Recent Developments in the Termination of School Desegregation Decrees

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INTRODUCTION

The remedial duty and responsibility imposed on a once segregated school district by the United States Supreme Court's opinions in *Brown v. Board of Education*[1] and its progeny is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure segregation system. In the last two terms, the Supreme Court handed down its most significant opinions involving de jure segregation of public elementary and secondary education in over a decade.[2] In *Board of Education v. Dowell*[3] and *Freeman v. Pitts*,[4] the Court addressed issues related to what a school district must establish in order to demonstrate that it has eliminated those vestiges in whole or in part. This Article discusses what the Supreme Court has decided regarding when a local school district has discharged its affirmative obligation to eliminate the vestiges of all or part of its prior discriminatory conduct. This Article also discusses the implications of those cases for the Indianapolis Public School (IPS) desegregation case, and will highlight issues that must be addressed to determine if all or part of federal court supervision of the IPS system can be terminated.

I. *BOARD OF EDUCATION V. DOWELL*

In *Dowell*, the Supreme Court faced its first opportunity to address issues related to the termination of a school desegregation decree. The Oklahoma City school desegregation case commenced in 1961 with the

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1. 347 U.S. 483 (1954).

2. In June of 1992, the Court also rendered an opinion in the case of *United States v. Fordice*, 112 S. Ct. 2727 (1992). In this opinion, the Court enuciatated the standards to apply when addressing whether the affirmative obligation to dismantle a prior de jure segregated school system has been met in the university context. This opinion, however, is outside the scope of this Article which is confined to de jure segregation in elementary and secondary schools.

3. 111 S. Ct. 630 (1991).

4. 112 S. Ct. 1430 (1992).

filing of a complaint by African-American students and their parents against the Board of Education of Oklahoma City.[5] In the ensuing years, the parties struggled through the difficult task of formulating a desegregation plan. This process culminated in 1972, with the district court imposing a desegregation plan known as the "Finger Plan."[6] In 1977, having found that the Finger Plan achieved the court's objectives and that the school system was therefore "unitary," the district court terminated supervision of the case.[7] Although the Board's motion was contested, the district court's order was not appealed.[8] The Board,

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5. *Dowell*, 111 S. Ct. at 633. In 1963, the district court found that Oklahoma City was operating a dual school system and had segregated schools intentionally in the past. *Id.* (citing Dowell v. School Bd., 219 F. Supp. 427 (W.D. Okla. 1963)).

6. In 1972, the district court ordered the Board to adopt a desegregation plan known as the "Finger Plan." Under the Finger Plan, kindergartners would be assigned to neighborhood schools unless their parents wished otherwise. Children in grades one to four would attend formerly all white schools. Children in grade five would attend formerly all black schools. Thus, the African-American children were to be transported from grades one through four, with the white children transported only for grade five. Students in the upper grades would be bussed to various areas to maintain integrated schools. In integrated neighborhoods, there would be stand alone schools for all grades. *Id.* (citing Dowell v. Board of Educ., 338 F. Supp. 1256, *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972)).

7. *Id.* at 634. The Supreme Court noted that the meaning of the word "unitary," as used by the district court, was unclear. *Id.* at 635. The Court also noted that lower courts had been inconsistent with their use of the term "unitary." *Id.* "Some have used it to identify a school district that has completely remedied all vestiges of past discrimination," and therefore accomplished their constitutional obligation. *Id.*; *see, e.g.*, United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987); Riddick v. School Bd., 784 F.2d 521, 533-34 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); Vaughns v. Board of Educ., 758 F.2d 983, 988 (4th Cir. 1985).

> Other courts, however, have used "unitary" to describe any school district that has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan. . . . [S]uch a school district could be called unitary and nevertheless still contain vestiges of past discrimination.

Dowell, 111 S. Ct. at 635 (citing Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985)). The Court stated that it was not sure that it was useful "to define these terms more precisely, or to create subclasses within them." *Id.* at 636. The Court found that "[t]he District Court's 1977 order [was] unclear with respect to what it meant by unitary and the necessary result of that finding." *Id.* This contradicted the Court's holding in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 438-39 (1976), which required a precise statement to the school board of its obligations under a desegregation decree. *See also* Freeman v. Pitts, 112 S. Ct. 1430, 1443-44 (1992) (advising caution with regard to the use of the term "unitary").

8. After the Finger Plan was implemented, the Board of Education moved to close the case in June 1975 on the ground that it had eliminated all vestiges of state imposed racial discrimination in its school system and that it was operating a unitary

however, continued to operate under the Finger Plan until 1984.

In 1984, the Board of Education adopted a student reassignment plan (SRP) which was to begin in the 1985-86 school year. Unlike the Finger Plan, the SRP relied solely upon neighborhood school assignments for students in grades kindergarten through four. The Board argued that demographic changes made the increased distance that young African-Americans were bussed under the Finger Plan too burdensome. In addition, the Board asserted its desire to increase parental involvement in the schools. The Board felt that parental involvement was necessary for quality education and that neighborhood school assignments would increase such involvement.[9] The result of the SRP, however, was to increase significantly the racial imbalance of students in the school system's elementary schools.[10] In February, 1985, the plaintiffs sought to reopen the case.[11]

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school system. The district court held in its unpublished "Order Terminating Case":

> The Court has concluded that [the Finger Plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before this court. . . .

Dowell, 111 S. Ct. at 633-34 (quoting No. Civ-9452, App. 174-76 (W.D. Okla. Jan. 18, 1977)).

9. When the Board adopted its new plan, it was convinced that parental involvement was essential to student academic achievement and quality education. In 1969, there were 95 parent-teacher associations in the Oklahoma City School District with a total membership of 26,528. When the Board implemented the SRP, there were only 15 PTAs with a total membership of 1,377. After the SRP had been in operation for just two years, the number of PTA organizations had increased by 200% and membership had increased by 144%. Open house attendance was up 5,167, and 3,745 more parents attended parent/teacher conferences in 1986-87 than in the year preceding the implementation of the SRP. Dowell v. Board of Educ., 677 F. Supp. 1503, 1516-17 (W.D. Okla. 1987).

10. Under the SRP, at least 96.9% of the students in 11 of the 64 elementary schools were black and "44% of all Afro-American children in grades K-4 were assigned to these schools." *Dowell*, 111 S. Ct. at 641 (Marshall, J., dissenting). At least 90% of the students in 22 other schools were non-African-Americans. The remaining 31 schools were racially mixed. *Id.* The SRP did not affect faculty and staff integration. *Id.* at 634.

11. *Id.* at 641. The district court concluded that the principles of res judicata and collateral estoppel prohibited the plaintiffs from challenging the district court's 1977 findings that the school system was "unitary." Dowell v. Board of Educ., 606 F. Supp. 1548, 1555 (W.D. Okla 1985). Because unitariness had been achieved, the district court concluded that court-ordered desegregation should come to an end. The Tenth Circuit reversed. 795 F.2d 1516 (10th Cir.), *cert. den.*, 479 U.S. 938 (1986). It held that nothing in the 1977 order indicated that the 1972 injunction itself was terminated, even though the order's unitary finding was binding upon the parties. The Tenth Circuit reasoned that the finding that the system was "unitary" merely ended the district court's active supervision of the

The district court eventually found that demographic changes made the Finger Plan unworkable and that the school district had bussed students for more than a decade in good-faith compliance with the court's orders.[12] The district court also found that the Board had done nothing for twenty-five years to promote residential segregation, and that the present residential segregation in Oklahoma City was the result of private decision making and economics. It was, therefore, too attenuated to be a vestige of former school segregation.[13] The district court went on to hold that the previous injunctive decree should be vacated and the school district returned completely to local control.[14]

The Tenth Circuit reversed, writing that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate."[15] The Tenth Circuit approached the case "not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies."[16] Relying on *United States v. Swift & Co.*,[17] the Tenth Circuit held that a desegregation decree remains in effect until a school district can show "'grievous wrong evoked by new and unforseen conditions'"[18] and "'dramatic changes in conditions unforseen at the time of the decree that . . . impose extreme and unexpectedly oppressive hardships on the obligor.'"[19] The Tenth Circuit held that the Board of Education failed to meet this burden; therefore, the desegregation decree remained in effect.[20]

In the majority opinion written by Chief Justice Rehnquist, the Supreme Court held that the Tenth Circuit's reliance on *Swift* was mistaken.[21] The Court noted that the test espoused by the Tenth Circuit

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case. Because the school district was still subject to the desegregation decree, the respondents could challenge the SRP. The case was remanded to the district court to determine if the desegregation decree should be lifted or modified. 795 F.2d at 1522-23.

12. Dowell v. Board of Educ., 677 F. Supp. 1503, 1512-13 (W.D. Okla. 1987).

13. *Id.*

14. *Id.* at 1526.

15. Dowell v. Board of Educ., 890 F.2d 1483, 1490 (10th Cir. 1989) (quoting Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986)).

16. *Id.* at 1486.

17. 286 U.S. 106 (1932).

18. *Dowell*, 890 F.2d at 1490 (quoting United States v. Swift & Co., 286 U.S. 106, 109 (1932)).

19. *Id.* (quoting Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1110 (1986)).

20. *Id.* at 1505-06.

21. Board of Educ. v. Dowell, 111 S. Ct. 630, 636-37 (1991). Justice Marshall wrote a vigorous dissent in which Justices Stevens and Blackmun joined. For a discussion of Justice Marshall's dissent, see *infra* notes 93-98 and accompanying text.

would subject a school district to judicial tutelage for an indefinite future. Such an extreme result could not be justified by the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause. The Court emphasized that a school desegregation decree is warranted only as a temporary measure intended to displace local decision making authority until transition to a unitary nonracial system of public education is achieved:

> [A] finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the *school board* would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved.[22]

The Court also indicated that a desegregation decree should be dissolved after the local authorities have operated in compliance with it for a reasonable period of time.[23]

The Court remanded the case to the district court, with instructions for the district court to determine:

> whether the Board made a sufficient showing of constitutional compliance as of 1985, when the SRP was adopted, to allow the injunction to be dissolved. The District Court should address itself to 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.[24]

To provide further direction on what factors lower courts should consider in determining whether a school system has eliminated the vestiges of de jure segregation as far as practicable, the Supreme Court cited its 1968 opinion in *Green v. County School Board*:[25]

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22. *Id.* at 636-37 (emphasis added).

23. *Id.* at 637.

24. *Id.* at 638. On remand, the district court held: (1) that the school board had complied in good faith with the initial desegregation decree from the time it was entered until adoption of the neighborhood school plan; (2) that there was no indication that the school board would return to a system of de jure segregation in the future; (3) that the vestiges of past discrimination had been eliminated to the extent practicable; (4) that the Board was entitled to complete dissolution of the initial decree; and (5) that the neighborhood school system was adopted for legitimate, nondiscriminatory reasons in compliance with applicable equal protection principles. Dowell v. Board of Educ., 778 F. Supp. 1144, 1196 (W.D. Okla. 1991).

25. 391 U.S. 430 (1968).

> In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but "to every facet of school operations . . . . [E]xisting policy and practice with regard to faculty, staff, transportation, extra-curricular activities, and facilities are among the most important indicia of a segregated system."[26]

The respondents also had contended that the Tenth Circuit held that the district court's finding—that residential segregation in Oklahoma City was the result of private decisionmaking and economics and too attenuated to be a vestige of the former school segregation—was clearly erroneous. The Court concluded, however, that the Tenth Circuit's finding on this point was at least ambiguous. To dispel any doubt, the Court directed that the district court and the court of appeals treat this question as *res nova*.[27]

Finally, the Court stated that once a school system has eliminated the vestiges of de jure segregation, the school system no longer requires court authorization for the promulgation of policies and rules regulating matters such as the assignment of students.[28] Challenges to subsequent actions by school boards, including those related to student reassignments, should be evaluated by the equal protection principles articulated in *Washington v. Davis*[29] and *Arlington Heights v. Metropolitan Housing Development Corp.*[30]

II. *Freeman v. Pitts*

In *Dowell*, the district court had relinquished all remedial control over the Oklahoma City School System. By contrast, in *Freeman v. Pitts*,[31] the district court had determined that control could be relinquished only over those aspects of the system in which the vestiges of the prior discriminatory conduct had been eradicated. The district court retained supervisory authority over the aspects of the school system that were not in full compliance.[32] Dekalb County School System (DCSS) is located in a suburban area outside of Atlanta, Georgia. In 1968, African-American school children and their parents instituted this class action.

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26. Board of Educ. v. Dowell, 111 S. Ct. 630, 638 (1991) (citing *Green*). These criteria for evaluation are now known as "the *Green* factors."
27. *Id.* at 638 n.2.
28. *Id.* at 638.
29. 426 U.S. 229 (1976).
30. 429 U.S. 252 (1977).
31. 112 S. Ct. 1430 (1992).
32. *Id.* at 1435-36.

After the suit was filed, DCSS worked out a comprehensive desegregation plan with the Department of Health, Education and Welfare (HEW). The district court approved the proposed plan and entered a consent order in June, 1969. Under the plan, all of the former de jure black schools in DCSS were closed and their students were reassigned to the remaining neighborhood schools. The district court found that DCSS was desegregated for a short period of time under this court-ordered plan.

According to the Supreme Court, between 1969 and 1986, the respondents sought only infrequent and limited judicial intervention.[33] The population in Dekalb County grew significantly between 1969 and 1986. Whites migrated to the northern part of the county, while African-Americans migrated to the southern part. In 1969, African-Americans made up only 5.6% of the student body of DCSS. By the 1986-87 school year, however, their percentage had increased to 47%. A significant amount of racial imbalance in student school assignments also existed in DCSS. Half of the African-American students attended schools that were over 90% black, and 62% of them attended schools that had over 20% more black students than the system-wide average. Of the white students enrolled in DCSS, 27% attended schools that were over 90% white, and 59% of them attended schools where the percentage of white students exceeded by 20% the system-wide average of white students.

Despite this amount of racial imbalance in the schools, in 1986 the School Board filed a motion for final dismissal of the litigation. The district court examined whether DCSS had complied with the *Green* factors. Even though there was a significant racial imbalance in student assignments, the district court found that DCSS was unitary not only with regard to student assignments, but also in the areas of transportation, physical facilities, and extracurricular activities.[34] The district court concluded that the racial imbalance of the students was attributable to the rapid demographic shifts that had occurred in DeKalb County, and other factors, but not to the prior unconsituttional conduct of DCSS.[35]

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33. *Id.* at 1437.

34. *Id.* at 1442.

35. *Id.* at 1440. The district court examined the interaction between DCSS policy and the demographic changes in DeKalb County. Of the 170 changes made by DCSS, only three were found to have had a partial segregative effect, and that effect was considered minor. The district court concluded that DCSS achieved the maximum practical desegregation. It found that the existing segregation of students attributable to demographic shifts that were inevitable as the result of suburbanization, the decline in the number of children born to white families, blockbusting of formerly white neighborhoods, which led to "selling and buying of real estate in the DeKalb area on a highly dynamic basis . . . and the completion of Interstate 20, which made access from DeKalb County into the City of Atlanta much easier. *Id.*

In addition to the *Green Factors*, the district court also considered whether the quality of education being offered to the white and black student population was equal. Because of the existence of such a large amount of racial imbalance, there were many schools in the system that were predominately black or predominately white. The district court not only examined resource allocation, but also examined measures of student achievement. The district court found that vestiges of the dual system remained in the areas of teacher and principlas assignments (one of the *Green Factors*).[36] The district court also found that DCSS assigned experienced teachers and teachers with graduate degrees in a racially imbalanced manner[37] and that DCSS spends more money educating white students than it does on the education of black students.[38] The district court ordered DCSS to equalize per pupil expenditures and to assign experienced teachers and teachers with advanced degrees equally between the primarily black schools and the primarily white schools.[39] The district court, however, rejected the notion that DCSS had not done enough to improve the educational performance of black students, specifically citing to improvements by African-American students on the Iowa Tests of Basic Skills and the Scholastic Apptitude Test of DCSS' black students.[40]

The Eleventh Circuit rejected the district court's incremental approach to the elimination of vestiges of prior de jure conduct. It held that the district court had erred in considering the six *Green* factors as separate categories.[41] In order for a school system to achieve unitary status, it must satisfy all of the *Green* factors at the same time for at least three years.[42] The Eleventh Circuit also held that a system that once had been segregated by law could not justify continued racial imbalance by pointing to demographic changes, at least until the system had eradicated all vestigies of segregation.[43] Given that DCSS had not done this, the Eleventh Circuit held that it bore the responsibility for the current racial imbalance and had to correct that imbalance.[44]

In a majority opinion authored by Justice Kennedy,[45] the Supreme Court agreed with the district court's conclusion that the *Green* factors

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36. *Id.* at 1441.
37. *Id.*
38. *Id.* at 1442.
39. *Id.*
40. *Id.* at 1441-42.
41. Pitts v. Freeman, 887 F.2d 1438, 1446 (11th Cir. 1989).
42. *Id.* at 1450.
43. *Id.* at 1449.
44. *Id.* at 1448-49.
45. Freeman v. Pitts, 112 S. Ct. 1430, 1435-50 (1992). Justice Kennedy's opinion was joined by Chief Justice Rehnquist and by Justices White, Scalia, and Souter. In

could be considered separately and that partial relinquishment of supervision and control of a school system in an appropriate case does not offend the Constitution:

> We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. . . . [U]pon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree. In particular, the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations.[46]

Kennedy's opinion emphasized that the decision to withdraw partial supervision lay in the sound discretion of the district court.[47] His opinion went on to note that a number of factors are to be considered in determining whether partial withdrawal is warranted: First, whether there has been full and satisfactory compliance with the court decree in those parts of the system where supervision is being withdrawn; second, whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other areas of the school system; and finally, whether the school district has demonstrated, both to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and Constitution that were the basis for judicial intervention in the first place.[48] Kennedy went on to note that in considering these factors a court should give particular attention to the school system's record of compliance. A school system is in a better position to demonstrate "[a] good-faith commitment to a constitutional course of action

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addition to joining the opinion of the Court, Justices Scalia and Souter also wrote separate concurring opinions. For a discussion of Souter's concurrence, see *infra* notes 63-67, 104-06 and accompanying text. For a discussion of Scalia's concurrence, see *infra* note 83, 94, 99-100 and accompanying text.

46. *Freeman*, 112 S. Ct. at 1445-46. Kennedy noted that this position was the actual position the Court took in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). *Freeman*, 112 S. Ct. 1430, 1444-45 (1992).

47. *Freeman*, 112 S. Ct. at 1446.

48. *Id.*

when its policies form a consistent pattern of lawful conduct . . . ."[49]

Both parties to the litigation agreed that quality of education was a legitimate subject of inquiry for the district court. The Supreme Court, therefore, indicated that it was not necessary for it to review this aspect of the lower court's actions. However, the Court approvingly noted that the district court's consideration of quality of education illustrated the fact that the *Green* factors were not to be a rigid framework.[50]

One of the major issues in this case was whether the district court was correct in releasing its control over student assignments. Justice Kennedy specifically examined whether the district court in *Freeman* had appropriately exercised its discretion when it withdrew supervision from DCSS's student assignments. The Court wrote:

> Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.[51]

Kennedy's opinion made it clear that "[t]he school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation."[52] Kennedy went on to add, however, that if a school district's desegregation plan has eliminated all racial imbalance attributable to the district's prior unlawful segregation, then the district court is under no duty to remedy an imbalance that is caused by demographic factors.[53]

Much of the remaining discussion in the Court's opinion related to the issue of whether the existing student segregation should be said to be attributable either to private decision making or to the original constitutional violation and subsequent action by the state.[54] The Court's analysis of this issue turned on the fact that the existing student segregation was the result of residential segregation.[55] As a result, it was necessary to inquire into the basis of residential segregation. If the residential segregation can be traced to factors other than the state's

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49. *Id.*

50. *Id.* at 1446-47.

51. *Id.* at 1447. The Court went on to quote from its opinion in *Swann*. "[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." *Id.* (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971)).

52. *Id.*

53. *Id.* at 1448.

54. *Id.* at 1447-50.

55. *Id.* at 1448.

attempt to fix or alter demographic patterns, then the residential segregation is not traceable to state action.

Kennedy noted that our society is a very mobile one.[56] Given the disparate preferences between blacks and whites with respect to the racial mix of neighborhoods, it is unlikely that racially stable neighborhoods will emerge.[57] Where resegregation is the product of private choices, the Court concludes that it does not have constitutional implications.

> It is beyond the authority and beyond the practical ability of federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated.[58]

The Court's opinion also considered whether retention of judicial control over student attendance was necessary to achieve compliance with other facets of the school system that were not in compliance.[59] The Court wrote that racial balancing of student assignments may be a legitimate remedial device to correct other fundamental inequities that were themselves caused by the constitutional violation. The Court noted that there was no showing that racial balancing was an appropriate mechanism to cure those aspects of the school system that were not in compliance at the time the district court released supervision of student assignments.[60] The case was remanded so that the district court could make specific findings with respect to whether it was necessary to retain control over student assignments in order to accomplish compliance in the areas that were not then in compliance.[61]

In addition, the Court noted that the district court did not address the issue stated in *Dowell* regarding the good faith compliance by the school district with the court order over a reasonable period of time.

> A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new *de jure* violation,

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56. "In one year (from 1987 to 1988) over 40 million Americans, or 17.6% of the total population, moved households. . . . Over a third of those people moved to a different county, and over six million migrated between States." *Id.* at 1447-48 (citing U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE U.S., p. 19, Table 25 (11th ed. 1991)).

57. According to evidence heard by the district court, African-Americans prefer a 50%—50% neighborhood racial mix, whereas whites prefer a mix of 80% white and 20% black. *Id.* at 1448.

58. *Id.*

59. *Id.* at 1449.

60. *Id.*

61. *Id.*

> and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.[62]

Justice Souter added a brief concurrence.[63] The opinion of the Court indicated that judicial control of student and faculty assignments may remain necessary to remedy the persisting vestiges of a dual system. Souter wrote separately, however, to note two additional situations in which continued judicial control may be necessary. First is the situation where the demographic change toward segregated residential patterns is itself caused by past school segregation and the patterns of thinking that segregation creates.[64] "Such demographic change is not an independent, supervening cause of racial imbalance in the student body, . . . and before deciding to relinquish supervision and control over student assignments, a district court should make findings on the presence or absence of this relationship."[65]

A second, related causal relationship occurs after the district court relinquishes supervision over a remedied aspect, and future imbalance in that remedied aspect is caused by remaining vestiges of the dual system. In other words, the vestige of discrimination in one aspect becomes the incubator for resegregation in others. Justice Souter discussed the potential that segregated faculties could send whites and blacks into schools based on faculty race and, as a result, increase student segregation along those lines.[66] Even though the student assignment problem had been remedied, it is possible that segregation of students could be the result of the fact that people moved to the schools where the faculty were segregated. Consequently, before a district court ends its supervision of student assignments, it should make a finding that there is no immediate threat of unremedied *Green*-type factors causing population or student enrollment changes that, in turn, may imbalance student composition.[67]

Justice Blackmun also wrote a concurring opinion, which was joined by Justices Stevens and O'Connor.[68] Blackmun agreed with what he considered to be the holding of the Court, that in some circumstances a district court need not interfere with a particular portion of a school system while retaining jurisdiction over the entire system. He also agreed

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62. *Id.* at 1449-50.
63. *Id.* at 1454-55 (Souter, J., concurring).
64. *Id.* at 1454 (Souter, J., concurring).
65. *Id.* at 1454 (Souter, J., concurring).
66. *Id.* at 1454-55 (Souter, J., concurring).
67. *Id.* (Souter, J., concurring).
68. This case was argued before Justice Thomas took the bench; he did not participate in the decision.

that the good faith of the school board is relevant in inquiries about the elimination of the vestiges of state imposed segregation. Finally, he agreed that DCSS must balance student assignments if an imbalance is traceable to unlawful state policy and if such an order is necessary to fashion an effective remedy. He wrote separately to address what it means for the district court to retain jurisdiction over a part of the case while relinquishing supervision and control over a subpart of the school system.[69] He agreed that, although active supervision over a particular aspect of a school system could be relinquished, the court must still retain jurisdiction over the entire system as a whole. The district court, therefore, has the ability to reassert active control over those areas from which it has withdrawn.

Justice Blackmun also discussed the issue of racial imbalance being traceable to the board actions. According to Blackmun, DCSS did not escape its duty to desegregate merely by showing "that demographics exacerbated the problem."[70] Rather, DCSS must prove that its own polices—including, for example, faculty assignment, placement of new schools, and the closing of old schools—did not contribute to residential segregation. For Blackmun, district courts must examine policies and practices of the school district closely to determine if they contribute to residential segregation. Blackmun noted that the district court in *Freeman* had not properly engaged in that inquiry. According to Blackmun, the available evidence suggested that this would be a difficult burden for DCSS to meet.[71]

III. Implications of *Dowell* and *Freeman*

There are some clear implications that flow from the Supreme Court's opinions in these two cases. To begin with, because the Court emphasized that federal judicial supervision was intended to be temporary, it follows that at some point in time, school districts should be allowed to terminate court supervision. When that time is reached, the existing desegregation decree would be dissolved. Complete authority over student and faculty assignments and other aspects of the school system is returned to school authorities. A school district is free to adopt new student and faculty assignment policies, even if an increase in the amount of racial imbalance occurs. The decision to adopt and implement such policies is to be analyzed under the traditional test of discriminatory intent for equal protection violations articulated by the Court in *Washington v. Davis*[72]

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69. *Freeman*, 112 S. Ct. at 1455-60 (Blackmun, J., concurring in the judgment).
70. *Id.* at 1457 (Blackmun, J., concurring in the judgment).
71. *Id.* at 1457-58 (Blackmun, J., concurring in the judgment).
72. 426 U.S. 229 (1976).

and *Arlington Heights v. Metropolitan Housing Development Corp.*[73]

A. Good Faith Compliance

Beyond these relatively clear aspects, issues involving the termination of court supervision are somewhat opaque. The Court's opinions in *Dowell* and *Freeman* give district courts broad discretion in determining whether partial or complete withdrawal of court supervision is warranted. For purposes of determining the elimination of all or part of the vestiges of the prior de jure conduct, the Court requires lower courts to examine the *Green* factors, which represent the observable racial balance. Both *Dowell* and *Freeman*, however, suggest that racial imbalance may not be the primary consideration in determining whether all or part of court supervision should be terminated. In *Dowell*, the Court accepted the possibility that after a desegregation decree is dissolved, current residential segregation can justify subsequent resegregation of students. In *Freeman*, the Court accepted the possibility that the vestiges of prior de jure conduct with regard to student assignments can be eliminated even if a significant amount of racial imbalance with respect to students exists at the time of the decision to terminate partial supervision.

In both cases, the Court noted that one prerequisite to partial or complete termination of court supervision is good faith compliance by the school district with the court decree for a reasonable period of time.[74] The Court also noted the importance of a determination that a school system will not return to its former ways of engaging in intentionally discriminatory practices.[75] It appears that the Court is requiring that school districts demonstrate that their attitude about African-Americans is positive. A school system no doubt must do more than simply indicate its changed attitude and willingness to comply with the Constitution. Specific policies, decisions, and courses of action must be examined in order to assess the school's good faith commitment.[76]

The Supreme Court did not mention whether the good faith commitment requires a commitment to integration. The Tenth Circuit, in applying the Supreme Court's opinions in *Dowell* and *Freeman* to the original lawsuit in *Brown v. Board of Education*,[77] however, concluded:

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73. 429 U.S. 252 (1977).

74. *Freeman*, 112 S. Ct. at 1446, 1449-50; Board of Educ. v. Dowell, 111 S. Ct. 630, 637-38 (1991). In his concurring opinion in *Freeman*, Justice Blackmun also agreed that the good faith of the school board is relevant in inquiries about the elimination of vestiges of state imposed segregation. 112 S. Ct. at 1455 (Blackmun, J., concurring in the judgment).

75. *Freeman*, 112 S. Ct. at 1445; *Dowell*, 111 S. Ct. at 636-37.

76. *Freeman*, 112 S. Ct. at 1446; *Dowell*, 111 S. Ct. at 636-37.

77. Brown v. Board of Educ., 978 F.2d 585 (10th Cir. 1992).

> we are convinced that evaluation of the "good faith" prong of the *Dowell* test must include consideration of a school system's continued commitment to integration. A school system that views compliance with a school desegregation plan as a means by which to return to student assignment practices that produce numerous racially identifiable schools cannot be acting in "good faith."[78]

This interpretation of the Tenth Circuit, however, appears to be inconsistent with the Supreme Court's opinion in *Dowell.* Recall that as the Supreme Court addressed the situation in Oklahoma City, it also had in front of it the decision by the Oklahoma City School Board to adopt a neighborhood school attendance plan.[79] The effect of that plan was to substantially increase racial segregation in school assignments over those contained in the court ordered desegregation plan. The Supreme Court's instruction in *Dowell* to the lower courts on remand did not require them to assess the segregative effect of the neighborhood attendance plan in addressing the good faith requirement.[80] Rather, the Court held that any subsequent decisions by the school board after termination of the desegregation decree must be judged by the traditional intent standards normally applied in equal protection challenges. The Supreme Court's opinion in *Dowell*, therefore, appears to contradict the Tenth Circuit's interpretation that the good faith component requires a school system to be committed to integration.[81] Rather, with regard to future actions, the school board must be committed to the traditional equal protection test, which focuses upon discriminatory intent.

B. Residential Segregation as a Vestige of the Prior De Jure Conduct

Perhaps the most complex issue in determining whether court supervision should be released in whole or in part is the existence of

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78. *Id.* at 592 (citing Board of Educ. v. Dowell, 111 S. Ct. 630, 637 (1991)).

79. *See* supra notes 9-14 and accompanying text.

80. If the Supreme Court agreed with the Tenth Circuit's interpretation of the good faith requirement, such an analysis would have been required by the Supreme Court. In fact, the Court's opinion in *Dowell* was issued over the strong dissent by Justice Marshall that was joined by Justices Blackmun and Stevens. Justice Marshall was clearly concerned about the resegregative effect of adopting a neighborhood school attendance policy. *Dowell*, 111 S. Ct. at 644-48 (Marshall, J., dissenting).

81. It may be that the Tenth Circuit was concerned about the possible resegregative impact of terminating school desegregation decrees, feeling that a movement to neighborhood schools would increase segregation of public schools and thereby make a mockery out of all of the effort that went into desegregating America's public schools over the past 40 years. Nevertheless, it appears as if that is the precise result that is sanctioned by the Supreme Court's opinions in *Dowell* and *Freeman.*

current residential segregation. Prior to *Dowell*, the Supreme Court had not addressed whether residential segregation could be considered a vestige of operating a dual school system.[82] Both *Dowell* and *Freeman* require an examination into the causes of current residential segregation in order to determine whether it is the result of private decision making or state action. "[T]he principal cause of racial and ethnic imbalance in . . . public schools across the country—North and South—is the imbalance in residential patterns."[83] Residential segregation is a way of life in the United States and is likely to remain so for sometime.[84] Hence, the Court's resolution of how to treat current residential segregation is likely to have profound implications for the termination of existing school desegregation decrees.

Residential segregation is the result of many diverse influences, including discrimination by private organizations as well as private individuals acting pursuant to their own social and economic reasons.[85]

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82. *See* Drew S. Days, III, *School Desegregation Law in the 1980s: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737 (1986) (reviewing PAUL R. DIMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION (1985) and stating that Dimond's book provides a compelling rebuttal to those who claim that residential segregation is the result of purely advantageous events).

83. Freeman v. Pitts, 112 S. Ct. 1430, 1451 (1992) (Scalia, J., concurring) (quoting Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 994 (1976) (Powell, J., concurring)). In addition to joining the opinion of the Court, Justice Scalia wrote a separate concurring opinion. Scalia criticized the Court because it did not articulate an easily applicable test to determine whether or not residential segregation is the result of public or private action. He noted that racially imbalanced schools resulting from residential segregation are the result of a blend of public and private actions. As a result, it is impossible to separate out what part is public from what part is private, and the attempt to do so is only guesswork. He argued for a standard with respect to residential segregation that if school boards adopt plans allowing for neighborhood schools and for free choice of other schools (transportation paid), then the constitutional violation with respect to students should be considered remedied. *Id.* at 1450-54 (Scalia, J., concurring). "[W]hatever racial imbalances such a free-choice system might produce would be the product of private forces." *Id.* at 1452 (Scalia, J., concurring).

84. *See, e.g.*, GARY ORFIELD, MUST WE BUS? 50-51, 54-55 (1978); Deleeuw et al., *Housing*, *in* THE URBAN PREDICAMENT 119, 145-55 (W. Gorham & N. Glazer eds., 1976); Farley, *Residential Segregation and its Implications for School Integration*, *in* THE COURTS, SOCIAL SCIENCE, AND SCHOOL DESEGREGATION 164, 169 (B. Levin & W. Hawley eds., 1975); Albert I. Hermalin & Reynolds Farley, *The Potential for Residential Integration in Cities and Suburbs: Implications for the Busing Controversy*, 38 AM. SOC. REV. 595, 605-08 (1973).

85. In Keyes v. School Dist. No. 1 Denver, Colo., 413 U.S. 189, 222-23 (1973), Justice Powell, concurring in part and dissenting in part, said that, in his opinion, housing separation of the races resulted from purely natural and neutral nonstate causes. Presumably what Powell meant was that housing segregation was the result of private choices. Chief Justice Burger and current Chief Justice Rehnquist concurred with Powell in his separate opinion in Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 994 (1976), in which

Residential segregation is also, in part, the result of discriminatory activities by non-school governmental authorities at the federal, state, and local level. Prior actions by governmental authorities have impacted on the amount of residential segregation that exists in the United States today. In the past, local authorities often prohibited integrated neighborhoods through the use of city ordinances,[86] zoning practices,[87] and by segregating public housing.[88] Racial discrimination by state authorities existed with respect to the enforcement of racially restrictive covenants.[89] Federal authorities contributed to segregated housing with the requirement that houses qualifying for federal mortgage insurance programs have racially restrictive covenants.[90] Residential segregation is also a product of the operation of a dual school system.[91] Over twenty years ago, Chief Justice Burger noted that people gravitate toward school facilities. Just as schools are located in response to the needs of people, the location of schools may also influence residential patterns.[92]

Powell wrote, in a concurrence, "[e]conomic pressures and voluntary preferences are the primary determinants of residential patterns." *See also* Clark, *Residential Segregation in American Cities: A Review and Interpretation*, 5 POPULATION RES. & POL'Y REV. 95-127 (1986). Dr. Clark was commissioned by the United States Commission on Civil Rights to conduct a study and present his findings on the causes of residential segregation. He concluded that the following factors influence residential segregation today: (1) economics and housing affordability; (2) personal preferences and social relationships; (3) urban structure; and (4) private discrimination.

86. *See, e.g.*, Dowell v. Board of Educ., 778 F. Supp. 1144, 1160 (W.D. Okla. 1991).

87. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917).

88. *See, e.g.*, PAUL R. DIMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION (1985). The author talks about residential segregation and about government culpability in creating it. He uses Hills v. Gautreaux, 425 U.S. 284 (1976), as a primary case, supplemented by shorter discussions of Warth v. Seldin, 422 U.S. 490 (1975), and Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

89. It was not until 1948 that the Supreme Court struck down racially restrictive covenants in Shelley v. Kraemer, 334 U.S. 1 (1948).

90. The Federal Housing Administration required the assertion of racially restricted covenants in all properties which received FHA insurance until 1949. DIMOND, *supra* note 84 at 184.

91. The Supreme Court noted the interrelationship and possibility, in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971), that the location of schools may influence the patterns of residential development of a metropolitan area, and have an important impact on the composition of inner-city neighborhoods. *See also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 n.13 (1979); DIMOND, *supra* note 88, at 56-59. Dimond argues that school boards' actions help create segregated neighborhoods because families tend to move near the schools that their school age children attend.

92. *Swann*, 402 U.S. at 20-21. The Court also noted that discriminatory school assignment polices "may well promote segregated residential patterns which, when combined with neighborhood zoning, further lock the school system into the mold of separation of the races." *Id.* at 21.

As the Court approached the issue of how to treat residential segregation, it was given the opportunity of choosing between positions articulated by Justice Marshall in his dissent in *Board of Education v. Dowell*[93] and by Justice Scalia in his concurring opinion in *Freeman v. Pitts*.[94] Marshall's opinion noted the role that the state and local officials and the Board of Education of Oklahoma City played in creating what he described as self-perpetuating patterns of residential segregation.[95] In Oklahoma, city residential segregation was originally enforced by an Oklahoma City ordinance that specified the areas in which blacks and whites were to live.[96] African-Americans today are still the primary residents in the areas originally ceded to them, even though that law was declared unconstitutional in 1935 by the Oklahoma Supreme Court.[97] Marshall, therefore, took the position that current residential segregation was a vestige of prior de jure conduct, because state action resulted in self-perpetuating patterns of residential segregation. For Marshall, desegregation decrees should remain in effect when it is clear that their removal would result in a significant number of racially identifiable schools due to residential segregation that could otherwise be prevented.[98]

By contrast, in *Freeman* Scalia argued that it is impossible to determine what part of residential segregation is traceable to public action and what part is private. Moreover, the attempt to do so is only guesswork.[99] Scalia proposed a standard with respect to residential segregation that would say if school boards adopt plans that allow for neighborhood schools and for free choice of other schools (transportation paid), then the vestiges of the prior discriminatory conduct with respect to students should be considered remedied. "[W]hatever racial imbalances such a free-choice system might produce would be deemed the product of private forces."[100]

In *Freeman*, Kennedy's opinion rejected both of these positions and instead sought a middle ground. Kennedy's opinion in effect forces lower courts to determine the cause of existing residential segregation. Racially

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93. 111 S. Ct. 630, 639-48 (1991) (Marshall, J., dissenting).

94. 112 S. Ct. 1430, 1450-54 (1992) (Scalia, J., concurring).

95. As I understand the use of the term "self-perpetuating patterns of residential segregation," Justice Marshall is referring to residential segregation. It does not matter whether the character of segregated neighborhoods was created recently with the movement of one racial group out of a given area and the movement of another racial group into that area, or whether the segregated neighborhood is one of long standing duration. What is important is the existence of segregated residential patterns.

96. Dowell v. Board of Educ., 778 F. Supp. 1144, 1160 (W.D. Okla. 1991).

97. Allen v. Oklahoma City, 52 P.2d 1054 (1935).

98. *Dowell*, 111 S. Ct. 630, 644 (1991) (Marshall, J., dissenting).

99. *Freeman*, 112 S. Ct. 1430, 1452 (1992) (Scalia, J., concurring).

100. *Id.*

imbalanced neighborhood schools that are the product of private residential decision making are not based upon de jure segregation's negative stigmatic assumptions about African-Americans. Kennedy appears to accept the notion that such schools are based upon legitimate educational and community benefits derived from neighborhood schools. Neighborhood schools minimize the safety hazards to children in reaching school, reduce the cost of transporting students so that more funds can be allocated to educational matters, ease pupil placement and administrative costs through easily determined student assignment policies, and increase communication between home and school.[101] The School Board of Oklahoma City specifically argued that its primary reasons for adopting the SRP were to increase parental involvement and to increase the level of community involvement and support in the schools. Neighborhood schools allow for greater parental involvement and thereby improve the academic environment for the youngsters in those schools.

Even though Justice Souter joined the Court's opinion in *Freeman*, he also wrote a separate concurrence that appears to be directed toward school systems other than DCSS. Souter's concurring opinion is enigmatic. Justice Souter specifically addressed the issue of residential segregation and satisfying his concurring opinion is necessary in order to achieve a five-person majority.[102] Justice Souter's concurring opinion appears to require a district court to do more with regard to residential segregation than Kennedy's opinion. Souter noted that prior to relinquishing supervision and control over student assignments, a district court should make findings that racial imbalance in students assignments is not caused by past school segregation and "*the patterns of thinking that segregation creates.*"[103] Justice Souter unfortunately did not elaborate on what he meant by racial imbalance caused by "patterns of thinking that segregation creates."

Because Justice Souter joined Kennedy's opinion, it can be inferred that if segregated residential neighborhoods are of recent origins—like those in Dekalb County—they are less likely to be products of patterns of thinking that segregation creates. For neighborhoods that have been segregated for sometime, however, the analysis is on considerably less firm ground.[104]

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101. *See, e.g.* Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 60 (6th Cir. 1966).

102. Although Justice Scalia also wrote a separate concurring opinion that addressed the issue of residential segregation, his test is relatively easy to satisfy.

103. 112 S. Ct. at 1454 (Souter, J., concurring) (emphasis added).

104. Justice Souter did not take part in the Court's decision in *Dowell*. It could be that Souter is attempting to revive Justice Marshall's notion of self-perpetuating patterns of residential segregation—at least with regard to residential neighborhoods that have been segregated for some time. These patterns could be seen as resulting from patterns of thinking that segregation creates.

Justice Souter may be drawing a distinction between racially segregated neighborhoods that develop after the implementation of a school desegregation decree—like those that existed in DeKalb County—and those that predated court supervision. For segregated neighborhoods of recent origin, it will be easier to attribute their development to private decision-making and not to state action. However, segregated neighborhoods that exist today and whose origins predate court supervision are more likely to reflect "the patterns of thinking that segregation creates." Justice Souter may be less likely to agree that court supervision over student assignments in these neighborhoods should be released as readily as those in the kinds of segregated neighborhoods—those that developed after court supervision—that the court encountered in Dekalb County.

If Justice Souter is making this kind of distinction, he appears to be at odds with how Justice Kennedy's opinion would view segregated neighborhoods that predated court supervision. It should be recalled that Justice Souter was the only Justice in *Freeman* who did not participate in the Court's opinion in *Dowell*. As Marshall noted in his dissenting opinion in *Dowell*, there were neighborhoods in Oklahoma City where segregation could be traced back to governmental action that occurred over fifty years ago. The majority in *Dowell* implicitly rejected Marshall's concept of "self-perpetuating patters of residential segregation." Justice Kennedy also focused on the mobility of people in the United States in his opinion in *Freeman*. This indicates that it is the sheer fact of moving that is important to Kennedy. For Kennedy, whether blacks move into neighborhoods that were historically black prior to court supervision and whites move into neighborhoods that were historically white prior to the initiation of desegregation appears to be irrelevant. The relevant issue appears to be mobility.

C. Conversion of School Desegregation Lawsuits to Quality Education Lawsuits

The Supreme Court's opinion in *Freeman v. Pitts*[105] has the potential to lead to a conversion of desegregation lawsuits into quality of education lawsuits. The Court's opinion in *Freeman* provides that a district court with a considerable amount of discretion with respect to whether in an appropriate case it can terminate its control over certain aspects of a school system while maintaining control over other aspects.[106] In addition, the Court's opinion also approved the district court's considering of quality of education between the existing black and white schools as an additional factor in determining whether or not supervision over a school

105. 112 S. Ct. 1430, 1446 (1992).
106. *Id.*

desegregation decree should be released. This sets up the possibility for a district court—under proper circumstances—to release control over student assignments. But the district court could also maintain control over other aspects of the school system in order to assure that any racially imbalanced schools receive equal quality education, including equal funding. The effect would be to convert desegregation lawsuits to quality education lawsuits. This is the most likely result of the Court's opinion of *Freeman*.

IV. The Indianapolis Public School Desegregation Case

On May 31, 1968, the Department of Justice filed suit in the United States District Court for the Southern District of Indiana alleging that the Indianapolis School Board operated a racially segregated school system.[107] Starting in 1971, 387 African-American students were bussed to Franklin Township schools. Two years later, the district court ordered the Indianapolis School Board to desegregate.[108] The Board decided to bus students within IPS districts and also sought to bus students across school district lines to contiguous suburban school systems. On appeal, the Seventh Circuit restricted the student transfers to within Marion County.

There are a number of school systems with cross-district desegregation plans.[109] IPS, however, is one of the few school systems that has a mandatory, as opposed to voluntary, cross-district bussing component. The cross-district bussing feature of the IPS desegregation case creates a number of issues that were not addressed by the Supreme Court in its two recent opinions. In addition, the mandatory feature of the cross-district desegregation plan will create a number of relatively unique issues that many lower courts with voluntary cross-district plans will not have to address as they terminate court supervision.

For purposes of terminating a portion of federal court supervision, it might be legally possible to separate the intradistrict desegregation of

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107. William E. Marsh, *The Indianapolis Experience: The Anatomy of a Desegregation Case* 9 Ind. L. Rev. 897, 904 (1976).

108. United States v. Board of Sch. Comm'rs of Indianapolis, 368 F. Supp. 1191 (S.D. Ind. 1973).

109. *See, e.g.*, Evans v. Buchanan, 416 F. Supp. 328, 344 (D. Del. 1976), *aff'd*, 555 F.2d 373 (3rd Cir.) (en banc), *cert. denied*, 476 U.S. 1186 (1986) (Wilmington, Del.); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 433 (8th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1186 (1986) (Little Rock, Ark.); Hoots v. Pennsylvania, 510 F. Supp. 615, 622 (W.D. Pa. 1981), *aff'd*, 672 F.2d 1107 (3rd Cir. 1982), *cert. denied*, 459 U.S. 824 (1982) (suburban Pittsburgh); and Turner v. Warren County Bd. of Educ., 313 F. Supp. 380, 386 (E.D.N.C. 1970) (rural N.C.).

IPS from the interdistrict desegregation plan.[110] If so, much of the analysis from *Dowell* and *Freeman* can be applied to an attempt to terminate court supervision over all or part of either the interdistrict or the intradistrict desegregation plan. The Indianapolis School Board, for example, might seek to eliminate all or part of the court supervision over the intradistrict portion of the desegregation plan, while allowing the federal district court to maintain its control over the cross-district elements of the desegregation plan. This Article will, therefore, address the matters that will be central to an analysis of whether all or part of the district court's supervision over the intradistrict aspects of the IPS desegregation plan could be released. I will conclude this Article by highlighting some of the issues that termination of all or part of the cross-district elements of the desegregation plan will have to resolve.

The intradistrict desegregation plan for IPS was put into effect in 1973, and has been in operation for the past 20 years. When the School Board in *Dowell* adopted a neighborhood student assignment plan, it had operated under its court approved desegregation plan for only twelve years.[111] In *Freeman v Pitts*, the School Board had operated under court supervision for seventeen years when the Supreme Court approved the district court's decision to terminate partial control. The passage of time, therefore, should not be a major issue for IPS.

Enforcing a desegregation plan for a reasonable period of time is only the beginning of the analysis of whether partial release from the desegregation decree is warranted. The primary issues the district court must focus upon will be nebulous, intangible considerations. The Indianapolis school board must demonstrate that it has satisfactorily complied with the portion of the desegregation decree from which supervision is to be withdrawn. The district court also will have to examine whether it is necessary to maintain control over certain aspects of the IPS desegregation case for which release is being sought (such as student and/or faculty assignments within IPS), in order to achieve compliance in other facets of the dual school system. In addition, the Indianapolis school board also must demonstrate its good faith commitment to the whole of the court's decree and to the provisions of the law and the Constitution that were the predicate for judicial intervention. In making these determinations, the federal district court will examine the record of compliance by the Indianapolis school board with its prior decisions.

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110. Since *Freeman* did not involve a cross-district desegregation decree, an argument can be made that it is not applicable to school systems that are seeking partial termination.

111. Eleven years had elapsed during the filing of the initial complaint and the institution of the court approved plan. On remand, the federal district court concluded that the School Board had made a sufficient showing to justify the termination of court supervision as of 1985. Dowell v. Board of Educ., 778 F. Supp. 1144, 1196 (1991).

If court supervision over intradistrict student assignments is to be released, then the district court also must address whether existing racial segregation in IPS districts is a vestige of the prior de jure conduct or the result of private decision making. The district court must therefore determine the cause of residential segregation.

As indicated earlier, Kennedy's opinion appears to imply that the key to determining whether present residential segregation is the result of private decision making is mobility. Because it will be necessary to satisfy Justice Souter, the district court also should make findings concluding that racial imbalance in student assignments is not caused by past school segregation or the patterns of thinking that segregation creates.

Finally, since the Supreme Court approved the inquiry into issues related to quality of education, it is certainly within the discretion of the district court to consider such factors in determining whether partial release of court supervision is warranteed in Indianapolis. Consistent with what the district court in *Freeman* did, the district court addressing partial release of the Indianapolis school system may decide to examine resource allocation to and school performance of the black and white school children in IPS.

Termination of either the entire school desegregation decree in IPS or portions of the cross-district component of the desegregation decree raises extremely complicated issues. When the time comes to address the termination of any of the cross-district desegregation components, the district court will have to address such issues as the effect on the students who attend suburban school systems once court supervision is terminated. Are they automatically returned to IPS? Should they be considered as permanently ceded to the suburban school systems? Or should they be given the choice of choosing to attend suburban schools or IPS? Another set of important concerns will center around analyzing the issue of residential segregation, particularly Justice Souter's notion of patterns of residential thinking which segregation creates. Has Indianapolis created a pattern of residential thinking that suggests that African-Americans should not move to some suburban school districts? Issues related to good faith compliance also will be novel. What should the district court do if it finds that some, but not all, of the suburban school systems and the State of Indiana have complied in good faith? These and a number of other important issues await analysis by the district court. Because of the relatively unique circumstances caused by the mandatory cross-district bussing component, I suspect that when these issues are addressed, there will not be a lot of guidance provided for the district court from other cases.