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## Board of Education of Oklahoma City v. Dowell: A Solution to Perpetual Judicial Supervision

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# **BOARD OF EDUCATION OF OKLAHOMA CITY V. DOWELL: A SOLUTION TO PERPETUAL JUDICIAL SUPERVISION**

## **I. INTRODUCTION**

The Judiciary may intervene to alleviate racial discrimination within public schools only when de jure segregation, as opposed to de facto segregation, is found to exist.<sup>1</sup> De jure segregation is an intentional separation of the races caused by "some purposeful governmental activity."<sup>2</sup> Any state action having a "segregative purpose and intent" may serve as the foundation for de jure segregation.<sup>3</sup> Such "purposeful" actions may be taken by a state government based on statute and constitution or by a school board intentionally maintaining a racially discriminatory system.<sup>4</sup> Both of these activities result in purposeful discrimination and are prohibited by the equal protection clause of the Fourteenth Amendment of the United States Constitution.<sup>5</sup> Because equal protection of the laws is unconditionally guaranteed to all citizens regardless of their race, educational segregation is a constitutional violation falling within the jurisdiction of the federal court system.<sup>6</sup>

All constitutional violation cases based on intentional discrimination involve a mandatory desegregation process that may be generally summarized in four steps. The first step in this process is the court's

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1. Thomas E. Chandler, *The End of School Busing? School Desegregation and the Finding of Unitary Status*, 40 OKLA. L. REV. 519, 528-29 n.66 (1987) (citing *Keyes v. School Dist.*, 413 U.S. 189, 214-17 (1973)).

2. *Id.* at 529. If the governmental activity has unintentionally caused racial segregation within a school district, de facto segregation, which is not unconstitutional, is present rather than de jure segregation. *Keyes v. School Dist.*, 413 U.S. 189, 205-06 (1973) (defining "essential elements of de jure segregation" as "segregation resulting from intentional state action directed specifically to . . . city schools").

3. *Keyes*, 413 U.S. at 206 n.14. (determinative factor between de facto and de jure segregation is "segregative purpose" and intent).

4. *Id.* at 529.

5. U.S. CONST. amend. XIV, § 1.

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

*Id.*

6. U.S. CONST. art. III, § 2. (conferring jurisdiction upon the courts by stating that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .").

finding of intentional, de jure segregation in a public school system.<sup>7</sup> Second, the court issues a remedial injunctive order that forces the school board to implement a desegregation plan within its district to correct the constitutional violation.<sup>8</sup> The third step, a declaration that "unitary" status<sup>9</sup> has been achieved by the schools, occurs upon the board's full compliance with the court's decree. Good faith compliance will presumably signify that the violations have been remedied. Accordingly, when the unlawful activities are deemed corrected, the school system will be declared "unitary."<sup>10</sup> Fourth, after finding "unitary" status, the court concludes the case and terminates its jurisdiction.<sup>11</sup>

This final step of the desegregation process, although appearing quite simple and straightforward on its face, has been the topic of much controversy among the courts.<sup>12</sup> The debate revolves around the applicable standard for the dissolution of the desegregation injunctive order. The major question is whether the injunction is automatically dissolved when the board achieves "unitary" status within its school system, consequently freeing the board from the court's jurisdictional power of supervisory control. Adhering to school desegregation precedent, the United States Supreme Court in *Board of Education of Oklahoma City Public Schools v. Dowell*<sup>13</sup> adopted well established principles. The Court resolved this much-litigated issue by providing dissolution of injunctive decrees when continual good faith compliance with the remedial order

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7. See *supra* notes 1-4 and accompanying text.

8. Hugh J. Beard, Jr., *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction*, 49 LA. L. REV. 1239, 1241 (1989). This remedial "court order must be tailored to remedy the violation found, and when finally approved, constitutes res judicata with respect to the remedial sufficiency of every part of the remedy." See also *id.* at 1251-56.

9. The courts' inconsistent use of the word "unitary" has caused much confusion. No precise definition of this term appears regularly in desegregation cases. *Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 111 S. Ct. 630, 635-36 (1991) (listing various approaches and citing numerous cases). Generally, "unitary" is used to describe a dual school system that has been brought into compliance with the equal protection clause of the fourteenth amendment of the Constitution. *Id.*

10. See Beard, *supra* note 8, at 1241 (discussing the three different results occurring upon the achievement of unitary status). See generally *id.* at 1287-1313.

11. Chandler, *supra* note 1, at 541. The finding of unitary status only diminishes the remedial powers of the court rather than automatically causing jurisdiction over the case to be terminated. The court could terminate jurisdiction or jurisdiction may be retained by the court "to ensure maintenance of the unitary system by school board compliance with outstanding orders . . ." *Id.*

12. See, e.g., *United States v. Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521, 533-34 (4th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986); *Vaughns v. Board of Educ. of Prince George's County*, 758 F.2d 983, 988 (4th Cir. 1985); *NAACP v. Georgia*, 775 F.2d 1403, 1413-14 (11th Cir. 1985); *Milliken v. Bradley* [Milliken II], 433 U.S. 267, 280-82 (1977); *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 (9th Cir. 1979); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

13. 111 S. Ct. 630 (1991).

eliminates, to the extent practicable, all vestiges of past de jure discrimination with respect to every facet of school operations.<sup>14</sup> The *Dowell* standard requires only the eradication of effects caused by intentional discrimination, but permits the existence of unintentional racial segregation when such segregation is due to private actions beyond a school board's control. Unintentional racial segregation is permitted even when one-race schools reappear subsequent to the unitary finding.

## II. HISTORY OF OKLAHOMA SEGREGATION

Before explaining the alternate standards employed by the courts to dissolve a desegregation injunction, a brief history of segregation in the state of Oklahoma needs to be explored. Southern states commonly subscribed to "Jim Crow" laws which required a complete and absolute separation of the races.<sup>15</sup> Such laws, demanding compulsory racial separation, were based on centuries-old customs and traditions of the South dating back to the slavery era. Oklahoma formally adopted these southern traditions into both its constitutional and statutory laws.<sup>16</sup> As a result, from the inception of Oklahoma's statehood in 1907, school districts were entirely segregated while operating under a "separate-but-equal" doctrine which presumably provided identical accommodations to children of all races.<sup>17</sup> Thus, pursuant to Oklahoma law,<sup>18</sup> the operation of racially intermingled institutions was unlawful and imposed criminal liability upon persons implementing and maintaining such facilities.<sup>19</sup> Not only were school operators held criminally liable for conducting racially-mixed forbidden activities, but students and teachers were also subject to criminal prosecution and penalties.<sup>20</sup>

In addition to creating a mandatory segregation system within the

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14. *Id.* at 638.

15. *Dowell v. School Bd. of Oklahoma City Pub. Sch.*, 219 F. Supp. 427, 431 (W.D. Okla. 1963). See Chandler, *supra* note 1, at 523 nn. 26-27 for citations to constitutions and statutes of southern states which incorporated mandatory racial separation into their laws. See also Wiley A. Branton, *The History and Future of School Desegregation*, 31 Educ. L. Rep. 1075 (1986) (manner in which racial segregation became an "institutionalized" custom and practice in many other areas of the country as well as in the original southern states).

16. OKLA. CONST. art. I, § 5; OKLA. CONST. art. XIII, § 3 ("Separate schools for white and colored children . . . shall be provided by the Legislature . . ."); Oklahoma School Code, ch. 1A, 1949 Okla. Sess. Laws 532, 536-37 (repealed 1953).

17. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (United States Supreme Court recognized racial equality but failed to abolish the deep-rooted discriminatory policies which created vivid distinctions between the two races and kept them from intermingling).

18. See *supra* note 16.

19. Oklahoma School Code, ch. 1A, 1949 Okla. Sess. Laws 537 (repealed 1953).

20. *Id.*

public schools, a state's adoption of "separate-but-equal" laws concurrently manipulated residential housing demographics.<sup>21</sup> The residential demographic patterns of the Caucasian and Negro people were largely governed by restrictive covenants placed upon the lands by developers pursuant to the "separate-but-equal" laws that prohibited the sale of lots to persons of the Negro race.<sup>22</sup> In 1954, these segregative practices and all other discriminatory policies, such as Oklahoma City's scheme of mandated racism, were declared unconstitutional and unenforceable in the landmark case, *Brown v. Board of Education*.<sup>23</sup> Thus, after the *Brown* decision, the Oklahoma City school board was not only forced to confront the monumental task of desegregating the public school system but additionally had to overcome a fifty-year vested tradition of race separation.<sup>24</sup> The difficulty of this task was due to the fact that "[t]he Negro people had been segregated so completely in their residential pattern that it was difficult to determine what way, method and plan would be first adopted and carried out and what progressive plans should be adopted and carried out in the future."<sup>25</sup>

### III. HISTORY OF *DOWELL*

#### A. *Operation of a Dual System*

In the midst of the most turbulent years of the civil rights movement, Robert Dowell brought a class action suit in 1961 against the school board of Oklahoma City public schools seeking injunctive relief that would restrain school officials from operating "a dual, biracial system of racially segregated schools."<sup>26</sup> Dowell was a Negro student who, while attending a public school in the Oklahoma City system, sought to protect his equal protection rights guaranteed by the Fourteenth Amendment of the United States Constitution<sup>27</sup> and Title 42 sections 1981<sup>28</sup> and

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21. *Dowell*, 219 F. Supp. at 433.

22. *Id.* ("[I]t was generally the practice of the developers to provide in the plats restrictive covenants on lands used for new homes or dwelling places, prohibiting the sale of lands or lots or the ownership by persons of the Negro race.")

23. 347 U.S. 483, 495 (1954).

24. *Dowell*, 219 F. Supp. at 434. See Charles L. Black, Jr., *The Lawfulness of the Desegregation Decisions*, 69 *YALE L.J.* 421, 424 (1960) (discussing the minority plight which leads the black race to continual confinement within a discriminatory system founded for the very purpose of keeping minorities inferior to whites); Donald E. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 *OHIO ST. L.J.* 117, 125 (1987) ("[c]ultural conditioning produces stereotypes that influence decisions and foster separatism.")

25. *Dowell*, 219 F. Supp. at 434.

26. *Id.* at 428.

27. See *supra* note 5 and accompanying text.

28. 42 U.S.C. § 1981 (1988) provides in part:

1983<sup>29</sup> of the United States Code. Dowell also asserted that certain provisions in both Oklahoma's Constitution and statutes were unconstitutionally applied by the school board with respect to the Negro race.<sup>30</sup>

The foundation of Dowell's action involved the board's operation of a discriminatory transfer policy, commonly referred to as "minority to majority." This policy allegedly created a non-integration environment in the school district<sup>31</sup> by allowing students to transfer from a school where their race represented the minority of students to a school where their race was the majority.<sup>32</sup> There was inequality in the transfer policy, because the Negro students were burdened with specific requirements and limitations that were not placed on Caucasian students who sought identical transfers within the same school district.<sup>33</sup>

In addition to the transfer policy, Dowell also submitted evidence of substantial well-developed patterns of the board's purposeful conduct that demonstrated racial discrimination within the school system.<sup>34</sup> The evidence established patterns indicating that: (1) the assignments of faculty and staff members were based solely on race; (2) a disproportionate number of Negro pupils in one attendance area caused student bodies to become completely segregated; and (3) no prospective plans requiring future racial integration in the district had been adopted by the Oklahoma City school board of education.<sup>35</sup> These patterns of discrimination revealed the board's "practice of nonintegration" which was allegedly an attempt to remedy the discontent felt by blacks attending predominantly white schools.<sup>36</sup> Thus, no future plans for integration had

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All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment . . . and to no other.

*Id.*

29. 42 U.S.C. § 1983 (1988) provides in part: "Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . ." *Id.*

30. *Dowell*, 219 F. Supp. at 428.

31. *Id.* at 429-30.

32. *Id.* at 440.

33. *Id.* at 429-30, 435-39. To justify a transfer to a better school, Robert Dowell was scholastically discouraged because the school board required him to take more difficult electronics courses offered at the predominantly white school that were not available at his present school. However, white transfer students were not required to enroll in any special courses before being permitted to transfer to this same school.

34. *Id.* at 430.

35. *Id.*

36. *Id.* at 440.

been developed because the board administered its discriminatory policies based on the premise that the student transfer procedures were developed to favor the best interest of the students individually and the public school system in its entirety.<sup>37</sup>

In 1963, the United States District Court determined that the Oklahoma City school board was still operating under the same policies that were in effect prior to the *Brown* decision.<sup>38</sup> Holding that these policies were specifically "designed to perpetuate and encourage segregation,"<sup>39</sup> the trial court found that the board had failed to implement new non-discriminatory policies as mandated by the United States Supreme Court in *Brown*.<sup>40</sup> The continuation of an intentional dual school system equals de jure segregation, triggering the need for the desegregation process and necessitating the second step, the issuance of a remedial injunctive order. Thus, after discovering such intentional segregation in Oklahoma City, the court ordered the board of education to permanently discard its "minority to majority" student transfer policy and to quickly devise a comprehensive integration plan.<sup>41</sup>

### B. *Segregation Remedy*

Attempting to comply with this order, the board submitted a "Policy Statement" to the court in January of 1964.<sup>42</sup> However, the court concluded that this "new policy" was merely an alteration of the existing transfer procedure and a neighborhood rezoning program, rather than a plan to desegregate.<sup>43</sup> In evaluating the board's desegregation attempt, the court focused on the transfer and rezoning policies which were incapable of producing an integrated system.<sup>44</sup>

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37. *Id.*

38. *Id.* at 441 (referring to *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

39. *Id.*

40. *Id.* (referring to *Brown*, 347 U.S. 483 (1954)).

41. *Id.* See *id.* at 447-48 for original language in the court's decree ordering the school board to establish and submit a comprehensive integration plan, within 90 days, accompanied by all pertinent information used by the board in the adoption of such a plan.

42. *Dowell v. School Bd. of Oklahoma City Pub. Sch.*, 244 F. Supp. 971, 972 (W.D. Okla. 1965), *cert. denied*, 387 U.S. 931 (1967). The school board submitted the "Policy Statement Regarding Integration of the Oklahoma City Public Schools" so that the court could determine whether the new policy adequately conformed to the orders given by the court in 1963. *Id.* at 972-73.

43. *Id.* at 976-77. "The essential or most important point is that defendants have never prepared a plan by which progress in the desegregation process could be accurately judged . . . . The plan submitted . . . is not a plan, but a statement of policy." *Id.* at 976.

44. *Id.* The court pointed out that the success of the board's desegregation plan could not be determined due to the indefinite nature of the submitted policy. "Desegregation . . . requires a definite and positive plan providing definable and ascertainable goals to be achieved within a definite time according to a prepared procedure and with responsibilities clearly designated." Regarding the

The adoption of a suspicious new "special" transfer policy allowed white students to transfer into all white or predominantly white schools and out of their assigned schools if the assigned schools were either racially integrated or predominantly Negro, making possible the continuation of purposeful racial segregation.<sup>45</sup> The new "special" transfer policy unquestionably hindered the abolishment of public school segregation and continued the judicially invalidated "minority to majority" transfer rule.<sup>46</sup>

The court also criticized the rezoning aspect of the board's new policy. Although the board claimed that the rezoning of school districts was founded on residence and not on race,<sup>47</sup> the board's utilization of established residential segregation in the rezoned districts not only reinforced the existing racial segregation but even expanded it to the extent of destroying previously integrated areas.<sup>48</sup> Because this neighborhood zoning plan was based on "logically consistent geographical areas" initiated by state laws, restrictive covenants, and economic discrimination which prevented Negroes from living among Caucasians, the court found that the rezoning created an even more intensified separation of the races.<sup>49</sup>

After reviewing the board's policies, the court concluded that the board "failed to desegregate the public schools in a manner so as to eliminate either the tangible elements of the segregated system, or the violation of the constitutional rights of the plaintiffs and the members of their

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adequacy of the policy statement, the court concluded that the board's "failure to adopt an affirmative policy is itself a policy, adherence to which, at least in this case, has slowed up—in some cases—reversed the desegregation process." *Id.* at 975.

45. *Id.* at 974-77. Because the school board allowed whites to separate themselves from other races, the "new" policy was merely a disguised continuation of the original unconstitutional transfer policy.

46. *Id.* at 974. See *Dowell v. School Bd. of Oklahoma City Pub. Sch.*, 219 F. Supp. 427, 442 (W.D. Okla. 1963) (ordering the Oklahoma City school board "to cease and desist its policy of minority to majority, or transfer of students from one school to another school . . ."). See also *Goss v. Board of Educ. of Knoxville*, 373 U.S. 683, 687 (1963) ("Classifications based on race for purposes of transfers between public schools . . . violate the Equal Protection Clause of the Fourteenth Amendment.").

47. *Dowell v. School Bd. of Oklahoma City Pub. Sch.*, 244 F. Supp. 971, 976 (W.D. Okla. 1965). The court stated that the board was adhering to a policy founded on geographical areas which "when superimposed over already existing residential segregation initiated by law . . . leads inexorably to continued school segregation." *Id.* Thus, the school board's method of drawing school boundary lines without giving consideration to pre-existing residential housing patterns constituted a continuance of "the very segregation which necessitated the rezoning action, and requires judicial condemnation of the procedure." *Id.* at 980 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

48. See *id.* at 976-77. See *supra* text accompanying note 47.

49. See *id.* at 975-77 for factors analyzed by the court in its determination that the Negro race had virtually no freedom in choosing the housing areas in which they lived due to intense discrimination against them.



class, enumerated in the *Brown* decision."<sup>50</sup> Thus, rather than effectively remedying the constitutional violations found by the court in 1963, the new policy merely preserved and enhanced the inequalities suffered by the minority races.

To alleviate these racial inequalities, the issuance of a new remedial order became imperative. The policy implemented by the board was totally ineffective in converting the Oklahoma City dual system into a unitary system, and the board offered no other alternate course of action. Thus, the court issued a new order specifically mandating use of the Finger Plan, which required a restructuring of school attendance zones while employing a reasonable busing scheme.<sup>51</sup>

The court formally entered this new injunctive decree in 1972 after considering three different proposed plans for desegregating the Oklahoma City public schools.<sup>52</sup> This decree ordered the school board to adopt the Finger Plan unification proposal submitted by the plaintiffs and prepared by an integration expert, Dr. John A. Finger.<sup>53</sup> Utilization of Finger's busing program was a plausible alternative to the board's established plan because the Supreme Court held in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>54</sup> that "[t]ransportation is a permissive tool for achieving integration."<sup>55</sup> The court reasoned that the Finger Plan, if faithfully adopted and implemented, would create a unitary system eventually leading to both blacks and whites being present in every

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50. *Id.* at 976 (referring to *Brown v. Board of Educ.*, 347 U.S. 483 (1954)). By failing to eradicate segregation in the public school system, the board's actions, or inactions, constituted a tremendous disservice to desegregation efforts and the plight of the non-white races by trapping these people in confined geographical areas providing no opportunity for racial integration. *Id.*

51. *Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 338 F. Supp. 1256, 1273 (W.D. Okla. 1972), *cert. denied*, 409 U.S. 1041 (1972). In allowing the school board to continue its policy, the court determined it had misplaced its reliance on the "good faith of the board" to convert the system into one with a unitary status. The policy implemented by the board was not capable of changing the racial identity of even a single school. *Id.* at 1264-65.

52. *Id.* at 1259-68. The three proposed plans were: (1) "Current Plan," a type of "freedom of choice" plan allowing a student to choose the school he wanted to attend by manipulating his course of study. The court held that this plan cleared a path for resegregation and was utterly impotent as a method of achieving unitary status; (2) "Consultants' Plan" providing "inter-racial exchange experiences" for all students which the court found to be neither feasible nor workable; and (3) "Finger Plan" that incorporated a restructuring and busing scheme within the school zones so that each school would have both black and white children in attendance. *Id.*

53. *Id.* at 1259. Dr. Finger was an education professor at Rhode Island State University specializing in desegregation and integration. The court stipulated that strict commitment and compliance to the principles of the Finger Plan was mandatory but the details were to be considered flexible. *Id.* at 1273.

54. 402 U.S. 1 (1971).

55. *Dowell*, 338 F. Supp. at 1272 (citation omitted).

school.<sup>56</sup> Additionally, continuous jurisdiction was retained by the district court "until it [was] clear that disestablishment of the dual system [was] complete."<sup>57</sup>

### C. *Termination of the Case and Jurisdiction*

In complying with the 1972 mandatory remedial order, the Oklahoma City school board completed the third phase of the integration process by dismantling its dual school system. Consequently, upon eliminating "all vestiges of state-imposed racial discrimination" and thus achieving unitary status, the school board moved to close the case in 1975.<sup>58</sup> After conducting a hearing to determine if the Finger Plan had accomplished its objective, the court, in 1977, took the final step of the integration process by terminating the case as well as relinquishing jurisdiction and supervision over the matter.<sup>59</sup> The court granted the school board's motion to terminate the case after finding that: (1) the board properly complied with the Finger Plan; (2) the board did not intend to dismantle the presently implemented plan; (3) unitary status was achieved within the school district; and (4) the attained unitary system would not be affected by termination of active court supervision.<sup>60</sup>

This 1977 order, although issued to terminate the case, failed to vacate or modify the injunctive desegregation decree ordered in 1972 requiring implementation of the Finger Plan.<sup>61</sup> Thus, the 1972 mandatory injunction was still effective and binding even after the court found that a unitary system had been attained and relinquished its jurisdiction.

In 1984, the board discontinued the Finger Plan in favor of a new plan, the "Student Reassignment Plan," which was designed to eliminate compulsory busing of black elementary students to schools outside their immediate neighborhood.<sup>62</sup> Under the Student Reassignment Plan, a

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56. *Id.* at 1271.

57. *Id.*

58. *Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 606 F. Supp. 1548, 1551 (referring to *Dowell v. School Bd. of Oklahoma City Pub. Sch.*, No. Civ. 9452, slip op. (W.D. Okla. Jan. 18, 1977)).

59. *Id.*

60. *Id.* (quoting *Dowell*, No. Civ. 9452, slip op. (W.D. Okla. Jan. 18, 1977)). Additionally, the 1977 order terminating the case stated that since the board was "[n]ow 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 this Court . . ." *Id.*

61. *See Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 795 F.2d 1516, 1518 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

62. *See Dowell*, 606 F. Supp. at 1552-53 for fundamental elements of the Student Reassignment Plan which was to become effective in the 1985-86 school year.

"majority to minority" transfer policy offered state-provided transportation, allowing elementary school children to transfer to a school where their race was the minority representation.<sup>63</sup> No alterations of the school boundaries or the demographic patterns were made by the school board to intentionally create any particular racially identifiable schools although eleven of the sixty-four elementary schools in Oklahoma City remained virtually all black after implementing the new plan.<sup>64</sup> The court found the Student Reassignment Plan to be "educationally sound" and constitutional because the plan was primarily drafted to alleviate the busing burdens imposed on young children and to accommodate shifting residential housing patterns.<sup>65</sup>

Dowell moved to reopen the case in 1985 to challenge the validity of the board's new plan and the unitary status of the system.<sup>66</sup> Upon verifying the constitutionality of the plan, the district court refused to reopen the case, reasoning that Dowell was collaterally estopped from relitigating these issues because "all indicia of 'unitariness' " were present in the Oklahoma City School District and had been present ever since the 1977 declaration of unitary status.<sup>67</sup> Additionally, the court concluded as a matter of law that "[t]he existence of racially identifiable schools is not unconstitutional without a showing that such schools were created for the purpose of discriminating on the basis of race."<sup>68</sup> No such showing of discriminatory intent was proven in the 1985 *Dowell* case.<sup>69</sup>

Nevertheless, the Tenth Circuit Court of Appeals reversed the district court decision, holding that Dowell, as representative for all the black class-action plaintiffs, could bring forth challenges concerning the plan and status maintained in the school system.<sup>70</sup> After pointing out

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63. *Id.* at 1552. It is important to note that this transfer policy was not the same policy previously declared unconstitutional by the court. The unconstitutional transfer scheme was called the "minority to majority" policy which permitted transfers achieving the exact opposite result as that achieved under the "majority to minority" policy discussed here.

64. *Id.* at 1553-54. An order demanding desegregation does not require every school in the district to be racially integrated in its entirety. A constitutional violation arising out of practicing segregation by law will not be found merely because some one-race schools exist within the system. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24-26 (1971).

65. *Dowell*, 606 F. Supp. at 1553-54.

66. *Id.* at 1549-50.

67. *Id.* at 1555.

68. *Id.* at 1556 (citing *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973)).

69. *Id.* "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* (citing *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)).

70. *Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 795 F.2d 1516, 1519 (10th Cir. 1986). Note that the court confined its holding to the issue concerning the plaintiffs' right to reopen the case. *Id.* at 1523.

that, pursuant to the 1972 remedial injunctive decree, no deviation from the Finger Plan was to be permitted unless court approval had been previously obtained by the board,<sup>71</sup> the Court of Appeals held that the board's abandonment of the Finger Plan and implementation of the Student Reassignment Plan constituted a basis of relief for the black plaintiffs.<sup>72</sup> The court opined that because the board independently and significantly revised the original desegregation plan, the plaintiffs, as beneficiaries of the initial plan, had the right to challenge such unapproved changes by seeking to enforce the injunction, without having to prove discriminatory motive or intent on behalf of the board.<sup>73</sup>

Based on this reasoning, the board would be free from challenges and regain total independence from the 1972 decree only if the 1977 order terminating active court supervision *further dissolved the mandatory injunction* at that same time.<sup>74</sup> The Tenth Circuit reasoned that, because the district court failed to specifically dissolve its decree, the court's enforcement powers were not abolished in any respect and the board was not relieved of its duty under the injunctive order to continue to remedy all traces of segregation found in the Oklahoma City schools.<sup>75</sup> In other words, the 1972 injunctive order "survive[d] beyond the procedural life of the litigation" and remained within the district court's continuing jurisdiction.<sup>76</sup>

#### D. *Dissolution of the Injunction*

In 1987, the district court on remand dissolved its desegregation decree finding that no action taken by the board caused the current separation of the races found within residential housing areas.<sup>77</sup> Addressing

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71. *Id.* at 1522 (citing *Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 338 F. Supp. 1256, 1273 (W.D. Okla. (1972)), *cert. denied*, 409 U.S. 1041 (1972)).

72. *Id.* at 1522-23.

73. *Id.* at 1519. The United States Court of Appeals for the Tenth Circuit also held that "a past finding of unitariness, by itself, does not bar renewed litigation upon a mandatory injunction." *Id.*

74. *Id.* at 1520-21.

75. *Id.* at 1520. The court found the theory espoused in the amicus brief of the government to be without merit. The government took the position that a finding of unitariness will return all authority over the operations of the school district back to the board of education causing the dissolution of all previously governing court orders. *Id.*

76. *Id.* at 1521 (citing *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980)). The "binding nature of a mandatory injunction is recognized in school desegregation cases." *Id.* (citing *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976)).

77. *Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 677 F. Supp. 1503, 1512 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *cert. granted*, 110 S. Ct. 1521 (1990), *rev'd*, 111 S. Ct. 630 (1991). Since the past illegal discrimination had been substantially eliminated and the decree's objective satisfied, the court held that enforcement of the mandatory injunction was no longer necessary. *Id.*

the actual cause of residential segregation in Oklahoma City, the court acknowledged that a substantial number of blacks had migrated from the predominantly black eastern inner-city area into all the other parts of the school district.<sup>78</sup> However, despite this vast black migration into predominantly white neighborhoods, the east inner-city area, although now less populated, still remained almost entirely black.<sup>79</sup>

Rather than attributing these demographic changes to school board action, the court decided the continuation of racial separation was due to housing "affordability," socioeconomic status, the personal preferences of races to live amongst themselves, and private discriminatory actions.<sup>80</sup> The differing economic status of the races was determined to be the contributing factor of at least thirty percent and possibly as much as seventy percent of the racial segregation persisting in America even after desegregation efforts are complete.<sup>81</sup>

After examining these substantial inadvertent changes in housing conditions, the court held that the original Finger Plan, which called for a contemporaneous increase in the busing burdens placed on young black children with the occurrence of such demographic variations, rendered itself unworkable,<sup>82</sup> thus warranting dissolution of the 1972 injunctive decree.<sup>83</sup> Furthermore, in accordance with its 1985 decision,<sup>84</sup> the district court again concluded the school board was not motivated by discriminatory objectives in its adoption of the new Student Reassignment Plan.<sup>85</sup>

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78. *Id.* at 1507. As a result of the black migratory pattern, all attendance areas comprising the Oklahoma City school district now had black residents.

79. *Id.* at 1512.

80. *Id.* at 1511-12. Research indicates that white families prefer living only where representation of blacks is relatively small (0-30%) and if the percentage reaches the upper limit, whites will move. In contrast, black families, although tending to also prefer their own race, will remain and move into areas containing a high representation of whites (50% or greater) (citing Defendant exhibits). *Id.*

81. *Id.*

82. *Id.* at 1514-15. The busing burdens imposed upon young black children increased due to longer amounts of time necessary to travel to properly assigned schools needing their minority representation. Dr. Finger, the draftsman of the Finger Plan, even testified that his plan would not be effective forever and that reformations were definitely required in light of the demographic changes occurring in the city. *Id.*

83. *Id.* at 1512. The decree was neither required nor effective to combat the residual segregation in Oklahoma City because "[n]o court is equipped with the judicial power or machinery necessary to eradicate residential segregation. This phenomenon develops even in the midst of court ordered desegregation." *Id.*

84. *See Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 338 F. Supp. 1256, 1271 (W.D. Okla.), *cert. denied*, 409 U.S. 1041 (1972).

85. *Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 677 F. Supp. 1503, 1516 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *cert. granted*, 110 S. Ct. 1521 (1990), *rev'd*, 111

Explaining the true intention of its 1977 order which terminated the case, the court conceded that the injunction should have been dissolved at that time in order to restore the school board's total independence.<sup>86</sup> After hearing this case for more than twenty-five years, the district court concluded that the objectives of the injunction had been fully achieved.<sup>87</sup> Achieving the injunction's purposes justified returning total control over the Oklahoma City school system to its board of education because judicial regulatory control was not intended to stay in effect beyond the time necessary to cure intentional segregation.<sup>88</sup>

Not surprisingly, the Court of Appeals reversed the lower court's decision once more and remanded the case for modification, rather than dissolution, of the desegregation decree.<sup>89</sup> Adhering to the standard initially pronounced in *United States v. Swift & Co.*,<sup>90</sup> which requires "a clear showing of grievous wrong evoked by new and unforeseen conditions"<sup>91</sup> to justify dissolution, the Tenth Circuit placed the burden of proof upon the board to establish the presence of unforeseen substantial changes in conditions that rendered the decree ineffective and unduly burdensome.<sup>92</sup> The board alleged that changing racial residential patterns constituted the new and unforeseen conditions that made the original decree onerous.<sup>93</sup> The appellate court focused on whether the Student Reassignment Plan either solved or was capable of solving the new problems presented by the substantial demographic changes in the school district.<sup>94</sup> Finding the Finger Plan incapable of solving such problems, the court alleged that the Plan actually "restore[d] the effects of past discriminatory intent remedied by the decree by recreating racially identifiable elementary schools, overlooking school capacity

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S. Ct. 630 (1991) (board proved by a preponderance of the evidence that its plan lacked a racially discriminatory design).

86. *Id.* at 1506.

87. *Id.* at 1526 (citing *Milliken v. Bradley* [Milliken II], 433 U.S. 267, 280-82 (1977)). In dissolving the desegregation decree, the court found the following factors determinative: (1) absence of present "vestiges of the past intentional discrimination"; (2) reoccurrence of de jure segregation was not anticipated; and (3) full achievement of the objectives of this case. *Id.*

88. *Id.*

89. *Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 890 F.2d 1483, 1486 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991).

90. 286 U.S. 106 (1932).

91. *Id.* at 119.

92. *Dowell*, 890 F.2d at 1490-91. In other words, the board must show, by clear and convincing evidence, that the racially discriminatory conditions which initiated the original injunction are no longer present, or that the unconstitutional conditions have been eliminated and that the new plan "maintains the continuing prospective effect of the decree." *Id.* at 1498.

93. *Id.* at 1493.

94. *Id.* at 1504.

problems, and failing to address faculty imbalance."<sup>95</sup>

In response to this decision, the school board's petition for writ of certiorari was granted by the Supreme Court of the United States so that the dispute arising among the appellate courts regarding the appropriate standard to apply in a case such as *Dowell* could finally be resolved.<sup>96</sup> On January 15, 1991, the Supreme Court reversed the Tenth Circuit and remanded the case back to the district court on the ground that the appropriate standard applicable to public school desegregation injunctions is not found in the *Swift* decision.<sup>97</sup>

The Court reasoned that because the *Swift* facts are not analogous to those in *Dowell*, a general application of the strict *Swift* standard to this case was inappropriate.<sup>98</sup> The unique facts present in desegregation cases and absent from *Swift* require special consideration by the Court with respect to the intentional conduct of the school board, the importance of local autonomy, the effect of achieving unitary status, and the accomplishment of remedial objectives.<sup>99</sup> Thus, in racial discrimination situations such as *Dowell*, where an evaluation of all these issues is crucial, any reliance on the *Swift* standard is misplaced.<sup>100</sup> The remainder of this article will focus on the Supreme Court's rationale for the *Dowell* decision, examining the reasons the *Swift* standard is inapplicable to desegregation cases and the appropriateness of the governing standard espoused by the Court for the dissolution of a remedial injunction.

## VI. ANALYSIS: RESOLUTION OF CONFLICTING STANDARDS FOR DISSOLUTION OF REMEDIAL INJUNCTIONS

### A. *Considerations Unique to Desegregation*

The most important considerations unique to desegregation cases are the need to protect the independence of local school boards, the difficulty of defining unitary status and measuring its effect on a board's continuing obligations, and the complexities surrounding the appropriate

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95. *Id.* The court noted that, as a result of implementing the Plan, half of the Oklahoma City elementary schools returned to being one-race majority schools. *Id.* at 1502.

96. Board of Educ. of Oklahoma City Pub. Sch. v. *Dowell*, 111 S. Ct. 630, 635 (1991) (citing Board of Educ. of Oklahoma City Pub. Sch. v. *Dowell*, 110 S. Ct. 1521 (1990)).

97. *Id.* at 637-38.

98. *Id.*

99. *Id.* at 637. The *Swift* standard was developed in the context of unlawful restraints on trade or "covenants not to compete" rather than in the context of public school desegregation. *Id.* at 636-37.

100. *Id.* at 636.

remedial objectives of court ordered desegregation injunctions.<sup>101</sup>

### 1. The Importance of Local Autonomy

In order to dispel racial discrimination in public schools, a court may issue a mandatory injunctive decree that requires adherence to specific remedial conduct as was done in *Dowell*.<sup>102</sup> However, such an injunction is intended to be only a temporary<sup>103</sup> solution and is not expected to perpetually govern the actions of the board.<sup>104</sup> Upon achieving the objectives of the compulsory remedy by faithfully complying with the order imposed on school officials, the Supreme Court held that dissolution of the injunctive decree is warranted.<sup>105</sup>

An important justification considered by the *Dowell* Court concerns the concept of respecting local autonomy.<sup>106</sup> Dissolution of the injunction allows local administrators to ultimately regain control over their school system.<sup>107</sup> Reasoning that the principal responsibility of providing equally competent education for all students falls on local authorities, the Court recognized the importance of permitting officials to manage school affairs and solve educational problems.<sup>108</sup> To achieve this end, the *Dowell* Court held that:

[d]issolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly

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101. *Id.* at 637.

102. *See* Beard, *supra* note 8, at 1241. Once a court finds intentional segregation it must issue a remedial injunction which will eradicate all previous constitutional violations.

103. *Dowell*, 111 S. Ct. at 637 (judicial supervision of local public school systems was always intended to be a temporary remedial measure). The Court also notes that the desegregation process was to be immediately implemented proceeding "with all deliberate speed." *Id.* (citing *Brown v. Board of Educ.*, 349 U.S. 294, 299-301 (1955)).

104. *See, e.g., id.* (recognizing the difference between the perpetual enforceability of the *Swift* decree and the injunction ordered in *Dowell* which was intentionally temporary in nature); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976) (school board could not be required to continually rearrange its attendance zones in an effort to perpetuate the specific racial balance desired by the district court).

105. *Dowell*, 111 S. Ct. at 637-38. Although the school board urged the Supreme Court to dissolve the injunction according to a previous district court decision, the Court remanded the case so that the district court could apply the appropriate standard and decide if the school board made a sufficient showing of good faith compliance with the decree. *Id.*

106. *Id.* at 637 (citations omitted) (reasoning that local control permits citizens to participate in making educational decisions and produces school programs that satisfy local needs).

107. *See* *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) (citations omitted) ("local autonomy of school districts is a vital national tradition"); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404, 434 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986) (school districts have an important interest in the management of their own affairs); *United States v. Board of Sch. Comm'rs of Indianapolis*, 637 F.2d 1101, 1114 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) (court order remedying segregation must strive to appreciate local autonomy).

108. *Dowell*, 111 S. Ct. at 637.



recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."<sup>109</sup>

In rejecting the *Swift* test as excessively stringent, the Court, without elaboration, concluded that the *Swift* standard would entail indefinite judicial supervision, producing "Draconian" ramifications that are not constitutionally required.<sup>110</sup> Even though the Court's rationale was less than concise, a conclusive decision was made regarding the governing standard and its goal of restoring local independence.<sup>111</sup>

## 2. The Effect of Achieving Unitary Status

Another aspect of the Supreme Court's decision in *Dowell* concerns the achievement of unitary status and its effect on the life of an injunction. The Court pronounced in *Pasadena City Board of Education v. Spangler*<sup>112</sup> that the school board is entitled to a definitive statement from the lower court indicating the significance of its unitary finding and the intended results of the desegregation injunction.<sup>113</sup> The obligations of the board remain hopelessly uncertain in the absence of such guidelines. However, the 1977 court order terminating the *Dowell* case failed to pronounce the district court's meaning of the word "unitary" and the corresponding effect of a unitary finding.<sup>114</sup> Without any guidance from the court, the obligations of the Oklahoma City school board remained undefined.

The difficulty in defining "unitary" is that each desegregation case must be resolved in light of its own particular facts; no precise formula can be routinely applied to all school systems.<sup>115</sup> Nevertheless, the *Dowell* court found guidelines in *Green v. County School Board*.<sup>116</sup> In *Green*, the Supreme Court defined desegregation goals as the conversion of a dual system into a unitary one, and indicated six areas that must be

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109. *Id.* (quoting *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d at 1245 n.5 (Kennedy, J., concurring) which cites *Milliken v. Bradley* [*Milliken II*], 433 U.S. 267, 280-82 (1977)).

110. *Id.* at 638.

111. *Id.* at 637-38.

112. 427 U.S. 424 (1976).

113. *Id.* at 438-39.

114. *Dowell*, 111 S. Ct. at 636.

115. See Chandler, *supra* note 1, at 535 n.100 (citing Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 662-63 (1987)).

116. 391 U.S. 430 (1968).

integrated in order for a school system to achieve unitary status.<sup>117</sup> These six prerequisites concern the integration of the students, instructors, staff members, extracurricular activities, facilities, and transportation.<sup>118</sup> Only upon freeing every one of these elements from the shadows of state-promoted racial segregation may a school system attain unitary status.<sup>119</sup>

After recognizing the capricious use of the word “unitary” and questioning the usefulness of determining a more precise definition, the Court concluded that “unitary” refers to a “school district that has completely remedied all vestiges of past discrimination,” as far as practicable, satisfying the mandate of *Brown*<sup>120</sup> and complying with the command of the Constitution. Because the *Green* unitariness guidelines evaluate the most crucial indicia of an integrated system, the Supreme Court ordered the District Court to use these principles on remand to determine whether dissolution of the injunction was warranted.<sup>121</sup> For dissolution, the remedial objectives of the decree had to be deemed satisfied.

### 3. Appropriate Remedial Objectives

Only a constitutional violation will invoke the power of a federal court to reorganize the operation of local and state governmental entities.<sup>122</sup> In order to provide the constitutionally guaranteed equal protection of the laws,<sup>123</sup> all vestiges of state-imposed segregation must be promptly eradicated.<sup>124</sup> Thus, the broad remedial objective of a mandatory integration order is “to restore, as nearly as possible, the victims of discrimination to the position they would have occupied in the

117. *Dowell*, 111 S. Ct. at 638 (citing *Green v. County Sch. Bd. of New Kent County*, 391 U.S. at 435).

118. *Green*, 391 U.S. at 435.

119. *Dowell*, 111 S. Ct. at 638 (citing *Green*, 391 U.S. at 435, and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971)). See also *Riddick v. School Bd. of Norfolk*, 784 F.2d 521, 533 (4th Cir.), cert. denied, 479 U.S. 938 (1986) (“All aspects of public education must be freed from the vestiges of state sanctioned racial segregation before a school system becomes unitary.”).

120. *Dowell*, 111 S. Ct. at 635-36 (citing *Brown v. Board of Educ.*, 349 U.S. 294 (1955)). See *Riddick*, 784 F.2d at 532-33. “Under the mandate of *Brown*, [s]chool boards . . . then operating state-compelled dual systems were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.” (quoting *Green*, 391 U.S. at 437-38).

121. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 438-39 (1976).

122. See *supra* notes 1 and 6. See also *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419-20 (1977).

123. See *supra* notes 5 and 6 and accompanying text.

124. See *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (requiring the remedy to be implemented “with all deliberate speed”). See also *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (per curiam), reh’g denied, 396 U.S. 976 (1969) (requiring unconstitutional school system to be changed at once).

absence of illegal conduct."<sup>125</sup> Achieving integration with respect to every critical element of a school system, such as those specified in *Green*,<sup>126</sup> remedies the prior *intentional* constitutional violations and leads to a pronouncement of unitary status. Such a pronouncement indicates that the purposes of the injunctive order have been fulfilled and that no further judicial intervention is warranted absent a subsequent showing of *intentional* resegregation.

In delineating appropriate remedial objectives, the court must take into consideration the fact that certain vestiges of segregation are not curable by judicial supervision.<sup>127</sup> For instance, people exercising their individual freedom to change their residence or send their children to private schools cannot constitutionally be hindered by a court ordering them to make endless attempts to totally integrate.<sup>128</sup>

Accordingly, the school board should not be required to accomplish any broad purpose which lies beyond the control of educational authorities.<sup>129</sup> The only affirmative duty perpetually imposed on local authorities is to not "take any action that would reinstitute a dual school system or discriminate against any child on the basis of race."<sup>130</sup> Since the court ordered objective is to eliminate all traces of *purposeful* segregation in public schools, a board that has achieved unitary status has no continuing duty to alter racial separation found to exist in residential areas due solely to economics and private, individual preferences.<sup>131</sup> Once determined, a unitary finding is not affected by post-desegregation demographic changes for which school authorities bear no responsibility.<sup>132</sup> Thus, "[o]nce a system becomes unitary, school officials need not make

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125. *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1241 (1979).

126. *See supra* notes 116-119 and accompanying text.

127. *See Beard, supra* note 8, at 1250 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971)).

128. *See id.* at 1249-51. "The preclusion or reduction of 'white flight' . . . is not a legitimate governmental objective . . ." *Id.* at 1249 (citing *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484, 490-91 (1972)).

129. *Id.* at 1250 (quoting *Swann*, 402 U.S. at 22).

130. *Chandler, supra* note 1, at 542 (explaining that school boards generally operate their systems, after a unitary finding, as though there never had been unconstitutional intentional segregation in the district).

131. *Davis v. East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425 (5th Cir. 1983). "Changes in neighborhood ethnicity taking place after school officials have transformed the system into a unitary one need not be remedied, . . . for school officials are under no duty to adjust for the purely private acts of those who choose to vote with their feet." *Id.* at 1435 (citing *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 435-37 (1976)).

132. *See Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 225 (5th Cir. 1983); *Spangler*, 427 U.S. at 434-36; *Riddick v. School Bd. of Norfolk*, 784 F.2d 521, 536-40 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

adjustments to changing residential or attendance patterns even if they result in resegregation.”<sup>133</sup>

Regarding the necessity of future adjustments to accommodate such demographic changes, the Court held in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>134</sup> that judicial intervention would only be appropriate where school officials deliberately attempted to modify demographic patterns to affect racial composition of the public schools.<sup>135</sup> Following this rationale, the Court in *Dowell* indicated that residential segregation resulting from private decision-making is “too attenuated to be a vestige of former school segregation,” and would not justify continuing the injunctive decree.<sup>136</sup>

Justice Marshall, writing for the dissent, found a broader purpose in desegregation injunctive decrees and emphatically asserted that the majority’s reasoning failed to recognize the “threatened reemergence of one-race schools as a relevant ‘vestige’ of *de jure* segregation.”<sup>137</sup> In the presence of such conditions which are apt to impose the “stigmatic injury” denounced by *Brown*, the dissent argued that the purposes of the mandatory injunction have not yet been achieved.<sup>138</sup> Marshall’s argument advocates a dissolution standard for desegregation injunctive decrees that considers the unique harm that racially identifiable schools inflict upon black children whether or not the segregation was intentionally caused by state action.<sup>139</sup> However, the dissent failed to acknowledge the equally important interests of local governance and its limited control over the remediation of constitutional violations.<sup>140</sup>

The majority, in recognizing local autonomy and the limits of board control, stated that “it is well established that school segregation ‘may have a profound reciprocal effect on the racial composition of residential

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133. Donald E. Lively, *Separate But Equal: The Low Road Reconsidered*, 14 HASTINGS CONST. L.Q. 43, 65 (1986).

134. 402 U.S. 1 (1971).

135. *Id.* at 31-32.

136. Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 111 S. Ct. 630, 634-35 (1991).

137. *Id.* at 639 (quoting *Swann*, 402 U.S. at 15).

138. *Id.* (referring to *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

139. *Id.* at 641-42. While criticizing the majority for not addressing the scope or meaning of “vestiges,” Justice Marshall suggested that the “vestige” of state-imposed segregation includes all conditions purporting to distinguish as inferior any particular class of persons. *Id.* at 644.

140. See *id.* at 647. “[T]he majority risks subordination of the constitutional rights of Afro-American children to the interest of school board autonomy. The courts must consider the value of local control, but that factor primarily relates to the feasibility of a remedial measure . . . not whether the constitutional violation has been remedied.” *Id.* (citation omitted).

neighborhoods.’”<sup>141</sup> Thus, the school board is required by the majority to only eliminate such effects to the most practicable extent within the bounds of the board’s authority.<sup>142</sup> The board governs school operations and has ultimate responsibility for any unfair ramifications caused by past discriminatory policies. This responsibility calls for making a transition from the dual school system that evolved from the board’s discriminatory policy to a unitary system while under the supervisory control of the judiciary. However, as the transition must inherently come to an end after remedying the unconstitutional effects of discriminatory practices, active judicial supervision must also cease since the remedial injunction “may extend only as far as necessary to correct the proven [intentional] violation.”<sup>143</sup>

If any effect is to be given to the finding of a unitary system, residential segregation existing after the achievement of unitary status cannot be considered a vestige of previous state-imposed segregation since “unitary” means that all traces of past discrimination have been remedied. In order for the school board to be held liable for such subsequent residential segregation, established principles require proof of “post-unitary” intentional, racially discriminatory conduct. No such showing was offered in *Dowell*. Nevertheless, the Supreme Court remanded the case to the district court for a determination of whether all “vestiges of past discrimination had been eliminated to the extent practicable.”<sup>144</sup>

According to the analysis presented above, Oklahoma City’s demographic conditions existing in 1985 could not be a vestige since unitary status had previously been attained. Therefore, unless the unitary concept is altered, the residential conditions must be deemed to be either a vestige that has been remedied “to the extent practicable” or a result of some other cause independent of the prior state-sanctioned segregation. Any alternate conclusion requires a change in the definition of unitary which was not contemplated by the majority or the dissenting opinion in *Dowell*. Giving no new effect to a unitary finding, the Supreme Court finally ended the controversy between the standards by addressing the

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141. *Id.* at 646 (quoting *Keyes v. School Dist.*, 413 U.S. 189, 202 (1973) and citing *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 n.13 (1979)).

142. See *Beard*, *supra* note 8, at 1250. The author indirectly discusses the bounds of the board’s authority in stating that “[i]t would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope.” *Id.* The author espouses that this limitation extends to all remedial measures not merely busing. *Id.* at 1250 n.51 (quoting *Swann*, 402 U.S. at 22).

143. *Id.* at 1301. See *General Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 399 (1982).

144. *Dowell*, 111 S. Ct. at 638.

pivotal issue of whether a unitary finding entitles a school board to dissolution of a mandatory injunctive decree ending active judicial involvement.<sup>145</sup>

### B. *The Swift Standard and Its Inapplicability to Desegregation*

The Supreme Court's resolution<sup>146</sup> of the conflict between applicable standards for the dissolution of a desegregation decree focused primarily on comparing the standard used by the Tenth Circuit Court of Appeals in the latest *Dowell* opinion, the *Swift* standard,<sup>147</sup> to that applied in *Spangler v. Pasadena City Board of Education*<sup>148</sup> and *Riddick v. School Board of Norfolk*.<sup>149</sup>

Comparing the *Swift* case to *Dowell*, the only analogous fact is that in both cases an injunction was entered against the defendants who later contested the operation of the decree. In contrast to the *Dowell* mandatory decree, the *Swift* injunction was a consent decree entered in 1920 enjoining several meat-packing companies "from maintaining a monopoly and from entering into or continuing any combination in restraint of trade and commerce."<sup>150</sup> By the very terms of the decree, the restrictions placed upon the defendant companies were to be effective in perpetuity.<sup>151</sup>

However, in 1930, the defendants decided that the restraints of the injunction to which they had consented had become useless and oppressive because of the changing conditions in their industry.<sup>152</sup> Thus, *Swift & Company*, joined by other defendants, requested a modification of the consent decree that addressed the new conditions.<sup>153</sup> Finding that the reasons for the restraint were still present and that the decree did not impose oppressive hardships upon the defendants, the Supreme Court held that modification of the injunction was not warranted.<sup>154</sup> The Court further stated that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what

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145. *Id.* at 634-36.

146. *Id.* at 636-38.

147. *See* *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) and *supra* text accompanying notes 90-91.

148. 611 F.2d 1239 (9th Cir. 1979).

149. 784 F.2d 521 (4th Cir. 1986).

150. *Swift*, 286 U.S. at 111.

151. *Id.* *See also Dowell*, 111 S. Ct. at 636-37.

152. *Swift*, 286 U.S. at 113.

153. *Id.*

154. *Id.* at 119-20.

was decreed after years of litigation with the consent of all concerned."<sup>155</sup> This is the *Swift* standard adhered to by the appellate court and examined by the Supreme Court in *Dowell*.

The dissimilarities between the facts in *Swift* and those present in a school desegregation case, such as *Dowell*, where a mandatory injunctive decree is imposed upon school officials, are self-evident. Neither the scope nor the purpose of the two decrees is comparable enough to justify a general application of the same standard to both situations. After remedying past transgressions, the school authorities should only need to demonstrate their faithful and continual compliance with constitutional demands. The *Swift* prerequisite of "grievous wrong evoked by new and unforeseen conditions" gives a longer life to desegregation injunctive orders than the existing principles of constitutional law will allow.<sup>156</sup>

It follows that the strict *Swift* standard, which recognizes perpetual injunctions as being a final judgment only modifiable or dissolvable under extraordinary circumstances, should not be applicable to volatile areas of the law such as public school desegregation. This rigorous standard should apply only to situations similar to *Swift* where the remedy is meant to be permanent and changes are not readily anticipated.

Additionally, since the *Swift* decree was consented to by all the parties, the use of an inflexible standard appears more justifiable than in a situation, such as *Dowell*, where the injunction takes the form of a mandatory court order. Adjudicated discrimination cases that result in a compulsory desegregation injunction require the court to balance state and local interests in light of the remedy's objectives and the magnitude of the constitutional violation.<sup>157</sup>

### C. *The Standard of Spangler and Riddick*

Since both the *Spangler* and *Riddick* cases closely resemble *Dowell*, as well as the majority of all desegregation cases, the Supreme Court's adherence to the standards and rationales set forth in these opinions, rather than *Swift*, is clearly merited. The Ninth Circuit Court of Appeals in *Spangler* held that the lower court had erred by refusing to lift its

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155. *Id.* at 119.

156. The *Swift* standard condemns a school board to judicial tutelage for the indefinite future. "Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result." *Dowell*, 111 S. Ct. at 638.

157. See *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1241 (9th Cir. 1979) (citing *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977)).

remedial order after substantial compliance had cured the effects of previous racial inequities.<sup>158</sup> The court further declared that “[t]he displacement of local government by a federal court is presumed to be temporary”<sup>159</sup> and “[f]urther delay in returning full responsibility for administration to the school board is unjustified.”<sup>160</sup>

This holding is entirely consistent with principles established by the Supreme Court in desegregation cases.<sup>161</sup> For instance, the Court has consistently held that “[t]he remedy ordered by a federal court to correct racial segregation in a school system may not be more extensive than is necessary to eliminate the effects of the constitutional violation that was the predicate for the court’s intervention.”<sup>162</sup> Accomplishing the objectives of a court ordered remedy warrants the termination of judicial supervision.<sup>163</sup> Thus, pursuant to *Spangler*, the district court must relinquish its continuing jurisdiction over public schools following the school board’s showing of faithful compliance with integration efforts.<sup>164</sup> Compliance with the decree’s objectives involves both remedying past constitutional violations and intending to continue desegregation in the future.<sup>165</sup>

The *Dowell* court turned to a second case, *Riddick*,<sup>166</sup> for the principles regarding subsequent challenges to school boards that have previously complied with desegregation orders.<sup>167</sup> Under the principles of *Riddick*, without new proof of discriminatory intent subsequent to the correction of previous violations, further judicial intervention with respect to student assignments constitutes the governmental establishment of racial quotas.<sup>168</sup> The Supreme Court has consistently condemned

158. *Id.* at 1241, 1244 (Kennedy, J., concurring).

159. *Id.* at 1241.

160. *Id.* at 1244.

161. *See, e.g.*, *Brennan v. Armstrong*, 433 U.S. 672 (1977); *School Dist. of Omaha v. United States*, 433 U.S. 667 (1977); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Milliken v. Bradley*, 433 U.S. 267 (1977); *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971); *Alexander v. Board of Educ.*, 396 U.S. 19 (1969) (per curiam); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964); *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

162. *Spangler*, 611 F.2d at 1242.

163. *Id.* (includes extensive list of Supreme Court cases that have espoused this principle).

164. *Id.* at 1241, 1247.

165. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Spangler*, 611 F.2d at 1241.

166. 784 F.2d 521, 538 (1986).

167. *Dowell*, 111 S. Ct. at 635.

168. *Riddick*, 784 F.2d at 538.



such judicial action where there are no unlawful circumstances to remedy.<sup>169</sup> Reasoning that the achievement of unitary status effectively dissolves a mandatory desegregation injunction, the *Riddick* approach deems any subsequent challenge to the school board's conduct to be a prayer for new relief requiring a new showing of discriminatory intent on behalf of the board.<sup>170</sup>

This rationale is consistent with those principles comprising the "unitary" concept which hold that the purpose of the remedy is satisfied upon achieving unitariness in the public system.<sup>171</sup> Accordingly, with nothing to remedy after achieving unitary status, the *Swift* burden of proving "grievous wrong" evoked by a change in conditions was erroneously placed upon the board on remand, in order to justify dissolution of the decree. The placement of this burden totally discounts the logical ramifications of satisfying a desegregation decree. If a judgment has been executed by implementing a mandatory injunction, "the judgment is satisfied and must be vacated" once "the purposes of the litigation as incorporated in the decree . . . have been fully achieved."<sup>172</sup>

## V. CONCLUSION

The primary objectives of court ordered desegregation are the dismantlement of racially identifiable schools and the creation of unitary schools while concurrently respecting the decision-making independence of local authorities.<sup>173</sup> Ultimately, these objectives may be fully achieved only through the eradication of the existing "race-consciousness" millennium.<sup>174</sup>

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169. *Id.* (citing *Spangler*, 427 U.S. at 433-34; *Milliken v. Bradley* [*Milliken I*], 418 U.S. 717, 740-41 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24-25 (1971)).

170. *Riddick*, 784 F.2d at 525 (school board was no longer required to bus students after the finding of unitariness). See L. Kevin Sheridan, Jr., Note, *The Unitariness Finding and Its Effect on Mandatory Desegregation Injunctions*, 55 FORDHAM L. REV. 551, 570 (citing *Riddick*, 784 F.2d at 536-37 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986)).

171. *Riddick*, 784 F.2d at 525 (upon becoming unitary and satisfying its duty to integrate, the board disposes of all issues raised by the order). "[A] unitary school system is the goal of a school desegregation remedy." Sheridan, *supra* note 170, at 554 n.11 (citing the landmark desegregation cases which established the principle that unitariness is the purpose of a remedial injunctive decree).

172. Beard, *supra* note 8, at 1267 (quoting *Sierra Club v. Mason*, 365 F. Supp. 47, 49 (D. Conn. 1973) and *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968)).

173. See, e.g., *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam).

174. See Lively, *supra* note 24, at 127-28 where the author criticizes modern school integration policies because of their "race-sensitivity." Rather than focusing on the proposed concept of "color-blindness," the implemented desegregation plans demand "attention to numbers, quotas, and formulas for effectuating racial balance." *Id.* at 127 n.93 (citations omitted).

Such racial distinctions must be displaced by a sincere "color-blindness" inducing the birth of a new educational system consisting of "just schools" rather than the "black" and "white" schools which are unjustly designed to separately accommodate different races.<sup>175</sup> By expelling these distinctions based on skin color alone, each individual's rights would finally receive the unbiased equal protection guaranteed by the Fourteenth Amendment of the United States Constitution. Nevertheless, the judicially forced creation of a unitary, unbiased educational system may only be justified with respect to segregation caused by purposeful discriminatory activities.

Following this reasoning, the Oklahoma City school board's faithful and continuous compliance with the mandatory desegregation injunction from 1972 until 1985 as to every facet of school operations calls for dissolution of the decree, provided that all vestiges of past intentional segregation have been eliminated to a practical extent. If all traces of the previous constitutional violations are eradicated, judicial supervision must cease, thus terminating jurisdiction and dissolving the decree. Since the *Dowell* desegregation decree was designed to remedy *intentional* racism, it would be an overreach of judicial power to allow this injunction to also govern discriminatory conditions arising from *unintentional* actions not contemplated in the formulation of the original decree. Once a final judgment is entered, subsequent constitutional transgressions should be remedied by new injunctive remedial measures. Thus, without proof of subsequent violations, the school board's unbridled independence must be reinstated bringing an end to the possibility of perpetual judicial supervision in the absence of intentional discrimination.

*Gretchen M. Widdig*

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175. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 442 (1968) (ordering school boards failing to comply with the *Brown* decision to immediately convert to a public system "without a 'white' school and a 'Negro' school, but just schools").

