CONSTITUTIONAL LAW—Dissolution of Desegregation Decree Is Proper if School Board Shows Good Faith Compliance and Elimination of Vestiges of Past De Jure Discrimination—*Board of Education v. Dowell*, 111 S. Ct. 630 (1991).

I. INTRODUCTION

From statehood until the decision of *Brown v. Board of Education (Brown I)*,[1] Oklahoma's constitution and statutes mandated racially segregated public schools.[2] Until *Shelley v. Kraemer*,[3] racially restrictive covenants were also permissible.[4] As a result, predominantly black schools and neighborhoods were concentrated in east central Oklahoma City.[5]

Responding to the Supreme Court's order in *Brown II*[6] to desegregate public schools, the Board of Education of Oklahoma City Public Schools ("Board") adopted a neighborhood school plan in 1955 that included a "minority to majority" transfer option.[7] In 1961, Robert Dowell, a black student attending an all black high school, requested a transfer to a predominantly white school.[8] When his request was effectively denied, Dowell filed a class-action suit seeking permanent injunctive relief from the Board's maintenance of a dual school system.[9]

Although the Board argued its "best interest of the student" transfer policy[10] was not racially discriminatory, the federal district court found "such a policy [was] designed to perpetuate and encourage segregation."[11] The court also found severe segregation of administrators, faculty, and staff.[12] As a result, the court enjoined the Board from issuing "minority to majority"

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1. Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown I) (holding segregation of schools based on race is unconstitutional).
2. Dowell v. School Bd., 219 F. Supp. 427, 431-33 (W.D. Okla. 1963) (quoting OKLA. CONST. art. XIII, § 3, and OKLA. STAT. tit. 70, §§ 5-1 to -8, -11 (1949)).
3. Shelley v. Kraemer, 334 U.S. 1 (1948).
4. Real estate developers often included restrictive covenants in plats that prohibited "the sale of lands or lots or the ownership by persons of the Negro race." *See, e.g.*, Dowell v. School Bd., 219 F. Supp. at 433.
5. *Id.* at 433-34.
6. Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II) (outlining criteria for lower courts to consider in implementing segregation plans).
7. Dowell v. School Bd., 219 F. Supp. 427, 434, 440-41 (W.D. Okla. 1963). A "minority to majority" transfer option permitted students to move from a "school wherein their race is in the minority to a school where their race will be in the majority, based solely upon the ground that the student is unhappy." *Id.* at 440.
8. *Id.* at 435. Dowell wished to attend Northeast High School, where only 45 of the total 1215 students were black. *Id.* at 436.
9. *Id.* at 428.
10. *Id.* at 440-41.
11. *Id.* at 441.
12. Dowell v. School Bd., 219 F. Supp. 427, 449 (W.D. Okla. 1963).

transfers and ordered the Board to prepare a desegregation plan within ninety days.[13]

Instead of a desegregation plan, the Board submitted a "Policy Statement" reiterating its choice of neighborhood schools.[14] The district court concluded three things: (1) the Board had indirectly continued its "minority to majority" transfer policy;[15] (2) the movement toward an integrated faculty was dilatory;[16] and (3) the neighborhood school plan would never result in integrated schools, and was even destroying the few integrated neighborhoods that did exist.[17]

The initial steps the court ordered to dismantle the dual system included a "majority to minority" transfer plan,[18] the combination of several school zones,[19] a timetable for faculty integration,[20] and a program of faculty education regarding desegregation.[21] The court also ordered the Board to "take clear, affirmative, aggressive action to bring about desegregation."[22] On appeal, the Tenth Circuit affirmed every aspect of the district court's order except that relating to faculty education.[23]

In late 1969, the Board finally submitted a desegregation plan for the secondary schools acceptable to the district court.[24] Known as the Cluster

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13. *Id.* at 447.

14. Dowell v. School Bd., 244 F. Supp. 971, 972, 976 (W.D. Okla. 1965), *aff'd in part*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967). The court's factual conclusions were based primarily on the plaintiffs' evidence because the Board refused to hire experts. Dowell v. School Bd., 244 F. Supp. at 973-74.

15. *Id.* at 974. The Board's new transfer policy permitted "members of the same family to attend the same school," allowed students to "complete the highest grade in [the school they had] been attending," and included an open-ended provision for transfers upon a showing of "valid, good faith reasons." *Id.*

16. *Id.* at 976. After the 1964-65 school year, only twelve of 107 schools had integrated faculties, and these were schools with integrated student bodies. *Id.*

17. *Id.* Discrimination by some realtors and financial institutions allowed white families to relocate in neighborhoods with all-white schools, "secure in the knowledge that housing segregation and the neighborhood school policy" would keep black families out. *Id.* at 975-76. Thus, the neighborhood school plan exacerbated residential segregation by destroying previously integrated neighborhoods. *Id.* at 977. The result was a greater number of racially identifiable schools. *Id.*

18. The "majority to minority" transfer plan allowed students assigned to schools where members of their race composed more than fifty percent of the student body to attend schools where members of their race were the minority. *Id.*

19. Dowell v. School Bd., 244 F. Supp. 971, 977 (W.D. Okla. 1965), *aff'd in part*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967).

20. The Board was given five years to achieve faculty racial balances in each school that approximated the faculty racial balance in the entire system. *Id.* at 978.

21. *Id.* at 977-78.

22. *Id.* at 982.

23. Board of Educ. v. Dowell, 375 F.2d 158, 168 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967).

24. Dowell v. Board of Educ., 307 F. Supp. 583, 595 (W.D. Okla.), *aff'd*, 430 F.2d 865 (10th Cir. 1970).

Plan,[25] it provided that each high school would serve both as a "home-base" neighborhood school and as a specialized curriculum center.[26] High school students would move between home-base and center schools, and would spend at least half of each day at a center school.[27] Desegregation of junior high schools would be accomplished by closing one nearly all black school and reassigning those students to six predominantly white schools.[28] On appeal, the Tenth Circuit approved the Cluster Plan.[29]

Less than two years later, the district court found the Board had emasculated the Cluster Plan "without notice to or permission by the court."[30] As implemented by the Board, the Cluster Plan was "simply a 'freedom of choice' plan."[31] In addition, the court concluded the Board's desegregation plan for elementary schools was "only a token effort."[32]

Exasperated that nine years of effort had yielded no results,[33] the court adopted the strategy set forth by the plaintiffs' expert, which was known as the Finger Plan.[34] The Finger Plan redrew attendance zones and required busing.[35] The court ordered the Board to implement the Finger Plan the next school year without alteration or deviation unless the court approved the change in advance.[36]

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25. Dowell v. Board of Educ., 430 F.2d 865, 867 (10th Cir. 1970).

26. Dowell v. Board of Educ., 307 F. Supp. at 586-87.

27. *Id.* at 588.

28. *Id.* at 587.

29. Dowell v. Board of Educ., 430 F.2d at 869.

30. Dowell v. Board of Educ., 338 F. Supp. 1256, 1263 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). Overall, only 12% of the student body actually participated in the specialized curricula at the center schools, and within that group, black students were underrepresented. *Id.* at 1264.

31. *Id.* The court concluded the "trend [was] clearly toward resegregation." *Id.*

32. *Id.* at 1265. The Board planned infrequent joint extracurricular activities for students in grades four through six who secured their parents' permission. *Id.*

33. The opinion is peppered with hot criticism. The court reached its boiling point when it concluded:

> This litigation has been frustratingly interminable, not because of insuperable difficulties of implementation of the commands of the Supreme Court of the United States and the Constitution of the United States, but because of the unpardonable recalcitrance of the Defendant Board and the Superintendent of Schools to come forward with a constitutional plan for the desegregation of the schools of this District . . . . The court, bearing in mind the rationale that a segregated school is inherently unequal and recognizing further that those students who have been and are being subjected to segregated education in the public schools are, regardless of race, having thrust upon them educational infirmities which are constitutionally impermissible, cannot and will not tolerate further delay.

Id. at 1271.

34. Dowell v. Board of Educ., 465 F.2d 1012, 1014 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

35. Dowell v. Board of Educ., 338 F. Supp. 1256, 1267-68 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

36. *Id.* at 1273.

The Board maintained the Finger Plan for five years before successfully moving to close the case in 1977.[37] At the end of 1984, the Board abandoned the Finger Plan and adopted the Student Reassignment Plan ("SRP") that called for neighborhood schools for the grades one through four.[38] The plaintiff class subsequently filed a motion to reopen the case.[39]

The district court reached the following legal conclusions: (1) The plaintiff class was collaterally estopped from arguing the school district failed to achieve unitary status, because the court stated in its 1977 order that a "unitary system had been achieved;"[40] (2) the school district was unitary in 1985;[41] (3) although half of the district's elementary schools would become

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37. Board of Educ. v. Dowell, 111 S. Ct. 630, 633 (1991). The district court's unpublished "Order Terminating Case" stated in part:

> The Court has concluded that [the Finger Plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before this court. . . .
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> . . . The School Board, as now constituted, has manifested the desire and intent to follow the law. The court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.
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> 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 this Court. . . .
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> . . . Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal.

Id. at 633-34 (quoting Dowell v. School Bd., No. CIV-9452, slip op. at App. 174-76 (W.D. Okla. Jan. 18, 1977)).

38. Dowell v. Board of Educ., 606 F. Supp. 1548, 1552 (W.D. Okla. 1985).

39. *Id.* at 1549-50.

40. *Id.* at 1555. In *Green v. New Kent County School Board*, the Supreme Court "identified six components of a school system which must be desegregated before the entire system can achieve unitary status: faculty, staff, transportation, extracurricular activities, facilities, and composition of the student body." Green v. New Kent County School Bd., 391 U.S. 430, 435 (1968). However, the Supreme Court has not explicitly defined "unitary status," and "[t]here is a considerable amount of confusion about the terminology in this area." Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1107 n.7 (1990). *See also infra* notes 69-70. The district court in *Dowell* seemed to equate "unitary" with "integrated Green components" when it stated, "[T]he Oklahoma City School District remains unitary today. The School Board, administration, faculty, support staff, and student body are integrated. Further, transportation, extracurricular activities and facilities within the school district are equal and non-discriminatory." Dowell v. Board of Educ., 606 F. Supp. at 1555. On appeal, the Tenth Circuit discussed only the legal effects of a finding of unitariness, not the definition of "unitary." *See* Dowell v. Board of Educ., 795 F.2d 1516, 1519-21 (10th Cir. 1986).

41. Dowell v. Board of Educ., 606 F. Supp. at 1554-55.

ninety percent or more black or white, the SRP was not adopted with discriminatory intent;[42] and (4) the plaintiff class failed to prove any "special circumstances" to justify reopening the case under Federal Rule of Civil Procedure 60(b)(6).[43] The petitioners appealed.[44]

On appeal, the Tenth Circuit considered only one issue: "whether the trial court erred in denying the motion to reopen."[45] The appellate court held the 1977 "Order Terminating Case" ended the "[district] court's active supervision" but did not terminate the 1972 desegregation decree.[46] Therefore, the plaintiff class had the right to ask for enforcement of the mandatory injunction until it was dissolved.[47] In addition, the Tenth Circuit held the Board's violation of the decree "without court approval" satisfied the requirements of Federal Rule of Civil Procedure 60(b)(6).[48]

The court of appeals remanded the case for a determination of whether the Board should reimplement the Finger Plan and, if so, whether it should be modified.[49] The Tenth Circuit discussed the stringent legal standard the district court was bound to apply to the Board's request: "the court should not allow any modification unless the law or the underlying facts have so changed that the dangers prevented by the injunction 'have become attenuated to a shadow,' and the changed circumstances have produced 'hardship so extreme and unexpected' as to make the decree oppressive."[50]

On remand, the district court expressed its thinly veiled frustration with the Tenth Circuit's decision by stating it fully intended in 1977 to relinquish control over the school system and to restore the Board's

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42. *Id.* at 1556 (citing Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976)).

43. Dowell v. Board of Educ., 606 F. Supp. 1548, 1557 (W.D. Okla. 1985). Rule 60(b)(6) of the Federal Rules of Civil Procedure is a catch-all that provides: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b)(6). "Special circumstances must be shown in order to justify relief under this rule." Dowell v. Board of Educ., 606 F. Supp. at 1557.

44. Dowell v. Board of Educ., 795 F.2d at 1517.

45. Dowell v. Board of Educ., 795 F.2d 1516, 1517 (10th Cir. 1986).

46. *Id.* at 1519. The Department of Justice filed an amicus brief and argued:

> [O]nce a finding of unitariness is entered, all authority over the affairs of a school district is returned to its governing board, and all prior court orders, including any remedial busing order, are terminated. . . . [T]he defendants could not be compelled to follow the Finger Plan once the court determined the district was unitary.

Id. at 1520. The Tenth Circuit expressly rejected the government's argument and stated, "A finding of unitariness . . . cannot divest a court of its jurisdiction, nor can it convert a mandatory injunction into voluntary compliance." *Id.* at 1520 n.3.

47. *Id.* at 1520-21.

48. *Id.* at 1522-23. See *supra* note 43 for the text of Rule 60(b)(6).

49. Dowell v. Board of Educ., 795 F.2d 1516, 1523 (10th Cir. 1986).

50. *Id.* at 1521 (citing United States v. Swift & Co., 286 U.S. 106 (1932)) (other citations omitted).

independence.[51] Nevertheless, the district court applied the test laid down by the Tenth Circuit: "whether the School Board has shown a substantial change in conditions warranting dissolution or modification of the [desegregation decree]."[52]

The district court concluded past official segregation was not the cause of present residential segregation,[53] the Finger Plan had become oppressive,[54] the SRP plan was adopted for nondiscriminatory reasons,[55] the SRP's creation of racially identifiable elementary schools did not override the finding of unitariness,[56] and the purpose of the desegregation decree—dismantling the dual system—had been achieved.[57] Thus, the district court dissolved the 1972 desegregation decree, relinquished its jurisdiction, and "return[ed] total control over the schools in Oklahoma City to its Board."[58] The plaintiff class again appealed.

The Tenth Circuit, despite a lengthy attack by one dissenter,[59] vacated the district court's judgment on the ground that the lower court had erroneously applied "the federal law on injunctive remedies."[60] The Tenth Circuit again stressed that the Board had to meet the "exacting standard . . . first articulated in *United States v. Swift & Co.*,"[61] and concluded the district court committed clear error when it held the Board had met this standard.[62] The case was remanded with instructions to "[m]odify the Finger Plan to accommodate the changed circumstances" and "to maintain racially balanced elementary schools."[63] The Board appealed.

The United States Supreme Court granted certiorari. In a five to three decision, the Court *held*, reversed.[64] Dissolution of a desegregation decree is

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51. Dowell v. Board of Educ., 677 F. Supp. 1503, 1506 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483. The District Court also concluded the Board abandoned the Finger Plan and adopted the SRP because it believed "the Oklahoma City schools were no longer subject to federal court supervision." *Id.* at 1505.

52. *Id.* at 1506.

53. *Id.* at 1512.

54. *Id.* at 1515.

55. *Id.* at 1516.

56. Dowell v. Board of Educ., 677 F. Supp. 1503, 1519 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989).

57. *Id.* at 1522.

58. *Id.* at 1526.

59. Dowell v. Board of Educ., 890 F.2d 1483, 1506-40 (10th Cir. 1989) (Baldock, J., dissenting).

60. *Id.* at 1486.

61. *Id.* at 1489-90 (citing United States v. Swift & Co., 286 U.S. 106 (1932)).

62. *Id.* at 1503-04. The Tenth Circuit also relied on *United States v. W.T. Grant Co.* for the proposition that "compliance alone cannot become the basis for modifying or dissolving an injunction." *Id.* at 1491 (citing United States v. W.T. Grant Co., 345 U.S. 629 (1953)).

63. *Id.* at 1506.

64. Board of Educ. v. Dowell, 111 S. Ct. 630, 636-38 (1991). Chief Justice Rehnquist authored the majority opinion and was joined by Justices White, O'Connor, Scalia, and Kennedy. *Id.* at 632-33. Justice Souter did not take part in this decision. *Id.*

proper if the school board shows good faith compliance and elimination of the vestiges of past de jure discrimination. *Board of Education v. Dowell*, 111 S. Ct. 630 (1991).

II. THE MAJORITY OPINION

Before the majority reached the substantive issues, it untangled some procedural snarls caused by the district court's 1977 "Order Terminating Case."[65] The Board argued the plaintiff class was collaterally estopped from challenging the trial court's 1987 order because the plaintiff class failed to appeal the 1977 finding of unitariness.[66] Both the majority and the dissenting opinions agreed with the Tenth Circuit in rejecting this argument.[67] The majority concluded that "the 1977 order did not dissolve the desegregation decree, and the District Court's unitariness finding was too ambiguous to bar [the plaintiff class] from challenging later action by the Board."[68]

The majority recognized the word "unitary" had acquired several different meanings.[69] Declining to prescribe the proper definition, however,[70] the majority simply recognized the 1977 "Order Terminating Case" was "unclear with respect to what it meant by unitary and the necessary result of that finding."[71] Therefore, the majority affirmed the Tenth Circuit's conclusion that the 1977 order bound "the parties as to the unitary character of the district" but was not the "rather precise statement" necessary to dissolve a desegregation decree.[72]

The majority then addressed the substantive issue—the proper standard for determining when a school desegregation decree should be

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65. *Id.* at 635.

66. Brief of Petitioner at 18, Board of Educ. v. Dowell, 111 S. Ct. 630 (1991) (No. 89-1080). The Board argued:

> [Because] unitariness means the effects of past discrimination have been eliminated, Dowell's directive for the Oklahoma City School Board to remain under the governance of the injunction in the absence of a showing of segregative purpose . . . is at odds with the very meaning this Court has given to the achievement of unitary status.

Id.

67. Board of Educ. v. Dowell, 111 S. Ct. at 635-36, 641 n.3 (Marshall, J., dissenting).

68. *Id.* at 635.

69. *Id.* Some lower courts have used the term "unitary" to describe school districts which have "completely remedied all vestiges of past discrimination," while others have used the word "to describe any school district that has currently desegregated student assignments, . . . [but] nevertheless still contain[s] vestiges of past discrimination." *Id.* (citations omitted). The Eleventh Circuit even "drew a distinction between a 'unitary school district' and a district that has achieved 'unitary status.'" *Id.* at 636 (citation omitted).

70. *Id.* "We think it is a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution. . . . We are not sure how useful it is to define these terms more precisely, or to create subclasses within them." *Id.*

71. *Id.*

72. *Id.*

dissolved—and reversed the Tenth Circuit's choice of the *Swift* test.[73] First, the majority pointed out the factual disparity between the *Swift* case, which involved antitrust violations, and school desegregation cases.[74] *Swift* addressed the defendant's attempt to escape enforcement of a consent decree and "the continuing danger of unlawful restraints on trade which the Court had found still existed."[75] In contrast, the district court in *Dowell* found that the Board was "in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways."[76] Because "the purposes of the . . . litigation had been fully achieved" in *Dowell* (as opposed to *Swift*), the Board was not required to prove any "grievous wrong evoked by new and unforeseen conditions."[77]

Most importantly, the majority held the *Swift* standard was more stringent than the Constitution required.[78] "[T]he allocation of powers within our federal system" properly vests control of schools in local officials, so that the federal government's displacement of local authority can only be justified by "a violation of the Constitution."[79] The federal courts' involvement in school affairs "was intended as a temporary measure," unlike the purposefully perpetual decree in *Swift*.[80] Thus, once local authorities complied with the desegregation decree "for a reasonable period of time," the injunction must be dissolved.[81]

By holding that "a school board's compliance with previous court orders is obviously relevant,"[82] the majority overruled the Tenth Circuit's declaration that "'compliance alone cannot become the basis for modifying or dissolving an injunction.'"[83] According to the majority, ignoring a school board's good faith efforts to comply with a desegregation decree effectively "condemn[s] a school district, once governed by a board which intentionally

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73. *Id.*
74. *Id.* at 636-37.
75. *Id.* at 636 (citing United States v. United Shoe Mach. Corp., 391 U.S. 244 (1968)).
76. *Id.* at 636-37.
77. *Id.* at 637 (quoting United States v. Swift & Co., 286 U.S. 106, 119 (1932)).
78. *Id.* at 633.
79. *Id.* at 637.
80. *Id.* The majority quoted the following passage from *Milliken v. Bradley* (*Milliken II*):
> "[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . ."

Id. (quoting Milliken v. Bradley, 433 U.S. 267, 282 (1977)).
81. *Id.* at 637.
82. *Id.*
83. *Id.* (quoting Dowell v. Board of Educ., 890 F.2d 1483, 1491 (10th Cir. 1989)). The Court found the *W.T. Grant* rule inapplicable to the *Dowell* case because the question in *W.T. Grant* was "whether an injunction should be issued in the first place." *Id.*

discriminated, to judicial tutelage for the indefinite future."[84] Such a "Draconian result" was not required by either the federal law of injunctions or the Equal Protection Clause.[85]

Instead of the *Swift* standard, the proper determination was "whether the Board made a sufficient showing of constitutional compliance as of 1985, when the SRP was adopted."[86] The "compliance" inquiry is comprised of two prongs: "whether the 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."[87] Addressing the "good faith" prong, the majority excused the Board's abandonment of the Finger Plan in 1985[88] on the ground that the Board relied on "the express language" of the district court's 1977 "Order Terminating Case."[89] Turning to the "vestiges" prong, the majority directed the district court to examine the *Green* components: the Board's policies and practices regarding students, "faculty, staff, transportation, extracurricular activities, and facilities."[90] The district court should terminate the decree only if the Board satisfied both prongs of the test.[91]

Dissolution of the injunction would not end the inquiry, however. The district court should then evaluate the plaintiffs' argument "that the SRP was a return to segregation."[92] Even a school district "released from an injunction imposing a desegregation plan . . . remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment."[93]

III. THE DISSENT

Justice Marshall wrote a lengthy dissenting opinion, joined by Justices Blackmun and Stevens.[94] The dissent framed the "practical question" this way: "[W]hether, [thirteen] years after [the] injunction was imposed, the . . . School Board should have been allowed to return many of its elementary schools to their former one-race status."[95] The test promulgated by the ma-

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84. *Id.* at 638.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 638 n.1. "The Court of Appeals viewed the Board's adoption of the SRP as a violation of its obligation under the injunction, and technically it may well have been." *Id.*
89. *Id.* "The District Court in its decision on remand should not treat the adoption of the SRP as a breach of good faith on the part of the Board." *Id.*; *see also supra* note 51.
90. *Id.* (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); Green v. New Kent County School Bd., 391 U.S. 430, 435 (1968)).
91. *Id.* at 638.
92. *Id.* at 634.
93. *Id.* at 638.
94. *Id.* at 639.
95. *Id.* (Marshall, J., dissenting). As an example of this return, consider the table prepared by the plaintiff class, which contains the percentage of black enrollment in ten

jority, the dissent charged, "fail[ed] to recognize explicitly the threatened reemergence of one-race schools as a relevant 'vestige' of *de jure* segregation."[96] Because the dissent perceived the central aim of injunctive relief to be the elimination of racially identifiable schools and the stigma caused by segregation, the dissent concluded the purpose of the *Dowell* decree had not been achieved.[97] Thus, the Tenth Circuit's decision to reinstate the decree was proper.[98]

Reviewing the Court's prior school desegregation decisions, the dissent concluded the constitutional harm to be remedied was the stigma caused by racial segregation.[99] The elimination of stigma guided the federal courts' formulation of desegregation decrees, and, the dissent asserted, that objective should also shape the standard for dissolution of those injunctions.[100]

The dissent criticized the majority's vague standard: "as to the scope or meaning of 'vestiges,' the majority says very little."[101] Surveying the Court's earlier decisions, the dissent argued the proper meaning of the previously undefined term "vestige" was "any condition . . . likely to convey the message of inferiority implicit in a policy of segregation."[102] In contrast, the majority's narrow focus on "present and future compliance" rendered irrelevant the stigma persisting even after complete implementation of a desegregation plan.[103] The dissent urged a broader focus, one which recognized that

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elementary schools for the year immediately preceding implementation of the Finger Plan (1971-72), the final year of the Finger Plan (1984-85), and the first year of the SRP (1985-86):

	1971-72	1984-85	1985-86
Creston Hills	100.00	41.4	99.0
Dewey	99.2	33.5	96.6
Edwards	99.7	29.7	99.5
Garden Oaks	100.0	36.9	99.0
King (formerly Harmony)	99.7	43.2	99.7
Lincoln	99.1	36.9	97.2
Longfellow	99.3	32.2	99.6
Parker	99.7	72.3	97.3
Polk	97.8	31.6	98.4
Truman	100.0	27.6	98.7

Brief for Respondents at 16, Board of Educ. v. Dowell, 111 S. Ct. 630 (1991) (No. 89-1080). The dissent observed that, under the SRP, "44% of all Afro-American children in grades K-4 were assigned to these virtually all-Afro-American schools." Board of Educ. v. Dowell, 111 S. Ct. at 641 (Marshall, J., dissenting).

96. Board of Educ. v. Dowell, 111 S. Ct. at 639 (Marshall, J., dissenting).

97. *Id.* (Marshall, J., dissenting).

98. *Id.* (Marshall, J., dissenting).

99. *Id.* at 642 (Marshall, J., dissenting). The dissent's identification of the constitutional injury was supported primarily by *Brown v. Board of Education*, in which the Court concluded the racial segregation of black students "generates a feeling of inferiority as to their status in the community." Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (Brown I).

100. Board of Educ. v. Dowell, 111 S. Ct. at 643-44 (Marshall, J., dissenting).

101. *Id.* at 644 (Marshall, J., dissenting).

102. *Id.* (Marshall, J., dissenting).

103. *Id.* (Marshall, J., dissenting).

"[a]gainst the background of former state-sponsorship of one-race schools, the persistence of racially identifiable schools perpetuates the message of racial inferiority associated with segregation."[104]

Examining the elementary schools' racial compositions under the SRP, the dissent concluded the Board's abandonment of the Finger Plan resulted in racially identifiable schools.[105] The student bodies in more than half of Oklahoma City's elementary schools reverted to "either [ninety percent] Afro-American or [ninety percent] non-Afro-American."[106] Moreover, "approximately [forty-four percent] of all Afro-American children in grades K-4 were assigned to . . . virtually all-Afro-American schools."[107] The dissent urged that the decree could not be dissolved until "this principal vestige of *de jure* segregation" was eliminated.[108]

In addition, the dissent recognized elimination of racially identifiable schools required neither the reimplementation of the Finger Plan nor the district court's active supervision of the Board.[109] Among the alternative integration strategies available to the Board was establishment of magnet schools,[110] an organizational pattern quite similar to the Cluster Plan the Board proposed in 1969.[111] The dissent asserted that as long as feasible methods of eliminating racially segregated schools exist, they must be undertaken.[112]

Additionally, the dissent criticized the majority for equivocating about "the effect to be given to the reemergence of racially identifiable schools."[113] On one hand, the majority directed the district court on remand to consider *res nova* the issue of whether current residential segregation was "a vestige of former school segregation."[114] The dissent inferred from this instruction that the majority accepted "at least as a theoretical possibility that vestiges may exist beyond those identified in *Green*."[115] On the other hand, the majority provided sizable escape hatches: the Board was not charged with residential segregation caused by "private decisionmaking and economics,"[116] the

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104. *Id.* at 645 (Marshall, J., dissenting).
105. *Id.* (Marshall, J., dissenting).
106. *Id.* (Marshall, J., dissenting).
107. *Id.* at 641 (Marshall, J., dissenting).
108. *Id.* at 645 (Marshall, J., dissenting).
109. *Id.* at 647-48 (Marshall, J., dissenting).
110. *Id.* at 646 n.9 (Marshall, J., dissenting).
111. *See supra* text accompanying notes 25-27.
112. Board of Educ. v. Dowell, 111 S. Ct. at 647 (Marshall, J., dissenting) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971)).
113. *Id.* at 645 (Marshall, J., dissenting).
114. *Id.* at 638 n.2.
115. *Id.* at 645 (Marshall, J., dissenting).
116. *Id.* at 638 n.2. In contrast, the dissent asserted "the relevant inquiry is whether . . . the board's past actions were a 'contributing cause' to residential segregation." *Id.* at 646 n.8 (quoting Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 n.13 (1979)).

judgment could not subject the Board to "Draconian" "judicial tutelage,"[117] and the inquiry must be limited to pre-SRP 1985.[118]

Instead of the majority's "equivocation," the dissent charged the Board with responsibility for current residential segregation—both for the movement of white families out of previously integrated neighborhoods, and the creation of "personal preferences" which kept whites from moving into predominantly black schools and neighborhoods.[119]

The dissent also "reject[ed] the majority's suggestion that the length of federal judicial supervision [was] a valid factor in assessing a dissolution."[120] The Board's recalcitrance in meeting its constitutional duty was, the dissent asserted, a major cause of the extended duration of the federal courts' "judicial tutelage" over the school system.[121] The dissent exhaustively reviewed the *Dowell* litigation and observed, "This history reveals nearly unflagging resistance by the Board to judicial efforts to dismantle the City's dual education system."[122] Most importantly, the dissent was concerned that an excessively keen concern for temporal factors "risk[ed] subordination of the constitutional rights of Afro-American children to the interest of school board autonomy."[123]

Considering the magnitude of the constitutional harm, the "slight burden on the school district," and the existence of a feasible means to eliminate racially identifiable schools and their "message of racial inferiority," the dissent firmly maintained the federal courts must continue enforcement of desegregation decrees until their purposes are fulfilled.[124]

IV. CONCLUSION

There is little doubt about the outcome of this litigation on remand. Since 1977 the district court has issued two judgments containing factual and legal conclusions that span the spectrum from eradication of all vestiges of racial segregation[125] to the absence of intentional discrimination.[126] Indeed, the test laid down by the Supreme Court is exactly the inquiry made by the district court in 1987—good faith compliance, integration of the *Green* factors, and nondiscriminatory motivations for returning to neighborhood schools.

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117. *Id.* at 638.
118. *Id.*
119. *Id.* at 646 (Marshall, J., dissenting).
120. *Id.* (Marshall, J., dissenting).
121. *Id.* at 647 n.11 (Marshall, J., dissenting).
122. *Id.* at 639 (Marshall, J., dissenting).
123. *Id.* at 647 (Marshall, J., dissenting).
124. *Id.* at 648 (Marshall, J., dissenting).
125. *See supra* text accompanying notes 40-41 and 56-57.
126. *See supra* text accompanying notes 42 and 55.

The court's decision adds little to the *Dowell* dispute other than the reversal of the Tenth Circuit's adherence to the *Swift* standard.[127] The decision will not be helpful as guiding precedent in other desegregation cases either. The majority opinion is particularly unsatisfactory because it fails to construct a coherent, comprehensive theory of the constitutional harms and goals implicated in decree dissolution cases.

First, the majority fails to identify specifically what constitutional injury results from *de jure* segregation.[128] It seems probable this lack of focus resulted in the majority's unwillingness—or inability—to define "unitary status." Until we isolate the disease, we cannot conclude it has been cured.

Grafting the *Green* components onto the dissolution analysis exacerbates the confusion. The *Green* factors were simply the Court's suggestion of palpable conditions that plaintiffs could prove in order to create an inference of the school authorities' impalpable intent to discriminate. After *Dowell*, the absence of symptoms becomes a clean bill of health, whether the disease is truly eradicated or not.

As a result, the majority opinion leaves lower courts without a much-needed identification of the constitutional harms to be remedied, which in turn, leaves the courts without a firm standard for determining when "the purposes of the desegregation litigation [have] been fully achieved."[129] Imposing the *Green* components on decree dissolution analysis further muddies the waters.

In contrast, the dissent effectively distilled twenty-five years of school desegregation opinions and achieved a definition of the constitutional harm: feelings of racial inferiority and stigma.[130] This determination may be entirely accurate. However, the dissent's theory is incomplete because lower courts still do not know what are the proper constitutional goals.

Without identification of the proper goals, an informed choice of the means for desegregation is impossible. For instance, if desegregation decrees were intended to improve black students' self-perceptions and majority/minority race relations, then busing was a miserable failure. If, on the other hand, desegregation decrees were intended to achieve integrated schools, then the majority's decision means the federal court system is simply throwing up its hands and crying, "Uncle!"

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127. *See supra* text accompanying notes 73-77.

128. As Professor Kevin Brown recently observed, "One of the intractable problems of the Supreme Court's jurisprudence in the area of de jure segregation has been its inability to articulate a coherent theory of the constitutional harm resulting from de jure segregation." Brown, *supra* note 40, at 1109. Professor Brown considered it "imperative" that the Supreme Court identify the constitutional harm in its *Dowell* opinion. Brown, *supra* note 40, at 1109-10.

129. Board of Educ. v. Dowell, 111 S. Ct. at 637.

130. *Id.* at 639 (Marshall, J., dissenting).