesize{\textsuperscript{121} Id. at 1490 (quoting Timothy S. Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1105 (1986)).}
\footnotesize{\textsuperscript{122} 286 U.S. 106, 119 (1932).}
\footnotesize{\textsuperscript{123} Id.}
\footnotesize{\textsuperscript{124} Dowell, 890 F.2d at 1490 (quoting Jost, From Swift to Stotts, supra note 121, at 1101, 1110 (1986)).}
\footnotesize{\textsuperscript{125} Dowell, 890 F.2d at 1493.}
\footnotesize{\textsuperscript{126} Id. at 1504 (citing Board of Educ. v. Brinkman, 433 U.S. 526, 538 (1979)).}
\footnotesize{\textsuperscript{127} Board of Educ. v. Dowell, 111 S. Ct. 630, 635 (1991) (relying on Board of Educ. v. Spangler, 427 U.S. 424 (1976), which requires courts to give a school board a precise statement of its obligations under desegregation decrees, as well as precise statements regarding the termination of those obligations).}
bring the lawsuit.\footnote{128}

Subsequently, the Supreme Court examined the holding of \textit{Swift} and acknowledged that \textit{Swift} does teach that a decree may not be modified or terminated if the purposes of the litigation as incorporated in the decree have not been fully achieved.\footnote{129} However, the Tenth Circuit was mistaken in relying on \textit{Swift} to require an extra showing of "'grievous wrong evoked by new and unforeseen conditions.'"\footnote{130} In \textit{Swift}, several companies in the meat packing business entered into a consent decree under which they would not enter any business that engaged in the manufacturing, selling, or transporting of any of 114 enumerated food products or thirty other unrelated articles.\footnote{131} The decree was designed to remain in force in perpetuity.\footnote{132}

Desegregation injunctions, however, unlike the consent decree in \textit{Swift}, are designed to be temporary.\footnote{133} Since \textit{Brown} was handed down, the Court has spoken of desegregation injunctions in the context of the "transition" of public education to a system that is free of racial discrimination.\footnote{134} This notion is also consistent with \textit{Milliken I} and \textit{Milliken II} where the Court held that the desegregation injunctions must be limited to the scope of the constitutional violation.\footnote{135} If the desegregation decree was designed to outlast the violation, then a violation of \textit{Milliken I} would certainly exist.\footnote{136}
After drawing the temporary/permanent distinction between the desegregation injunctions and the consent decree in Swift, the Court reiterated the importance of local control over public education, and allowing citizens to participate in the development of school programs so that they may fit local needs. 137

Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems does not extend beyond the time required to remedy the effects of past intentional discrimination." 138

Although the Supreme Court did overrule the Tenth Circuit's decision, the district court's decision was not reinstated. 139 Rather, the case was remanded so that the district court could "address itself to whether the School Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." 140 In making its decision, the district court should look not only to the student reassignment plan, but to every facet of school operation: faculty, staff, transportation, extra-curricular activities, and facilities. 141

The majority in Dowell handed down its decision over an outraged dissenting opinion written by Justice Marshall and joined by Justices Blackmun and Stevens. 142 The central theme of the dissent was that the majority was not true to the spirit of Brown and its progeny. 143 Justice Marshall's view is best summed up by his state-

137. Id. (relying on Milliken I, 418 U.S. at 742; School Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).
139. Dowell, 111 S. Ct. at 638.
140. Id.
141. Id. (referring to the criteria set forth in Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)).
143. Id. Among the numerous references to these cases, Justice Marshall stated: In my view, the standard for dissolution of a school desegregation decree must reflect the central aim of our school desegregation precedents. In [Brown I], a unanimous Court declared that racially "[s]eparate educational facilities are inherently unequal." This holding rested on the Court's recognition that state-sponsored segregation conveys a message of "inferiority as to the status [of Afro-American
ment, "I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in Brown I persist and there remain feasible methods of eliminating such conditions." However, nowhere in his opinion does Justice Marshall explain what "stigmatic" injury is at stake in Dowell. While it is certainly arguable that segregating public school students by race may cause educational injury, in terms of depriving the students of the enrichment that cultural diversity may bring to a school, it is unclear how such an injury is stigmatic when it is not motivated by discriminatory intent. This distinction is crucial in this area of the law because, as Justice Marshall himself admits, it is the "stigmatic" injury that Brown and its progeny protect against.

The dissent continues by agreeing with the majority's overall standard for terminating a desegregation decree—that the purpose of the decree must be fully achieved. The disagreement rests in what constitutes fulfillment of the decree's purposes. Specifically, Marshall relies on Swann v. Charlotte-Mecklenburg, which requires school districts to "'make every effort to achieve the greatest possible degree of actual desegregation and [to] be concerned with the elimination of one-race schools.'" The ultimate goal is a "'nonracial system of public education.'" This goal is realized once "school officials have 'eliminate[d] from the public schools all vestiges of state imposed segregation,'" whether they exist in criteria set out in Green v. County School Board, or even in "'community ... attitudes toward a school.'"

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144. Id. (quoting Brown I, 347 U.S. 483, 494 (1954)) (citations omitted).
145. Id. (emphasis added). This quote is especially telling because of what it omits. Nowhere in his dissent does Marshall weigh into his analysis the basic constitutional rule that the scope of the remedy may not exceed the scope of the violation. See id.
146. Id. at 641 (referring to the standard adopted by the majority which originated in United States v. Swift & Co., 286 U.S. 106 (1932)).
147. Dowell, 111 S. Ct. at 641-42.
149. Id. at 643 (quoting Swann v. Board of Educ., 402 U.S. 1, 26 (1971)) (emphasis omitted).
151. Dowell, 111 S. Ct. at 644 (quoting Swann, 402 U.S. at 15).
152. 391 U.S. at 435.
The dissent then continues by noting that the term “vestige” has never been explicitly defined and offers as a definition, “any condition . . . likely to convey the message of inferiority implicit in a policy of segregation.” The significance of this definition is not readily apparent until Marshall discusses what seems to be his underlying fear, that the majority does not consider residential segregation to be a vestige of school desegregation. Marshall’s point becomes even more obvious as his opinion argues that under the majority holding:

[T]he District Court could ignore the effect of residential segregation in perpetuating racially identifiable schools if the court finds residential segregation to be the result of private decisionmaking and economics . . . . There is no basis for the majority’s . . . suggestion that the result should be different if residential segregation is . . . perpetuated by “private decisionmaking” as opposed to being a vestige [of past discrimination].

This remark indicates a desire to have residential segregation treated as a vestige of school segregation regardless of what the underlying facts might indicate. This interpretation is anomalous to the prior case law, completely wiping out the distinction between de jure and de facto segregation.

Furthermore, Justice Marshall’s stance seems to take desegregation law to an extreme never before contemplated. In *Columbus Board of Education v. Penick,* and *Dayton Board of Education v. Brinkman,* the Supreme Court held that if a school system is found to have once operated under a policy of de jure segregation, and the schools are presently segregated, there is a presumption that the present segregation is a result of the past de jure policy. Consequently, the school board is still bound to an affirmative duty to desegregate. Justice Marshall’s opinion says that whether or not the present day segregation resulted from past de jure policies, the school board is under an affirmative duty to desegregate. This second argument is as much a departure from the state of desegregation law.

154. The term is not even defined by the majority in Dowell.
155. Dowell, 111 S. Ct. at 644.
156. See id. at 645-46.
157. Id. at 646.
160. See Columbus, 443 U.S. at 458; Dayton, 443 U.S. at 536.
161. See Columbus, 443 U.S. at 458; Dayton, 443 U.S. at 536.
as Justice Marshall claims the majority opinion to be.

The best manner by which to analyze the majority opinion and its compatibility with the prior case law is in light of the dissent's complaints. In order to do this, the effects of the majority opinion must be set out. The explicit impact of the majority opinion is not very complex. It sets out a standard by which the district courts should review desegregation injunctions: the purposes of the injunction must be fulfilled and the vestiges of past discrimination must be eliminated to the extent practicable. The decision ultimately remains with the district court.

Assessing the dissent's criticisms against these simplistic, albeit extremely broad rules, reveals that however appealing Justice Marshall's arguments may be at an emotional level, even when recognizing the gravity of the societal problems that are caused by residential segregation, as legal arguments they are seriously flawed.

Before addressing the dissent's flaws, however, one major point that must be considered is that at issue is the standard for lifting a desegregation injunction, not for imposing one. Much of the dissenting opinion is spent quoting the rhetoric of *Brown* and its progeny. However, most of this rhetoric addresses the effects of pre-remedy segregation, not how to handle school boards which have complied with desegregation injunctions in good faith and want relief from the burdens that these injunctions cause. Although this difference does not invalidate any of the dissent's reasoning, it does create a different backdrop against which to analyze the opinion. For example, the unforseen consequences of the desegregation orders, such as unprecedented "white flight" outweighs any positive effect of court ordered integration efforts.

In addition to the difference in the issue at hand, there are two specific egregious flaws in the dissenting opinion. The first is that it draws on the more dramatic rhetoric of the desegregation opinions without acknowledging the context of that rhetoric. For example, Marshall quotes *Swann* at length to portray the spirit of the desegregation law without ever acknowledging that *Swann* also im-

162. *See supra* notes 139-41 and accompanying text.
163. *Id.*
164. Among the most obvious of these burdens is the cost of the busing itself, in terms of maintaining the buses, the insurance, etc.
165. *See supra* note 81. For a more in depth discussion of white flight, see Gerwitz, *supra* note 81, at 628-65.
166. *See supra* notes 142-61 and accompanying text.
licitly recognizes the importance of the underlying local interest involved in running a public school system. This implicit recognition is especially important because it shows that even when the Court was still developing the basic guidelines of the desegregation law, it still appreciated that local concerns were in tension with the constitutional protections. Consequently, where the constitutional protections end, the rights of the locality begin. The issue of where to draw this line is exactly what is addressed in *Dowell*. By not acknowledging this broader underlying context, Marshall implicitly dismisses it and consequently appears to be applying the law in a piecemeal fashion, without acknowledging its underlying concerns.

The second flaw in Marshall’s opinion is that he ignores the boundaries of the allowable remedies under the Equal Protection Clause and erases the distinction between *de facto* and *de jure* segregation. Specifically, although Marshall recognizes, at least in theory, that the desegregation orders are temporary in nature, he fails to enunciate a standard. Rather, he makes an appeal to the Court based on the burdens that racism places on society, regardless of whether or not the actual violations are caused by a local school board, or just personal (albeit racist) preferences in residential patterns. Although the damage caused may ultimately be the same, their constitutional implications are diametrically opposed. As stated above, Marshall goes so far as to condemn the majority for hinting that the district courts could ignore residential segregation as a cause of school segregation if the residential segregation was a result of “private decisionmaking and economics.” Marshall then drives this point home by stating that “there is no basis for the majority’s . . . suggestion that the result should be different if residential segregation is now perpetuated by ‘private decisionmaking.’” This assertion completely ignores a basic tenet of desegregation law: a constitutional remedy can only be imposed to rectify a constitutional violation. Residential segregation that exists as a result of private decisionmaking and economics is not in itself a constitutional viola-

167. *See supra* notes 32-39 and accompanying text. This recognition is implicit, but obvious, in the Court’s appreciation of the merits of a neighborhood school policy, if the local school board is inclined to adopt such a policy.


169. *Id.* at 645-46.

170. *Id.* at 645.

171. *Id.* at 646.

tion. It may only amount to *de facto* segregation, which is not unconstitutional. Justice Marshall has, in reality, created a new violation where none previously existed.

IV. CONCLUSION

The Supreme Court’s decision in *Board of Education v. Dowell* is not a departure from the previous case law regarding desegregation. It provides a standard for district courts to review desegregation orders that have been complied with while explicitly recognizing that the district courts have the discretion to deny a school board’s motion to lift a desegregation injunction if the court is suspicious of the board’s intent. The dissent’s opinion is severely flawed in that: (1) it fails to address the context in which *Dowell* exists, specifically in terms of the importance of the local interest in controlling public schools; and (2) it ignores the distinction between *de facto* and *de jure* segregation, creating a constitutional remedy where none previously existed. These flaws in the dissent’s arguments only serve to further evidence that the majority opinion is in line with preceding cases.

Although Justice Marshall’s dissent is contrary to contemporary desegregation law, it should not be summarily dismissed. Rather, it should be read to emphasize the failure of both desegregation remedies and the case law implementing those remedies. Clearly, as we enter the new phase in desegregation law, the injunctions may be lifted but the underlying issues have not been resolved.

Justice Marshall’s goals could be achieved in three ways not considered in his opinion: (1) overruling *Keyes* and eliminating the distinction between *de jure* and *de facto* desegregation; (2) overruling *Milliken I*, in whole or in part; or (3) limiting *Milliken I* to its facts by recognizing that residential segregation is often a vestige prior discrimination, and creating a rebuttable presumption to this effect.

174. It should be noted that the differences between the majority and the dissent in *Dowell* could be read as simply differing perspectives on the facts. However, such a reading seems to oversimplify a major development in the desegregation law and ignore the strength of the language used by both the views.
175. *Dowell*, 111 S. Ct. at 637.
178. It should be noted that a fourth option, not discussed, is to let the state courts...
Overruling *Keyes*, however, is senseless. It would create an unnecessary anomaly in well established case law. Eliminating the distinction between *de jure* and *de facto* segregation would not only effectively create a new remedy, it would render *Washington v. Davis* and the requirement of discriminatory intent a nullity in desegregation law. This departure would not only leave the court to rewrite virtually the entire corpus of the equal protection case law, it is wholly unnecessary.

Even overruling *Milliken I*, in whole or in part is unnecessary, and would cause more inconsistencies in the case law than is warranted. The greatest danger of overruling any part of *Milliken I* is that the decision will directly contradict the basic tenet of constitutional construction: that the scope of the remedy cannot exceed the scope of the violation. Altering this rule could easily have unforeseeable repercussions when applied outside of the desegregation law, allowing courts to fashion remedies without limits.

Limiting *Milliken I* to its facts is the best option. By limiting *Milliken I* to its facts, Justice Marshall’s goal could be accomplished while eliminating a host of potential problems. By taking this tack, the Court could explicitly find as a general rule that residential segregation is a vestige of past discrimination, and then create a rebuttable presumption to this effect. Although creating a presumption here may seem to place too high a burden on the school boards, it is really no more than a logical extension of the already existing presumption that present day segregation in schools, often coupled with segregated residential patterns, is presumptively unconstitutional. Additionally, patterns of white flight could then be traced to this *de jure* segregation and give the Court the power to fashion broader remedies.

handle the contemporary problems in desegregation law. Presently pending before the courts of Connecticut is a case in which the plaintiffs are trying to argue that the state constitution permits remedies that affect both the city in which unconstitutional segregation is found, and the suburbs in which no violation occurred. *Sheff v. O’Neill*, 609 A.2d 1072 (Conn. Super. Ct. 1992). This is a similar argument to the one that failed in the U.S. Supreme Court in *Milliken I*. The effect of the plaintiffs’ success at the state level would be to allow Justice Marshall’s goals in the *Dowell* dissent to be realized indirectly. However, as previously discussed, this would still have effect of eliminating distinction between *de jure* and *de facto* desegregation and all the problems that this would entail. See *supra* notes 167-74 and accompanying text. This possibility is not fully discussed in the text because it falls outside of the menu of affirmative choices for the Supreme Court.

179. *See supra* notes 167-74 and accompanying text.
Although this option sounds similar to Justice Marshall's dissent in Dowell, it is different in one important respect: it does not erase the distinction between de jure and de facto segregation. Rather, it just recasts the case law, decreasing the value of the underlying facts of Milliken I, without actually altering any of the rules applied in that case. Additionally, the scope of the remedy would not exceed the scope of the violation. Finding residential segregation to be a vestige of prior segregation would simply increase the scope of the violation. This solution should be especially palatable because it does not bind the lower courts to one specific outcome. It still allows the school boards to show that residential patterns are not vestiges of prior discriminatory intent, but rather a result of personal decisionmaking. If a school board can meet this test, unlike the test posited in Marshall's dissent, then the previously issued injunction may be lifted as it was in Dowell.

Given the choices that could be adopted to reach Justice Marshall's goals as set out in his dissent in Dowell, the best option is to limit Milliken I to its facts and create a rebuttable presumption that residential segregation is a vestige of prior discrimination. This presumption would afford more protection to minority children in school districts where desegregation plans have already been implemented for a protracted period of time, but the effects of segregation are still felt, while leaving well entrenched case law essentially intact.

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