The Supreme Court's Unsuccessful Attempt to Clarify when School Boards Have Complied with Desegregation Decrees: Board of Education of Oklahoma City v. Dowell

Kevin P. Fitzpatrick
Lynne E. Trimble

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/jcred/vol6/iss2/4

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
THE SUPREME COURT'S UNSUCCESSFUL ATTEMPT TO CLARIFY WHEN SCHOOL BOARDS HAVE COMPLIED WITH DESEGREGATION DECREES: BOARD OF EDUCATION OF OKLAHOMA CITY v. DOWELL

The notion of equality of individuals, a cornerstone of American society, is heralded by the Declaration of Independence and guaranteed to all by the United States Constitution. To achieve the ideal of equality, particularly equality of opportunity, America's sociologically diverse and multi-ethnic peoples must not be segregated. Hence, to promote the success of society and its

1 See The Declaration of Independence para. 2 (U.S. 1776). It provides in relevant part: "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." The United States Constitution, which evolved out of the spirit of the Declaration of Independence, provides equal protection under the laws of the United States. See U.S. Const. amend. XIV:

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

Id.; Fulfilling the Letter and Spirit of the Law, Desegregation of the Nations Public Schools. A Report of the United States Commission on Civil Rights, at viii (Aug. 1976) [hereinafter Fulfilling the Letter] (all United States citizens should have equal chance); see, e.g., Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (opportunity to attain education fosters success); Taylor, Brown, Equal Protection and the Isolation of the Poor, 95 Yale L.J. 1700, 1703 (1986) (United States citizens should have chance to develop their skills and be rewarded for their development).

citizens, education—"the very foundation of good citizenship"—should be equally available to all, and should be integrated. Since public schools play a critical role in educating contemporary society, the affirmative desegregation of these schools will allow America's children to achieve a desirable sense of community, in keeping with the fulfillment of equal opportunity. In a
dence on integration of communities. See also WEBSTER'S DICTIONARY 953 (2d ed. 1970).
Integrate means "to make whole or complete by adding or bringing together parts... to put or bring (parts) together into a whole." Id.


* See, e.g., Brown, 347 U.S. at 493 (education important to our democratic society); Piper v. Big Pine School Dist., 193 Cal. 664, 673, 226 P. 926, 930 (1924) ("[T]he common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities."); J. HOGAN, THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST 2 (2d ed. 1985) (public schools are principal dispensers of knowledge and learning); E. REUTTER, JR., THE LAW OF PUBLIC EDUCATION 1 (3d ed. 1985), "The public education system in the United States is an instrumentality for carrying out a function that society has determined to be a desirable one—the education of all the children of all the people." Id.

* See, e.g., Estes v. NAACP, 444 U.S. 437, 451 (1980) (Powell, J., dissenting) (ethnically diverse public schools help children assimilate into our pluralistic society); Wright, 407 U.S. at 460 (district court may enjoin desegregation proposal that impedes dismantling dual segregated system); Green, 391 U.S. at 438 (calling for prompt and effective disestablishment of dual school system); Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968) (desegregation plan must be shown to be affirmatively converting system into unitary non-discriminatory system); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 513 (C.D. Cal.
Desegregation Decrees

decision that will affect countless desegregation cases pending across the country, the Supreme Court, in *Board of Education v. Dowell*, held that a federal court’s supervision of a school board which was ordered to desegregate ends when the court decides the board has complied with the desegregation decree. Thereafter, control of the composition of the school and its facilities can be relinquished to local school authorities, subject as always, to the mandate of equal protection.

*Dowell*, and its complex procedural history, has spanned a period of thirty years. In 1961, seven years after *Brown v. Board of Education of 1970* (integration provides positive educational benefits to prepare children to live in multi-racial society). But see A. Bickel, *The Supreme Court and the Idea of Progress* (1978) ("[N]o policy that a court can order, and a school board, a city or even the state has the capacity to put into effect, will in fact result in the foreseeable future in racially balanced public schools.").


11 Dowell, 111 S. Ct. at 638; see *Barnette*, 319 U.S. at 637 (fourteenth amendment protects citizens against state and its subdivisions, including boards of education).

12 See Dowell, 111 S. Ct. at 633.
Education declared "separate educational facilities inherently unequal," respondent Robert Dowell, along with other black students, brought an action to end de jure segregation in the Oklahoma City public school system. In 1963, the United States District Court for the Western District of Oklahoma ruled that the Oklahoma City Board of Education's (the "Board") mere statement of policy to desegregate was not enough to eliminate vestiges of segregation or violations of constitutional rights and ordered the Board to take "clear affirmative aggressive action to bring about desegregation." Finally, in 1972, after the Board failed to devise a suitable desegregation plan, the district court ordered Oklahoma public schools to adopt the "Finger Plan" proposal submitted by the respondents.

The Board functioned under the Finger Plan for five years, and in 1977, the district court granted a motion to close the case. However, in 1984, the Board adopted the Student Reassignment Plan which, in effect, resegregated some schools. A year later, a
class action suit was filed on behalf of black school children which included a motion to reopen the Dowell case. The district court refused to reopen the case, claiming the faculty and student body were integrated.

The court of appeals reversed, holding that when the district court found the school system to be unitary, it merely ended active court supervision, although the Board would still have to adhere to the constitutional mandate of desegregation. On remand, the district court found the new plan constitutional because the requisite discriminatory intent to segregate on the part of the Board was not present. Nevertheless, the court of appeals reversed once more, holding that the district court had again found that the school district was integrated. This finding released the Board from court supervision despite any evidence that the circumstances underlying the issuance of the decree had substantially changed. Finally, the Supreme Court granted certiorari to resolve a conflict which had arisen among the circuits in determin-

eliminated compulsory busing for students in kindergarten through fourth grades. Id. All fifth year centers, junior high schools, and high schools continued mandatory busing. Id. at 1552-53. Also, an equity officer was appointed to observe all of the schools to keep them integrated. Id. at 1552.

See id. at 1549. The petitioners claimed that the Oklahoma school system had not attained "unitary" status and had consequently resegregated. Id. at 1549.

See id. at 1556-57 (school board's Student Reassignment Plan [SRP] was constitutional because it was not intentionally discriminatory).

See Dowell v. Board of Educ., 111 S. Ct. 630, 636 (1991). "Courts have used the terms 'dual' to denote a school system which has engaged in intentional segregation of students by race, and 'unitary' to describe a school system which has been brought into compliance with the command of the Constitution." Id.


See Dowell v. Board of Educ., 677 F. Supp. 1503, 1515-16 (W.D. Okla. 1987), rev'd, 890 F.2d 1483 (10th Cir. 1989), rev'd, 111 S. Ct. 630 (1991). The school system reflected the demographics of the segregated residential areas. Id. at 1512-13. As a result, the district court concluded that supervision of the school system could be relinquished to local authorities. Id. at 1526.

ing school district compliance with desegregation decrees.\textsuperscript{28} The Supreme Court remanded the \textit{Dowell} case to the district court for a factual determination of whether the school district complied with the desegregation decree.\textsuperscript{29} In offering direction to the district court, the Court held that court supervision ends when "the board comply[s] in good faith with the desegregation decree . . . and the vestiges of past discrimination ha[ve] been eliminated to the extent practicable."\textsuperscript{30} The Court further provided that when considering vestiges of past segregation, the district court should consider "not only . . . student assignments, but . . . 'every facet of school-operations, faculty, staff, transportation, extra-curricular activities and facilities.'"\textsuperscript{31} The Court thus concluded that when a school district is released from a desegregation decree, court authorization of new school policies and procedures is no longer needed.\textsuperscript{32} However, the Court warned that school districts remain subject to the mandate of the equal protection clause of the fourteenth amendment.\textsuperscript{33} Justice Marshall, writing for the dissent, was concerned with the lack of guidance in the majority's opinion.\textsuperscript{34} "[T]he inquiry it commends to the District Court fails to recognize explicitly the threatened reemergence of one-race schools as a relevant 'vestige' of \textit{de jure} segregation."\textsuperscript{35} Justice Marshall believed that as long as the conditions of segregation declared unconstitutional in \textit{Brown} persist, compliance with a desegregation order is not complete, and consequently, the need for court supervision is not dispelled.\textsuperscript{36} The dissent also criticized the majority's vague standard

\textsuperscript{29} See \textit{Dowell}, 111 S. Ct. at 638 (Court remanded after holding that substantial compliance with district-court's decree was necessary before decree could be terminated).
\textsuperscript{30} Id.
\textsuperscript{31} Id. (quoting \textit{Green} v. County School Bd., 391 U.S. 430, 435 (1968)).
\textsuperscript{32} Id. at 638.
\textsuperscript{33} See id.
\textsuperscript{34} See \textit{Dowell}, 111 S. Ct. at 644 (Marshall, J., dissenting). Justice Marshall, joined in dissent by Justices Blackmun and Stevens, expressed his dissatisfaction with the vagueness and relative mildness of the majority's standard, as compared to the \textit{Brown I} standard, which required the school district to eliminate the effects of past discrimination. \textit{Id.}
\textsuperscript{35} \textit{Id.} at 639 (Marshall, J., dissenting).
\textsuperscript{36} \textit{See id.} (Marshall, J., dissenting). Justice Marshall restated the court of appeal's finding that feasible steps could be taken by the school board to eliminate one race schools. \textit{Id.} He concluded that the purposes of the desegregation decree had not been achieved. \textit{Id.}

316
Desegregation Decrees

for determining achievement of compliance with a desegregation decree. The dissent believed that the majority's emphasis on operation in compliance with the fourteenth amendment would not satisfactorily guarantee the elimination of vestiges of segregation. Justice Marshall stressed that the ultimate goal of a school board is to "eliminate any condition that perpetuates the message of racial inferiority inherent in the policy of state-sponsored segregation."

This Comment will suggest that Dowell's standard for compliance with a desegregation order is vague and unworkable. It will then discuss the conflict between the Fourth, Ninth and Tenth Circuits which Dowell was explicitly intended to resolve and will examine how the decision has increased the confusion surrounding compliance with desegregation decrees. Finally, this Comment will suggest that the adoption of the standard enunciated by the First Circuit would more properly address the issues facing school districts in decades to come.

I. The Fourth and Ninth Circuits' Approach to Compliance

In Riddick v. School Board of Norfolk, a case decided by the United States Court of Appeals for the Fourth Circuit, the plaintiffs challenged a post-unitary school board plan calling for the end of mandatory busing. The court held that in order for a

37 See id. at 644. (Marshall, J., dissenting). Although the Court asserted that the vestiges of past discrimination should be eliminated, the dissent pointed out that the continued majority of one race schools in the school district comprised such a vestige. Id.

38 See id. (Marshall, J., dissenting). By placing emphasis on the equal protection clause rather than on the effects of past discrimination, the dissent feared that the Court ignored the stigmatic harm done to minority children through a message of racial inferiority. Id.


40 784 F.2d 521 (4th Cir.), cert. denied, 479 U.S. 938 (1986).

41 Id. at 524. The plan was proposed in response to significant "white flight" and decreased parental involvement in education attributed to mandatory busing. See id. at 526 (experts concluded that busing led to both desegregated schools and declining white enrollment which would resegregate schools, if not discontinued); see also Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 469 (1979) (Burger, J., concurring) (highly doubtful that busing accomplishes desired goals); Keyes v. School Dist. No. 1, 413 U.S. 189, 222 (1973) (busing easier to implement in rural areas than in cities because of dense shifting populations, numerous schools, and traffic problems associated with metropolitan areas) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 (1971)); Lee v. Macon City Bd. of Educ., 616 F.2d 805, 810 (5th Cir. 1980). Several experienced educators stated that busing would burden pupils, their parents, and the school system with serious time and transporta-
school system to become unitary, ""[a]ll aspects of public education must be freed from the vestiges of state sanctioned racial segregation . . . ."" It also stated that the jurisdiction of the district court terminates once unitariness is achieved. 

Black educators emphasized that any gains made by desegregation of the early grades would be outweighed by the disadvantages of cross-town busing. Id. The stability gained from attending a school near home and family for several years, especially in the presence of siblings and friends, was stated to be more important than desegregation. Id.; see also Flax v. Potts, 864 F.2d 1157, 1161 (5th Cir. 1989) (end of busing would decrease "white flight" and stabilize residential integration).

"White flight" is a term used to describe the phenomenon of whites retreating from schools or communities in order to resist desegregation. See Gewirtz, Remedies and Resistance, 92 YALE L.J. 585, 629 (1983). Instead of challenging integration directly, these white parents react by transferring their children to private schools or by moving to other communities. Id. Most studies of "white flight" indicate that mandatory desegregation causes many white students to leave their schools. See Note, Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation, 100 HARV. L. REV. 653, 663 n.66 (1987). But see Devins, supra note 2, at 13 (recommending standard which recognizes busing as preferred remedy but allows school board to show that busing is ineffective).

43 Riddick, 784 F.2d at 533 (emphasis added). Specifically, a school system's faculty, staff, transportation practices, facilities, extracurricular activities and student assignments must all be integrated before the school system as a whole would be deemed "unitary." See id.; see also Green v. County School Bd., 391 U.S. 430, 435 (1968) (setting forth standard for assessing school district's unitariness).

44 Riddick v. School Bd. of Norfolk, 784 F.2d 521, 535 (4th Cir.), cert. denied, 479 U.S. 938 (1986). In contrast to the Tenth Circuit's indefinite, and seemingly perpetual involvement in Dowell, the Fourth Circuit requires a court's jurisdiction to end at a fixed point in time. Id. (once unitary system is achieved, district court's role ends); see also Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 440-41 (1976) (issue before Court was when court desegregation decree should cease). Under the Fourth Circuit's approach, the plaintiffs bear the burden of proving that the school board has intentionally discriminated in adopting the new plan. Riddick, 784 F.2d at 537. "We agree . . . that Swann and the cases that follow, both in the Supreme Court and in the courts of appeals, require a plaintiff to prove discriminatory intent on the part of the school board of a unitary school system." Id.

The court emphasized that its holding only applies to systems which have successfully uprooted all vestiges of de jure, as opposed to de facto, segregation and have thus been declared "unitary." See, e.g., Gilmore v. City of Montgomery, 417 U.S. 556, 565 (1974) (private infringement of individual rights does not implicate fourteenth amendment equal protection clause); Cooper v. Aaron, 358 U.S. 1, 16-17 (1958) (Constitution protects individuals from state action only); Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ., 745 F.2d 324, 333 (4th Cir. 1984) (refusing to remedy desegregation problems caused by demographic and individual prejudices); Rosson, Busing in Unitary School Districts: A Board's Right to Modify the Plan, 35 W. EDUC. L. REP. 607 (1987) [hereinafter Rosson, Busing in Unitary School Districts]. Only de jure segregation is prohibited by the fourteenth amendment. Id. This type of segregation is always caused by governmental action, but not all governmental action that separates people by race is de jure segregation. Id. Sometimes governmental plans do not intentionally discriminate based on race, but nevertheless have a segregatory effect. Id. This is known as de facto segregation. Id. De facto segregation may also result from private acts of citizens such as their choice of residence. Id. Unlike de jure segregation, de facto segregation is not illegal and does not create a duty to desegregate. Id. Riddick, 784 F.2d at 543 ("Our holding is a limited one, applicable only to those school
Desegregation Decrees

In *Spangler v. Pasadena City Board of Education*, the United States Court of Appeals for the Ninth Circuit proposed a standard distinct from those adopted by the Fourth and Tenth Circuits. *Spangler* involved an appeal by the Board of Education of Pasadena City from the denial of its motion to end ten years of court supervision over its school system. The Ninth Circuit agreed with the Fourth Circuit's position that a court's jurisdiction must end once the school system is declared "unitary." However, *Spangler* did little to clarify the law as to when a court's jurisdiction will come to an end and merely adopted the vague three-part test previously espoused by the Supreme Court in *Milliken v. Bradley*.

systems which have succeeded in eradicating all vestiges of de jure segregation."). If the plaintiffs failed to establish discriminatory intent, their action would fail and the school board would continue to operate the educational system without the intervention of the federal courts. See *id.*. But see Board of Educ. v. Dowell, 111 S. Ct. 630, 646 (1991) (Marshall, J., dissenting) (result in desegregation cases should be same even if segregation is caused by decisions of private individuals); Milliken v. Bradley, 418 U.S. 717, 761 (1974) (Douglas, J., dissenting) (no constitutional difference between de jure and de facto segregation).

*Riddick* has been criticized for placing the burden of proof on the plaintiffs after a finding of unitariness as too heavy a burden because it is extremely difficult for the plaintiff to prove intent. See *Keyes v. School Dist. No. 1, 413 U.S. 189, 233 (1973) (Powell, J., concurring in part and dissenting in part). Decisions resting on the Court's impression of the subjective intent of the school board will be "fortuitous, unpredictable and even capricious." *Id.*. Such a standard will provide inadequate protection from discrimination to minority students. *Id.* at 227; see also *Terez,* supra note 9, at 70 (advocating shifting of burden to school board to show that its proposals conform to unitary schools concept). Note, supra note 41, at 654 (under some circumstances, once control given back to school authorities, burden of proof should be on school board); Note, *The Unitary Finding and the Threat of School Resegregation: Riddick v. School Board,* 65 N.C.L. REV. 617, 638 (1987) (questioning whether plaintiffs can meet burden of proving discriminatory intent in school system that is already unitary); Note, *Attacking School Segregation Root and Branch,* 99 YALE L.J. 2003, 2020-21 (1990) (discussing difficulty of proving discriminatory intent since school boards are likely to conceal it; suggesting use of circumstantial evidence of community sentiment and acts by municipal officials as proof of school board's intent); *Dowell* failed to resolve the issues of which party carries the burden of proof and what the burden should be. See Coyle, *School Ruling Leaves Burden on Lower Courts,* Nat'l L.J., Jan. 28, 1991, at 5.

44 611 F.2d 1239 (9th Cir. 1979).
45 See supra notes 24, 40-43 (discussing Tenth and Fourth Circuit approaches).
46 *Spangler,* 611 F.2d at 1240.
47 *Id.* at 1241-42.
48 *Id.* at 1241. The court enumerated three factors to be considered in determining whether a school system may be deemed unitary:

[1] "the nature and scope of the constitutional violation; [2] the remedial objective: to restore, as nearly as possible, the victims of discrimination to the position they would have occupied in the absence of illegal conduct; and [3] interests of state and local authorities in managing their own affairs, consistent with the Constitution."
II. THE SUPREME COURT'S ATTEMPT AT COMPLIANCE

A. Five Interpretive Problems

Recognizing the need to resolve this conflict between the circuits, the United States Supreme Court granted certiorari to the Tenth Circuit in *Board of Education v. Dowell.* A review of the decision, however, illustrates that it may actually raise more questions than answers.

First, the Court incorrectly states that under the Tenth Circuit standard of unitariness set forth in *Dowell,* a "school district" could be called unitary and nevertheless still contain vestiges of past discrimination. What the Tenth Circuit actually meant was that a "particular educational area," for example student assignments, could be declared unitary, although the school district as a whole contained vestiges of past discrimination. In support of the proposition, the Tenth Circuit cited *Morgan v. Nucci.* In *Nucci,* the First Circuit was extremely careful in pointing out that the school district as a whole would not be declared unitary merely because a particular educational area such as student assignments was unitary. Thus, the Supreme Court's analysis of the Tenth Circuit's standard was based on an incorrect interpretation of what that standard required. This misinterpretation is particularly disturbing when one considers that, if anything, the Tenth Circuit was more determined to actively enforce desegregation than the other circuits.

Second, although the Supreme Court points out the differences in the definitions of the terms "unitariness" and "dual system" and acknowledges that this has fostered inconsistency in the use of these terms by the lower courts, it does not attempt to resolve this disparity nor does it set forth a clear definition to be used in fu-

---

*Id.*

*See infra notes 51-77 and accompanying text.

*Dowell,* 111 S. Ct. at 635 (emphasis added).


*Nucci,* 831 F.2d at 318-19.

*Dowell,* 890 F.2d at 1493 (school board must show that plan does not re-establish dual system).
Desegregation Decrees

ture cases. Instead, the Court simply observed that it was “not sure how useful it is to define these terms more precisely, or to create subclasses within them.” In so doing, the Court may have impliedly done away with the use of the terms “unitary” and “dual.” If this is what the Court intended, it should have done so clearly and expressly since interpretation of these terms has been the primary source of inconsistency and confusion in this area, indeed, the question of what constitutes unitariness has been called the “central riddle” in desegregation cases. Indirectly disposing of the term “unitary” is especially inappropriate considering that the Court has consistently used the term throughout the relevant cases, and the term’s elimination might invalidate most, if not all, of the case law in this area. Thus, instead of resolving the inconsistencies in this area, the Court may have added a new level of complexity to desegregation law.

57 Id. at 636 (questioning usefulness of defining “unitary” and “dual system” more precisely).
58 Id.
59 See id. at 635-36. Many lower courts have used “unitary” in different and inconsistent ways. Id.; see, e.g., Terez, supra note 9, at 57 (vague definition of “unitariness” results in confusion and inconsistent decisions); Note, Unitary School Systems and Underlying Vestiges of State-Imposed Segregation, 87 Colum. L. Rev. 794, 795 (1987) (meaning of “unitary” unclear, and “premature finding of unitariness could lead to inadequate remedy”) (citations omitted); Sherman, Classroom Bias Cases Continue, Nat’l L.J., (Jan. 11, 1988, at 24) (Supreme Court has declined to address issue of “unitariness” in spite of split between circuits). But see Northcross v. Board of Educ., 397 U.S. 232, 236-37 (1970) (Burger, J., concurring) (“argument that the definition of unitary is unclear is unsupported”).
62 See Coalition to Save Our Children v. Delaware Bd. of Educ., 757 F. Supp. 328, 349 (D. Del. 1991). In Coalition to Save Our Children, the district court concluded that there is no longer a need to use the term “unitary.” Id. (court dispensed with word “unitary” because Supreme Court in Dowell found lower courts’ use of “unitary” inconsistent and confusing). It remains unclear whether the Supreme Court has in fact dispensed with the term “unitary” entirely. It is likely that other courts may come to different conclusions as to the ramifications of the Supreme Court’s holding. Scholars have used the term “unitary” in analyzing Dowell, suggesting that the Court may not have effectively done away with the
Third, the Supreme Court stated that it was an error for the court of appeals to apply the standard in United States v. Swift, which dealt with injunctions in perpetuity, to a desegregation injunction, which is only a temporary measure to remedy past discrimination. In describing the temporary nature of a desegregation decree, the Court stated that it would be dissolved “after the local authorities have operated in compliance with it for a reasonable period of time.” Although the Court identifies what happens once a board is released from judicial control, it never clearly identifies what must occur for a board to be eligible for release. Thus, the Supreme Court failed to answer the central issue in this area which has divided the courts: “When does a district court’s jurisdiction over a school system end?”

The fourth problem with the Dowell opinion is that it remands the case to the district court to decide “whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.” This instruction, perhaps the most significant part of the case, merely pieces together broad language used time and again by many of the federal courts.


Desegregation Decrees

The Court uses the phrases "good faith,"70 "vestiges of past discrimination,"71 and "extent practicable"72 without defining what (finding that authorities implemented plan in good faith); Estes v. NAACP, 444 U.S. 437, 440 (1980) (noting school board’s good faith efforts to create unitary school system); Dowell v. Board of Educ., 890 F.2d 1483, 1499 (10th Cir. 1989) (one factor court looks at to determine if student assignments area is unitary is good faith of school board in desegregation effort and operation of schools); rev’d, 111 S. Ct. 630 (1991); Monteilh v. Saint Landry Parish School Bd., 848 F.2d 625, 628 (5th Cir. 1988) (school board acted in good faith by treating all children in school system equally).

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O’Connor, J., concurring) ("racial distinctions are . . . highly relevant to . . . state objective of eliminating pernicious vestiges of past discrimination"); Pitts v. Freeman, 887 F.2d 1438, 1446 (11th Cir. 1989) (educational areas can be analyzed to determine whether all vestiges of past discrimination have been eliminated from school system), cert. granted, 111 S. Ct. 949 (1991); Monteilh, 848 F.2d at 629 (unitary means eliminating all vestiges of past discrimination); United States v. Lulac, 793 F.2d 636, 642 (5th Cir. 1986) (state has duty to eliminate vestiges of past discrimination). See also Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 240 (1973) ("[B]oundaries of neighborhood attendance zones should be drawn to integrate to the extent practicable, the school’s student body."); Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983) (same); United States v. Texas Educ. Agency, 679 F.2d 1104, 1114 (5th Cir. 1982) (same); Brunson v. Board of Trustees of School Dist. No. 1, 429 F.2d 820, 823 (4th Cir. 1970) (same); Davis v. East Baton Rouge Parish School Bd., 514 F. Supp. 869, 875 (D. La. 1981) (same), aff’d, 721 F.2d 1425 (5th Cir. 1983).

70 Dowell, 111 S. Ct. at 658. The term “good faith,” as used by the courts, means good faith compliance with a desegregation decree. Id. Yet the phrase could also impose a requirement that a court look to whether the school board acted with discriminatory intent. See Morgan v. Nucci, 831 F.2d 313, 321 (1st Cir. 1987). If the school board is found to be acting in good faith, it is unlikely that it is intentionally discriminating. Id. at 321. But see Dowell, 890 F.2d at 1503 (fact that school board members acted in good faith does not mean absence of discriminatory intent), rev’d, 111 S. Ct. 630 (1991). The Tenth Circuit in Dowell considered intent to be irrelevant and focused instead on apparent changes in conditions which have taken place since the decree was entered. See id. at 1491.

71 Dowell, 111 S. Ct. at 658. Phrases to the same effect as “vestiges of past discrimination” were used by the Fourth Circuit in Riddick. See Riddick, 784 F.2d at 534. Although it may be that the Supreme Court was adopting the Riddick approach when it used this language, the Court’s opinion does not mention Riddick, nor does it expressly approve of the Riddick standard. Thus, it is difficult to determine whether Riddick is still good law after Dowell.


72 Dowell, 111 S. Ct. at 658. This language was used by the First Circuit in Morgan v. Nucci and it may be that the Supreme Court was attempting to adopt the Nucci approach. See Morgan v. Nucci, 831 F.2d 313, 324, 329 (1st Cir. 1987). Yet this is by no means clear from the Court’s directive, and Nucci is not cited for this proposition. Dowell, 111 S. Ct. at
they mean. Thus, the opinion did not resolve the conflicting interpretations which have arisen due to the ambiguity of these terms.

Fifth, by analogy to the Supreme Court’s earlier decision in Spangler, the Dowell Court stated that, in order to terminate or dissolve a desegregation decree, the respondents and the school board are entitled to a precise statement from the court. In Spangler, the Court required a district court issuing a desegregation decree to provide the school board with a precise statement of its obligations under the decree. In Dowell, the Court discussed what statement is to be given when a desegregation decree is terminated or dissolved. Although the Court agreed that respondents and the school board were entitled to a precise statement, it failed to indicate or define what statement the district court could have provided to satisfy this requirement. Such lack of guidance and vague terminology by the Court may have jeopardized whatever right or notice this “precise statement” was meant to provide.

B. A Better Approach

It is recognized that setting forth specific guidelines in the desegregation area is difficult because desegregation law is highly controversial, politicized and fact-sensitive. The primary diffi-

638. The Court also fails to identify what steps a school board must take and what results must be accomplished to reach “the extent practicable,” nor does it indicate how much money, time, and effort must be expended before a district court may properly conclude that a school system is desegregated to “the extent practicable.” Id.; see also End to School Busing Eased, supra, at 35 (Dowell failed to define “practicable”).

73 Dowell, 111 S. Ct. at 636.

74 See id. (citing Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976)).

75 See id.

76 Id.

77 Id. The Court gave respondents the right to a precise statement that a decree is being terminated, yet it did not indicate whether this means simple notice, or if a statement of the reasons for the termination was required. Id.

78 See Liebman, Desegregating Politics: “All-Out” School Desegregation Explained, 90 COLUM. L. REV. 1463, 1472 n.56 (1990). Liebman states that:

The problem . . . is that we are no longer certain what kind of question public school desegregation really is. Twenty years ago we were convinced it was a matter of showing southern school segregation to be morally wrong. But with busing, good moral arguments exist on both sides. To the extent that desegregation has become less a moral question, or at least more a moral standoff is it also less clearly a constitutional requirement the Supreme Court is entitled to impose?

Id.
Desegregation Decrees

culty in formulating a standard is that the competing interests of local authorities and minorities must be balanced in each case.  

There may be no perfect solutions in the desegregation area in light of the demographic, geographic, and sociological complexities of modern urban communities. See Estes v. NAACP, 444 U.S. 437, 448 (1979). Desegregation cases turn on close factual distinctions. See Note, The Unitariness Finding, supra note 10, at 575. Thus, it is difficult to formulate standards governing the appropriate time for courts to end their involvement in the desegregation process. Id. at 576.

See Spallone v. United States, 493 U.S. 265, 272 (1990) (citing Milliken v. Bradley, 433 U.S. 267, 280-81 (1977)). In devising a solution to the problem of school segregation, federal courts must consider "the interests of state and local authorities in managing their own affairs consistent with the Constitution." Id.; see also Delaware State Bd. of Educ. v. Evans, 446 U.S. 923, 926 (1980) (Rehnquist, J., dissenting). In his dissent, Justice Rehnquist stressed the importance of local control:

The [Milliken] Court emphasized that "local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation and a healthy competition for educational excellence." The Court not only emphasized these important benefits of local control, but also recognized the inability of courts and judges to assume that role, noting that "[t]his is a task which few, if any, judges are qualified to perform.


A number of federal courts have expressed the view that the judiciary should not intervene in the local or legislative arenas. See, e.g., Ayers v. Allain, 914 F.2d 676, 695 (5th Cir. 1990) (Higginbotham, J., concurring in part and dissenting in part) (judiciary not competent, nor appropriate institution to set educational policy); Lee v. Anniston City School Sys., 737 F.2d 952, 955 (11th Cir. 1984) (quoting Milliken, 433 U.S. at 281) (although federal courts have authority to ensure that unitariness is achieved, school authorities have the primary responsibility for elucidating, assessing and solving these problems); Lee v. Washington County Bd. of Educ., 625 F.2d 1235, 1237 (5th Cir. 1980) (elected or appointed authorities, not federal courts, should manage internal affairs of local school system); see also Rabkin, Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government, 40 Stan. L. Rev. 203, 248 n.197 (control over educational policy historically and constitutionally belongs to state and local school authorities).

School boards mirror the will of the local community and are better able than courts to make policy decisions regarding education. See Strossen, 'Secular Humanism' and 'Scientific Creationism': Proposed Standards for Revising Curricular Decisions Affecting Students' Religious Freedom, 47 Ohio St. L.J. 333, 354 (1986). Professional educators and elected officials have more resources and expertise than the courts. Id. As a result, courts may lack the means to articulate appropriate standards for resolving educational issues. Id. Finally, educational institutions should be given wide discretion in managing educational affairs. Id. "Judicial deference to educational decisions by state and local officials reflects several important traditions and concerns, including; preserving local democratic control over educational policy; protecting teachers' academic freedom; and maintaining policies that comport with the views of educational experts." Id.; see also Flax v. Potts, 864 F.2d 1157, 1161 (5th Cir. 1989). Neighborhood schools make important contributions to the quality of education. Id. For example, where less time is spent on local transportation, more time can be spent on extracurricular activities and parental involvement programs. Id. In addition, money saved from eliminating compulsory busing could be spent on primarily minority schools. Id.

325
It is not enough for the standard adopted to be theoretically sound; it must also take into account the practical realities of everyday life and provide an adequate plan of implementation.81 Although a number of courts have grappled with this issue, the United States Court of Appeals for the First Circuit, in Morgan v. Nucci and Morgan v. Burke, articulated a standard that is both equitable and functional.82 In Nucci, the court held that the Constitution requires “maximum practicable desegregation”83 in all edu-

The Supreme Court’s desegregation policy places the judiciary in conflict with the other branches of government. See Devins, supra, note 2, at 42-43. The Court’s extension of desegregation law has been called “the worst sort of judicial overreaching.” Id. Some commentators have speculated that this overreaching may provoke Congress into challenging the existence of courts as institutions. Id. The limitations that desegregation law has placed on the public school system “are both constitutionally unnecessary and educationally unsound.” Id. As one commentator points out, judicial intervention in the public school system has been a recurring source of discontent and resentment. See Lively, The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society, 48 OHIO ST. L.J. 117, 132 (1987). Many believe that by usurping legislative authority and interfering with parental discretion, the Court’s “active judicial role in promoting equal protection objectives actually sacrifices them.” Id.

80 See Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 486 (1979) (Powell, J., dissenting). “If public education is not to suffer further, we must return to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert.” Id.; see also R. Salamone, Equal Protection Under Law 49 (1986) (desegregation orders must balance societal, individual and community interests).

81 See Estes v. NAACP, 444 U.S. 437, 448 (1980) (Powell, J., dissenting). Justice Powell emphasized that court orders designed to remedy constitutional violations must take into account the particular circumstances present in each case and the alternative remedies available. Id. (Powell, J., dissenting). Although it has only given general guidelines in this area, the Supreme Court has emphasized the importance of “effectiveness and practicalities.” Id. (Powell, J., dissenting). Thus, according to Justice Powell, the Court recognizes that “perfect solutions may be unattainable in the context of the demographic, geographic and sociological complexities of modern urban communities.” Id. (Powell, J., dissenting). This imperfection is demonstrated by the tendency of parents to enroll their children in private schools, move to other communities, or refuse to move into a particular school district. Id. (Powell, J., dissenting).

82 Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987); Morgan v. Burke, 926 F.2d 86 (1st Cir. 1991).

83 Nucci, 831 F.2d at 324. “[M]aximum practicable desegregation” is the ultimate remedial goal in these cases. Id. at 322. “Both the Supreme Court and this court have repeatedly stated that a judicially imposed desegregation remedy goes too far if it attempts to engineer some sort of idealized racial balance in the schools.” Id. at 325; see, e.g., Brown v. Board of Educ., 892 F.2d 851, 910 (10th Cir. 1989) (realistic approach should be taken so that courts do not intervene in local affairs any longer than necessary); Lee v. Macon City Bd. of Educ., 681 F. Supp. 730, 738 (N.D. Ala. 1988) (agreeing with Morgan’s incremental approach to unitariness); Ross v. Houston Indep. School Dist., 699 F.2d 218, 227 (5th Cir. 1983) (whether public officials have eliminated segregation and its vestiges depends upon conditions in district, achievements to date and feasibility of further measures). But see Pitts
Desegregation Decrees

cational areas and that a court's jurisdiction ends when a school system is found to be unitary. In so doing, the court formulated a practical standard, followed later in Morgan v. Burke, that minimizes court intervention in school affairs, yet protects the rights of minority students guaranteed under the equal protection clause.

The Nucci-Burke standard takes an "incremental" approach to unitariness which further emphasizes the importance of returning control of educational policy to the local authorities.

v. Freeman, 887 F.2d 1438, 1446-47 (11th Cir. 1989) (rejecting Morgan's holding permitting school systems to attain unitary status incrementally and stating that unitary status not achieved until school system maintains at least three years of racial equality in six Green areas), cert. granted, 111 S. Ct. 949 (1991); Terez, supra note 9, at 60-61 (calling for elimination of all racially identifiable schools and permanent injunction requiring defendants to establish and maintain unitary schools). See generally Gewirtz, supra note 9, at 778-79 (courts should consider plans which allow city students to transfer to suburban schools and vice versa).

See Green v. County School Bd., 391 U.S. 430, 435 (1968) (discussing the relevant six educational areas). See also Dowell v. Board of Ed., 111 S. Ct. 630, 658 (1991) (quoting Green factors); supra note 31 and accompanying text (Dowell v. Board of Ed., 111 S. Ct. 630, 638 (1991) (quoting Green factors)). The unitariness of each separate factor must be considered individually. See Nucci, 831 F.2d at 319. In Nucci, the court stated that in order to determine whether student assignments have achieved this status, the court must apply the standard of "maximum practicable desegregation." Id. In addition, a court must look to: (1) the number of one-race or racially identifiable schools; and (2) whether the school board has shown good faith in implementing the desegregation plan and in operating the schools. Id.

See Nucci, 831 F.2d at 318 (consequences of unitariness is "mandatory devolution of power to local authorities").

Id. at 324-25 (realistic, not idealistic desegregation is goal); see also Burke, 926 F.2d at 92.

See id. at 318 (incremental approach espoused); see also Burke, 926 F.2d at 92.

Nucci, 831 F.2d at 324-25 (court should not intervene in school affairs any longer than necessary).

Like Nucci, Riddick recognizes the importance of the role of local authorities in the educational process. See Riddick v. School Bd. of Norfolk, 784 F.2d 521, 539 (4th Cir.) ("[n]o one seriously disputes that public education has traditionally been a local concern") (citing Milliken v. Bradley, 418 U.S. 717, 741-42 (1974)), cert. denied, 479 U.S. 938 (1986). That is why the district court's role ends once a school system is found to be unitary and control over the system must be returned to local authorities. Id. at 535. See South Park Indep. School Dist. v. United States, 453 U.S. 1501, 1504 (1980) (once school system declared unitary, district court's jurisdiction terminates); Green v. County School Bd., 391 U.S. 430, 439 (1968) (court should retain jurisdiction until state-imposed segregation completely eliminated); Flax v. Potts, 915 F.2d 155, 159 (5th Cir. 1990) (court must stop supervising school board policy once need to oversee it ends); United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987) (district court jurisdiction must end when school system found unitary); Vaughn v. Board of Educ., 758 F.2d 983, 988 (4th Cir. 1985) (district court's jurisdiction not perpetual and terminates when school system achieves unitary status) (citations omitted); Beard, supra note 27, at 1286 (once school system becomes unitary, all in-
Under this approach, once a school board achieves a unitariness in one or more areas, those areas are returned to local control without necessarily waiting to achieve unitariness in the entire school system.\textsuperscript{89}

The \textit{Nucci-Burke} standard also points out that unitariness is not achieved at the "magical moment"\textsuperscript{90} when the school board has technically complied with part of the decree, for example, by meeting the desired white-to-minority student ratio for the first time.\textsuperscript{91} The standard calls for limited judicial monitoring over a school board for a three-year period after it has technically com-

\textsuperscript{89} \textit{Nucci}, 831 F.2d at 318. As stated by the First Circuit in \textit{Morgan v. Burke}, a companion case to \textit{Nucci}, "the achievement of unitariness in [each individual] sector can be judged independently of progress or lack thereof in other sectors." \textit{Burke}, 926 F.2d at 92 (citing \textit{Morgan v. Nucci}, 831 F.2d 313, 318-19 (1st Cir. 1987)). The Supreme Court granted certiorari on February 19, 1991 to the appellant in \textit{Pitts v. Freeman}. \textit{See} \textit{Pitts v. Freeman}, 887 F.2d at 1446. By granting certiorari to the Eleventh Circuit, the Supreme Court implicitly recognized that several important issues were left unresolved by \textit{Dowell}. \textit{See} \textit{Tatel & Borkowski}, supra note 71, at 27; see \textit{also} \textit{Greenhouse, Supreme Court Roundup, Court to Review Case from Georgia on Desegregation}, N.Y. Times, Feb. 20, 1991, at A1, col. 3 (Supreme Court's decision to hear \textit{Freeman} may be result of \textit{Dowell}'s failure to provide much guidance to school districts and federal judges).

\textsuperscript{90} \textit{Burke}, 926 F.2d at 91.

\textsuperscript{91} \textit{Id.}

328
plied with the student-assignment portion of the decree. It is only when the school board has complied with the student-assignment portion of the decree for the three-year period, that unitariness is achieved. Once maximum practical desegregation is reached in a particular educational area, for example, student assignments, and thus the three-year probationary period has necessarily expired, unitariness is achieved and the district court’s jurisdiction over that particular educational area terminates. The

92 Morgan v. Burke, 926 F.2d 86, 91 (1st Cir. 1991); see also Nucci, 831 F.2d at 326. During the three year probationary period, the Board would submit annual or biannual progress reports to the district court to assure that the prior segregatory patterns had not resurfaced. See id. at 316 (stating that district court required board to submit semi-annual reports); see also United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 230 (1969) (requiring school boards to submit annual reports to court); United States v. DeSoto Parish School Bd., 574 F.2d 804, 809 n.11 (5th Cir. 1978) (same) (citing United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 395 (5th Cir. 1967) (en banc), cert. denied, 439 U.S. 982 (1978)). The DeSoto court noted that “[s]uch a requirement had long been the practice in school cases.” Id. Were it not for this discretion, “the entire exercise . . . could well prove to have been a painful charade.” Burke, 926 F.2d at 91. The First Circuit in Burke emphasized that such monitoring has been employed in both the Fifth and Eleventh Circuits. Id. (citing Quarles v. Oxford Mun. Separate School Dist., 868 F.2d 750, 752 (5th Cir. 1989); Ross v. Houston Indep. School Dist., 699 F.2d 218, 227 (5th Cir. 1983); Freeman, 887 F.2d at 1446 n.9). These circuits have had “perhaps the most comprehensive and intensive experience in desegregation litigation.” Id.; see also Nucci, 831 F.2d at 326.

This is a reasonable compromise between the Riddick view that court intervention should end immediately at the point of unitariness and the Tenth Circuit’s view that it should last indefinitely. See supra note 88. Critics may argue that a school board could wait out the three year probationary period and then segregate again. This is unlikely in light of the fact that the particular educational area would be fully integrated at the time it is declared unitary. See supra note 90 and accompanying text. Thus, minority administrators and staff members would be able to resist any attempts at resegregation either at the local level or by bringing a new lawsuit against the school board. The potential for such suits is a powerful deterrent against intentional resegregation since the lawsuits are quite lengthy and, if the school board loses, it will be forced to implement a new plan which can be extremely costly in terms of dollars, time, and effort. See Columbus Bd. of Educ. v. Penick, 439 U.S. 1348, 1352 (1978). The Supreme Court emphasized the high costs of desegregation activities which include:

- inventory, packing, and moving of furniture, textbooks, equipment, and supplies;
- completion of pupil reassignments, bus routes and schedules, and staff and administrative reassignments;
- construction of bus storage and maintenance facilities;
- hiring and training of new bus drivers;
- and notification to parents of pupil reassignments and bus information.

Most important . . . there will occur the personal dislocations that accompany the actual reassignment of 42,000 students, 37,000 of whom will be transported by bus. The Columbus school system has severe financial difficulties. It is estimated that for calendar year 1978 the system will have a cash deficit of $9.5 million, $7.3 million of which is calculated to be desegregation expenses.

Id.

93 Burke, 926 F.2d at 91.

94 Id.
district court would retain jurisdiction over other educational areas which had not yet complied with the decree for the requisite three-year probationary period. In this way, unitariness would be achieved separately in each of the six educational areas mentioned in Dowell.

Admittedly, the Nucci-Burke standard is not perfect since it does not precisely define the phrase "maximum practicable desegregation." However, it does emphasize the need for the remedy to be practical and not merely theoretical. From this it may be argued that "maximum practicable desegregation" takes into account the resources of the individual school and the "demographic, geographic and sociological complexities" of the community. This is a reasonable approach that is fair to all concerned because, while it requires the school board to desegregate to the extent practicable, it does not impose an insurmountable burden on the board which far exceeds the social ill it was designed to remedy. Objective evidence, such as financial statements, maps and census data, will assist a court in assessing the practical realities of the situation.

Finally, the Nucci-Burke standard stresses what so many courts have failed to recognize, namely, that a court’s power is limited in this area because "the scope of the remedy is determined by the nature and the extent of the constitutional violation."

---

95 Id.
97 Nucci, 831 F.2d at 324.
98 Id.
99 See supra note 81 (advocating balanced evaluation of societal and educational interests in achieving desegregation).
100 Nucci, 831 F.2d at 324-25.
101 Id. at 319. Justice Powell emphasized that the demographic and economic realities of cities must be taken into consideration in the desegregation area. Id.
102 See, e.g., Spallone v. United States, 110 S. Ct. 625, 632 (1990) (remedial powers of equity court not unlimited); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-23 (1971) (desegregation cases should not be used for purposes beyond their scope, they cannot embrace all problems of racial prejudice); Wright v. Council of Emporia, 407 U.S. 451, 477 (1972) (Burger, C.J., dissenting) (court's preference should not displace local school board plans where it would only provide small change in racial composition).
Desegregation Decrees

Courts have so consistently issued overbroad desegregation decrees, that an argument may be made that this is an area best left to local authorities who have traditionally used their training and expertise to oversee education.\(^\text{104}\) Local authorities can debate, discuss and formulate appropriate guidelines in this area of the law.\(^\text{105}\) If the authority enacts a plan that is unconstitutional or fails to affirmatively desegregate when ordered to do so, it is only then that the courts should get involved.\(^\text{106}\)

CONCLUSION

Although Dowell sets out to resolve the inconsistencies and confusion in the area of desegregation, the decision raises more questions than it answers. It fails to define what constitutes a unitary school system and to identify what are the consequences of being declared unitary. The direction given by the Court only complicates the area further by using vague terminology without explanation. It is submitted that the courts should follow the Nucci-Burke standard adopted by the First Circuit because it is fair and equitable to all concerned and it recognizes the important role that local authorities play in educating this nation's young people.

tion because they often require a change in the structure of the educational system. \(^\text{104}\) See Penick, 443 U.S. at 487-88 (Powell, J., dissenting). Justice Powell disapproved of courts' issuing overbroad decrees and engaging in "ongoing supervision over school systems." \(^\text{Id.}\) at 487. (Powell, J., dissenting). He pointed out that many legislatures may welcome judicial intervention for the very reason that this is a complex and highly controversial area. \(^\text{Id.}\) In his view, the judiciary was the "branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education." \(^\text{Id.}\) at 488 (Powell, J., dissenting); see also Dozier v. Chupka, 763 F. Supp. 1430, 1435 (S.D. Ohio 1991) ("court's role has always been that of an overseer of a temporary judicial remedy, not that of a coparticipant with city government in the establishment of executive policy and execution of legislative decision-making").

\(^\text{105}\) See supra note 79 (emphasizing important role local and legislative authorities play in educational process).

\(^\text{106}\) \(^\text{Id.}\) (same).
Since education is "the very foundation of good citizenship," application of the Nucci-Burke standard in desegregation cases may lead to the ultimate goal of a successful and equal society.

Kevin P. Fitzpatrick & Lynne E. Trimble