6-1-1994

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IGNORING THE HARM: THE SUPREME COURT, STIGMATIC INJURY, AND THE END OF SCHOOL DESEGREGATION

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At some point, these school authorities and others like them should have achieved full compliance with this Court’s decision in Brown I.1

But when does the transition end, and how will we know that point when we see it?2

I. INTRODUCTION

As the 1990s began, some eight hundred school systems in the United States were under court supervision3 because school authorities had operated them in a racially discriminatory manner.4 This supervision is the result of four decades of Supreme Court decisions recognizing the stigmatic injury that segregated schools inflict on minority students5 and requiring school districts to remedy their segregated school systems.6 The goal of this supervision is the conversion of the

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* Executive Editor, Boston College Third World Law Journal.
4 The distinction between de jure segregation, which results from intentional state action and is prohibited by the Constitution, and de facto segregation, which exists as a result of circumstance and is not, results from the Supreme Court’s focus on whether the segregation was caused by the affirmative acts of the state. See Keyes v. School Dist. No. 1, 413 U.S. 189, 215 (1973) (Douglas, J., concurring); see also Washington v. Davis, 426 U.S. 229, 240 (1976) (requiring racially discriminatory purpose); Swann, 402 U.S. at 15 (state-imposed segregation is condition to be corrected). The Supreme Court’s initial cases concerned school districts where this distinction was not open to question because racial segregation had been required by law. See Green v. County Sch. Bd., 391 U.S. 430, 432 (1968) (segregation established by state constitution and statutes); Brown v. Board of Educ., 347 U.S. 483, 487-88 (1954) (Brown I) (segregation established by state law). In Keyes, however, the Court held that such codification is not necessary. 413 U.S. at 201. Rather, the Court held that where school authorities have intentionally used their policies to isolate black children and maintain the one-race status of white schools, a constitutional violation is present. See id. at 199-201; see also Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979) (proof of “intentional state action” necessary element of school desegregation cause of action); Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 991 & n. l (1976) (mem.) (finding of intentional segregative conduct by state necessary for desegregation).
5 See Brown I, 347 U.S. at 494.
6 See Green, 391 U.S. at 435-36.
illegally segregated, or “dual,”7 school systems into systems that are desegregated, or “unitary.”8

After decades of bitter debate about the effectiveness,9 correctness,10 and methodology11 of desegregation, the discussion has shifted

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7 This term for a school system that is segregated by race is illustrated by the school system in Green, which comprised two subsystems, one “black” and one “white.” See 391 U.S. at 432.

8 A unitary school district is one in which the goal of removing all vestiges of prior unconstitutional segregation from a school system has been achieved. See Swann, 402 U.S. at 13. As the Supreme Court noted in Board of Education v. Dowell, there is considerable disparity among the meanings given the term “unitary” by lower courts, stemming from the vagueness of the term. See 498 U.S. 237, 245–46 (1991); see also Owen M. Fiss, The Civil Rights Injunction 14 (1978); J. Braxton Craven, Jr., Integrating the Desegregation Vocabulary—Brown Rides North, Maybe, 75 W. Va. L. Rev. 1, 1 (1971) (noting “cryptic” meaning of unitary); T.A. Smedley, Developments in the Law of School Desegregation, 26 Vand. L. Rev. 405, 405–06 (1973) (standard for unitariness is unclear). But see Northcross v. Board of Educ., 397 U.S. 232, 236 (1970) (Burger, C.J., concurring) (rejecting suggestion that unitariness has not been defined). As a result, inconsistent definitions of the term have been used by the courts. Some courts have used the term to denote a school district that has completely remedied all discrimination, meeting the mandate of Brown I and Green. See United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987); Riddick v. School Bd., 784 F.2d 524, 532–33 (4th Cir. 1986), cert. denied, 479 U.S. 938 (1986); Vaughns v. Board of Educ., 758 F.2d 983, 988 (4th Cir. 1985). Other courts have used the term with reference to school districts that have desegregated student assignments. See Dowell v. Board of Educ., 890 F.2d 1483, 1503–04 (10th Cir. 1989), rev’d on other grounds, 498 U.S. 237 (1991). Further, at least one court has drawn a distinction between “unitary school districts” that have not operated segregated schools for a period of several years and school systems with “unitary status,” which indicates a removal of all vestiges of past discrimination and an adjudication to that effect. See Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985). The Supreme Court expressed doubts in Dowell concerning the utility of such precise definitions and subdefinitions, and refrained from doing so either in Dowell, 498 U.S. at 245–46, or Freeman v. Pitts, 112 S. Ct. 1430, 1443–44 (1992). However, the Supreme Court has stated that a unitary school system is one “within which no person is to be effectively excluded from any school because of race or color,” Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam), and a “nonracial system” of schools in which discrimination has been completely removed. Green, 391 U.S. at 436. For a more thorough discussion of unitariness, see infra part II.B.


to the problem of when control of school districts should revert to local authorities and how district courts should abdicate their authority over school systems. The Supreme Court addressed these questions in *Board of Education v. Dowell* and *Freeman v. Pitts*. In *Dowell*, the Court ruled that a school district may be released from supervision when it shows that it has complied with court orders and is unlikely to revert to unconstitutional behavior. In *Freeman*, the Court concluded that the supervising court may relinquish control of one part of a school system at a time, as each aspect of the system becomes unitary.

In reaching these conclusions, the Court largely ignored the stigmatic injury that provided the basis for its initial determination that racial discrimination in the public schools violates the Fourteenth Amendment. As a result, the Court has framed a doctrine for terminating school desegregation that allows local authorities to regain control over all or part of a school district even if vestiges of prior discrimination that continue to cause stigmatic harm remain. So long as school authorities can demonstrate their recent compliance with the Constitution and court orders, their present good faith, and the elimination of most vestiges of prior intentional segregation, judicial supervision must cease.

This Note analyzes when and how school desegregation should terminate, taking into account the stigmatic injury that the court ignores. A proper focus on stigmatic injury leads to the conclusion that greater efforts should be made to eliminate all vestiges of prior discrimination from formerly segregated school systems. This emphasis


15 498 U.S. at 247.

16 *Freeman*, 112 S. Ct. at 1444–45. These aspects are the six areas of schools that were identified as indicia of the presence or absence of a "dual" school system in *Green v. County School Board*: student assignments, faculty, staff, transportation, extracurricular activities, and facilities. See id. (citing 391 U.S. 430, 435 (1968)). For a discussion of these areas, see infra notes 138–42 and accompanying text.


18 See id. at 247.
II. Segregation and Stigmatic Injury

[Segregation's only purpose is to label or define blacks as inferior and thus exclude them from full and equal participation in society.]

The principle evil of school desegregation is that it stigmatizes the excluded race as inferior. Professor Kenneth B. Clark studied the stigmatizing effects of segregation as part of the Mid-Century White House Conference on Children and Youth in 1950. From that study, Clark concluded that black children strongly identify themselves by race, that they have been taught that their race is inferior, and that this causes black children to reject their race and themselves.

Clark interviewed children aged three to seven to ascertain their attitudes about themselves and their race. Clark showed the children four dolls that were identical except that two were white and two were black. The interviewer asked the child which was the white or black doll, and which doll looked like them. The children answered the first question correctly, and responded to the second question depend-

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19 Charles Lawrence, "One More River to Cross"—Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies, in Shades of Brown, supra note 11, at 49, 50.
20 See Gewirtz, supra note 2, at 729 (injury suffered by blacks not segregation itself, but deliberate subordination by American society).
22 Clark, supra note 21, at 19-24.
23 Id. at 19.
24 Id.
25 Id.
ing on their race.\textsuperscript{26} This demonstrated that the children showed a strong awareness of skin color and identified themselves by their race.\textsuperscript{27}Clark then asked the children which doll the child would like to play with; which doll the child liked; and which doll looked nice, looked bad, or was a nice color.\textsuperscript{28} Black children showed an unmistakable preference for the white doll.\textsuperscript{29} Clark concluded that this evidenced self-rejection by the black children stemming from their awareness and acceptance of prevailing racial attitudes.\textsuperscript{30}

Clark also found that segregated schools were one source of this message of inferiority.\textsuperscript{31} He stated that attending a white school evidences the superiority of a white child, while a black child learns of his or her own inferiority by being placed in a black school.\textsuperscript{32} As Clark explained, "[a] child who is required to attend a segregated school is being taught that race is an important factor in his education. It is practically impossible for him to avoid including in his appraisal of himself ... the fact of his racial identity."\textsuperscript{33}

A group of social scientists relied extensively on Clark's report in a later statement on school segregation.\textsuperscript{34} That report relayed Clark's conclusions and further developed his findings on the relationship between school segregation and self-rejection by black children.\textsuperscript{35} The report explained that enforced segregation is a major cause of such self-rejection.\textsuperscript{36} Segregation was found to cause self-rejection for three reasons: because it resulted from a decision by the majority group without the consent of the minority, because it was perceived in that way, and because segregation was historically based on the assumption of the excluded race's inferiority.\textsuperscript{37} The report concluded that enforced segregation compounds the problem, as it sanctions the assumptions of inferiority and the imposition of segregation on the minority race.\textsuperscript{38}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{26} \textit{Id.} at 19–22.
\item \textsuperscript{27} \textit{Id.} at 20–22.
\item \textsuperscript{28} \textit{Id.} at 23.
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} at 24; see also \textsc{John E. Williams}, \textit{Race, Color and the Young Child} 191–92 (1976) (reaching similar conclusions from study in which black children preferred pictures of white children to those of black children); \textsc{Judith Porter}, \textit{Black Child, White Child: The Development of Racial Attitudes} 85–86 (1971).
\item \textsuperscript{31} See \textsc{Clark}, \textit{supra} note 21, at 33.
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.} at 32–33.
\item \textsuperscript{34} The report is reprinted in \textit{The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement}, 37 \textsc{Minn. L. Rev.} 427 (1955) [hereinafter \textit{The Effects of Segregation}].
\item \textsuperscript{35} \textit{The Effects of Segregation}, \textit{supra} note 34, at 429–32.
\item \textsuperscript{36} \textit{Id.} at 432.
\item \textsuperscript{37} \textit{Id.} at 432–33.
\item \textsuperscript{38} \textit{Id.} at 433.
\end{enumerate}
\end{footnotesize}
In 1965, Clark further explored the educational effects of this stigmatic injury and of segregation generally. As part of a larger study of the effects of segregation in Harlem, New York, Clark examined the effectiveness of overwhelmingly black inner-city schools. Clark found that the children in those schools lagged behind students elsewhere in New York City and throughout the nation in terms of IQ and academic achievement. This finding demonstrates that the stigmatic injury caused by segregation impairs the academic development of the affected students.

III. THE LAW OF SCHOOL DESEGREGATION

Clark's 1950 study and the social scientists' report based on his study were submitted to the Supreme Court for its consideration of the constitutionality of racial discrimination in public schools. As the following discussion shows, the stigmatic injury flowing from segregation had a significant effect on the development of the law of school desegregation. This Part begins with the Supreme Court's recognition of the unconstitutionality of desegregation, and briefly reviews the cases in which the Court developed its various desegregation doctrines.

40 Id. at 117-25.
41 Id. This finding was confirmed by a 1986 study of first-grade students in black, white, and integrated schools. Robert Dreeben & Adam Gamoran, Race, Instruction, & Learning, 51 AM. SOC. REV. 660, 661 (1986). That study found significant differences between learning by blacks and whites. Id. at 663. However, when other variables were held constant, it became apparent that the availability and use of superior resources in the white schools caused the disparity in learning ability. Id. at 667.
42 CLARK, supra note 39, at 117-25. Studies showing that black students' achievement is improved by desegregation buttress the conclusion that this disparity is traceable to school segregation. See, e.g., Gail E. Thomas & Frank Brown, What Does Educational Research Tell Us About School Desegregation Effects?, 13 J. OF BLACK STUD. 155, 157-59 (1982) (reviewing studies showing improvement in black students' achievement after desegregation). A comprehensive review of studies on this issue was undertaken in 1982. See ROBERT L. CRAIN & RITA E. MAHARD, DESEGREGATION PLANS THAT RAISE BLACK ACHIEVEMENT: A REVIEW OF THE RESEARCH (1982). Ninety-three studies measuring the impact of desegregation on minority achievement were analyzed to determine whether desegregation resulted in increases in achievement by desegregated students. Id. at 7. Desegregation resulted in consistent IQ and achievement gains for black children, and gains in reading and language skills when reading aid was available at the transferee school. Id. at 24-25. The most impressive gains were made when desegregation was instituted in kindergarten and first grade, and where the transferee schools were predominantly, but not overwhelmingly, white. Id. at 35; see also ROBERT L. CRAIN & RITA E. MAHARD, DESEGREGATION & BLACK ACHIEVEMENT 16 (1977) (concluding that desegregation has resulted and will continue to result in increased achievement by black children).
43 CLARK, supra note 21, at vi; The Effects of Segregation, supra note 34, at 427.
This Part then examines in detail the concept of unitariness that evolved from those cases.

A. School Desegregation in the Supreme Court

The major Supreme Court precedents that provide the background for the issues decided in Board of Education v. Dowell\(^4^4\) and Freeman v. Pitts\(^4^5\) can be placed into three groups. In the first group of cases, the Court recognized the stigmatic injury of segregation and held that segregation in public schools violates the Equal Protection Clause.\(^4^6\) In the second group of cases, the Court announced the “affirmative duty” to desegregate, mandating the dismantling of formerly discriminatory school systems to remedy the stigmatic injury of segregation.\(^4^7\) Finally, the Court refined this affirmative duty to desegregate in the third group of cases.\(^4^8\) These latter cases stated that the remedy a district court may impose on a segregated school system must be limited to school districts in which intentional segregation is shown,\(^4^9\) and prohibited courts from implementing remedies calling for the perpetual balancing of student assignments at particular levels.\(^5^0\)

1. Recognizing Stigmatic Injury

The Supreme Court’s school desegregation jurisprudence has its origins in Brown v. Board of Education (Brown I),\(^5^1\) perhaps the most important decision of the modern Supreme Court,\(^5^2\) and in its sister case of the same name (Brown II).\(^5^3\) In Brown I, the Court broke with the “separate but equal” doctrine of Plessy v. Ferguson,\(^5^4\) which had

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\(^4^9\) See Milliken I, 418 U.S. at 744–45.
\(^5^0\) See Pasadena City, 427 U.S. at 437–38.
\(^5^1\) 347 U.S. 483 (1954). In Brown I the Court consolidated four school segregation cases: Brown v. Board of Education (Topeka, Kansas), Briggs v. Elliott (Clarendon County, South Carolina), Davis v. County School Board (Prince Edward County, Virginia), and Gebhart v. Belton (New Castle County, Delaware). Id. at 483 n.*.
\(^5^3\) 349 U.S. 294 (1955).
\(^5^4\) 163 U.S. 537 (1896).
eroded over the past few decades.\textsuperscript{55} The Court held that separate educational facilities are inherently unequal, and that maintaining such facilities constitutes a denial of equal protection of the laws in contravention of the Fourteenth Amendment.\textsuperscript{56} In reaching this conclusion, the Supreme Court explicitly focused on the stigmatic injury inflicted upon black schoolchildren by segregation.\textsuperscript{57} The Court stated that segregation caused psychological damage and inculcated a sense of inadequacy in black children, "generat[ing] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."\textsuperscript{58}

\textit{Brown II} addressed the more difficult issue of how to remedy the stigmatic injury caused by segregation.\textsuperscript{59} In that case, the Court concluded that remedies for segregated schools would be determined by the district courts in which the particular cases had been brought, and that those courts should use equitable principles to formulate their remedies.\textsuperscript{60} The Court relied on the district courts because of their proximity to local conditions, which would enable them to ensure that school authorities carried out their remedial responsibilities in good faith.\textsuperscript{61} Equitable principles were chosen for their "practical flexibility in shaping . . . remedies and . . . facility for adjusting and reconciling public and private needs."\textsuperscript{62} These needs included the public interest

\textsuperscript{55} See, e.g., McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637, 642 (1949) (black student, once admitted to state graduate school, must be provided with same treatment by state as students of other races); Sweatt v. Painter, 339 U.S. 628, 635 (1949) (state must provide blacks with legal education equivalent to that offered to whites); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938) (state must provide blacks with facilities "substantially equal" to those afforded to whites).


\textsuperscript{57} \textit{Brown I}, 347 U.S. at 494; see also United States v. Fordice, 112 S. Ct. 2727, 2743–44 (1992) (O'Connor, J., concurring) (describing stigmatic effects of discrimination); Freeman v. Pitts, 112 S. Ct. 1430, 1443 (1992) (noting that stigmatic injury is principal wrong of de jure segregation); cf. Britton v. South Bend Community Sch. Corp., 775 F.2d 794, 812 n.20 (7th Cir. 1985) (no stigmatic implication of inferiority in preference against members of "dominant white majority group"), vacated on other grounds, 783 F.2d 105 (7th Cir. 1986); see also \textsc{Richard Kluger}, \textsc{Simple Justice} 556 (1976).

\textsuperscript{58} \textit{Brown I}, 347 U.S. at 494. The Court buttressed this conclusion by citing Clark's study and several similar studies. \textit{Id.} at 494 n.11.

\textsuperscript{59} 349 U.S. 294, 298 (1955).

\textsuperscript{60} \textit{Id.} at 299-301.

\textsuperscript{61} \textit{Id.} at 299.

in seeing an effective and systematic transition of school systems from dual to unitary,\textsuperscript{63} and the private need of minority children to attend schools without regard to their race.\textsuperscript{64} \textit{Brown II} commanded a "prompt and reasonable start" toward compliance with \textit{Brown I},\textsuperscript{65} and ordered courts to retain jurisdiction during the period of transition to racially nondiscriminatory school systems.\textsuperscript{66} \textit{Brown I} and \textit{Brown II} thus performed two functions: they recognized the inequality implicit in intentional segregation, and made it clear that the stigmatic injury to black children caused by such segregation is the harm to be remedied.\textsuperscript{67}

2. The Affirmative Duty to Desegregate

After \textit{Brown II}, the Supreme Court faced the task of determining what remedies sufficiently vindicated the rights of black schoolchildren. Initially, the Court considered a school district's obligations fulfilled upon admission of students to its schools without regard to race.\textsuperscript{68} This approach did not prevail. Instead, the Court recognized the need to eradicate the conditions that caused the stigmatic injury to continue.\textsuperscript{69} In \textit{Green v. County School Board},\textsuperscript{70} the Court held that school authorities who have operated intentionally segregated school systems in the past have an affirmative duty to desegregate their systems and remove all vestiges of prior discrimination.\textsuperscript{71} This decision was followed by \textit{Swann v. Charlotte-Mecklenburg Board of Education},\textsuperscript{72} where the Court authorized supervising district courts to order school boards


\textsuperscript{63} \textit{Brown II}, 349 U.S. at 300.

\textsuperscript{64} \textit{Id.} at 298.

\textsuperscript{65} \textit{Id.} at 301.

\textsuperscript{66} \textit{Id.} at 301.

\textsuperscript{67} \textit{Brown II}, 349 U.S. at 301; Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (\textit{Brown I}).

\textsuperscript{68} See, e.g., Goss v. Board of Educ., 373 U.S. 683, 689 (1963) (transfer program allowing students to transfer from school where they were in the racial minority to one where they would be in the racial majority insufficient only because not accompanied by majority-to-minority transfer policy, which would allow pupils to choose their schools free of racial considerations); Cooper v. Aaron, 358 U.S. 1, 7 (1958) (duty discharged upon immediate general admission of black children to schools). This initial standard was summed up by the statement in \textit{Briggs v. Elliot} that the Constitution "does not require integration. It merely forbids discrimination." 132 F. Supp. 776, 777 (E.D.S.C. 1955).


\textsuperscript{70} 391 U.S. 430 (1968).

\textsuperscript{71} \textit{Id.} at 435–36.

\textsuperscript{72} 402 U.S. 1 (1971).}
that default on this affirmative duty to use radical measures to transform their systems from dual to unitary. These cases clearly demonstrate the need to remedy the continuing effects of prior unconstitutional actions, rather than merely correcting the discriminatory actions of school boards, in order to end the stigmatic harms caused by school desegregation.

In Green, the Court rejected a school board’s claim that its “freedom of choice” school attendance plan was a sufficient response to Brown II and held that Brown II imposed an affirmative duty on school boards to eradicate all vestiges of prior de jure segregation. The New Kent County schools had been segregated by law prior to the Court’s Brown I decision. The school board eventually responded to Brown II by adopting its freedom of choice plan, under which pupils either chose which school to attend at the beginning of each year or were assigned to the school they had attended the previous year. In rejecting this approach, the Green Court reasoned that while securing students’ freedom to attend schools on a nondiscriminatory basis had been the immediate goal of Brown II, the ultimate aim was the transition of school districts to unitary, nonracial systems of public education. The Court therefore recognized the affirmative duty of school boards to desegregate all aspects of school systems—student, faculty, and staff assignments, extracurricular activities, facilities, and transportation—to eliminate the racial identifiability of schools. Since the freedom of choice plan would not eliminate the vestiges of racial discrimination, the Court held it insufficient to discharge the school board’s affirmative duty to desegregate.

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73 Id. at 18–30.
74 See id. at 15; Green, 391 U.S. at 437–38.
75 Under that plan, students would either choose which school to attend or be assigned to the school attended in the previous year. Green, 391 U.S. at 433–34. The result was a pattern of separate white and black schools in which racial identifiability extended to all of the facets of school operations significant to the Court—student assignments, faculty, staff, transportation, extracurricular activities, and facilities. Id. at 435.
77 Green, 391 U.S. at 432.
78 Id. at 433–34.
79 Id. at 436.
80 Id. at 435.
81 Id. at 438; see also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971) (racially neutral remedies may fail to correct stigmatic harm).
In its opinion in *Green*, the Court also expressed frustration with the delay and evasion that had followed its demand for a prompt and reasonable start towards desegregation in *Brown II*. The Court therefore instructed that school authorities be required to come forward with a plan that would work immediately. The Court ordered district courts to evaluate desegregation plans in practice, retaining jurisdiction until state-imposed segregation had clearly been removed.

The affirmative duty to desegregate was affirmed in *Swann v. Charlotte-Mecklenburg Board of Education*, where the Court approved a district court's use of various radical measures to achieve unitariness. The Charlotte-Mecklenburg Board of Education had defaulted on its duty to dismantle its dual school system. The district court had responded by imposing a desegregation plan that relied on several unusual measures to desegregate the school district. That plan began with relatively innocuous steps such as the creation of a single athletic league and reassignment of teachers and administrative staff. However, the plan also radically redrew school attendance zones, used quotas for racial balancing, relied on extensive busing of students, and ordered the closing of several schools.

The Supreme Court first examined the power of the supervising district courts in this context. The Court acknowledged that school authorities have the initial responsibility for compliance with *Brown II*, and that a finding of a constitutional violation is necessary before

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84 *Green*, 391 U.S. at 439.
85 402 U.S. 1 (1971).
86 Id. at 9.
87 Id. at 7.
88 Id. at 8–10.
89 Id. at 8.
90 Id. at 9.
91 Id. at 23–24. The district court had ordered that there be no imbalance greater than 71% of one race to 29% of the other in the individual schools. Id. at 23. However, the court allowed for variations from this norm. Id.
92 Id. at 29–30.
93 Id. at 20–21.
94 Id. at 15. This aspect of the Court's decision was crucial, as it broke a "logjam" in lower courts over the scope of the remedial duty that had delayed meaningful relief in many communities. Days, *supra* note 10, at 1744 (quoting Gary Orfield, *Public School Desegregation in the United States, 1968–1980*, at 4–5 (1983)).
district courts may impose a remedy. The Court stated, however, that where school authorities default on their affirmative duty to desegregate, a district court may order the school system to take steps to meet that duty.

The Court applied this analysis to the racial quota set by the district court. While noting that a requirement of a certain racial balance as a substantive constitutional right would improperly impose a remedy beyond the constitutional violation, the Court approved of the district court's limited use of this ratio as a "starting point" in shaping a remedy. The Court also approved the extreme measures contained in the district court's order. It noted that remedies "may be administratively awkward, inconvenient, and even bizarre . . . and may impose burdens on some" but that dual school systems must be desegregated nonetheless. Because the district court had concluded that the assignment of children to schools closest to their homes would not dismantle the dual school system, the order was within that court's authority.

Green and Swann thus established a remedial standard completely consistent with the concept of stigmatic injury. Under those cases, a

95 Swann, 402 U.S. at 15–16. The Court recognized as a corollary to this that a remedy is limited to the scope of the constitutional violation. Id. at 16.
96 Id.; see Columbus Board of Educ. v. Penick, 443 U.S. 449, 459 (1979); Anderson v. Dougherty County Bd. of Educ., 609 F.2d 225, 227 (5th Cir. 1980) (ordering a district court to implement a plan where the school board had failed in its duty to desegregate). The Court also reasserted that courts should retain jurisdiction where necessary to ensure compliance. Swann, 402 U.S. at 21.
99 Swann, 402 U.S. at 28.
101 Swann, 402 U.S. at 30. Although the Court thus approved the radical rezoning used by the district court, it stated that there would be no need to make yearly adjustments to reflect demographic shifts once the affirmative duty to desegregate had been fulfilled. Id. at 31–32.
school system may not remedy prior segregation by mere reliance on neutral practices.\textsuperscript{102} School authorities must instead take affirmative measures to eliminate all vestiges of segregation that would otherwise continue to inflict stigmatic harms, even if "bizarre" measures must be used.\textsuperscript{103}

3. Limitations on Remedies

Two subsequent Supreme Court decisions saw the Court retreat from this earlier aggressive stance, increasingly finding remedies to exceed the scope of the constitutional violation they addressed. In \textit{Milliken v. Bradley (Milliken I)},\textsuperscript{104} the Court rejected a district court's remedy for segregation in the Detroit school system because the remedy extended to adjacent school districts in which no intentional segregation had been shown.\textsuperscript{105} In \textit{Pasadena City Board of Education v. Spangler},\textsuperscript{106} the Court struck down a racial quota because it was too strict and imposed requirements on the school district beyond the correction of the original constitutional violation.\textsuperscript{107}

In \textit{Milliken I}, the Supreme Court held that a district court could not order a remedy comprising several school districts adjacent to the district where de jure segregation had been shown, or order a specific racial balance in every school, grade, and classroom in the involved districts.\textsuperscript{108} After concluding that the segregation in the Detroit school system had resulted from intentional acts of state and local officials, the district court considered the viability of several remedial options.\textsuperscript{109} The court concluded that a remedy limited to the Detroit schools would not effectively dismantle the dual school system in accordance with the affirmative duty to desegregate.\textsuperscript{110} It therefore devised a remedy reaching fifty-three outlying suburban school districts.\textsuperscript{111} The court ordered measures be taken so that no school, grade, or classroom in those districts would have a racial composition differing from that of the extended desegregation area as a whole.\textsuperscript{112} In rejecting this remedy,
the Court first disposed of the strict racial composition requirement by invoking the command of *Swann* that particular degrees of racial balance may not be required as a matter of substantive constitutional right. The *Milliken I* Court stated that the purpose of the remedy is not to provide such a balance, but to restore the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct.

The Court then rejected the multidistrict remedy, buttressing its conclusion that the remedy impermissibly exceeded the scope of the constitutional violation with observations concerning the extent of the federal equity power, the importance of local control over schools, and the competence of federal courts. In evaluating the extent of the federal equity power, the Court concluded that because the scope of the remedy is determined by the nature and extent of the constitutional violation, an interdistrict remedy depends on a showing that a constitutional violation in one district has been a substantial cause of interdistrict segregation. The Court justified this conclusion by citing the need to uphold the tradition of local control over schools and the need to avoid requiring a district court to act as de facto legislature and school superintendent—positions that were beyond its competence. Because de jure segregation had only been shown in the Detroit school district, the Court held that there was no basis for an interdistrict remedy.

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113 Id. at 740.

114 Id. at 746; see also *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977) (*Milliken II*) (quoting *Milliken*, 418 U.S. at 746); see also *Jenkins* v. *Missouri*, 11 F.3d 755, 757 (8th Cir. 1993) (remedy must restore victims to the position they would have occupied without discrimination) (citation omitted); *United States* v. *Lawrence County Sch. Dist.*, 799 F.2d 1031, 1043 (5th Cir. 1986) (same); *Liddel* v. *Missouri*, 731 F.2d 1294, 1305 (8th Cir.) (same), cert. denied, 469 U.S. 816 (1984).


117 See id. at 741–42. See also *Milliken*, 418 U.S. at 743–44.

118 Id. at 744–45. The Court’s ruling was qualified by the facts that no finding was made of cross-district violation and that no meaningful opportunity was given for the outlying districts to be heard. Id. at 721–22. A later case further undermined the limits placed on interdistrict remedies by *Milliken I*, stating that interdistrict remedies are permissible so long as they do not infringe on the autonomy of outlying school districts. See *Hills*, 425 U.S. at 305–06. Therefore, it
Milliken I was followed by Pasadena City Board of Education v. Spangler, where the Court again found that a lower court's remedial reach exceeded its constitutional grasp. In Pasadena City, the Court rejected a district court's order that contemplated a perpetual balancing of student assignments at a specified level. After finding that a dual school system existed, the district court had mandated that student assignments be readjusted yearly so that minority students would never form the majority of the student body of any school. Although the plan balanced student assignments in the year after it was implemented, the district court refused the school board's subsequent request to dissolve the racial quota.

In an opinion by Justice Rehnquist, the Supreme Court rejected this approach. The Court first rejected the rigid racial quota under the rule of Swann. Swann was then cited for the rule that school desegregation remedies are limited to the extent of the constitutional violation. Because the district court's order had remedied the constitutional violation by balancing student assignments, the district court did not have the power to require annual readjustment of school attendance zones to maintain its quota. The Court thus concluded that the district court's inflexible remedy exceeded constitutional limits.

The cases from Brown I to Pasadena City establish the duty to eradicate vestiges of prior de jure segregation that cause stigmatic injury to black students. Milliken I and Pasadena City establish important limits on how a court may remedy that injury. Also important, but vague, is the Court's concept of unitariness. The cases from Green on deal with the concept of unitariness as a goal of, and a limit upon, supervising district courts. The Court has failed to fully ex-

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121 Id. at 440.
122 Id. at 428, 433.
123 Id. at 434–36.
124 Id. at 440.
125 Id. at 434.
126 Id.
127 Id.
130 See Pasadena City, 427 U.S. at 436–37; Milliken I, 418 U.S. at 744–45; Swann, 402 U.S. at 15; Green, 391 U.S. at 437–38.
plain this concept, however, and this omission has generated considerable confusion.

B. Unitariness—The "Central Riddle" 132

The goal of Brown II's remedial effort, as stated in Green, is the transformation of school systems from dual to unitary. 133 The Supreme Court has indicated the meaning of unitariness with broad and imprecise statements. It has said that a unitary school system is a "nonracial system" of schools where segregation has been eliminated "root and branch." 134 Unitariness has also been held to result from the elimination of all vestiges of de jure discrimination throughout the system. 135 On other occasions, the Court called for the elimination of racial identifiability of schools, so that there are not white or black schools, but "just schools." 136 Unfortunately, the Supreme Court has given no real content to that term, and lower courts have struggled with its meaning. 137

1. Measuring Unitariness

The Supreme Court has made it clear that lower courts must measure the unitariness of a school district by examining all aspects of the school system's operations—student assignments, faculty, staff, transportation, extracurricular activities, and facilities. 138 These aspects

138 Green, 391 U.S. at 435.
provide courts with indicia of whether the school system has achieved unitariness as a whole. It has long been recognized that these factors are interrelated, and thus that the supervising court has a duty to remedy all aspects of a school system.

The Supreme Court has developed three presumptions to aid district courts in measuring the unitariness of a school district. These presumptions are crucial because of the complexity of the questions


140 See Vaughns v. Board of Educ., 742 F. Supp. 1275, 1291 (D. Md. 1990) (the Green factors are interdependent upon each other), aff'd sub nom. Stone v. Prince George's County Bd. of Educ., 977 F.2d 574 (4th Cir. 1992), cert. denied, 113 S. Ct. 973 (1993); see also Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 (1979) (Dayton II) (noting that faculty assignment segregation is inextricably tied to segregation in student assignments). This corresponds accurately with sociologists' conception of schools as complete social systems in which these factors constantly interact. Brief of the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae at 37 (1971) (upon showing of violation, court or local authorities must "make every effort" to implement a unitary school system); this insistence upon remedies in all aspects of a school system coincides with the conclusions of many studies that have found that a simultaneous attack on all parts of a school system is necessary for the effective eradication of prior de jure segregation.

141 See, e.g., Milliken I, 418 U.S. at 744 ("federal courts have a duty to prescribe appropriate remedies" upon breach of students' constitutional rights); Davis v. School Comm'rs, 402 U.S. 33, 37 (1971) (upon showing of violation, court or local authorities must "make every effort" to implement a unitary school system); Green, 391 U.S. at 438 n.4 (citing Louisiana v. United States, 380 U.S. 145, 154 (1965)); Little Rock Sch. Dist. v. Pulaski County Special Sch., 778 F.2d 404, 433 (8th Cir. 1985) (showing of violation gives district court duty to implement effective remedy), cert. denied, 499 U.S. 982 (1978).

142 See, e.g., Milliken v. Bradley, 433 U.S. 267, 283 (1977) (Milliken I) (basic task is achieving public school system free of discrimination) (quoting United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 231–52 (1969); Milliken I, 418 U.S. at 737 (aim of Brown I was elimination of de jure school systems); Keyes v. School Dist. No. 1, 413 U.S. 189, 225–26 (1973) (Powell, J., concurring in part and dissenting in part) (right at issue is that of expecting that school board will operate nondiscriminatory school systems); Swann, 402 U.S. at 22 ("[t]he remedy commanded in Brown I was to dismantle dual school systems") (emphasis added); Green, 391 U.S. at 435 (flaw of desegregation plan affecting only student assignments was its failure to remedy all aspects of a school system). This insistence upon remedies in all aspects of a school system coincides with the conclusions of many studies that have found that a simultaneous attack on all parts of a school system is necessary for the effective eradication of prior de jure segregation. See Brief of the NAACP et al. as Amicus Curiae at 21 n.27, Freeman v. Pitts, 112 S. Ct. 1430 (1992) (No. 89-1290) (citing R. Scott & J. McPartland, Desegregation as National Policy: Correlates of Racial Attitudes, 19 Am. Educ. Res. J. 397–414 (1984); W.D. Hawley, Equity and Quality in Education: Characteristics of Effective Desegregated Schools, in EFFECTIVE SCHOOL DESSEGREGATION 298–99 (W.D. Hawley ed., 1981); Sheehan, A Study of Attitude Changes in Desegregated Intermediate Schools, 53 Soc. of Educ. 51–59 (1980); Larry W. Hughes et al., Desegregating America's Schools (1980); G. Forehand & M. Ragosta, A HANDBOOK FOR INTEGRATED SCHOOLING 11–12 (1976)). This is because continuing vestiges of discrimination inflict stigmatic harms and result in an inferior education to the same extent as does present de jure segregation. Id. at 19 & n.23 (citing Weinberg, Minority Students: A Research Appraisal 159 (1977); Edgar J. Epps, The Impact of School Desegregation on the Self-Evaluation and Achievement Orientation of Minority Children, 42 LAW & CONTEMP. PROBS. 57 (1978)).
of causation and intent involved in determining whether segregation has been caused by intentional actions of the school board or other factors.143 Because of this complexity, these presumptions have a tendency to preordain rulings against school authorities.144

First is the presumption against one-race schools identified in Swann.145 According to this presumption, school systems containing individual schools whose students are practically all of one race have the burden of demonstrating that this segregation is not the result of intentional action by school authorities.146

The second presumption operating against school authorities is known as the Keyes presumption, after the case that created it. Keyes v. School District No. 147 involved a school district where a significant amount of segregation had been shown to have resulted from intentional state action.148 The Supreme Court created a presumption to aid the plaintiffs in that case: all segregation in a school district shown to be partially de jure segregated is presumed to result from intentional actions of school authorities.149 The effect of this presumption is to allow the supervising court to impose a systemwide remedy on the

143 See Freeman, 112 S. Ct. at 1450 (Scalia, J., concurring).
144 See United States v. Fordice, 112 S. Ct. 2727, 2748 (1992) (Scalia, J., concurring in part and dissenting in part) (noting the "ordinarily unsustainable burden of proving the negative proposition that [the school board] is not responsible for extant racial disparity"); Robert Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 Vand. L. Rev. 1205, 1206 (1981); Chandler, supra note 12, at 545 ("Allocation of the burden of proof is often dispositive of the merits of the claim.").
146 Freeman, 112 S. Ct. at 1457 n.1 (Blackmun, J., concurring) ("there is a presumption in a former de jure segregated school district that the board's actions caused the racially identifiable schools"); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 527, 537 (1979) (Dayton II); Columbus Bd. of Educ. v. Penick, 433 U.S. 449, 460 (1979); Milliken I, 418 U.S. at 741 n.19; Keyes, 413 U.S. at 208; Swann, 402 U.S. at 26.
148 Id. at 192.
149 Id. at 208. The Keyes Court noted that its presumptions were justified by probability, policy, and fairness. Id. at 207-09. As Professor Gewirtz has stated, the "antecedent probability" that school authorities who have operated a dual system in substantial part have also maintained the rest of the system in a like manner is high, justifying the presumptions on probability grounds. Gewirtz, supra note 2, at 786. He further points out that school authorities are more likely to have information about their motives and the effect of their actions. Id. at 786-87. This supports the fairness justification of the presumption. See Note, Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation, 100 Harv. L. Rev. 653, 659 (1987). Finally, the policy justification for this presumption lies in the fact that the defendant school board has been proven to be a wrongdoer with respect to a substantial part of the school system; thus, "it is preferable for errors of factfinding to be made in plaintiff's favor once the plaintiff has shown that the defendant purposefully segregated in at least a substantial part of the school system." Gewirtz, supra note 2, at 786-87. Similar justifications motivate the other presumptions in this context. See Note, supra, at 658.
school district when only part of the school system has been shown to be intentionally segregated.\footnote{See Keyes, 413 U.S. at 208 (burden also shifts with regard to proof that "other segregated schools within the system are not also the result of intentionally segregative actions").}

The Court momentarily abandoned the Keyes presumption in \textit{Dayton Board of Education v. Brinkman (Dayton I)}\footnote{Id. at 413.}. In that case, a district court had found that three discrete violations of the Equal Protection Clause constituted a "cumulative violation" that justified a systemwide desegregation remedy.\footnote{Id. at 417.} The Supreme Court disagreed, holding that the remedy was broader than the constitutional violation required.\footnote{Id. at 420.} Justice Rehnquist's opinion introduced the concept of "incremental segregative effect," and instructed district courts to tailor remedies to redress only segregation that had been caused by unconstitutional actions.\footnote{Id.; see also Days, supra note 10, at 1749.} The Court ordered lower courts to examine the segregation in the schools, determine how much would have occurred without intentionally discriminatory actions by the school board, and fashion a remedy that would correct segregation beyond that amount.\footnote{Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (Dayton II).}

This was corrected by the Court's decision when the Dayton case returned after remand.\footnote{Id. at 537.} \textit{Dayton II} created the final presumption operating against school authorities.\footnote{See G. Scott Williams, Note, Unitary School Systems and Underlying Vestiges of State-Imposed Segregation, 87 Colum. L. Rev. 794, 814 (1987) ("If plaintiffs show a systemwide violation followed by segregation in the schools at some point after the violation, [Dayton II] presumes the causal connection.").} \textit{Dayton II} permitted plaintiffs to establish a prima facie case without having to prove that currently racial identifiable schools were caused by past intentionally discriminatory acts.\footnote{Dayton II, 443 U.S. at 537; Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979).} Instead, causation was presumed when such effects followed past de jure segregation.\footnote{See Days, supra note 10, at 1750.} The Court thus considerably eased plaintiffs' burden in establishing a prima facie case of discrimination.\footnote{Id. at 537.}

2. The Affirmative Duty to Desegregate

While the riddle of unitariness has yet to be solved, one thing is clear about the status of a school board prior to a finding that unitariness has been achieved. Once the school board has defaulted in its
constitutional duties, it is subject to the affirmative duty to desegregate imposed by *Green*.161 Steps must be taken to desegregate the school system and remove all vestiges of prior de jure segregation that will otherwise continue to inflict the stigmatic injury identified by *Brown I*.162 The adoption of racially neutral practices by school authorities is insufficient to bring the school system into constitutional compliance.163 Rather, those authorities must make every effort to achieve unitariness, and bear the burden of showing that the choice of less effective measures over more effective alternatives is not driven by illicit motives.164 Moreover, if school authorities take actions that perpetuate or reestablish segregation prior to unitariness, they must show that those actions serve “important and legitimate” purposes.165

The affirmative duty to desegregate also includes countering any demographic shifts caused by lingering vestiges of past desegregation.166 Because people tend to consider the racial composition of area schools when deciding where to live, outstanding vestiges of prior de

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161 391 U.S. at 437–38; see *Columbus Bd. of Educ.*, 443 U.S. at 459; *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 978 F.2d 1574, 1583 (11th Cir. 1992); *Lee v. Macon County Bd. of Educ.*, 616 F.2d 805, 810 (5th Cir. 1980) (affirmative duty remains where school system has not been made unitary); *supra* notes 70–84 and accompanying text.


163 See *United States v. Fordice*, 112 S. Ct. 2727, 2738 (1992) (where effects of de jure segregation linger, affirmative duty is not discharged by adoption of racially neutral policies); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 212 (1973) (racially neutral plans that fail to counteract prior discrimination not sufficient to discharge affirmative duty) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971)); *Morgan v. Burke*, 926 F.2d 86, 88 (1st Cir. 1991) (that policy may be racially neutral does not prove that the effects of prior discrimination have been eliminated), *cert. denied*, 112 S. Ct. 1664 (1992); see also *Dayton II*, 443 U.S. at 538 (“[T]he measure of . . . a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of [the school board’s] actions . . . .”) (citing *Wright v. Council of Emporia*, 407 U.S. 451, 462 (1972) and *Davis v. School Comm’rs*, 402 U.S. 33, 37 (1971)).


jure segregation have an inevitable effect on area housing choices.\textsuperscript{167} Courts have held that until those vestiges are eliminated, demographic shifts do not excuse school authorities from their affirmative duty to desegregate.\textsuperscript{168}

The effect of a finding of unitariness was uncertain prior to Board of Education v. Dowell and Freeman v. Pitts. The only certainty was that such a finding returns control of a school system to local school authorities.\textsuperscript{169} The questions of exactly what constitutes unitariness, how such control should be ceded to elected authorities,\textsuperscript{170} and what effect a finding of unitariness has on the burden of proof and presumptions against school authorities\textsuperscript{171} remain unsettled before those cases, as contrasting conclusions were reached in the various circuits.

\textsuperscript{167} See Keyes, 413 U.S. at 292 (racially identifiable schools have a “reciprocal effect on the racial composition of residential neighborhoods . . . causing further racial concentration within the schools”); see also Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 n.13 (1979) (noting that residential segregation is responsibility of school authorities if it is shown to be a substantial cause of school segregation); United States v. Board of Sch. Comm’rs, 573 F.2d 400, 408 (7th Cir. 1978) (“racial segregation in public schools and racial segregation in housing are integrally interrelated”).

\textsuperscript{168} See Vaughns, 758 F.2d at 988; Davis, 721 F.2d at 1435.

\textsuperscript{169} See United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987) (after attaining unitary status, a school board may act as it pleases so long as it does not purposefully discriminate); Vaughns, 758 F.2d at 988 (same); Valley v. Rapides Parish Sch. Bd., 646 F.2d 925, 937 (5th Cir. 1981) (same), cert. denied, 455 U.S. 939 (1982); Oliver v. Kalamazoo Bd. of Educ., 640 F.2d 782, 808 (6th Cir. 1980) (same); Chandler, supra note 12, at 539; Donald E. Lively, Separate But Equal: The Low Road Reconsidered, 14 Hastings Const. L.Q. 43, 55 n.78 (1986).

\textsuperscript{170} Compare Morgan v. Nucci, 831 F.2d 313, 318-19 (1st Cir. 1987) (holding that incremental withdrawal is permissible) and United States v. Lawrence County Sch. Dist., 799 F.2d 1031, 1059 (5th Cir. 1986) (Higgenbotham, J., concurring in part and dissenting in part) (advocating return of judicial control incrementally) with Pitts v. Freeman, 887 F.2d 1438, 1446 (11th Cir. 1989) (“[a] school system achieves unitary status or it does not”); rev’d, 112 S. Ct. 1430 (1992) and Riddick v. School Bd., 784 F.2d 521, 533 (4th Cir.) (all aspects of a school system’s operations must be free of vestiges of intentional segregation before control of the school system is returned to state authorities), cert. denied, 479 U.S. 938 (1986).

\textsuperscript{171} Compare Dowell v. Board of Educ., 890 F.2d 1483, 1492 (10th Cir. 1989) (placing burden of proof on school authorities despite finding of unitariness), rev’d, 498 U.S. 237 (1991) and Brown v. Board of Educ., 892 F.2d 851, 862 (10th Cir. 1989) (burden of proof remains with defendants after finding of unitariness), vacated, 112 S. Ct. 1657 (1992) with Overton, 834 F.2d at 1175-76 (finding of unitariness releases district from burden of proof with regard to intent) and School Bd. v. Baliles, 829 F.2d 1308, 1311 (4th Cir. 1987) (presumptions and placement of burden of proof on defendants cease with finding of unitariness) and Riddick, 784 F.2d at 536-37 (unitariness places burden of proof on plaintiffs). But see Morgan, 831 F.2d at 326 n.19 (noting, without deciding, that plaintiffs may have benefit of modified burden of proof even after finding of unitariness). See also Note, supra note 149, at 668-69 (proposing modified burden of proof).
IV. Termination in the Federal Courts

This Part examines the major appellate and Supreme Court decisions addressing the meaning of unitariness and its effects. *Riddick v. School Board*\(^\text{172}\) and *Dowell v. Board of Education*\(^\text{173}\) reached different conclusions in defining when a school district becomes unitary. Concurrently, *Morgan v. Nucci*\(^\text{174}\) and *Pitts v. Freeman*\(^\text{175}\) addressed the question of whether a district court may withdraw its supervision over unitary parts of a school system that has not yet achieved complete unitariness. The Supreme Court granted certiorari in two of these cases, and resolved these issues in *Board of Education v. Dowell*\(^\text{176}\) and *Freeman v. Pitts*\(^\text{177}\).

A. Termination of Desegregation in the Courts of Appeals

In 1986 the Fourth Circuit expressed its opinion on the definition and effect of unitariness in *Riddick v. School Board*.\(^\text{178}\) In *Riddick*, that court held that judicial supervision of a formerly de jure segregated school system ends when vestiges of intentional racial segregation have been removed from all aspects of that system contemporaneously.\(^\text{179}\) The Court of Appeals for the Tenth Circuit reached a drastically different conclusion in *Dowell v. Board of Education*.\(^\text{180}\) The *Dowell* court held that an injunctive decree ordering a school system to become and remain unitary outlasts a finding that vestiges of segregation have been eliminated and may be dissolved only upon a showing of an extreme change in circumstances.\(^\text{181}\) In *Morgan v. Nucci*,\(^\text{182}\) the First Circuit held that when a school system becomes unitary in one aspect of its operations, the supervising court must relinquish control over that aspect while retaining jurisdiction over the system to ensure that overall unitariness is achieved.\(^\text{183}\) Conversely, the Eleventh Circuit decided in *Pitts v. Freeman*\(^\text{184}\) that a supervising district court in the same circum-

\(^{172}\) 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).
\(^{174}\) 831 F.2d 313 (1st Cir. 1987).
\(^{178}\) 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).
\(^{179}\) *Id.* at 533–35.
\(^{181}\) *Id.* at 1490–91.
\(^{182}\) 831 F.2d 313 (1st Cir. 1987).
\(^{183}\) *Id.* at 319.
stances must continue to take actions over all aspects of a school system until the entire system has been unitary for several years. This section will now discuss these four cases, which demonstrate the diverging paths taken by the federal appellate courts.

1. Riddick v. School Board

The subject of Riddick v. School Board was the Norfolk, Virginia school system, which had been segregated by law prior to the Supreme Court’s decision in Brown I. After lengthy litigation, the Norfolk school system was found to be unitary in 1975. The school board continued the crosstown busing that the district court had mandated before that finding. In 1983, the board attempted to counter increasing “white flight” from its schools by adopting a geographic pupil reassignment plan for its elementary schools.

The Riddick action ensued, as the plaintiffs attempted to prevent implementation of the pupil reassignment plan. The district court held the reassignment plan to be constitutional, concluding that the 1975 finding of unitariness had been correct. The court also concluded that the finding of unitariness shifted the burden of proof regarding discriminatory intent from the school board to the plaintiffs, and that the plaintiffs had not met that burden.

The Fourth Circuit affirmed the district court’s conclusions. The appellate panel held that a finding of unitariness is predicated on a showing that all aspects of the school system have been freed from the vestiges of de jure segregation, measured by the indicia of Green v. County School Board. Furthermore, it held that the finding of unitariness both ends the supervising district court’s role and returns the burden of proof of discriminatory intent to the plaintiffs.

The court of appeals reached this conclusion because of the importance of local control over schools and the limited power of the federal courts. The court reasoned that because the use of the fed-
eral equity power in this context depends on a continuing constitutional violation, the court’s involvement must end upon the finding of unitariness. Because such a finding signals the end of the violation, if a court does not then cease its involvement with the school district, it will be imposing the perpetual racial balancing condemned in *Pasadena City*.

2. *Dowell v. Board of Education*

In *Dowell v. Board of Education*, the Court of Appeals for the Tenth Circuit addressed a factual situation similar to that faced by the Fourth Circuit in *Riddick*. The *Dowell* litigation began in 1961 and resulted in a 1972 order commanding that the school system be made unitary. The court adopted a desegregation plan proposed by the plaintiffs and ordered the school board not to deviate from the plan without the court's permission. After a finding of unitariness in 1977, the school district continued to comply with the original order until 1984. It then adopted a Student Reassignment Plan (SRP) that contemplated the reemergence of several one-race schools.

After the district court found the SRP constitutional and refused to reopen the case, the Tenth Circuit reversed and remanded for a finding of whether the initial injunction had been violated and whether that injunction should be dissolved or modified. The appellate court did not consider the underlying constitutional issues, but treated the case as involving only the issue of the dissolution of injunctions. The district court found that the school board was not responsible for the demographic changes that had made the original desegregation plan inequitable, that nondiscriminatory reasons motivated the adoption of the SRP, and that the school district continued to be unitary. Therefore, the district court concluded that modification of...
the 1972 decree was unnecessary and that the school board was free to adopt the SRP.\textsuperscript{207}

The plaintiffs appealed once again to the Tenth Circuit.\textsuperscript{208} The court of appeals again focused its analysis on questions of dissolution of injunctions independent of the underlying constitutional issues.\textsuperscript{209} The court stated that while the school system regulated by the injunction had been declared unitary, the injunction could not be dissolved upon a finding of mere compliance.\textsuperscript{210} Instead, it held that the school board must satisfy the test of \textit{United States v. Swift & Co.}\textsuperscript{211} by showing an extreme hardship caused by new and unforeseen conditions.\textsuperscript{212}

Because the school board’s actions violated the injunction, which had not been dissolved before the SRP was adopted, the court placed the burden on the school board to either show that it had met its continuing affirmative duty to accomplish desegregation, or demonstrate that circumstances had changed so that the injunction should be dissolved.\textsuperscript{213} The court found that the one-race schools allowed plaintiffs to establish a prima facie case that the district was no longer unitary.\textsuperscript{214} It also found that the school board’s claims of hardship were based on conjecture and that the demographic changes were foreseen at the time the decree was framed.\textsuperscript{215}

Although this finding led the Court of Appeals to conclude that the decree should not have been dissolved, it found that the changed circumstances provided a reason to modify the decree.\textsuperscript{216} The court ignored the previous finding of unitariness and ordered that the decree be modified in light of the continuing duty to desegregate mandated by \textit{Swann}.\textsuperscript{217} The court found that feasible measures to desegregate remained open to the school board and ordered that the decree be modified to include those measures.\textsuperscript{218}

3. \textit{Morgan v. Nucci}

While the issue of when a school system may revert to local control was being argued in the above cases, the question of how supervising
courts should relinquish control was considered in *Morgan v. Nucci*\(^{219}\) and *Pitts v. Freeman*.\(^{220}\) In *Morgan*, the Court of Appeals for the First Circuit held that a district court supervising the Boston school district was obligated to refrain from adjusting student assignments once that aspect of the school district had become unitary.\(^{221}\) In *Pitts*, the Eleventh Circuit reached the opposite result, concluding that the affirmative duty to desegregate applies to every aspect of a school system until the entire system has been unitary for a period of several years.\(^{222}\)

The *Morgan* litigation began in 1972 and resulted in a 1974 ruling that the Boston schools had been intentionally segregated.\(^{223}\) The federal district court for the District of Massachusetts subsequently issued several orders to make all aspects of the schools' operations unitary.\(^{224}\) In 1982, the district court determined that the Boston schools had made significant progress toward unitariness and began to turn direct supervision of the district over to the Massachusetts Board of Education.\(^{225}\) In 1985, the district court dissolved half of its original orders and issued several final orders that enunciated binding requirements.\(^{226}\) Among these requirements was an order mandating that the school district maintain student assignments at the ratio that they had been required to achieve by the original orders.\(^{227}\)

The Boston School Committee appealed.\(^{228}\) It claimed that the school district had achieved substantial compliance with the district court's original student assignment order.\(^{229}\) The school board asserted that the further final order impermissibly dictated a particular degree of racial balance despite the fact that student assignments had become unitary.\(^{230}\)

The First Circuit agreed with the school committee.\(^{231}\) It remanded the case to the district court to determine whether student assignments in the Boston schools had become unitary, and to relinquish control

\(^{219}\) 831 F.2d 313 (1st Cir. 1987).
\(^{220}\) 887 F.2d 1438 (11th Cir. 1989), rev'd, 112 S. Ct. 1430 (1992); see also United States v. Overton, 834 F.2d 1171 (5th Cir. 1987).
\(^{221}\) 831 F.2d at 319.
\(^{222}\) 887 F.2d at 1446–48.
\(^{223}\) *Morgan*, 831 F.2d at 315.
\(^{224}\) *Id.* at 316.
\(^{225}\) *Id.*
\(^{226}\) *Id.*
\(^{227}\) *Id.* at 316–17 & n.3.
\(^{228}\) *Id.* at 317.
\(^{229}\) *Id.*
\(^{230}\) *Id.* at 317–18.
\(^{231}\) *Id.* at 326.
over that aspect of the school system if they had.\textsuperscript{232} The appellate court construed \textit{Pasadena City Board of Education v. Spangler}\textsuperscript{233} to require a court that finds one area of a school system unitary to relinquish control over that area to local authorities.\textsuperscript{234} The court read \textit{Pasadena City} to hold that when a school district has achieved unitariness in student assignments, the supervising court has fully remedied the previous racially discriminatory attendance patterns.\textsuperscript{235} The court therefore held that proper respect for local control mandates that judicial involvement with an aspect of a school district must cease when that aspect becomes unitary.\textsuperscript{236} Although the court's examination of the record led it to believe that student assignments were unitary, it remanded the case to the district court to evaluate the number of one-race or racially identifiable schools, the good faith of the school authorities, and the achievement of maximum practicable desegregation in student assignments.\textsuperscript{237}

\textbf{4. \textit{Pitts} v. \textit{Freeman}}

In \textit{Pitts} \textit{v. Freeman}, the Eleventh Circuit expressly declined to follow the First Circuit's reasoning.\textsuperscript{238} Instead, it held that a school board must continue to meet its affirmative duty to desegregate until all aspects of the system have been unitary for several years. It also stated that this affirmative duty extends even to segregation not caused by the initial constitutional violation but occurring before a finding of unitariness.\textsuperscript{239}

Like \textit{Morgan \textit{v. Nucci}}, \textit{Pitts} involved a school system that had integrated some, but not all, aspects of its operations.\textsuperscript{240} Because the district court had found the areas of student assignments, transportation, and extracurricular activities in the formerly dual DeKalb County School System (DCSS) to be unitary, it refused to impose additional duties in those areas.\textsuperscript{241} This was despite student assignments in the DCSS having become increasingly segregated in previous years.\textsuperscript{242} The

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\textsuperscript{232}Id. \textsuperscript{233}427 U.S. 424 (1976); see \textit{supra} notes 120–28 and accompanying text. \textsuperscript{234}See \textit{id.} at 318–19. \textsuperscript{235}Id. at 319 (citing \textit{Pasadena City Bd. of Educ. v. Spangler}, 427 U.S. 424, 437 (1976)). \textsuperscript{236}Id. at 318–19. \textsuperscript{237}Id. at 319–26. \textsuperscript{238}887 F.2d 1438, 1446 (11th Cir. 1989), \textit{rev'd}, 112 S. Ct. 1450 (1992). \textsuperscript{239}Id. at 1446–48. \textsuperscript{240}See \textit{id.} at 1443–44. \textsuperscript{241}See \textit{id.} at 1444. \textsuperscript{242}See \textit{id.} at 1448.
\end{flushright}
district court found that demographic shifts, rather than prior intentionally discriminatory acts, had caused the resegregation. The district court remained active in other areas, however, ordering further relief in the system’s faculty, staff, facilities, and distribution of educational resources.

The court of appeals rejected this piecemeal approach. It directed the district court to require the DCSS to continue desegregating student assignments to counter any demographic shifts until all aspects of the school system had been unitary for several years. This instruction was motivated by the desire to prevent resegregation and the conclusion that the affirmative duty to desegregate imposed by Green continues until the entire school system has become free of all vestiges of de jure segregation. The appellate panel described the Green factors as providing a benchmark for determining a school system’s unitary status, rather than as discrete parts of a school system capable of becoming unitary one by one.

The court of appeals asserted that this holding would neither require district courts to impose remedies exceeding their authority over the school system nor contradict Pasadena City. The remedy thus imposed would not exceed the supervising court’s authority to rid the school system of all vestiges of de jure segregation. Continuing de jure segregation in any aspect of the system continues the constitutional violation, and the supervising court’s authority, throughout the entire system. The Eleventh Circuit construed Pasadena City more narrowly than the First Circuit had in Morgan v. Nucci. The Pitts court interpreted Pasadena City only to reject the rigid and permanent requirement of a substantive racial balance. Because of this interpretation, the Pitts court required the district court to continue to enforce the DCSS’s affirmative duty to desegregate until all vestiges of prior de jure segregation had been eliminated for several years.

243 See id.
244 See id. at 1443–44.
245 Id. at 1445.
246 Id. at 1447–48.
247 Id. at 1446–47.
248 Id. at 1446.
249 Id. at 1446–47.
250 Id. at 1446.
251 Id. at 1446.
253 See Pitts, 887 F.2d at 1447.
254 Id. at 1446.
B. Termination in the Supreme Court

The cases from Brown I to Pasadena City illustrate the beginning and the middle of the Supreme Court’s school desegregation doctrine. The appellate decisions discussed above framed the issues in the next phase of the Supreme Court’s desegregation jurisprudence. The Court denied certiorari in Riddick,255 but agreed to reexamine Dowell256 and Freeman.257 Dowell provided the Court with an opportunity to begin writing the end of that doctrine by deciding when judicial control of school districts must cease.258 Freeman further refined this, specifying the manner and degree in which the bounds of a supervising court’s powers dictate that this cessation of control must occur.259

1. Board of Education v. Dowell

The Supreme Court granted certiorari in Board of Education v. Dowell260 to resolve the split between the Tenth Circuit’s judgment in Dowell v. School Board261 and the contrary holdings in Spangler v. Pasadena City Board of Education262 and Riddick v. School Board.263 In an opinion by Chief Justice Rehnquist, the Court resolved this conflict by holding that a school district must be released from judicial control after it has complied in good faith with desegregation orders for a reasonable time and has eliminated the vestiges of prior de jure segregation to the extent practicable.264

The Dowell plaintiffs’ failure to contest the 1987 order in which the district court had dissolved its original desegregation injunction prompted the Court to address whether that order barred them from challenging later actions by the school board.265 The Court held that plaintiffs were not so barred because the order’s use of the term “unitary,” which the Court considered inherently vague, made the order so ambiguous that plaintiffs could not have known its effect.266 The Court also expressed disapproval of the use of “unitariness” as an explicit constitutional requirement and indicated a preference for

255 479 U.S. 938 (1986). The decision in Morgan was not appealed.
262 611 F.2d 1239 (9th Cir. 1979).
263 784 F.2d 521 (4th Cir.), cert. denied, 479 U.S. 938 (1986).
265 Id. at 244–45.
266 Id. at 245.
evaluating school systems directly under the Fourteenth Amendment. 267

After disposing of this matter, the Court turned its attention to the question of when desegregation efforts should terminate. The Court first rejected the Tenth Circuit’s reliance on United States v. Swift & Co. for the proposition that only a showing of an extreme change in circumstances and oppressive hardship could justify the dissolution of an injunction. 268 It distinguished Swift because that case concerned a perpetual injunction. 269 The Court determined that federal court desegregation decrees are of a character inconsistent with this approach. 270 The use of the word “transition” in Brown II and Green indicated to the Court that federal supervision of segregated schools was intended to be temporary. 271 This reasoning, combined with the importance of local control of schools 272 and the limits of the federal equity power, 273 led the Court to the conclusion that a federal court’s regulation of a school system may not extend beyond the time required to remedy the past de jure segregation, and thus that Swift is inapposite to those decrees. 274

The Court relied instead on the formulation of the standard for dissolving a desegregation decree found in United States v. United Shoe Machinery Corp. 275 Under that standard, a decree may be dissolved if its purposes have been fully achieved. 276 The Court held that this standard would be met in the context of school desegregation if the district court found that the school district was being operated in compliance with the Constitution and that a return to unconstitutional actions was not likely. 277 The district court was to gauge the likelihood of such a return by examining the demonstrated good faith of the school board and the board’s compliance with prior court orders. 278

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267 See id. at 245–46.
268 See id. at 246–48.
269 Id. at 246 (citing Swift, 286 U.S. 106, 119 (1932)).
270 Id. at 247.
272 Dowell, 498 U.S. at 248. The Court noted that such control of schools “allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.” Id. (citing Milliken v. Bradley, 418 U.S. 717, 742 (1974) (Milliken I)).
273 These limitations are exceeded when a court aims its decree at “a condition that does not violate the Constitution or . . . flow from such a violation . . . .” Dowell, 498 U.S. at 247 (quoting Milliken v. Bradley, 433 U.S. 267, 282 (1977) (Milliken II)).
274 See Dowell, 498 U.S. at 249.
275 See id. at 247 (citing United Shoe, 391 U.S. 244 (1968)).
276 See id. (citing United Shoe, 391 U.S. at 248).
277 Id. at 247.
278 See id. at 249–50.
Furthermore, the Court instructed the district court to evaluate all aspects of the school system—student assignments, faculty, staff, transportation, extracurricular activities, and facilities. The district court was ordered to use the results of this inquiry to determine whether the vestiges of prior intentional segregation had been eliminated to the extent practicable. If all of these requirements were met, the 1985 declaration of unitariness should be affirmed and the challenge to the SRP evaluated under traditional equal protection principles. However, if the district court found that the resegregation was caused by prior de jure acts, rather than by “private decisionmaking and economics,” or if the constitutional compliance or good faith of the school board was not clear, then the finding of unitariness should be reversed.

Justice Marshall dissented, arguing that local control over schools and the desire to limit remedies should not be placed in a higher position than the constitutional rights of black schoolchildren. Marshall stressed the importance of eliminating the stigmatic injury of de jure segregation, and of eliminating all vestiges of prior discrimination that caused such an injury. One such vestige that Marshall thought to be particularly harmful was that of reemerging one-race schools. He felt that such schools could be traced to prior de jure segregation by school authorities and other state actors who had enforced or influenced residential segregation. Since the SRP promised to reestablish such schools, Marshall concluded that the purposes of federal intervention had not been accomplished.

2. *Freeman v. Pitts*

*Freeman v. Pitts* gave the Court an opportunity to further refine the doctrine it had begun to develop in *Dowell*. *Freeman* held that it is within a district court’s discretion to cease supervision of part of a

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279 *Id.* at 250 (citing Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)).
280 *Id.*
281 *Id.* at 249–50 (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976)). This presumably indicated that the burden of proof should be returned to the plaintiffs and the presumptions against the school board discarded upon a finding of unitariness. See *supra* notes 143–60 and accompanying text.
282 *Dowell*, 498 U.S. at 249–50 & n.2.
283 Justices Blackmun and Stevens joined Justice Marshall’s dissent. Justice Souter did not take part in the consideration or decision of the case. *Id.* at 251, 268.
284 *Id.* at 266–67 (Marshall, J., dissenting).
285 *Id.* at 260 (Marshall, J., dissenting).
286 See *id.* at 265 (Marshall, J., dissenting).
287 See *id.* at 263 (Marshall, J., dissenting).
school system before the entire system has achieved unitariness. The Supreme Court began with a closer examination of the facts of the case. The litigation in Freeman began in 1968, when plaintiffs brought suit against the DeKalb County School System in the District Court for the Northern District of Georgia. DCSS immediately ceased its policy of "recalcitrance and hesitation" in integrating its formerly de jure segregated system and promulgated a desegregation plan in conjunction with the Department of Health, Education, and Welfare. In 1969, DCSS adopted that plan, subject to minor revision, as a result of an order by the district court.

In 1986, DCSS moved for final dismissal of the litigation. The district court found DCSS to be unitary in the areas of student assignments, transportation, extracurricular activities, and physical facilities. The court found that DCSS was not unitary, however, with respect to faculty and staff assignments, resource allocation, or quality of education. The court held that while it would order DCSS to remedy the defects in its system, it would cease to actively supervise the areas of the system that were unitary.

Justice Kennedy wrote the Supreme Court's opinion reversing the appellate court's rejection of this incremental relinquishment of judicial control. The Court first revisited the evaluation of the unitariness concept engaged in by the Dowell Court. That term was noted to have been helpful in the remedial process, but to lack any precise content. The Court stated that the term does not confine the discretion of

289 See id. at 1444–46.
290 Id. at 1436.
291 Prior to the suit, DCSS had implemented only the type of freedom of choice transfer plan that the Court had held insufficient to satisfy a school district's remedial responsibilities in Green v. County School Board, 391 U.S. 430, 441 (1968). Freeman, 112 S. Ct. at 1436. This type of delay was typical of school boards during this period. See Days, supra note 10, at 1746–47; Swann, 402 U.S. at 14; Griffin v. County Sch. Bd., 377 U.S. 218, 221–22 (1964); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 417 (8th Cir. 1985), cert. denied, 476 U.S. 1186 (1986); Liddell v. Missouri, 731 F.2d 1294, 1305–06 (8th Cir.), cert. denied, 469 U.S. 816 (1984).
292 Freeman, 112 S. Ct. at 1436.
293 After revision, this plan abolished the freedom of choice plan, closed all de jure black schools, and instituted a neighborhood schools plan. Id.
294 Id.
295 Id. at 1437.
296 Although the district court found black students' achievement to be satisfactory, this area was found not to be unitary because of the higher level of education of teachers in majority white schools, and the disparity in resource allocation and quality of education between majority white and majority black schools. See id. at 1441–42.
297 See id. at 1442.
298 Id. at 1444–45.
299 Id. at 1443.
300 Id. at 1443–44.
district courts as defined by traditional equitable principles, but that those courts should continue to balance public and private interests to redress the constitutional injury.  

The Court then drew on *Pasadena City Board of Education v. Spangler* to illustrate that such balancing requires that district courts be given the discretion to withdraw their control over school systems incrementally. The Court noted that the *Pasadena City* decision had rejected a district court’s continued readjustment of student assignments in a school system in which that aspect had been balanced, as that readjustment exceeded the authority of the district court. The Court concluded that the rationale of that case dictated that a district court has the discretion to partially withdraw from supervision of a school system, while retaining jurisdiction over that system until the remedial goal has been fully realized. Justice Kennedy described such relinquishment as an appropriate means to the ultimate end of returning the school system to local control. He concluded that the importance of such control, the temporary nature of the desegregation remedy, and the limits on the power of federal courts mandated this holding.

The Court also rejected the Eleventh Circuit’s conclusion that the affirmative duty to eliminate vestiges of discrimination extended to the use of “bizarre” methods to rectify resegregation caused by factors not traceable to intentionally discriminatory actions by the school board. Questioning both the authority and the ability of federal courts to effectively counter massive demographic shifts, the Court held that the affirmative duty to desegregate an aspect of a school system’s operations ceases once school authorities carry their burden of demonstrating that the racial imbalance caused by de jure segregation in that aspect has been remedied. The Court acknowledged the duty to eliminate all vestiges of prior de jure segregation and recognized the possibility that such vestiges may be subtle. It stated, however, that they “must be so real that they have a causal link to the [original] de

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301 Id. at 1444.
303 *Freeman*, 112 S. Ct. at 1444.
304 Id. (quoting *Pasadena City*, 427 U.S. at 436).
305 Id. at 1444-45.
306 Id. at 1445.
307 Id. at 1446.
308 Id. at 1447-49.
309 Id. at 1447-48. The Court noted that the length of time for which the remedy had been in force and the demonstrated good faith of the school board could be used to demonstrate that current conditions were not the result of past discrimination. *Id.* at 1448.
310 Id.
jure violation."311 The Court remanded the case to the district court with instructions to evaluate whether the school board had complied with court orders in areas where supervision was to be withdrawn, whether retention of control over those areas was necessary or practicable for compliance in other areas of the school system, and whether the school authorities had acted in good faith.312

Justice Scalia concurred, pointing to the impossibility of determining whether remaining segregation results from public or private decisions.313 He noted that the pro-plaintiff presumptions created by the Court had preordained a finding of de jure segregation in almost all cases, as school boards were unable to rebut those presumptions.314 Justice Scalia stated that while those presumptions may have been appropriate at the inception of the Court’s school desegregation jurisprudence, the factual basis for them had disappeared over the years as private factors increasingly took precedence.315 He concluded that the Court would soon have to abandon these presumptions in favor of traditional equal protection principles and burdens of proof.316

Justice Souter concurred only to explain the inquiry that he believed a district court should engage in before relinquishing control over a school system.317 Souter warned against such action where the demographic changes leading to a finding of unitariness are themselves a product of past de jure segregation and the “patterns of thinking” that de jure segregation creates.318 He also cautioned against a cessation of supervision where future imbalances in the remedied aspect of the school system could be caused by continuing de jure segregation in other aspects.319

Justice Blackmun’s opinion, in which Justices Stevens and O’Connor joined, opened with the observation that in the decades since Brown I, DCSS students had never attended a desegregated school system.320 In agreeing with the Court’s general holdings,321 he echoed Justice

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311 Id.
312 Id.
313 Id. at 1451 (Scalia, J., concurring).
314 Id. at 1452-53 (Scalia, J., concurring) (“Conversely, if we alter our normal approach and require the school authorities to establish the negative . . . the plaintiffs will almost always win.”).
315 Id. at 1453 (Scalia, J., concurring).
316 Id. at 1453-54 (Scalia, J., concurring).
317 See id. at 1454 (Souter, J., concurring).
318 See id. (Souter, J., concurring).
319 See id. at 1454-55 (Souter, J., concurring).
320 Id. (Blackmun, J., concurring in part and dissenting in part).
321 Id. at 1455 (Blackmun, J., concurring in part and dissenting in part).
Souter’s recommendations to district courts considering whether to relinquish control over a school system. He stated that such courts should consider any contribution that school authorities’ actions have made to demographic shifts and whether retention of control over the area to be relinquished would help bring another part of the system into compliance.

Blackmun also suggested that district courts view school boards asserting their good faith and intentions with “reasonable skepticism” to ensure the conversion to a unitary system.

V. REEXAMINING THE TERMINATION OF DESEGREGATION

Dowell and Freeman, taken together, greatly diminish the affirmative duty to desegregate imposed on school boards by Green v. County School Board. Rather than desegregating a school system until all vestiges of de jure segregation have been eliminated, school boards may simply demonstrate their present compliance with remedial decrees and good faith commitment to the Constitution. Vestiges of prior segregation must be removed, but only if they are directly traceable to unconstitutional acts by the school board, and not to “private decisionmaking and economics.” School boards also no longer bear the burden of desegregating their entire school system as commanded by the Court in Green. Instead, school authorities may remedy discrete aspects of their system one at a time, even if the entire school system has never achieved unitariness. This will result in an inquiry that strongly resembles the concept of incremental segregative effect introduced by the court in Dayton I and subsequently rejected in Dayton II. Courts must discover the extent of segregation caused by school boards, determine how much segregation resulted from intervening private decisionmaking, and then remedy only the former.

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322 Id. at 1455–57 (Blackmun, J., concurring in part and dissenting in part).
323 Id. (Blackmun, J., concurring in part and dissenting in part).
324 Id. (Blackmun, J., concurring in part and dissenting in part).
325 See Green, 391 U.S. 430, 436–37 (1968); supra notes 161–71 and accompanying text.
327 See Dowell, 498 U.S. at 249–50; Freeman, 112 S. Ct. at 1447.
328 Green, 391 U.S. at 436–37.
329 Freeman v. Pitts, 112 S. Ct. 1430, 1455 (1992) (Blackmun, J., concurring in part and dissenting in part); see id. at 1444–45 (majority opinion of Kennedy, J.).
332 Cf. Dayton I, 433 U.S. at 420.
A. The Affirmative Duty to Desegregate Survived

The Court has employed two tactics to lessen school boards’ affirmative duty to desegregate. First, in *Dowell*, the Court explicitly shifted the focus of the inquiry away from unitariness as a goal of the remedial effort. In *Freeman* the Court further noted that the concept of unitariness does not confine the discretion of the supervising court in devising equitable remedies. The Court preferred instead to measure school boards’ actions against the requirements of the Constitution as interpreted in *Freeman* and *Dowell*. Second, in *Freeman* the Court essentially held that *Pasadena City* modified the duties underlying the concept of unitariness, and abolished the affirmative duty to desegregate to the extent that that duty requires vestiges of racial discrimination to be eliminated and racial identifiability of schools to be remedied until the school system is entirely unitary.

By its disparagement of the concept of unitariness, the Court may have disposed of that concept as a measure of school authorities’ compliance with their affirmative duty to desegregate. This does not, however, affect the duty that unitariness had previously measured. Under the Court’s precedents, all vestiges of segregation must be completely removed from a school system before remedial efforts may cease. While the Court may choose not to use unitariness as a measure of the completion of that duty, it must supply an independent justification if it is to make that duty lighter.

The Court unsuccessfully searched for such a justification for reducing the affirmative duty to desegregate by following the expansive reading of *Pasadena City* engaged in by the First Circuit in *Morgan v. Nucci*. *Pasadena City* does not serve this purpose. Simply put, that case does not require a supervising district court to incrementally relinquish control over a school district, nor does it reduce the affirmative duty to desegregate. As the Court in *Pasadena City* realized, the

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335 112 S. Ct. at 1444.
336 See Freeman, 112 S. Ct. at 1443–44; Dowell, 498 U.S. at 245–46.
338 112 S. Ct. at 1444–45; see supra notes 299–311 and accompanying text.
339 See supra notes 161–68 and accompanying text.
340 Morgan had construed *Pasadena City* to require courts to withdraw supervision over school districts incrementally as each part of the district became unitary. 831 F.2d 313, 319 (1st Cir. 1987); see supra notes 233–35 and accompanying text.
holding of that case was limited to a rejection of the district court’s order that student assignments be perpetually readjusted to reflect a certain racial balance.\textsuperscript{341} \textit{Pasadena City} therefore does not in any way lessen the affirmative duty to desegregate school systems that have not yet achieved unitariness.\textsuperscript{342}

The limits on the power of the federal courts and the concerns for local control that motivated the \textit{Pasadena City} decision—and that the Court relied on in \textit{Dowell} and \textit{Freeman}—neither require a district court to relinquish control over aspects of a school system as they become unitary nor mandate that full efforts to desegregate not be undertaken.\textsuperscript{345} Because \textit{Brown I} and the cases that followed declared the unconstitutionality of segregated school systems,\textsuperscript{344} a court does not exceed its constitutional authority so long as any part of the school system retains vestiges of state-imposed segregation.\textsuperscript{346} The Court itself implicitly admits this in \textit{Freeman v. Pitts} by allowing the supervising court the \textit{discretion} to relinquish control over part of a school district. If the limitations on the power of the federal courts and the concerns for local control that motivated the decision in \textit{Pasadena City} required a supervising district court to give up control over facets of a school system as they become unitary, the supervising court would not have the discretion to relinquish control that the Court finds. Instead, the supervising court would be required to surrender control over each aspect of the school system as soon as it became unitary to avoid exceeding its constitutional authority.

The fact that local control of a school district will be displaced by the orders of a supervising court is not a reason to forego a comprehensive and effective remedy. In \textit{Brown II}, the Court recognized the interference with local control that the remedial process would cause,

\begin{footnotesize}
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  \item \textsuperscript{341} See \textit{Pasadena City}, 427 U.S. at 432 ("All that is now before us are the questions of whether the District Court was correct in denying relief when petitioners in 1974 sought to modify the ‘no majority’ requirement . . . ."); see also Vettereli v. United States Dist. Ct., 435 U.S. 1304, 1308 (1978) (Rehnquist, Circuit Judge) (\textit{Spangler} would be violated only if court forced school authorities to reassign students annually).
  \item \textsuperscript{342} See Vaughns v. Board of Educ., 758 F.2d 983, 988–89 (10th Cir. 1985); Tracy Ellen Sivitz, Note, \textit{Eliminating the Continuing Effects of the Violation: Compensatory Education as a Remedy for Unlawful School Desegregation}, 97 YALE L.J. 1173, 1191 (1988) (\textit{Morgan} incorrectly cited \textit{Pasadena City} to approve incremental cessation of supervision).
  \item \textsuperscript{343} In fact, those concerns were expressly contemplated by the Court in \textit{Brown II} as factors to be considered in shaping a remedy, not as a limitation on the power of the district court to redress the constitutional injury. See Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (\textit{Brown II}).
  \item \textsuperscript{344} See \textit{supra} notes 140–42 and accompanying text.
  \item \textsuperscript{345} Milliken v. Bradley, 433 U.S. 267 (1977) (\textit{Milliken II}) (discrimination in schools is condition that offends the Constitution and provides basis for intervention).
\end{itemize}
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and ordered district courts to consider this when effectuating an equitable remedy.\textsuperscript{346} To contend that a court exceeds its authority by continuing to fully eradicate vestiges of segregation assumes that those actions are outside the court's discretion. If the remedy for de jure segregation is full compliance with the affirmative duty to desegregate, the district court remains within its authority for as long as vestiges of prior discrimination remain in the school system.

B. Reemphasizing Stigmatic Injury

As Justice Marshall noted in his dissent in \textit{Dowell}, the Court has regressed from its original remedial approach to a forward-looking doctrine in determining when school desegregation efforts should cease.\textsuperscript{347} The Court's present emphasis is not focused on whether the effects of past de jure segregation have been remedied, but on whether the school board has recently complied with the Constitution. Although this approach may reflect an understandable sympathy for school boards that have inherited segregated systems from past administrations, it misses the point of the Court's school desegregation jurisprudence by failing to address the stigmatic injury done to black children by discrimination in public education.\textsuperscript{348}

The stigmatic injury of de jure segregation was the basis for federal court intervention relied on by \textit{Brown I}, as the Court confirmed that such discrimination sends a message of inferiority to the children of the disfavored race.\textsuperscript{349} Because the stigmatic injury persists in a school system for as long as vestiges of prior de jure segregation remain,\textsuperscript{350} the remedial process must meet the affirmative duty imposed by \textit{Green}—discrimination must be removed "root and branch" from all aspects of the school system's operations.\textsuperscript{351}

Instead of easing the burdens placed on school boards by their predecessors' unconstitutional conduct, the Court should have seized the opportunity presented by \textit{Board of Education v. Dowell} and \textit{Freeman v. Pitts} to order school boards to remedy this stigmatic injury. In deciding these cases, the Court should have reinforced the affirmative duty to desegregate introduced by \textit{Green} and refocused school deseg-

\textsuperscript{346} \textit{Brown II}, 349 U.S. at 298–300.
\textsuperscript{348} \textit{Id.; see supra notes} 20–42 and accompanying text.
\textsuperscript{349} \textit{See Brown v. Board of Educ.}, 347 U.S. 483, 494 & n.11 (1954) (\textit{Brown I}); supra notes 20–42 and accompanying text.
\textsuperscript{350} \textit{See supra note} 142.
regation remedies on the stigmatic injury caused by de jure segregation.

The Court in *Dowell* was correct in holding that judicially enforced school desegregation should be halted when remedial goals are achieved to the extent practicable. The Court's analysis of when this has occurred is flawed, however, because of its failure to address the stigmatic injury that vestiges of prior discrimination inflict on minority children. Where school authorities' acts cause this stigmatic injury, the remedial effort must continue.

The Court's major failing in this regard is that it implies a distinction between resegregation caused by the original de jure acts and resegregation that is caused by "private decisionmaking." This is troubling because private decisionmaking, for which the Court concludes school authorities are not responsible, is invariably influenced by continuing vestiges of de jure segregation that continue until the school district is made unitary. Vestiges of segregated schools will influence private housing decisions, causing residential choices to follow the patterns set by vestiges remaining in the schools. This will cause racially identifiable schools to reemerge and inflict the stigmatic harms prohibited by *Brown I*. Given the difficulty of determining what has caused present imbalances, and the inevitable interrelationship between racially identifiable schools and residential segregation, racial imbalances in a school district should be assumed to stem from de jure segregation. The Court should therefore require that the affirmative duty to desegregate be enforced until the schools have ceased to be racially identifiable for a period of several years.

Emphasizing stigmatic injury also reveals that it is mistaken to allow court supervision over any facet of a school system's operations to cease before the entire system has achieved unitariness. The Court

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353 See *id.* at 250 n.2.
354 While this is especially likely in the time before any part of the school system has been made unitary, it can also follow a declaration of unitariness as to one facet of the school system's operations. In *Freeman*, for example, the schools remained racially identifiable in their faculty assignments and quality of education. 112 S. Ct. 1430, 1437 (1992). It is almost inconceivable that this would not influence "private decisionmaking" in the area. See *supra* notes 167–68 and accompanying text. Student assignments, which had been made unitary for the moment, would then reemerge as a dual element of school operations indirectly caused by the continuing vestiges of discrimination.
355 See *supra* notes 143–44 and accompanying text.
356 *Cf.* *Riddick v. School Bd.*, 784 F.2d 521, 533 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986) (school system unitary when vestiges of discrimination have been removed from all aspects of school system for several years).
has recognized that the aspects of school systems examined in *Green*—student assignments, faculty, staff, transportation, extracurricular activities, and facilities—merely provide indicia for determining when the duty to desegregate the entire school system has been met. This reflects the inherent interrelatedness of these different aspects, and reveals the difficulty of remediying facets of a school system one at a time. The Court should require district courts to continue to remedy all aspects of school systems until unitariness is achieved in order to prevent any aspect from causing the stigmatic injury of segregation. Incremental relinquishment of control over school boards, therefore, should not be permitted.

The Court also erred by creating a scheme that weighs the good faith of the school board in determining whether vestiges of prior segregation remain. The Court properly recognized that a school board’s good faith is probative of the likelihood that it will not discriminate in the future. It mistakenly asserted, however, that this good faith also reveals the likelihood that current imbalances are vestiges of prior discriminatory acts. This definition of vestiges of prior discrimination is incompatible with the concept of stigmatic injury. If vestiges that continue to inflict the harms of segregation remain, it is immaterial that school authorities may have acted in good faith. To ensure that conditions that cause stigmatic harms do not continue, vestiges of de jure segregation should be defined as any present conditions that cause those harms, without regard to the good faith of school authorities. The Court should require school boards to remove all such vestiges before judicial control is lifted to ensure that stigmatic harms do not continue.

VI. Conclusion

In *Brown v. Board of Education*, the Supreme Court identified the stigmatic injury to black school children that public school segregation causes, and concluded that such segregation amounts to a denial of equal protection in violation of the Fourteenth Amendment to the Constitution. Subsequent holdings of the Court enforced this decision by requiring the removal of all vestiges of segregation that continue to inflict stigmatic injury. The doctrine developed in *Freeman v. Pitts* and

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358 See *supra* notes 138–42 and accompanying text.
359 See *supra* notes 140–42 and accompanying text.
361 See *id.* at 1449.
Board of Education v. Dowell dilutes this duty, concentrating instead on considerations of whether a school board has complied in good faith with court orders, and whether the school board seems likely to operate its school system in a nondiscriminatory manner in the future. Unless the Court returns to its earlier stance, and focuses on removing all vestiges of state-imposed segregation, the stigmatic injury to minority children inflicted by past segregation is indeed “unlikely ever to be undone.”\textsuperscript{362}

\textsuperscript{362}Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (\textit{Brown I}).